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**DEVELOPING A COMPENSATION FRAMEWORK
FOR
LAND ACQUISITION
AFFECTING
ORANG ASLI NATIVE LANDS**

By

ANUAR BIN ALIAS

Thesis submitted in fulfillment of the requirement for the degree of
Doctor of Philosophy


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ABSTRACT

This research explores the issues of land rights and land acquisition compensation related to the Orang Asli in Peninsular Malaysia. Acquisition of Orang Asli native lands is inevitable as land is scarce to meet the national growth agenda and socio-economic developments. As an independent country, Malaysia provides constitutional guarantees, and customary land tenure is recognised and respected. Unfortunately, since land rights of Orang Asli native lands are not being clearly defined in Malaysian legal system, payment of compensation to acquisition of the land is unstructured, and disparity exists among the different states. It is therefore pertinent to propose a uniform compensation framework for the acquisition of Orang Asli native lands. The research adopts various approaches of study and triangulates the findings. The case study and quantitative survey methods are the main strategies for data collection, reinforced by the qualitative survey method using the Delphi Method in which consultation was sought from the experts on land acquisition compensation of Orang Asli lands to enhance the validity of the research findings.

This research revealed that laws of Malaysia are lacking with regard to the protection of Orang Asli lands and rights to fair and just compensation. This research concludes that the position of Orang Asli land rights has not much improved. Due to this unresolved land rights issue, the present structure of compensation as spelt out under the sections 11 and 12 of the Aboriginal Peoples Act 1954 is perceived as inadequate. At present, in the absence of proper guidelines and regulations, the determination of compensation is solely based on the discretion of the various authorities. Some authorities apply the rules rigidly, while others are too generous. Additionally, this research proposes a compensation framework for land acquisition of Orang Asli native lands, which should possess two categories of compensation – monetary and non-monetary components. Finally, the research argues that proposed compensation framework is 'implementable and workable'. However, the degree of success in its implementation is subject to how far the Orang Asli land rights are resolved.

ABSTRAK

Kajian ini membincangkan isu pemilikan tanah dan pampasan pengambilan tanah yang melibatkan tanah tradisi Orang Asli di Semenanjung Malaysia. Pengambilan tanah Orang Asli tidak boleh dielakkan kerana tanah diperlukan bagi memenuhi kehendak pembangunan sosio ekonomi negara. Sebagai sebuah negara yang merdeka, Malaysia menghormati serta memberi jaminan terhadap hak pemilikan ke atas tanah. Malangnya, disebabkan hak pemilikan ke atas tanah tradisi Orang Asli tidak didefinisikan dengan jelas oleh sistem perundangan negara, bayaran pampasan pengambilan tanah menjadi tidak berstruktur dan wujud pula jurang perbezaan dari segi pakej pampasan antara negeri-negeri. Dengan demikian, pembangunan kerangka pampasan yang seragam sangatlah diperlukan bagi mengatasi masalah ini. Kajian ini menggunakan kombinasi kaedah penyelidikan kuantitatif dan kualitatif yang terdiri daripada kajian kes, soal selidik lapangan dan seterusnya mengadaptasi kaedah Delphi bagi menggembeling pendapat pakar untuk memperkasakan penemuan kajian.

Hasil kajian ini melaporkan bahawa undang-undang Malaysia tidak menyediakan perlindungan yang mencukupi terhadap hak dan kepentingan ke atas tanah tradisi Orang Asli. Implikasinya, ia menjadi kekangan untuk merealisasikan pembayaran pampasan yang adil dan berpatutan ke atas pengambilan tanah Orang Asli. Hal tersebut menjadikan taraf kehidupan Orang Asli masih tidak banyak berubah. Disebabkan isu hak ke atas tanah tidak dapat diselesaikan, struktur pampasan yang berasaskan peruntukan seksyen 11 dan 12 Akta Orang Asli, 1954 dianggap tidak mencukupi. Memandangkan tiadanya garis panduan, peraturan yang sempurna pada masa kini, penentuan pampasan adalah berdasarkan kepada budi bicara pihak berkuasa. Terdapat pihak berkuasa yang 'rigid' dan ada pula yang bermurah hati dalam memberikan pampasan. Kajian ini mencadangkan kerangka pampasan bagi pengambilan tanah tradisi Orang Asli mestilah dibuat berlandaskan pampasan dalam bentuk kewangan dan bukan kewangan. Akhirnya, kajian ini merumuskan bahawa kerangka pampasan yang dibangunkan boleh dilaksanakan secara berkesan. Namun, kejayaan dalam perlaksanaannya bergantung kepada sejauh mana isu hak ke atas tanah Orang Asli dapat diselesaikan.

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LIST OF ABBREVIATIONS AND ACRONYMS

ASEAN	- Association of Southeast Asian Nations
BOO	- Build, Operate and Own
BOT	- Build, Operate and Transfer
COAC	- Centre for Orang Asli Concern, Malaysia
CVM	- Contingent Valuation Method
DEIA	- Detail Environment Impact Assessment
DOE	- Department of Environment, Ministry of Natural Resources and Environment Malaysia
EIA	- Environment Impact Assessment
EMP	- Environment Management Plan
EPU	- Economic Planning Unit, Prime Minister Department
FA	- Factor Analysis
FELDA	- Federal Land Development Authority
FRU	- Federal Reserve Unit, Royal Police of Malaysia
GCI	- General Compensation Issues
GDP	- Gross Domestic Product
HMSO	- Her Majesty's Stationery Office
HRC	- Human Rights Committee, United Nations
IACHR	- The International Agreement on Civil and Human Rights
ICCPR	- The International Covenant on Civil and Political Rights
ICERD	- The International Covenant on the Elimination of All Forms of Racial Discrimination
ICESCR	- The International Covenant on Economic, Social and Cultural Rights
ILO	- International Labour Organisation
ILUA	- Indigenous Land Use Agreements
JBA	- Jabatan Bekalan Air
JBIC	- Japan Bank for International Cooperation
JHEOA	- Jabatan Hal Ehwal Orang Asli, Malaysia
JKKK	- Jawatankuasa Kemajuan dan Keselamatan Kampung
JPS	- Jabatan Parit dan Saliran
KLIA	- Kuala Lumpur International Airport, Sepang
KPTG	- Pejabat Ketua Pengarah Tanah dan Galian
LAP	- Lembaga Air Perak
LDP	- Lebuhraya Damansara – Puchong
LKPPP	- Lembaga Kemajuan Pertanian dan Perladangan, Pahang
MC	- Monetary Compensation
MEWC	- Ministry of Energy, Water and Communication, Malaysia
MHA	- Malaysian Highway Authority
MLJ	- Malaysian Law Journal
NGO	- Non-Government Organisation
NMC	- Non-Monetary Compensation
OANL	- Orang Asli Native Lands
OAC	- Online Archive of California
OAS	- Organisation of American States

OEA	- Ohio Education Association
PACOS	- Partners of Community Organisation, Sabah
PCA	- Principal Component Analysis
POASM	- Persatuan Orang Asli Semenanjung Malaysia
PLUS	- Projek Lebuhraya Utara-Selatan
PPH	- Pasukan Polis Hutan, Polis Di Raja Malaysia
PPPM	- Pusat Pengajian Pribumi Malaysia, Universiti Malaya
PTG	- Pejabat Tanah dan Galian
PUB	- Public Utilities Board, Singapore
PWD	- Public Work Department, Malaysia
RICS	- The Royal Institutions of Chartered Surveyors, United Kingdom
RPS	- Rancangan Pengumpulan Semula
SOPP	- Second Outline Perspective Plan
SPSS	- Statistical Package for Social Science
STSB	- Saujana Triangle Sdn Bhd
UEM	- United Engineers Malaysia
UK	- United Kingdom
UN	- United Nation
UNESCO	- United Nation Education, Scientific and Cultural Organisation
USA	- United States of America
VPSD	- Valuation and Property Services Department, Ministry of Finance, Malaysia
WGIP	- Working Groups of Indigenous Peoples
WTP	- Willingness to Pay

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

Freedom of a person and the right to acquire, hold and enjoy property are two pillars in which a democratic system provides, and being recognized as distinctiveness of natural rights of the people. Property is not only an economic asset; it also has emotional and sentimental value attached to it (Buang, 1993; Jain & Xavier, 1999). The right to property is not absolute. This right has always been regarded as being subject to *eminent domain*¹, an inherent right of the state, an essential part of the state sovereignty (Ghosh, 1973). Eminent domain is subject to two essential conditions; private property is to be taken only for public use; and just compensation must be paid for the property taken (Keith, 1984).

Land acquisition is the government's power to overcome the problems of land supply, and a means to total control of land for development (Buang, 1993; Singh, 1994; Hussin, 1999). Furthermore, Singh (1994) stressed that the power of compulsory acquisition supports the land supply negotiations; at the same time it avoids situations where landowners can frustrate development by refusing to sell (Hussin, 1999); and hold out land by demanding for unreasonable value (Buang, 1993; 2001; 2007). Therefore, land acquisition is a solution to the problems with landownership and landowners who are reluctant to surrender their land for development (Omar & Ismail, 2005). Acquisition of private lands including

¹ Eminent domain (from Latin *dominium eminens*) is the power of the sovereign to take property for a public use without the owner's consent (see *Scott v Toledo* 36 F 385, 1 LRA 688). In *Jones v Walker* 2 Paine 688, Fed Cas No 7507, it was said: *The right of society, or of the sovereign, to dispose, in case of necessity, and for the public safety, of all the wealth contained in the state, is called 'eminent domain'*. The term appeared in English only in 1758 but the legal principle that is expressed for compensation for individual loss for the common benefit can be traced back to Roman and Biblical times (Khublal, 1994).

Orang Asli² native lands is inevitable as land is scarce to meet national growth agenda and socio-economic developments. In the context of Orang Asli native lands, land acquisition has dramatic impacts on all aspects of their life in terms of culture, heritage, and values. Under international treaties, the indigenous communities have at least six rights to protect their existence i.e. personal integrity, culture, self-determination, historical subjects, development, and environment (Cheah, 2004a; 2004b). However, because they are the minorities, legislations and authorities seldom prioritize their needs and interests.

In brief, Orang Asli constituted 0.68% (149,723 peoples) of Malaysian total population and are divided into three main groups i.e. Negrito, Senoi and Proto-Malay and further subdivided into 18 sub-ethnic groups. The sub-ethnic groups each have their own language, culture, religion, and subsistence lifestyle. The lifestyle and means of subsistence are fishing, hunting, gathering forest produce, and traditional farming. About 50% of Orang Asli live below poverty line (Statistics Department, 2006).

Indeed, in the context of a possession of their ancestral land, the Orang Asli believe that land is not a commodity, therefore, it cannot be bought and sold but has spiritual and cultural values attached to it. According to Salleh (1990: 68-69), *'the Orang Asli concept of land rights as a result of their customary occupation of the land, is a native in concept which do not have any force in Malaysia law'*. However, their rights to areas, which have been legally designated by the state governments as aboriginal areas or aboriginal reserves (section 2 of the Aboriginal Peoples Act, 1954) are legally protected (Hooker, 1976). Thus, the creation of Orang Asli reserves and areas does not grant Orang Asli legal ownership to the land. A solution need to be formulated to grant Orang Asli

² Malay term for the indigenous peoples of Peninsular Malaysia as defined under section 3(1) – (3) of the Aboriginal Peoples Act, 1954 (Act 134). More details explanation of Orang Asli could be referred in Chapter 3 (paragraph 3.3).

absolute rights to the land, in which the land will contribute positively to their development (Salleh, 1990).

1.2 RESEARCH BACKGROUNDS

This research focuses on the underlying issue of land rights and compensation attached to Orang Asli in Peninsular Malaysia. As an independent country, Malaysia has under constitutional guarantees recognised and respected customary land tenure. According to Sheehan and Small (2002); Adlington (2000), these customary lands are often unable to be accessed for feasible development projects unless the consent of the customary owners is obtained on terms and conditions that must be negotiated to the satisfaction of those owners. However, governmental powers of compulsory acquisition, which are for various state purposes (e.g. highway, school, hospital etc), can be called upon to acquire any land including Orang Asli lands, irrespective of the wishes of the owner (Nicholas, 2003). In addition, there is often a constitutional or legal guarantee that land held in private ownership could be acquired for state purposes if adequate compensation is paid (Keith, 1984; Nicholas, 2003).

Appropriate provisions have been inserted in legislation in many countries (e.g. Australia, New Zealand, Canada and USA) to deal with the issue of compensation (Smith, 2001). Some of these provisions have been suggested as purely monetary compensation, while others although still economic in nature may involve in-situ reinstatement or replacement of land (e.g. resettlement program), with only minimum monetary payment for disturbance and other losses. These notions of compensation are referred to in the research of Hyam, (1995), which provides a comprehensive introduction to such compensation structures – monetary and non-monetary, in the Australian legal context. There is also the useful commentary by Adlington, (2000:28) on the role of fair compensation in transition economies, says:

‘It may seem perverse in situations where the overwhelming emphasis is on the disposal by the public sector of land and property to give time and considerations to the rules under which the public sector may acquire property; but such rules are an important guarantee of property rights. National constitutions frequently enshrine the right to compensation when property is acquired compulsorily. Fair compensation depends on a mixture of the correct legal framework, accessible independent appeal mechanisms and the professional competence of those involved. There are principles that are applicable world wide in all situations. Application of a fair system in the countries concerned depends on the introduction of a fair compensation code that has regard to the de facto situation rather than allowing claims on the often uncertain strict de jure rights’.

Boydell (2001:12) commenting the work on property theory undertaken by Sheehan and Small (2001) says:

‘There is confusion in addressing the valuation of inalienable customary land in all parts of the world, including the South Pacific. Just as attempts at transposing colonial tenure systems on customary land have run into complications, so too have erroneously applied contemporary/conventional valuation techniques designed for a Western paradigm. Unconventional situations require the application of unconventional practices and solutions.....Culture, tradition, religion and paramountcy of indigenous rights combine to create individualistic property environments where tools, rather than rules, can be applied with careful adaptation...However, tools are just tools and can be used destructively if there is no underlying property philosophy, or theory, on which to ground understanding’.

Although there are researches in relation to indigenous peoples in Malaysia and other countries, no specific research was done focusing on compensation issues of land acquisition affecting Orang Asli native lands in Malaysia. Other Malaysian researches focus on socio-economic development (Dollah, 1996; Nicholas and William-Hunt, 1996; Nicholas, 1998), development planning (Salleh, 1990), indigenous peoples and development challenges (William-Hunt, 1998), sustainable design approach in architecture for indigenous peoples (Omar and Ang, 2005), and environmental impact on indigenous peoples (Man, 2007; Salleh, 1995; 2008). Other countries researches focus on assessment of compensation for indigenous common property (Sheehan & Winseng, 1998), determination and measurement of native land compensation (Whipple, 1997; Smith, 2001), development of methodology for the assessment of native title compensation (Sheehan, 2002), assessment of good practice on implementation of development

projects by development agencies (Janet, 2002). Further, Xanthaki (2003) studied on land rights issues of the indigenous peoples in South East Asia.

In the context of Malaysia, the government is engaged in a massive programme of construction of various public works all over the country that involves acquisition of private land including Orang Asli native lands on a large scale. The government intervention in supplying land for development is directly exercised under the power of land acquisition as stipulated under the Land Acquisition Act 1960, and provided under Article 13 of the Malaysian Constitution 1957. This article stipulates that no person may be deprived of property in accordance with law and no law may provide for compulsory acquisition or for the use of property without adequate compensation. With reference to the clause of the land acquisition by the Federal Government, Article 83 sets out detailed procedures for land acquisition and compensation as stipulated by the Malaysian Constitution 1957 read as,

‘Article 83(1) – If the Federal Government is satisfied that land in the state, not being alienated land is needed for federal purposes, that government may, after consultation with the State Government, require the State Government, and it shall be the duty of that Government, to be caused to be made to the Federation, or to such public authority as the Federal Government may direct, such grant of the land as the Federal Government may direct;’

Article 83(5) - The foregoing provisions of this Article (except Clause (3)) shall apply in relation to alienated land as they apply in relation to land not being alienated land; where a requirement is made under that clause, it shall be the duty of the State Government to cause to be acquired by agreement (private treaty) or compulsorily....’

Therefore, the Orang Asli native lands acquisition fall under Article 83(1) due to the status of Orang Asli lands as being un-alienated in nature. In contrast, by using the power contained in the Land Acquisition Act 1960, the government can only acquire alienated land, land under Application Approved (A.A.) and land under Registry Holders; for public purposes with adequate compensation as determined under Schedule 2 of the Act. Adequate compensation, therefore, as stated under the provision of Article 13(2) of the Federal Constitution refers to

amount of compensation which is decided, considering all principles stated under the First Schedule of the Land Acquisition Act 1960.

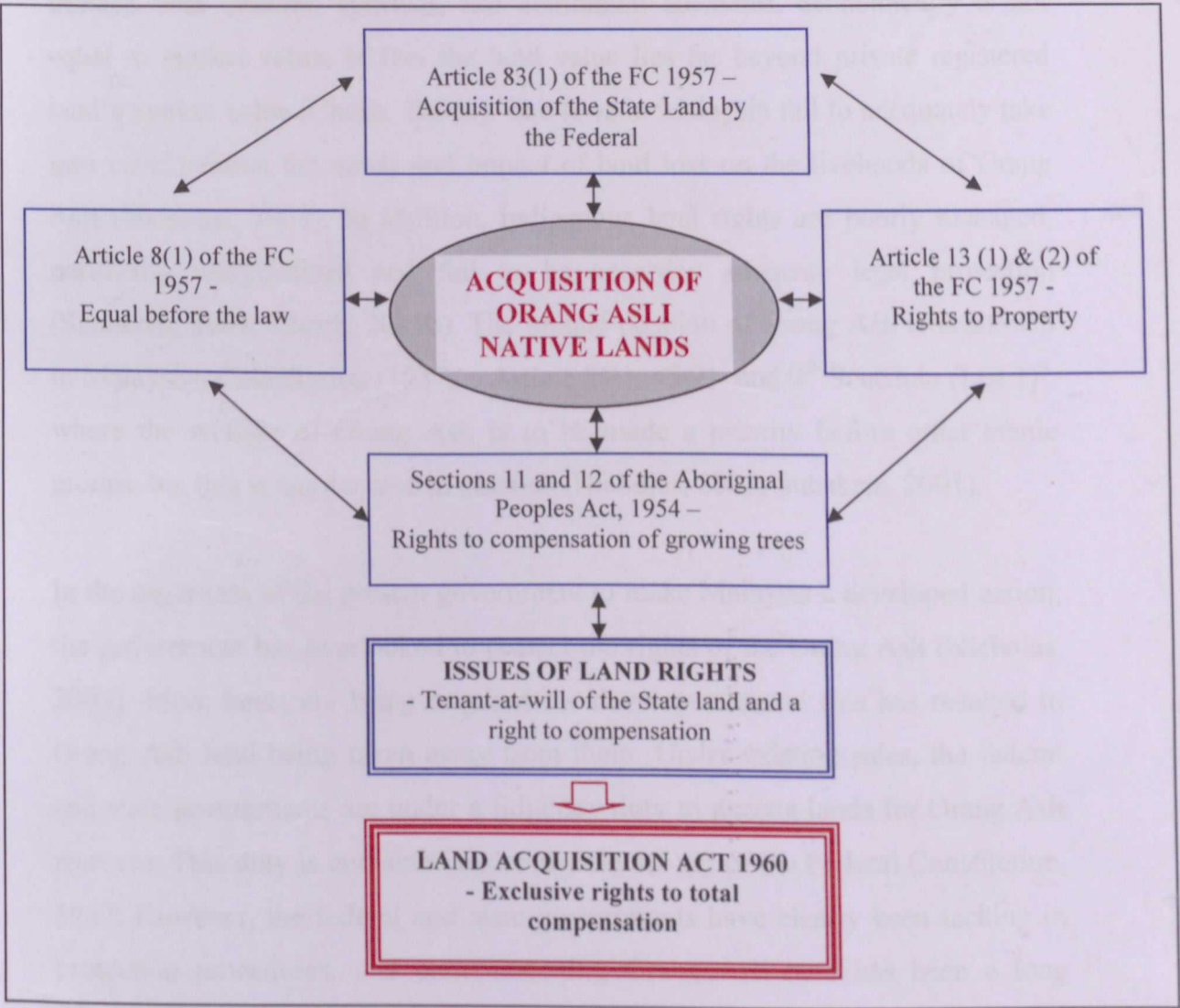
To gain an understanding of Orang Asli native lands and their development problems, it is necessary that the issue of customary lands be recognised as a major factor, which must be addressed in order to encourage national economic and social development. There is a complementarity between developments and national goals. However, for development to occur there is a requirement that policy settings for land are formulated within a framework, which accommodates the existing functional of Orang Asli lands ownership systems. For all these developments to take place, land was much needed. Therefore, a substantial amount of land was alienated to the private sector for the development and well-being of the people. Aggrawala (1984:134) says *"the sovereign power of every state has authority to appropriate for purposes of public utility, lands situated within the limits of its jurisdiction"*. This is the power of land acquisition. The general principle used is *"salus populi suprema lex"* i.e. the interests of the public are paramount. Therefore, it is in the interest of the community, for the provision of better services, to enable the government to acquire land in private ownership for the common well-being of the community at large (Usilappan, 1997; 2000). However, such powers should not be misused in the sense that land expropriation is used to deprive the citizen of his rights to property including property rights of Orang Asli.

Furthermore, Article 8(1) of Federal Constitution, 1957 states that, *'all persons are equal before the law and entitled to equal protection of the law'*. This means Orang Asli also have the same protection as other citizens of Malaysia and, they are eligible for adequate compensation when their land is being acquired by the government.

Even though the State Authority, under the provision of Land Acquisition Act 1960, has the power to possess any private land, an acquisition of Orang Asli native lands is not using the same power but rather using the spirit of Article

83(1); Article 13 and Article 8(1) of Federal Constitution and the Aboriginal Peoples Act, 1954. The law does not allow the authority to violate one's right onto their private properties, and this should be applied to Orang Asli property rights as well. Therefore, an acquisition of Orang Asli native land can be summarised as shown in the Figure 1.1:

Figure 1.1: Acquisition of Orang Asli Native Lands



Apparently, land acquisition is an encroachment on property rights, compensation matters are entirely the creatures of statute (Keith, 1984; Xavier, 1995). Historically, the courts have declared that the requirement may be satisfied by expressing adequate compensation in terms of money. The problem then is to

determine, how much money is to be paid to meet the constitutional mandate for adequate compensation.

To address this problem, practitioners rely on the concept of market value that is also provided under the laws of compulsory acquisition. Unfortunately, in the acquisition of Orang Asli native lands, the authorities have no recourse to the powers of the Land Acquisition Act 1960. Further, the value of land which is imbued with cultural, spiritual, and communal attributes, economically is not equal to market value; in fact the land value lies far beyond private registered land's market value (Cheah, 2004a). The laws in Malaysia fail to adequately take into consideration the needs and impact of land loss on the livelihoods of Orang Asli (Nicholas, 2003). In addition, indigenous land rights are poorly managed, politically marginalized and fail to be accorded adequate legal protection (Suhakam, 2001; Cheah, 2004b). The unique position of Orang Asli is enshrined in Malaysian Constitution (1957) – Article 8(1); 45(2)³ and 9th Schedule (List 1)⁴, where the welfare of Orang Asli is to be made a priority before other ethnic groups, but this is not the case in practice (Nicholas, 2003; Suhakam, 2001).

In the eagerness of the present government to make Malaysia a developed nation, the government has overlooked to protect the rights of the Orang Asli (Nicholas, 2003). More lands are being required for development and this has resulted in Orang Asli land being taken away from them. Under existing rules, the federal and state governments are under a fiduciary duty to gazette lands for Orang Asli reserves. This duty is contained under Article 8(5)(c) of the Federal Constitution, 1957. However, the federal and state governments have clearly been lacking in protection procedures, and under-gazetting Orang Asli land has been a long standing problem. This fact has been revealed by Nicholas (2003) as stated in Ismail (2005:5) who says:

³ Appointment to the Senate of the Representative of the Aborigines by the Yang di-Pertuan Agong

⁴ List No. 16 – Welfare of the Aborigines

‘My research has also shown that in a given area, it was not always the case that all land occupied, and claimed, by the Orang Asli was gazetted. Invariably only a portion of what the Orang Asli claim as their traditional land is gazetted or earmarked for gazettement. That is to say, there has been under-gazettement of Orang Asli lands. And when such under-gazettement happens, there is very little protection to the Orang Asli as envisaged under the Aboriginal Peoples Act’.

Until December 2006, the Malaysian government recognised a total of 141,369.67 hectares of Orang Asli land. Only 13.9 % (19,582.21 hectares) of the said Orang Asli lands were gazetted as Orang Asli reserves and importantly, more than half or 57.5% (81,269.58 hectares) of the said Orang Asli lands were applied for gazettes but no approval had been given. The JHEOA identified that the land gazetted represented only 15% from 876 Orang Asli villages (JHEOA, 2006).

Therefore, although the obligation to gazette Orang Asli lands exists, the rampant under-gazettement by the government leaves the Orang Asli unprotected against developers who prey on what they perceive as cheap lands and easy targets (Ismail, 2005). Encroachment is quite widespread, particularly in Kelantan due mainly to a liberal land alienation policy (Yaqin, 2002). Due to the undeclared status of most Orang Asli land and the lack of mechanism to keep track of Orang Asli's land, State Government often ends up awarding the Orang Asli ancestral land to private developers (Nicholas, 2003; Endicott & Dentan, 2004).

The land rights of the Orang Asli over their traditional lands are minimally protected by the Aboriginal Peoples Act, 1954. The Aboriginal Peoples Act, 1954 provides for the establishment of Orang Asli inhabited places, Orang Asli areas and Orang Asli reserves. Previously, it was the view of the government that under the Aboriginal Peoples Act, 1954 the best title that the Orang Asli may obtain from their traditional lands is as a tenant-at-will (Nik Yusof, 1996; Jafry, 1996; Awang, 1996). This is attributed to the government's perception that the Orang Asli traditional lands are actually state lands.

The Orang Asli is therefore allowed to occupy or remain on their traditional lands at the pleasure of the government (Nik Yusof, 1996; Jamaluddin, 1997; Salleh,

1990). Whenever the government wants to acquire the Orang Asli traditional lands for any reason, they simply revoke the status of these traditional lands and issue to the Orang Asli living in that area a relatively short notice to vacate their traditional lands - notwithstanding the fact that the Orang Asli and their families may have been living in the area for generations. The Orang Asli is then expected to move from their traditional lands within the short stipulated period or be forcibly evicted by the law of the state. This can be evidenced particularly in the state of Selangor as in the case of *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591.

Furthermore apart from being evicted, the Orang Asli is not paid any form of compensation for the loss of their traditional lands. Instead, the Orang Asli is compensated purely based on Sections 11 and 12 of the Aboriginal Peoples Act, 1954 read as,

‘Section 11 – Compensation on alienation of State land upon which fruit or rubber trees are growing: (1) ...then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just; (2) any compensation payable under subsection (1) may be paid in accordance with section 12;

Section 12 – Compensation:any aboriginal area or aboriginal reserve granted to any aborigines or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefore and may pay such compensation to the persons entitled.....’

Any compensation pursuant to Sections 11 and 12 of the Aboriginal Peoples Act, 1954 is at the discretion of the authorities. There is no fixed guideline. The compensation payable to the Orang Asli pursuant to Sections 11 and 12 is only for the loss of growing trees and buildings. Some State Authorities are very generous while others are not. There are no provision under the laws for compensation of the acquisition or loss of the Orang Asli's traditional lands. But in general, the amount paid to the Orang Asli as compensation for their loss of trees and buildings is comparatively small and inadequate (Ismail, 2005; *Adong bin Kuwau & Ors v Kerajaan Negeri Johor and Anor* [1997] 1 MLJ 418). It is clear that this provision is insufficient in giving an appropriate protection to indigenous

community, and it is at best to compensate based on 'equitable' amount under the principles of sustainability and good governance (Salleh, 2008).

As expressed by Jimin et.al. (1983), on the role plays by the Department of Orang Asli Affairs (JHEOA), to take great care of the Orang Asli community, to nurture them 'from womb to grave'. However, the department, which consists of a majority of non-indigenous staff, is perceived by the Orang Asli as being distant, unapproachable, and irrelevant in representing their interests (Yap, 2002).

1.3 PROBLEM STATEMENT

Based on the above discussion (paragraph 1.2), the real problems encountered in term of acquisition and compensation of Orang Asli native lands are:

- i. The lack of protections by laws toward Orang Asli land rights and interests.
- ii. Compensation as required by the existing laws only provides for payment of growing trees and affected buildings – no compensation for the loss of traditional lands.
- iii. Quantum of compensation is at the discretion of the authorities which results in disparities among the State Governments. There are State Governments which follow the laws strictly, while others are too generous.
- iv. There have been inconsistencies in the way the common law treated the basis of compensation (e.g. Sagong Tasi (2002); Adong Kuwau (1997)).

Accordingly, the problem statement of this research is as follows,

'The land rights of Orang Asli native lands are not clearly explained in Malaysian legal system, payment of compensation to acquisition of the land is unstructured in nature, and disparity exists among states. Thus, there is a need for formulating a uniform compensation framework across the whole country for acquisition of Orang Asli native lands'.

1.4 RESEARCH OBJECTIVES

This research is carried out with the aim of assessing whether the existing compensation package for acquisition of Orang Asli native lands as stipulated in the Aboriginal Peoples Act, 1954 and other related rules, circulars, and guidelines released by related government agencies and valuation practices in Malaysia is effective and adequate in safeguarding the interest of Orang Asli. Specifically, the research assesses the existing compensation structure, legal instruments and the practice of valuation in determining compensation for affected ancestral lands.

This research, therefore studies the land rights of Orang Asli within Malaysian legal system, and reviews the international guidelines that relate to indigenous peoples such as acts, charters, recommendations, and resolutions on compensation as practised by the foreign country. Australia is selected for comparison due to her advanced law in placed, and the origins of the law are the same as Malaysia.

To summarise, the specific objectives of this research are:

- i. To determine the extent to which current laws are adequate in protecting Orang Asli native land rights to compensation.
- ii. To determine the extent of compensation problems from the perspectives of those concerned and decided cases.
- iii. To assess current practices of the State Governments with regard to compensation for acquisition of Orang Asli native land.
- iv. To evaluate the applicability of the pre-compensation framework (being developed based on the results of quantitative survey, case study and the compensation practices of Australia).

- v. To propose a compensation framework for land acquisition affecting Orang Asli native lands.

1.5 RESEARCH METHODOLOGY

In order to achieve the above objectives, this research is to be carried out in three parts:

Part I: Review of Literature and an Overview of Foreign Country Practices

To establish possible research aims and objectives, a thorough literature study was conducted, including both primary and secondary sources on areas related to land acquisition and compensation in general. Special attention was given to identify current land acquisition and compensation research and problems on indigenous land faced by other country, especially in the Australia. Thus, an evaluation, review of land acquisition and compensation for native title in Australia is carried out. The evaluation and review of Australian practice will enhance the credibility of the objectives of this research.

Part II: Case Study and Quantitative Survey Method

This research adopts case study and quantitative survey method as the strategies for data collection. In order to evaluate the impact on current practices of compensation for acquisition of Orang Asli native land (OANL), five (5) previous acquisition projects of Orang Asli lands were chosen as case study. These involved cases located in Selangor, Kuala Lumpur, Perak, Johor and Pahang, namely:

- i. Acquisition of OANL for the project of water supply and construction of dam in Ulu Kinta, Perak.
- ii. Acquisition of OANL for the project of township in Bukit Lanjan, Damansara.
- iii. Acquisition of OANL for the project of construction of dam in Sungai Lingui, Kota Tinggi, Johor.
- iv. Acquisition of OANL for the Project of the North-South Link and KLIA Expressway Mukim Dengkil, District of Sepang.
- v. Acquisition of OANL for the Project of the Construction of Kelau Dam and Distribution of Raw Water from Pahang to Selangor.

To achieve objectives (i - iii), this research explores the perceptions of related parties on the issues of land acquisition that involves Orang Asli native land by way of questionnaires survey. Two sets of questionnaire are designed; the first set is for affected Orang Asli in five case studies and the second set is for the professionals. The targeted professionals' respondents are the officers of the Department of Orang Asli Affairs (JHEOA), Land Administrators at respective Land Offices, Valuation Officers at Valuation and Property Services Department, academics and the activists of NGOs.

Part III: Qualitative Method

This research also adopts qualitative survey method as the final strategy for data collection and to answer the fourth objective. The methodology is developed from Delphi Method whereby consultancy is sought with the experts in the land acquisition of Orang Asli native lands. Face-to-face structured interviews are carried out with them to get their views on the pre-compensation framework that being established and concluded from Part I and Part II of the research methodology. Fifteen (15) renowned experts are identified and have been selected under the Delphi Method;

- i. Valuation and Property Services Department, Malaysia (Valuation Section) – 2 experts identified.
- ii. Department of Aboriginal Affairs, JHEOA (Land Development Section) – 2 experts identified.
- iii. Persatuan Orang Asli Semenanjung Malaysia (POASM) – 2 experts identified.
- iv. Pusat Pengajian Pribumi Malaysia (PPPM), University of Malaya - 1 expert identified.
- v. Academician and Journalist in Indigenous Study – 5 experts identified.
- vi. Senator of Orang Asli Malaysia - 1 expert identified.
- vii. Centre for Orang Asli Concern (COAC), Malaysia - 2 expert identified.

All data are analysed by quantitative techniques e.g. descriptive and inferential statistics – frequency, mean, and standard deviation, principal component analysis, and Pearson correlation. Statistical Package for Social Sciences (SPSS version 12.0) is the main tool in assisting the data analysis. It is important to note that all figures, tables, graphs and pictures shown in this thesis are based on this research unless otherwise stated.

1.6 SCOPE OF THE RESEARCH

As previously discussed in paragraph 1.2, this study will focus on acquisition and compensation for Orang Asli native lands in Peninsular Malaysia. Indigenous peoples of Sabah and Sarawak are excluded since their land rights and political status are more structured and established under their respective State Land Rules⁵ in which the law recognises that indigenous peoples have native customary

⁵ See Land Ordinance 1930 (Sabah, Malaysia) s 15; Land Code 1958 (Sarawak, Malaysia) s 5. See also Osman, S., (2000), *Globalization and Democratization: The Response of the Indigenous Peoples of Sarawak*, 21, Third World Quarterly, 977; Lasimbang, J., (1996), *Juridical Rights of*

rights over their lands. Thus, the issue of unstructured compensation for acquisition of these lands does not exist.

Therefore, this research will address and focus on the issues of acquisition and compensation of Orang Asli native lands within the scope of:

- Perceptions of international communities, Orang Asli and professionals on acquisition of Orang Asli native lands. In context of this research, Orang Asli native land refers to the '*aboriginal areas, aboriginal reserves and aboriginal inhabited places*' as defined in Section 2 of the Aboriginal Peoples Act 1954 (Act 134).
- Issues of Orang Asli land rights, acquisition and compensation with reference to international treaties, United Nation Declarations, Federal Constitution of Malaysia 1957, Aboriginal Peoples Act 1954 and Land Acquisition Act 1960. Apparently, the Aboriginal Peoples Act 1954 does not establish the right of the Orang Asli to own the lands and reserves that they have traditionally occupied (Xanthaki, 2003).
- Fundamental legal paradigms with an emphasis on common law approaches (decided court cases) to Orang Asli native land compensation such as the impact of court cases decided locally – Adong Kuwau (1997), Sagong Tasi (2002) as well as cases decided internationally.
- An overview of Australian practices with regard to compensation elements for acquisition of indigenous native title. The basis of Australia as a model is because of land rights for native title had long been established and legalised in Australia via Native Title Act, 1993 (Commonwealth). This

Indigenous Peoples and Their Relations to the State and Non-Indigenous Peoples: The Case of Sabah, in Christian, E., (ed), '*...Vines that Won't Blind...*', *Indigenous Peoples in Asia* (1996), p109-111.

gave Australia a forefront position in Asia Pacific Rim in term of recognizing indigenous property rights in her legal systems.

- Developing a compensation framework for land acquisition affecting Orang Asli native land in Malaysia based on the findings of the research methods employed.

1.7 STRUCTURE OF THE RESEARCH

This thesis is organised into eight chapters including this introduction that are divided into three distinct parts.

- Part I (Chapters 1, 2, 3, and 4): Review of Secondary Sources.

Chapter 1 – establishes the context of the research, describing the background and focuses to the research, its objectives, the methodology, and the structure of the thesis presentation.

Chapter 2 – provides an overview of the fundamentals of land acquisition and compensation, which in general discusses the concept of property rights and ownership. The principles, laws, and fundamental rights of land acquisition and compensation are also discussed. Accordingly, the international perspectives of such issues are examined in due manner. The profound idea is to understand the principles and concepts of acquisition and compensation of private lands in brief before applying it to acquisition of Orang Asli native lands.

Chapter 3 – examines the various ideological frameworks by the international community in respect of indigenous land rights. It then proceeds to discuss the Orang Asli of Malaysia – laws relating to them; government policies which construed their activities and life; issues and challenges confronting them. Thus, this chapter gives theoretical explanations of policy and created

foundation for analysis of developing a compensation framework for land acquisition affecting Orang Asli native lands.

Chapter 4 – specifically discusses the compensation issues in acquisition of aboriginal native lands, which covers the examination of land rights and interest of Orang Asli on their native lands and factors of consideration for acquisition of the lands. An attempt is made to explain and highlight the processes of measurement and recognition of compensation by the authorities. Current thinking of valuation approaches and the challenges in determining of compensation are also discussed and evaluated. Accordingly, an analysis of international experiences, which focus on Australian native title compensation framework, is taken as a model for reviewing.

- Part II (Chapter 5): Research Methodology

Chapter Five - focuses specifically on the discussion of the research design and methods. Thus, it incorporates the research methodology and describes the data collection procedures (pilot study, sampling procedures), formulation of research model and statistical analyses that been conducted.

- Part III (Chapters 6, 7 and 8): Empirical Analysis and Findings

Chapter Six – highlights the research findings of Case Studies of five (5) previous land acquisition projects affecting Orang Asli native lands. The aim is to seek and explore the current compensation structures as implemented by the authorities. This chapter evaluates the compensation packages awarded by the various state authorities in term of generosity, fairness, and its impact to the community of Orang Asli at large.

Chapter Seven – analyses the empirical findings of quantitative survey and Delphi Technique. This chapter is organized in four sections. The first section reports the perceptions of Orang Asli in relation to acquisition of their land as well as the compensation issues and their expectation on this matter.

The second section critically analyses the opinion of the professionals on land acquisition of Orang Asli native lands in term of issues land acquisition and compensation. The third section, reports the Principal Component Analysis (PCA) of both questionnaires as well as the results of inferential analysis to prove the research objectives. The fourth section, addresses the specific conclusions of the empirical findings by bringing together the findings of the case studies, and the results of the quantitative survey. From these findings, the pre-compensation framework is developed for land acquisition affecting Orang Asli native lands, and thereafter examines by the qualitative method of Delphi Technique.

Chapter Eight - concludes the research with a suggested compensation framework, as well as giving recommendations and suggestions for future research in the area of Orang Asli land acquisition compensation.

Figure 1.5 provides diagram of the overall structure of this research and the research processes.

RESEARCH STRUCTURE AND PROCESS

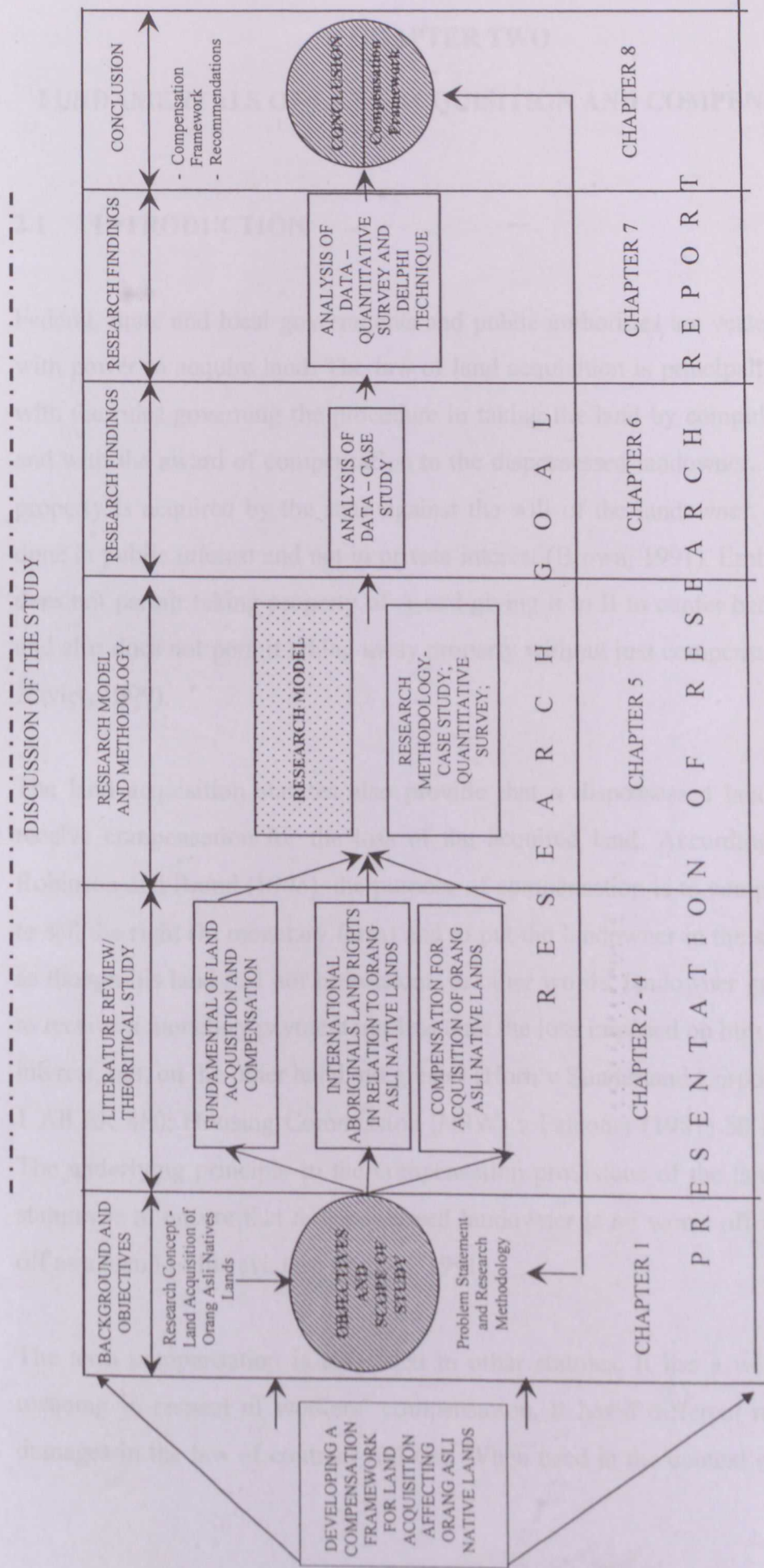


Figure 1.2: Research Process for Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands
Source : Adopted from Ramly, A.,(1995).

CHAPTER TWO

FUNDAMENTALS OF LAND ACQUISITION AND COMPENSATION

2.1 INTRODUCTION

Federal, State and local governments and public authorities are vested by statute with power to acquire land. The law of land acquisition is principally concerned with the rules governing the procedure in taking the land by compulsory means, and with the award of compensation to the dispossessed landowner. This means, property is acquired by the state against the will of the landowner. This can be done in public interest and not in private interest (Brown, 1991). Eminent domain does not permit taking property of A and giving it to B to confer benefit on him, and also does not permit taking away property without just compensation (Jain & Xavier, 1999).

The land acquisition statutes also provide that a dispossessed landowner shall receive compensation for the loss of the acquired land. According to Rowan-Robinson and Brand (1995), the purpose of compensation is to compel the owner to sell the right (in monetary form) and to put the landowner in the same position as though his land had not been taken. In other words, landowner gains the right to receive a monetary payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater (*Horn v Sunderland Corporation* [1941] 1 All ER 480; *Housing Commission (NSW) v Falconer* (1981) 50 LGRA 334.). The underlying principle in the compensation provisions of the land acquisition statutes is to ensure that a dispossessed landowner is no worse off and no better off as a result of his eviction (Brown, 1991).

The term compensation is also used in other statutes. It has a well-understood meaning in respect of workers' compensation. It has a different meaning from damages in the law of contract and tort. When used in the context of deprivation

of land it means recompense or amends (Re Meldon Homes No 2 Pty Ltd's Land [1976] Qd R 79). It means the sum of money, which the owner would have got when he sold the land on the open market plus other losses, which result from the eviction. However, the term compensation is not defined in the land acquisition statutes. The term takes its meaning from the provisions, which define what monetary sum must be paid to the dispossessed owner for the loss of his land (Aggarawalla, 1981; Brown, 1991; Rowan-Robinson & Brand, 1995).

This Chapter discusses in general the concept of property rights and ownership, international perspectives of land acquisition, and fundamental of land acquisition and compensation for acquisition of private lands. The profound idea is to understand the principles and concepts of acquisition and compensation of private lands in brief before applying to acquisition of Orang Asli native lands.

2.2 THE CONCEPT OF PROPERTY RIGHTS OR OWNERSHIP

2.2.1 Property Rights

The concept of property rights or ownership has no single or universally accepted definition. Like other concepts, usage varies broadly and has great weight in public discourse. Various scholar communities (e.g. law, economics, anthropology, sociology) treated the concept more systematically, but their definitions are different based on fields.

In common use, property is simply one's own thing and refers to the relationship between individuals and the property itself. Scholars in the social sciences frequently conceive of property as a bundle of rights and obligations. As defined in law, property is often conceptualised as the rights of ownership. This means that if a person owns a property, he is subject to legal constraints and permission in usage of the property.

Wyatt (1995) refers to property as land and buildings, while property valuation concerns the economic analysis of property rights. As a factor of production, landed property has unique characteristics that differentiate it from other factors of production. Land is heterogeneous (Fraser, 1991) either spatially, physically or both (Kivell, 1983); land is costless in creation but needs expenses to develop or redevelop (Balchin and Kieve, 1977); land is scarce and usage is relatively fixed in short term but can be changed over a longer term via planning and reclamation (Kivell, 1983). Moreover, property is durable, immobile, and location-dependent (Millington, 1994); property market is governed by imperfect knowledge (Britton et al, 1989); transaction of property is expensive, time-consuming and attached with legal process (Balchin and Kieve, 1977). Government intervention and external influences play a pivotal role in property; and land has no value intrinsically, value derives from the property rights and multiple property rights may exist within the property (Kivell, 1983).

Traditionally, the bundle of rights in property, includes:

1. controlled use of the property
2. benefit from the property (examples: mining rights and rent)
3. transfer or sale of the property
4. exclusion of others from the property.

Modern property rights perceive ownership and possession as belonging to legal individuals, even if the legal individual sometimes is an organization. Thus, corporations, governments and other collective forms of ownership are framed in terms of individual ownership. The theories of property rights are to promote the general good, encourage economic development and utilisation of property (Britton, et.al., 1989; Kivell, 1983).

2.2.2 Types of property

Most legal systems distinguish between different types of property, especially between landed property and all other forms of property, as well as differentiation between tangible and intangible property.

In common law, property is divided into:

1. Real property - interests in land and improvements thereto;
2. Personal property - interests in anything other than real property

Personal property is divided into tangible property (such as cars, clothing, furniture, etc) and intangible or abstract property (e.g. stocks, bonds, bank deposits, derivatives, options, patents, copyrights, trademarks, etc) which includes intellectual property.

2.2.3 Property in Relation to Compulsory Acquisition

The High Court (in Australia) has consistently applied a broad interpretation to property. In *Minister for Army v Dalziel* [1994] 68 CLR 269 at 285 Rich J, observed that,

‘Property, in relation to land, is a bundle of rights exercisable with respect to land’.

Latham CJ ((1983) 7(3) LR 279 at 292) similarly stated that,

‘...the term property is ambiguous, as applied to land it may mean the land itself in relation to which rights of ownership exist, or it may refer to rights of ownership which exist in relation to the land’

He further stated that,

‘Property should be liberally...interpreted so as to include land itself and also proprietary rights in respect of land’.

Longo (1983:136), argued that the concept of property is *'organic, and contemporary property theory seems to be groping for a new concept of property, which reflects the new circumstances and aspirations of modern society'*. Lofgren (1998) commented that the bundle of rights exercisable with respect to land supports the 'right to negotiate', as the right to negotiate prior to compulsory acquisition is a long established community aspiration. Stoebe (1972), in his analysis on the history of compulsory acquisition mentioned that even before the requirement for compensation, there was the requirement that property could be taken only by consent of the individual in person or by his representatives.

Similarly, about two centuries ago, Blackstone (1809) observed that parliament can compulsorily acquire land, subject to three qualifications: i) a full indemnification and equivalent; ii) a reasonable price; and iii) indulgences with caution. Traditionally, judicial interpretations of compulsory acquisition have tended to focus on compensatory equivalence and to the effect of the procedural aspects of acquisition (Lofgren, 1998).

2.3 INTERNATIONAL PERSPECTIVE OF LAND ACQUISITION

Since the laws of the Commonwealth countries (including Malaysia) originated from England, the development of the laws of compensation must be seen in a political and historical context of England. In addition, for Malaysia the development of the laws of compensation in India must also be given due regard as the Malaysian Land Acquisition Act, 1960 is based on the earlier Indian Land Acquisition Act of 1894.

Before the First World War (1914 to 1944) a typical compulsory purchase was for the purposes of a utility (e.g. railway and water supply) under powers contained in a private Act, normally promoted by a limited company. The Act would incorporate the Lands Clauses Consolidation Act 1845, which set out machinery

for the implementation of compulsory purchase and the payment of compensation. The cases established that compensation should be paid on the basis of 'the value to the owner' (*Birmingham City Corp v West Midlands Baptist Trust* [1970] AC 874). Compensation was usually assessed by a jury. A special allowance was given to reflect the compulsory nature of the acquisition.

As the Scott Committee commented in 1918 (Scott Report, 1918: paragraph 8):

'Compulsory acquisition of land to any great extent first took place in connection with the Railway development in the first half of the 19th century, and public opinion in regard to compensation was undoubtedly much influenced by the fact that railway enterprise undertaken for profit rather than the interest of the State was the moving force. The sense of grievance which an owner at that time felt when his property was acquired by railway promoters, then regarded as speculative adventurers, led to sympathetic treatment by the tribunal which assessed the compensation payable to the owner...'

In contrast, the 20th century, until the last two decades, was the century of the corporate state; cleared slums, built houses, schools and hospitals, constructed roads, provided gas, electricity and water, took over the running of the railways and other developments for the benefits of the people. Thus, it saw the authorities did intensive compulsory acquisitions.

2.3.1 The Development of the Statute that Relates to Compulsory Acquisition in England

The interests of the State became more dominant after the Second World War. This trend reached its climax under the Town and Country Planning Act 1947, where planning control was extended to the whole country. This made all development value expropriated by the State, resulting in land acquisitions being made at existing use value (Carfield & Carnwath, 1976).

The Town and Country Planning Act 1959 did not finally abolish this system until the restoration of market value, as the basis for compensation. The Lord

Chancellor, when introducing the 1959 Bill (Col. 579) gave a summary of the intervening history:

‘... the 1947 Act set up a new financial system, designed to solve once and for all the problems of compensation and betterment that prevented effective planning in the pre-war years. The State took over all development rights. Before anybody could carry out development, he had to buy back the right to develop by paying a development charge. Owners were to be compensated for the loss of the development values existing in 1947 out of a £300 million fund, and machinery was set up for the making and establishment of claims on the fund. It was assumed that, in these circumstances, land would be bought and sold in the market at existing use value. As a logical consequence of this it was provided that compensation for land bought compulsorily should be limited to existing use value. As is well known, the system did not work well in practice. The public found it difficult to understand and the development charge was regarded simply as a tax on development. The Conservative Government in the Town and Country Planning Acts of 1953 and 1954, therefore abolished development charge, so leaving owners of land free to realise the development value of their land provided that they could get planning permission...’

Even after abolishment of development charge in 1954, compulsory acquisitions continued to take place at existing use value, plus a share of the 1947 compensation fund. Since this was based on 1947 development values, there was a big gap between compensation payments and prices at which land was being sold in the market (Corfield & Carnwath, 1976).

The Town and Country Planning Act 1959 was designed to restore market value for public acquisitions (in accordance with the 1919 rules, by virtue of the comprehensive system of planning control introduced in 1947). The relevant provisions were in sections 2 - 9 of the Act. The Parts II and III of the Land Compensation Act 1961, which remains in force today, were a consolidation of these provisions.

The subsequent fifteen years saw two further legislations being introduced; the Land Commission Act 1967 (introducing Betterment Levy) and the Community Land Act 1974 (similar with Development Land Tax) introduced by the Government. The purpose is to directly control issues related to land development and dealt with the perceived problem of betterment. Development potential was

no longer seen as an intrinsic right of land ownership, the restriction or removal of which would attract compensation (*Belfast Corp v OC Cars Ltd* [1960] AC 49). Thus, even in cases where restriction would formerly have carried a right to compensation, the right could in effect be nullified by planning controls (*Westminster Bank Ltd v MHLG* [1971] AC 508; *Hoveringham Gravels Ltd v Secretary of State* [1975] QB 764).

In 1980 onwards, by the introduction of privatisation programme, the role of public authorities as direct providers of services or initiators of development was drastically reduced. In case of the development schemes were initiated by public authorities, they were usually in partnership with private developers (HMSO, 1972). Land acquisition powers were exercised with a view to handing the land over to the private developer, who might indemnify the authority against the cost. Privatisation resulted eventually, in most of the major utilities passing into private hands. The Transport and Works Act 1992, which replaced the private bill procedure for railway and other transport works, enabled any undertaking (public or private) to apply for compulsory powers for such projects.

Changes of the Government in 1996 did not bring any radical change of direction in terms of land or development policy. There are no proposals to take greater public control of development, or tax development gains. The utilities remain privatised. Developments involving public authorities are likely to be through some form of public/private partnership or private finance initiative (HMSO, 1972).

In formulating modern principles of compensation, these historical changes need to be taken into account by the respective parties. Any conception that compulsory acquisition is largely devoted to promoting public, non profit-making activity would be misleading. Many, perhaps most, compulsory purchases now involve transferring land, and the potential to profit from it, from one private person or undertaking to another. Any rule which seeks to exclude from

compensation part of the value of that potential requires a clear policy justification. In one way or another, Malaysia is influenced by those developments of acquisition laws either in England or India respectively.

Furthermore, the Human Rights Acts also need to consider though these have no policy significance in the real world, and are simply a part of the process of determining compensation. There also doubts about the role of the Human Rights Act in this context, particularly in relation to compulsory acquisitions by Government. The Human Rights Act 1998, incorporating the European Convention of Human Rights, imposes a new discipline in land acquisition procedures. Article 1 of the First Protocol provides:

‘Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of public international law’.

This provision does not impose any specific standard of compensation. The general principle is that,

‘The property taken should be compensated by payment of an amount reasonably related to its value, but this does not guarantee full compensation in all circumstances since legitimate objectives of public interest, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value’

(*Lithgow v UK* (1986) 3 EHRR at 329, 371; *James v UK* (1986) 8 EHRR at 12)

However, it is implicit in this statement, and in general, principles of Convention law, that any deviation from full compensation needs to be adequately justified (Clayton & Tomlinson, 1982). Additionally, Article 14 stressed that the law must not discriminate unfairly as between different groups of property owner affected by the interference.

The application of these principles to the present compensation law has yet to be tested under the Human Rights Act. The Act does, however, underline the

importance of ensuring that the compensation rules produce results which are fair, rational and reasonably predictable, and do not result in arbitrary discrimination between those affected (Clayton & Tomlinson, 1982).

Reference should also be made to Article 6(1) which guarantees a right to a fair hearing by an independent tribunal in the determination of civil rights. The House of Lords has confirmed that the role of the Secretary of State, in determining planning appeals and confirming compulsory purchase orders, does not breach this principle, in view of the policy content of the issues involved, and the supervisory role of the High Court (*R Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389). The High Court has a similar role on appeals in respect of certificates of appropriate alternative development issued by planning authorities.

2.4 PRINCIPLES OF LAND ACQUISITION AND COMPENSATION

The compulsory of land for a public purpose is an inalienable right of every sovereign state and, has been recognized over many centuries. This right, in modern times, has become increasingly important in the light of the ever increasing responsibility of the public sector to provide services which cannot effectively be provided by the interaction of the forces of supply and demand.

The enactment of laws to compel landowners to sell their land to the state or to some other body is done as a matter of practical necessity. This is so even in a capitalist democracy, for example, in US where, under the term eminent domain, land may be taken for any bona fide public purpose. The rationale of the compulsory acquisition of privately owned land is that the general good of the whole community, that is, the public good, is paramount to that of the individual landowner; or the welfare of the people or public is the paramount law (*salus*

populi est seprema lex) and public necessity is greater than private (*publica major est quam private*)(Aggarawalla, 1981; Brown, 1991).

The principle of land acquisition is based on the reasoning that an individual's property rights can be set-aside in the interests of a society. This includes the addition of Section 3(b) of Land Acquisition Act 1960 (as amended) under Act 804 on 13th September 1991. The State may acquire any land which is needed:

‘By any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or to the public generally or any class of the public’.

The amendments to the Land Acquisition Act 1960, indicated that how compensation will be decided [Please refer to Appendix D]. The fundamental principle of compensation for compulsory acquisition of land is as has been mentioned in *Land Administrator, District of Gombak v Huat Heng (Lim Low & Sons) Sdn. Bhd* (1990) 3 MLJ at 465, Hashim Yeop A Sani CJ.

‘The basic principle of the law of compensation is that the sum awarded should as far as practicable, place the claimant in the same financial position as he would have been in, had there been no acquisition of his land being compulsorily acquired’.

Court decisions appear to sustain the principle of equity in land acquisition cases in which the owner is to be left in monetary terms. It is the court's intention to leave his monetary position (as measured by the value of his property before and after the taking) intact. It is clear then that the owner is not entitled to make a profit from the acquisition.

Furthermore, the general principles of compensation to land from the Privy Council's decision by Lord Romer when considering Sec. 23(1) of the Land Acquisition Act 1894 (India) which required compensation to be awarded for market value and damage sustained, in *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer Vizagapatam* (1939) 2 All ER at 317:

‘Compensation must be determined by reference to the price which a willing vendor expects to obtain from a willing purchaser. The disinclination to part with his land and the urgent necessity of the purchaser to buy is to be disregarded and neither party is to be considered as acting under compulsion. (This in practice is termed ‘market value’). The value of the land is not to be estimated at its value to the purchaser. The fact that a particular purchaser might desire the land more than others is to be considered’.

The sum payable may represent a sum not only for the land taken, but also other losses suffered in consequence of the acquisition. The fundamental principle has been to place the affected landowners in the same position, after the acquisition as he was before, nor worse, nor better. This also known as the principle of equivalence (Cruden, 1986; Brown, 1991, Rowan-Robinson & Brand, 1995; Teo & Khaw, 1995; Usilappan, 1997; Jain & Xavier, 1999). The earliest case that set out this principle was *Rickets v Metropolitan Rail Co.* 1867; ‘*Compensation is the amount required to put the dispossessed landowner in the same position as if his property had not been acquired*’.

The detailed principles for the determination of compensation are spelt out in the First Schedule of the Land Acquisition Act, 1960.

2.5 FUNDAMENTAL RIGHTS IN LAND ACQUISITION

Since the enforcement of the Land Acquisition Act, 1960 there are five (5) elements of fundamental rights that must be justified under acquisition of land:

2.5.1 Rights to be heard

Landowner under the laws has the rights to be informed of the government’s intention to acquire his land. Notification of intention must clearly state the information of the land being acquired such as lot number, area, registered land owner and other related information (Yew Lean Finance Development (M) Sdn

Bhd v Director of Land and Mines, Penang (1977) 2 MLJ 45, 46.). According to Viscount Dilhorne J, Privy Council in the case of Syed Omar Ab. Rahman Taha Alsagoff & SL v Johor State Government (1979) 1 MLJ 49, notification notice must also state the purpose of the acquisition.

2.5.2 Rights to object

Landowners and the interested parties are given an opportunity to object and highlight any dissatisfaction towards land acquisition and compensation. This right includes the right to be represented by lawyer in the inquiry proceeding, to call witnesses, to give explanations and to get related documents (CLR Balik Pulau, Penang v Kam Gin Paik and Anors (1983) 2 MLJ 390).

2.5.3 Urgency in dealings with land acquisition

When the land is deemed to be acquired and demarcation has been made, any deal towards such land is frozen. In this situation, landowners have lost their rights to deal with their land, such as to mortgage, rent and sell. A process of land acquisition is relatively a long process and therefore payment of compensation must be made fast and timely. Requirement for urgency in dealing with land acquisition and payment of compensation are decided in Malaysian cases e.g. CLR Balik Pulau, Penang v Ong Gaik Kee (1983) 2 MLJ 35; Oriental Rubber and Oil Palm Sdn Bhd v CLR Kuantan (1983) 1 MLJ 315; CLR Balik Pulau, Penang v Kam Gin Paik and Anors (1983) 2 MLJ 390. In these cases, the High Court has decided that a delayed in inquiry and awarding an award for a period of three and half years was unreasonable, abuse of powers and unfair to land owners where the awards given was the market value of the land for three and half years ago.

2.5.4 Mala fide

Acquisition in bad faith could be the reason to claim that the acquisition of land was not according to the law. Since such claim is serious, the burden of proof is vested to the landowner (Lord Griffiths in case *Yeap Seok Pen v State Government of Kelantan* (1986) 1 MLJ 449). The High Court has the power to make the acquisition proceeding becomes null and void by the way of certiorari⁶ if it is proven that the Land Administrator and State Government have acted beyond discretion powers of the state (*Tan Boon Bak & Sons v State Government of Perak* (1983) 1 MLJ 117).

2.5.5 Full investigation

A procedure of land acquisition is completed when the landowner is awarded an adequate compensation. To achieve the adequate compensation, the Land Administrator is required under the laws to carry out full investigation before awarding an award. All the main materials of the case must be upheld and given due consideration. Failure to do so, the Land Administrator is regarded as neglecting his duty and the award offered by him is nullified and can be ignored.

2.6 DEFINITION OF COMPENSATION AND ADEQUATE COMPENSATION

The law requires, in any acquisition of land, the State Authority to pay adequate compensation. The term 'adequate compensation' is however not clearly defined. It is totally abstract, it has no meaning from a practical standpoint, unless it is related to something which has a concrete value (Graham, 1984).

⁶ A writ emanating from a higher court requiring the record of the case in the court below to be sent up to itself for re-determination. It is not a matter of right, and when the petition for the writ is denied. It is almost without opinion (Sinha & Dheeraj, 2005).

Market value and adequate compensation are not defined in acquisition laws, neither has it been contended that adequate compensation and market value are the same thing. Obviously, in some cases they are not, rather, the idea is that market value is the best method of satisfying the requirement that adequate compensation is paid, and therefore this idea is sound and works well in practice (Khublal, 1994). Furthermore, it is the desire of the state to give adequate compensation based only on market evidence, and if each party involved in land acquisition will act in accordance with professional ethics, honesty and integrity, the objective of arriving at adequate compensation will be achieved based on market value notion (Khublal, 1994).

Dundas & Evans (2001) stated that the compensation on market value basis is considered satisfactory, however, there is a feeling that an additional payment, probably a percentage of the value, should be paid to property owners in term of solatium⁷ or ex-gratia⁸ for compulsorily eviction. Epstein (1998) acknowledged that restrictions on the rights of others often serve as a form of implicit, in-kind compensation. For example, zoning restrictions in a residential neighbourhood may be justified by the average reciprocity of advantage received by residential landowners.

A study in Aberdeen (RICS, 1995; Rowan-Robinson and Brand, 1995) also recommended that a supplement should be paid. If the compensation were seen to be more generous it could be possible to present compulsory purchase positively to the extent that, if it were sufficiently high, owners/occupiers might welcome compulsory purchase.

The meaning of adequate compensation has different interpretations in different countries. In United States, the market value of the subject property is generally

⁷ Please refer to paragraph 2.12.1

⁸ Please refer to paragraph 2.12.2

held as just compensation for the dispossessed owner (Eaton, 1995). In UK, compensation is based on the principle of value to owner, that is made up of market value together with other losses suffered by the claimant (Denyer-Green, 1994). This principle is broadly followed in most Commonwealth countries and regions such as Australia (Brown, 1991) and Hong Kong (Cruden, 1986). In China, the current compensation laws are far from adequate due to fair compensation principle being not in place, and has caused great discontent (Chan, 2003).

Usilappan (1997; 2000; 2006) concerned on payment of fair, equitable and adequate compensation to the affected owners. The Constitution required payment of adequate compensation and the Act provides for market value and other damages and, though these appear equitable in law, in practice the landowners still suffer. Various amendments to the Act somehow, provide the landowners with lesser compensation such as compensation on planned use, relocation hardships, and business losses (Usilappan, 1997). Most jurisdictions have done away with betterment, in Malaysia betterment clause is still in the Act (Buang, 2001; 2007; Usilappan, 2000; Xavier, 1999).

Therefore, 'compensation' is defined as the act of compensating or the state of being compensated; something, such as money, given or received as payment or reparation, as for a service or loss. Something given in exchange for goods or services rendered. In addition, consideration, payment, recompense, remuneration are all that something to make up for loss or damage. Furthermore, amends, indemnification, indemnity, offset, quittance, recompense, redress, reimbursement, remuneration, reparation, repayment, requital, restitution, satisfaction, setoff, all these are best described meaning of compensation (<http://www.yourdictionary.com>). This word implied that the dispossessed landowner should be paid for all losses sustained in consequence of the compulsory acquisition of his land (*Suryapal Singh v State of Uttar Pradesh* 1953 SCA 932; *Ratilal Shankerbhal v State of Gujarat* AIR 1970 SC 984).

The word 'compensation' is also defined by the High Court in *Nelungaloo Pty Ltd v Commonwealth* [1948] 75 CLR 495 at 571 to mean,

'Recompense for loss, and when an owner is to receive compensation for being deprived of real or personnel property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less the money value into which he might have converted his property had the law not deprived him from it. You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the government authority for its purpose'.

'Adequate' is defined as sufficient to satisfy a requirement or meet a need; being what is needed without being in excess: comfortable, competent, decent, enough, satisfactory, sufficient; of moderately good quality but less than excellent: acceptable, all right, average, common, decent, fair, fairish, goodish, moderate, passable, respectable, satisfactory, sufficient, tolerable (<http://www.yourdictionary.com>). Therefore, in simple words, 'adequate compensation' in land acquisition can be defined as sufficient payment of losses due to acquisition of land to the affected landowners, being what is needed without being in excess.

2.7 LAWS OF LAND ACQUISITION

2.7.1 Federal Constitution of Malaysia, 1957

In Malaysia, Article 13 of Federal Constitution, 1957 established that an owner shall be disposed of his property only by the powers of law. It also forbids the introduction of any legislation authorizing the compulsory acquisition of property without payment of adequate compensation. The Constitution permits the federal government to make laws with respect to the acquisition of property on just terms from any State or person for public purposes. Article 13 of the Malaysian Federal Constitution mentioned the following;

‘Article 13(1) - no person shall be deprived of property save in accordance with law and, Article 13(2) - no law shall provide for the compulsory acquisition or use of property without adequate compensation’

This means, Article 13 of Federal Constitution, 1957 guarantees the citizen the right to compensation and Constitution also provides for adequate compensation to be given to the owner if his land is acquired under any law passed by Parliament. As what is adequate could be relative to person interested and, more objective definition must be attached to it. These provisions are also applied to any types of property and there must not exclude the Orang Asli native lands. The law concerned is the Land Acquisition Act, 1960, which consolidates all existing legislation on acquisition and compensation. This Act is based on the earlier Indian Land Acquisition Act of 1894.

2.7.2 Land Acquisition Act, 1960

The principal land acquisition law in Peninsular Malaysia is the Land Acquisition Act, 1960. The act contains the procedures governing the acquisition of land, the principles regulating the assessment and payment of compensation and other incidental matters. The introduction of this act superceded a number of former legislations as followings:

- i. Land Acquisition Enactment of the Federal Malay States;
- ii. Acquisition Ordinance of the Straits Settlements;
- iii. Kelantan Land Acquisition Enactment;
- iv. Kedah Land Acquisition Enactment (No. 57);
- v. Land Acquisition (Extension to Terengganu) Ordinance, 1952;
- vi. Land Acquisition (Extension to Perlis) Act, 1958 and
- vii. Acquisition of Land for Railway Purposes of the State of Perlis.

In contrary, Sabah and Sarawak have their own land acquisition laws, viz., Sabah Land Acquisition Ordinance, 1950 (Cap. 69) and Part IV of the Sarawak Land Code (Cap. 81).

The Land Acquisition Act, 1960 endowed the authority with the sovereign power to acquire land compulsorily for land needed by the State and Federal Departments, Local Authorities, Statutory Bodies and other government or quasi-government authorities for public purposes as stipulated under section 3 of the Act. Section 3(b) also empowers the acquiring authority to compulsorily acquire any land for any person or corporation undertaking a project of a public utility in nature or for the sake of economic development.

Article 83(5) of Federal Constitution, 1957 empowers the Federal Government to demand the State Authority to acquire land for federal purposes by private treaty or compulsory purchase. On the other hand, other Acts of Parliament such as Electricity Act, 1949; Urban Development Corporation Act, 1971; Street, Drainage and Building Act, 1974 etc, empower the appropriate authorities to acquire land for their specific needs but, the acquisition shall be proceed with in accordance with the Land Acquisition Act, 1960.

Till to-date, the Land Acquisition Act, 1960 has been amended several times to bring the Act in line with current development of Malaysia. For instance, in 1976, the principles of compensation (including an attempt to give meaning to the term 'market value') as contained in the First Schedule of the Act were radically amended by the Land Acquisition (Amendment) Act, 1976 (Act A336). However, in the following year, the Land Acquisition (Amendment) Act, 1977 (Act A388) nullified the amendments and restored the previous principles of compensation.

Following on, in 1981, based on the findings of the Cabinet Committee, headed by the Minister of Finance, ways to expedite development projects were published. The Committee found that 7% of the projects under the Third Malaysia

Plan were held up by delays in land acquisition. Recommendation was made to look into possible amendments to the Land Acquisition Act, 1960 due to the Committee concern that development projects should be smoothly and expeditiously completed while, at the same time ensuring that landowners' interests were protected. Finally, the long awaited amendment to the Act was passed by Parliament vide Land Acquisition (Amendment) Act, 1984 (A575).

The Land Acquisition (Amendment) Act, 1997 (Act A999), saw the Land Acquisition Act, 1960 was significantly amended. It took almost two years of deliberation and considerable debate before the final amendments being enforced. As a background, this was due to pronouncements of Ministers and politicians on the unhappiness of the government over having to pay substantial amounts in compensation for public purpose acquisition, misuse of acquisition powers by a number of State Governments on land acquired for economic development by not adhering to cabinet guidelines and, the government's unhappiness over awards by Judges in resolving land acquisition cases.

The major amendments to the Act summarized as: guidelines for economic and public utility acquisitions; new procedures for objections and appeals; new principles for compensation; legislative role for valuers; legislative role for planners; new definitions, consequential and, other minor changes. Detail list of amendments to the Land Acquisition Act, 1960 is tabulated in the following Table 2.1.

2.2 PARTIES INVOLVED IN LAND ACQUISITION

The key parties involved in land acquisition process would include the Government (consist of the State Authority, District Land Administrators, Legal Advisors, the Courts (represented by Judge, Assistant Legal Counsel and Claimants), and the Valuers (Government Valuers who represent the government and Private Valuers who represent the landowners).

Table 2.1
The Detailed List Of Amendments To The Land Acquisition Act, 1960

Amending Law	Short Title	In-force From
L.N. 477/1965	National Land Code (Repeals and Amendments) Order 1965	23.12.1965
P.U. (A) 515/1969	Essential (Land Acquisition) Regulations 1969	19.12.1969
Act A49	Land Acquisition (Amendment) Act 1971	30.04.1971
Act A216	Land Acquisition (Amendment) Act 1973	13.10.1973
P.U. (A) 81/1974	Federal Territory (Modification of Land Acquisition Act 1960) Order 1974	01.02.1974
P.U. (A) 184/1975	Federal Territory (Modification of Land Acquisition Act 1960) Order 1975	01.02.1974
Act A336	Land Acquisition (Amendment) Act 1976	27.02.1976
Act A387	Land Acquisition (Amendment) Act 1977	18.03.1977
Act A388	Land Acquisition (Amendment) Act 1977	27.02.1976
Act A575	Land Acquisition (Amendment) Act 1984	20.01.1984
Act A804	Land Acquisition (Amendment) Act 1991	13.09.1991
Act A852	Land Acquisition (Amendment) Act 1993	16.07.1993
Act A999	Land Acquisition (Amendment) Act 1997	01.02.1998
P.U. (A) 200/2002	Federal Territory (Modification of Land Acquisition Act 1960) Order 2002	16.05.2002

Source: International Law Book Services, ILBS (2004), *Land Acquisition Act 1960 (Act 486) and Rules and Order*, ILBS, Kuala Lumpur.

According to Buang (2001; 2007), the Land Acquisition Act 1960 has two objectives; firstly to provide a standard method of procedure applicable to all the states in Peninsular Malaysia and, secondly to serve as a speedy mechanism for acquiring land compulsorily, where they are needed urgently for development purposes. If properly implemented, the Act should be able to provide balance between meeting the need of government and at the same time rendering justice to the dispossessed owners.

2.8 PARTIES INVOLVED IN LAND ACQUISITION

The key parties involved in land acquisition process would include the Government (consist of the State Authority, District Land Administrators, Legal Advisor); the Courts (represented by Judge, Assessors, Legal Counsels and Claimants), and the Valuers (Government Valuers, who represent the government and Private Valuers, who represent the landowner).

2.8.1 The Government

Generally, the owner's property rights are guaranteed by the Federal Constitution, but they are subject to modifications by legislative, executive and judicial actions. The form of government and the guiding principles of political leadership do influence the price system and property values. For example, in China as a result of Communist political policy introduced in 1949, ownership of land was seized in the name of the 'people' of China, and as such, private rights and property values were liquidated (Chan, 2003).

In Malaysia, the high costs of acquiring lands for public purpose led the Government to change the basis of assessing market value from open market value to existing use value on 18th March 1977 with the passing of the Land Acquisition (Amendment) Act 1977 (Act A387) . [Appendix C shows the newspaper report on this matter]. The amendment did not work. Act A387 was repealed by Act A388 later, reinstating open market value as the basis. Now, market value is still the basis of compensation in Malaysia. The Exco Members, Land Administrator and Legal Adviser normally represent the government in land acquisition process.

2.8.2 The Court

The High Court is the court, which deals with land reference cases in Malaysia. The courts have long since accepted that the valuation of land is primarily a matter for valuers. A conflict between valuers (government and private valuers) requires the court to determine the nature of the conflict. It could be a conflict of law, of fact or of opinion. Its solution may not be found in valuation texts or decided cases, as the difference may lie in the assumptions which they have made. A valuation done on a wrong assumption does not give guidance to the value of the acquired land.

At the outset of compensation proceedings the court needs to establish the issues between the valuations; whether both valuers have made the same assumptions of law or of fact. If they have made the same assumptions, the differences may be narrowed down to the inferences and conclusions which have been drawn from common material facts. If they are different, then the court needs to determine which assumptions are justified.

Court decisions generally involve valuation of freehold interests; mostly involved in interpretation of market value of freehold interests. Today, the bulk of real estate transactions are leasehold properties and the majorities are financed. The way they are financed has an effect on property interest that are sold and valuers are often asked to value it. Courts are limited to what is presented at the trial. Judges are learned in law, not experts in the mathematics of valuation and valuation theory. In latest development, it was evident that the Orang Asli, which is considered by the laws as not having ownerships to property, also challenges the quantum of compensation in court. Ironically, they succeeded in their trial.

2.8.3 The Valuers

The task of a valuer is to estimate the worth of the interest in the land to the claimant or the acquiring body. For that purpose, the valuer prepares a valuation report on the value of the land. Subsequently, the valuer may also be called as a witness, to be examined, cross-examined on the valuation in compensation proceedings.

Valuers are familiar to viewing the compensation in monetary term in exchange for real property. There is another magnitude of compensation that should be explored by the valuer who seeks to be a true professional. Emerson (1941:38) explored this facet of compensation from a philosophical and humanistic viewpoint. He writes,

‘Every act rewards itself. Men suffer their life long, under the foolish superstition that they can cheat. But it is as impossible for a man to be cheated

by anyone but himself, as for a thing to be, and not to be at the same time. There is a third silent party to all our bargains. The nature and soul of things takes on the guaranty of fulfillment of every contract, so that honest service cannot come to loss. If you serve an ungrateful master, serve him the more. Put God in your debt. Every stroke shall be repaid. The longer the payment is withholden, the better for you, for compound interest on compound interest is the rate and usage of this exchequer’.

Emerson (1941) forewarned valuers not to be so despicably concerned with the payment for the services, but to be more concerned with the service rendered instead. Valuers must ensure thoroughly that the quality of work they produce justifies the fees charged. The courts have long accepted the professionalism of valuers because they are trained to give their expert opinions on values of property. The idea lies behind valuation profession; valuers must be knowledgeable, skilful, and competent with integrity toward their job (Khong, 1996). Justice Jerrold S. Cripps. QC says:

‘Finally, I have been asked to make some comments on the role of the valuer in court proceedings. There is little I can say on this subject beyond stating the obvious, viz, that the work of the court in valuation cases would be difficult, if not impossible, without the assistance of expert valuers. For reasons which I take to be self-evident, I must leave it to others to judge the importance attached to the evidence of any particular valuer in a given case. My experience of the profession of valuers is that they do their best honestly and competently in a difficult and complex area of the law. There are, of course, the odd few who are capable of stretching even my credulity, but that is to be expected in any area of expert witnesses. Although, as I have said, I do not propose to enlarge upon the subject of the role of the valuer in the court in the sense of commenting upon the performance of any particular valuer, I do not think it is inappropriate for me to remind valuers of the practice of the court with respect to compensation cases. Expert reports are required to be exchanged before the hearing. I view that direction, in spirit at least, as requiring a report that could be read by a reasonably intelligent person who would know not only what the valuer's opinion was but also the reason why the valuer reached that conclusion. In Yates it was suggested to me by one of the barristers that if the reports were as I suggested, the result would be that the valuer's report would be tendered and he would not be asked any question-in-chief. I responded that that is exactly what I intended. Even in a complicated case I am sure a competent valuer is quite able to set out his opinion and his reasoning in language that is understandable to a reasonably intelligent non-expert. The advantage to the court, if it is done, is that an enormous amount of time is saved and the judge has a full understanding of the issues for determination’.

(The Valuer, February 1991; p.37)

2.9 PROCEDURES OF LAND ACQUISITION

The discussion of the procedures of land in acquisition in Malaysia can be summarized and grouped according to the following sub-topic:

2.9.1 Purposes of Acquisition

Whenever land is intended for development by the Applicant's Agency, the State Authority may acquire property as set out in Section 3;

‘Section 3 (a) – For any public purpose

Section 3 (b) – For any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia, or any part thereof, or to the public generally or any class of the public or;

Section 3 (c) – For the purpose of mining or for residential, agriculture, commercial, industrial or recreational purposes or any combination of such purposes’.

Therefore, by using the powers of the Land Acquisition Act, 1960 the purposes of acquisition must be strictly based on the above purposes, though the purpose of section 3(b) sometime misused by the authority (Please refer to Appendix D for the details).

2.9.2 Notification Gazette

Similarly, whenever land is intended for public purposes, a notification under section 4(1) in Form A shall be published in the State Gazette. In addition to this notification, the Land Administrator must give public notice of the notification as required by section 52. The notice is to be displayed in Land and District Office, on public notice boards and other suitable places, in which the subject land is located. Under section 4(3), notification of section 4(1) is limited to a period of not exceeding 12 months, before the notification under section 8 to be published in the gazette. If not, the notification shall be lapsed. Section 4(4) states that

notwithstanding section 4(3), it shall be lawful for the State Authority to publish fresh notification under section 4(1) in respect of the same land or part thereof if required for a purpose referred to in section 3.

2.9.2 Award of Compensation

The importance of section 4 notification is that, the date shall be the date of valuation for assessment of compensation in accordance with the First Schedule, provided that notification of section 8 is made within 12 months. If notification of section 8 is made more than 12 months, the date of valuation shall be the date of section 8 notification gazette.

2.9.3 Land Investigation

After the publication of the gazette under section 4, the Land Administrator will investigate the land physically and gathers information about the subject lands. The layout plan of the land that is to be acquired is prepared in Form C for consideration of the State Authority. Then, in accordance with section 8(1), a declaration in Form D must be published in the Gazette. The contents thereof must be consistent with the lands as set out in Form C. This declaration is deemed to be conclusive that the lands to be acquired are needed for the purpose stipulated in the Gazette.

2.9.4 Inquiry

The Land Administrator commences the proceedings by giving a notice in Form E to the registered owner, occupier and interested person. A public notice is also displayed at Land and District Office's notice board. The inquiry will be held after 21 days from the date of a public notice. The purpose of the inquiry is to hear and note down all claims for compensation in respect of the acquired land.

All information disseminated to the Land Administrator is made under oath by the claimants.

2.9.5 Award of Compensation

Notice of the award and the offer of compensation are made in Form H. Once the form is served, the Land Administrator shall as soon as possible direct the acquiring body to make payment to the entitled persons. When payment cannot be made for any reasons, the Land Administrator may make an ex-parte application to the Registrar of the court for an order to deposit the compensation to the court. In the case of the interested person is not satisfied with the award or considered the amount is inadequate; he may accept the award under protest. He then, can appeal to the court.

2.9.6 Formal Takings

Possession is normally taken after the service of Form H. This is to notify the persons interested that the award has been made and that it can be accepted or rejected (acceptance under protest). Formal possession may be taken upon issuance of a notice in Form K.

2.9.7 Appeal

Any objection against the Land Administrator's award must be made to the High Court. Section 36 provides that any reference to court can be made only by the Land Administrator by way of his own volition or when an objection has been made to him under section 37. An objection to court under section 37 may be made on any of the following grounds:

- a) the measurement of the land;
- b) the amount of the compensation;
- c) the person to whom it is payable; and
- d) the apportionment of the compensation.

In general, the formalities required under section 37, 38 and 39 must be complied with before a reference can be made by the Land Administrator. Any objection under section 37(1) is to be made by written application in Form N to the Land Administrator requiring him to refer the matter to court for its decision. Every application to the court need to be made within six weeks of the Land Administrator's award (in the case of the person making it was present or was represented when the award was made) or in other cases, within six weeks from the date of receipt of the notice in Form H.

The flow chart of the land acquisition process in Malaysia, and land acquisition process based on requirements of the Land Acquisition Act, 1960 respectively are attached in Appendix A and B.

2.10 MEASUREMENT OF ADEQUATE COMPENSATION

What should be the measure of compensation? According to Elliott (1977), there is nothing in any compulsory acquisition laws mentioned on the measure or yardstick to apply in assessing the compensation. As the result, the legislation has left the measurement of compensation to the arbitrators or juries (Parish, 1990). Michelman (1980) develops two models of compensation designed to achieve different objectives, one derived from classical utilitarianism and the other, the fairness model derived from the justice as fairness approach of John Rawls (1958). Michelman's main concern was with the question 'when to compensate'.

However, Bell (1980), considers how the objectives of these two models might be reflected in the measurement of compensation. Bell (1980) suggests that the objective of the utilitarian approach would be to maximise social welfare. His research indicates that in terms of the time, trouble and expense incurred in lengthy negotiations with landowners would create greater net benefit. This provides claimants with minimum advantages, thus encouraging less objection and speedier settlements. Indeed, this minimum advantage might be assessed by reference to the optimum point on a claimant's satisfaction curve. Based on the data available, he estimated that an addition of 30 percent would be added to the market value of a property.

A Rawlsian approach to compensation would view matters from a different perspective. Rawls (1958:113) suggested that the principles of justice for society are *'free and rational persons concerned to their own interests and equity as defined in the fundamental terms of their association'*. Moreover, Bell (1980) hypothesised that Rawl's rationale can be explained that those who had no idea whether they would be faced with the prospect of the expropriation of their land, would select a measure of fairness which would ensure that the worst affected group would end up marginally better off. He concluded that such a measure might add at least 10 percent of the market value.

Compensation for compulsory purchase based on equivalent might reflect the price which the claimant expected to obtain on a sale in the open market together with other consequential loss (Rowan-Robinson, 1990). McGregor (1988) states that compensation which is granted as a substitute for what has been lost would seem to comprehend rather more intangible loss and something that cannot be replaced. Such an element in an award of compensation of compulsory purchase might provide recompense for the individual value which people commonly attribute to heritable property in excess of its market value (McAuslan, 1980; Knetsch, 1983; Farrier & McAuslan, 1988). This is sometimes referred to as 'householder's surplus' and reflects loss of tie with the area, friendships, and so

on – items which are difficult to value (Knetsch, 1983; Farrier & McAuslan, 1988; Rowan-Robinson, 1990).

Both the Utilitarian and Fairness Models of compensation would be likely to make some allowance, although for different reasons, for the subjective expectations of the claimants (Farrier & McAuslan, 1988; Rowan-Robinson, 1990).

UNESCO and Crennan (1998) in Groundwater Recharge Study carried out in Bonriki Island Tarawa, Kiribati during 1996-1997 state that, monetary compensation does not always compensate for the loss of relationship to the land, the dignity and identity that it provides. Perhaps the compensation can be tied in some way to the role of guardianship, which can then be passed on to the next generation. Although in some respects traditional attitudes and relationships to land may work against acquisition and use for public purposes, it may be possible to work with those values.

Compensation has been accepted as referring to specific measures intended to recover the losses suffered by people negatively affected by the acquisition. Compensation usually takes the form of a one-off payment, either in cash or kind and is principally about awards to negatively affected persons (Bartolome et. al., 1999). The losses incurred by people affected by the construction of infrastructure such as project of township, canals, transmission lines, and other activities are not usually properly accounted for and so these losses have not been adequately compensated. Similarly, the impact of the projects (for example, the dam project) on the livelihoods of the downstream population and on people losing lands and livelihoods due to land acquired for compensatory afforestation has not been properly assessed and compensated.

Compensation is awarded only to persons in possession of undisputed legal title. Workers, agents, artisans and helpers are rarely considered eligible for

compensation. Community assets and common resources like grazing grounds and forests, which again may be critical for the livelihood of the poorest and aborigines, are not compensated for under the acquisition process.

Compensation has primarily addressed the loss of assets and property (tangible), and not rights (intangible, e.g. cultural, spiritual rights). The basis of compensation has thus been (i) legal ownership and (ii) individual claim (Brown, 1991; Rowan-Robinson & Brand, 1995). Based on this basis, therefore, Orang Asli native lands are far from benefiting in the normal land acquisition process. The general practice is to pay compensation for lost fixed assets at the prevailing market rate. The basis of compensation is the value in exchange rather than value of replacement.

In sum, the above discussions explained that compensation based on replacement value still restricts to individually owned property; meaning that the totalities of rights that are violated are not compensated. This highlights the need for compensation to be relocated in a framework of restitution of rights, both community and individual, beyond even replacement value, and this treated as a kick-start to a research in developing a compensation framework for land acquisition/dispossession of Orang Asli native lands.

2.11 ASSESSMENT OF COMPENSATION

The goal of compulsory land acquisition is to arrive at 'adequate compensation' via market value. Market value is estimated through the application of valuation methods and procedures that reflect the nature of property and the circumstances under which a given property would most likely sell in the open market. The procedure by which the basic valuation principles are applied is known as valuation method. In order to arrive at a proper valuation conclusion, the fundamental questions in the development of methods are - what arrangement and

combination of basic valuation principles should be used, and, what type and volume of market data should be sufficient?

The valuation methods that normally adopted in determining market value of acquired private land are as follows:

- i) Market comparison method;
- ii) Investment / Discounted Cash Flow Method;
- iii) Cost method;
- iv) Residual method;
- v) Profit Method

However, this research has no intention to explain the above valuation methods in detail since the methods are only suitable for valuation of an acquisition of private lands. In the case of the Orang Asli native lands, there are other methods that have to be considered as explained in Chapter 4 of this research.

2.12 HEADS OF CLAIM

Heads of claim to compensation under Land Acquisition Act 1960 which are currently applicable for acquisition of private lands are:

- (i) Market value (land and buildings thereon).
- (ii) Severance and Injurious Affection (or depreciation in the value of the remaining land arising from the effects of acquisition).
- (iii) Betterment (enhancement in the value of the remaining land arising from the effects of acquisition).
- (iv) Disturbance (all losses flowing as a direct result of dispossession of land).
- (v) Accommodation works (works done in mitigation of the loss suffered, arising from the effects of acquisition).

As comparison, other countries also have provisions of the following as discusses below:

2.12.1 Solatium

A solatium⁹ is an addition to the value of the land and for other heads of compensation; the dispossessed owner is entitled in respect of his injured feelings due to hardship, inconvenience or unspecified loss caused by compulsory acquisition. Hyam (1995:264) states that, *'the ordinary meaning of the word 'solatium' is a sum of money or other compensation given to a person to make up for loss or inconvenience'*.

A solatium may be awarded as a percentage of the compensation or it may be an amount calculated without reference to any percentage. With regard to the payment of a solatium by way of a percentage allowance, there are four approaches:

- (a) express provision is made for its payment;
- (b) express provision is made stating that it shall not be paid;
- (c) no provision is made; or
- (d) alternative provision is made.

Where provision is made for payment of a solatium in addition to the market value of the land or in addition to the compensation, the issue arises whether such solatium is a right, in the sense that the claimant is entitled to it, or whether it is a discretionary award to be determined by the authority or by the court.

⁹ Compensation, especially for hurt feeling. Compensation for injured feelings as distinct from financial loss or physical suffering. The compensation allowed for injury caused to the feelings of others (Sinha and Dheeraj, 2005).

Where no provision is made for payment of a solatium, the courts used to manifest a readiness to imply a right to do so in appropriate circumstances as a matter of discretion. The introduction of detailed provisions in respect of compensation raises a presumption that, in the absence of express provision, the courts would be unlikely to imply such a provision.

For example, in Australia under section 11B(1)(a), Lands Compensation Act 1958 (Victoria) it has been held that the term solatium is an apt expression to describe an award of some amount to cover inconvenience and distress caused by compulsory taking. The correct approach is to decide what percentage would be fair in the particular case, without regard to any others, and to give that percentage up to a maximum of 10 per cent, without any kind of grading in relation to other cases known (*March v City of Frankston (No.1)* (1996) VR 350 at 356). The provision is a discretionary power in the court and the solatium should be assessed in respect of imponderable factors arising from the compulsory nature of the acquisition. It is a means of compensating claimants for the nuisance and annoyance resulting from the disruption of their business and the trouble caused by the acquisition. Any award must not include any of the factors, which they have been compensated for but represent only the imponderables which are not specifically provable.

In respect of other compensation provisions in the land acquisition statutes the position in respect of a solatium for inconvenience may be stated as follows:-

- a) Any payment by way of a solatium requires express statutory provision;
- b) In its absence, to some extent an award of compensation for disturbance may provide a substitute for any claim in respect of a solatium;
- c) Where it does exist it is a separate and distinct heading of compensation in respect of factors which are not covered by the other heads of compensation; and

- d) Where it exists the claimant has a right to claim it, provided he can establish good reasons as to why it should be paid in full or in part.

2.12.2 Ex-Gratia

An ex-gratia¹⁰ payment is an additional sum (over and above) of what being compensated to a person for land acquisition under legislation. From time to time, an ex-gratia payment was made in cases of hardship or based on the merit of the case. There is no legal right to ex-gratia payments (Khublal, 1994). Therefore, one cannot find a cause of action for an ex-gratia payment which was made purely under an administrative discretion as was held in *Seah Hong Say v Housing and Development Board* [1992] 2 SLR 54. The plaintiff in this case was the son of a statutory tenant of the premises acquired by the government. He was paid \$19,050 which he accepted. However, he subsequently claimed \$76,000 on the basis of a legitimate expectation founded on the declared policies of the government regarding ex-gratia payments. The High Court dismissed the claim as the plaintiff had no legal right, nor was he the chief tenant. On appeal ([1993] 1 SLR 222), the Court of Appeal held that by definition there can be no legal entitlement to an ex-gratia payment.

In *Indo-Australian Trading Co Ltd v Collector of Land Revenue* [1993] 1 SLR at 222 there was a settlement between the parties after the collector had agreed to grant an ex-gratia payment. Buttrose J commented,

‘I accept that this settlement is made purely as an ex-gratia matter, so no question of principle is involved in the making of it, and is made entirely and independently of the merits or demerits of the particular acquisition’.

¹⁰ When something has been done ex-gratia, it has been done voluntarily, out of kindness or grace. In law, ex-gratia payment is a payment made without the giver recognizing any liability or legal obligation. Compensation payments are often made ex-gratia when a government or organization is prepared to compensate victims of an event such as an accident or similar, but not to admit liability to pay compensation, or for causing the event (Sinha and Dheeraj, 2005).

The making of an ex-gratia payment does not mean that there is an amendment of the award. In fact, there is no statutory provision which allows the Collector to review his award (*Kashi Prashad v Notifield Area Mahoba*, AIR 1932 All 598).

2.13 LESSONS FROM OTHER COUNTRIES

A study by Alias & Daud (2005) involving comparisons of the United Kingdom, USA, Canada, Hong Kong, China, India, Australia and New Zealand, found six advantages of the systems implemented in those countries as compared to Malaysia. These factors are perhaps relevant for Malaysian compensation structure in land acquisition to consider, in moving towards improving its compensation framework. The advantages are as follows:

a) The recognition of business compensation

UK, USA, Australia and New Zealand recognised the payment for loss of goodwill as an attribute of compensation. In Malaysia, business losses are allowed under compensation claims as stipulated in section 2(e) of First Schedule but they do not cover loss of goodwill and loss of earnings.

ii) Equity of disturbance payments (relocation hardships)

Disturbance payment can include a wide range of items such as professional fees for acquiring alternative premises; costs of adapting alternative premises, including carpets, curtains and shelving; removal costs and any other reasonably quantifiable losses. In Malaysia, a claim under this heading is only for the cost of transfer.

iii) Payment of solatium/premium over and above the total compensation

Solatium is an additional sum in respect of the owner injured feelings or the insult due to the unilateral action of the acquiring authority in arbitrarily expropriating

the land. A solatium may be awarded as a percentage of the compensation or it may be an amount calculated without reference to any percentage. This payment has been the practices in many countries but Malaysia has yet to adopt it.

iv) An element of compulsory negotiation before using compulsory acquisition powers

In the United States, landowners have the right to negotiate before compulsory acquisition and this was made mandatory in the land acquisition procedures. Indeed, municipalities are required to prove that negotiations have failed before leave to proceed through the courts is granted. In Malaysia, negotiation is allowed under acquisition of Section 3(b) but subject to cooperation in the entire project.

v) Compensation details

In the United States, the compensation proposal which indicates the detailed valuation of compensation is made available for landowners to review for a period of one month before an official inquiry. No such procedures are in place in Malaysia.

vi) Alternative compensation

Section 105 of Public Works Act in Australia states that an alternative to monetary compensation such as 'land for land' compensation can be considered where equivalent crown owned land is readily available. The Law Reform Commission in Canada (1978) recommended a 'home for home' principle whenever a residential property is expropriated. India also has such clause in her land acquisition act. However, in Malaysia no law provides such alternative.

2.14 SUMMARY

The literature survey revealed that the main issue of land acquisition is the quantum of compensation that is perceived as inadequate to fulfill adequate compensation notion under the spirit of Constitution. There is a need to review the heads of compensation structure by incorporating other countries' practices. Although there is a broad acceptance that market value is the appropriate basis for compensation for land taken, perhaps there is also a general feeling that a solatium or premium should be paid to compensate the claimant for the compulsory nature of the acquisition. Most of the valuers perceived that land acquisition need not necessarily present the best alternative for government to secure land for development (Alias and Daud, 2005). Other alternatives such as direct purchases through negotiation and joint venture are the alternatives available for government to exercise rather solely depending on land acquisition powers (Alias & Daud, 2005; Usilappan, 2000). According to Usilappan (2000), land acquisition is a complex process, is sensitive in nature, and needs pragmatic approach to deal with. Wherever possible, land developments should be carried through the process of normal economic supply and demand.

In relation to other countries, evidence from practitioners indicated that a standard premium is added to the valuation achieved via the statutory basis of compensation, in instances where the owner is prepared to allow the State to purchase their property by negotiation. For instance, in USA, municipalities are required to prove that negotiations have failed before proceeding to courts is granted (Dowdy et al, 1998). The levels of premium have been quoted at 10% to 25% where in UK, it is perceived that valuations undertaken by reference to compulsory purchase legislation produce lower than market value and in relation to 'blight'¹¹. The incidence of blight in the other countries tends to be reduced

¹¹ The reduction in value of land due to the prospect of a scheme of development by a body possessing compulsory purchase powers (RICS, 1995).

because of greater certainty in their land use development plans and in respect of re-expropriation (RICS, 1995).

Current negotiation and mediation practice suggests that some parties are trying to adopt a workable approach to compensation. It remains to be seen, however, whether the principles of valuation by the court in land reference cases are recognised to give space for compensation that addresses the intrinsic value of land. To secure 'just terms' and sustainable outcomes, awareness of all parties in relation to different statutory pathways for compensation need to be increased. An impartial or unprejudiced interpretation of the law and a better understanding of the principles and practice of valuation will lead to an adequate compensation settlement.

A call for greater transparency in compensation agreements lies alternative interpretations of whether the compensation is 'private' (hence there is no requirement to be open) or 'public' (hence there is a public interest in greater scrutiny) (Altman, 1985, 1998; Levitus, 1999). Whatever the outcome of that debate, the lack of transparency contributes to inadequate monitoring of compensation payments, obstructs independent evaluation of terms and conditions, and limits the development of benchmarks for how compensation might be better measured, distributed and managed.

Finally, the problems of compensation are more than just a matter of law and valuation; it is a matter of justice between society and man. *'The word compensation would be a mockery if what was paid was something that did not compensate'* (Lord Reid in *Birmingham Corporation v West Midlands Baptist Trust* 13 (1969) 3 All ER at 172). Indeed, the study of land acquisition and compensation of private lands would be the starting point and a revelation for a research in acquisition and compensation of Orang Asli native lands. Therefore, the following chapters proceed to examine the land acquisition and compensation of Orang Asli native lands.

CHAPTER THREE

INDIGENOUS LAND RIGHTS IN OTHER COUNTRIES IN RELATION TO ORANG ASLI NATIVE LAND RIGHTS

3.1 INTRODUCTION

This chapter begins with an overview of the various ideological frameworks by the international community in respect of indigenous land rights. It then proceeds to explore an international minimum content of indigenous land rights as established through these various frameworks. Furthermore, this chapter will also discuss in depth the Orang Asli of Malaysia, covering three main aspects. Firstly, laws relating to them; secondly, government policies which construed their activities and life; and thirdly, issues and challenges confronting them. Finally, this chapter examines the particular effect of Sagong Tasi (2002) case, which is considered as landmark judgment on Orang Asli land rights in Malaysia with reference to international minimum standards, and explores how the Malaysian court could have brought its judgment in conformity with these international standards.

3.2 LAND RIGHTS OF INDIGENOUS PEOPLES

3.2.1 Definition of Indigenous Peoples

There are two significant definitions of indigenous peoples, which are often endorsed by aid agencies and governments. These definitions are proposed by Jose R. Martinez Cobo, Special Rapporteur appointed by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and, Article 1 of the International Labour Organisation (ILO) Convention No. 169.

(a) Cobo Definition (Special Rapporteur appointed by the UN Economic and Social Council Sub-Commission on the Prevention of Discrimination and the Protection of Minorities), 1986.

‘Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems’.

This historical continuity is characterized by,

- a) occupation of ancestral lands, or at least part of them;
- b) common ancestry with the original occupants of these lands;
- c) culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, life style, etc);
- d) language (whether used as only language, as the mother tongue, as the habitual means of communication at home or in the family, or as the main preferred, habitual, general, or normal language);
- e) residence in certain parts of the country, or in certain regions of the world;
- f) other relevant factors e.g study of the *Problem of Discrimination Against Indigenous Populations: Conclusions, Proposals, and Recommendations* (UN Doc E/CN 4/Sub 2/1986/7 Add 4)’.

(b) International Labour Organisation (ILO) Convention No. 169, 1989

Article 1.1 of the Convention notes that,

‘This Convention applied to,

- a) tribal peoples in countries whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- b) peoples in countries who are regarded by themselves and others as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country

belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain, or wish to retain, some or all of their own social, economic, spiritual, cultural and political characteristics and institutions’.

The Convention added,

‘Identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply’.

3.2.2 International Indigenous Peoples Land Rights

Cobo (1986) recognised that the special relationship between indigenous peoples and their land as mandatory to their existence, beliefs, customs, traditions and culture. This unique and fundamental relationship being recognised in various international forums, for example the ILO (1991) recognised the importance of the cultures and spiritual values of indigenous peoples in their relationship with land. The UN Declaration (1994) states the rights of indigenous peoples to maintain and strengthen their distinctive spiritual and material relationship with the land. Further, OAS (1997) acknowledged the special relationship between indigenous peoples and their land that is a necessary for their survival in social organisation, development and their individual and collective well-being.

Though the indigenous concept of land may seem primitive to societies which have embraced private land ownership, such different conceptions of land are by no means exclusive to indigenous peoples (Ellickson, 2002). The controversy surrounding indigenous land rights lies not in its difference from private land ownership but its claim for recognition within a larger mainstream society (Ellikson, 2002). However, according to Cheah (2004a), the unique existence of indigenous land rights is uncontested by present international community. Therefore, its content and ideological justification remains unsettled.

Indigenous cultures and societies have a right to exist. Thus, the government is obliged to take certain steps in ensuring conditions conducive to the growth of

minority cultures, but is not responsible to ensure the continued existence of the culture itself (UN Draft Declaration, 1995). Such piecemeal and limited development of indigenous land rights on the international level has made the authority reluctant to claim of indigenous peoples to exist as a distinct group with rights and claims that are against the authority requirements.

Besides, state governments are traditionally very careful in granting rights, as proven in the early days of minority rights, because state perceiving them as threats to state identity due to their potential to challenge en masse¹² the state government’s authority (Cheah, 2004b).

The claims and interests of indigenous peoples, articulated in the form of people’s rights or group rights (IACHR Report, 1985). The difference between a people’s right or group right and rights of collectivities such as a minority’s rights to culture (OAS Report, 1985). Table 3.1 shows some human rights principles providing a basis for assessment of projects affecting minorities and indigenous peoples.

Table 3.1
International Human Rights Principles

Extracts of Relevant Article from Human Rights Instruments	Principles
<ul style="list-style-type: none"> Article 2(2) of the UN Minority Declaration <i>Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life...</i> Article 2(3) of the UN Minority Declaration <i>Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live.....</i> Article 5(1) and (2) of the UN Minority Declaration <i>1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.</i> <i>2. Programmes of cooperation and assistance among States shold</i> 	<p>Participation</p> <p>Free and informed consent</p> <p>Avoidance of adverse impact (the ‘do no harm’ principle)</p>

¹² en masse – together, usually in group (Sinha & Dheeraj, 2005)

<p><i>be planned and implemented due regard for the legitimate interests of persons belonging to minorities.</i></p> <ul style="list-style-type: none"> Article 19 of the UN Draft Declaration on the Rights of Indigenous Peoples <i>Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.</i> Article 20 of the UN Draft Declaration on the Rights of Indigenous Peoples <i>Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.</i> Article 7(1) of the ILO Convention No. 169 <i>The peoples concerned shall have the right to decide their own priorities for the process of developments as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.</i> Article 16(1) of the ILO Convention No. 169 <i>.....the peoples concerned shall not be removed from the lands which they occupy.</i> Article 17(2) of the ILO Convention No. 169 <i>Where the relocation of (indigenous and tribal people) considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.</i> 	<p>Participation</p> <p>Free and informed consent</p> <p>Avoidance of adverse impact (the 'do no harm' principle)</p>
<ul style="list-style-type: none"> Article 4(3) of the UN Minority Declaration <i>States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.</i> Article 22 of the ILO Convention No. 169 <i>Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.</i> Article 5 of the ICERD <i>State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of</i> 	<p>Increasing indigenous peoples'/minorities' capacity (training, skills, self-esteem)</p>

<p><i>the following rights....e(v) The right to education and training...</i></p>	
<ul style="list-style-type: none"> • Article 22 of the UN Draft Declaration on the Rights of Indigenous Peoples <i>Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.</i> • Article 4(5) of the UN Minority Declaration <i>States should take appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.</i> • Article 5(1) of the UN Minority Declaration <i>(See above)</i> • Article 7(2) of the ILO Convention No. 169 <i>The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.</i> 	<p>Increasing indigenous peoples/minorities well-being</p>
<ul style="list-style-type: none"> • Article 1(1) of the UN Minority Declaration <i>State shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.</i> 	<p>Valuing, respecting and protecting indigenous peoples' /minorities' knowledge and culture</p>
<ul style="list-style-type: none"> • Article 22 of the UN Draft Declaration on the Rights of Indigenous Peoples <i>Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their culture, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies, and visual and performing arts and literature, as well as the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.</i> • Article 5 of the ILO Convention No. 169 <i>The social, culture, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals.</i> • Article 8(j) of the convention on Biodiversity <i>Each Contracting Party shall, as far as possible and as appropriate... subject to its national legislation, respect, preserve and maintain the knowledge, innovations and practices of</i> 	<p>Valuing, respecting and protecting indigenous peoples' /minorities' knowledge and culture</p>

<p><i>indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of the biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.</i></p>	
<ul style="list-style-type: none"> • Article 15.1a of the ICESCR <i>The States Parties to present covenant recognize the right of everyone to take part in cultural life.</i> 	
<ul style="list-style-type: none"> • Article 4(1) of the UN Minority Declaration <i>States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedom without any discrimination and in full equality before the law.</i> 	Promoting equality; right to non-discrimination
<ul style="list-style-type: none"> • Article 3 (1) of the ILO Convention No. 169 <i>Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.</i> 	Promoting equality; right to non-discrimination
<ul style="list-style-type: none"> • Article 26 of the ICCPR <i>All persons are equal before the law and entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i> 	Promoting equality; right to non-discrimination
Note: UN - The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) ILO - The International Labour Organisation (1989) ICERD - The International Covenant on the Elimination of All Forms of Racial Discrimination (1965) ICESCR - The International Covenant on Economic, Social and Cultural Rights (1966) ICCPR - The International Covenant on Civil and Political Rights (1966)	

Source: Adopted from Stephanie C. Janet (2002:5-7)

3.2.3 Indigenous Peoples Land Rights within ASEAN

Historically in Association of Southeast Asian Nations (ASEAN), the indigenous rights movement was focussed on indigenous groups from countries colonised

and still dominated by European settlement such as the Americas, Australasia and the Nordic countries. Due to this fact, ASEAN countries with no history of European colonisation such as Thailand or which have achieved national independence such as Cambodia and Indonesia, have argued that the concerns of the indigenous movement are limited to the experience of groups subject to European colonization (Cheah, 2004a; Kingsbury, 1992).

The official stance taken by most ASEAN countries not only denies the existence of indigenous populations within their borders but also legitimises the aggressive assimilation of these indigenous communities into mainstream society (WGIP Report, 1994). Indigenous populations are perceived as backward and primitive, as hindrances to national development, and are persuaded or restrained by force into giving up their indigenous lifestyles. All this has been championed in the name of progress and unity (Cheah, 2004a; Awang 1996). The presence of indigenous peoples within their borders was denied due to continuing domination, capitalising on this difference.

Indigenous populations have argued that such historical differentiation results in the denial of recognition to indigenous populations with genuine needs for protection against national persecution or discrimination (WGIP Report, 1994). Such fear was clearly demonstrated at the 1998 meeting of the Working Group for Indigenous Peoples. The ASEAN countries recognised that all citizens are original inhabitants of the country, there is no need for separate treatment of any group based on their characterisation as indigenous peoples (WGIP Report, 1994). For example, the Myanmar claims that all 135 ethnic groups within Myanmar were 'indigenous in the truest sense of the word' and that problems of indigenous populations did not exist in Myanmar (WGIP Report, 1998). However, Malaysia treated the Orang Asli as a community that needs the government guardian.

The definition of indigenous peoples has remained controversial due to the complex and varying nature of indigenous cultures worldwide. The indigenous representatives have accepted the general definitions formulated by UN Special Rapporteurs and international organisations such as the ILO and the World Bank (WGIP Report, 1994; 1996). These definitions consist of several objective and subjective identifying criteria. The former focuses on the group's distinct culture and social organisation, and attachment to a particular territory while the latter, argued by many indigenous groups as the most important identifying factor, focusing on the group's own self-identification (WGIP Report, 1994; 1996). Based on these definitions, it is undeniable that many indigenous groups exist within ASEAN countries. Recent years have seen the mobilisation of these diverse groups, their formation of country-wide and regional networks and their participation within international calling for recognition of their separate and unique identity as indigenous peoples (WGIP Report, 1994; 1996).

The 1989 Asian Indigenous Peoples Pact declares the solidarity among indigenous groups in Asia as *'descendents of the original inhabitants of a territory which has been overcome by conquest...distinct from other sectors of the prevailing society...(with) their own language, religion, customs and worldview and their common aspiration to transmit these to future generations'*. The nationalist movements and political elites of colonised ASEAN that negotiated for independence have now ironically assumed the role of 'coloniser' with respect to the indigenous populations within the country. This has been characterised as another form of imperialism, as fourth-world colonialism, or internal colonialism (Cheah, 2004a; 2004b; Kingsbury, 1992).

The analysis of land rights of indigenous peoples in Asean countries reveals that there is a clear gap between the existing situation and the relevant standards of the international law (Xanthaki, 2003). The most significant threat to indigenous land rights continues to be the development projects undertaken on the lands they occupy. Although the protection accorded by international law in this area gradually increased, the desire of Asean countries to continue such projects at any

cost (especially in cases of economic obligation's) which resulting the project has weaken the protection given to indigenous peoples. This indicates a lack of political motivation and obstructs the improvement of indigenous land rights (Xanthaki, 2003).

3.2.4 Appreciation of Indigenous Rights

The ILO Convention No 26 is the only source of conventional law available for indigenous people's rights. The UN Draft Declaration and the OAC Proposed Declaration showed that the negotiations by authority on provisions that go beyond individual or collective rights such as the right to self-determination achieved limited progressing (UN Draft Declaration, 1995).

Many debates and reports are generated within the UN's Permanent Forum for Indigenous Peoples, the two UN Working Groups on Indigenous Rights and by respective Special Rapporteurs have added much understanding to indigenous peoples' needs and interests. All these remain as soft law, persuasive but non-binding (WGIP Report, 1997). On the contrary, the resistance of the authority in recognising indigenous rights has hindered the formation of concrete, clear norms governing indigenous land rights at international law. Further, lack of enforcement mechanism has geared towards the specific observance and implementation of indigenous land rights (WGIP Report, 1997).

Meeting the urgent demands of indigenous communities, the international community has adopted two approaches, firstly, establishment of existing rights such as basic individual and minority rights, and secondly, to draw upon newer group and third generation rights in advancing indigenous land claims, such as the right to self-determination, development and environment (UN Draft Declaration, 1994).

Indeed, the implementation of indigenous rights within accepted rights can take advantage of existing institutional mechanisms and legitimacy. The stretching of

such concepts to accommodate indigenous rights may result in the distortion of indigenous rights or the original right. The latter method has the advantage of drawing on concepts because their flexibility have made them capable of accommodating indigenous rights within their ambit (UN Draft Declaration, 1994). However, they also have the disadvantage of being relatively newer rights at international law, and loaded with uncertainty and authority resistance (Cheah, 2004a).

Furthermore, according to Cheah (2004b) and Subramaniam, (2007b), the indigenous communities have at least six (6) basic rights under international treaty namely;

- (a) The right to personal integrity, family and movement
- (b) The right to culture
- (c) The right to self determination
- (d) The right as a historical subject and marginalised group
- (e) The right to development
- (f) The right to environment

3.2.5 Striving to International Minimum Standards of Indigenous Land Rights

By examining the various frameworks within which indigenous land rights have developed, an emerging minimum international standard of indigenous land rights can be observed. First, indigenous land rights are *sui generis*¹³, the content of which is to be ascertained in accordance with indigenous perceptions. This will vary from tribe to tribe and from time to time as indigenous cultures and societies evolve. Second, authorities have to adhere to certain procedural rules when

¹³ *sui generis* – of its own kind e.g. idea or identity that cannot be included in a wider concept (Sinha & Dheeraj, 2005)

indigenous land rights are affected (UN Draft Declaration, 1994). Therefore, within all frameworks, being that of culture, self-determination, environmental or development, authorities are obliged to consult and include indigenous populations in decisions affecting them.

Growing of various frameworks at international law has created and characterised the content of indigenous land rights. Such development has compromised on the certainty and coherence that a single framework would have provided. However, the diversity of angles from which the question of indigenous land rights can be approached, underscores not only the substantive dimensions of the indigenous land but its interaction with other rights (Cheah, 2004b).

The implementation of these minimum international norms in the local context faced certain problems even supported by political will. The random growth of indigenous land rights within different frameworks has caused uncertainty as to its content and binding nature. Because indigenous peoples make up the minority, their needs and interests are seldom prioritised by the legislatures and governments (Cheah, 2004a; 2004b). Perhaps, in most countries, it is the judiciary, prompted by international legal developments, that has lead the recognition and implementation of indigenous land rights. Indeed, the legal systems facing difficulty in transplanting international developments into national law, due to the uncertain and nonbinding nature of these developments (Cheah, 2004a; Ismail, 2005).

However, in the context of Malaysian, although there have been major positive developments in the protection of Orang Asli rights, clearly there is still a room for more positive changes. The disadvantage of simply focusing on improving domestic laws and not taking the step to embrace international treaties is that the executive and the judiciary are drive to move at their own pace. International treaties like the Covenants make the executive accountable not only to their citizens but to the international community (Ismail, 2005).

For example, there are three instruments in the International Bill of Rights namely; the Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). These instruments are international legal instruments. Members of the United Nation accept major obligations grounded in law. All parties including Malaysia bind themselves to bring national legislation, policy and practice into line with their existing international legal obligations (Office of the High Commissioner for Human Rights, UN, 2000).

As mentioned earlier, the Orang Asli's identity, survival and culture are linked to their lands. 'Work' for the Orang Asli is different from work as most of the peoples normally understands it. 'Orang Asli work' incorporates many facets of their lives and their culture (Kingsbury, 1992; Ismail, 2005). With the incorporation of the Covenants as part of our own domestic laws, full protection is complied with the Orang Asli's way of living. Apparently, Article 6 of the UN Covenant recognises the right to work, which includes the right to the opportunity to gain one's living by work they chose or accepted. The Covenants impose an obligation on the state to achieve the full realisation of this right. Steps taken must include social and cultural development and full and productive employment under conditions that safeguard the fundamental political and economic freedoms of the Orang Asli.

On the other hand, Article 15 of the Covenant recognises the right to take part in cultural life and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production. The steps to be taken to achieve the full realisation of this right must include those necessary for the conservation, the development and the diffusion of the Orang Asli culture.

The incorporation of the Covenants will clearly benefit communities like the Orang Asli. Otherwise, the majority's way of life will subsume the culture and way of life of minorities. The traditional lands of the Orang Asli are fast shrinking. More lands have been taken away for modern development without

truly benefiting the Orang Asli as a community (Ismail, 2005; Kingsbury, 1992). A number of evidences indicated that once deprived of their right to live and work on their traditional lands, the Orang Asli was unable to survive in modern living. They were unable to cope with the sudden and drastic change to their lifestyles (Nicholas, 2003; Cheah, 2004a; Awang, 1996). The introduction of international treaties like the Covenant into our domestic laws will protect the Orang Asli's way of life and not force them to embrace modern way of life unless they choose to do so (Ismail, 2005; Cheah, 2004a; 2004b; Kingsbury, 1992).

The Sagong Tasi (2002) case is an example whereby the Malaysian judiciary, responding to international developments in indigenous land rights, attempted to implement these developments into domestic law via progressive statutory interpretation and common law development. Details of this case will be further discussed in the following subsection 3.6 of this chapter. Briefly, the Sagong Tasi (2002) judgment falls short of achieving current minimum international standards and respectively suggests how the court could have achieved these standards using the same judicial tools of statutory interpretation and common law development.

3.3 THE ORANG ASLI OF PENINSULAR MALAYSIA

3.3.1 Background of Indigenous Peoples in Malaysia

Who are the Indigenous Peoples of Malaysia? According to Article 16, Malaysian Charter on Human Rights,

‘Indigenous people are entitled to self determination. By this is meant their natural and inalienable right to retain and control the land and all resources found on their traditional territories, and the right to choose their own way of life. They have the right to practise and develop their culture and indigenous religion and to maintain their cultural identity’.

Who are the Aborigines? According to the Aboriginal Peoples Act 1954 (Act 134), an aborigine is,

‘Section 3 (1) -

- a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;
- b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or
- c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remain a member of an aboriginal community.

Section 3(2) – Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be aborigine by reason only of practising that religion.

Section 3(3) – Any question whether any person is or is not an aboriginal shall be decided by the Minister’.

Furthermore, as mentioned by Rachagan (1990:110-11),

‘The Orang Asli clearly occupies a unique and disadvantageous status in Malaysian society. Despite being an indigenous people they are not accorded any of the binding special privileges that are provided in the Constitution to the other indigenous peoples – the Malays, and the native peoples of Sabah and Sarawak’.

The indigenous peoples of Malaysia are not a homogenous group. There are more than 95 subgroups; and each of the subgroup have their own language and culture (JHEOA, 2004). They are marginalised socioeconomically and culturally (Nicholas & William-Hunt, 1996). In term of political perspective, the natives of Sabah and Sarawak are in a relatively better position as compared to the Orang Asli because they are part of the ruling government (Lasimbang, 1996; Phoa, 1996). Eventhough with this political dominance, the socio-economic status of the majority of indigenous peoples in Sabah and Sarawak still lags behind, as it does with their counterparts in Peninsular Malaysia (Dollah, 1996; Awang, 1996; Jafry, 1996; Phoa, 1996).

There is a big contrast between the proportion of indigenous peoples of Peninsular Malaysia and the East Malaysian states. In Peninsular, the indigenous peoples constitute only 0.68% of the total population (JHEOA, 2004). However, they form the majority in Sabah at 54.26% (State Government of Sabah, 2000; Jafry, 1996) and in Sarawak at 49.2% ((State Government of Sarawak, 2000; Phoa, 1996). This number is approximately 2.156 million or 9.80% of the national total population.

Apparently, the lifestyle and means of subsistence of the indigenous peoples vary. In Peninsular Malaysia, fishing is the main occupation of coastal communities, such as the Orang Laut, Orang Seletar and Mahmeri. Others, including Temuan, Jakun and Semai communities, practise permanent agriculture and manage their own rubber, oil palm or cocoa farms. Another, approximately 40% of indigenous community lives close to or within forested areas. These comprise the Semai, Temiar, Che Wong, Jahut, Semelai and Semoq Beri communities, which engage in hill paddy cultivation as well as hunting and gathering. They trade forest products such as petai, durian, rattan and resins to earn cash incomes. A very small number, especially among the Negrito groups, are still semi-nomadic and depend on the seasonal bounties of the forest. A fair number of them are to be found in urban areas surviving on their waged or salaried jobs (Phoa, 1996; JHEOA, 2004).

In Sabah, the coastal and riverine communities mainly engage in fishing, together with cultivation of food for their own consumption. Surplus food, cash crops and jungle produce provide them with a cash income. The majority of the indigenous population lives in the rural areas as subsistence farmers practising diversified agriculture - often a form of rotational (shifting) agriculture, combined with wet padi, tapioca, fruits and vegetables. An increasing number of them cultivate cash crops (State Government of Sabah, 2000; Jafry, 1996).

In Sarawak, the rural indigenous peoples also practise rotational cultivation which emphasis on hill paddy. These communities supplement their diet by hunting and

gathering forest produce. A small number of the Penan community still lead a nomadic life; hunting and gathering while the rest of the community either lead to permanently settled or partially settled life. The rural indigenous communities depend on the river for their drinking water, food, washing and transportation. The indigenous peoples in Sarawak have also been integrated into plantation projects involving the cultivation of cash crops such as oil palm, pepper, cocoa and rubber trees. Others work in the timber industry and there are those who have migrated to urban areas (State Government of Sarawak, 2000; Phoa, 1996).

The total numbers¹⁴ of indigenous peoples in Malaysia are tabulated in Table 3.2.

Table 3.2
Indigenous Peoples of Malaysia

Peninsular Malaysia	Sabah	Sarawak
<p>Total Population: 149,723</p> <p>18 sub-ethnic groups classified under :</p> <p>a. Negritos - 4,851</p> <p>[Kensiu, Kintak, Jahai, Lanoh, Mendriq, Bateq]</p> <p>b. Senoi - 80,972</p> <p>[Semai, Temiar, Semaq Beri, Che' Wong, Jahut, Mahmeri]</p> <p>c. Jakun or Proto-Malay - 63,900</p> <p>[Temuan, Semelai, Jakun, Orang Kanak, Orang Kuala,</p>	<p>Total Population: 1,187,200</p> <p>39 different ethnic communities estimated:</p> <p>a. Dusunic - 476,981</p> <p>[Dusun, Coastal Kadazan, Kimaragang, Eastern/Labuk, Kadazan, Lotud, Kuijau, Tatana, Tenggara, Bisaya, Rungus, Dumpas]</p> <p>b. Paitanic - 52,751</p> <p>[Tambanua, Upper Kinabatangan, Sinabu, Lobuu/Rumanau, (Abai),</p>	<p>Total Population: 820,000</p> <p>28 individual groups listed officially:</p> <p>(However, there are at least 37 known groups and sub-groups)</p> <p>a. Iban - 493,000</p> <p>b. Bidayuh - 140,000</p> <p>c. Melanau - 96,000</p> <p>d. Other Indigenous - 91,000</p> <p>[Kenyah, Kayan, Ukit, Penan, Sekapan, Lahanan, Lun</p>

¹⁴ The figure for Peninsular Malaysia is for 2004; Sabah and Sarawak - 2000.

Orang Seletar]	<p>Sungai, Lingkabau]</p> <p>c. Murutic - 63,803</p> <p>[Kolod/Okolo, Gana, Kalabakan, Sebangkung, Serudung, Tagal/Sumambu, Baukan, Nabay, Timugon]</p> <p>d. Bajau - 166,843</p> <p>e. Suluk/Tausug - 25,062</p> <p>f. Sino-Native - 23,865</p> <p>g. Other Indigenous - 377,895</p> <p>[Bonggi, Illanun, Bengkahak/Mangkaak, Malayic (Cocos, Kedayan), Tidung, Dayak, Lundayeh, Bugis, Ida'an]</p>	Bawang, Kelabit, Berawan and Punan Bah]
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Source: Adopted from Nicholas (1996: 158), Lasimbang (1996: 178- 79), Phoa (1996: 198) and JHEOA (2004; 2006).

3.3.2 The Orang Asli

Malaysia is a multi-ethnic and multi-cultural society that consists of Malays, which form the largest ethnic category (approximately 50% of her population), Chinese (23.94%), Indians (7.04%) and indigenous peoples (10.96%) (Department of Statistics, 2003). The indigenous populations of Malaysia are governed under three different geographical legal regimes. Those residents in Peninsular Malaysia, known commonly as Orang Asli, fall under the Aborigine People's Act, 1954 while those residing in Sabah and Sarawak, known also as 'Orang Asal', are subject to their respective State laws.

Based on anthropological descent, experts have divided the Orang Asli, which make up approximately 0.68% of the population in Peninsula Malaysia, into the three general categories namely; 'Negrito', 'Senoi' and 'Jakun' (or 'Proto-

Malays'). Each of these three groups can be further differentiated into six subgroups, each with its own culture, language, religion and subsistence lifestyle (<http://www.jheoa.gov.my/e-orangasli.htm>). Most of them have adopted a more settled lifestyle due to State intervention and support or through interaction with mainstream society while some still continue to practise shifting cultivation, hunt or forage as part of their subsistence lifestyle.

Due to perceptions that Orang Asli is undeveloped, unprogressive and in need of state guardian, the government continues to adopt a policy of governing and controlling (Nicholas, 2002). In a 1961 policy statement, the Ministry of the Interior outlined the official view of the Orang Asli as an indigenous community whose social, economic and cultural development prevents them from sharing fully in the rights and advantages enjoyed by other sections of the population. It aims to adopt suitable measures designed for their protection and advancement with a view to their ultimate integration with the Malay section of the community.

In 2007, statistics show that the Orang Asli makes up 50% of Malaysian population live below the poverty line. Yet in 8th Malaysia Plan, they are not a focal target in national development programmes in eradicating poverty (<http://www.pmo.gov.my/RancanganWeb/menuRM8.htm>). Due to lack of consultation and consideration of their specific requirement, the state development schemes do not address their most pressing needs or are implemented inefficiently. The Malaysian representative at the 1996 WGIP meeting admitted that the Orang Asli population remains far behind the mainstream population in terms of health, welfare and education (WGIP Report, 1997).

False perceptions of indigenous people, coupled with exclusion from national life on the economic, political and ideological level have widened the gap between the aspirations of the Malaysian nation-state and her indigenous citizens (Dollah, 1996, Awang, 1996). In fact, Orang Asli perceived that they are not against development, desirous of health and welfare improvements, need protection on

their interests, especially which regard their unique relationship with ancestral land. However, these are seldom considered within State developmental schemes (Jafry, 1996; Awang, 1996, Nicholas, 2003). Yet, despite continuous efforts by the JHEOA, most Orang Asli still live on the fringe of Malaysian society, cut off from most social services, poorly educated and making a hard earning (Jamaluddin, 1997; Todd, 1990; Salleh, 1990).

3.3.3 The Socio-Economic and Legal Framework of Orang Asli

(a) National law

Malaysian law does not formally codified the Orang Asli land rights. It evidenced that federal laws often deny these rights, if they exist. An example of federal legislature that denies indigenous peoples' land rights is the National Land Code 1965, which declares the State as owner of all lands. Under this Code, derived from the Australian Torrens System of land registration, all lands belong to the State. Private land interests are vested in individuals only upon registration in the land registrar.

Orang Asli lands, traditionally passed down from generation to generation, are fall outside the Malaysia's land registration system, technically belonging to the State (Cheah, 2004b). The closest one can get to statutory legal recognition of Orang Asli's land rights is through the Aboriginal Peoples Act, 1954. This Act was enacted due to unwanted roles played by the Orang Asli during the Emergency of 1948-1960, such as providing food, labour, and intelligence to the communist insurgents, and even joining them. To overcome these problems, the colonial government established a Department of Aborigines and set up 'jungle forts' in Orang Asli areas which served to provide welfare, health and education to the Orang Asli (JHEOA, 1996; Cheah, 2004a; 2004b).

The Aboriginal Peoples Ordinance was legislated in 1954, and subsequently the resettlement schemes were implemented to integrate them into the cash economy. The Aboriginal Peoples Act, 1954 successor to the Aboriginal Peoples Ordinance, empowers the Minister to declare certain plots of land to be protected as gazetted aboriginal reserves or areas. Unfortunately, the Aboriginal Peoples Act does not treat the Orang Asli as legal owners of these aboriginal reserves or areas nor give mandate to compensation for State acquisition of these reserves (Xanthaki, 2003).

Section 10 of the Aboriginal Peoples Act 1954 recognises that the State authorities for acquisition of Orang Asli's crops shall pay compensation, themerely states that the State 'may' pay compensation for the acquisition of aboriginal reserves or areas. This reveals a degree of discretion in the compensatory process. Furthermore, sections 6 and 7 allow the Minister to extinguish by declaration the status of aboriginal reserves and areas. This worrying laguna explained by section 6(3) gives the State Government the power to revoke wholly or in part or vary any declaration of an aboriginal area made under section 6(1).

This power in reality renders the State full discretion on compensation duty. Under this Act, the Orang Asli are only tenants-at-will of the State and, not all inhabited Orang Asli land have been declared as aboriginal reserves or areas. This make them unprotected from State acquisition or third party encroachment. Most of the Orang Asli do not know the existence or implications of this Act and are unable to petition the government for the protections owed to them under this Act.

(b) The Department of Orang Asli Affairs (JHEOA)

The Department of Orang Asli Affairs or Jabatan Hal Ehwal Orang Asli (under Malay acronym JHEOA) was set up pursuant to the Aboriginal Peoples Act, 1954. The JHEOA is a federal government body which now under the Ministry of Rural Development and Coopeartive Development. There are 6 State Branch

offices, 36 District offices and 133 project offices administered by headquarters in Bangunan Selangor Dredging, Jalan Ampang, Kuala Lumpur (JHEOA, 2006). A 1961 policy statement which remains applicable and binding until today states in respect of Orang Asli land rights that every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically into line with other communities in this country. In *Sagong Tasi*, (2002) the Judge requires the Department to recognise the special position of aborigines in respect of land usage and land rights and that they will not be moved from their land without their free consent.

The Department is claimed to retain a 'fatherly attitude' towards the Orang Asli, but is perceived to be ineffective in safeguarding or guaranteeing their land rights (Nicholas, 2001). On the other hand, the staff with a majority of them are non-indigenous is perceived by the Orang Asli as being distant, unapproachable and irrelevant in representing their interests at the national level (Yap, 2002). A 2001 resolution passed by the Association of Orang Asli of Peninsular Malaysia (POASM) calls for the dissolution of the Department or transfer the effective control to the Orang Asli themselves (POASM, 2001; Nicholas 2001).

(c) Attempt for Legal Recognitions

Latest Malaysian case laws attempt to give legal recognition to Orang Asli land rights and reintegrate them into a legal system, which has been excluded before. In 1997, the Johor High Court in *Adong bin Kuwau* declared the customary right of indigenous peoples to gather produce from land surrounding their native lands (*Adong Kuwau*, 1997). Then, in a 2002 groundbreaking decision, the Selangor High Court declared the existence of native title to ancestral lands at common law. *Sagong Tasi* (2002) leads to the era of aboriginal land rights in Peninsular Malaysia. Previously the court in *Adong Kuwau* (1997) was reluctant to recognise aboriginal rights to land as actual interests or ownership rights. This restricting the

court to decide on the actual facts of the case before them which concerned adequate compensation for crops grown instead of land acquired. Sagong Tasi (2002) brings Adong Kuwau (1997) to its practical conclusion, declaring that the establishment of ancestral ties would confer ownership rights to land and for the indigenous community.

The Sagong Tasi judgement recognized native title's unique characteristics in relation to State acquisition. Therefore, native title was to be equated with private land title and its compensation similarly considered under the Land Acquisition Act 1960 (Sagong Tasi, 2002). However, this decision fails to give recognition to the basic differences between the Orang Asli ancestral land rights and a private individual's right to land. Before this case, the laws do not confer legal rights to Orang Asli over their traditional lands. Through the Sagong Tasi case, the court attempted to put legality to the situation, but unfortunately this case is currently under appeal by the State Authority and decision has yet been released.

3.4 STATUS OF ORANG ASLI'S LAND

The legal recognition of the Orang Asli rights in Malaysia was first enacted in 1939 under the State of Perak Enactment No. 3 of 1939. It was enacted to protect the Orang Asli tribes of Perak whereby a 'protector' was appointed by the Ruler in the State Council to take charge of the Orang Asli affairs. When the Aboriginal Peoples Ordinance 1954 was re-enacted, the post of 'protector' was retained for the same purpose as the 1939 Enactment. But, in 1967 when the Aboriginal Peoples Ordinance 1954 was amended, the post of 'protector' was changed to 'the commissioner'. The Aboriginal Peoples Ordinance 1954 was then revised in 1974 into the Aboriginal Peoples Act 1954 (Adong Kuwau, 1997).

The Act provides for the commissioner to be appointed for the protection, well being and advancement of the Orang Asli in peninsular Malaysia. These responsibilities are carried-out by the JHEOA. The Aboriginal Peoples Act 1954

that takes care of all matters concerning the Orang Asli, particularly on land matters. The Act provides Orang Asli with only 'usufructuary rights' - the right to use only and not proprietary rights. Not only that, under the present legislations, the state is not obliged to pay any compensation or to allocate an alternative site for the Orang Asli in the event that the land they are occupying is acquired. However, in reality the state always ensure that the welfare of Orang Asli is protected by providing an alternative site for them.

In-depth discussions on rights and interests of Orang Asli on their native lands could be referred in Chapter 4 (paragraph 4.2).

Until June 2004, 19,582.21 hectares of land have been gazetted as Orang Asli Reserves in Peninsular Malaysia. Another 30,425.68 hectares have been approved but have yet been gazetted, and 81,296.58 hectares have been applied for by the JHEOA in various states. However, only 0.04% (603.40 hectares) of Orang Asli have titles to their lands (JHEOA, 2006). In spite of, the rest are living on reserve, state land or other types of land. Orang Asli who do not own land, live as 'tenants at will', and the state can decide whether to allow them to occupy the land or otherwise. In other words, the state government has the right to gazette a land as Orang Asli reserve and to degazette it. In the event of this occurring, the affected Orang Asli are expected to move elsewhere.

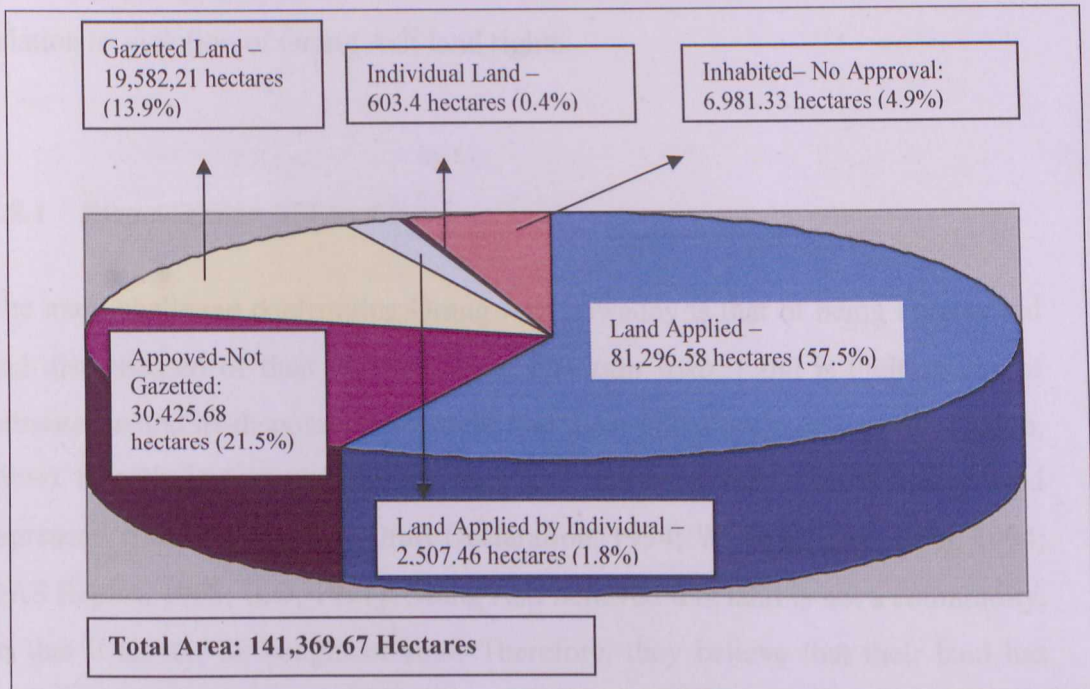
Table 3.3 and Figure 3.1 show the Orang Asli lands in Malaysia and the status of lands respectively.

Table 3.3
Orang Asli Lands in Peninsular Malaysia (Until June, 2004)

No.	States	Land Gazetted (Hectares)	Approved – Not Gazetted (Hectares)	Land Applied		Other Lands/ Villages (Hectares)	Land Owned by Individual		Total (Hectares)
				Reserves (Hectares)	Individual (Hectares)		Residential (Hectares)	Agriculture (Hectares)	
1.	Perak	5,191.92	7,510.19	17,054.48		-	1.39	1.26	29,759.24
2.	Kedah	173.38	-	-		-	-	-	173.38
3.	Pahang	4,293.39	14,999.67	42,335.16	2,507.46	5,492.11	16.75	454.50	70,099.04
4.	Kelantan	-	3,953.52	12,200.00		-	3.72	-	16,157.24
5.	Terengganu	1,312.60	206.80	161.94		-	-	32.33	1,713.67
6.	Selangor and Federal Territory (Kuala Lumpur)	1,262.90	1,213.30	4,312.05		875.99	18.86	41.29	7,724.39
7.	Johor	4,896.48	1,068.93	2,600.52		50.00	6.45	12.67	8,635.05
8.	Negeri Sembilan	2,336.05	1,155.70	2,595.33		391.53	-	12.57	6,491.18
9.	Melaka	115.49	317.57	10.10		171.70	-	1.61	616.47
Total (Hectares)		19,582.21	30,425.68	81,269.58	2,507.46	6,981.33	47.17	556.23	141,369.67

Source: JHEOA (2006)

Figure 3.1
Status of Orang Asli Lands



Source: JHEOA (2006).

3.5 ISSUES AND CHALLENGES CONFRONTING ORANG ASLI

The issues and challenges that confronting the Orang Asli community could be divided into four (4) main categories, namely;

- i. Dispossession of land
- ii. Healthcare
- iii. Education
- iv. Poverty

This thesis has no intention to discuss the issues of healthcare, education and poverty in details as the focus of the research is to investigate the issue of compensation in relation to land acquisition. Nevertheless, a brief discussion on

those issues (for the benefits of the reader) is attached in Appendix E. Thus, the following paragraphs discuss the issue of dispossession of lands and cases in relation to violation of Orang Asli land rights.

3.5.1 Dispossession of Land

The main challenge confronting Orang Asli nowadays is that of being encroached and dispossessed of their native land or *kawasan saka*. Land is their source of subsistence and its dispossession would trap them into a cycle of poverty (Dollah, 1996). Equally important is the fact that land embodies their cultural identity and represents their identity (UN Draft Declaration, 1994; WGIP Report, 1996; 1994; OAS Report, 1995; ILO, 1991). Orang Asli believed that land is not a commodity, so that it cannot be bought or sold. Therefore, they believe that their land has spiritual and cultural values attached to it. For example, the practice of shifting cultivation among Orang Asli is a skill developed and adopted by them to allow the environment to regenerate itself between each cycle of agricultural use. Shifting cultivation is considered '*efficient and effectively suited to the rather poor physical environment and specific ecological situations*' (Spencer, 1966:10) and has proven to be sustainable over the years (Hong, 1987). Indeed, Orang Asli do not take from the forest and rivers any more than they need. These traditional beliefs and practices have nurtured the natural environment, thus preserve the biodiversity and eco-system of the forest (Hong, 1987).

In contrast, large scale rapid deforestation for extractive and development purposes destroys the rich heritage of flora and fauna. Internationally, the preservation of the environment has become a major concern due to the risk of losing a rich genetic resource. In addition, it is recognised that preservation would ensure a supply of clean, fresh air as well as making a contribution to preventing or halting the process of climatic change. The reluctance of Orang Asli to part with their land for logging, plantations, dam projects, industrial zones, highway constructions and development of new townships, to name a few, is often labelled

as 'anti-development' (Nicholas, 2003). This also implies that their way of life is considered 'backward'. The fact was 'modern development strategies' have created the present environmental crisis (Hong, 1987). There is international mutual agreement that development has to be sustainable, i.e. consideration has to be given to the environment in development planning. Researches have proved that the traditional lifestyles of Orang Asli are attached with environment-friendly activities (Salleh, 1990; Nicholas, 2003; Kirk & Endincott, 2004).

In spite of the fact that Orang Asli have been plunged into economically, culturally, and spiritually in mainstream development policies by poor strategy implementations; efforts to integrate them into mainstream economy are still ongoing (Nicholas, 2003). For example, under the 8th Malaysia Plan, the government development approach to eradicate poverty is to develop Orang Asli land into productive assets. So much so, the Orang Asli will realise its potential value through joint-ventures with the private sector, for example in plantation development and other types of development.

This approach needs to be questioned on several grounds. First, is this what Orang Asli themselves want? Secondly, will Orang Asli benefit economically, spiritually and culturally from the proposed development? Experience has shown that Orang Asli are rarely consulted on the kind of development they want, not being invited to participate in private sector development projects (e.g. development of township at Bukit Lanjan, Damansara, Kuala Lumpur). In the present scenario, developments are usually imposed to their native land. For example, there are cases where their native land has been forcibly encroached upon or taken in the name of development. Related to this resettlement issue is whether the new location can ensure the quality and type of lifestyle they have been used to, and of the inadequacy of compensation (Nicholas, 2003). These are vital issues in Peninsular Malaysia (may be equally the same in East Malaysia) where Orang Asli continue to be dispossessed from their land.

For the Orang Asli, this development has given a dramatic impact on all aspects of their lives, their livelihood, way of life and values (Adong Kuwau, 1997; Sagong Tasi, 2002). Being deprived of their land, they are increasingly pushed from a subsistence economy into the prevailing cash economy or as labourers in the timber industry, workers in town or settlers in land schemes (Nicholas, 2003).

Apparently, under the Federal Constitution 1957 only indigenous peoples of Sabah and Sarawak and Malays are accorded special privileges and rights to land. The Orang Asli position to special rights and privileges to land is not clearly specified in the Constitution. Although distinctly different, Orang Asli rights need to be respected and accorded the same status and not to be discriminated (Dollah, 1996; Salleh, 1990). For example, in the legal statutes on Malay Reserve Land, any change in status of any portion of reserve land requires in law that another piece of land of similar size and features be declared as replacement. However, for Orang Asli land, there is no such guarantee in the law.

It is possible to reverse the waning or decreasing of cultural identity experienced by the Orang Asli. First, their land rights need to be recognised and protected. Second, their knowledge of the forest and their spiritual and cultural traditions need to be respected and appreciated (Salleh, 1990; Dollah, 1996). The negative impact of labelling the Orang Asli as 'backward' is, they are no longer proud of their traditional identity. Recognition and respect for their way of life would put the multi-racial nature of the National Cultural Policy into reality (Dollah, 1996). The main concern is that only the physical aspects of Orang Asli culture are promoted, e.g. for tourism purposes, without understanding and appreciating the spiritual and cultural values attached to it.

3.5.2 Violations of Orang Asli Land Rights in Malaysia

The following extracted media reports are among many acts of violations to Orang Asli native land in Malaysia;

'Win Against Loggers'

About 1,000 Orang Asli from Bukit Rok and Bukit Ibam in Bera won a battle against logging in what they claimed as their ancestral land. They were given an assurance that no more logging would be conducted in their area during a meeting with authorities including representatives of the district office and Land and Mines office'.

Source: The Star, 25th April, 2006 [News-p3]

'Resettlement and drop in living standard'

The Orang Asli from Kampung Busut Lama, Sepang who moved to make way for the Kuala Lumpur International Airport are in a worse situation than before. Most of them are either jobless or have to take odd jobs. They would like to be self-reliant but the 400 ha of land allocated to them is swampy and not fertile. Not only that, the plan for an oil-palm plantation to provide jobs and income has not materialised since they moved to the settlement 3 years ago. Basic amenities like water and electricity were not provided before they moved in and they had to wait a long time for the facilities. What is most disturbing to Senin, one of the affected Orang Asli, is this, "Initially there was talk that they would give us plots of land with grants but until today we have not received anything. Maybe one day Kampung Busut Baru may be moved too because we are so near to Putrajaya'.

Source: The Star 17th October, 1996.

A summary of the documented violations of Orang Asli land rights is presented to highlight the injustices and sufferings that they faced. The cases highlighted are those that have reported through the media and those are shared by the Orang Asli Association of Peninsular Malaysia (POASM), Centre of Orang Asli Concern (COAC) and people working with the Orang Asli and the media. In these instances, Orang Asli communities are united and are strong enough to resist 'infringements' of their rights and some cases are being contested in court. Furthermore, as some cases that would be highlighted, it is not only the developer or logging companies that violate or infringe the rights of Orang Asli communities but also the state in terms of the laws or regulations that fail to protect their land rights. These laws and regulations provide lesser protection in every subsequent amendment. It is important to note that for those who agreed to

be resettled, this has also resulted in dropping of their living standard or promises unfulfilled (Nicholas, 2001).

(a) **Documented Encroachment and Acquisition Cases**

The following example of encroachment and acquisition cases on Orang Asli native land is gathered through newspaper, JHEOA, POASM, COAC and previous researches. Table 3.4 shows the example of encroachment and acquisition cases that happened within 10 years from this research.

Table 3.4
The Example of Encroachment and Acquisition Cases in Various States

No.	Encroachment / Acquisition Case	Detail of the Case	Remark
1.	Acquisition of land for the construction of highway in Dengkil, Sepang, Selangor	<p>The acquisition of this land involved gazetted Orang Asli reserve land and non-gazetted reserve land of around 16.59 hectares in Kampong Bukit Tampoi, Dengkel, Selangor. The Orang Asli was informed of the acquisition in early 1995 for the construction of the North-South Highway Link Project and the Kuala Lumpur International Airport (KLIA) Expressway. Based on the government's valuation, the Orang Asli will be compensated for their crops/fruit trees and houses but not for their land. The Orang Asli are not satisfied with the compensation and they have received the said compensation under protest. When they asked how the compensation was calculated and determined, the Land Officer replied that it was a government's secret. Naturally, the Orang Asli are unhappy that they have not been consulted.</p> <p>Due to failure to vacate the land within stipulated time given by the authority, on 21 March 1996, a team of Federal Reserve Unit (FRU) was sent to evict them. Two unit of houses and about 4.85 hactares of oil palm plantation owned by Orang Asli were destroyed by the road contractor with the help of the FRU. Seven of the villagers on the non-gazetted land for which they and their ancestors have occupied since time immemorial have appointed lawyers for certain declaratory and consequential relief on their rights including to obtain a fair and just compensation for the acquisition of their land. Proceedings are believed to have been instituted and are expected to raise certain crucial constitutional and legal issues. This case is refered as Sagong Tasi (2002) and being discussed in detail at para 3.6 of this Chapter.</p> <p>Meanwhile, the Orang Asli on the gazetted land is seeking legal action. They have attended an inquiry to order for degazetting the land as Orang Asli reserve.</p>	This case is taken as one of the case study of the research

2.	Encroachment of land in Kudong, Bekok, Johor	<p>It was reported that a team headed by the Secretary-General (I), Ministry of National Unity and Social Development, Datuk Dr Zainul Arif Husin and accompanied by the JHEOA Director-General, Ikram Jamaluddin went to investigate allegations by the Orang Asli and Koperasi Daya Asli (KDA) Johor Sdn Bhd over alleged encroachment and illegal logging activities at Kampung Tamok, Bekok (<i>The Sun</i>, 20th September 1996). The action was taken following a demonstration by 100 Orang Asli at the settlement a week before. It was also reported that the Anti-Corruption Agency (ACA) was investigated the role of Orang Asli affairs officers in the cooperative to ensure that there is no fraud. Johor Menteri Besar, YAB Datuk Abdul Ghani Othman, was quoted as saying that <i>'the state would request the Rural Development Ministry to take steps to differentiate the interests of the department's officers and that of the Orang Asli community which come under the cooperative'</i>. From reliable sources, it is learnt that the cooperative has been granted the licence to log. The tender was opened early 1996 and it is believed that it was not closed until August 1996. The tractors cleared an estimated of 30 hectares of the primary jungle that subsequently prompted the demonstration.</p> <p>The cooperative has decided not to take action. However, the villagers are considering legal action. They are unhappy that they have not been consulted on the privatisation project involving the gazetted Orang Asli reserve and feel uncertain of their future. The agreement between government and the company, the company is responsible to cultivate and to manage the oil palm plantation for 8 years before being handed over to the villagers. Each family will then be given 3.24 hectares of an oil palm plantation and a house. This had been conveyed verbally to the villagers without any written proposal. The villagers have requested for a bank guarantee of RM1 million for a possibility if the project failed. In addition, the villagers asked for 4.04 hectares of land with an additional 0.60 hectares of residential land, a bungalow per family and to provide basic facilities such as electricity and clean water supply.</p>	
3.	Encroachment of land in Kampung Sungei Manok, Jeli	<p>In 1972 the Jahai community was asked by the JHEOA to be resettled in Kampung Sungei Manok, Jeli, Kelantan under the regroupment scheme. The land was approved for gazettement as an Orang Asli Reserve in 1976 but, until to date it has yet been gazetted. In 1988, a total of 660 hectares of land was approved under Temporary Occupation Licence (TOL) status by the Kelantan government to Jahai community. The encroachments on the land started since the late 1970s, first by loggers and later by non-Orang Asli settlers from neighbouring districts. Since early 1992, about 20,000 hectares of state land have been encroached upon by illegal settlers in Kelantan, especially in the traditional Orang Asli areas of Gua Musang, Kuala Krai and Jeli. This is partly due to the state government policy of giving district officers the authority to approve land applications involving less than 4 hectares each. This saw a surge of applications especially in areas made more accessible by logging tracks and Pos Rual</p>	

		<p>was affected as well.</p> <p>In March 1993, due to an outbreak of cholera that had claimed a few lives, the Jahais were requested to vacate the settlement in an attempt to stem the disease. The Jahai community was transferred and stayed in Jeli for about a month. Soon after their return to the settlement, on 25 April 1993, a local Kelantanese came and asked them to move out in one day time, claiming that they had bought the land. Despite the abuses and threats, the Jahais refused to move. The next following day, six Kelantanese came to the settlement for final chasing out. Two of them were brandishing long knives and the leader of the group insisted that the Jahais have to move out immediately. Things went out of control when the leader kicked the Tok Batin causing him to fall and a young Jahai was cut on his left arm. Other Jahai men came to rescue and at the end of the fight, 3 of the intruders died. In May 1993, 9 of the Jahais were charged with 'culpable homicide' without intention to murder. After 3 years of struggle in the court, they were acquitted without their defence being called. (Various local media reports, 1993; 1996).</p>	
4.	Acquisition of land for township project in Bukit Lanjan, Damansara, Kuala Lumpur	<p>About 320.22 hectares of land in Bukit Lanjan was gazetted as Orang Asli Reserve since 1995. This Reserve consist of five titles of land; PT 31428 (HS(M) 9639); PT 31429 (HS(D) 100994); PT 31430 (HS(D) 100996 and, PT 31431 (HS (D) 100997, all under Mukim Sungai Buloh, District of Petaling. However, in 1996, the Selangor State Government alienated 273.6 hectares of this reserve to property developer, Saujana Triangle Sdn Bhd. There are about 158 families affected. Out of these, 13 had refused to enter into the agreement and accept the compensation offered. They are not satisfied as they are not consulted and unhappy with the divide and rule tactic use by the developer who offered varying sums to the villagers. They are seeking legal redress (Various media report, 1995-1996; Sagong Tasi, 2000; NST, 2006).</p>	This case is taken as one of the case study of the research
5.	Acquisition of land for industrial development and resettlement programme of non-Orang Asli in Bentong, Pahang	<p>Orang Asli have been residing in Sungai Dua, Olak, Bentong, Pahang for more than 100 years on land declared and approved as an Orang Asli settlement. In the early 1990s, the land was acquired for industrial development and for resettlement programme of the non-Orang Asli. However, the Orang Asli were not told. They were later compensated for their destroyed farmland i.e compensation of crops and productive trees. Factory buildings then were constructed on their ex-farmland and these factories are located overhead their houses. The Health Department of Pahang had advised them to shift due to polluted air transmitted by industrial activities. Their houses that are on lower ground and along the river are not conducive as a settlement because of the pollutions. The Orang Asli are in a dilemma as no alternative place was proposed and no compensation being offered.</p>	

<p>6. Outstanding compensation for acquisition of land for plantation development in Kuala Rompin, Pahang</p>	<p>Orang Asli from Kampung Merdu/Kedaik, involving 13 families are still waiting for the compensation promised to them by the plantation company for approximately 74 hectares of land taken from them. They had occupied the land since early 1960s and applied for the land title in 1975 but did not receive any response from the land office. Instead, the land was alienated to another party in the early 1990s. They are not satisfied with the RM400-RM800 paid by the plantation company side for each affected house. They were demanded for a fairer sum of RM 50,000 per family, failing which the land need to be returned to them.</p> <p>As a result of being dispossessed from their land where their rubber trees, orchards and houses destroyed, they faced hardship in making a living. In a letter to the Deputy Chief Minister of Pahang (c.c. to JHEOA), Batin Boh Suan bin Tan See complained that "my people not only lose their sources of income but also face an uncertain future. My people are forced to shift and make way for plantations when development comes. Here and there, are plantations, mines, factories and etceteras making it difficult for my people to earn a living".</p>	
<p>7. Temuans of Kuala Kubu Baru not informed of development on their ancestral land</p>	<p>The Temuan lives by the bank of Peretak River, an Orang Asli settlement at the foothills of the Hulu Selangor Forest Reserve in Kuala Kubu Baru. The Temuans were not told about the development (Privatisation Project for Sungai Selangor Water Supply - Phase 3 (SSF 3)) on their ancestral land though their livelihoods are severely affected by the logging upstream. They complained of having less food to eat, as their staple diet, fish has been depleted. The river that was once crystal clear has turned murky due to the silt flushed down by logging activities and garbage strewn by picnickers. Utat Binket, a wild boar hunter and farmer lamented, "We have stomach ache whenever we drink the stream water. It smells of mud... We used to drink water direct from the river and waterfalls. Now, we have to boil it" (New Straits Times 28 May 1996). There are 180 Orang Asli or 38 families from this area have to relocate to Kampong Gerachi Jaya for construction of the dam in their traditional kampongs.</p>	

Source: JHEOA, COAC, POASM, and Newspaper clippings (1993-1996).

(b) Recent Privatisation Projects in Selangor

The above cases (paragraph 3.5.2.1) explained the issues of inadequate compensation or dissilusionment of Orang Asli towards land acquisition compensation. In contrast, Table 3.5 shows the examples of the recent land acquisition of Orang Asli native lands for privatization projects that received considerably lucrative compensation packages located in Selangor.

Table 3.5
The Recent Land Acquisition of Orang Asli Native Lands for Privatization Projects in
Selangor

Location	Kg. Air Kuning, Bukit Cherakah, Shah Alam	Kg. Sg. Rasau Hilir, Daerah Petaling (Bukit Air Hitam Forest Reserve – Block B)	Kg. Sg. Rasau Hulu, Daerah Petaling	Kg. Tjg. Rabok dan Kg. Bukit Kemandul, Mukim Tanjung 12, Kuala Langat.
Area (hectares)	110.5 hectares	32.4 hectares	22.3 hectares	299.87 hectares
Land Status	State Land	Forest Reserve	Orang Asli Area	State Land
Purposes of Acquisition	Mixed-Development	Mixed-Development	Mixed-Development	Flood Mitigation and Canal City
Year of Acquisition	2001	2004	2003	2006
No. of Families Affected	30	57	46	159
Compensation				
Property / Asset	<ul style="list-style-type: none"> • One (1) unit single storey bungalow for each family • One (1) unit double storey terrace house for each family • One (1) unit medium-cost apartment for each family 	<ul style="list-style-type: none"> • One (1) unit double storey semi-detached house for each family • One (1) unit single storey terrace house for each family <p><u>For Community:</u></p> <ul style="list-style-type: none"> • Three (3) units double storey shop-office • Two (2) units double storey bungalow for Tok Batin 	<ul style="list-style-type: none"> • One (1) unit double storey bungalow for each family • One (1) unit single storey terrace shop-office for each family • One (1) unit medium-cost apartment for each family 	<p><u>For Community:</u></p> <ul style="list-style-type: none"> • Four (4) units double storey shop-office • Acquisition by purchasing of Lot 8437, HS (D) LP 10044, Mukim Hutan Melintang, District of Hilir Perak – Makmur Estate; 492.5 hectares under 3 to 20 years oil palm plantation. The total purchase price was RM 24,340,000 or RM 20,000 per acre. <p>Note: a) Each family is eligible for 3 acres of ownership for the above estate</p>

				<p>which the cost is borne by the acquiring body – (total 477 acres; RM 9,540,000).</p> <p>b) The balance of 740 acres is bought by using the ASB and Welfare Fund allocations.</p> <p>b) The estate is managed by Koperasi Wawasan Orang Asli Bukit Kemandul and Tanjong Rabok Berhad.</p>
Saving/ Trust Funds	<ul style="list-style-type: none"> • ASB @ RM50,00 per family 	<ul style="list-style-type: none"> • ASB @ RM10,000 per family 	<ul style="list-style-type: none"> • ASB @ RM20,000 per family 	<ul style="list-style-type: none"> • ASB @ RM 100,000 per family • ASB for teenagers @ RM 20,000 per teenager.
Monetary	<ul style="list-style-type: none"> • Compensation for loss of trees @RM66,667 • Evacuation Allowance - terrace house @ RM 2,000 and RM 8,000 (bungalow) per family: • Living Allowance @ RM 500 per month/ family for 60 months 	<ul style="list-style-type: none"> • Compensation for loss of trees @RM1,000,000 • Evacuation Allowance @ RM 2,000 per family • Living Allowance @ RM 500 per month/ family for 24 months • Token to heir of deceased @ RM 50,000 (transfer of cemetery) • Cost of transfer of cemetery ground @ RM50,000 	<ul style="list-style-type: none"> • Compensation for loss of trees @RM500,000 • Evacuation Allowance @ RM 5,000 per family • Living Allowance @ RM 600 per month/ family for 24 months 	<ul style="list-style-type: none"> • Compensation for loss of trees @RM8,300,000 • Evacuation Allowance @ RM 1,000 per family
Amenities/ Facilities	<ul style="list-style-type: none"> • Surau • Multi-purpose hall • Kindergarten 	<ul style="list-style-type: none"> • Multi-purpose hall @ RM500,000 • Surau @RM 	<ul style="list-style-type: none"> • Multi-purpose hall 	<ul style="list-style-type: none"> • Surau • Community Complex • Kindergarten

	<ul style="list-style-type: none"> • Children playground 	<ul style="list-style-type: none"> • 100,000 • Kindergarteen @ RM150,000 		<ul style="list-style-type: none"> • Children playground • School • Training Centre
Remarks		<ul style="list-style-type: none"> • Temporary Shelter @ RM 1,500,000 • Education Trust Fund @ RM250,000 • Contingency @ RM1,000,000 • Allowances fo JKKK Training @ RM100,000 	<ul style="list-style-type: none"> • Temporary Shelter • Education Trust Fund @ RM250,000 	<ul style="list-style-type: none"> • Education Trust Fund @ RM 1,000,000 • Capital for Orang Asli Co-operative @ RM 1,000,000 • Orang Asli Welfare Fund @ RM 1,000,000
Compensation Packages if converted into monetary form	RM 25,185,000	RM 33,298,400	RM 5,412,000	RM 94, 620,000
Total Compensation if converted into value of land per hectare.	RM 227,918 per hectares or RM 92,274 per acre	RM 1,027,728 per hectare or RM 416,084 per acre	RM 242,690 per hectare RM 98,255 per acre	RM 315,536 per hectare RM 127,747 per acre

Source: JHEOA Selangor/W.P. Kuala Lumpur (2007).

3.6 SAGONG BIN TASI V THE SELANGOR STATE GOVERNMENT - RECOGNISING THE ORANG ASLI LAND RIGHTS

The following case is excerpted from Judgement of the case as published in Malaysian Law Journal – Sagong bin Tasi v The Selangor State Government [2002] 2 MLJ 591. This case is highlighted because it was the first case about acquisition of Orang asli native land, which recognized the Orang Asli land rights. This case is considered as ‘the common law of Orang Asli land rights’ and was also regarded as landmark case to Orang Asli as it was the first case discussed the land rights issue of Orang Asli in details. Furthermore, many researchers in Orang

Asli study regard this case is an attempt to give due recognition to Orang Asli on their land rights.

3.6.1 Background of the Case

On 13th February 1996, the plaintiffs, members of the Orang Asli Temuan tribe, pursuant to an acquisition of land were ordered by the Sepang Land Administrator (the first defendant) to vacate their homes at Kampung Bukit Tampoi, an area found by the court to have been inhabited by the Temuan for at least 210 years. The State authorities sought to acquire the Temuan's land, part of which consisted of a gazetted aboriginal reserve under the Aboriginal People's Act 1954, for the construction of a highway to the Kuala Lumpur International Airport. The plaintiffs were given 14 days to vacate their homes and monetary compensation for the loss of their homes and crops (but not for their ancestral land). The first defendant claimed that the land was state land and, refused to recognize that the plaintiffs had any '*proprietary interest*' in the land or any interest in it at all.

Unhappy with the inadequacy of the compensation for their ancestral land, the plaintiffs refused to relocate or accept the compensation offered by the State. Therefore, on 27th March 1996, they were forcibly evicted by the police with support from the Federal Reserve Unit (FRU) and, witness by officials from District Office, United Engineers Malaysia (UEM), Malaysian Highway Authority (MHA) and JHEOA. The plaintiffs filed a writ seeking declarations that they are the customary owners, original title holders and the holders of usufructuary rights in respect of the land claiming relief for trespass, illegal eviction and breach of fiduciary duty.

3.6.2 Summary of the Judgment

Mohd Noor Ahmad J, in his judgement mentioned that the court declared the existence of aboriginal land ownership or Native title as common law, apart from aboriginal reserves and areas set up under the Aboriginal People's Act 1954. The

Act, which does not require the State to pay compensation for acquired land, was held to cover only aboriginal reserves and aboriginal areas. This restrictive interpretation of the Act and liberal interpretation of the common law would require the State to pay compensation for Native title at common law. It is necessary to avoid the Aboriginal People's Act inconsistency with Article 13 of the Federal Constitution 1957 which provides for compulsory State compensation for acquired land. The valuation and acquisition of Native titles was to be determined in accordance to the Land Acquisition Act 1960, the same 'regime' applying to private registered title. The court also held that the State had breached a fiduciary duty owed to the Orang Asli when the State acquired their land without adequate notice.

The judgment of this case recognised that Orang Asli land rights differed in several ways from private land rights. Orang Asli land was held to be a form of native title based on their laws and customs, entitling them to move freely in their land, without any form of disturbance or interference. They also permitted to live from the produce of the land, but not to the land itself (in the real sense that the aborigines cannot convey, lease out, rent out the land or any produce therein). Despite these differences, the court applied the Orang Asli land rights, the same compensation that governing private land rights. By implication, the court reserved their decision on the fact that despite differences in content, Orang Asli native title and private title are to be considered as alike when it came to determining compensation for compulsory acquisition.

The court based their conclusion of Orang Asli land rights on the Orang Asli's exclusive and continuous occupation of their ancestral lands since time immemorial (Bryan, 2000). Such reasoning, though sufficient to ground an interest in land, but itself cannot treat Orang Asli land interests differently from private land title. In arguing for different treatment of Orang Asli native rights, when it comes to acquisition, the reason for treating Orang Asli land rights differently from private land rights needs to be addressed.

3.7 SUMMARY

A series of judgments originating from the Malaysian courts have resulted in a progression for Orang Asli land rights, inspiring from the Sagong Tasi (2002). In this case, court declared the existence of Orang Asli land title at common law despite non-statutory recognition, giving them the right to adequate compensation from compulsory acquisition under the Malaysian Land Acquisition Act, 1960.

The Malaysian judiciary's attention towards Orang Asli land rights is respected for several reasons. First, despite much of international indigenous land rights' content being uncertain and nonbinding on the Malaysian domestic legal system, the Malaysian court's decision extensively referred to comparative State practise and international developments in indigenous land rights. Further, international treaties recognized six indigenous rights (paragraph 3.2.4) as explained by Cheah (2004b). Second, despite its helpful intentions, the Sagong Tasi (2002) case effectively fails to give full recognition to Orang Asli land rights. This is because of the court's decision to ultimately apply the Land Acquisition Act, 1960 the same compensation regime governing private land rights, to Orang Asli land. This piece of legislation (Land Acquisition Act, 1960), never intended to apply to Orang Asli land resulting in only partial articulation of Orang Asli land rights. While, the Sagong Tasi case is currently awaiting for Federal Court decision early year 2007 following the decision by the Court of Appeal on 19th September 2005 upheld the Shah Alam High Court's decision (New Straits Times, 2006). The Court of Appeal in Sagong's case has recognised that the Orang Asli lands are a very valuable socio-economic commodity and therefore the government must give due recognition to the importance of the Orang Asli traditional lands.

The incorporation of the Covenant in particular Articles 6 and 15 (UN Declaration) thereof would ensure that steps are taken to protect Orang Asli traditional lands as permanent settlements which cannot be compulsorily acquired for development. If the previous judgement is sustained, this will give a full recognition of the Orang Asli land rights and, compensation for the market value of land will be materialized. Furthermore, as been discussed in paragraph 2.11

(Chapter Two), the measurement of adequate compensation contributes space for research to develop a compensation framework for acquisition affecting Orang Asli native lands. Thus, six indigenous rights as explained by Cheah (2004b), essence of the Sagong Tasi case, and measurement of adequate compensation have created foundation for this research.

Eventhough the issue of land rights of Orang Asli native land has been discussed since a decade ago, unfortunately, this issue has yet been resolved in an amicable manner. The position of Orang Asli land rights has still not much improved. Finally, as reported by Nicholas (2001) on unpleasant situation voiced out by Orang Asli on current phenomenon of developments in their ancestral land should be considered by the various parties concerned in trustworthy manner, 'Dulu gajah menyerang kita. Sekarang pembangunan yang menyerang kita' (In the past, it was the elephant that attacked us, today it is the thing called development).

CHAPTER FOUR

COMPENSATION FOR ACQUISITION OF ORANG ASLI NATIVE LAND

4.1 INTRODUCTION

The issues with regard to the assessment of compensation for Orang Asli native land concern the interests of such land, which confer differing level of rights from the ones enjoyed, by a titled land. These interests are even lesser than the interests conferred to a group settlement grant by the Land (Group Settlement Areas) Act 1960 in which the rights, although impaired, are not totally extinguished. Neither do these interests exist under the traditional laws and customs (Nik Yusof, 1996; Jafry, 1996). Therefore, it is necessary to establish the Orang Asli land rights as highlighted in Adong Kuwau (1997) and Sagong Tasi (2002) as well as native title rights emphasised in *The Wik Peoples v The State of Queensland & Ors*; *The Thayorre People v The State of Queensland & Ors* (Wik, 1993).

Again, there are precedents relating to the compulsory acquisition of, and compensation for, lesser interests in land. The Spencer principle¹⁵ remains applicable and compensation is assessed on the basis of the amount a willing buyer would pay a willing seller for the interest. There are examples of courts assessing compensation for the compulsory acquisition or loss of leases, easements, licences, riparian rights, fishing rights and even the right to dig for worms for bait (Gobbo, 1993). Similarly, the courts developed methods for valuing lesser native title interests under the Native Title Act 1993 (Australia) (Smith, 2001). This can serve as useful guidance in valuing for compensation involving Orang Asli native lands in Malaysia.

¹⁵ *Spencer v Commonwealth* (1907) 5 CLR 418

This chapter discusses the compensation issues in acquisition of Orang Asli native lands in Malaysia starting with the rights and interest of Orang Asli on their native lands, and factors to be considered in acquisition of Orang Asli native land. Furthermore, the discussion extended to the recognition for compensation of Orang Asli native lands; current thinking of valuation approaches; the challenges in valuation of compensation; and the practices of native title compensation of other country, which recognized Australia as a model for reviewing.

4.2 RIGHTS AND INTERESTS OF ORANG ASLI ON THEIR NATIVE LANDS

4.2.1 Land Ownership

Orang Asli regard *saka* or traditional rights to specific ecological niches as owned communally by them from the time of their ancestors, and these rights will continue to the following generations (Nik Yusof, 1996). To a large extent, their claims to these areas were not contested by other communities because these areas were invariably regarded as uninhabitable, remote and backward. In fact, it was not so much the lands that were coveted by others but rather the resources found therein. Being the persons with the best knowledge and the most talented to perform the exploitation of the resources (such as *gaharu*, resins, rattan, and petai), the Orang Asli had since 1400s found themselves being made use of by outsiders to harvest the forest produce (Nicholas, 2003).

The scenario changed with the arrival of Malay Rulers who assumed ownership of all lands lying within their claimed domain and thus 'colonised' the territories of the Orang Asli. Later, the introduction of the Torrens System of land ownership during British colonial rule was to reinforce this situation (Nik Yusof, 1996; Awang, 1996). Nonetheless, the Orang Asli were not only displaced from their traditional lands during these periods; in fact, during the later part of the British

colonial rule (particularly in the 1930s and 1950s) some of the traditional territories of the Orang Asli were gazetted as Orang Asli reserves while others were recognised as Orang Asli areas or Orang Asli 'sanctuary'. None of these were conferred legal territorial ownership to the Orang Asli. Even the more recent Aboriginal Peoples Act (Act 134, 1954 revised 1974) also does not give full recognition to land rights but merely declared Orang Asli as tenants-at-will.

During the Emergency of 1948-1960, they were known to be providing food, intelligence and labour to the insurgents. Due to this reason, the British uprooted whole Orang Asli communities and resettled them, supposedly temporarily, into 'squalid camps' that caused the deaths of hundreds of Orang Asli due to disease, malnutrition and mental stress (Iskandar, 1976; Nicholas, 1998; 2002). Although the Emergency officially ended in 1960, the security threat from the communists remained until 1989, thereby prompting the government to step up the resettling of Orang Asli in deep forest areas into permanent regroupment schemes (Rancangan Perkumpulan Semula or RPS) where they could be watched over by the security forces (JHEOA, 1996).

Furthermore, as commented by Nicholas & Singh (1996) and Nicholas (2003), these regroupment schemes continue until now, not for security reasons but as political reasons to exploit Orang Asli lands. The government frequently contends that it is unable to induce development to the Orang Asli because of their nomadic lifestyle. Also, their dispersed settlements make it difficult to provide basic infrastructure and social services to the Orang Asli as it incurred high financial costs. Hence, the need to regroup them into large settlements. In some instances, after the Orang Asli have been resettled, the original territories are given to someone else and developed (Nicholas, 2003).

The Emergency was also unforgettable history to Orang Asli because it prompted the establishment of the Department of Aborigines (later renamed as the Department of Orang Asli Affairs (JHEOA)) and the introduction of the

Aboriginal Peoples Act, 1954. Both these institutions were to have a major impact on Orang Asli lives and on the control over their traditional territories. More specifically, the JHEOA, with the perceived legislative backing of the Aboriginal Peoples Act, was given the sole responsibility for all matters concerning the Orang Asli (Endicott & Dentan, 2004; Jamaludin, 1997; Salleh, 1990; Idris, 1983).

Recent years have seen several established Orang Asli settlements having to make way for significant development projects such as the Kuala Lumpur International Airport (KLIA), highways, private university, dams, golf courses, and for private housing and industrial projects. The Orang Asli were told that whenever the Government had to take their traditional territories, it was for 'altruistic' reasons and for the welfare of the peoples at large (Nicholas, 2003).

As a reflection of their resilience on the matter, the Orang Asli referred to various quarters to seek remedies, including to the courts of law. In certain cases, they have succeeded and forced the State to recognise the rights of their traditional territories and resources. For example, in *Koperasi Kijang Mas v Kerajaan Negeri Perak & Ors* (1991), the High Court ruled that irrespective of whether or not an area had been gazetted as an Orang Asli reserve, as long it was an Orang Asli area or an Orang Asli inhabited area, all resources in it, including timber, rightfully belonged to the Orang Asli concerned.

In *Adong Kuwau* (1997) where a dam built in the traditional territories of the Jakun tribe in Johor (to supply Singapore with drinking water) caused the Orang Asli loss of their subsistence area, the court ruled that because the Orang Asli were no longer able to subsist on the bounty of their traditional resource, the state authority must compensate the Orang Asli for the loss of income so effected, for a period of 25 years – or a total of RM38 million (final decision).

Until 2002, Malaysian law acknowledged no Orang Asli rights to their ancestral land. However, in the more recent case of Sagong Tasi (2002), the court ruled that,

‘Although the affected lands were not gazetted as an Orang Asli reserve or were untitled, those traditional territories where the community had lived and worked upon in accordance with their ‘adat’ or custom are to be considered as having been accorded the same rights as that of a titled land and, as such, the law that applies elsewhere for acquisition should equally apply to the holders of the traditional lands.’

According to Jimin et.al (1983), JHEOA and other offices claimed they were helpless to force the state governments to establish Orang Asli areas and reserves. Nevertheless, Article 83 of Federal Constitution 1957 gives the federal government ample power to acquire land from the states. This power is frequently used for important projects e.g. airport and highway projects, but not to create Orang Asli areas and reserves (Rachagan, 1990). In May 1999, First Finance Minister, Tun Daim Zainuddin had promised to expedite the process of gazetting the land already applied for, but in reality the situation remained as before.

4.2.2 Tenant-at-Will

The rights of the Orang Asli over their traditional lands are spelt out in the Aboriginal Peoples Act, 1954. In effect, the Act provides for the establishment of Orang Asli areas and Orang Asli reserves. Previously, the view of the government was that under the Aboriginal Peoples Act, 1954 the best interest the Orang Asli may obtain from their traditional lands is as a tenant-at-will. This was due to the perception that the Orang Asli traditional lands in principle are state lands (Endicott & Dentan, 2004; Jamaluddin, 1997; Salleh, 1990; Jimin et.al, 1983). The Orang Asli were therefore considered to occupy or stay on their traditional lands at the pleasure of the government. Whenever the government needs the lands for any reasons, it would be just a matter of revoking the status of these traditional lands and issuing to the affected Orang Asli a short notice to vacate their traditional lands, notwithstanding the fact that the Orang Asli and

their families may have been living in the area for generations. The Orang Asli are then expected to move from their traditional lands within a stipulated period or be forcibly evicted by the powers of the state. This is evident in the state of Selangor, as in Sagong bin Tasi (2002) case.

Apart from being summarily evicted, the Orang Asli is not paid any form of compensation for the loss of their traditional lands. Instead, the Orang Asli is compensated purely based on Sections 11 and 12 of the Aboriginal Peoples Act, 1954. Any compensation pursuant to these sections is in effect discretionary and arbitrary since it is up to the authorities to decide on the quantum of compensation to be paid to the Orang Asli (Ismail, 2005). There is no fixed guideline. The compensation payable to the Orang Asli pursuant to these sections is only for the loss of productive trees, buildings and any activities on the land. No compensation is paid for the acquisition or loss of the Orang Asli traditional lands. In reality, the amount paid to the Orang Asli as compensation for their loss of productive trees and buildings are inadequate (Ismail, 2005; Endicott & Dentan, 2004).

These traditional lands are meant to provide for the future generations of the Orang Asli. With the acquisition of the traditional lands and inadequate compensation, the future of the Orang Asli becomes uncertain. They neither have the lands where they can live on nor the money to provide for the future (Awang, 1996).

4.2.3 The Orang Asli Land Ownership Policy

After the independent of Malaysia, all ordinances which were implemented during British administration have been reviewed and amended. In relation to this, on 20th November, 1961 the Federal Government of Malaya had declared the Orang Asli administration policy which was called the 'Statement of Policy Regarding the Long Term Administration of the Aborigine Peoples in the Federation of Malaya'. This policy sets out certain principles to be observed, and

makes special reference to particular problems with regard to education, health, agriculture, and forest policy, together with the security aspects of the problem (Ministry of Interior, Malaysia, 1961). However, the main purposes of this policy were to integrate the Orang Asli with national community as well as to monitor the land rights of Orang Asli (Yusof, 2005). The policy was left unattended since then and the burden to take care for the welfares of Orang Asli becomes sole-responsibility of the JHEOA.

Later, in 1992 a motion to grant land titles for Orang Asli was first discussed by the Ministry of Lands and Cooperative, the Federal Department of the Director General of Lands and Mines (KPTGP), the State Authority (PTG) and JHEOA. After a series of discussions done by various parties, on 17th November 1999, the KPTGP Circular No. 6/1999 entitled 'Kaedah dan Pendekatan Pelupusan Tanah Kepada Orang Asli (Methods and Approaches for Disposal of Land to Orang Asli)' was released. This circular provided guidelines for the Land Administrator in dealing with cases involving Orang Asli land ownership (Yusof, 2005). Further, there were policies and guidelines circulated by the State Governments on the same matter. Based on information from JHEOA (2006), all State Governments except Kedah, Perlis and Pulau Pinang have issued land titles to Orang Asli but, the numbers were relatively very small.

Section 7(2)(iv) of the Aboriginal Peoples Act 1954 explains that, *'no land shall be alienated, granted, leased or otherwise disposed of except to aborigines of the aboriginal communities normally resident within reserve'*. Under present practices, the Orang Asli have granted rights to occupy any land not being alienated or lands leased and do their activities on specific areas - section 8(1) of the Act.

Generally, under the National Land Code 1965, the State Authorities may dispose land through alienation, reservation, leasehold etc. The common practice for disposal of Orang Asli land was through reservation as Federal Reserve, but this mechanism did not grant land titles to Orang Asli. Therefore, as suggested by the

KPTGP Circular No. 6/1999 there are three methods which could be applied to overcome the issue of land titles for Orang Asli;

- Development under the Land Act (Group Settlement Areas) 1960 – this is similar to Felda Schemes, which had proven to be the most successful land planning program under regional development scheme.
- Individual alienation – by this method the Orang Asli are able to be alienated land under individual title as provided under section 8(3) of the Aboriginal Peoples Act 1954. The State Authority needs to revoke the Orang Asli Reserve from Federal Reserve before alienation to individual can be done.
- Continue to maintain as Federal Reserve – no alienation for titled land is allowable under this provision.

These approaches seem to be ineffective and proven to be disadvantages in policy of land alienation by the State Authority. JHEOA strongly objected to continue and maintain the idea of reservation as Federal Reserve under the land alienation policy for Orang Asli (JHEOA, 2006). More effective approaches need to be established due to the current phenomenon that the issue of Orang Asli land is involving court litigations. The JHEOA suggests two methods of alienation:

- Through development of the land under the Land Act (Group Settlement Area) 1960. The modus operandi is similar to the Felda Schemes.
- Granting of land title to the individual or to the head of the family. The individuals shall be granted lands not more than 2.43 hectares (6 acres) for plantation, 0.4 hectare (1 acre) for orchard and 0.1 hectare (0.25 acre) for residential plot.

These suggestions have yet to be approved by the government. The land rights issues of Orang Asli remains.

4.2.4 The States - Land Alienation Policy

All states are requested under the KPTGP Circular No. 6/1999 to formulate land alienation policy for Orang Asli within the state jurisdiction. Until to date, only states of Kelantan, Perak, Pahang, Melaka, Johor and Selangor have the land alienation policy implemented within the states. Negeri Sembilan, Kedah and Terengganu have yet to formulate their land alienation policy, while Perlis and Pulau Pinang have no requirement to formulate such policy due to non-existence of Orang Asli in the state. Table 4.1 shows the land alienation policy for Orang Asli in various states.

Table 4.1
Land Alienation Policy of the States

No.	State	Year of Enforcement	Land Alienation Policy
1.	Kelantan	1989	<p>Specially designed for Orang Asli Regroupment Centre of Kuala Betis, Gua Musang. The policy is for alienation of:</p> <p>Residential plot</p> <p>Orchard land</p> <p>Rubber land – reserve under the Land Act (GSA) 1960.</p> <p>No detail for the size of the land and the tenure is fixed to 99 years leasehold.</p>
2.	Perak	1993	<p>The policy instrument is called the '<i>Policy and Guidelines on Disposal and Land Development for Orang Asli</i>'. Land granting for alienation is 10 acres which includes:</p> <p>Residential plot – 0.25 acre</p> <p>Orchard land – 2 acres</p>

			<p>Agriculture land – 7.75 acres.</p> <p>No provision of land for future generation.</p> <p>Grant under 99 years leasehold.</p>
3.	Pahang	1998	<p>The State Government of Pahang refused to gazette the lands inhabited by the Orang Asli under section 7(1) of Act 134 because the State does not want the lands to be converted as Federal Reserves. The State agreed in principle that the lands in Orang Asli villages to be converted into the <i>'Tanah Kelompok Khas Untuk Orang Asli (Special Land Groups for Orang Asli)'</i>; whereas each family is entitled to be alienated:</p> <p>6 acres of agriculture land</p> <p>0.25 acre of residential plot</p> <p>The State Government is also agreeable to revoke Malay Reservations or Forest Reserves and turn it into Orang Asli Land Group Schemes if there are enough evidences that particular land is inhabited by the Orang Asli for generations.</p>
4.	Melaka	2000	<p>The policy states that the existing Orang Asli villages will be alienated to the head of the family a land for orchard and residential. The size of orchard and residential plot are based on the existing size of the village and layout prepared by the JHOEA of Melaka/Negeri Sembilan.</p> <p>In normal cases, each family is entitled for 5.5 acres of land under the following categories:</p> <p>5 acres agriculture land</p> <p>0.5 acre residential plot</p> <p>The agriculture land will be planted with rubber trees under RISDA program and assistance.</p>

5.	Johor	2000	<p>Johor has no specific policy for land alienation to Orang Asli. But the state authority had implemented one privatization project of land development called '<i>Projek Penswastaan RPS Bekok, Segamat (Privatisation Project of Bekok Regroupment Scheme, Segamat)</i>'. It covered an area of 1,070.372 hectares and involving 188 families of Orang Asli. The land activities under the project include housing schemes, plantations and infrastructure. The land alienated to each family with total area of 11.72 acres were as follows:</p> <p style="padding-left: 40px;">Farm land – 8 acres</p> <p style="padding-left: 40px;">Orchard land – 3.47 acres</p> <p style="padding-left: 40px;">Residential plot – 0.25 acres</p>
6.	Selangor	2001	<p>The State Government of Selangor has approved the lands in Orang Asli villages to be alienated and converted into the '<i>Rancangan Tanah Kelompok Khas Untuk Orang Asli (Special Land Groups Programme for Orang Asli)</i>'; whereas each family is entitled to be alienated:</p> <p style="padding-left: 40px;">5 acres of agriculture land</p> <p style="padding-left: 40px;">0.25 acre of residential plot</p> <p style="padding-left: 40px;">An additional land will be provided for infrastructure and public amenities. Another 30% from the total size of the programme will be reserved for future generation of Orang Asli.</p>

Source: JHEOA (2006)

The policy stated above is a policy that guides the Land Administrators in dealing with Orang Asli land matter. Unfortunately, this policy is not fully implemented and many Orang Asli reserves remained as Federal Reserves without serious attempts to revoke them for land alienation processes to start. Though the policy was already in place for quite sometimes in the various state governments, it was

implemented in one or two Orang Asli village(s) or reserve(s) only. Thereafter, the policy is unimplemented and the respective state authority is actually not serious in granting land to Orang Asli. The Orang Asli in these states still occupy forest reserves or state lands for their villages and subsistence activities. The reluctance of the state governments to alienate land to Orang Asli is resulting from fears that the Orang Asli might sell the land or they cannot afford to pay land premium and quit rent. This was clearly stated by the State Land and Rural Development Committee Chairman of Perak, Dato' Azman Mahalan (1996),

'... the state would not grant land titles, in order to protect the interests of the Orang Asli...(there are) fears that, on granting the titles, Orang Asli families would have to pay various land taxes, which would be a burden to most of them...there is also the possibility of them selling the land to others'.

4.3 LAWS IN RELATION TO ACQUISITION AND COMPENSATION OF ORANG ASLI NATIVE LAND

4.3.1 The Aboriginal Peoples Act, 1954

Apart from the establishment of the Department of Orang Asli Affairs (JHEOA), the Emergency also saw a special legislation being enacted for the Orang Asli. This is the Aboriginal Peoples Act 1954 (Act 134) which only has 19 sections. This Act is unique because it is the only legislation that is directed at a particular ethnic community (for that matter, the JHEOA is also the only government department that is to cater for a particular ethnic group which exists in the world).

Originally enacted during the peak of the Emergency, the Aboriginal Peoples Act 1954 (revised in 1974) served to prevent the communist insurgents from getting help from the Orang Asli. It also aimed at preventing the insurgents from imparting their ideology to the Orang Asli. For this reason, for example, there are provisions in the Act which allow the Minister concerned to prohibit any non-Orang Asli from entering an Orang Asli area, or to prohibit the entry of any

written or printed material (or anything capable of conveying a message). Even in the appointment of headmen (Tok Batin), the Minister has the final say. The Act treats the Orang Asli as if they were a people unable to lead their own lives and needing the 'protection' of the authorities to safeguard their wellbeing.

Nevertheless, the Act does recognise some rights of the Orang Asli. For example, it stipulates that no Orang Asli child shall be precluded from attending any school only by reason of being an Orang Asli. It also states that no Orang Asli child attending any school shall be obliged to attend any religious instruction without the prior consent of his parents or guardian. Generally also, the Act allows the right of the Orang Asli to follow their own way of life.

While the Act provides for the establishment of Orang Asli Areas and Orang Asli Reserves, it also grants the state authority the right to order any Orang Asli community to leave and stay out of an area. In effect, the best security that an Orang Asli can get is one of 'tenant-at-will' (Section 8 – rights of occupancy). This means, Orang Asli is allowed to remain in a particular area only at the pleasure of the state authority. If at such time the state wishes to re-acquire the land, it can revoke its status and the Orang Asli are left with no other legal recourse but to move elsewhere. Furthermore, in the event of such displacement occurring, the state is not obliged to pay any compensation or allocate an alternative site.

Thus, the Aboriginal Peoples Act has laid down certain ground rules for the treatment of Orang Asli and their lands. Effectively, it accords the Minister concerned or the Director-General of the Department of Orang Asli Affairs (JHEOA) the final say in all matters concerning the administration of the Orang Asli. In matters concerning land, the state authority has the final say. The development objective of the Act, therefore, appears to have been included of both, the security motive and the tendency to regard the Orang Asli as wards of the government.

The Aboriginal Peoples Act, 1954 defines the areas and the resources as follows:

a) 'Aboriginal Areas' (Section 6): exclusively or mainly inhabited by aborigines, these are not reserves; they are divided into aboriginal cantons, but are considered to be occupied only temporarily.

They cannot be declared Malay reservations, wild bird or animal reserves, they cannot be given to anyone but another aborigine without consulting the Commissioner. Only resident aborigines may collect forest produce without permission from the Commissioner.

b) 'Aboriginal Reserves' (Section 7) can be within aboriginal areas and are a permanent occupation of the land.

The same restrictions apply as in Section 6, with one major difference - on no account can the land be occupied temporarily. In other words, aboriginal area can be occupied but by whom is not specified, whereas reserve land cannot be occupied. As far as the Orang Asli are concerned, not only land tenure is uncertain, but even the Aboriginal Peoples Act does not provide a guarantee for their occupation of the land.

c) 'Malay Reservations', in the Federal Constitution (Amendment 1985) - Article 89, the government, or any state, may legally acquire land to settle Malays or other communities.

In this Article, 'Malay reservations' implies 'land reserved for alienation to Malays or to natives of the state in which it lies'. And 'Malay' means a person who, according to local state legislation, is treated as a Malay in matters of land reservation. Therefore, if intending to reserve land, an Orang Asli can be 'Malay' and there are examples of this in the states of Kelantan, Perlis, and on the Kedah Malay reserve.

d) 'Land Transaction' (Section 9): aborigines have no rights allowing them to engage in land transactions without permission from the Commissioner.

Texts on alienation define land-holding in terms that do not mention concepts of land occupation and use by the Orang Asli.

e) 'Residence' (Section 10) of aboriginal communities on Malay reservations, or on forest or game reserves is ruled by state legislation; the state government can request that they leave giving them compensation.

An important fact is that laws on Malay reservations can be altered and apply to an Orang Asli community, and that Orang Asli people may continue to reside on the land under specific conditions dictated by the state authorities.

f) 'Rights' of aboriginal communities over fruit or rubber trees (Section 11) on alienated, granted or leased land are recognized by state authorities and compensation may be paid if their claim is valid.

g) 'Compensation' (Section 12) - If any land is excised from any aboriginal area or aboriginal reserve is revoked wholly or in part, the State Authority need to grant compensation and pay such compensation to the person entitled.

h) 'Compulsory acquisition' of land for Orang Asli areas or reserves (Section 13), the property may be acquired with the written law relating to the acquisition of land and the property is needed for a public purpose in accordance with that written law.

The full version of the Aboriginal Peoples Act, 1954 (Act 134) is depicted in Appendix F.

4.3.2 The Land Acquisition Act, 1960

The act gives power to the state government to acquire private land for public purposes, including agricultural development. In other words, the state government can acquire private land and Orang Asli reserve or aboriginal territory by force, but the federal government can go against this decision. In fact, no Orang Asli as such has any title to land. The closest to it is permission to occupy an area or reserve land, and even when the Orang Asli get monetary compensation for the disturbance due to the occupation of the land by the developers, it is under JHEOA control.

The detailed explanations of the Act (Act 486) were discussed in Chapter Two, paragraph 2.7.2

4.3.3 Development of the Laws of Orang Asli Land Rights

The development of the Orang Asli land rights in Peninsular Malaysia can be credited to two major cases. They are the cases of Adong Kuwau(1997) and Sagong Tasi (2002).

The decision in Adong's case in essence imposed a requirement of adequacy of compensation in accordance with Article 13(2) of the Federal Constitution to be paid to the Orang Asli for the losses of their usufructuary rights. Usufructuary rights are the rights that the Orang Asli have over their traditional lands which include the right to move freely over their traditional lands without any interference or prohibition and also the right to live from the produce of their traditional lands. The High Court in Adong's case accepted that the Orang Asli have the right to live on their traditional lands as their forefathers had lived and this includes the future generations of the Orang Asli. Adong Kuwau (1997) case recognised the Orang Asli's rights for things situated on their traditional lands.

The High Court in Adong's case also decided that the Orang Asli were not adequately compensated within Article 13(2) of the Federal Constitution in respect of fruit and rubber trees which were planted on their traditional lands. The High Court was of the view that the Orang Asli's usufructuary rights both under the common law and statutory law are proprietary rights protected by Article 13 of the Federal Constitution which mandates that all acquisition of proprietary rights shall be adequately compensated.

The High Court in Adong's case further decided that in any calculation of the compensation under Section 11 of the Aboriginal Peoples Act, 1954 to the Orang Asli must take into account the following:

- a. The deprivation of heritage land;
- b. The deprivation of freedom of inhabitation or movement under Article 9(2) of the Federal Constitution;
- c. The deprivation of produce of the forest;
- d. The deprivation of future living for himself and his immediately family; and
- e. The deprivation of future living for his descendants.

The decision of the High Court in Adong's case was subsequently affirmed by the Court of Appeal in *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors.* [1998] 2 MLJ 158. The Court of Appeal upheld the High Court's decision in its completeness on the issue of liability. During the appeal, a further ground was also added, namely, that the loss of their traditional lands was a loss of livelihood to the Orang Asli in violation of their constitutional rights under Articles 5 and 8 of the Federal Constitution.

However, the Orang Asli land rights received a major boost in *Sagong Tasi* (2002) case. The significance of the *Sagong's* case is that the High Court had recognised that the Orang Asli have proprietary rights in their traditional lands. The High Court in this case held that the proprietary interest of the Orang

Asli in their customary and ancestral lands was an interest in and to the land. Indeed, the interest is limited only to the area that formed their settlement and not the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. The area of settlement and its size would be a question of fact in each case.

What is also significant in this case was that the High Court took the view that Orang Asli rights under the common law and the statute had to be looked at conjunctively. It held that both these rights were complementary. Therefore the Aboriginal Peoples Act, 1954 did not extinguish the rights enjoyed by the Orang Asli under the common law. In other words, the Orang Asli land rights could co-exist with statutory law in Malaysia.

It was further held that the purported compensation for the Orang Asli pursuant to Sections 11 and 12 of the Aboriginal Peoples' Act, 1954 was not adequate within the meaning of Article 13(2) of the Federal Constitution notwithstanding that the Aboriginal Peoples' Act, 1954 was a special act for the Orang Asli. Therefore, the deprivation of their traditional land rights was unlawful. Accordingly, the High Court ruled that the Orang Asli in Sagong's case must be compensated in accordance with the Land Acquisition Act, 1960.

The findings in Sagong's case were affirmed by a unanimous decision in the Court of Appeal in September 2005. The Court of Appeal has further held that the purpose of the Aboriginal Peoples Act, 1954 '*..was to protect and uplift the First Peoples of this country. It is therefore fundamentally a human rights statute. It acquires a quasi constitutional status giving it pre-eminence over ordinary legislation*' (Kerajaan Negeri Selangor v Sagong bin Tasi (19th September, 2005 - unreported).

The Court of Appeal further held that the Aboriginal Peoples Act, 1954 did not intend to deprive the Orang Asli from having a customary title at common law; even though there is no specific alienation of the land to the Orang Asli. To

interpret that the Aboriginal Peoples Act, 1954 requires a specific alienation of the land before the Orang Asli receives any form of rights in the customary would result in the Aboriginal Peoples Act, 1954 being '*a wasted piece of legislative action*' as its purpose was '*to provide socio-economic upliftment of the aborigines*' (Kerajaan Negeri Selangor, 2005). The Federal and State Governments are now seeking leave to appeal to the Federal Court.

4.4 FACTORS TO BE CONSIDERED IN LAND ACQUISITION AND COMPENSATION OF ORANG ASLI NATIVE LANDS

4.4.1 Land Rights and the Privileged Position of Orang Asli from Federal Constitution Perspectives

The Federal Constitution guarantees an equal protection of laws to Malaysian citizens as spelt out in Article 8 of the Constitution. This right to equal treatment has been broadly interpreted in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, at 284 as '*a dynamic concept with many aspects and dimensions ... (which) cannot be imprisoned within traditional and doctrinaire limits*'. Meaning that, like must be treated with like and unlike with unlike. Therefore, due to its inherent differences, Orang Asli land should not be treated under the same compensation regime as private land.

Subramaniam (2007:1-1i) revealed that,

'...the recognition of aboriginal customary rights to land in Peninsular Malaysia is but a gateway into the minefield that shields a successful claim. In spite of its importance in proving these claims, the use of traditional knowledge from within the aboriginal community still inescapably requires external expert evidence for validation by the courts due to its unique nature'.

According to Cheah (2004a), the special and privileged position of Orang Asli in Malaysia is stated in the Federal Constitution under three ethnic-specific provisions; spelt out the State duties in relation to the Orang Asli's welfare namely;

- Article 8(1) legitimising affirmative action in favour of the Orang Asli;
- Article 45(2) providing for the appointment of Senators who are capable of representing the interest of the aborigines, and
- Nine Schedule (List 1) vesting upon the Federal Government legislative duties for the 'welfare of the aborigines'. Literal meaning of these provisions that at the very least, the Orang Asli's welfare is to be made a priority before other ethnic groups.

The Federal Constitutional provisions favouring the Malays, Orang Asli and Aborigines of Borneo have specific historical origins (Suffian (Tun), 1976). The Malays, as the dominant ethnic group in Malaysia sought to maintain the status-quo in politic due to fears of being threatened politically by the Chinese who controlled economy. The aborigines of Borneo sought specific constitutional guarantees as pre-conditions for joining the Malaysia. The Orang Asli seem to have depended on the Aborigines of Borneo's claims, the latter's privileges being more specifically spelt out in the Constitution than the former (Suffian (Tun), 1976; Salleh, 1990; Nik Yusof, 1996; Jafry, 1996).

Article 5 of the Constitution on right to life provides further support for recognizing the Orang Asli's specific relationship with their ancestral land. This Article has been given an all-encompassing definition by the Malaysian courts, being held not to refer to *'mere existence, but all those facets that are an integral part of life itself and those matters which go to form the quality of life'* (Tan Tak Seng, 1996:284). Section 4 of The Aborigines Peoples Act, 1954 recognises the Commissioner's responsibility 'for the general administration, welfare and advancement of the aborigines'. The Charter of the Department for Orang Asli, set up under the same Act, aims to 'reduce and subsequently eliminate poverty', 'improve the quality of life' and 'health of Orang Asli communities' (<http://www.jheoa.gov.my/index-malay.htm>). The 1961 Policy Statement recognises the 'special position' of Orang Asli and aims to 'provide for their protection, well-being and advancement' (Ministry of Interior, Malaysia, 1961;

Sagong Tasi, 2002). These constitutional provisions, state legislative and administrative policies have been set up for the benefit of Orang Asli (Cheah, 2004b).

State acquisition of private land (i.e. non-indigenous land) when accompanied by market-value compensation does not deprive landowner of an 'integral part' of his life. However, for the Orang Asli, their economic, cultural and spiritual dependence on their land makes their ancestral land as an integral part of life itself (Cheah, 2004a). This link between indigenous peoples and their land has been recognised in international practice (OEA Report, 2000). For the Orang Asli, land acquisition without appropriate resettlement or reintegration programs effectively takes away their cultural, spiritual and social life as well as the source of their centuries-old subsistence life-style. This not only '*denude(s) life of its effective content and meaningfulness but it would make life impossible to live, contravening their right to life under Article 5*' (OEA Report, 2000:285).

Based on national law, it is argued that the interpretation and application of domestic legislature should be guided by international developments and standards. In keeping with the worldwide recognition, a Malaysian court has given the indigenous rights to aboriginal peoples (Sagong Tasi, 2002). Such an approach is consistent with recent indigenous land cases in which Malaysian courts looked to international law for guidance, though acknowledging their non-binding persuasive authority (Sagong Tasi, 2002). Blackstone (1809:264), in his exposition on the State's right to compulsorily acquisition, states that the holiness of property rights cannot be stripped in an 'arbitrarily manner' but must be compensated 'by giving full indemnification and equivalent for the injury thereby sustained'.

4.4.2 Fiduciary Duties of the State

In *Sagong Tasi* (2002), the court found the existence of a fiduciary duty on the part of the State towards the Orang Asli which defined it as 'a duty to protect the welfare of the aborigines including their land rights and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs'. The fiduciary's duty, a concept existing in many areas of law such as company law and trust law, limits and requires fiduciary to exercise his or her power in the best interests of the beneficiaries (Christie, 2000). According to Rotman (1996:18), in a sense the State as '*the repository of the citizenry's voting power, is also fiduciary of all citizens*'. This will give rise to the argument that there may be circumstances in which the general population's developmental interests may overrule the interests of Orang Asli (Cheah, 2004a).

However, the explicit mention in the Federal constitution of the State's duties towards the Orang Asli is that they deserved priority as compared to the other ordinary citizen. Taking this into consideration, the question asked is then, how and where should the balancing point between conflicting rights be struck? Malaysian courts have exempted States from administrative duties of natural justice and procedural fairness in land acquisition decisions due to its public interest dimensions (*Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481; Pillay, 1999). It is argued that the State's fiduciary duty towards the Orang Asli not only subjects the process of indigenous land acquisition to scrutiny but imposes on it obligations beyond general administrative law.

4.4.3 Land Occupied Under Customary Right

The court interpreted 'land occupied under customary right', as set out in the Section 2 (First Schedule) of the Land Acquisition Act 1960, to include Orang Asli native title within its ambit (*Sagong Tasi*, 2002). However, even the court

itself recognised that at the time of its codification, this phrase in Section 2 (First Schedule) intended to target, not Orang Asli land rights, but lands occupied under the tribal 'adat' in Negeri Sembilan and Malacca. The Land Acquisition Act was never intended or drafted to accommodate within its scope the substantive compensation and procedural rights of native title. The native title under a common law somehow possessed the land rights under the international covenants and treaties.

4.4.4 Determination of Loss

In Adong Kuwau (1997) court refrained from awarding compensation for the non-economic aspects of indigenous land due to the difficulties of quantification. However, the practise of other national and regional courts has demonstrated its possibility (OAS Report, 1985). Such quantification is important as it serves as public acknowledgement of indigenous land's unique status. Beside, courts have also awarded moral compensation for mental and emotional suffering in acknowledgment of the effects of illegal land dispossession on indigenous peoples.

Adequate compensation should aim to counter the full effects of native land dispossession. As observed by the court in Adong Kuwau (1997), *'an aborigine will not be in the same category as the other Malaysian citizen, for an aborigine has special attachment to his land and without any skill, education or way to live as the other communities, he would find it very difficult, if not impossible, to relocate himself and start afresh'*. While resettlement and relocation are often necessary in large-scale developmental projects, the State has to take into consideration not only the immediate effects of any relocation or resettlement but the long-term sustainable development of Orang Asli communities within these settlements (Subramaniam, 2007; Cheah, 2004a).

Resettlement in modern plantations and estates, even when consented to by the Orang Asli, becomes meaningless without training the Orang Asli in modern ways of farming. Resettlement should also seek to preserve the cultural and social framework of the Orang Asli, with sufficient land to cater for their community's activities. As stressed in Operational Policy 4.12 of the World Bank that lays down guidelines on resettlement, resettlement land should be in '*productive potential, locational advantages, and other factors at least equivalent to the advantages of the land taken*' (www.worldbank.org). This seeks to make a better impact of resettlement on the lives of Orang Asli.

4.4.5 Consideration of Heritage

As mentioned in Sagong Tasi (2002), Orang Asli land rights consists of the right to move freely about their land without any form of disturbance or interference, and to live from the produce of the land itself. However, they cannot possess the ownership of the land.

This difference stems from the communal nature of native land. The land belongs to the community as a whole, not separately to the individuals within the community. This communal nature of Orang Asli native land also has a generational aspect as pointed out by Justice Chin in *Nor Anak Nyawai & 3 Ors v. Borneo Pulp Plantation Sdn Bhd & 2 Ors* Suit No. 22-28-99-I [12th May 2001], when he drew attention to the land value lost to future generations when indigenous land is compulsorily acquired from the community. This communal nature of Orang Asli native land varies from tribe to tribe and community to community. Justice Brennan of the Australian High Court, cited by the Malaysian High Court in this case - *Sagong Tasi* (2002), recognised that while '*Native title belonged to the aboriginal community as whole, individuals within the community could by its laws and customs possess proprietary individual rights over their respective parcels of land. The distinguishing factor between Native title and modern registered title is that while Native title is recognised and given effect by*

the common law of the modern legal system, its content is defined by the particular indigenous community's own laws and customs' (Pareroultja & Ors v Tickner & Ors (1993) 117 ALR 206 at p. 213, cited by Adong Kuwau, 1997). The legitimacy of dividing communal land into individual plots during the valuation process depends on the indigenous populations own value system.

4.4.6 Cultural and Spiritual Element

Orang Asli depend on their ancestral land not only for their economic survival but for their cultural and social identity. For example, the Temuan at Kampung Bukit Tampoi have a belief system distinctly tied to their land. Before any activity is carried out on a specific plot of land, the ritual of 'adat tanah' or land ceremony, in which certain spirits are called upon, has to be performed. The spirits of the Temuan dead, known as 'penunggu' or spirits-in-waiting, are said to be tied to the land and guard their community. These spirits' help and blessings are sought by the Temuan in all daily matters, from health to weather problems (Sagong Tasi, 2002). Market-value compensation under the Land Acquisition Act, 1960 does not give full expression to the cultural and spiritual significance of native land. The court in Adong Kuwau (1997), noted how '*native land is a far cry from a titled land*', its spiritual and cultural value making it an unsuitable subject for the market-value test which applies in determining the amount of compensation.

This is notwithstanding that European influence in Australia is set in a process of cultural and spiritual destabilizing which according to McKay (2000:20) as, '*...dispossession, the misery, the cultural carnage and the impression that our society and its government have visited on aborigines, unwittingly or not*'.

4.4.7 Sustainable Development

The Canadian court in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 153 DLR (4th) p.193, found that State objectives in encroaching on indigenous land rights are limited by their fiduciary duties, *'The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims are legitimate objectives'*.

The limit to such developmental objectives can be found in the concept of the fiduciary itself, as conceived in company and trust law, which requires the fiduciary to exercise its discretion in the interest of its beneficiaries. This is further supported by the Constitution's specific provisions toward Orang Asli which make continual references to their welfare (Federal Constitution, 1957). Developments with no direct or real benefit to the Orang Asli such as those which worsen the environment would not fulfil this test (Nicholas, 2001). The Orang Asli have been repeatedly loss off their land in the name of development, the benefits of such development are never or seldom enjoyed by their communities. The State as fiduciary should bear the burden of proof of proving that developmental projects affecting Orang Asli native land are beneficial to the Orang Asli by producing evidence such as project details or environmental assessment results (Nicholas, 2001; Endicott & Dentan, 2004; Cheah, 2004a; 2004b).

As Sperling (1997:42) saw an inhibiting moves towards sustainable development in Australia, stated that,

'...historical conceptions of property rights and the proper role of government became one of the central pillars upon which English and Australian law was based. The suggestion that there may be an alternative way of ordering and governing the relationship between humans and land. Therefore, fundamentally challenges the correctness of hundreds of years of thought, experience and law'.

4.4.8 International Consultations

In view of international indigenous rights, the term 'fiduciary' has often been used to define the relationship between States and indigenous peoples. However, its exact content and application has received less attention. The Canadian courts held that State encroachment on indigenous beneficiaries is only permissible when the State has a 'compelling and substantial' objective which is consistent with the nature of the State's fiduciary duty and only then to the extent necessary to achieve this objective (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385). Canadian jurisprudence on the State's fiduciary duty towards aborigines is based on Canadian constitutional provisions (*Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, 153 D.L.R.).

In applying a similar methodology into the Malaysian context, the content of the Malaysian State's fiduciary duty in relation to the Orang Asli will have to be ascertained by reference to the Malaysian constitution. As mentioned earlier, the Federal Constitution empowers and obliges the State to take positive action promoting the welfare of the Orang Asli. It is silent as to how Orang Asli welfare is to be promoted, via 'paternalism or empowerment' (Cheah, 2004b). This case submits that in line with developments on the international level, such a fiduciary duty should be conceived as one that seeks to empower rather than to nullifying the Orang Asli. Constitutional history supports this view. The intent of Orang Asli in seeking group-specific constitutional guarantees was to preserve and maintain their presence in the political discourse of Malaysia. To treat them as 'dependent wards' would exclude them as active participants in Malaysia's political discourse (Endicott & Dentan, 2004; Cheah, 2004a; 2004b).

Fiduciary duties as interpreted above will require the active participation of Orang Asli in determining their interests and welfare rather than the imposition of the State's notions of welfare. This requires the State to carry out good faith consultations with Orang Asli communities. Guidance as to how such a

meaningful dialogue between State and Orang Asli communities can be achieved and can be obtained from international instruments. These instruments, which have recognised the importance of such procedural consultative safeguards, though with different underlying aim whether for self-determination and sustainable development. In many countries such as New Zealand, Canada and the Phillipines, development decisions that impact indigenous populations are made pre-conditioned on indigenous consultation and dialogue (UN Draft Declaration, 1994). The UN Human Rights Committee has also emphasised the need for involving indigenous populations when impacting their rights to culture (HRC Report, 1994).

4.5 THE FORMS AND MEASUREMENTS OF ABORIGINAL COMPENSATION

Aboriginal compensation mechanisms reveal preferences and social values. For the aborigines, compensation is primarily about social process and prioritizing certain relations – people and land (Smith, 2001). Compensation can consist of material and takes many non-material forms i.e. it may take the form of ‘an apology’ from people or from government (Myers, 1986). For example, the action taken by the Australian Government for formally apologizing to the indigenous peoples of the land for the injustices perpetrated against them for more than 200 years (The Star, 20th February, 2008). In instances of serious inter-group conflict over certain actions, settlement has been reported in the form of a series of exchanges of small areas of territory between particular groups. The transaction indicated a resolution of conflict, and not involved so much of transferred of ownership of land (Kesteven & Smith, 1983). In addition, according to Mah (1995), the entitlements to compensation under the Native Title Act 1993 (Commonwealth) are entitlements to money, non-monetary compensation for example grant of land, but this subject to negotiation between government and native people.

According to Smith (2001), the form that compensation takes is directly linked to the nature of the provoking action or incident; to the extent of affects to people; and to the criteria of social distance involved. Smith (2001:17) summarised this compensation as;

- *'Action oriented and physical perhaps in the form of punishment and sanctions involving regulated civil revenge, injury or death;*
- *Socially based as in process of segmentation, expulsion or self-imposed absence;*
- *Material and monetary*
- *Religious and spiritual*
- *Symbolic and performative e.g. through apology'*

Perhaps the critical feature of aboriginal compensation is the process-based system in which the relationship between people, the land, law and the 'dreaming'. The mechanism of compensation is used to affirm the value of that connection. This to achieve defined social purposes, to reaffirm relationship of mutual equivalence and demand sharing (Chase, 1980); to bind individuals into groups (Kickett, 1999; Maddock, 1984); and to confirm ownership of the land (Chase, 1980; Kickett, 1999; Maddock, 1984; Martin, 1995; Peterson, 1991).

Compensation processes reveal spectrums of value with multiple referential. For example, in evaluating an effect for compensatory purposes, consideration is given to the utility value of the thing and relationship involved; the extrinsic value as means to something desirable; the inherent social value; the moral and authoritative value derived under law; and its economic value (Smith, 2001).

With regards to the measurements of compensation, Native Title Act 1993 (Commonwealth) provides two measures of monetary compensation. Firstly, compensation must be on 'just term' (Section 51) or it may that the principles contained in legislation which would entitle ordinary title holders to compensation for the act in question be applied to native title land, whether or not on just terms (Section 51(3)). Secondly, applies to acts done onshore for which compensation is payable under existing legislation to ordinary titleholders. Both these measures of

compensation, however subject to the commonwealth's overall duty to provide just terms for the acquisition property (Mah, 1995).

Broadly, a compensation measurement process can be used to:

- Restore and maintain environmental productivity and reproductive capacity (Smith, 2001; Peterson, 1991; Memmot, 1979)
- Protect the health and reproduction of people and land (Smith, 2001; Chase, 1980)
- Re-establish economic exchange relationship (Gray, 1994; Weiner, 1992; Peterson, 1991)
- Restore and safeguard religious rights, interest and responsibilities (Smith, 2001; 1981; Kickett, 1999; Myers, 1986)
- Confirm the authority of group and individuals for areas of land (Smith, 2001).

Perhaps, the preferred primary outcome of all forms of compensation is to secure the appearance of final compensation in social and spiritual domains of indigenous peoples (Smith, 2001).

4.6 RECOGNITION FOR COMPENSATION OF ORANG ASLI NATIVE LAND

Generally, it was agreed that the determination of Orang Asli native land compensation will be based on an assessment of the specific traditional land rights and interests, and on the specific effects of an activity on their traditional land. In order for Orang Asli native land to be recognised by the common law, the 'facts' of Orang Asli native land have to be determined through translation from one cultural domain to Malaysian common law. It is important, therefore, to ascertain what appear to be the current limits of that common law translation. The

translation problems involved are not new; there is a long experience of them under the Aboriginal Peoples Act, 1954.

Many of the same difficulties are arising in the native title discussion. As accepted by Justices Deane and Gaudron in *Mabo v Queensland* (1992) 175 CLR 1 (*Mabo*, 1992), it is correct to assume that the traditional interests of the native inhabitants are to be respected even though those interests are of a kind unknown to English law. Justice Brennan also argued that the general principle that the common law will recognise a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title (*Mabo*, 1992). The extent of that exception is uncertain and still being explored (Smith, 2001). As for Orang Asli native land, the compensation will require an innovative jurisprudential approach that acknowledges the Orang Asli native land. Therefore, legal and comparative studies are required to equate Orang Asli native land compensation rights and interests either to Western property law concepts and precedents, or to market land valuation methodology (Cheah 2004a; 2004b; Smith, 2001).

The conventional principles of special value to the owner or solatium will be of little direct applicability, if any, in assessing the value of Orang Asli native land. Freehold market value does not provide a notional limit for that culturally-based value nor for the losses of past, current and future generations (Smith, 2001).

The economic, social, material and spiritual domains of Orang Asli life are seen as indivisible and fundamentally connected with land. Orang Asli principles and processes of compensation are built upon the same paradigm. Orang Asli native land compensation is best viewed conceptually as a multi-dimensional package whose form and purpose reveal the distribution of social, legal, relations, entitlements, and value preferences. The new recognition space for Orang Asli native land compensation will expand and contract as courts deliver their judgments and parties negotiate outcomes (Cheah, 2004a). At the heart of that

space, however, one principle should remain constant: that Orang Asli native land constitutes a proprietary right, and its extinguishment amounts to an acquisition of property (Sagong Tasi, 2002).

Determining the value of Orang Asli native land for the purposes of compensation will focus on what kind of property right it is and, in particular, what constitutes 'property', 'loss', 'extinguishment', 'adequate' and 'fair'. There will continue to be contending evaluations of these concepts, in legal, economic and other forums across the world, and a more socially oriented vision of entitlement is starting to emerge (Gray 1994). Such a trend is well suited to creating a recognition space, and facilitating practical outcomes for Orang Asli native land compensation. Common law recognition and valuation of native land for the purposes of compensation will require an expansion of the borders of the legal imagination (Macklem 1991). Hopefully, with the common law development of Orang Asli native land that is now taking place, Orang Asli can do more than simply bring their 'special knowledge and insights or traditional knowledge' to apply in native land compensation cases.

4.7 CURRENT THINKING ON THE VALUATION APPROACHES

In consideration of a basis of compensation for acquisition of native land, there is always a tendency to begin by applying conventional methods of land valuation. However, according to Humphry (1998) a 'more flexible approach' is required which combined principles of valuation and the assessment of intangible factors such as general damages. Compensation for damage to native title will include monetary and non-monetary components or, as suggested by Whipple (1997), 'material' and 'non material' components.

The material aspect is the loss of or effect upon the acquired land. Generally, the owner of compulsorily acquired land is entitled to the higher market value of the land (*Spencer v Commonwealth* (1907) 5 CLR 418) and the value of the land to

the owner (*Pastoral Finance Association v Minister* (1914) AC 1083). The former focuses on a likely arms length agreed sale price assuming a willing buyer and a willing seller. The latter focuses upon any special value to the owner. These general principles have been refined and developed for the purpose of valuing land which may not be capable of sale or in relation to which there is no apparent market and also to value lesser interests such as leases, easements and licences (Whipple, 1997; Humphry, 1998).

However, the market value which may be attributed to a freehold title to land remains the starting point of any attempt to compensate for loss of an interest in land. It is likely that these principles are being applied or developed in the determination of compensation for loss or impairment of native title rights (Smith, 2001). In this context, the inalienability of native title has not posed a great difficulty. Although the determination will involve assessing the value of the land to the native title holders, the market value of a freehold title to the same land will be a benchmark (Smith, 2001; Boyd, 2000). This approach has been adopted by the Privy Council, the High Court (in relation to an acquisition of land from traditional owners in New Guinea) and by United States courts (Keon-Cohen, 1995).

The essential nature of land to indigenous peoples is both metaphysical (for example, spiritual and cultural) and material (Small, 1997). Hence, any assessment for compensation needs to consider both dimensions. Unfortunately, until to date there is no court decision that provides for the payment of compensation for elements of cultural or spiritual value (Sheehan, 1997). Whipple (1997) suggested that the assessment of spiritual rights is outside the scope of the formal object of the discipline of valuation and should, more appropriately, be assessed by the Federal Court. Sheehan (1998), on the other hand, argued that special value to the owner and solatium can be constructed to cover compensation for the loss of access to ceremonial lands, spiritual deprivation and loss or perceived loss of social environment. In addition, the

decision of the Canadian Supreme Court on 11 December 1997¹⁶ has explored the concept that indigenous peoples in Canada have not only a constitutional right to own their traditional lands but also to use them in a largely unrestricted manner. Nevertheless, some likely implications of the Orang Asli native land issues for valuers are:

- the need for reassessment of existing methodologies to cater these developments;
- the need to develop new valuation methodologies to determine appropriate compensation;
- the evolution of new case laws to interpret the Aboriginal Peoples Act, 1954 and the Land Acquisition Act, 1960 with regard to the property rights of Orang Asli; and
- the creation of new relationships between the legal system and the valuation profession.

It is suggested that this may lead to the development of a 'new arm' of land law specifically for indigenous property rights which can decide simultaneously on matters of both federal and state laws. It is also anticipated that valuers will work in partnership with other disciplines such as ethnoecological and ethnographic consultants and heritage consultants (Sheehan, 1998).

Boyd (2000) proposed that valuers can assess the appropriate range of values of partial and co-existing property rights of indigenous people. He comments on two issues that should be considered; the sum of the value of the partial rights does not necessarily equal the market value of the total property and; co-existing property rights usually have a detrimental effect on the party property rights, thus, an additional co-existing right can reduce the value of an existing right. According to Fitzgerald (1997), some native title rights may co-exist with the

¹⁶ Delgamuukw v Canada (Supreme Court of Canada, No. 23799, 11 December 1997) and Delgamuukw v British Columbia (1993) 104 DLR (4th) 470 as stated in Asch, M. & Bell, C., 1994), *Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of Delgamuukw*, Queen's Law Journal, Vol. 19(2), 1994, p.549.

rights granted to the 'pastoral lessee' over the same track of land. The same situation also happened in Malaysia where the Orang Asli Reserves or Areas sometimes co-exist with 'newly alienated' rights of land of private company.

Whipple (1995) identifies the three appropriate valuation approaches as:

- Inference from past transactions
- Simulation of the most probable buyer's price fixing calculus
- Normative Modeling (Contingent Valuation)

These methods are discussing in-detail in the following paragraphs.

4.7.1 Inference from Past Transactions

This relies on evidence from relevant market activity and infers value from similar scenarios. If factual market evidence is used, this approach consequently produces the most appropriate results (Boyd, 2000; Whipple, 1995).

Since Orang Asli native land is of forest nature, valuation by reference to the market prices of forest should be considered by the valuers. Because of the similarity between actual forest and Orang Asli native land, it could be an advantage to adopt forest valuation for Orang Asli native land valuation; in principle, both types of lands are non-titled.

Many goods and services derived from tropical forest land uses are traded, either in local or international marketplaces, including wood products (timber, pulp and fuel), non-wood forest products (food, medicine and utensils), crops and livestock products, wildlife (meat and fish) and recreation. For those products that are commercially traded, market prices can be used to construct financial accounts to compare the costs and benefits of alternative forest land use options. In some cases, it may be necessary to adjust market prices to account for market.

4.7.2 Simulation Of The Most Probable Buyer's Price Fixing Calculus

This approach is appropriate where direct market evidence is not available but market based scenarios are known. When the identity of the potential buyers is established, investigation is made to elicit the way these buyers fix the price, and this is considered a market-based approach to price estimation. In this approach, probability is a major component in simulation and probability distributions should be utilised in arriving at expected value. The success of this approach depends on the existence of offers from potential buyers (Whipple, 1995).

4.7.3 Contingent Valuation (CV)

CV elicits individual expressions of value from purchasers for specified increases or decreases in the quantity or quality of a non-market good. Most CV studies use data from interviews or postal surveys (Mitchell & Carson 1989). Valuations produced by Contingent Valuation Method (CVM) are 'contingent' because value estimates are derived from a hypothetical situation that is presented by the valuer to the respondent. The two main variants of CV are open-ended and dichotomous choice formats. The former involves letting respondents determine their 'bids' freely, while the latter format presents respondents with two alternatives to choose from. Open-ended CVM format typically generates lower estimates of willingness to pay (WTP) than dichotomous choice designs (Bateman *et al.* 1995).

Carson (1991) argued that the theoretical foundations of a CVM are firmer than those of other valuation techniques, because of its direct measures from survey. Moreover, CV is the only generally accepted method for estimating non-use values, which are not traded in marketplaces and for which there are no traded substitutes, complements or surrogate goods, which can be used to attribute values. On the other hand, because no payment is made in most cases, some

observers question the validity of the stated preference techniques. Critics argue that CVM fails to measure preferences accurately and does not provide useful information for policy (Diamond & Hausmann, 1994). Even practitioners accept that poorly designed or badly implemented CV surveys can influence and distort responses, leading to results that bear little resemblance to the relevant population's true WTP. Much recent attention has focused on overcoming potential sources of bias in CVM studies. To solve these difficulties, it may involve careful design and pre-testing of questionnaires; rigorous survey administration (Mitchell & Carson 1989); and sophisticated econometric analysis (Bateman *et al.* 1995) to detect and eliminate biased data.

According to Whipple (1995), in applying this approach, the valuer tends to make a series of assumptions on how the market should behave. Among the assumptions concerned are the types of interested buyer, market forecasting, decision criteria, alternatives available and availability of information as desired. CVM is the least accurate approach as it is necessary to make numerous assumptions (Boyd, 2000). This does not mean that CVM should not be used, because in practice, market information always is not readily available. If this situation is existed, CVM might be the answer.

The use of conceptual markets under CVM is the most widely used approach in the estimating of non-use value. One reason for this is the perception that CVM is the only means by which passive or non-use values can be estimated (Adamowicz *et. al.*, 1994; Perman *et.al.*, 1996). This general rule has also applied to indigenous cultural values. Another reason for preferring CVM is non-use data collected with this approach is easier to obtain than data collected using a behaviourally based approaches (Adamowicz *et.al.*, 1998).

4.8 CHALLENGES IN THE VALUATION OF ORANG ASLI NATIVE LAND FOR ACQUISITION COMPENSATION

The challenges derive mainly from the need to identify the exact nature of the rights of Orang Asli on their native lands. Also, they flow from the types of compensation that can potentially be considered. These challenges are discussed in detail in the following paragraphs.

4.8.1 Issue Of Land Rights

Generally, rights can be viewed either as legal rights and/or as economic rights.

Legal rights - Legal rights arise as a result of formal arrangements, including as a result of constitutional, statutory, judicial rulings or as part of an organised system of indigenous laws, and informal conventions and custom. The nature of property rights will affect the way resources are utilised and the net social benefit enjoyed by a community from their resources. The position of law has been such that the Orang Asli do not have legal rights over their traditional lands. This situation, however, can change if the Sagong Tasi (2002) case finally gets its endorsement. This case is a landmark case in the sense that the court has, for the first time, recognised the legality of rights of Orang Asli native lands, although at this date this case is pending appeal to a higher court.

Economic rights - Economic rights depend on the enforcement of legal rights and consist of the right holder's ability to enjoy the benefits from that holding. Economic rights may include the ability to enjoy benefits and to meet responsibilities, either directly through consumption and cultural appreciation or indirectly through exchange, including barter, sale, rent, inheritance and gift giving.

Orang Asli rights and interests - Orang Asli rights and interests recognised under the Aboriginal Peoples Act, 1954 defined the range and type of privileges and responsibilities holders of Orang Asli native land rights possess. The special or unique features of Orang Asli native land affect value and the way valuation might be estimated. Pre-existing Orang Asli rights and interests differ from common law concepts of title in land (Nik Yusof, 1996). Orang Asli native land rights are uniquely 'of their own kind', in that the rights provide 'closely intertwined' or joint, material and cultural benefits, where a community's cultural benefits are specific to place (Awang, 1996; Nik Yusof, 1996). According to Sutton (1998), differing degrees of rights and interests in land have been characterised as core and contingent. The Court decision in Sagong Tasi (2002) which recognised the Orang Asli land rights will, if endorsed, affect the valuation of compensation for Orang Asli native lands in near future.

4.8.2 Monetary v Non-Monetary Compensation

The benefits or choices available to an individual or community are not without limit. Indeed if there are, then there would be no conflict over resource use, nor would there be any need to make choices between different items, and there would be no relative differences in the value of items. Value, then, is the result of scarcity and the need to make choices. The choices available to an individual or a community are constrained by the individual's or the community's budget. Economic value indicates the relative preference for the benefits obtainable from the ownership of an item relative to the benefits obtainable from ownership of some other item and the willingness to go without something in order to obtain more of something else.

Confusion about what is meant by the term 'value' has created difficulties in its application to Orang Asli native land rights. Many think of value solely in terms of market or monetary value, and often attach intrinsic value to money itself. While market prices may provide a low cost estimate of the relative value society

places on the benefits obtainable from different items, neither money nor the market are necessary for value to exist. The lack of trade in Orang Asli native land rights does prevent Orang Asli from treating the benefits of their native land rights as economic goods.

Based on Sections 11 and 12 of the Aboriginal Act, 1954 compensation for acquisition of Orang Asli native land is subjected to payment of productive trees and buildings on the acquired area only. This monetary compensation is mandatory under the existing law, but does not cover payment for loss of Orang Asli ancestral land. Additionally, as being practised in Malaysia, the state government does have a package of non-monetary compensation over and above the requirement of payment for loss of trees and buildings. The non-monetary package is *ex-gratia* in nature, calculated based solely on the discretion of the state and is not uniform among state government. The components of non-monetary compensation are normally inclusive of resettlement programme (which can come in the forms of, for example, a house and 2.5 hectares of agricultural land) and if the state is generous enough, this will extend to providing monthly allowances (e.g. RM500 per month) to each family for such a duration until the agricultural land is ready to produce. In relation to this, no valuation approach is needed to determine compensation as the existing structure is not paying for loss of native land. Even though the calculation of compensation for loss of trees and buildings is always referred to a valuer, no technical approach is used to arrive at the total compensation. The calculation is a matter of applying the value per tree from a uniform value list prepared by the Valuation and Property Services Department, Ministry of Finance Malaysia to the number of trees involved.

4.8.3 Legal Framework – Federal Constitution, 1957; Land Acquisition Act, 1960; Aboriginal Peoples Act, 1954

Government intervention over land development is exercised through the Land Acquisition Act 1960 and via Article 13 of the Federal Constitution 1957. The latter stipulates that no person may be deprived of property except in accordance with law and that no law may provide for compulsory acquisition or for the use of property without adequate compensation. With regard to land acquisition by the Federal Government, Article 83 sets out detailed procedures for land compensation as stipulated by the Federal Constitution 1957. Therefore, using the power contained in the Land Acquisition Act 1960, the government can acquire land for public purposes with adequate compensation as determined under Section 3 of the Act. Adequate compensation, therefore, as stated under the provision of Article 13(2) of the Federal Constitution refers to the amount of compensation which is decided, considering all principles stated under the First Schedule of the Land Acquisition Act 1960.

Even though the State Authority, under the provision of Land Acquisition Act 1960, has the power to take possession of any private land, it does not allow the authority to violate one's right onto their private properties (Omar & Ismail, 2005). Unfortunately Orang Asli native land rights are not considered as private properties, but rather only as tenant-at-will. Under the Aboriginal Peoples Act 1954, the government perception towards Orang Asli native land is no better than of a state land. Based on these reasons, the acquisition of Orang Asli native land is not made under the powers of Land Acquisition Act 1960. The Act which contains the provision to compensate the land but, the compensation payable to Orang Asli is being only based on the provision of Sections 11 and 12 of the Aboriginal Peoples Act 1954 for loss of productive trees, activities on land and buildings. Therefore, to provide better treatment for acquisition compensation of Orang Asli native land, the land rights issues need to be resolved.

4.8.4 Negotiation of Compensation

If the compensation awarded to Orang Asli native land includes a property right transmitted across time to succeeding generations, then compensation for ongoing effects must, in fairness, also be made available to those future generations. If the extinguishment of Orang Asli native land constitutes cultural loss of 'property for grouphood', as Moustakas (1989) points out, future generations are unable to consent to current transactions that threaten their existence as a group. For that reason, compensation should include a loading for inter-generational equity. The alternative to a current loading is that compensation could be staggered by developing conjunctive conditions for its assessment over the period. The challenge would be how to conduct the assessment?

Staggering the negotiation for compensation might not satisfy the needs of any party about the exact total of compensation, especially when that amount could effectively constitute a final compensation. On the other hand, such an approach would have the advantage that *"the total amount of compensation could be more directly linked to actual impacts (positive or negative); be informed by ongoing impact assessment; and be distributed to the persons actually experiencing impacts over the life of an act. It might also ensure that native title would have benefits remaining, to enable them to deal with the later 'closure' of a resource development project, and the need to re-establish access to, and use of, the land involved"* (Altman & Smith, 1994:96).

For the parties involved in negotiation and mediation, as opposed to court litigation, the consideration of Orang Asli native land compensation is becoming the vehicle for developing other kinds of social and economic relationships. In the process, contending values and objectives have to be settled to mutual satisfaction.

4.8.5 The Most Reliable Valuation Approach?

Boyd (2000) believes that the approaches discussed in paragraph 4.7 are the most appropriate approaches to use to arrive at reasonable property value of indigenous peoples. He recommended that the valuer select the approach based on the progression of the three approaches, from inference to simulation and to CVM as to suit the valuation exercise. How does this translate to the situation for Malaysia? For Orang Asli native land, where changes in property rights exist, it is crucial to differentiate between market sentiment and reaction of the community. Further, no record of transaction of Orang Asli land prevails in the market. This is because land ownership for Orang Asli reserves or areas have never been granted by the government except for agricultural projects under resettlement programme where the land title is to be granted after full settlement of the loan for land development by the respective Orang Asli. Thus, inference of market evidence cannot be applied in valuing compensation of Orang Asli native land. Simulation of the most probable buyer's price fixing calculus approach seems also out of question because the identity of the potential buyers cannot be established. CVM is the only approach for valuers in Malaysia to apply in determining the compensation for Orang Asli native land provided that the land right issues of Orang Asli native land are overcome.

However, issues arise on how principles of valuation developed in the context of ordinary title land can apply to Orang Asli native land. A number of important quantification issues which are left open for discussion. Firstly, can Orang Asli claim compensation for the loss of their spiritual connection with their land? Established principles of valuation under compulsory acquisition statutes allow compensation to be paid for the 'special value' of the land to the owner of ordinary title land (*Pastoral Finance Association Ltd v Minister* [1914] AC 1083). However, this special value is usually limited to value arising from some special, or the location, of the land rather than sentimental value (Brown, 1991).

Whether cultural significance qualifies as a special feature of the land, even though sentimental of significance is not is a difficult question (Mah, 1995). According to Brennan J, in *Mobo* (No. 2) at 70, *'the court has, in the context of standing to sue, at times drawn a distinction between mere emotion concern and cultural concerns'*. Whatever the established principles, it is at least arguable that failure to compensate for the loss of connection with land would be to fail to justly compensate for the extinguishment of Orang Asli land.

A second issue is on the impact of the inalienability of Orang Asli native land on its value for compensation purposes. Under present laws, Orang Asli native land cannot be alienated except for reserves to the Federal. If the base amount for compensation is the market value of the land, what happens when there is no market because Orang Asli land is legally disabled from selling? Ordinary compulsory acquisition principles deal with the valuation of compensation where there is an absence of buyers, save for the relevant statutory authority compulsorily acquiring the land (Brown, 1991 citing the *Raja* decision [1939] 2 All ER 317). Where there is the case, compensation is to be calculated with regard to the land uses as proposed by the acquiring body (Mah, 1995). This principle could be applied to Orang Asli native land, although there are difficulties reconciling it with the principle of compensating Orang Asli native land for the loss of their special attachment to land. The final issue remained open for Orang Asli native land is on the role of indigenous valuation systems (if such exist in Malaysia) to measure the compensation. Such systems are very much an anthropological issue which is needed to be explored by both the valuers and anthropologists in Malaysia.

The possibility of using other approaches, including Hedonic Pricing, Travel Cost, Ordinal Ranking, and use of a Non-Monetary Numeraire of Value are reviewed in Campbell (1999a). Perhaps, others have suggested by passing the question of valuation through the use of a Coasian Approach (Whipple, 1997; Godden, 1999). Such an approach is unlikely to be applicable in this instance, as

the assumptions for its application to the loss or diminution of native rights do not exist (Campbell, 1999b). Even if Coasian's assumptions were met, it is still doubtful whether it is applicable to a situation in which more than two parties are involved (Baland & Platteau, 1996).

4.8.6 Points of View on Malaysian Experience

Presented in Table 4.2 below are the Malaysian experiences in dealing with the determination of compensation for Orang Asli native lands. The framework by Burke (2002) has been adopted for the layout.

Table 4.2
Malaysia Experiences in Determination of Compensation

Principles	Evidence	Calculation	Malaysian Experiences
Insult	<ul style="list-style-type: none"> The formal determination of native title rights. (If no determination) the formulation of native title rights determined in the compensation hearing. 	<ul style="list-style-type: none"> Based on the most affected individual. Minimum based loosely on non-economic loss for injury to homes in tort cases. Maximum on the income producing value of total figure. Individual to group adjustment. 	<ul style="list-style-type: none"> Pilot study¹⁷ showed that Orang Asli are not really insulted by acquisition, as long as the compensation packages offered by the government are reasonable. For example, compensation packages for each family of Orang Asli affected under the Privatisation Project of Bukit Lanjan Township were offered: 1 unit bungalow house; 1 unit double storey terrace houses; 1 unit low-cost apartment for each child above 15 years old; RM45,000 worth of Trust Fund unit and, a monthly allowance @ RM500 for 3 years (period of construction). Due to this attractive compensation package, only 13 families out of 158 families objected the offer.
Disturbance	<ul style="list-style-type: none"> loss of access to sites, hunting grounds, other natural resources; loss of access through the area to 	As above	<ul style="list-style-type: none"> Based on <i>Adong Kuwau</i> case, a total of RM38 million was awarded to the community of Orang Asli due to loss of hunting grounds and traditional resources. This payment is for loss of income so affected, for

¹⁷ The pilot study carried-out by the researcher to 35 Orang Asli in Perak (Tapah and Ulu Kinta) and Desa Temuan, Bukit Lanjan from 10 – 20 April 2006.

	other areas;		<p>a period of 25 years.</p> <ul style="list-style-type: none"> Recognition for disturbance is also given by Article 9(2) of Federal Constitution, 1957 which allows the Orang Asli to roam/subsist in any state forest in the country. Therefore, an acquisition of their reserve will not so affect their traditional life.
Mental Distress	<ul style="list-style-type: none"> Feelings about the loss of homeland; concern about sites and the proposed use of the country; concerns about future generations; Expert anthropological evidence on the above. 	As above	<ul style="list-style-type: none"> To overcome mental distress of Orang Asli community, the government has implemented the following policy for Resettlement Program: appropriate infrastructure and amenities at resettlement location; motivation programme for Orang Asli to adapt to new environment and life; special and systematic agricultural projects to ensure stable income for Orang Asli at present and in the future and, land ownership for them after the development cost of such project is fully settled by the respective Orang Asli.
Economic Value	<ul style="list-style-type: none"> justification of the selection of analogy (freehold, leasehold, profit a prende etc). Expert evidence of valuation of the market value of the chosen analogy, considering the highest and best use. 	The straightforward notional figure similar to special damages.	<ul style="list-style-type: none"> Attempts have been made by the Ministry of Rural Development to alienate land to each family of Orang Asli in Malaysia. If approved, each family will be entitled to 2.5 hectares of land which comprises 2 hectares of agricultural land, 0.4 hectare of orchard land and 0.1 hectare of housing plot. The site may or may not be at the same site where the existing Orang Asli being inhabited. In <i>Sagong Tasi</i> case, the Court has ruled that the land rights of Orang Asli Reserve are recognized as similar to private titled land. But, on compensation, the Court still does not consider the Land Acquisition Act, 1960 compensation structure applicable to Orang Asli land. The case is now pending appeal at Court of Appeal. If the previous decision is sustained, this will give a full recognition of Orang Asli land

			rights and, compensation for the market value of land will be materialised.
Younger Generation	<ul style="list-style-type: none"> • Age composition of the native title group, current instruction of the younger generation in traditional laws customs relating to the area; • The typical time span of each generation based on genealogical records of the native title group; • Expert evidence of current long-term return on secure investments. 	An estimation based on projected real returns using the compound interest formula and making allowances for inflation and taxation.	<ul style="list-style-type: none"> • Under the present policy, the government is encouraging the Orang Asli to leave the forest and live near to other communities. By this move, it is easy for the government to provide education, healthcare and, development to Orang Asli that have long been benefited by other communities. If they still refuse, their younger generation is encouraged to move out and stay at government school hostels to ensure proper education is given to them. • Under 'Program Pembangunan Minda' (Mindset Development Program) by JHEOA, the younger generation is trained to adopt real world challenges and integrate with other communities. • The idea is to avoid political marginalisation for younger generation of Orang Asli as experienced by their older generation (if any).

Source: Adopted Burke (2002) for layout.

4.9 NATIVE TITLE ACQUISITION AND COMPENSATION - PRACTICES OF AUSTRALIA

The bases for Australia as model for compensation framework of an acquisition for Orang Asli native land are as follows:

- Land rights for native title had long been established and legalized in Australia via Native Title Act, 1993 (Commonwealth). This gave Australia a better position and forefront in Asia Pacific rim in recognizing indigenous property rights in her legal systems.

- The Torrens System for administration of lands in Malaysia was first adopted from Australia. Unfortunately, under British colonial the Orang Asli native land was not registered under the stipulated system. This makes Orang Asli native land is left behind and now being considered as tenant-at-will of state land. In Australia, recognition of indigenous property rights have long been established and accepted even before the enforcement of Native Title Act, 1993 (Commonwealth) whereby the Act is divided into 'past acts' and 'future acts'. The 'past acts' dealing with native title that occurred prior to 1st January 1994.
- Native Title Act, 1993 (Commonwealth) promotes considerably well structured compensation framework for compulsory acquisition of native title in Australia. The act proposes legal procedurals of acquisition for native title as well as the compensation framework for payment of 'just compensation'. On the contrary, Malaysia has yet to have acts, rules, guidelines or systems in place for acquisition of Orang Asli native land.
- Many researches in indigenous subjects have been carried out by institutions, NGOs and universities in Australia. These researches have empowered the management and administration of the native title and indigenous peoples in Australia as compared to Malaysia.

4.9.1 The Discourse about Compensation under the Native Title Act, 1993 (Commonwealth)

At this point, this research tries to avoid becoming obstructed by the technicalities of the Act. Therefore, the researcher will only discuss the meaning and philosophy of the act and its sections in a very precise and comprehensible manner. It is understood that particular aspects of the statutory regime for

compensation have been covered elsewhere in more detail e.g. in Lane (2001); Smith (2001; 1998); Bartlett (2000); Edmunds & Smith (2000); Sumner (2000); Litchfield (1999); Neate (1999); Gobbo (1999); Humphry (1998); and Mah (1995). So, the aim is to explore overview of the key principles and criteria of the Australian compensation framework based on the Native Title Act 1993 (Commonwealth), and to describe the multiple pathways established for securing compensation.

Section 48 of the Native Title Act 1993 (Commonwealth) provides that holders of Native Title are entitled to compensation for acts, particularly dealings in land, which affect native title. These acts are divided into 'past acts' and 'future acts'. In general, a 'past act' occurs prior to 1 January 1994 and, apart from the Native Title Act, would be invalid by reason of the existence of native title as stipulated in sections 227 - 228. On the other hand, section 233 explains that 'future acts' will generally have occurred on or after 1 January 1994 (Smith, 2001; Humphry, 1998).

Apparently, this legislation sets a number of statutory qualifications on the entitlement to compensation, and refers to broad principles of assessment to be followed (Smith, 2001: 22-3). These are outlined below:

1. Compensation may variously be payable to registered native title claimants; native title holders, and/or their prescribed bodies corporate; persons claiming to be entitled to it; persons in the 'native title group'; and possibly to other Indigenous holders of statutory rights and interests over land which have compulsorily converted or replaced native title rights and interests.

2. It is liable to be paid by governments for acts attributable to them unless they have specified otherwise in relevant legislation, and may be payable under negotiated agreements by any third party liable, or agreeable, to pay.

3. It can be paid only once in respect to acts that is essentially the same (s. 49).

4. In respect to acts affecting native title, compensation consists of money unless the person claiming to be entitled to the compensation requests otherwise, whereupon the court, person or body must consider the request and may make a non-monetary transfer which will constitute full compensation for the act (ss. 51(5–8)).

5. In respect to an application for determination of native title, compensation may be requested in a non-monetary form, and such requests must be considered by the other negotiating parties, who must negotiate the proposal in good faith (s. 79(1)).

6. In a non-monetary form, compensation may consist (without limiting other forms) of the transfer of land or other property or the provision of goods or services (s. 79(2)); the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise (ss. 24BE(2), 24CE(2), 24DF(2));

7. It is subject to the overriding constitutional condition that it be on ‘just terms’ (though its content and application to non-compulsory acquisitions remains to be sorted out by the courts).

8. If based on a non-compulsory acquisition of native title rights and interests (for example, a mining tenement to which the non-extinguishment principle currently applies), then compensation may be determined by applying principles or criteria set out in relevant legislation under which the acquisition took place (referred to as the ‘similar compensable interests test’).

9. If particular provisions of the legislation do not meet ‘just terms’ compensation, the legislation provides that additional compensation is payable to ensure the ‘acquisition is made on paragraph 51(xxxi) just terms’; and

10. Compensation is not payable for the extinguishment of native title during the period before the enactment of the *Racial Discrimination Act 1975*.

4.9.2 Summary of Australian Native Title Compensation Framework

Table 4.3 shows the summary of the compensation framework for acquisition of native title in Australia based on the application of the Native Title Act 1993

(Commonwealth). This table is constructed from literature survey explored in this research with regards to payment of compensation for native title.

Table 4.3
Summary of Australian Native Title Compensation

Acts/ Related Rules	Recognition on Native Land Rights	Monetary Compensation	Non-Monetary Compensation
<ul style="list-style-type: none"> • The Australian Constitution Act 1901 • Land Acquisition Act 1989 (Commonwealth) • Native Title Act 1993 (Commonwealth) • Land Acquisition and Public Works Act 1995 • Land Acquisition (Just Terms Compensation) Act 1991 (New South Wales) • Public Work Act 1912 (New South Wales) • Land Acquisition and Compensation Act 1986 (Victoria) • Acquisition of Land Act 1967 (Queensland) • Public Work Act 1902 (West Australia) • Lands Acquisition Act 1969 (South Australia) • Lands Resumption Act 1957 (Tasmania) • Lands Acquisition Act 1978 (Northern Territory) 	<ul style="list-style-type: none"> • Section 51(xxxi) of The Australian Constitution – obligation to pay compensation on ‘just terms’ for the acquisition of the property. • Section 48 of NTA 1993 provides that the holders of native title are entitled to compensation for acts (particularly dealings in land) which affect native title. • Section 51(1) of NTA 1993 provides that native title holders are entitled on <i>‘just terms for any loss, diminution, impairment or other effect of the act on their native title rights and interests’</i>. 	<ul style="list-style-type: none"> • Market value of native title • Royalty payment - exploration activities and project development (Conjunctive Agreement) 	<ul style="list-style-type: none"> • Heritage and cultural loss • Rights to negotiation • Special attachment to land (e.g. loss of spiritual connection to land) • Grant of land • Aboriginal training • Employment • Environmental management • Provision of community infrastructure.

Source: Humphry (1998); Smith (2001); Sheehan (2001).

4.9.3 The Multiple Statutory Pathways for Native Title Compensation in Australia

Figure 4.1 shows five broad ‘pathways’ under the Act through which native title compensation may be secured. These are:

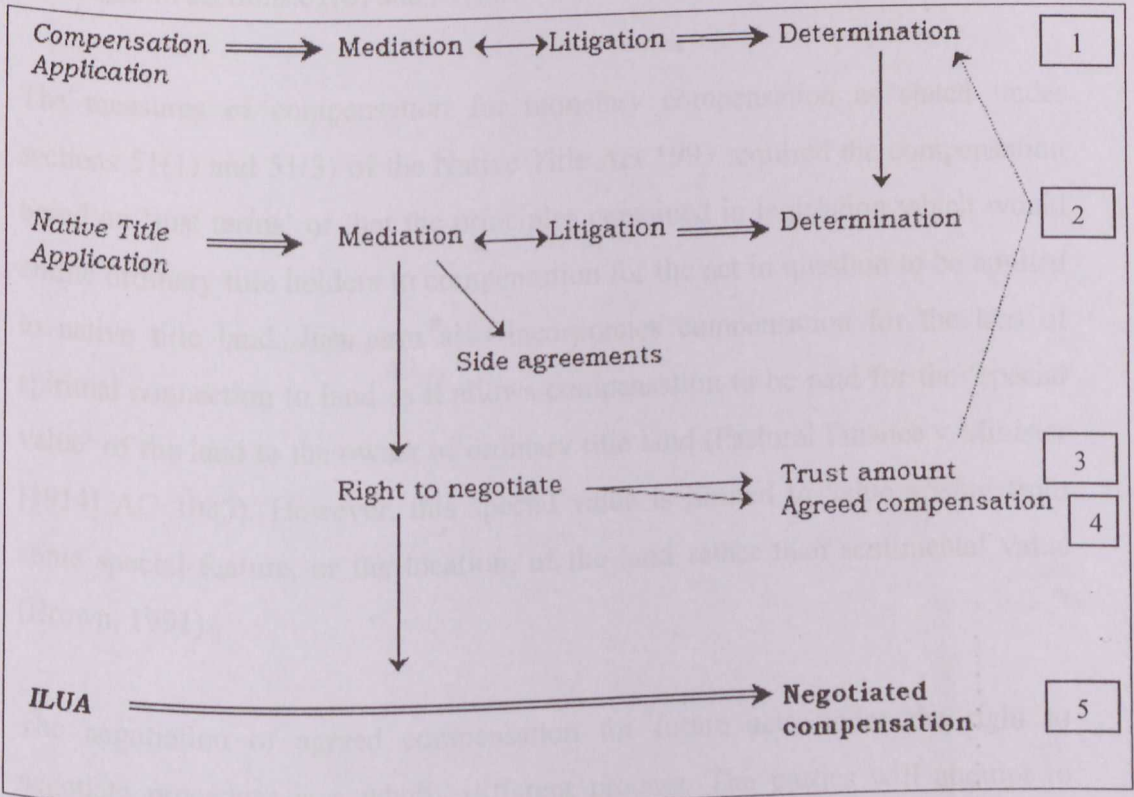
- Path 1: An application for the determination of compensation, which may be either mediated or subject to litigation in the courts;
- Path 2: An application for the determination of native title, which may be either mediated or subject to litigation in the courts;
- Path 3: The negotiation phase of the right to negotiate where ‘agreed compensation’ may be secured;
- Path 4: The arbitration phase of the right to negotiate where an arbitrated ‘trust amount’ may be determined on account of any future liability; and
- Path 5: Under Indigenous Land Use Agreements (ILUAs) in the form of negotiated ‘compensation’.

For the last four pathways, compensation may be secured without a formal application for the determination of compensation being made. While the third and fifth pathways may lead to forms of compensation being secured without native title having been finally determined. The first process i.e. the formal claim for compensation may be commenced without an application for the determination of native title having been made, but can only be secured with such a determination being carried out in parallel by the court.

These different pathways for compensation call forth differently defined native title groups; invoke different principles and criteria, thus its delivery of

compensation in different forms. The extent to which the specific rights and interests comprising native title must be regarded or proven also varies significantly from one pathway to another. Importantly, the term ‘compensation’ is used throughout the legislation, but in different senses, and nowhere is it defined. It is also used interchangeably with other terms such as ‘condition’, ‘consideration’, ‘payment’ and ‘trust amount’—all of which have compensatory characteristics (Smith, 2001; Humphry, 1998).

Figure 4.1
Statutory Pathways to Compensation



Source: Smith (2001).

4.9.4 Conclusion of Australian Practices

As a conclusion for the Australian practices, the assessment of compensation by the Federal Court under the Native Title Act for acts which affect native title will

include both material (monetary) and non material (non-monetary) factors. This will involve an approach which combines principles applied in relation to land valuation and to the assessment of general damages.

The Native Title Act 1993, in addition to defining liability also prescribes relevant criteria to be applied when calculating compensation. The entitlement to compensation under the Native Title Act 1993 is entitlements to money as provided under sections 51(5) and 51(8). Non-monetary compensation, like grant of land can be the subject of negotiation between the parties concerned as illustrated in sections 51(6) and 51(7).

The measures of compensation for monetary compensation as stated under sections 51(1) and 51(3) of the Native Title Act 1993 required the compensation based on 'just terms' or that the principles contained in legislation which would entitle ordinary title holders to compensation for the act in question to be applied to native title land. Just term also incorporates compensation for the loss of spiritual connection to land as it allows compensation to be paid for the 'special value' of the land to the owner of ordinary title land (*Pastoral Finance v Minister* [1914] AC 1083). However, this special value is limited to value arising from some special feature, or the location, of the land rather than sentimental value (Brown, 1991).

The negotiation of agreed compensation for future acts under the right to negotiate procedure is a wholly different process. The parties will attempt to negotiate terms for obtaining the native title parties' consent to the proposal. This raises the reality of the willing buyer and the willing seller. Numerous variables will influence the outcome (Mah, 1995).

The possibility of an arbitrated decision by the National Native Title Tribunal provides both parties with an incentive to reach agreement. Generally, the cost of

obtaining consent will be related to the value of the proposal. Delays and timing issues may increase that cost.

4.10 SUMMARY

After decades of adjudication in Malaysian legal systems, no precise theory or rule has developed to determine the line between acquisition of Orang Asli native lands and regulation, or in simple words, a clear line does not exist in Malaysian law. Many have identified categories of acquisitions and encroachments that have been regarded as compensable takings, but there is a lack of clear criteria for identifying compulsory acquisition compensation. The existing law (Act 134, 1954 and Federal Constitution, 1957) only provides some general principles for determining the compensation of property rights. This chapter has reviewed the various sources of law on the treatment of Orang Asli rights and interest; recognition for compensation; factors to be considered in acquisition, as well as appropriate valuation approaches and challenges in land acquisition affecting Orang Asli native lands. These are to discern some of the broad principles of state responsibility for acquisition, and, in particular, examined state responsibility for compulsory acquisition. The principles are summarized below:

- A state must pay compensation to Orang Asli where their native lands have been acquired. Compensation must be made notwithstanding that the acquisition was for a public purpose, in the public interest or for legitimate social or economic reasons.
- A deviation act of acquisition, such as encroachment or confiscation, is not required in order for state responsibility to arise. The form of the government measure is unimportant. Rather, the focus is on the effect of the government measure on Orang Asli land rights.
- State responsibility does not arise for bona fide, non-discriminatory measures that are commonly accepted within the land acquisition and revocation powers of the state. An uncompensated deprivation of property

rights can be justified under the state's police power, but must be applied to all citizens in order to maintain the environment, public health, safety, morality, and to enforce penal law.

- The Orang asli cannot be indefinitely deprived of their native lands. A state is liable for acts that damage and abuse of Orang Asli native lands under international law.

The primary focus has been on the treatment of claims of compulsorily acquisition and how claims for deprivations of land rights should be addressed. A complete code of land protection would have to address these issues in more detail and address other important issues such as recognition of Orang Asli land rights under the law, cultural and spiritual attachment to land, and more structured monetary and non-monetary compensation framework. In addition, while the broad elements of land rights protection have been outlined, but refined, clear, justifiable, and legal Orang Asli land rights are mandatory for the development of a uniform compensation structure across Malaysia.

CHAPTER FIVE

RESEARCH METHODOLOGY

5.1 INTRODUCTION

According to Sekaran (2000), a research can be described as a systematic and organized effort to investigate a specific problem that needs a solution. Further, he stressed that a research is an activity of solving problems with the aim to add new knowledge, developing theories as well as gathering evidences to prove generalizations. Thus, as explained by Burns (1994), a research is a systematic investigation to find solutions of a specific problem. Bulmer (1977) defined sociological research as primary commitment to establish systematic, reliable and valid knowledge about the social world. However, Kerlinger (1986) states that a scientific research is a systematic, controlled, empirical, and critical investigation of propositions about the presumed relationships between various phenomena.

This research was designed for 'developing a compensation framework for land acquisition affecting Orang Asli native lands'. This research is the first research in Malaysia focusing on acquisition and compensation aspects of Orang Asli native lands. To achieve the specific objectives of the research, the main research outlook is triangulatory in nature, with three data collection techniques in use, namely; the questionnaires survey (quantitative approach), case study, and Delphi method (qualitative approach). To provide some comparative insight, compensation practices of native title in Australia were also reviewed.

This chapter presents the research methodology in conducting the above research area. According to Chaudhary (1991), the difference between research methods and research methodology are; research methods describe all techniques or methods that are used to conduct a research, while research methodology is a systematic way of solving research problems or a science of studies on how to carry research scientifically. On top of it, research methodology has many

dimensions and research methods are only some integral parts of it (Chaudhary, 1991; Kumar, 1999). Sarantakos (1998) classified research methodology into quantitative and qualitative, while Tashakkori & Teddi (1998) explored that 'mixed method' can contain elements of the quantitative and qualitative approaches. This research mainly adopted mixed-method approaches or triangulation of approaches whereby the case study and Delphi method applied qualitative element and questionnaire-based survey applied quantitative element of the research. According to Naoum (1998), quantitative survey produces non-abstract and trustable data. It can be measured by numbers and analyzed by statistical procedures. In research of quantitative nature, research model needs to be constructed in order to explain and measure the abstract concept (Bryman and Bell, 2003).

5.2 THE KEY CONCEPTS AND FORMULATION OF THE RESEARCH MODEL

In this section, two main issues are highlighted: firstly, the key concept of an acquisition and compensation of Orang Asli native lands, and the challenges faced by the respective parties in quantifying an appropriate and adequate compensation packages for acquisition of native lands. Secondly, the formulation of research model which describes the components that should be considered in developing the compensation framework for acquisition of such lands.

5.2.1 Key Concepts

Based on the discussion in previous Chapters 1, 2, 3 and 4, which discussed in detail on the literature review on the subjects, the theoretical framework of the research could now be highlighted.

On the subject of compensation, it can be concluded that the 'monetary' and 'non-monetary' compensations are the two categories of which endeavour on the

compensation for acquisition of Orang Asli native lands. Unlike for private land, the compensation structure only deals with monetary compensation. Furthermore, general compensation issues such as perceptions on acquisition of Orang Asli lands; laws, regulations and land rights issues; and negotiations of compensation need to be explored.

Legislative provisions have been developed over time in many countries to address compensation of native lands. However, over the past decade, these have been proven as probably not capable to provide adequate compensation for acquisition of native lands by the authority. As mentioned in the earlier chapters, there are features inherent in native land tenures, which are generally unknown to either English or Roman concepts of land law. One of the most problematic issues associated with native lands is the spiritual and cultural attachment that landowners often placed on them. This feature of connection to native lands remains a difficult concept for western tenurial systems, and yet it has been stated by the French ethnologist Bruhl (2001:4) that:

‘No essential difference has been established between primitive mentality and our own. There is a mystical mentality more marked among primitive societies than our own, but present in every human mind - A sense of an invisible power and a reality other than our normal reality’.

In support, Lewis Wolpert (2001:4), states that spirituality:

‘...gave our ancestors two advantages that enabled them to adapt to a tough environment: uncertainty, and thus anxiety, was removed, and there was an animate agent that might be appeased by a dance, offering or sacrifice’.

Further, he assumes that, ‘...mystical beliefs offer an advantage – the less one understands, the more one can explain’.

Hence, there has been great interest especially among the common law countries in Africa, Asia, Oceania and North America in the attempt of Australia to devise a

methodology for the assessment of compensation for customary lands (Sheehan, 2001).

Another issue to deal with is that of land rights. The Orang Asli native lands are perceived to convey no rights as compared to the rights associated with a titled land. The existing laws treated Orang Asli merely as tenant-at-will of the State land. The protections of property rights as enshrined in the Constitution are unable to overcome a stumbling block for any legislative attempt to appropriate customary lands without adequate compensation. Also, the constitutional guarantee ensures that the amount of compensation ought to reflect the true worth of the rights and interests that are being compulsorily acquired. Salleh (1990:68-69) comments that,

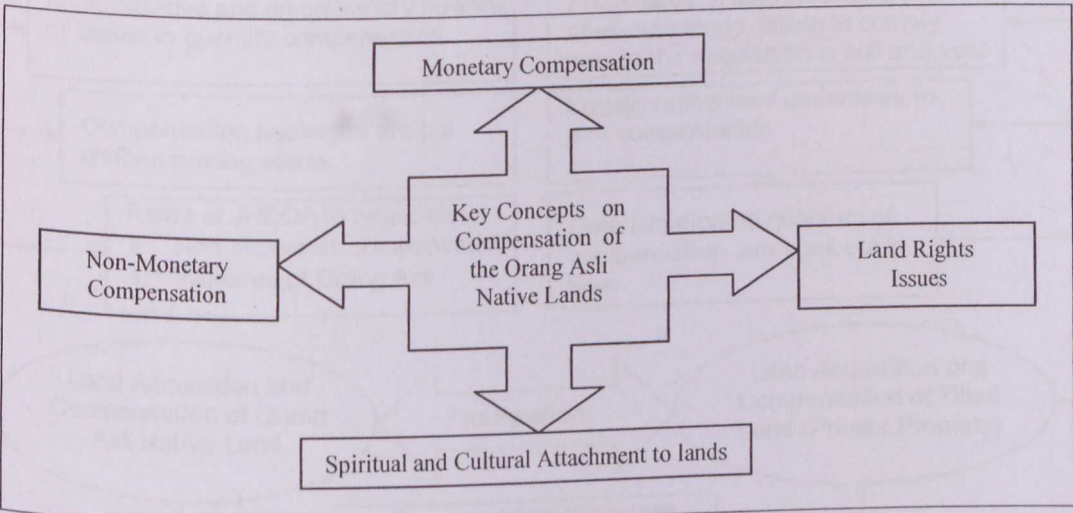
‘The Orang Asli concept of land rights as a result of their customary occupation of the land is a native concept which does not have any force in Malaysian law. The creation of Orang Asli reserves and areas are not the best solution to overcome the reluctants of state governments to grant Orang Asli rights to the land. A way has to be found, that will give Orang Asli absolute rights to the land in which the land will contribute positively to their development’.

However, their rights to areas, which have been legally designated by the state governments as aboriginal reserves or aboriginal areas are legally protected. But, when the creation and declaration of these reserves or areas do not take into account the socio-culture factors attached to it by Orang Asli, such as their concept of ‘land of forefather’, it gives little consolation to these legally protected rights (Hooker, 1976).

As previously stated, such constitutional guarantees are the basis of existing legislative provisions permitting the state to compulsorily acquire private property rights, indigenous or non-indigenous. These provisions reveal similarities in compensation throughout much of the common law world, notably former British colonies in Africa, Asia and Oceania. Figure 5.1 summarizes the key concepts on

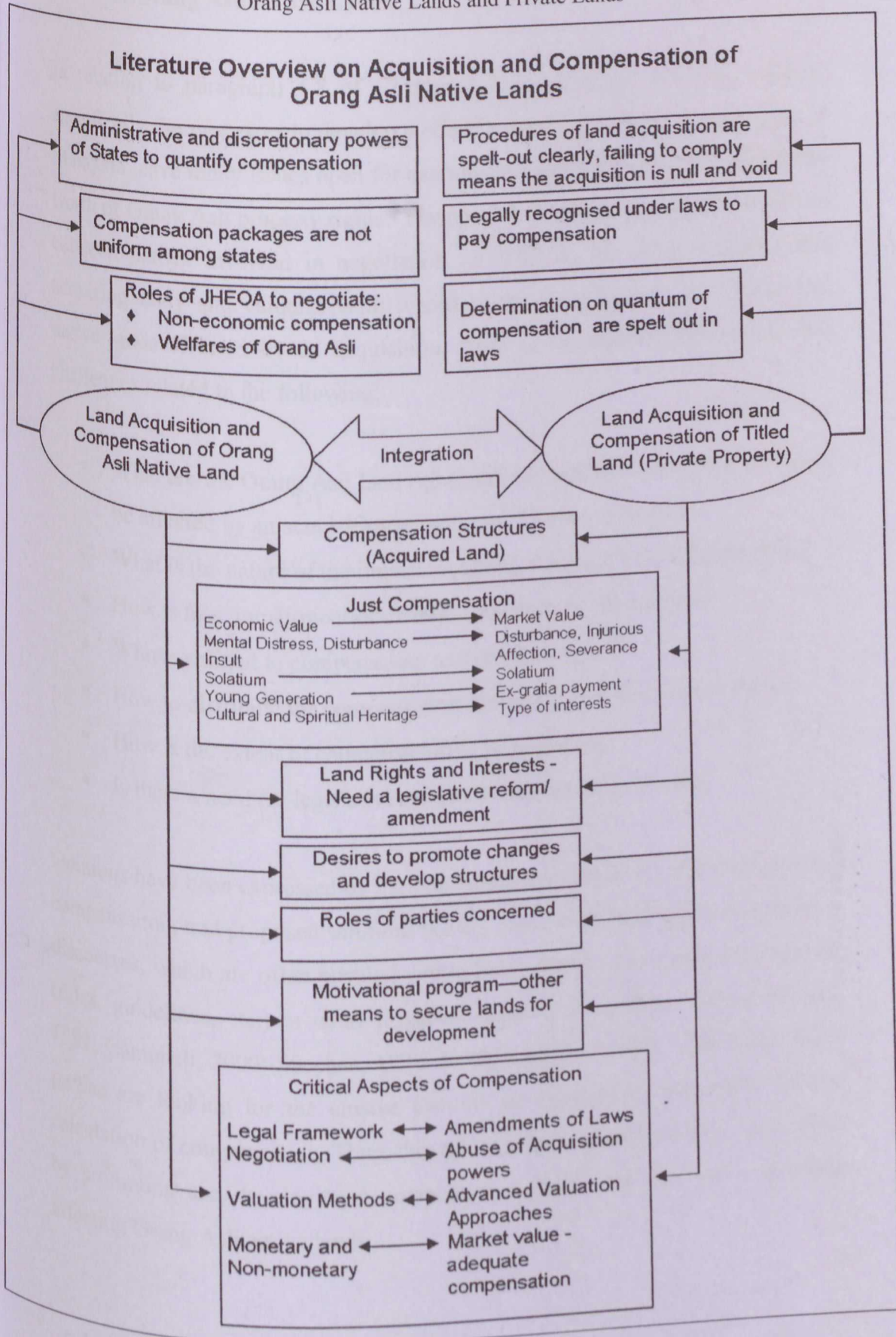
compensation of Orang Asli Native Lands, while Figure 5.2 compares the literature overview between Orang Asli native lands and private lands.

Figure 5.1
The Key Concepts on Compensation of the Orang Asli Native Lands



As a pre-summary, these traditional lands are meant to provide for the future generations of the Orang Asli. With the acquisition of the traditional lands and inadequate compensation, the future of the Orang Asli becomes uncertain. They neither have the lands where they can live on nor the money to provide for the future (Cheah, 2004b; Nicholas, 2003; Suhakam, 2003).

Figure 5.2
Literature Overview on Acquisition and Compensation Between
Orang Asli Native Lands and Private Lands



5.2.2 Processes to Develop the Compensation Framework for Acquisition of Orang Asli Native Lands

In relation to paragraph 4.8 of Chapter 4, this paragraph however, explains specifically the processes to develop a compensation framework. Current laws in Malaysia leave many issues open for examination when it comes to assessing the worth of Orang Asli property rights. The specific details remain to be worked out between parties involved in negotiation i.e JHEOA, the State Authority, the acquiring body and valuer. With regard to the compensation for Orang Asli native lands affected by an acquisition, there is considerable uncertainty and challenges related to the following:

- What are the Orang Asli land rights and interests that have been, or might be affected by an acquisition exercise by the state authority?
- What is the nature of the impact on Orang Asli land rights and interests?
- How is loss, impairment or extinguishment to be determined?
- Who is entitled to compensation and on what basis?
- How to distribute the compensation for Orang Asli Reserves or Areas?
- How is the extent of compensation to be measured?
- Is there a need for legislative reform to address the problems?

Opinions have been expressed by various quarters on the issues of land rights and compensation, and proposed solutions mostly come from legal and land valuation discourses, which are often pursued within the contexts of resource development (rules, guidelines, etc.) or court litigation (Sagong Tasi, 2002; Adong Kuwau, 1997; Campbell, 2000; Sheehan, 1997, 1998; Nicholas, 1997). Therefore, many parties are looking for the elusive formula or standardised procedure for the calculation of compensation. Thus, this research aims to explore these challenges by promoting and developing a compensation framework for land acquisition affecting Orang Asli native lands.

5.2.3 Research Model

The research model as illustrated in Figure 5.3 is being initiated from in-depth literature survey on the research topic. There are three (3) dimensions of compensation framework for acquisition of Orang Asli native lands namely; general compensation issues, monetary compensation, and non-monetary compensation.

(a) General Compensation Issues

There are four (4) issues to be explored in this context of the study namely:

- General perspectives on acquisition of Orang Asli native lands
- Laws, regulations, and land rights
- Negotiation of compensation
- Challenges in determining compensation

Perceptions on acquisition of Orang Asli native lands need to be perceived from two aspects. Firstly, the perceptions in relation to benefits of the acquisition to the entire community of Orang Asli at large. Examples of the benefits that might be received by the Orang Asli are; economic benefits, spiritual and cultural advantages, creation of productive asset and potential value, better quality of life, and opportunity to own land legally. Secondly, the perceptions on the adverse effects to Orang Asli of having their lands acquired for development. The obvious disadvantages of the acquisition are; the Orang Asli are suffering from deprivation of ancestral lands, freedom of inhabitation or movement and deprivation of produce of the forest as they are traditionally used to that kind of lifestyle. Furthermore, Orang Asli are also worried about their future living of their family and their descendants since their ancestral lands are developed for projects.

For instance, the Orang Asli are not satisfied with the facilities, amenities and location of the resettlement schemes provided by the authorities. They are alienated with uneconomic size of agricultural land for their living and the worst scenario is they are not eligible for compensation of their ancestral land as laws do not provide such requirement. No laws recognise the Orang Asli as the legal owner of Orang Asli Reserves; their rights are only as tenant-at-will of the state land. The existing laws also fail to adequately take into consideration the needs and impact of land loss to lives of Orang Asli. Due to this phenomenon and undeclared status of Orang Asli lands and the lack of mechanism to keep track of those lands, the State Government often ends up awarding these lands to private developers (Nicholas, 2001; 2003). In reality, the Orang Asli land rights are victims to political marginalisation, poor management and the lack of protection (Ismail, 2005).

Hence, compensation for acquisition of Orang Asli lands is invariably calculated based on the discretion and negotiation between the parties concerned. The problems are whether the negotiation procedure is made compulsory before an acquisition; is the interest of Orang Asli taken care of; and whether this approach is appropriate and effective for payment of just compensation for acquisition of Orang Asli lands. Furthermore, as suggested by Whipple (1995), there are three valuation approaches that are suitable to determine value of compensation for aboriginal native title. The problem is how appropriate these approaches are when it comes to valuing the Orang Asli native lands.

(b) **Monetary Compensation**

The components of monetary compensation or economic compensation can be categorized into payment of compensation based on the laws and regulations requirement, i) market value of the property rights, ii) economic value on loss of income or subsistent area and, iii) other claims entitled based on nature of the

case. At present, the Aboriginal Peoples Act, 1954 is the only legislation that provides for payment of compensation for acquisition of Orang Asli native lands; even this is limited to payment of loss of growing trees and buildings if so affected. This is the only economic value recognized under the present laws. No market value or economic value of land is payable since the issue of land rights of Orang Asli remains unresolved. If this issue is resolved and land rights prevail, the economic compensation would be calculated based on the existing interest in land. The calculation of the economic value of such an interest is based on the usual principles of land valuation, which is a principle of market value.

The legislation dealing with monetary compensation invariably addresses three main issues, namely:

- i. Entitlement to compensation;
- ii. Selection of assessment methodology regarding the various elements of the property rights evident in the particular exercise, and
- iii. Assessment of various components of the compensation package, regarding the weight and quantum of each component.

(c) **Non-Monetary Compensation**

Non-monetary compensation or non-economic compensation would be in addition to compensation of economic loss. As mentioned by Burke (2002:1) based on the overriding principle that long-standing acceptance by Australian courts of the importance of land to the indigenous people of Australia, *'the scale of compensation in native land should err on the side of generosity because the importance of rights to land for indigenous people'*. In practice, this could be implemented in relation to the calculation of non-economic loss, which will be the main component of the compensation. Burke (2002:1) added, *'compensation for the loss of native title rights should focus on elaborating the nature of the non-*

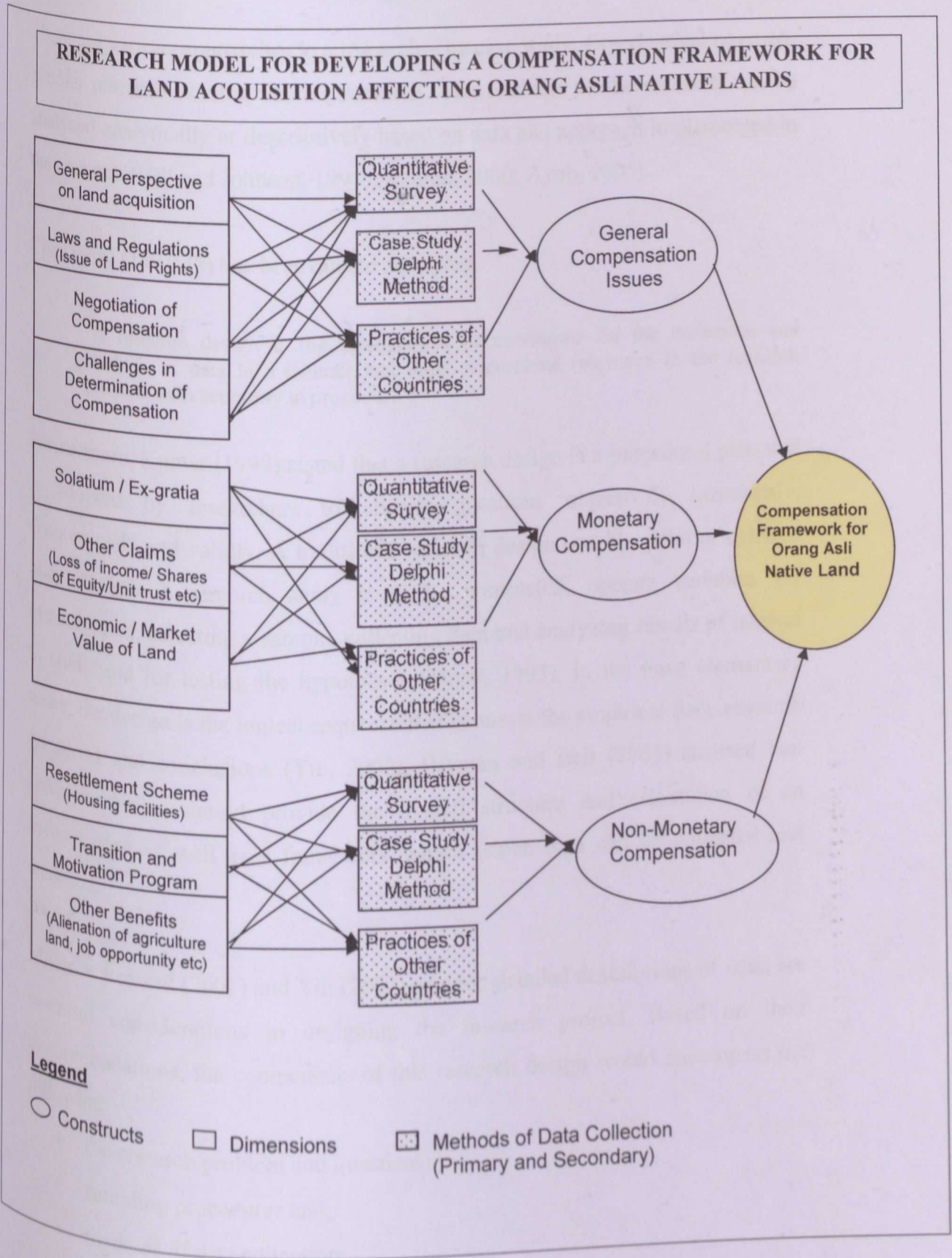
economic losses'. In Malaysia, under the present compensation structures the non-economic losses are minimally recognized. Thus, the scale of compensation for non-economic loss can become more manageable if subheadings of non-economic loss could be adopted.

In relation to consistency with the legal conceptualization of native title, likely evidence of loss, and principles from various acts and regulations, the three (3) subheadings of non-economic loss according to Burke (2002) are:

- 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.

In addition of the above subheadings that could be considered for compensation of Orang Asli land acquisition, most of state authority implemented the non-economic compensation by offering compensation package for Orang Asli that includes an establishment of new resettlement area; motivational program and opportunity to participate and own equity in the development projects.

Figure 5.3
The Research Model



5.3 RESEARCH DESIGN

There are various approaches to a research – by case study, experimental research, actions research or observations research. The findings of the research can be analysed analytically or descriptively based on data and approach implemented in the research (Gill and Johnson, 1991; Sekaran, 2000; Ayob, 2005).

Chaudhary (1991:28) has been quoted as saying,

‘A research design is the arrangement of conditions for the collection and analysis of data in a manner that aims to combine relevance to the research purpose with economy in procedure’.

Furthermore, Kumar (1999) stated that a research design is a procedural plan that is adopted by researchers to answer questions objectively, accurately, economically and validly. A traditional research design is a blueprint or detailed plan on how a research study is to be completed; operate variables for measurement, selecting a sample, collecting data and analyzing results of interest to study and for testing the hypotheses (Thyer, 1993). In the most elementary sense, the design is the logical sequence that connects the empirical data, research questions and conclusions (Yin, 2002). Bryman and Bell (2003) stressed that research design should provide the overall structure and orientation of an investigation as well as a framework within which data can be collected and analysed.

Miller & Lessard (2001) and Yin (2002) provide detailed descriptions of what are essential considerations in designing the research project. Based on their recommendations, the components of this research design would encompass the following:

- the research problem and question(s);
- sampling procedures and,
- methods of data collection;

Furthermore, Yin (2002) stresses that the main purposes of the research design are to help to avoid a situation in which the evidence does not address the initial research questions. In this sense, a research design deals with logical problem and not a logistical problem. In conclusion, Rani (2004) describes a research design as a blueprint or a plan for action, specifying the methods and procedures for collecting and analyzing the needed information, for fulfilling the research objectives and finding the solutions.

5.3.1 Research Problems and Hypotheses

Identifying and formulating a problem is one of the most important aspects of doing research in any field. Research cannot proceed until a problem is recognized (Rani, 2004). The research problem serves as the foundation of a research study if it is well formulated. As stated by Einstein & Infield (1938:95) decades ago about how important a research problem is,

‘The formulation of a problem is far more essential than its solution, which may be a matter of mathematical or experimental skill. To raise new questions, new possibilities, to regard old problems from a new angle require creative imagination and marks real advance in science’.

A research problem may take a number of forms, from the very simple to the extremely complex. The formulation of a problem is akin to the ‘input’ and the ‘output’ of a study, thus reflecting the quality of the contents of the research report and the validity of the causation established (Chaudhary, 1991; Kumar, 1999). A problem does not necessarily mean that something is seriously wrong with a current situation, which needs to be rectified immediately. A problem could simply indicate an interest in an issue where finding the right answers might help to improve an existing situation, or to minimize a gap between the actual and the desired ideal state (Sekaran, 2000). In the final stage of formulating the research problem, the general question can be transformed into a series of specific

questions to indicate the strategic observations to answer those questions (Chaudhary, 1991).

Under the study of land acquisition and compensation of Orang Asli native lands, the main problem encountered is the recognition of Orang Asli land rights. In Adong Kuwau (1997) and Sagong Tasi (2002) cases, the High Court decisions were a quantum shift in the recognition of the rights of Orang Asli on their native land. Unfortunately, the decisions are still pending an appeal to higher court. The legal and institutional frameworks for Orang Asli land rights are still being developed and this issue has received minimal attention from the authorities.

Moreover, due to unresolved issue of land rights, there is a high level of uncertainty in applying economic valuation methodologies to the estimation of compensable loss or diminution of Orang Asli native land rights and interests under the Aboriginal Peoples Act, 1954 or other related acts. Unlike those for non-Orang Asli lands, the methodologies for valuing Orang Asli native land are poorly developed. The reason for discussing the valuation in terms of compensation is that Orang Asli native land rights are inalienable rights and cannot be traded in the open market; thus setting the need for appropriate valuation methodologies in determination of compensation.

In Australia, most of the input to the valuation of native title rights is provided by land valuers (Whipple, 1997; Sheehan & Wensing, 1998). However, a major criticism of their work is that, it fails to accommodate what Neate (1999) describes as the special (even unique - *sui generis*) features of native title. While this shortcoming in the use of land valuation is recognized (Neate, 1999; Litchfield, 1999), little consideration has been given in Australia to the use of alternative methodologies in the economic valuation literature. Indeed, many, including Whipple (1998), believe this problem to be best resolved by the court due to judicial experience in assessing damages in accident cases or through an application of solatium. Because of the *sui generis* nature of native title, new

principles need to be developed for sui generis compensation regime (Burke, 2002). Thus, due to these problems, Malaysia has yet to have a structured compensation framework for acquisition of Orang Asli native lands, and this research attempts to contribute to the development of the so-called compensation framework.

In order to test whether this research problem does in fact hold true; the non-directional hypotheses (Rani, 2004) are constructed for the solution. Kerlinger (1986) explores that hypotheses are usually more specific and closer to actual operations and testing than problem statements. Rani (2004: 40-1) adds,

‘...as distinct from propositions that are theoretical statements at a high level of abstraction, hypotheses are proposition that have been converted into testable statements and closer to the ground, where the variables in the interrelationships are operationally defined and observed. Hypothesis is just a research tool that enables us to relate both theory to observation, and observation to theory’.

The constructed non-directional hypotheses for this research are:

1. Perceptions on protection by the laws, land rights issues, negotiation and challenges in determining the compensation (i.e. general compensation issues) will give a direct impact on the development of the compensation framework.
2. Perceptions on market value of the land, ex-gratia and other claims of monetary nature (i.e. monetary compensation) will give a direct impact on the development of the compensation framework.
3. Perceptions on resettlement, motivation program and other benefits of non-monetary nature (i.e. non-monetary compensation) will give a direct impact on the development of the compensation framework.

The above non-directional hypotheses will be analyzed and answered by adopting inferential analysis of Pearson Correlation.

5.3.2 Methods of Data Collection

In any research, data can be collected in various ways, in different settings, and from different sources. As observed by Sekaran, (2000), data collection methods include face to face interviews; telephone interviews; computer-assisted interviews; questionnaires that are either personally administered, sent through mail, or electronically administered. According to Ayob (2005); Rani (2004) and Sekaran (2000), data sources can be primary or secondary. On primary data, the researcher must specifically set up respondents of a research - individuals, groups, and a panel of respondents whose opinion may be sought on specific issues. Interviewing, questionnaires, and observing people and phenomena are the three main data collection methods in survey research. Surveys are useful and powerful, but they can do more harm than good if not correctly targeted (Sekaran, 2000). Data can also be obtained from secondary sources, as for example, company records or archives, government publications and files, industry analysis offered by official publications etc.

As mentioned in Chapter One, methods of data collection in this research are questionnaire-based survey, case study and Delphi Method. Two sets of structured questionnaires are designed; first set for affected Orang Asli and the second set for selected professionals. Both questionnaires were developed based on literature surveys and further enhanced by employing the outcomes, suggestions and comments from the pilot study.

5.3.2.1 Pilot Study

According to Naoum (1998), good research practices start with pilot study before actual study is carried out. This is to trace any discrepancies in the questionnaire designs. However, Liaw and Goh (2002) state that pilot study is not mandatory in research design, but it is normal practice before actual study.

In this research, the pilot study was conducted by quantitative survey, and data collection method was based on interview. The 'Non-Random Convenience Sampling' method was used as sampling method. This type of sampling method has less reliability but is to be preferred when the time is short, and where the information is needed in faster manner (Sekaran, 2000). The main purposes of the pilot study are to test the consistency of internal data, to test the reliability of the measurement scales for variables used in the questionnaire and to test the goodness of data (Sekaran, 2000). Furthermore, it is to ensure whether the respondents understand the questions set in the questionnaire, required data is available, and to avoid misinterpretations (Naoum, 1998). Besides, there are few matters that need to be ensured in pilot study as mentioned by Naoum (1998), Bryman and Bell (2003), namely; time period to fill/answer questionnaire; clarity of the questions and instructions; sensitive questions that respondents are reluctant to answer; ensuring the questionnaire has covered all important topics; layout is clear and attractive and, consideration of comments and suggestions by respondents.

For the first set of questionnaire (i.e. Q1 – Questionnaire for affected Orang Asli), 15 Orang Asli from Kampong Sungai Merbau, Tapah Road (Land acquisition project for construction of University Commonwealth Malaysia) and 20 Orang Asli from Ulu Kinta (Land acquisition project for construction of Sungai Kinta Dam, Tanjong Rambutan - Perak) were involved in the pilot study. Further, 19 professional respondents were involved in the pilot study of second questionnaire (Q2- Questionnaire for Professionals) comprising two Land Administrators from Pejabat Tanah Batang Padang, Tapah; ten Valuation Officers from Valuation and Property Services Department, Ipoh and Shah Alam; two Academicians from Department of Estate Management, UiTM, Seri Iskandar, Perak; Researcher from the Centre of Aboriginal Studies, University of Malaya; Assistant Director of JHEOA Head Quarters, State Director, and Deputy State Director of JHEOA Selangor/Wilayah Persekutuan and two Officers from Land Development Section of JHEOA Perak/Kedah.

Reliability test was conducted on this pilot study. Table 5.1 and Table 5.2 show the results of reliability test for both questionnaires. Based on Table 5.1 and 5.2, the overall coefficient values of Cronbach's Alpha for both questionnaires are 0.7314 (Q1) and 0.7410 (Q2). Since both achieved above 0.7, the results showed that all variables had indicated internal consistency and achieved high reliability values based on scales developed by Sekaran (2000) and Nunally (1998). In theory, a variable that achieves a coefficient value of Cronbach's Alpha of more than 0.6, is regarded as achieving high internal consistency and reliability. Thus, due to high coefficient values of Cronbach's Alpha, it can be concluded that the respective respondents were able to understand all questions in the questionnaires and they admitted the necessity for asking the questions.

Table 5.1
Reliability Test on Orang Asli Questionnaire

No.	Variables	No. of Items	Coefficient Value – Cronbach's Alpha
1	Reasons for not supporting	12	0.7369
2	Advantages of land acquisition to OA	7	0.7358
3	Opinion on existing compensation	2	0.7406
4	Reasons for inadequacy of compensation	9	0.7358
5	Types of compensation required	7	0.7350
6	Overall	37	0.7314

Table 5.2
Reliability Test on Professionals Questionnaire

No.	Variables	No. of Items	Coefficient Value – Cronbach's Alpha
1	Constructs of compensation framework	3	0.7442
2	General compensation issues	6	0.7550
3	Issues of monetary compensation	5	0.7396
4	Issues of non-monetary compensation	5	0.7383
5	General perspectives on acquisition of OANL	9	0.7331
6	Law, regulations and land rights issues	4	0.7339
7	Negotiation of compensation	6	0.7383
8	Challenges in determination of compensation	5	0.7276
9	MC - Economic / market value	2	0.7504
10	MC - Solatium / premium	2	0.7504
11	MC - Other claims	4	0.7430
12	NMC – Resettlement program	4	0.7426
13	NMC – Motivational and training program	3	0.7398
14	NMC – Other benefits	4	0.7402
15	Suggestions to up-grade the compensation structure	7	0.7416
16	Suggestions on proposal of compensation framework	8	0.7338
17	Suggestions on socio-culture dimensions	4	0.7363
18	Overall	81	0.7410

5.3.2.2 Case Study

The case study is considered as the first level of primary data collection in this research. In order to evaluate the impact on current practices of compensation for acquisition of Orang Asli native lands, five (5) previous land acquisition projects of Orang Asli native lands were chosen as the case study. These involved cases located in Federal Territory of Kuala Lumpur, Selangor, Perak, Johor and Pahang respectively (List of the case studies is presented in Chapter 1, paragraph 1.6).

The rationale to adopt the case study as an approach in this research is to obtain an indepth understanding of compensation packages being implemented in various purposes of acquisition e.g. from privatization, public, inter-government as well as mixed-development projects. By focusing the nature of compensation packages by different nature of projects and by different state governments, it would contribute to fair and justifiable analysis of the research objectives. Further, this research requires an in-depth examination of compensation packages based on an appropriate number of case studies.

According to Yin (2002), there are six sources of data and evidence for case study research – documentation; archival records; direct observation; participant observation; physical artifacts; and as well as interviews. However, Yin (2002) explained that no single source has an absolute advantage over the others and each case study need not necessarily apply all methods. The term ‘case study’ is strongly associated with qualitative nature of research though it may be used in a variety of ways (Lewis, 2003).

In the context of this research, the intrinsic case study approach is carried out. In this approach, the empirical data is focused on five (5) specific case studies. This is to investigate the basis of compensation being awarded as well as to establish the nature of compensation in acquisition of Orang Asli native lands. The case studies also allow for comparison between compensation packages for privatization, public, inter-government and mixed-development projects as well as between state governments.

The criteria specified for choosing the appropriate land acquisition projects for the purpose of the case studies were as follows:

- i. The purposes of land acquisition should be different between the case studies. This is to explore whether the purpose of acquisition has any influence in the determination of compensation.

- ii. The land acquisition should be comparatively large in size i.e more than 15 hectares (40 acres). The size of land acquisition will reflect how the compensation package is negotiated.
- iii. The case studies should be located in different states or different municipality area in Peninsular Malaysia. This is to determine similarities or dissimilarities in compensation packages among state governments.
- iv. The acquisition projects should affect more than 50 members of Orang Asli or more than 20 families of Orang Asli community. This is to justify the total effects of land acquisition to the community of Orang Asli at large in that particular location.
- v. The land acquisition projects take place within 10 years prior to the date of this research. This is to avoid outdated compensation packages.
- vi. The compensation packages awarded by the Authority to Orang Asli must be final and fully settled; except for compensation that was appealed to court or pending the higher court decisions. If the compensation package is under on-going negotiations process, the fairness and adequacy of this compensation package cannot be measured.

The five (5) land acquisition projects involving Orang Asli community fulfilled the above-mentioned criteria and then were chosen as the case studies as presented in Table 5.3. Chapter Six explains these case studies in more detail.

Table 5.3: Case Studies and Criteria's Fulfillment

Case Study	Name of Project	Criteria
I	Acquisition of OANL for the project of water supply and construction of dam in Ulu Kinta, Perak.	<ul style="list-style-type: none"> • Acquisition for public purposes project – construction of dam • Acquisition area – 100 hectares • Located in Ipoh, Perak • 86 families affected • Date of acquisition – 1999-2000 • Compensation package is fully

		settled and awarded
2	Acquisition of OANL for the project of township in Bukit Lanjan, Damansara.	<ul style="list-style-type: none"> • Acquisition for privatisation project – townsship • Acquisition area – 256.4 hectares • Located in Federal Territory of Kuala Lumpur • 112 families affected • Date of acquisition – 1996-1997 • Compensation package is fully settled and awarded
3	Acquisition of OANL for the project of construction of dam in Sungai Lingui, Kota Tinggi, Johor.	<ul style="list-style-type: none"> • Acquisition for inter government project – construction of dam • Acquisition area – 5,450 hectares • Located in Kota Tinggi, Johor • 41 families affected • Date of acquisition – 1994-1997 • Compensation package is fully settled and awarded
4	Acquisition of OANL for the Project of the North-South Link and KLIA Expressway Mukim Dengkil, District of Sepang.	<ul style="list-style-type: none"> • Acquisition for public purposes project – construction of highway • Acquisition area – 16.59 hectares • Located in Sepang, Selangor • 25 families affected • Date of acquisition – 1997 • Compensation package is pending for court decision
5	Acquisition of OANL for the Project of the Construction of Kelau Dam and Distribution of Raw Water from Pahang to Selangor.	<ul style="list-style-type: none"> • Acquisition for public purposes project – construction of dam • Acquisition area – 4,090 hectares • Located in Raub, Pahang • 115 families affected • Date of acquisition – 2007 • Compensation package is fully settled and awarded

The surveys, visiting and re-visiting of the case studies were conducted from June 2006 till March 2007. Processes involved in data collection for each case study are as follows:

- a) A review of initial information about that particular land acquisition projects which included cases citation and report; official publications of the relevant authorities; newspaper clippings; related articles in journal and mass-media etc.

- b) A review of available documents, files or other materials with regard to specified land acquisition project at respective JHEOA Offices, Developer Offices, Consultant Offices and Acquiring Body Offices.
- c) Face-to-face interview sessions with JHEOA Officers, Developers, and Consultants. At this point, interview was selected as appropriate data collection method because in-depth interviews offer a greater possibility of obtaining precise and detailed information compared to other methods of data collection. Interviews can also reveal direct answers to research questions and objectives. Some interviews were recorded on tape before transcription but it is subject to permission of the interviewees. No time limit was set for each interview and it very much depends on the availability of time of interviewees. This was aimed to gather as much information as possible from interview sessions. In order to avoid interpretation bias, immediate write-up was done at every completion of the session. In occasions when ambiguities existed, reconfirmation of what have been written is done with the respective parties. Interviewees are requested to fill up two letters with regard to this interview session i.e. the Letter of Permission and Letter of Endorsement as attached in Appendix G and H respectively.
- d) Site visit was done with the help of JHEOA staff. Information of compensation packages could be proved based on the evidences available on site. Non-monetary compensation such as housing facilities, amenities promised under the packages were investigated and reviewed. Photographs were taken as proof and records. On top of that, the affected Orang Asli were also interviewed for questionnaire-based survey under the quantitative approach (Level 2 of Questionnaires Survey). The Orang Asli were explained the purposes of the research and they were asked to answer the questionnaire verbally based on questions set in the questionnaire. The representatives of the researcher or researcher himself did the transcriptions.

5.3.2.3 Questionnaires

This quantitative technique of research by the questionnaire-based survey is considered the second level of primary data collection for the research. The questionnaires are prepared in two categories; first, questionnaire (Q1) which is specifically meant for affected Orang Asli in land acquisition case studies; and second questionnaire (Q2) which is specifically meant for professionals involved in Orang Asli land development or in Orang Asli Affairs. These questionnaires are attached in Appendix I and J respectively.

The target respondents are the affected Orang Asli for first questionnaire and for second questionnaire are the officers of the Department of Orang Asli Affairs (JHEOA), Land Administrators at respective Land Offices, Valuation Officers at Valuation and Property Services Department, Academician from local universities and Activists of Orang Asli's NGOs in Malaysia.

The pre-requisite conditions in the selection of the respondents are that the respective Orang Asli must be involved and affected by the land acquisition project and, for the professional respondents, they must have experiences in dealing with land acquisition of Orang Asli native lands or in Orang Asli affairs or in Orang Asli researches (the sampling procedure will be further discuss in the following sub-section 5.3.3). The rationale for this quantitative approach is, as suggested by Sarantakos (1998), to allow inductive generalizations of the research findings to be made. Furthermore, the purpose of quantitative approach is to explore perceptions or opinions of the peoples on certain issues under study and, the use of questionnaires is the best instrument to achieve this objective (Bernard, 2000; May, 1997; Ackroyd & Hughes, 1983). The quantitative analyst would seek to derive categories from the data so that it can be compared, whereby words or phrases in the documents are converted into numbers (May, 1997).

5.3.3 Sampling Procedures

Sampling is the process of selecting a sufficient number of elements from the population so that by studying the sample and understanding the properties and characteristics of the sample, generalization of the properties and characteristic of the population elements can be made. The reasons for using a sample rather than collecting data from entire population is obvious; in research investigations involving large size of elements, it would be impossible to collect data, to test or to examine every element due to constraint of time, cost and human resources (Sekaran, 1992; Ayob, 2005). According to Punch (1998), all research involves sampling because no study, whether quantitative or qualitative can cover everything.

The sampling designs as outlined by Kumar (1999) are: random sampling; non-random sampling and, mixed sampling design. Each design has its own categories and can be referred further in Kumar (1999); Sekaran (1992); Ayob (2005); and Supranto (1986). For example, the non-random designs, which are commonly used in quantitative and qualitative research are: quota sampling; accidental sampling; judgment or purposive sampling and, snowball sampling.

This research applies 'non-random judgment sampling' or 'purposive sampling' for its quantitative research. This is because the primary consideration in purposive sampling is the judgment of the researcher as to who can provide the best information in order to fulfill the objectives of the research. The researcher identified and selected the people who in the opinion of the researcher are likely to have the required information, knowledge and willingness to share it. As stated by Kumar (1999), this type of sampling is extremely useful for construction of a historical reality, describe a phenomenon or develop something about which very little is known. The target sample list of the first quantitative surveys (questionnaires for an affected Orang Asli) is as tabulated in Table 5.4.

Table 5.4
The List of Target Sample for the Survey on the Affected Orang Asli

Name of Project / Case Study	Name of Orang Asli Kampung	No. of Families
Acquisition of land for project of water supply and construction of Sungai Kinta Dam in Mukim Ulu Kinta, Perak (Case Study No. 1)	Kampung Jintan	3
	Kampung Dollah	26
	Kampung Kuala Termin	25
	Kampung Jambu	9
	Kampung Sumba	23
	Sub-total	86
Acquisition of land for project of Bukit Lanjan Township, Damansara, Petaling Jaya (Case Study No. 2)	Kampung Bukit Lanjan	158
Acquisition of land for project of the construction of Sungai Linggui Dam in Kota Tinggi, Johor (Case Study No. 3)	Kampung Semanggar	26
	Kampung Pasir Intan (Formerly known as Kampung Pasir Asam)	13
	Kampung Sayong Pinang (Formerly known as Kampung Sungai Pinang)	14
	Sub-total	53
Acquisition of land for project of KLIA Highway, Kampung Bukit Tampoi, Sepang. (Case Study No. 4)	Kampung Bukit Tampoi	14
	Kampung Bangkong	7
	Sub-total	21
Acquisition of land for project of Kelau Dam to distribute raw water from Pahang to Selangor involving alignment of acquisition from Raub to Hulu Langat, Selangor. (Case Study No. 5)	Kampung Sungai Temir	115
TOTAL SAMPLE OF ORANG ASLI RESPONDENTS		433

Source: JHEOA (Headquarters; Perak/Kedah; Selangor/Wilayah Persekutuan; Raub, Pahang; Kota Tinggi, Johor)(2007)

On the other hand, the sample list of the second quantitative surveys, Q2 consists of all Administrative Officers and Officers from Land Development Section of Department of Aboriginal Peoples Affairs Malaysia (JHEOA); Valuation Officers from Department of Valuation and Property Services Malaysia; Land Administrators from Land and District Offices where the Case Studies are

located; selected Academicians from local universities and, activists from NGOs such as POASM, COAC etc. Table 5.5 shows the number of targeted Professionals' respondents.

Table 5.5
List of Target Sample for Survey on Professionals

Department	Designation	No. of Officers
Department of Aboriginal Peoples Affairs, Malaysia	Administrative Officer (M54, S48, S44, M41 and S41)	20
	Support Officer (S32, U29, S27 and N27 in Land Development Section of JHEOA Offices)	50
Department of Valuation and Property Services Malaysia (DVPS)	Valuation Officer from the following offices – Johor, Melaka, Negeri Sembilan, Selangor, Wilayah Persekutuan Kuala Lumpur, Pahang, Perak, Kedah, Kelantan and Terengganu.	60
District and Land Office	Land Administrator	20
Private Firms	Valuer	20
Universities / Institutes / Centres	Centre for Aboriginal Studies (PPPM), University of Malaya	3
	Dept. of Estate Management, Faculty of the Built Environment, UM.	5
	Dept. of Estate Management, UiTM (Shah Alam & Seri Iskandar, Perak)	12
	Dept. of Property Management, UTM	8
	Activist - POASM	15
Non-Government Organisation	Activist - COAC	7
Other Related Organisations		30
TOTAL SAMPLE OF PROFESSIONAL RESPONDENTS		250

5.3.3.1 Questionnaire for Affected Orang Asli (Q1)

This questionnaire was divided into three main sections:

- Part A – Respondent's background.
- Part B – Perceptions on land acquisition of Orang Asli Reserves. This addressed the views of affected respondents on acquisition that took place on their native lands. Reasons why he/she supported or not supported the acquisition and lastly, the advantages of land acquisition to him/her or to the family.
- Part C – Perceptions on compensation awarded by the Authority for land acquisition that involved native lands. This section described views on payment of compensation on loss of trees and buildings; reasons on inadequacy of the compensation; suggestions on what types of compensation should be awarded by the authority in acquiring of Orang Asli Reserve. Lastly, respondent also asked to give his/her overall views on acquisition of Orang Asli Reserve based on open-ended question.

The rationale in designing all these questions is to explore views and perceptions of affected Orang Asli toward land acquisition on their native lands. This will give first hand data on feelings, expectations and hopes of this community when they have to give away their lands for the sake of developments.

5.3.3.2 Questionnaire for Professional (Q2)

This questionnaire was divided into seven (7) main parts:

- Part A – Respondent's background. The respondent needs to give information on type of organization he/she is attached with; designation he/she holds; age; gender; experiences in dealing with Orang Asli affairs and number of land acquisition projects he/she directly participated.

- Part B – Measurement on Development of the Compensation Framework. One (1) question posted in this part, asking on the main constructs that give vital influenced in developing of compensation framework for acquisition of Orang Asli native lands.
- Part C – Measurement on the Constructs in Developing the Compensation Framework. Three (3) questions asked were divided into three sections namely; general compensation issues; monetary compensation, and non-monetary compensation.
- Part D – Measurement of Dimensions in Developing the Compensation Framework. This part is further divided into: General perspectives on acquisition of Orang Asli native land; Laws/regulations/land rights issues; negotiation of compensation, challenges in the determination of compensation, economic / market value, solatium/premium payment, other claims, resettlement program, motivation program, and other benefits of non- monetary compensation. Ten (10) questions were asked in this section on general and wide spectrums of acquisition involving Orang Asli lands.
- Part E – Suggestions on compensation framework. This section provided three questions. First is regarding to suggestion on how to upgrade the unstructured nature of existing compensation for acquisition of Orang Asli native lands. Second, the respondent is requested to give his/her preference on proposed framework of monetary and non-monetary compensation and third, opinions on socio-culture dimensions losses faced by the indigenous peoples.
- Part F – Miscellaneous. The question was posted in open ended format and the respondent is requested to give further comments on related issues where they have not covered in any part of the questionnaires.

- Part G - Questions specifically for Valuation Officer or Valuer. Questions asked basically on basis for determining market value and valuation methods that could be applied in valuing Orang Asli native lands.

The rationale in designing these questions is to seek opinions toward issues and structures of land acquisition compensation for Orang Asli native lands. Later, the suggestions and opinions, which are recommended by the respective parties will be used to develop the compensation framework for land acquisition affecting Orang Asli.

5.3.4 Distribution of Questionnaire

The time spent for quantitative study through distribution of questionnaires was approximately one year i.e. from 1st April 2006 until 30th April 2007 (Table 5.6). This included time spent for pilot study of 8 weeks. Some 433 questionnaires were distributed directly to respondents for Q1 (during on-site visit of the case studies) in five geographical locations. Some 250 questionnaires were distributed through posted-mail, e-mail and personal hand-over for Q2.

The response rate for Q1 was very good achieving overall responses of 85%. This was due to direct approaches with the respondents and time spent with them during answering sessions. The 15% non-response was due to non-return of the questionnaire because the respondents were not at home during the visiting period and the questionnaires were left to Tok Batin for him to distribute to respective Orang Asli. However, Tok Batin normally failed to mail or send the answered questionnaires due to communication problem and lack of cooperation from respective Tok Batins and the fact that the locations of the case studies were relatively distant, this 15% of unreturned questionnaires were left unattended. However, the 85% responses received were adequate to generalize views and perceptions of affected Orang Asli towards land acquisition and compensation on their native lands.

Furthermore, the response rate of Q2 was considered moderately good as the responses rate attained 63%. The good response rates received were due to method of circulation by direct approach to respective professionals, either by the researcher himself or through the help of research assistants who were appointed for this quantitative survey. This direct approach method was done due to low responses rate of posted-mail and email that were being employed at the early stage of the field survey.

Table 5.6
Schedule on Distribution of Questionnaires for Quantitative Study

Steps	Date	1 April – 31 May 2006	15 June – 31 August 2006	15 September – 30 November 2006	2 January – 30 April 2007
Pilot Study	8 weeks				
Distribution of Questionnaire (Phase 1)			(Q1, 150; Q2, 75) [2 case study visits] 10 weeks Valid Returned: Q1, 135 = 90% Q2, 42 = 56%		
Distribution of Questionnaire (Phase 2)				(Q1, 150; Q2, 75) [1 case study visit] 10 weeks Valid Returned: Q1, 125 = 83% Q2, 41 = 57%	
Distribution of Questionnaire (Phase 3)					(Q1, 133; Q2, 100) [2 case study visits] 12 weeks Valid Returned: Q1, 110 = 83% Q2, 75 = 75%
TOTAL RESPONSES: Q1= 370 (85%) ; Q2 = 158 (63%)					

5.3.5 Delphi Method

The Delphi method of research received its name from Greek mythology for predictions and forecasts of the future (Uhl, 1983). The technique was so named

in recognition of the reputed ability of the Oracle of Delphi to forecast the future in ancient Greece (Brooks, 1979; Weatherman & Swenson, 1974). The development of Delphi method was new to the mid-1900s. According to Dalkey et al. (1972), the first significant use of Delphi method took place in 1953 and was initially applied to establish consensus among a group of experts concerning urgent defence problems, in terms of forecasting defence technology needs and estimating future dates for the predicted occurrence of social and technological advances. Sackman (1975: 11) noted,

‘Delphi is an attempt to elicit expert opinion in a systematic manner for useful results. It usually involves iterative questionnaires administered to individual experts in a manner protecting the anonymity of their responses. Feedback of results accompanies each iteration of the questionnaires, which continues until convergence of opinion, or in a point of diminishing returns, is reached. The end product is a consensus of experts, including their commentary on each of the questionnaire items, usually organized as a written report by the Delphi investigator’.

The Delphi has its own unique characteristics and distinguishes it from other group interaction techniques. Its three basic features are, a) anonymity, b) iteration with controlled feedback, and c) statistical group response (Dalkey et al., 1972). To maximize effectiveness and increase the likelihood of obtaining true and honest opinions from experts with Delphi technique, three principles should be of concern: i) the experts must be selected wisely, ii) the proper conditions under which they perform must be created wisely, and iii) if several of the experts hold a similar opinion or judgment, considerable caution must be used in deriving a solitary combined position for the entire Delphi panel (Canterino, 1990).

The format for Delphi investigation is usually the same. Bruno (1976: 245-6) described the procedures as follows:

‘First, a group of experts are selected and each member completes a specially designed and structured questionnaire. Second, the responses of each individual on the questionnaire are reported (usually inter-quartile ranges are given), and the panels are asked to re-evaluate their responses based upon information provided by the analysis of responses. Third, the entire cycle is repeated; if some experts are not in the middle quartile range, they can be asked to justify their estimates or to provide other members of the committee with information they possess that justified their extreme (out of range of the middle two quartiles) response.

Respondents might also be asked to present reasons for revisions of their original estimates. In addition, they might be asked to critique reasons presented by their members of the group and to specify which arguments were convincing and why. These arguments and counter-arguments would then be summarized in writing and included in the decision framework for each individual in the next round'.

Thus, the Delphi method can serve as excellent tools for projecting and forecasting future trends. In the context of this research, the Delphi method is used to confirm the practicality of pre-tested compensation framework being established from the quantitative-based method and the case study approach in meeting future challenges and changing environment. Furthermore, Delphi results can serve to guide the design of forward-looking compensation framework for acquisition of Orang Asli native lands as well as a wealth of predicted best solutions to problems in other areas where consensus among experts can be attained through interaction. In this context, Delbecq, Van de Ven and Gusafan (1975: 84) mentioned that,

'When properly executed, employing Delphi methods can produce summary results that are more current and relevant than investigations using other methods of research..... Delphi can provide a more updated exchange of scientific or technical information than a literature search by drawing upon the current knowledge of experts'.

The selection of experts for this research is based on the following criteria:

- i) The experts must possess relatively vast knowledge and experiences in related field of the studies or are active in aboriginal researches i.e. in property valuation; aboriginal affairs; laws with regard to aboriginal or native lands, researchers in aboriginal researches, related NGOs as well as those who are officially appointed to represent the Orang Asli by the government (Senator). Thus, 15 experts are identified to participate in the research that are chosen from VPSD, JHEOA, Institution / Centre of Aboriginal research, Academics, Lawyers, Journalists, NGOs and Senator of Orang Asli as presented in Table 5.7.

- ii) These experts are required to be involved in two (2) rounds of structured interview session. Their pre-agreeable and commitment to this requirement is pre-requisite and very important.

Table 5.7

Identification of Experts in Delphi Technique

No	Organisations / Professionals	No. of Experts Identified
1	Valuation and Property Services Department, Ministry of Finance.	2
2	Department of Orang Asli Affairs (JHEOA), Ministry of Land and Rural Development	2
3	Pusat Pengajian Pribumi Malaysia (PPPM), Universiti Malaya	1
4	Office of the Orang Asli Senator	1
5	Academics, Journalists and Lawyers	5
6	Centre for Orang Asli Concern (COAC), Malaysia	2
7	Persatuan Orang Asli Semenanjung Malaysia (POASM)	2
Total		15

With regard to the reliability of the Delphi method, Dalkey et al. (1972) took into account group responses and the representativeness of the experts. He also found that group responses are more reliable than individual opinions. However, according to Canterino (1990), with respect to the representativeness of experts on the panel, no all experts can always agree on certain issues. There is always a possibility of two groups giving different forecasts, judgments, decision, or opinions. If this were to occur often, then the Delphi method could be represented as being somewhat unreliable.

The key to successful Delphi study lies in the selection of experts or panels (Gordon, 1994). According to Huss (1990), the two critical steps in a Delphi study are the design of the questionnaire and the selection of experts. Most studies use panels of 15 to 35 people and should anticipate an acceptance rate between 35 and 55 percent (Gordon, 1994; Brooks, 1979; Dalkey et. al., 1972). Because the number of panels is usually small, Delphi is not intended to produce statistically

significant results. In other words, the results provided by any panel do not predict the response of a larger population. The data can be displayed in mode, median or inter-quartile range (Gordon, 1994).

Delphi's structural interviews took place after the completion of case studies; quantitative survey (descriptive) analyses because the design of the Delphis' interview questions are based on the above results. The First Round of interview sessions commenced from first week of August 2007 and finally completed the analyses of both rounds (Round I and Round II of Delphi) at the end of April 2008.

Please refer to Appendix K and L for the Delphis' Round I dan Round II Questionnaires respectively.

5.4 ANALYSIS OF RESULTS

The data were processed and analysed using a Statistical Package for Social Science (SPSS) Version 12.0 for Windows software by utilizing *quantitative analysis* method as outlined in the following sections.

5.4.1 Descriptive Analysis

i. Frequency

According to Norusis (2002) the purpose of frequency analysis is to identify the nature of population sample and analyse their understanding and ability with regards to the questionnaire. A set of data can be summarized via construction of frequency distribution or frequency table and, the processes involves recording the numbers of times each particular value of a variable occurs (Rani, 2004). Section A of both questionnaires in this research applied to the frequency analysis

to present the results. Frequency statistics is also used in analyzing Delphi method.

ii. Descriptive Statistics

This research employed nominal and five-point Likert scale as a means of measurement. Data are mainly analysed and elaborated by descriptive analysis. Naoum (1998) and Liaw & Goh (2002) mentioned that descriptive analysis can give generalization of research results and explain the situation of the research outcomes. Further, they added, it can be explained in the form of frequency, centered probability (mean, mode and median) and distributions (variation, dispersion and standard deviation).

This analysis aims to compute the centered probability (mean) and distributions (variance, standard deviation) – wherein the variables, mean value seems to lie between the minimum and maximum values of the scale in the questionnaire, whereas variance starts with a mean as a point of reference, and then calculated the deviations of the 'mean' from each of the observation in the data set. Later, standard deviation is computed by square-root of the variance. According to Rani (2004) mean and standard deviation is very useful tool in descriptive statistics.

Generally, the scales used in the research questionnaire (except mentioned otherwise) are based on five-point Likert scales of either interval or ordinal category (Sekaran, 2000), e.g. 1=strongly disagree, 2=disagree, 3=neutral, 4=agree and 5=strongly agree. This scale falls under 'ordinal category', where scale for 'neutral' existed in the scale lines. However, 'ordinal category without neutral interval' is also used wherever appropriate, in situations where the respondent gives his/her answer on the level of opinion or degree of support (Zakaria & Md. Som, 2001). The example of this scale is, 1= inadequate, 2=hardly adequate, 3=adequate, 4=generous, and 5=exceedingly generous.

Likert scale is also guaranteed validity and produces high reliability even if it is managed by small numbers of items (Sarantokos, 1993; Kidder & Judd, 1999). According to Kidder & Judd (1999), the perceptions of an individual towards something (e.g. politics, conservatives etc) can be investigated by using Likert scale. This research applies three-point Likert scale for Q1 and five-point Likert scale for Q2. Three-point Likert scale gives a general level of perception whereas five-point Likert scale explores a medium level of perception towards an issue of the study, and also it does not give burden to respondents to answer the questionnaire (Verma & Mallick, 1999; Barbie, 1998; Sarantokos, 1993; Kidder & Judd, 1999). Three-point Likert scale was chosen for Q1 (e.g. 1=disagree; 2=not sure; 3=agree) in consideration of the respondents who are Orang Asli; which majority of them are uneducated and to make easy for them to choose the answers. Even though the intensity of the agreement or disagreement is difficult to quantify, for the respondents of uneducated or minimum educated, this scale is the most appropriate (Kidder & Judd, 1999).

5.4.2 Principal Component Analysis (PCA)

The general purposes of a factor analysis technique are; to reduce the number of variables and, to detect structure in the relationships between variables; that is to classify the variables (Statsoft, 2003). Therefore, it is often used to reduce the number of variables in the data file and, it is ideal to examine relationships between variables (Thurstone, 1931; Wherry, 1984). There are two categories of Factor Analysis models – in the Principal Components Analysis (PCA), it assumes that all variability in an item should be used in the analysis, while in Principal Factor Analysis (PFA) it only uses the variability in an item that is common with the other items. In most cases, these two methods usually yield very similar results (Statsoft, 2003). However, PFA is often preferred as a method for data reduction, while PCA is often preferred when the goal of the analysis is to

detect structure (MSITStore, 2007). Furthermore, according to Garson (2007), PFA is used to uncover the latent structure (dimensions) of a set of variables by reducing attribute space from a larger number of variables to a smaller number of factors and as such is a 'non-dependent' procedure. Principal Component Analysis (PCA) is the most common form of PFA. PCA seeks a linear combination of variables such that the maximum variance is extracted from the variables. It then removes the variance and seeks a second linear combination that explains the maximum proportion of the remaining variance, and so on.

Thus, the purpose for applying the PCA in this research is to enhance the results of the previous descriptive analysis. This is because this method examines relationships between the variables and explains what these factors represent or contribute. PCA is also used to select a subset of variables from a larger set, based on which original variables have the highest correlations with the principal component factors (Garson, 2007). It assumes that some of the variability in the data cannot be explained by the components (usually called 'factors' in other extraction methods). As a result, the total variance explained by the solution is smaller.

5.4.3 Correlation Analysis

To describe how well the model fits with the data, one should have an absolute measure, which does not depend on the units of measurement, but must be easier to interpret (Norusis, 2002). This can be done by applying correlation analysis. Correlation analysis explains how strong the relationship and the direction of relationship between two variables via correlation coefficient. The statistics mostly used for this purposes are Pearson Correlation and Spearman's Rho Correlation. The Spearman's Rho Correlation is used when the data for the variables are ordinal and assumes that the relationship between variables is linear.

If the relationship is not linear, correlation method cannot be used to study the intensity of relationship between two variables (Zakaria & Md Som, 2001).

Table 5.8
Type of Data and its Statistical Test

Type of Data	Statistical Test to Use
Interval	<ul style="list-style-type: none"> • Pearson Correlation
Ordinal	<ul style="list-style-type: none"> • Spearman's rho • Kendall's tau-a, tau-b, tau-c
Nominal	<ul style="list-style-type: none"> • Phi Cramer's V

Source: Zakaria & Md. Som (2001: p.66)

The correlation coefficient is symbolized by r which indicates its value between negative one to positive one ($-1 < r < 1$). If all the points fall exactly on a line with a positive slope, the correlation coefficient has a value of +1 and vice-versa. The absolute value of Pearson Coefficient between two variables tells how close the points are from straight line. Both large positive and negative values indicate a strong linear relationship between the two variables. According to Norusis (2002) if two variables have a large correlation coefficient, it does not mean that one of them causes the other. If there is no linear relationship between the two variables, the correlation coefficient is close to zero (0) but this does not mean that there is no relationship at all; nevertheless may be there is strong non-linear relationship between the two variables (Norusis, 2002; Zakaria & Md. Som, 2001).

This analysis is targeted to express the nature of relationship and the effects between the dimensions with their constructs headings, constructs with main compensation dimensions, and main compensation dimensions with compensation framework model, i.e. to identify the intensity of relationship whether 'inversely proportionate' or 'directly proportionate' by computing values of the Pearson Correlation of the variables. Table 5.9 shows the interpretations of the values of correlation coefficients.

Table 5.9
Interpretations of Values of the Correlation Coefficients

Values of Correlation Coefficient (r)	Interpretations	
	Guilford (1956)	Norusis (2002)
0.0	-	No linear correlation
+/-0.0 to +/-0.2	Very weak correlation	Very weak correlation
+/-0.2 to +/-0.4	Low correlation	Weak correlation
+/-0.4 to +/-0.6 or +/-0.4 to +/-0.7	Medium correlation	Moderate correlation
+/-0.6 to +/-0.8 or +/-0.7 to +/-0.9	High correlation	Strong correlation
+/-0.8 to +/-1.0 or +/-0.9 to +/-1.0	Very high correlation	Very strong correlation
+/-1.0	-	Perfect positive or negative linear correlation

Source : Adopted from Zakaria & Md. Som (2001: p.92)

5.5 SUMMARY

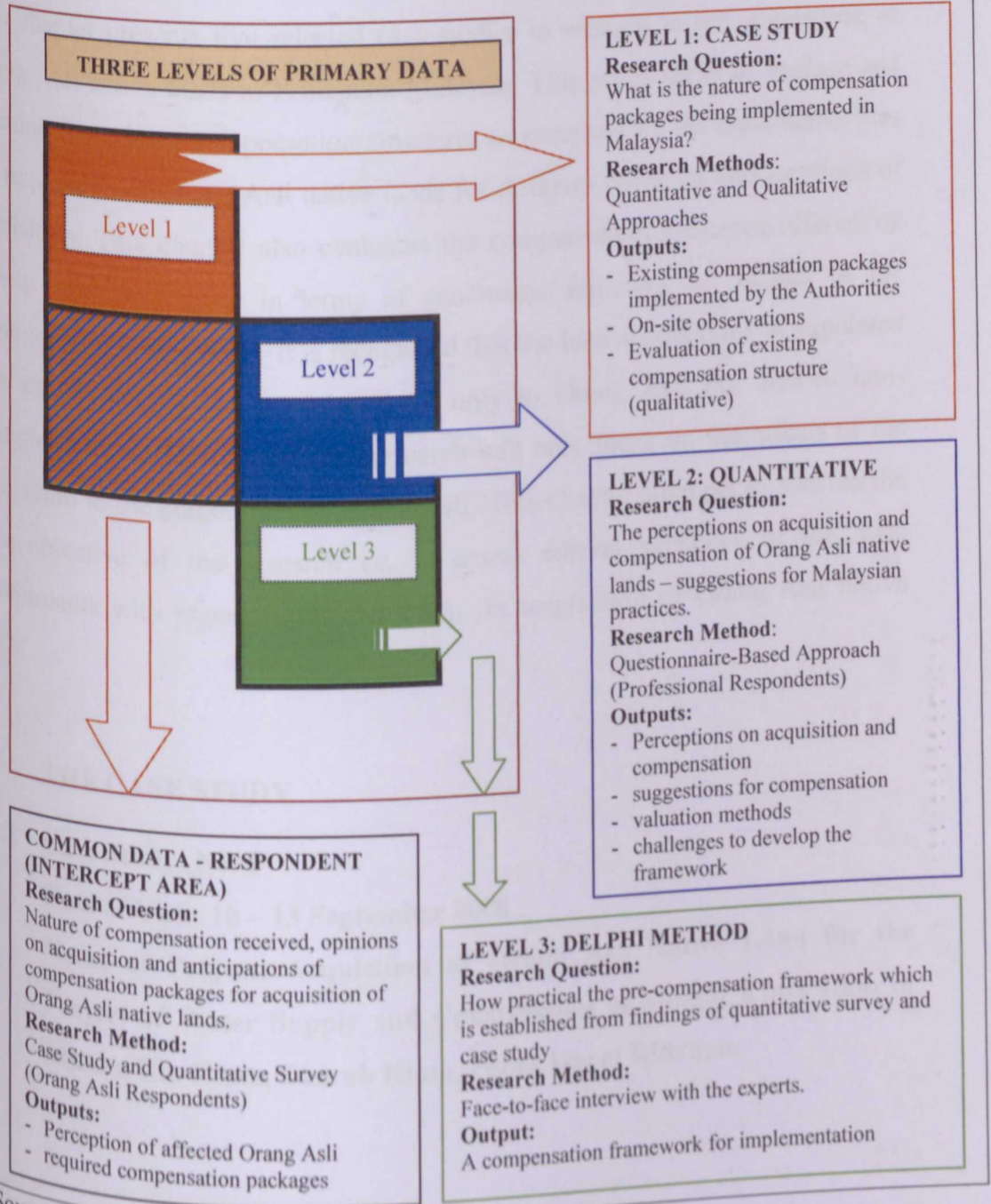
This research applies three methodologies to achieve its research objectives – quantitative survey, qualitative technique (Delphi method) and case study approaches as described in Figure 5.4. The research model, which was developed based on discussions of literature surveys needs to be proved by statistical analysis procedures in order to develop a compensation framework for land acquisition affecting Orang Asli native lands. This research recognized the affected Orang Asli in five stipulated case studies as well as the professionals involved in and affected by the land acquisition as respondents in quantitative survey approach.

The SPSS version 12.0 software is used as the main number crunching tool for data analysis. This analysis involved descriptive statistics – frequency, mean, variance and standard deviation, as well as inferential analysis of correlation. The results of data analysis and interpretation of the findings are presented in Chapter 7.

Figure 5.4
Summary of the Research Methodology

Research Aim	To develop a compensation framework for land acquisition affecting Orang Asli native lands
Research Focus	To explore the perceptions of related parties on land acquisition and compensation of native lands, and thereafter to give suggestions for compensation packages for Orang Asli lands in Malaysia

RESEARCH METHODS: CASE STUDY, QUANTITATIVE AND DELPHI METHOD APPROACHES



Source: Adopted from Hanif (2005:97)

CHAPTER SIX

RESEARCH FINDINGS: ANALYSIS OF THE CASE STUDY – EVALUATION OF THE CURRENT COMPENSATION PACKAGES FOR ORANG ASLI NATIVE LANDS

6.1 INTRODUCTION

This chapter presents five selected case studies in relation to the acquisition of Orang Asli native lands in Peninsular Malaysia. This study seeks to explore and examine the current compensation structures as practised by the state authorities for acquisition of Orang Asli native lands for different purposes and locations of acquisition. This chapter also evaluates the compensation packages offered by various state authorities in terms of generosity, fairness, and impact to the community of Orang Asli. It is recognised that the land acquisitions in stipulated case studies have given an impact not only to Orang Asli but also to non-aboriginals as well. However, this research will only focus on the effects of the acquisition to the community of Orang Asli. This chapter attempts to address the third objective of the research i.e. to assess current practices of the state governments with regard to compensation for acquisition of Orang Asli native lands.

6.2 THE CASE STUDY

6.2.1 Case Study: No. 1

Date of Visit: 10 – 13 September 2006

**Name of Project: Acquisition of Orang Asli Native Land for the
Project of Water Supply and Construction of Sungai Kinta Dam in
Mukim Ulu Kinta, Daerah Kinta, Perak Darul Ridzuan.**

6.2.1.1 Background

This Orang Asli native land is part of Bukit Kinta Forest Reserve that covered an area of about 15,000 hectares which now being dedicated as water catchments area for Kinta District. The Orang Asli land is situated at the north-east of the catchments area consisting of five villages namely; Kampong Jintan; Kampong Dollah; Kampong Kuala Termin (Kampong Bako); Kampong Jambu and Kampong Sumba. These kampongs together with their roaming/subsist area make an area of 1,073.4 hectares. This site has been discussed by the State Government of Perak with the intention to be gazetted as Orang Asli Reserve via Exco Paper No. MMK 1157/1988. Later, on 4th April 1990 the site has been re-approved and finally endorsed as Orang Asli Reserve via Exco Paper No. MMK 1190 for an area of 1,073 hectares.

These kampongs are situated 35 km to the north-east of Ipoh city. The main access to the site is from Jalan Tanjong Rambutan/Jalan Tambun junction and later takes the laterite road to Intake, Ulu Kinta and from PPH Ulu Kinta through 3 km laterite road and earth road. The nearest town from the site is Tanjong Rambutan.

6.2.1.2 The Land Acquisition

The total area acquired for the project of Sungai Kinta Dam and its activities is 100 hectares. This project is initiated by Lembaga Air Perak (LAP) under the 'Greater Ipoh Water Supply Scheme II' through the project called 'Construction of Sungai Kinta Dam and Associated Works'. The construction had severely affected two Orang Asli kampongs, which were Kampong Jintan, and Kampong Dollah. Both kampongs were demarcated as the site of the dam and water retention area/pond. The other three kampongs were not really affected by the construction of the dam, but by construction of the roads and accessibilities to the dam and intakes. There were 86 families and 72 houses/shacks of Orang Asli

from these kampongs that had to give up their ancestral land for the project as the following details (Table 6.1):

Table 6.1
Details of Orang Asli Kampongs in Case Study No.1

No.	Name of Kampong	No.of Family	No.of House
1.	Kampong Jintan	3	18
2.	Kampong Dollah	26	3
3.	Kampong Kuala Termin (Bako)	25	17
4.	Kampong Jambu	9	11
5.	Kampong Sumba	23	23
Total		86	72 ¹⁸

Source: JHEOA Perak/Kedah (2007)

All the affected families have been transferred under the Regroupment Scheme (Rancangan Pengumpulan Semula, RPS) of JHEOA to new settlement area in Kampong Makmur (formerly known as Kampong Sungai Ular), Ulu Kinta. At the new settlement area, all families were provided with houses and basic infrastructure and amenities.

6.2.1.3 Compensation Package

The compensation packages for the acquisition were negotiated by JHEOA on behalf of the respective Orang Asli. After going through a lengthy negotiation process, the Perak State Authority and LAP agreed with the following compensation packages (Table 6.2):

¹⁸ Number of houses not equal to the number of the families due to some of the families is nomadic in life style and do not owned any house or shack at the date of acquisition/regrouping program.

Table 6.2
Compensation Packages for Case Study No.1

Monetary Compensation	Non-Monetary Compensation
<ul style="list-style-type: none"> • Compensation of productive trees Total Compensation: RM 2,117,668.00 No.of Orang Asli: 47 Total Area: 100 hectares. Valued by: Department of Valuation and Property Services Negeri Perak (Note: DVPS uses standard value per tree of productive trees as prepared by the department since 1980s) • Living Allowance Rate: RM200 per month/family No.of Family: 86 families Period: 60 months (July 2000 – Jun 2004) • Evacuation Allowance Rate: RM500 per family No.of Family: 29 families • Property 3 acres agriculture land planted with oil palm. Note: This is part of the compensation package but it was borne by the JHEOA under the Regroupment Scheme project. LAP is not responsible for the cost incurred. 	<ul style="list-style-type: none"> • Construction of house LAP has agreed to construct 29 unit of houses for the affected families in Kampong Jintan (3 families) and Kampong Dollah (26 families) in the new settlement area of Kampong Makmur. LAP used standard building plan of JHEOA. The cost of construction is estimated @ RM25,000 per house including the wiring works for electrical supply and piping works for clean water supply. (Note: For another 57 families from Kampong Kuala Termin, Kampong Jambu and Kampong Sumba were taken care by JHEOA due to their houses in respective kampongs were not affected by the construction. JHEOA had decided to relocate these families due to administrative reasons) • Infrastructures and Amenities LAP has agreed to upgrade the existing amenities provided by JHEOA in Kampong Makmur such as Village Clinic, Hall, Surau etc. Construction of a new metalled road from Kampong Cadak to Kampong Makmur (5 km) and access road to connect the site of 29 new houses to the existing linkages road within Kampong Makmur. • Relocation of Cemetery LAP has agreed to manage and relocate the traditional cemetery at new site in Kampong Makmur from the flooded area of the dam site.

	<ul style="list-style-type: none"> • Permission for Roaming The Orang Asli are allowed by LAP to harvest their plants, collect forest produces and fishing in the said catchments areas and within their roaming bounty as long as they did not enter the protected areas.
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Source: JHEOA (Perak and Kedah) (2007).

6.2.1.4 Analysis of the Acquisition and Compensation

Based on the above information of acquisition and compensation packages, it is believed that the project has contributed to upgrade the quality of life of the respective Orang Asli. The project has aided JHEOA in resolving the long standing issue of resettling the Orang Asli in Ulu Kinta to Kampong Makmur under the Regroupment Scheme (RPS). The objective of RPS is to ensure the Orang Asli community lives in an appropriate atmosphere with basic communal amenities and infrastructure. It has enabled JHEOA to provide better services for them in terms of the children's education, healthcare, welfare, and socio-economic development.

However, at the very beginning, the Director General of JHEOA was not satisfied with the compensation packages offered by the State Authority. This is because the compensation offered was relatively less attractive as compared to compensation packages offered by the State Government of Selangor in acquisition of Orang Asli land for project of Sungai Selangor Dam (Splash Project Phase 3) in Kampong Gerachi and Kampong Pertak, Hulu Selangor. During the first round of negotiation (18th May 1999), JHEOA has suggested to the State Authority and LAP the following compensation packages:

- Compensation for affected productive trees
- Construction of 53 unit of houses (JHEOA standard building plan)
- Living Allowance for 86 families for the period of 5 years @ RM350 month/family.
- Evacuation allowance @ RM500 per family
- Oil palm plantation project of 595 acres
- Orchard project of 170 acres
- Alienation of residential land with title
- Appropriate infrastructure and amenities for community of Orang Asli at the new settlement area.

Unfortunately, the State Authority has made a counter offer to the above compensation packages and offered the compensation as tabulated in Table 6.1 (as a final compensation) on January 2002 via MoU Agreement between JHEOA and LAP. JHEOA had used all possible means to fight for a better compensation scheme for Orang Asli. However, due to the State Government policy, this did not materialise as expected. In the negotiation of compensation with the state governments, JHEOA always comes up with uniform and standard claim but the success of the claim is based on the generosity of the state government. This is because, compensation packages for acquisition of Orang Asli native lands is solely based on 'ex-gratia', due to the absence of laws governing compensation claim by the Orang Asli except, for compensation of productive trees under section 11 and 12 of the Aboriginal Peoples Act, 1954.

On the payment of productive trees, JHEOA is bound by government policy to refer to the Valuation and Property Services Department (VPSD) for opinion on the totality of compensation for the affected trees. Batin Long bin Long from Kampong Dollah (personal interview, September 13, 2006), revealed that many Orang Asli in this project had voiced out their dissatisfaction towards the value per tree for their orchard and plantation. For example, matured rubber and durian tree, the valuation department only value at RM 33.00 and RM 730.00 per tree,

whereas they claimed that these should be at least RM 50.00 and RM 1,000.00 per tree respectively. However, when this matter was referred to the Officer A from LAP (personal interview, September 13, 2006), it was revealed that as a government agency, the agency was bounded by the government policy and need to comply the VPSD advices with regard to the value of trees. This principle also applies to other compensation in relation to the acquisition. Furthermore, Batin Dero bin Alang from Kampong Jambu (personal interview, September 13, 2006) was not satisfied with the size of agriculture land as part of the compensation package. He claimed that the size was uneconomical for Orang Asli future income and survival.

6.2.2 Case Study: No. 2

Date of Visits: 2 – 3 October 2006 and 21 – 23 November 2006

Name of Project: Acquisition of Orang Asli Native Land for the Project of Bukit Lanjan Township, Damansara, Petaling Jaya, Selangor Darul Ehsan

6.2.2.1 Background

This acquisition is inspired by the policy of 'privatisation' to develop a potential Orang Asli Reserve into more profitable and sustainable development with the objective to achieve economic well being for Orang Asli community. The private developer, Saujana Triangle Sdn Bhd, a subsidiary company of Emkay Berhad (hereinafter called STSB) intended to develop Orang Asli land located in the fringe of Kuala Lumpur or specifically known as Kampong Orang Asli Bukit Lanjan, Jalan Damansara, Mukim Sungai Buloh, Daerah Petaling into township called Bandar Damansara Perdana. The Orang Asli Reserve consists of five titles of land; PT 31428 (HS(M) 9639); PT 31429 (HS(D) 100994); PT 31430 (HS(D) 100996 and, PT 31431 (HS (D) 100997, all under Mukim Sungai Buloh, District of Petaling. The total land area is 256.4 hectares. This site easily accessible from

three main highways i.e. LDP, Sprint and PLUS Highway (from Toll Plaza Sungai Buloh and Kota Damansara).

In order to make the intended development into reality, a special committee known as 'Special Committee for the Development of Bukit Lanjan, Negeri Selangor Darul Ehsan' has agreed with the contents of MoU dated 28 November 1996 which among others spelt out the purposes of the said development; mutual understanding of the three main parties represented the Orang Asli i.e. Village Security and Development Committee (JKKK), Lembaga Adat, JHEOA and the developer, STSB; implementation of the development of Bukit Lanjan Resettlement area. Further, this committee also functions as a facilitator for a smooth implementation of the whole development. STSB is also responsible to allocate 45 acres of land for development of 'Bukit Lanjan Settlement Site' and another 35 acres as 'Sungai Buloh Settlement Site'.

6.2.2.2 The Land Acquisition

This acquisition involved the whole pieces of Orang Asli Reserve at Bukit Lanjan with a combined area of about 256.4 hectares. This reserve was popularly known as Kampong Orang Asli Bukit Lanjan. The acquisition involved 158 Orang Asli families which were divided into six main groups:

- a) Group A - Orang Asli who lived in Bukit Lanjan.
- b) Group B - Orang Asli who lived outside Bukit Lanjan but originally and rooted from Bukit Lanjan
- c) Group C - Orang Asli from other areas/locality who lived and possessed property by purchased in Bukit Lanjan
- d) Group D - Orang Asli from other areas who lived in Bukit Lanjan by 'permission and generosity' of the Bukit Lanjan's community.
- e) Group E - Government servants (Orang Asli or non Orang Asli) who lived in Bukit Lanjan in JHEOAs' quarters.


- f) Group F – Outsiders (Orang Asli or non Orang Asli) who owned project in Bukit Lanjan.

All these groups are considered as beneficiaries and interested parties of the acquisition. JKKK and Lembaga Adat were elected by the community to represent them in any negotiation with the JHEOA, developer and the state authority. Based on the MoU agreeable between parties concerned, these groups have agreed to be transferred into the allocated site of 45 acres by STSB.

6.2.2.3 Compensation Package

Table 6.3 showed the compensation packages that were agreeable by the parties concerned after a series of negotiations between them:

Table 6.3
Compensation Package for Case Study No. 2

Monetary Compensation	Non-Monetary Compensation
<ul style="list-style-type: none"> Compensation of productive trees <p>Total Compensation: RM 6, 685,000</p> <p>No.of Family: 112 families (Group A)</p> <p>Total Area: 256.4 hectares.</p> <p>Valued by: Department of Valuation and Property Services Selangor Darul Ehsan</p> <p><i>(Note: DVPS uses standard value per tree of productive trees as prepared by the department since 1980s)</i></p> <ul style="list-style-type: none"> Living Allowance <p>Rate: RM500 per month/family</p>	<ul style="list-style-type: none"> Residential Compensation <p>Each family is entitled to residential benefits as follows:</p> <p>a) One (1) unit of bungalow house with individual title and land area of approximately 7,275 sq.f; built-up area of 1,500 sq.f ; construction cost not less than RM 113,000 (inclusive of professional fees and management cost) built on Bukit Lanjan Settlement Site by STSB.</p>  <p>b) One (1) unit of double storey terrace house with individual title and land area of 1,080 sq.f (18' x 60'); built-up area 931 sq.f; construction cost not exceeding RM45,000 (inclusive of professional fees and management cost) built on on Sungai Buloh</p>

No.of Families: 158

Period: 12 months (May 1998 – Apr 1999)

- **Evacuation Allowance**

Rate: RM600 per family

No.of Families: 158

- **Amanah Saham Bumiputera**

Rate: RM45,000 per family

No.of Family: 158 families

Settlement Site by STSB.



- c) One (1) unit of medium cost apartment with built-up area of about 640 sq.f; construction cost not less than RM27,000 (inclusive of professional fees and management cost) built on Bukit Lanjan Settlement Site by STSB for each bachelor son/daughter or family member aged more than 15 years on 4th October 1995 (date of census). If more than one bachelor child or family member eligible, the number of apartment allocated is progresses accordingly.



- d) A temporary accommodation to each Orang Asli family from the date of evacuation of their land until their bungalow in Bukit Lanjan Settlement is fully completed and ready for occupation.

- **Infrastructure and Amenities**

STSB is responsible to construct and provide basic infrastructure (road, drainage, street lighting, oxidation pond, water reticulation, electrical supply and sub-station etc) to both sites of settlements (Bukit Lanjan Settlement and Sungai Buloh Settlement) according to various authorities' requirements and policies.

STSB is also responsible to construct and provide the following amenities for the benefits of Orang Asli community in both settlements:

- a) Surau / Musolla
- b) Multi-purpose Hall
- c) Stall / Shop for small scale business
- d) Temuan Museum (Only at Bukit Lanjan Settlement)
- e) Kindergarten
- f) Children playground
- g) Quarters for JHEOA Officers

6.2.2.4 Analysis of the Acquisition and Compensation

Until end of 2006, to say the least, the compensation package given to the Orang Asli of Temuan tribe in Bukit Lanjan was considered as one of the most attractive and generous compensation packages for acquisition of Orang Asli native land in Malaysia. This package if translated into monetary form (excluding cost of providing infrastructure and amenities, and the value of bungalow plot) is equivalent to RM70 million. This means that, each of the affected family has received the total compensation of about RM 443,000 plus benefits of better quality of life, secured income and opportunity in investment. If the compensation is translated into value of land per hectare, its fetched around RM273,500 per hectare (@ RM 27.35 per sq.m / @ RM2.50 per sq.f) and this showed that for such land without title (reserve land in status) the value is considered high enough and the Orang Asli have received a very substantial benefit from the acquisition. This is evident from the fact that, out of 158 families affected, only 13 of them objected the compensation packages. As mentioned by the Manager of STSB (personal interview, November 22, 2006), this fair compensation package offered by the developer to Orang Asli aimed to uplift the quality of life of Orang Asli to the level at par with neighbouring community as well as a social obligation of the developer to the well-being of Orang Asli.

Unlike in Case Study No. 1, the Chairman of Desa Temuan's JKKK (personal interview, November 22, 2006) revealed that, most of the Orang Asli here were satisfied with the value of productive trees as assessed by the Department of Valuation and Property Services, Negeri Selangor. To them, the value assessed by the department was reasonable and adequate. Furthermore, Puan Rogayah (member of the Desa Temuan's JKKK through personal interview, November 22, 2006) also believed that Orang Asli would not go against any development on their native lands, provided that the compensation offered to them is reasonable, adequate, a boon to their standard of living and, most importantly, offers security of income or better economic well-being.

According to Officer A of JHEOA (personal interview, November 23, 2006), the compensation packages of Bukit Lanjan are used by the department as a template/guide to compensation in any negotiation involving privatisation/joint venture project of Orang Asli native lands. Usually, lands that are involved in privatisation / joint venture project are potentially developable and in proximity with towns.

6.2.3 Case Study: No. 3

Date of Visit: 7 – 10 November, 2006

Name of Project: Acquisition of Orang Asli Native Land for the Construction of Sungai Linggui Dam in Kota Tinggi, Johor Darul Takzim

6.2.3.1 Background

Based on an agreement in 1962 between the Governments of Johor and Singapore, the government of Johor is responsible and under obligation to supply not less than 544 megalitre per day (MLd) of untreated water to Singapore over a period of 99 years. Due to the inadequate capacity faced by Johor which needed to the state's own water consumption at the same time, the state government of Johor (with federal government consent) granted the Singapore government to construct her own dam in Kota Tinggi (Sungai Linggui Dam Project). The dam is earth-fill type with cost of construction estimated about RM160 million. The purpose of this dam is for regulation of water from Sungai Johor in order to achieve the maximum abstraction of 1135 MLd (250 megagallon per day (Mgd)). Before that, Singapore abstracted less than 544 MLd from Johor.

The area inundated by the dam is about 5,450 hectares of forest land, of which 200 hectares had been logged. The project area is 300 metres downstream from

confluence of Sungai Tempinis – Sungai Linggui and the sites of three existing Forest Reserves and an existing wildlife refuge. The forest reserves directly affected are Kluang Forest Reserve, Ulu Sedili Forest Reserve, Panti Forest Reserve and the Endau-Kota Tinggi Wildlife Reserve. Two kilometres downstream from the dam site is situated by three Orang Asli (Jakun tribe) settlements, namely, Kampong Semanggar, Kampong Pasir Asam and Kampong Sungai Sayong consisting of 41 families or 225 persons. The Orang Asli had traditionally used the dam site for their hunting-gathering activities as well as for *kawasan saka* or ancestral ground.

6.2.3.2 The Land Acquisition

On 17th August 1988, JHEOA was invited as a member of the First Coordination Meeting between Department/Government Agency and Public Utilities Board of Singapore (PUB) in relation to Sungai Linggui Dam Project. All related departments/agencies were asked to express their opinions and feedbacks about the project through this meeting. Their comments are needed by PUB to be considered in designing the project. JHEOA declared that there was no Orang Asli settlement within the dam site. Infact, the Orang Asli from Kampong Semanggar, Kampong Pasir Asam and Kampong Sayong had used the dam site as their subsistence and roaming area. The site is traditionally considered as *kawasan saka* based on their belief and custom.

In relation to the project, JHEOA was also a member of a Main Committee (Malaysia) and an Ad-hoc Committee headed by the Department of Environment (Ministry of Science, Technology and Environment, Malaysia). In both these committees meeting, JHEOA highlighted an issue of compensation to the respective Orang Asli on the demise of their *kawasan saka*. Accordingly, it was claimed by Orang Asli from these kampongs that they were losing their sources of income as a result of the construction of the dam. Therefore, they insisted on an

appropriate and reasonable compensation. In this regard, JHEOA Headquarters proposed to the state government to compensate these Orang Asli for a total loss of RM560,535.00¹⁹. This estimate was objected to by the respective Orang Asli who of consequently produced their own estimates. Based on their first calculation, they put in a claim of RM3,850,000 as the total loss. On 27th May 1993, they submitted a reclaim of RM3,120,000 revised (after being disputed by JHEOA on the basis of the calculation). After more than a year with no apparent decision from the state, the Orang Asli proceed to engage a lawyer from Kuala Lumpur to arbitrate on their behalf on the issue..

On 1st August 1995, the State Legal Advisor of Johor directed the JHEOA (State Director) to discuss the Orang Asli compensation claim at High Court of Johor. The State Legal Advisor pointed that, the High Court urged the parties concerned to settle this case by 'out of court settlement' through negotiation. Unfortunately, the counsel for Orang Asli could not come up with a reasonable claim. Another negotiation was held on 19th August 1995, but this time the claim was extremely high (i.e. RM120 million without justifiable basis of calculation and evidences). A series of negotiations were held on 23rd September 1995 and 3rd October 1995 respectively. The counsel claimed a total loss for two generations (50 years) of Orang Asli amounting to RM 89 million. Following this, the State Director, Department of Valuation and Property Services (DVPS) of Johor was instructed to estimate the total compensation that payable by the state to the aggrieved Orang Asli based on Sections 11 and 12, Aboriginal Peoples Act, 1954 (Revised 1974). Based on feedback from DVPS, the meeting on 3rd October 1995 decided to bring the matter to the State Government to decide. Until 26th February 1996, the State Government was still unable to decide on the claim by the Orang Asli because of the vast difference between DVPS figures and the claim by the Orang Asli. In the end, the judgment by the High Court of Johor Bahru favoured the Orang Asli.

¹⁹ The calculation is based on loss of income of each family per month for a period of 25 years. Total family affected as calculated by JHEOA is 53 families.

6.2.3.3 Compensation Package

For this acquisition, there was no compensation package offered by the acquiring body (the state authority) that was mutually agreed by the parties concerned. The final compensation was based on the High Court of Johor Bahru judgment/decision for payment of loss of income to Liggui Valley Orang Asli (Jakun) Trust administered by the lawyer appointed by the Orang Asli.

Based on the judgment on 19th December 1995, the High Court of Johor Bahru decided that the plaintiffs had to be paid RM 26.5 million with 8% interest per annum commencing from 4th November 1994. Further, in Civil Appeal No. J-01-65-1997, the total compensation to be paid by the State Government to Orang Asli was increased to RM 38 million. The State Government, which was not satisfied with the decision, had appealed on the compensation sum. On 21st Mac 2000, the Court of Appeal has rejected with cost the state government appeal and the total compensation of RM 38 million was upheld.

6.2.3.4 Analysis of the Acquisition and Compensation

This is an example of compensation paid to Orang Asli on lands that are not inhabited and not gazetted as their reserve land. They are paid solely based on the consideration of the lands that were used traditionally as their subsistence area since time immemorial. This decision was considered unique, and the decision by the court to allow such compensation was a surprising one due to the status of the land as a state land (i.e. the land was not officially reserved for Orang Asli) and further, the Orang Asli themselves did not live on the land.

The total compensation of RM38 million (decision after the appeal) for a total area of 5,450 hectares works to RM6,859 per hectare or RM2,777 per acre. Taking into consideration the state of the land at the date of acquisition i.e. typical

forest land, the compensation awarded to the community of Orang Asli in this project was considerably high. This is because the market value of forest land in the vicinity was recorded at between RM1,000 – RM2,500 per acre (DVPS Johor, 2005).

Officer A from JHEOA Kota Tinggi, Johor (personal interview, November 10, 2006) was also of the opinion that the compensation was considered high due to the status and circumstances of the land acquired. Furthermore, he commented that the Orang Asli themselves were also surprised with the quantum of compensation decided by the court because in the negotiation with the State Authority they claimed and expected only RM3,120,000 for their total loss. This claimed was turned down by the State Authority because the total loss of their trees was only RM560,535 (as calculated by the JHEOA with advice from DVPS, Johor). Dissatisfied with the decision of the State Authority, the Orang Asli engaged a lawyer to challenge the matter at the High Court. After going through the process of legal battle the judgment was favourable to Orang Asli. Unfortunately, the total compensation was not paid directly to Orang Asli, as it was placed under the Linggui Valley Orang Asli Trust (the lawyer was appointed by the court as an Administrator). The money was to be managed by an Administrator.

The Administrator apparently did not pay the compensation in lump sum but paid it in instalment on monthly basis to 53 heads of the families for a period of 25 years. Each family is entitled to RM 900 per month. According to Encik Abdul Rahman, former Batin of Kampong Pasir Intan (personal interview, November 9, 2006) before the action was brought to the High Court, a series of negotiations were held between Orang Asli and the lawyer. As one of the conditions the Orang Asli had to agree that should court rules in their favour, the awarded amount would be split 50% : 50% between the Orang Asli community and the lawyer; however, should the court decision go against them, then the lawyer was to bear litigation costs fully. JHEOA was unhappy with this arrangement but was not in

the position to interfere since it was not appointed by the court to represent the Orang Asli. This was evident from the letters sent by JHEOA to the lawyer asking about the distribution of the compensation and other matters in relation to the compensation that were not entertained by the lawyer.

Based on the foregoing, it is obvious that even though the High Court award to Orang Asli, in reality the Orang Asli did not receive full benefit from this generosity. On the contrary, it is the lawyer who is seen to have reaped greater benefit from the compensation in terms of the 50% share he gets and the right to hold the other half of the compensation money for 25 years. Batin Abdul Rahman, Batin Adung Kuwau of Kampong Sayong Pinang and Batin Daud of Kampong Semanga (personal interview, November 9, 2006) pointed out that their rights to the 'interest' that accumulates from the saving was in a grey area. Since the matter was not sorted out from the very beginning, the Orang Asli have no absolute rights to interest gained. To make matters worse, no parties (including JHEOA) can interfere with the matter unless the Orang Asli themselves file an action against the lawyer.

Picture 6.1

Most of Orang Asli in Kampong Pasir Intan still live in old houses provided by the government in 1980s due to the fact that compensation money was distributed in instalments.



6.2.4 Case Study: No. 4

Date of Visit: 29 – 30 January, 2007; 5-6 February 2007

Name of Project: Acquisition of Orang Asli Native Land for Construction of the North-South Link and KLIA Expressway Mukim Dengkil, District of Sepang.

6.2.4.1 Background

This case study represents an example of acquisition for public infrastructure project constructed and funded by a private company under the privatization programme. This project was part of the North-South Link and KLIA Expressway. The private company under this programme was awarded a concession contract and the power to maintain and collect toll from the motorists using the highways.

The alignment of the North-South Link and KLIA Expressway project partly passed through the kampongs of Orang Asli of the Temuan tribe – Kampong Bukit Tampoi and Kampong Bangkong. These kampongs were gazetted in 1935 by the British Administrator as 'Sakai Residential Area and Domain Reserve' under Gazette Notification No. 1649-35 (Federal Malay States Gazette) for an area of 182.25 hectares. Later, under the Plan PW 734 of Revenue Survey Sheet No. 117 (B-D) these areas were demarcated as 'Kawasan Simpanan Orang Asli Bukit Tampoi, Mukim Dengkil, Daerah Sepang'. In 1989, another 21.45 hectares (53 acres) was added to make the total of Orang Asli Reserve into 203.70 hectares (503.15 acres). These kampongs are being occupied by 221 Orang Asli from 47 families.

These kampongs are located at Km 2 of Dengkil-Puchong road. Dengkil town is located about 2.5 km to the south-east. The immediate neighbourhood of these kampongs are surrounded with small-scale industrial plots, residential areas and

small holding oil palm plantations. Bandar Baru Salak Tinggi is located 25 km to the south from Bukit Tampoi reserve area.

6.2.4.2 The Land Acquisition

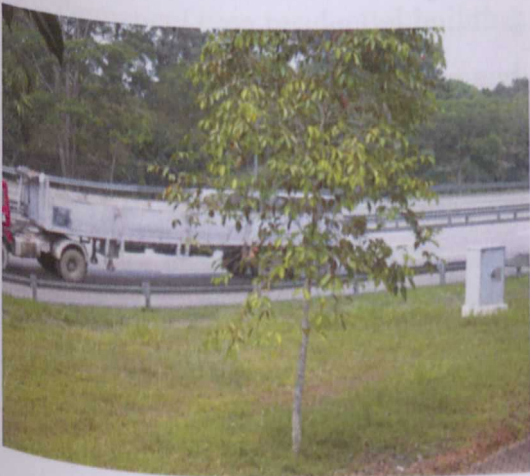
The acquisition of this land involved a gazetted Orang Asli reserve land of about 16.59 hectares (40.65 acres) in Kampong Bukit Tampoi and Kampong Bangkong, Dengkil, Selangor. The Orang Asli was informed of the acquisition in early 1995 for the construction of the North-South Highway Link Project and the Kuala Lumpur International Airport (KLIA) Expressway. The land was officially acquired in March 1996 for the purpose of the construction of a portion of the highway to the KLIA. The land was in the shape of a strip running through a gazetted Orang Asli reserve. Some 25 families were affected by the acquisition.

Based on the government valuation, the Orang Asli will be compensated for their crops/fruit trees and houses but not for their land. The Orang Asli were not satisfied with the compensation and received the compensation offered by the State Authority under protest. The Orang Asli inquired on how the compensation was calculated and determined, but the Land Officer was reluctant to disclose this information to the representatives of Orang Asli. The Orang Asli community was unhappy that they were not consulted.

Due to the failure to vacate the land within stipulated time given by the authority, on 21 March 1996, a FRU team was sent to evict the Orang Asli. Two units of houses and about 4.85 hectares of oil palm land owned by Orang Asli were flattened by the road contractor with the help of the FRU. Seven of the villagers who, between them and ancestors, have occupied the land since time immemorial have appointed lawyers for certain declaratory and consequential relief on their rights including to obtain a fair and just compensation for the acquisition of their land.

Picture 6.2

'Vehicular Culvert' constructed by LLM as a main access to Kampong Bukit Tampoi, Dengkil.



Picture 6.3

The portion of North-South Link and KLIA Expressway pass through the ex-Orang Asli Reserve at Kampong Bukit Tampoi.

6.2.4.3 Compensation Package

The compensation packages offered by the acquiring body (Lembaga Lebuhraya Malaysia –LLM) were based on loss of trees and ex-gratia payment for every building affected. The values of the trees were valued by the Department of Valuation and Property Services, Bangi Branch. At the very beginning, the compensation packages agreed by the LLM were as follows:

- Compensation for Crops (25 families): RM 511,560
- Compensation for 5 Buildings: RM144,500(@RM25,000/ building)

- The LLM also agreed to replace and construct a new Community Hall for Kampong Bukit Tampoi and a Multi-purpose Hall for Kampong Orang Asli Melut (3 km away from the original site).

Most of Orang Asli were not satisfied with the above compensation packages. They claimed that the compensation offered by the LLM was relatively low. On the contrary, they submitted their own claims²⁰ through JHEOA as follows:

- Compensation for their ancestral lands involving an area of 40.68 acres being acquired.
- Resettlement area of 10.0 acres.
- Permanent type residential building with minimum size of 30 ft x 40 ft – 3 bedrooms, water piping system and electrical wiring.
- Residential plot of 1.0 acre each.
- Cost of earth-fill to the residential sites and retaining wall of 1.0 meter high for each residential plot.
- Full infrastructure and amenities for resettlement area – metalled access road, street lightings, drainage systems, community hall, public telephone booths and cost to relocate existing cemetery to a new area.

Due to existence of differences in compensation package offered by LLM and that was claimed by the Orang Asli, another discussion was held between the parties. LLM agreed to increase by 33% the total compensation on the crops valued by the DVPS and to cash money of RM25,000 for each family whose buildings were affected by the acquisition. On the argument that the Orang Asli ancestral lands are untitled lands, LLM offered to pay an ex-gratia payment for loss of land for RM 30,000 per acre. LLM also urged the Authority to review the Act 134 to avoid disputes in compensation payment in acquisition of Orang Asli lands. On

²⁰ Memorandum of the Village Development and Security Committee (JKKK) Kampong Bukit Tampoi and Kampong Seberang Tasik Seri Tanjung together with Batin Endik Palepan and villagers dated 28th March 1995 to JHEOA.

the numbers of houses affected, LLM agreed to add another six (6) houses to make the total of eleven (11) houses to be compensated. This compensation was agreed to by the respective Orang Asli except a group of seven (7) Orang Asli from Kampong Bukit Tampoi who sued the State Authority in High Court, Shah Alam (Sagong case). Until now the case is pending for decision at the Court of Appeal.

6.2.4.4 Analysis of the Acquisition and Compensation

The Orang Asli were informed by the Authorities (The State Authority and LLM) that their right to compensation in this acquisition was solely based on provision of Sections 11 and 12 of the Aboriginal Peoples Act 1954 (Act 134); meaning that they are eligible only for their trees and buildings that were affected by the acquisition. But, the State Authority in this case was generous to recommend an 'over and above' or additional payment to what that has been required by the law. The affected Orang Asli were also compensated the so-called 'ex-gratia' payment under the compensation packages for this project. Unless the Act 134 is reviewed and amended in due manner, the compensation for market value of land may be considered based on the provisions of the Land Acquisition Act 1960. According to Batin Tukas (personal interview, February 10, 2007) most of the Orang Asli realised and understood the situation (no compensation for ancestral land) and agreed to accept the compensation offered by the State Authority.

However, a group of seven people from Kampong Bukit Tampoi (headed by Sagong bin Tasi – hereinafter called the plaintiffs) were unhappy with the compensation offered by the State Authority and proceeded to file legal action. The suit was filed as the result of a dispute that arose out of the eviction from their 40.68 acres of land situated at Kampong Bukit Tampoi, Dengkil, Selangor for the construction of a portion of the highway to KLIA. The State Authority (hereinafter called the defendant) claimed that the plaintiffs have no 'prima facie'

case and concrete reason that they were not happy with the amount of compensation. Furthermore, the land is State Land and the plaintiffs have no proprietary interest in the land or any interest therein at all. The defendant also refused to compensate the plaintiffs for the market value of the land except for the loss of their crops and fruit trees and the loss of their homes or any building structure.

The plaintiffs via the writ of action had sought the declarations for: the plaintiffs are the customary owners, the original title-holders and the holders of usufructuary rights of the land; these rights to the land are not destroyed, restricted or extinguished; the Orang Asli and their ancestors to the land are entitled to protection by the State Authority under the fiduciary duty owed or the existence of trust in respect of the ownership, title and rights; the State Authority has no right to destroy, restrict or extinguish their ownership, title and rights to the land without compensation. Based on these declarations, the plaintiffs also seek these orders: the State Authority to pay adequate compensation for the land; another party to pay for the damages of trespass; the State Authority to pay for the damages of the illegal eviction; and to pay for special damages if so proven (Sagong Tasi, 1996).

In summary, Datuk Wira Mohd Noor (Shah Alam High Court Judge) delivered his judgment as follows:

- a) The land is customary and ancestral land occupied by the Orang Asli for generations.
- b) Under the common law, the proprietary interest of Orang Asli in the land is within the settlement.
- c) The rights under the common law and the Act 134 are complementary to each other.
- d) The rights both under the common law and the statutory law are proprietary rights protected by Article 13 of the Federal Constitution 1957.

- e) The compensation paid to Orang Asli under the Act 134 was not adequate within the requirement of Article 13(2) of the Constitution; therefore the deprivation of the land was unlawful.
- f) The Orang Asli must be compensated under the Land Acquisition Act 1960.
- g) The State Authority and the Federal Government owe fiduciary duties towards the Orang Asli, which had been breached. Therefore, the Orang Asli would be entitled to be compensated for the loss suffered i.e. value of the land.
- h) The 14 days notice given for eviction of the Orang Asli from their land was unlawful, unreasonable and insufficient.
- i) The other parties concerned have committed trespass against the possession of Orang Asli land.

However this case is now still pending Federal Court decision (although at time of the report it is likely to be released somewhere in early 2007) following the decision by the Court of Appeal on 19th September 2005 upholding the Shah Alam High Court's decision (New Straits Times, 22nd November, 2006).

The Court of Appeal in this case has recognised that the Orang Asli lands are very valuable as socio-economic commodity and therefore the government must give due recognition to the importance of the Orang Asli traditional lands. The incorporation of the Covenant in particular Articles 6 and 15 of the Federal Constitution 1957 thereof would ensure that actions are taken to protect Orang Asli traditional lands as permanent settlements which cannot be compulsorily acquired for development.

Officer A from JHEOA Selangor/Wilayah Persekutuan (personal interview, February 9, 2007) was of the opinion that the compensation packages offered for this acquisition project were less attractive as compared to other compensation packages that have been awarded to other projects in Selangor, such as the Selangor River Water Supply Scheme Phase 3 (SSF 3) in Kuala Kubu Bahru;

Privatisation Project of Bukit Lanjan Township, Damansara; Mixed-Development Project on Part of Bukit Air Hitam Forest Reserve, Mukim Petaling; etc. All these projects received better compensation packages that included compensation for loss of fruit trees, building, trust fund, cash-money for saving purposes, monthly allowances, houses and residential plots with full infrastructure and community amenities.

6.2.5 Case Study: No. 5

Date of Visit: 15 – 17 March, 2007; 29-30 March 2007

Name of Project: Acquisition of Orang Asli Native Land for the Construction of Kelau Dam and Distribution of Raw Water from Raub, Pahang to Hulu Langat, Selangor.

6.2.5.1 Background

The RM3.8 billion Kelau Dam Project involving construction of a dam to transfer raw water from Pahang to Selangor, funded by the Japan Bank for International Cooperation (JBIC) had commenced its preliminary works in early 2007 and is expected to take five years to complete. Prior to this, the land acquisition process for the project was completed including the compensation packages for the affected Orang Asli. This project would involve the building of the dam across Sungai Kelau east of Bentong and the construction of a 45 km tunnel through the Titiwangsa Main Range. Raw water stored by the dam will be channeled through the tunnel to water treatment plant to be simultaneously built near Hulu Langat, Selangor.

The Kelau Dam Project will inundate 4,090 hectares of land, which forms part of Lakum Forest Reserve and also comprises Felda land schemes. In relation to this project, a total of about 1,300 people are affected and will be relocated. Most of

them are Felda settlers, inhabitants of the affected villages and 520 Orang Asli from 115 families from Kampong Sungai Temir, Raub. However, this case study will only focus on the land acquisition of the 115 Orang Asli families.

Despite objections from many quarters, this project has been given the go-ahead by the cabinet in 2006. This is because this project had gone through the detailed studies including by the Environmental Impact Assessment (EIA). Accordingly, the Natural Resources and Environment Minister (The Star, 7th February, 2007) then had this to say,

‘There is no doubt that the flora and fauna in the forest reserve will be affected but there is no other way and besides it is for a good cause, and the project is necessary to meet the demand for water and for the continued development of the Klang Valley and Selangor’.

However, later in March 2007, the Deputy Prime Minister (DPM) made a surprising announcement that the project would be reviewed and there was a possibility that it be shifted to Perak instead of its original location at Raub. This announcement was made due to continuous objections from all quarters on the construction of the 45 km tunnel through the Main Range. They claimed that the construction of the tunnel would have an adverse impact on the eco-systems. Nevertheless, according to the statement by the Secretary General of the Ministry of Energy, Water and Communication (MEWC) in the Pre-Council Technical Committee Meeting of the Project No. 1/2007 on 5th March 2007, the Ministry has not received any formal directive from the DPM office with regards to the review of the project implementation. Therefore, until today the Ministry’s stand is in accordance with the Cabinet decision in 2006 that the project will be implemented.

Despite the fact that the project may be reviewed or shifted from its original site in Raub to somewhere in Perak (most probably in Slim River/Tanjong Malim), it remains as one of the case studies for this research for the following reasons:

- Compensation packages to 520 affected Orang Asli from 115 families were already finalised by the parties concerned, which made this case and fulfill the requirements of this study.
- Perceptions of Orang Asli on land acquisition were already established. This means that the impacts of the land acquisition have been experienced by them.
- Opinions of Orang Asli toward the project which went through the the phases of ahead, later review and, later proceed again may be useful to be investigated and might reveal some new observations or findings to the research.

6.2.5.2 The Land Acquisition

Land acquisition for Intakes, Semantan Pump Station, reserve for piping and access road, Kelau Dam and access road, and reserve for tunnel was gazetted on 9th November, 2006. Inquiries in relation to this land acquisition are expected to begin in the middle of 2007. In addition, the land acquisition process of the inundated area of Kelau Dam (4,090 hectares) and the alignments of access roads are due to be gazetted in April 2007. However, the whole process of land acquisition including acquisition of lands for the construction of tunnel should be completed by the end of 2007.

At present, the MEWC is in the process of finalizing the appointment of Project Consultants, call for Pre-Qualification Contractors, and Negotiation Tender for building of the tunnel components. The works of these components are expected to commence in early 2008. Meanwhile, the construction of Kelau Dam, Intakes, Semantan Pump Station and alignment of pipes are expected to commence in early 2009. However, according to Datuk Seri Dr Lim Keng Yaik; Water and Communication Minister, the international tender for this project may be called as

early as August 2007 because the project has been delayed for more than a year due to various setbacks (The Star, 29th June, 2007).

Kelau Dam Project will affect a total of 1,300 people. Most of them are settlers of Felda Lembah Kelau, settlers of Rancangan Tanah Pemuda (RTP) Kelau, inhabitants of affected villages and 520 Orang Asli from 115 families from Kampong Sungai Temir. In principle, most of them supported the implementation of the project, provided they are awarded with fair and equitable compensation. The settlers of RTP Kelau had made a request for the State Authority to resettle them near to the other resettlements to facilitate their travel and transportation.

The Orang Asli of Temuan tribe from Kampong Sungai Temir is not the original tribe who inhabited the area for generations. This is because, according to Batin Cham a/l Beng (personel interview, March 30, 2007), they originated from Ulu Gali, Raub where their great grandparents inhabited the area since time immemorial. During the Emergency Period (1941- 1948), they were forced to evacuate to Sungai Ruan, Raub under the British Government policy to curb insurgent activities. Thereafter, for the establishment of the Chinese New Village at Sungai Ruan, they were transferred to Lembah Kelau. Again, due to development of Felda Lembah Kelau in 1980s, the Orang Asli had to give away their settlement and roaming area and were forced to evacuate to Kampong Sungai Temir. On the current phenomenon, Batin Cham a/l Beng sincerely hopes,

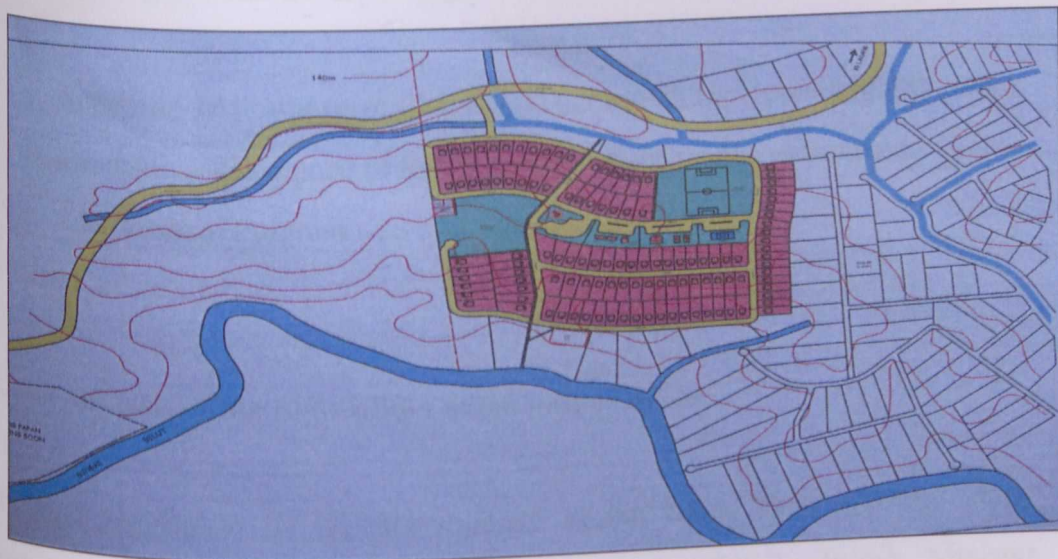
‘Now, with the Kelau Dam project in the pipeline, we have to move again to Sungai Bilut, the place which is not familiar to us. However, I hope this time we are moving for the better, not only for us but also for our children and our future generations’.

6.2.5.3 Compensation Package

Under the resettlement scheme for Orang Asli of Kampong Sungai Temir, the State Authority together with JHEOA has developed the new Resettlement Area at Sungai Bilut which encompasses the followings:

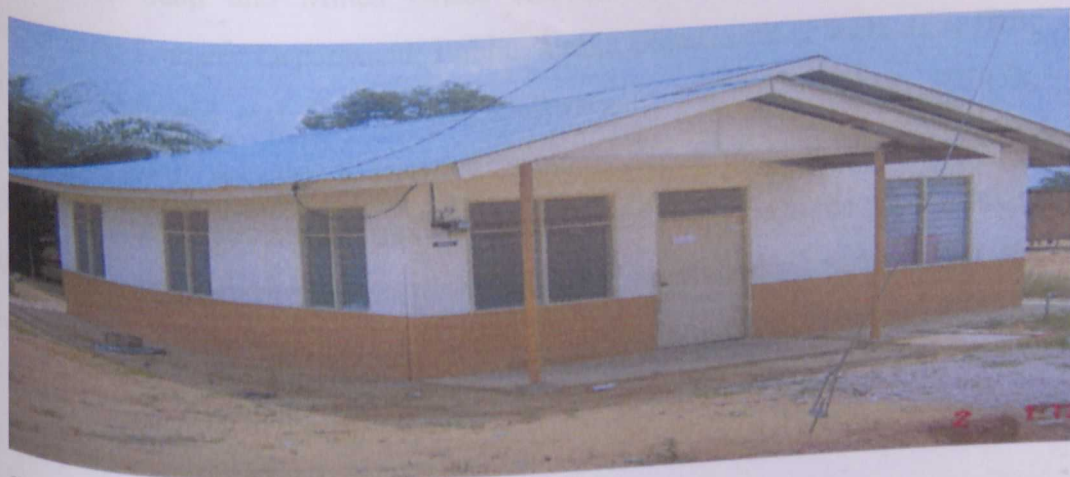
- The Resettlement Area of 855 acres at Sungai Bilut, Raub.
- The MEWC has prepared the Environment Management Plan (EMP) to formulate the mitigation actions (before, during and after the implementation of the project) for the Orang Asli Resettlement Area. This EMP has been approved by the Department of Environment (DoE) in June 2005.
- Residential plot for each family (115 unit) - 0.25 acre land together with a construction of detached low-cost house (JHEOA building plan – type A or B).
- Agriculture land for each family – 6 acres of agriculture land which will be planted with oil palm (5 acres) and orchard (1 acre).
- Full infrastructures and amenities for their new resettlement area which comprises metalled road, clean water supply, electricity supply, telecommunication facility, public phone booths, community hall, surau, 5 unit shops, football field and kindergarten.

Figure 6.1
Layout Plan of the New Resettlement Area of Orang Asli at Sungai Bilut



Source: JHEOA, Raub (2007)

Picture 6.4
Example of Single Storey Detached House (Type B) for Orang Asli



Source: JHEOA, Raub (2007).

Under the provisions of sections 11 and 12 of the Aboriginal Peoples Act 1954, they are also eligible for compensation of their growing trees, buildings and other consequential losses if so affected. The total compensation under these clauses will be determined by the Valuation and Property Services Department, Raub Branch.

Additionally, the State Government agreed to award each family of Orang Asli in Kampong Sungai Temir the following:

- Supporting Allowance of RM 400.00 per month for a period of 48 months.
- Evacuating Allowance of RM 500.00 per family upon evacuation.
- Motivational Program

6.2.5.4 Analysis of the Acquisition and Compensation

The land acquisition for the development of the Kelau Dam involved many parties. The MEWC, Economic Planning Unit (EPU), Prime Minister Department; the Treasury, Ministry of Finance; State of Pahang EPU (UPEN-Pahang); Pahang State Legal Advisor Office; Pahang State Financial Office; Director of Land and Mines Office (PTG); Urban and Country Planning Department; Forestry Department; Public Works Department (PWD); JPS; JBA; Perhilitan; Mineral and Geo-Science Department; LKPPP; FELDA; JHEOA, VPSD and DoE are the federal government departments who are directly responsible for the successful implementation of the project. On the other hand, to ensure the interest of those directly affected by the project are safeguarded, the technical committee also involves the Coordinator, Centre for Orang Asli Concern (COAC) and the Negotiations and Actions Committee of Kelau Dam Project, represented by Dr. Collin Nicholas and Mr. Ibrahim Mohamed / Mrs. Maznah Yakob respectively.

For the implementation of the project, three main issues are of deep concern: the environmental issue, agricultural activities in the catchment area, and flood risk in upstream of the dam.

The environmental issues were also seriously considered by the government in implementing the project. The Detailed Environmental Impact Assessment

(DEIA) for the project has been approved by the DoE on 24th February 2001. An extension of the DEIA (for the third consecutive extensions) until 24th February 2009 was forwarded to Director General of DoE on 7th February 2007. In addition, the EMP was prepared by the MEWC to formulate mitigation actions for implementation of the project which covers the mitigation actions before, during and after the construction of the dam. However, on the same issues, WWF Malaysia suggests that an independent Environment Auditor be appointed to further enhance the project implementation as well as to give more confidence to stakeholders.

To address the issue on agricultural activities, MEWC needs to prepare the Catchments Management Plan. A study on the agricultural activities would ensure that water supply to the settlements is safe considering that the location of intakes is 22 km to the downstream. As for flood risk measures, the dam was designed to be able to sustain water to the maximum level of 85 metres above sea level without any effect to security, stability and structures of the dam.

According to the Administration Officer of UPEN, Pahang (personal interview, March 30, 2007), the community of Orang Asli here have agreed with their new resettlement area located in Sungai Bilut, Raub. An allocation of RM 2 million in terms of launching grant has been approved by the authority to carry-out the earthworks and infrastructure works. Another RM 8 million will be applied by the State Government to Ministry of Finance for the constructions of houses and planting of oil palm and orchard. LKPP Property Sdn Bhd, a subsidiary company of LKPP was given the contract to construct houses, provide infrastructure and amenities as well as plant oil palm and orchard, and maintain them until the age of harvesting, before the official surrender to Orang Asli. Based on LKPP's cash-flow, the total cost for both developments is about RM 6,796,800 for the development of houses, infrastructure and amenities. Some RM 2,443,300 will be needed to develop the 575 acres of oil palm and orchard until age of harvesting (6th year).

This total value of compensation (in monetary form, is worth about RM12 million in total, excluding the land value of 855 acres of the resettlement site) if converted into land value for ancestral land which the Orang Asli of Kampong Sungai Temir have owned a reserve of 101.98 hectares (256 acres), is worth about RM 117,700 per hectare or RM 47,600 per acre. Cross-checking with VPSD Raub revealed that market value for smallholdings of an agriculture land in the vicinity recorded a range of value from RM8,000 to RM15,000 per acre depending on the location of the land from the main road. In terms of market value, the Orang Asli of Kampong Sungai Temir have received the compensation packages far beyond the total market value of the land itself.

Picture 6.5

Existing Orang Asli houses in Kampong Sungai Temir, Raub, Pahang.



Officer A from JHEOA, Raub (personal interview, March 29, 2007) contended that the compensation package offered to Orang Asli was considered attractive and very appropriate. This compensation package is quite similar to the compensation package received by the Orang Asli in Kampong Sungai Gerachi and Kampong Pertak for 'Splash Project' in Kuala Kubu Bahru, Selangor, except that the house is better in terms of size and quality in Splash Project.

6.3 SUMMARY

This chapter has described the case studies, which serve as a tool for reference on the payment of compensation over a spectrum of acquisitions involving the Orang Asli native lands in Peninsular Malaysia. Specifically, a case study approach was adopted to explore the nature of compensation packages awarded by various authorities in the acquisition of Orang Asli lands. The negotiation process between the parties concerned has become very crucial in every acquisition as this can provide attractive, better, reasonable or sufficient compensation packages for the subject of an acquisition.

The case studies have laid the foundation to understanding the institutional and legal framework involved in the compensation of acquisition of Orang Asli native lands. Table 6.4 shows the summary of the compensation packages offered by the stipulated case studies. From the results of the case studies, a certain conclusion can be drawn in relation to objectives two and three of this research, wherein specific issues have been explained and clarified.

Comparisons among the case studies have shown that disparity exists in the compensation packages awarded by the respective authorities. This disparity exists due to:

- the purposes of the acquisition,
- the acquiring bodies that participated in the acquisition, and
- the manner in which the negotiations between authorities and representatives of Orang Asli were conducted.

As the focus of the research is to explore the nature of compensation packages for acquisition of Orang Asli native lands and thus to comprehend the nature of such case studies, the results had provided the premise for the foregoing discussion in the layout of the research.

The following chapters provide the empirical analysis of quantitative survey and Delphi method to evaluate the practicality of the pre-compensation framework that was established from the results of the survey and case studies (Chapter 7). Thereafter, Chapter 8 concludes the formulation of compensation framework for land acquisition affecting Orang Asli native lands as well as recommendations for the scope of further research.

Case Study		1	2	3	4	5
Area (hectares)		100 hectares	256.4 hectares	5,450 hectares	16.59 hectares	101.98 hectares
Location		Ulu Kinta, Perak	Bukit Lanjan, Kuala Lumpur	Kota Tinggi, Johor	Dengkil, Selangor	Raub, Pahang
Land Status		Orang Asli Reserve	Orang Asli Reserve	Forest Reserve	Orang Asli Area	Orang Asli Reserve
Purposes of Acquisition		Construction of Dam (Public project)	Mixed-development (Privatization project)	Construction of Dam (Inter-country project; Malaysia-Singapore)	Construction of highway (Concession project)	Construction of Dam (Inter-state project; Pahang-Selangor) funded by International Fund (JBIC)
Compensation Packages						
Property / Asset		<ul style="list-style-type: none"> One (1) unit single storey detached low-cost house for each family (under Resettlement Program of JHEOA) 	<ul style="list-style-type: none"> One (1) unit single storey bungalow for each family One (1) unit double storey terrace house for each family One (1) unit low-cost apartment for each children age above 15 years old. 	Nil	Nil	<ul style="list-style-type: none"> One (1) unit single storey detached low-cost house for each family (under Resettlement Program of Pahang State Government) 5 acres of agriculture land planted with oil palm. 1 acre of orchard land 0.25 acre of residential plot.
Saving/ Trust Funds		Nil	ASB @ RM45000 per family	Nil	Nil	Nil

Monetary	• Compensation for fruit tress	• Evacuation Allowance @ RM500 per family	• Living Allowance @ RM 200 per month/ family for 60 months	• Evacuation Allowance @ RM3000 per family	• Living Allowance @ RM 600 per month/ family for 12 months	• Total Compensation of RM 38 million payable on monthly basis @ RM 900 per month/ family for 25 years.	• Compensation for fruit tress	• Compensation for affected buildings @ RM 25,000 per building	• Compensation for fruit tress	• Evacuation Allowance @ RM500 per family	• Living Allowance @ RM 400 per month/ family for 48 months		
Amenities/Facilities	• Re-groupment Scheme – full infrastructures	• Clinic	• Community Hall	• Surau	• Relocating of cemetery	• Multi-purpose hall	• Surau	• Multi-purpose hall	• Re-groupment Scheme – full infrastructures	• Clinic	• Community Hall	• Surau	• Relocating of cemetery
Remarks and Comments						• Decision of Court of Appeal	• The total compensation if analysed in term of the market value of the land is @ RM6,859 per hectare.	• The Orang Asli not inhabited on the acquired land	• Pending for Federal Court decision expecting in the middle of 2007.				

Table 6.4: Comparison of Compensation Packages among Case Studies

CHAPTER SEVEN

RESEARCH FINDINGS: ANALYSIS OF THE QUANTITATIVE SURVEY AND DELPHI TECHNIQUE

7.1 INTRODUCTION

Chapter Five has discussed in-depth the research methodologies being applied in this research. As a whole, the quantitative approach has dominated the methodology of the research in achieving the stipulated objectives. Based on this approach, the theoretical framework was constructed to expose the components of the research. The theoretical framework, which was known as the 'research model', has also been discussed in detail in the preceding chapter. This chapter proceeds to test the research model that has been constructed to develop the compensation framework for land acquisition affecting Orang Asli native lands. Hence, this chapter discusses the research findings based on an analysis of data using the Statistical Package for Social Science (SPSS) version 12.0 for Windows.

This chapter comprises four (4) main sections. The first section analyses the questionnaires on affected Orang Asli in the case studies (had been discussed in Chapter Six). These had revealed pertinent facts and the perceived thoughts of the various parties involved in the acquisition process. Due diligence has actually prevailed: the concern of the affected Orang Asli on their livelihood; and the amount or quantum on compensation packages awarded by the authority for the various acquisitions. The second section critically analyses the opinions of the professionals on land acquisition of Orang Asli native lands in term of issues of land acquisition and compensation, and the suggestions by this group for enhancement of the compensation packages that are currently being implemented by the authorities in Malaysia. The third section reports on the Principal Component Analysis of the both questionnaires (Q1 and Q2) as well as the results

of Inferential (Correlation) Analysis to prove the research hypotheses. The fourth section addresses the specific conclusions of the research by bringing together the findings of the case studies and the results of the quantitative approach. From these findings, the pre-compensation framework is developed for land acquisition affecting Orang Asli native lands and thereafter examined by the qualitative methods of the Delphi Technique.

7.2 THE FINDINGS OF THE QUESTIONNAIRES ON AFFECTED ORANG ASLI

Table 7.1 shows the response rates for questionnaires on affected Orang Asli. The response rates (achieved in the field survey) are considered very high as the overall rates reached at 85%. The distribution of the questionnaires was personally undertaken by the researcher who had also approached the respective Orang Asli during investigation of the case study with JHOEA officers' and Tok Batins' help.

Table 7.1
The Response Rates of the Affected Orang Asli's Survey

Name of Project / Case Study	Name of Orang Asli Settlement	No. of Family	No. of Responses / %
Acquisition of land for project of water supply and construction of Sungai Kinta Dam in Mukim Ulu Kinta, Perak (Case Study No. 1)	Kampong Jintan	3	3 (100%)
	Kampong Dollah	26	24 (92%)
	Kampong Kuala Termin	25	20 (96%)
	Kampong Jambu	9	9 (100%)
	Kampong Sumba	23	20 (87%)
	Sub-total	86	76 (88%)
Acquisition of land for project of Bukit Lanjan Township, Damansara, Petaling Jaya (Case Study No. 2)	Kampong Bukit Lanjan	158	134 (85%)

Acquisition of land for project of the construction of Sungai Linggui Dam in Kota Tinggi, Johor (Case Study No. 3)	Kampung Semanggar	26	22 (85%)
	Kampung Pasir Intan (Formerly known as Kampung Pasir Asam)	13	11 (85%)
	Kampung Sayong Pinang (Formerly known as Kampung Sungai Pinang)	14	10 (71%)
	Sub-total	53	43 (81%)
Acquisition of land for project of KLIA Highway, Kampung Bukit Tampoi, Sepang. (Case Study No. 4)	Kampung Bukit Tampoi	14	14 (100%)
	Kampung Bangkong	7	7 (100%)
	Sub-total	21	21 (100%)
Acquisition of land for project of water supply from Raub, Pahang to Hulu Langat, Selangor comprising the construction of Kelau Dam. (Case Study No. 5)	Kampung Sungai Temir	115	96 (83%)
TOTAL SAMPLE / RESPONSE RATE OF ORANG ASLI RESPONDENTS		433	370 (85%)

7.2.1 The Respondents Profile

The background of the respondents who took part in the survey is presented in Table 7.2, while Table 7.3 shows the frequency of the respondents based on abovementioned projects.

Table 7.2 shows that an overwhelming majority (95%) of the respondents were male. This was because the heads of the family were predominantly male. The 5% female respondents represented the heads of the families in which who were already deceased. The majority of these respondents were from Temiar and Temuan tribe with the age cluster mostly from groups of 21-40 years, 41-60 years and above 60 years old, representing 37%, 27% and 28% respectively. However,

71% of the respondents have no education background, while 26% only attended primary school. The approach of direct interview with Orang Asli was very appropriate since most of them were illiterate. Most of the respondents i.e. 76% have a large family i.e., between 6-10 members per family, meaning that acquisition on their native lands had a great impact on their family.

Table 7.2
The Background of the Respondents (Affected Orang Asli)

Characteristic		Frequency (N)	Percentage (%)
Gender			
Valid	Male	350	95
	Female	20	5
Total		370	100
Tribe			
Valid	Temiar	149	40
	Temuan	124	34
	Jakun	52	14
	Che Wong	45	12
Total		370	100
Age			
Valid	< 21 years	30	8
	21 – 40 years	135	37
	41 – 60 years	100	27
	> 60 years	105	28
Total		370	100
Education Level			
Valid	No Education	262	71
	Primary	96	26
	Secondary	12	3
	College	0	0
Total		370	100
Number of Family Members			
Valid	< 5 persons	72	19
	6 – 10 persons	280	76
	> 10 persons	18	5
Total		370	100

Table 7.3
The Respondents Based on Projects

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Sungai Kinta Dam	76	20.5	20.5	20.5
	Bukit Lanjan Township	124	33.5	33.5	54.1
	Sungai Linggui Dam	43	11.6	11.6	65.7
	KLIA Expressway	21	5.7	5.7	71.4
	Kelau Dam	106	28.6	28.6	100.0
	Total	370	100.0	100.0	

7.2.2 Perspectives on Land Acquisition of Orang Asli Native Lands

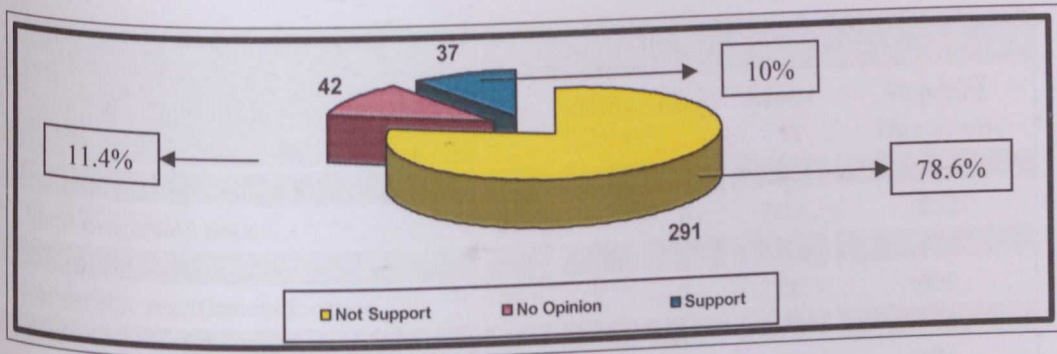
7.2.2.1: Opinion on acquisition of Orang Asli Lands

Table 7.4 and Figure 7.1 show the frequency statistics on the opinion of Orang Asli on land acquisition of their native lands. Some 78.6% of the respondents do not support the acquisition exercise carried out by the government. Only 10% support it while 11.4% have no opinion on the issue. It is evident that a large number of Orang Asli are not happy with what they perceive as the authorities' targeting Orang Asli native lands to be acquired for development. This result was consistent with research of Nicholas and William-Hunt (1996), which revealed that reliance on private sector initiative to develop Orang Asli lands has its risks, with the Orang Asli likely to end up losing their lands.

Table 7.4
Opinion on Land Acquisition

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Not Support	291	78.6	78.6	78.8
	No Opinion	42	11.4	11.4	90.0
	Support	37	10.0	10.0	100.0
	Total	370	100.0	100.0	

Figure 7.1
Opinion on Acquisition of Orang Asli Lands



7.2.2.2: Reasons for not supporting the Land Acquisition

For the respondents who indicated that they do not support the acquisition of Orang Asli Reserves (N=291), they were for the reasons based on a list of 12 suggested explanation. Table 7.5 shows the results. It was evidenced that most of the respondents claimed that promises to protect Orang Asli interests are not fulfilled and they observed that life becomes more difficult as illustrated by the mean values of 2.74 and 2.73 respectively. On top of that, Orang Asli had requested that the government find alternative sites and preserve Orang Asli lands; further, encroachment on rights, heritages and interest of Orang Asli should be avoided. These were evidenced by mean values of 2.70 and 2.69. For example, as mentioned by Nicholas (1996) the promises of titled individual plots mostly thrown in under the agreement of joint-venture projects. Short evacuation notice is not a problem to Orang Asli as stated by mean value of 2.02. However, this is quite contradicting to the scenario presented Sagong Tasi (2002) where the appellants were unhappy with the 14 day notice served by the state authority for them to move out from their ancestral lands.

Table 7.5
Descriptive Statistics on the Reasons for Not Supporting Land Acquisition

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Encroachment on rights and heritages	291	1	3	2.69	.606
b) Short evacuation notice	291	1	3	2.02	.662
c) Inadequate compensation	291	1	3	2.63	.670
d) Not suitable resettlement location	291	1	3	2.68	.609
e) Loss of traditional jobs and skills	291	1	3	2.68	.604
f) No place to practice traditional lifestyle	291	1	3	2.37	.875
g) Life more difficult	291	1	3	2.73	.551
h) Integration problems	291	1	3	2.12	.569
i) Cultural shocks and isolation	291	1	3	2.52	.802
j) Promises not fulfilled	291	1	3	2.74	.540
k) Affects on cultures, beliefs and heritages	291	1	3	2.60	.659
l) Government should find alternative site	291	1	3	2.70	.553
Valid N (listwise)	291				

Legend: 1 = Not Agree, 2 = Not Sure, 3 = Agree

7.2.2.3: Advantages of Land Acquisition to Orang Asli

Table 7.6 shows the frequency statistics on the opinion of Orang Asli toward the advantages of land acquisition to the Orang Asli community. As clearly shown in the Table 7.5, the mean values of all variables are between 2.30 to 2.49 except the variable 'compensation money can be invested' that achieved mean value of 1.72. This is within the category scale of 'not sure' as scored below 2.5 point and close to 2.0 point. This result has indicated that the Orang Asli considered that land acquisition was not bringing any obvious benefits to their community. The Orang Asli believed that these traditional lands are meant to provide for their future generation (Nik Yusof, 1996) and perhaps, the acquisition with inadequate compensation, the future of Orang Asli becomes uncertain (Nicholas, 2003; Cheah, 2004; Suhakam, 2003). From this result it seems to conclude in general that the Orang Asli are not happy with the acquisition imposed upon their native lands since they regard these lands as their 'saka' or traditional rights that were owned communally by them from the time of their ancestors (Nik Yusof, 1996).

Table 7.6
Descriptive Statistics of the Advantages of Land Acquisition to Orang Asli

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Better economic standing	370	1	3	2.44	.735
b) Life is more comfortable	370	1	3	2.49	.722
c) Opportunity to own land	370	1	3	2.30	.772
d) The family future is more secure	370	1	3	2.47	.714
e) Easy for the Government to help	370	1	3	2.42	.722
f) Compensation money can be invested	370	1	3	1.72	.843
g) Permanent job	370	1	3	2.42	.726
Valid N (listwise)	370				

Legend: 1 = Not Agree, 2 = Not Sure, 3 = Agree

7.2.3 Perspectives on Payment of Compensation

7.2.3.1: Opinion on Compensation Given by the Government

The descriptive statistics as shown in Table 7.7 revealed a result on the opinion of Orang Asli on existing compensation regime as implemented by the government when taking possession of Orang Asli native lands. With the mean values for compensation of growing trees and buildings of 1.84 and 1.93 respectively, it seems to Orang Asli that the present structure of compensation is below 'reasonable' level. This result is consistent with Cheah (2004b) who mentioned that due to Orang Asli native lands being imbued with cultural, spiritual, and communal attributes, hence is not equal to market value in economic terms, in fact is far beyond private registered land's market value. Nicholas (2003) added that the laws in Malaysia fail to adequately take into consideration the needs and impact of land loss on the livelihoods of Orang Asli.

Table 7.7
Descriptive Statistics on Opinion of Existing Compensation

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Growing trees – e.g. fruits, rubber	370	1	3	1.84	.732
b) Buildings – e.g. house, shed, hut etc.	370	1	3	1.93	.659
Valid N (listwise)	370				

Legend: 1 = inadequate, 2 = reasonable, and 3 = exceedingly adequate

7.2.3.2: Reasons for Inadequacy of Compensation

Table 7.8 shows the descriptive statistics on the ‘reasons for inadequacy of compensation’ as perceived by the Orang Asli in land acquisition of their native lands. It was evident from the mean value of 2.64 that the Orang Asli considered the discretion vested to the government as most contributory to the adequacy. Among the other reasons, that the Orang Asli attributed the inadequacy to, more significant one with mean value of greater than 2.5 were; the ineffectiveness of JHEOA negotiating on their behalf; no compensation given for ancestral land; the lack of clarity in methods for determining compensations; and no consideration given for hardships or difficulties due to the acquisition. In particular, all the suggested reasons were perceived do agreeable by the respondents as the reasons for inadequacy of compensation achieving mean values between 2.43 to 2.64 points.

Table 7.8
Descriptive Statistics of the Reasons for Inadequacy of Compensation

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Negotiations by JHEOA	370	1	3	2.52	.612
b) JHEOA is not serious	370	1	3	2.49	.630
c) No compensation for ancestral land	370	1	3	2.56	.568
d) Special attachment not considered	370	1	3	2.43	.656
e) Value of trees is relatively low	370	1	3	2.48	.612
f) Methods not clear	370	1	3	2.58	.585
g) Difficulties not considered	370	1	3	2.52	.621
h) No guidelines of claims	370	1	3	2.46	.671
i) Solely on government discretion	370	1	3	2.64	.529
Valid N (listwise)	370				

Legend: 1= Not Agree, 2= Not Sure, 3= Agree

7.2.3.3: Types of Compensation should be awarded in Acquiring Orang Asli Lands

Specifically when asked what types of compensation they would expected when their lands are acquired by the government, given two main types of compensation package for them to choose and evaluate. The results are as

revealed in Table 7.9. All listed factors recorded the mean values ranges from 2.47 to 2.67. This means that the Orang Asli still needed the monetary and non-monetary compensation as their main constructs of compensation package. However, factor (a) value of growing trees and buildings, and factor (b) market value of ancestral land eventhough recorded the mean scores of 2.47 and 2.53, which is under the category of 'most required'. However, under the valuation principles if both factors are to be considered, it becomes double counting and not allowed. As comparison, under the Australian Native Title Act 1993, it only considered the market value of the native title.

Table 7.9
Descriptive Statistics of the Types of Compensation Should be awarded

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
I. Monetary Compensation:					
a) Trees and buildings (sections 11 & 12, Act 134)	370	1	3	2.47	.629
b) Market value of ancestral lands	370	1	3	2.53	.589
c) Ex-gratia / solatium payment	370	1	3	2.60	.553
II. Non-Monetary Compensation:					
a) Housing, infrastructure and amenities	370	2	3	2.67	.472
b) Guarantee of job/ source of income	370	1	3	2.55	.957
c) Living allowance for at least two years	370	1	3	2.49	.647
d) Motivational program	370	1	3	2.67	.500
Valid N (listwise)	370				

Legend: 1= Not required, 2= Not sure, 3= Most required

7.2.4: Summary of Findings with regard to Orang Asli Questionnaire

Table 7.10 shows a summary of the results of Orang Asli questionnaire. This table is developed by computing the result of each factor from the questions asked. In principle, Orang Asli opposed the land acquisition of their traditional lands. This is evidenced by the mean value of 1.31. They seem to agree on all listed factors presented to them for the reasons against the acquisition based on depicted mean

value of 2.56. For the Orang Asli, they perceived that land acquisition of the traditional lands does not bring justifiable advantages either to affected families or community of Orang Asli at large. This is evident by mean value of 2.37 pertaining to this question. With mean value of 1.88, the Orang Asli contended that the current compensation structure as per the Aboriginal Peoples Act 1954 (sections 11 and 12) was inadequate. Again, the overall mean value of the reasons of inadequacy at 2.52, the Orang Asli agreed to all suggested factors presented to them. As a consequence, the Orang Asli required the compensation packages for such land acquisition of their lands to be made under two main constructs; monetary and non-monetary. Under monetary compensation, their demand is payment for the market value of their ancestral lands; solatium or premium payment due to their special attachment to land (in terms of spiritual and cultural), disturbance, insult, and mental distress; as well as living/support allowances. Under the non-monetary package, it is expected that the authority provide new resettlement area with housing, and adequate infrastructures and amenities. They also required employment and motivational programmes for them to adopt a new lifestyle in resettlement area.

Table 7.10
Summary of Descriptive Statistics of Orang Asli Questionnaire

Variables	N	Mean	SD	Result
B1: Perceptions on acquisition	370	1.31	.462	NSp
B2: Reasons for Not Support	290 ²¹	2.56	.466	Ag
B3: Advantages of Land Acquisition	370	2.37	.277	Ag
C4: Opinion on Existing Compensation	370	1.88	.468	Rs
C5: Reasons for Inadequacy of Compensation	370	2.52	.224	Ag
C6: Types of Compensation Required	370	2.57	.235	MRq
Valid N (listwise)	370			

Legend: NSp=not support; Ag=agree; Rs=reasonable; MRq=most required

²¹ N=290 are based on respondents who answer question 1 - 'not supporting'.

7.3 THE ANALYSIS OF FINDINGS ON PROFESSIONALS

Table 7.11 shows the response rates for questionnaires to professionals involved in acquisition and compensation of Orang Asli lands. It is evident that the response rates achieved in the survey are considered moderate at 63%. Perhaps the administering of questionnaires directly to professionals (as respondents) had helped in the survey.

Table 7.11
List of Target Population and Responses Rate for Professional Survey

Department	Designation	No. of Officers	No. of Responses / %
Department of Aboriginal Peoples Affairs, Malaysia	Administrative Officer (M54, S48, S44, M41 and S41)	20	12 (60%)
	Support Officer (S32, U29, S27 and N27 in Land Development Section of JHEOA Offices)	50	36 (72%)
Department of Valuation and Property Services Malaysia (DVPS)	Valuation Officer from the following offices – Johor, Melaka, Negeri Sembilan, Selangor, Wilayah Persekutuan Kuala Lumpur, Pahang, Perak, Kedah, Kelantan and Terengganu.	60	42 (70%)
District and Land Office	Land Administrator	20	12 (60%)
Private Firms	Valuer	20	8 (40%)
Universities / Institutes / Centres	Centre for Aboriginal Studies, University of Malaya	3	2 (66%)
	Dept. of Estate Management, Faculty of the Built Environment, UM.	5	5 (100%)
	Dept. of Estate Management, UiTM.	12	10 (83%)
	Dept. of Property Management, UTM	8	7 (87.5%)

Non-Government Organisation	Activist – POASM	15	11 (73%)
	Activist – COAC	7	5 (71%)
Other Related Organisations		30	8 (27%)
TOTAL SAMPLE OF PROFESSIONAL RESPONDENTS/PERCENTAGE		250	158 (63%)

7.3.1 Respondents' Background

The background of the respondents who took part in the survey is presented in Table 7.12. Based on the results in Table 7.12, the appropriate respondents who gave their responses in the survey are considered to be of caliber to give their opinions. Some 63.3% of them come from full-fledged government entities while 15.2 % semi-government and other related government agencies. They were made up of Valuation Officers and JHEOA Officers from the age groups of 31-40 years and 41-50 years of which, 65.2% of them have direct and indirect involvement in land acquisition projects of Orang Asli native lands. Of significance, some 43.7% and 31.6% have experiences in dealing with Orang Asli affairs of between 2-5 years and 6-10 years respectively.

Table 7.12
The Background of the Respondents (Professionals)

Characteristic		Frequency	Percentage (%)
<i>Organisations</i> <i>Valid</i>	Government	100	63.3
	Semi Govt/Govt Agency	24	15.2
	Private	18	11.4
	NGO	16	10.1
	Total	158	100
<i>Designation</i> <i>Valid</i>	Valuation Officer/Valuer	50	31.6
	JHEOA Officer	48	30.4
	Land Administrator	12	7.6
	NGO Activist	16	10.1

	Academician	24	15.2
	Others	8	5.1
Total		158	100
<hr/>			
Age			
<i>Valid</i>	21- 30 years	16	10.1
	31- 40 years	77	48.7
	41- 50 years	52	32.9
	51- 60 years	13	8.2
Total		158	100
<hr/>			
Gender			
<i>Valid</i>	Male	132	83.5
	Female	26	16.5
Total		158	100
<hr/>			
Experience			
<i>Valid</i>	2 – 5 years	69	43.7
	6 – 10 years	50	31.6
	> 10 years	39	24.7
Total		158	100
<hr/>			
Land Acquisition Involvement			
<i>Valid</i>	1 projects	16	10.1
	2 – 5 projects	103	65.2
	6 – 10 projects	39	24.7
Total		158	100
<hr/>			

7.3.2 The Components for Developing Compensation Framework

Table 7.13 shows the descriptive statistics of the components of compensation for developing a compensation framework for land acquisition affecting Orang Asli native lands. All components scored the mean values ranging from 4.65 to 4.86. This shows that respondents are agreeable that general compensation issues (GCI); monetary compensation (MC); and non-monetary compensation (NMC) are the main components to develop a compensation framework. This is also consistent with the constructs of the 'Research Model', initiated and inspired by the literature review. According to Humphry (1998), compensation for damage to native title should include monetary and non-monetary components or, as suggested by Whipple (1997), material and non-material components. Furthermore, the mechanism of compensation is basically to affirm the value and to achieve defined social purposes, to reaffirm relationship of mutual equivalence

and demand sharing (Chase, 1980); to bind individuals into groups (Kickett, 1999; Maddock, 1984); and to confirm ownership of the land (Sagong Tasi, 2002; Kickett, 1999; Martin, 1995; Peterson, 1991; Maddock, 1984; Chase, 1980).

Table 7.13
Descriptive Statistics of the Components of Compensation

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) General Compensation Issues	158	3	5	4.65	.493
b) Monetary Compensation	158	3	5	4.86	.365
c) Non-Monetary Compensation	158	4	5	4.75	.433
Valid N (listwise)	158				

Legend: 1= strongly disagree 2= disagree 3=neutral 4=agree 5= strongly agree

7.3.3 General Compensation Issues (GCI)

The descriptive statistics as shown in Table 7.14 revealed the results on the opinion of professionals toward sub-factors of general compensation issues which arose when taking possession of Orang Asli native lands. The respondents opined that the main issue of acquisition Orang Asli native lands is lack of protection provided by the laws on Orang Asli land rights, which registered a mean value of 4.82. The respondents also agreed that deprivation also occurred to freedom of inhabitation, produce of the forrest, and future living of families as evidenced by mean values ranging from 4.00 to 4.66. Although the sub-factor of ‘they are suffered from deprivation of ancestral land’ scored the minimum mean value at only 3.80, this can be considered as agreeable by the respondents as indicated by a margin of only 0.20. As mentioned in Sagong Tasi (2000), the laws in Malaysia fail to give full recognition to Orang Asli land rights, and in Adong Kuwau (1997) the court was reluctant to recognise aboriginal rights to land as actual interests or ownership rights but rather only as ‘tribal rights’ which is a very low degree of rights. Therefore, the view of the government was that under the Aboriginal Peoples Act, 1954 the best interest the Orang Asli may obtain from their

traditional lands is as a tenant-at-will. This is due to the perceived belief that the traditional lands of the Orang Asli in principle are state lands (Endicott & Dentan, 2004; Jamaluddin, 1997; Salleh, 1990; Idris, 1983). The Orang Asli therefore occupy or stay on their traditional lands at the pleasure or discretion of the government.

Table 7.14
Descriptive Statistics of the GCI

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Suffered due to deprivation of ancestral land	158	3	5	3.80	.476
b) Deprivation of freedom of inhabitation/movement	158	4	5	4.66	.474
c) Deprivation of produce of the forest	158	4	5	4.00	.000
d) Deprivation of future living for family	158	4	5	4.27	.446
e) Under any laws, no compensation for land	158	4	5	4.66	.474
f) Lack of protection given by the laws	158	4	5	4.82	.388
Valid N (listwise)	158				

Legend: 1= strongly disagree 2= disagree 3=neutral 4=agree 5= strongly agree

7.3.4 Monetary Compensation

Table 7.15 shows the descriptive statistics of the factors under monetary component. According to the results presented in Table 7.15, the factor ‘payment for trees and buildings is not a fair basis of compensation for acquisition of Orang Asli native lands’, and the ‘failure to consider the impact of land loss’ are dominant whereby the mean values are the highest at 4.96 and 4.95 respectively. This means that payment of monetary compensation as implemented currently is not within the spirit of Article 13(1) and 13(2) of the Federal Constitution. Moreover, other listed factors are also agreed by the respondents as equally important to be considered where the mean values range from 3.86 to 3.96, which are close to 4.0 (agree).

Table 7.15
Descriptive Statistics on Monetary Compensation

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Fail to consider the impact of land loss	158	4	5	4.95	.220
b) No obvious economic benefits	158	3	4	3.86	.347
c) Special value for special attachment to land	158	3	4	3.96	.192
d) No uniform compensation framework for States	158	3	4	3.95	.220
e) Payment for trees and buildings not a fair basis	158	4	5	4.96	.192
Valid N (listwise)	158				

Legend: 1= strongly disagree 2= disagree 3=neutral 4=agree 5= strongly agree

7.3.5 Non-Monetary Compensation

Table 7.16 shows the descriptive statistics of the factors under non-monetary component. The factor 'providing ownership toward property'; scored the highest mean value of 4.58 while other factors all score mean values of greater than 4.0. As an overall analysis, the non-monetary compensation seems to be inadequate to Orang Asli. Nevertheless, an ownership or security of tenure is the most important factor in the life of Orang Asli, as compared to other non-monetary compensation. According to Suhut (2006), land is an invaluable asset to Orang Asli, but indeed, land is also pride, dignity, and survival to them. In addition, Sections 6, 7, and 8 of the Aboriginal Peoples Act, 1954 have guaranteed a special privilege of Orang Asli to land.

Table 7.16
Descriptive Statistics on Non-Monetary Compensation

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Resettlement program enhance quality of life	158	4	5	4.41	.494
b) Provides ownership toward property	158	4	5	4.58	.495
c) Not provided enough facilities	158	4	5	4.48	.501
d) Location of resettlement not suitable	158	4	5	4.52	.501
e) Alienation of uneconomic size of land	158	4	5	4.42	.495
Valid N (listwise)	158				

Legend: 1=not important 2=slightly important 3=moderately important 4=important 5=most important

7.3.6 General Perception on Acquisition of Orang Asli Lands

7.3.6.1: Land Acquisition

The descriptive statistics as shown in Table 7.17 revealed the results on the opinion of professionals toward land acquisition issues of Orang Asli native lands in general. As revealed the main issues concerning acquisition Orang Asli native lands are, 'no uniform method to determine monetary and non-monetary compensation; no uniform compensation packages among states; lack of protection provided by the laws on Orang Asli land rights; compensation to consider market value of ancestral lands; and land acquisition powers should be used for acquisition for public purposes only', which were proved by mean values ranging from 4.58 to 4.66. The respondents also agreed that joint venture creates productive asset for Orang Asli; compensation proposal must be made available for review prior to inquiry; and procedures of land acquisition to be executed in proper manner as verified by mean values ranging from 4.27 to 4.35.

Table 7.17
Descriptive Statistics on Land Acquisition Issues

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Less protections by law	158	4	5	4.58	.495
b) Procedures of land acquisition	158	4	5	4.35	.478
c) Land acquisition powers for public purposes only	158	4	5	4.58	.495
d) No uniform compensation packages	158	4	5	4.58	.495
e) Consider compensation for ancestral land	158	4	5	4.62	.469
f) No uniform method to determine MCand NMC	158	4	5	4.66	.474
g) Compensation proposal prior inquiry for review	158	4	5	4.32	.467
h) Challenge the acquisition	158	4	5	4.58	.495
i) JV creates productive asset	158	4	5	4.27	.443
Valid N (listwise)	158				

Legend: 1 = strongly disagree 2 = disagree 3 = neutral 4 = agree 5 = strongly agree

7.3.6.2: The Issues of Land Rights

Table 7.18 shows the results on issues of land rights. The factor ‘the meaning of land occupied under customary rights under section 2 (First Schedule) of Land Acquisition Act 1960 should be given a wider interpretation so as to ensure that compensation would be paid for acquisition of Orang Asli native lands was the highest mean value with 4.57 point, and other factors have attained mean value more than 4.0. This means that the unresolved issues of land rights seem to be an obstacle to payment of adequate and just compensation for acquisition of Orang Asli land. However, section 7(2)(iv) of the Aboriginal Peoples Act 1954 explains that, ‘no land shall be alienated, granted, leased or otherwise disposed of except to aborigines of the aboriginal communities normally resident within reserve’. Under present practices, the Orang Asli have been granted rights to occupy any land not being alienated or lands leased and do their activities on specific areas - Section 8(1) of the Act, and they only have the tenant-at-will status. As for Orang Asli native lands, the compensation will require an innovative jurisprudential approach that acknowledges the Orang Asli native lands. Therefore, legal and comparative studies are required to equate Orang Asli native land compensation rights and interests either to Western property law concepts and precedents, or to market land valuation methodology (Cheah 2004a; 2004b; Smith, 2001). It is suggested that this may lead to the development of a ‘new arm’ (Sheehan, 1998) of land law specifically for indigenous property rights which can decide simultaneously on matters of both federal and state laws.

Table 7.18
Descriptive Statistics on the Issues of Land Rights

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Land rights are politically marginalized	158	4	5	4.56	.498
b) Only Tenant-at-Will status	158	4	5	4.56	.498
c) Awarded OANL to private developers	158	3	4	4.27	.443
d) Wider meaning of ‘land occupied under customary ‘	158	4	5	4.57	.497
Valid N (listwise)	158				

Legend: 1= strongly disagree 2= disagree 3= neutral 4= agree 5= strongly agree

7.3.6.3: Compensation Negotiation

Table 7.19 shows the descriptive statistics of the factors under compensation negotiation sub-component. The factor 'the right of Orang Asli is not recognised', was the highest mean value with 4.63 point, meaning that parties involved in the negotiation processes of compensation do not really fight for the protection of interest of Orang Asli. This is proved by lowest mean values of 2.40 and 2.75 recorded by factor 'the interest is taken care of' and 'not fair to Orang Asli' respectively. This showed that negotiation without the Orang Asli representatives is not an appropriate way in conducting such negotiations.

Table 7.19
Descriptive Statistics on Compensation Negotiation

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Negotiation made mandatory	158	4	5	4.49	.502
b) The interest is taken care	158	2	3	2.40	.491
c) Not fair to Orang Asli	158	2	4	2.75	.722
d) The rights are not recognised	158	4	5	4.63	.484
e) This approach is appropriate	158	4	5	4.50	.502
f) Administratively justified	158	4	5	4.52	.489
Valid N (listwise)	158				

Legend: 1= strongly disagree 2= disagree 3=neutral 4=agree 5= strongly agree

7.3.6.4: Challenges in Determination of Compensation

Table 7.20 shows the descriptive statistics of the factors under challenges' sub-component. The factor 'issues of land right'; was the highest mean value with 4.82 point, meaning that issues of land right is the highest rank of challenges that need to be treated and resolved in developing of the compensation framework for Orang Asli native lands. This is being followed by challenges to put legal framework (i.e. Federal Constitution 1957, the Land Acquisition Act 1960 and the Aboriginal Peoples Act 1954) to legalise ownership of Orang Asli lands.

Table 7.20
Descriptive Statistics on Challenges in Determination of Compensation

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Legal framework	158	4	5	4.66	.474
b) Monetary and non-monetary	158	4	5	4.34	.474
c) Issues of land right	158	4	5	4.82	.388
d) The most reliable valuation methods	158	3	4	3.73	.443
e) Negotiation of compensation	158	4	5	4.27	.443
Valid N (listwise)	158				

Legend: 1= strongly disagree 2= disagree 3=neutral 4=agree 5= strongly agree

7.3.7 Monetary Compensation - Current Practiced of Compensation Package

Table 7.21 shows the descriptive statistics of the results on current compensation package (monetary). The results showed that all economic and other claims' sub-constructs recorded the mean values less than 2.0. This means that current practice of compensation that consists of dimensions of 'loss of growing trees; buildings and other improvements; solatium due to special attachment to land, and other claims i.e. support and evacuation allowances; and equity shares' which fell under monetary compensation category were 'hardly adequate' and 'inadequate'. Again, these results are consistent with the statement made by Cheah (2004b) and Nicholas (2003) who commented on inadequacy of compensation to reflect the actual loss of the traditional lands and livelihood of Orang Asli due to acquisition.

Table 7.21
Descriptive Statistics on the Current Monetary Compensation Package

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
Economic / Market Value:					
a) Loss of growing trees	158	1	2	1.82	.388
b) Affected buildings and other improvements	158	1	2	1.27	.443
Solatium and Premium:					

c) Additional pay to reflect attachment to land	158	1	2	1.80	.398
d) Additional pay to reflect socio-culture dimensions	158	1	3	1.34	.500
Other Claims:					
e) Support allowances due to loss of income	158	1	2	1.09	.294
f) Unit trust	158	1	2	1.18	.388
g) Evacuation allowances	158	1	2	1.26	.440
h) Equity shares in development projects	158	1	2	1.15	.360
Valid N (listwise)	158				

Legend: 1= inadequate 2= hardly adequate 3= adequate 4= generous 5= exceedingly generous

7.3.8 Non-Monetary Compensation

Table 7.22 shows the descriptive statistics of the results on current compensation package (non-monetary). The results showed that all variables and sub-variables achieved mean values ranging from 2.13 to 2.77. Again, the results showed that the respondents believed that current non-monetary compensation packages were 'hardly adequate' except for the variable 'quality of house' which under category of 'adequate'. Therefore, comments made by Cheah (2004b) and Nicholas (2003) are founded.

Table 7.22
Descriptive Statistics on the Current Non-Monetary Compensation Package

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
Resettlement Program:					
a) Quality of house	158	2	3	2.77	.425
b) Size of the house	158	2	3	2.16	.366
c) Infrastructures	158	2	3	2.15	.354
d) Amenities	158	2	3	2.19	.393
Motivational Program and Training:					
e) Mindset Development Program	158	2	3	2.13	.341
f) Program objectives	158	2	3	2.16	.372
g) Frequent and period of the program	158	2	3	2.15	.354
Other Benefits:					
h) Size of agriculture land	158	2	3	2.18	.383
i) Type of crops planted	158	2	3	2.20	.403
j) Size of residential land	158	2	3	2.18	.383
k) Job/employment opportunity	158	2	3	2.17	.378
Valid N (listwise)	158				

Legend: 1= inadequate 2= hardly adequate 3= adequate 4= generous 5= exceedingly generous

7.3.9 Suggestions on Compensation Framework

7.3.9.1: Suggestions to upgrade the compensation structure

Table 7.23 shows the descriptive statistics on suggestions to upgrade the compensation structure. The results showed that all variables recorded the mean values more than 4.0, except for the item 'adopt other countries practices'; the respondents are of indifferent opinion. This means that in order to upgrade the existing compensation structures, the related authorities should take the following steps:

- consider compensation for market value of Orang Asli lands
- make the existing implemented structure (i.e. monetary and non-monetary) recognized under a law
- recognize legally the land rights of Orang Asli by giving ownership
- amend the Land Acquisition Act 1960 to incorporate Orang Asli native lands
- Implements the judgment of the High Court in Sagong Tasi case, which places Orang Asli native lands on the same status as title lands
- Make payment of non-monetary compensation uniform across state governments.

Table 7.23
Descriptive Statistics on Suggestions to upgrade the compensation Structure

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Consider compensation for market value of land	158	4	5	4.47	.501
b) Make the existing structures a law	158	4	5	4.61	.488
c) Recognized in law the land rights of Orang Asli	158	4	5	4.82	.388
d) Implement Sagong Tasi decision	158	3	5	4.10	.507
e) Amend the LAA 1960 to incorporate OANL	158	4	5	4.42	.495
f) Adopt other countries practices	158	3	4	3.27	.443
g) Uniformity of the non-monetary compensation	158	3	5	4.25	.597
Valid N (listwise)	158				

Legend: 1=strongly not recommended 2=not recommended 3=neutral 4=recommended
5=strongly recommended

7.3.9.2: Suggestions on Compensation Framework

The descriptive statistics as shown in Table 7.24 revealed the results of the professionals on the suggestions of developing a monetary and non-monetary compensation framework for land acquisition affecting Orang Asli native lands. The results show that all variables recorded the mean values of more than 4.0, except for the item 'evacuation allowance', the respondents are of indifferent opinion. This means that the components for developing a compensation framework for land acquisition affecting Orang Asli native lands should consists the following:

- Monetary component - market value of land; solatium; monthly allowance; evacuation allowance; and equity shares.
- Non-monetary component - resettlement program; adequate infrastructures and amenities; motivational and training program, and employment.

As a comparison, the Australian Native Title Act 1993 also has established the compensation framework for acquisition of their native titles with two constructs i.e., monetary and non-monetary.

Table 7.24
Descriptive Statistics on Suggestions of the Monetary and Non-Monetary Compensation Framework

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
I. Monetary Compensation:					
a) Components of compensation – market value + other claims (as LAA 1960)	158	4	5	4.34	.474
b) Solatium – not less than 10% of MV	158	3	5	4.10	.507
c) Monthly allowance – 3 years	158	4	5	4.73	.443
d) Evacuation allowance	158	3	4	3.23	.425
e) For privatisation project – equity share for minimum of 2%	158	4	5	4.65	.478
II. Non-Monetary Compensation:					
f) Transition / motivational program – 1 year	158	4	5	4.32	.467
g) Guaranteed of employment	158	4	5	4.42	.495
h) Resettlement with full infra and amenities	158	4	5	4.27	.443
Valid N (listwise)	158				

Legend: 1=strongly not recommended 2=not recommended 3=neutral 4=recommended
5=strongly recommended

7.3.9.3: Suggestions on Compensation for Socio-Culture Dimensions Losses

According to Burke (2002), non-monetary compensation structure for acquisition of indigenous peoples should include the socio-cultural dimension losses which considered insults, mental distresses, disturbances and the future of the young generation. Table 7.25 shows that all variables recorded the mean values of more than 4.0 (i.e between 4.18 to 4.32), meaning that the respondents agreed to all the listed variables. Hence, these socio-culture dimensions ought to be considered in determining the compensation for Orang Asli native lands.

Table 7.25
Descriptive Statistics on Suggestions for Compensation of Socio-Culture Dimensions Losses

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Insults	158	4	5	4.32	.467
b) Mental Distress	158	4	5	4.18	.388
c) Disturbances	158	4	5	4.27	.443
d) The future of the young generation	158	4	5	4.23	.425
Valid N (listwise)	158				

Legend: 1=strongly not recommended 2=not recommended 3=neutral 4=recommended
5= strongly recommended

7.3.10 Valuation Methods

7.3.10.1: Basis for Determining of Market Value for Compensation of Orang Asli Native Land

Specifically, this part is meant for the Valuation Officer or Valuer category of respondents. This is because the questions designed are focussed on the basis of valuation and methods of valuation appropriate to value Orang Asli native lands. Table 7.26 shows the descriptive statistics analysis for basis in determining of market value for compensation of Orang Asli native lands. The respondents were given seven (7) items as basis of valuation and thereafter, to give their opinion on the items. Based on the results tabulated in Table 7.24, all items had achieved the

mean values of more than 4.0 (i.e. 4.22 to 4.42) except for the item 'possibility of more than one market for Orang Asli lands' which respondents opined as 'indifference', meaning that for this item the opinion is neither 'agree' nor 'disagree'. Therefore, when valuing Orang Asli native lands, consideration should be given to the aspects of partial and co-existing property rights; spiritual and cultural dimension of the community that effect value of property; environmental aspect that creates market segment; and the possibility of more than one market for Orang Asli native lands. Indeed, these factors of consideration are different from titled property rights that at all cost do not give any consideration to any intangible matters such as spiritual, cultural and environmental aspects.

Table 7.26
Descriptive Statistics on the Basis for Determination of Market Value

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Based on the appropriate range of values of partial and co-existing property rights	50	4	5	4.34	.479
b) Consider spiritual and cultural values	50	4	5	4.30	.463
c) The concept of individual title is unacceptable	50	4	5	4.22	.418
d) Rate the property on its spiritual or cultural value to the community rather than its productive value	50	4	5	4.26	.600
e) Awareness of environmental, culture and institutional factors, cause duality in the market	50	4	5	4.42	.499
f) Possibility of more than one market for OA land	50	3	4	3.22	.418
Valid N (listwise)	50				

Legend: 1 = strongly disagree 2 = disagree 3 = neutral 4 = agree 5 = strongly agree

7.3.10.2: Appropriate Valuation Approaches

According to Whipple (1995), there are three (3) appropriate valuation approaches that can be applied in determining the market value of native title (Australia) which can be possibly applied to value the Orang Asli native lands. The respondents were asked to evaluate these approaches and give their opinion on the practicality of these approaches in the valuation of Orang Asli native lands.

Table 7.27 showed the results. Obviously, the respondents contended that only Normative Modelling (e.g. Contingent Valuation Methodology (CVM)) is suited to the valuation of Orang Asli native lands. On the other hand, the respondents demonstrated indifference in opinion on the other two approaches i.e. ‘Inference from past transaction (market evidences method)’ and ‘Simulation of the most probable buyer’s price fixing’. Further, respondents commented that traditional valuation methods and advanced valuation techniques (e.g. Monte Carlo Simulation, Multiple Regression Analysis, Discounted Cash Flow, etc) are not recommended in valuation exercises.

Table 7.27
Descriptive Statistics on the Appropriate Valuation Approaches

Variables	Descriptive Statistics				
	N	Min	Max	Mean	Standard Deviation
a) Inference from past transactions	50	2	3	2.80	.404
b) Simulation of the most probable buyer's price fixing	50	2	3	2.72	.454
c) Normative Modeling e.g. Contingent Valuation Methodology (CVM)	50	4	5	4.70	.463
Valid N (listwise)	50				

Legend: 1=strongly not recommended 2=not recommended 3=neutral 4=recommended
5= strongly recommended

7.3.11 Summary of Findings with Regard to Professional Questionnaire

7.3.11.1 Part B to Part E of the Questionnaire

Table 7.28 shows a summary of results of Part B, C, D and E of Professionals questionnaire. This table is developed by computing the results of variables and sub-variables of the questions in the questionnaire. As an overall, the constructs of compensation framework which include GCI, MC, and NMC were rated as ‘strongly agree’ by the respondents to become as main components for developing a compensation framework for Orang Asli native lands. On variables of general compensation issues; issues of monetary compensation; issues of non-monetary compensation; general perspectives on acquisition of OANL; law,

regulations and land rights issues; negotiation of compensation; and the challenges in determination of compensation; perceived by the respondents as 'agreed' with the mean values ranges from 4.33 to 4.49. All variables and sub-variables presented are important variables to be considered in developing a compensation framework. On the other hand, the existing MC and NMC structures implemented by various state authorities were perceived by them either 'hardly adequate' or 'inadequate'. This is consistent with the comments made by Cheah (2004b) and Nicholas (2003) that the compensation paid by authorities in land acquisition of Orang Asli native lands does not reflect the total losses of land, lives, culture and spiritual domain of Orang Asli community. The compensation as Altman & Smith (1994:96) recommend would possess, "*the total amount of compensation could be more directly linked to actual impacts (positive or negative); be informed by ongoing impact assessment; and be distributed to the persons actually experiencing impacts over the life of an act. It might also ensure that native title would have benefits remaining, to enable them to deal with the later 'closure' of a resource development project, and the need to re-establish access to, and use of, the land involved*".

Therefore, the respondents recommended that compensation framework for acquisition of Orang Asli native lands to be based on monetary and non-monetary dimensions. This is consistent with statement that compensation for damage to native title will include monetary and non-monetary components (Humphry, 1998; Sheehan, 1997; Mah, 1995; Myers, 1986) or, as suggested by Whipple (1997), 'material' and 'non material' components. In addition, socio-culture dimensions also need to be considered to reflect a special attachment to land of Orang Asli community. The essential nature of land to indigenous peoples is both metaphysical (e.g. spiritual and cultural) and material (Small, 1997). Hence, any assessments for compensation need to consider both dimensions.

Table 7.28
Summary of Descriptive Statistics of Part B–E of Professionals Questionnaire

Variables	N	Mean	SD	Result
B1: Constructs of compensation framework	158	4.75	.247	SAg
C2: General compensation issues	158	4.36	.246	Ag
C3: Issues of monetary compensation	158	4.33	.143	Ag
C4: Issues of non-monetary compensation	158	4.48	.253	Ag
D5: General perspectives on acquisition of OANL	158	4.46	.276	Ag
D6: Law, regulations and land rights issues	158	4.49	.337	Ag
D7: Negotiation of compensation	158	4.49	.327	Ag
D8: Challenges in determination of compensation	158	4.36	.170	Ag
D9: MC - Economic / market value	158	1.54	.264	HAd
D10: MC - Solatium / premium	158	1.57	.301	HAd
D11: MC - Other claims	158	1.17	.116	InAd
D12: NMC – Resettlement program	158	2.31	.172	HAd
D13: NMC – Motivational and training program	158	2.15	.197	HAd
D14: NMC – Other benefits	158	2.18	.251	HAd
E15: Suggestions to up-grade the compensation structure	158	4.30	.124	Rc
E16: Suggestions on proposal of compensation f/work	158	4.26	.171	Rc
E17: Suggestions on socio-culture dimensions	158	4.25	.037	Rc
Valid N (listwise)	158			

Legend: SAg=strongly agree; Ag=Agree; HAd=Hardly adequate; InAd=Inadequate; Rc=recommended

7.3.11.2 Part G (Answered by Valuation Officer / Valuer only) of the Questionnaire

Generally, it was agreed that the determination of Orang Asli native land compensation will be based on an assessment of the specific traditional land rights and interests, and on the specific effects of an activity on their traditional lands. Table 7.29 shows the overall results of variables, which serve as the basis of valuation and valuation approaches to determine compensation of Orang Asli native lands. On basis of valuation dimension, the respondents seem to agree with all listed sub-variables. This was evident from the mean value of 4.14. On the other hand, on valuation approaches, the overall result rather contradicts the result of sub-variables. While the mean value for overall is 3.41, meaning that they have indifferent opinion on the valuation approaches to be applied in the valuation of Orang Asli native lands, the results of individual sub-variable showed that the only valuation approach suitable for valuing Orang Asli native lands is the

Contingent Valuation Method (see paragraph 7.3.10.2). In fact, however, no contradiction occurred, because the results for overall are based on average mean value of three sub-variables.

Table 7.29
Summary of Descriptive Statistics of Part G of Professionals Questionnaire

Variables	N	Mean	SD	Result
G19: Basis to determine market value of OANL	50	4.14	.166	Ag
G20: Appropriate valuation approaches	50	3.41	.205	Nt
Valid N (listwise)	50			

Legend: Ag= agree; Nt=Neutral

7.4 THE PRINCIPAL FACTOR ANALYSIS (PFA)

7.4.1 General Compensation Issues

The Measure of Sampling Adequacy (MSA) scores and its meaning is tabulated in Table 7.30. Furthermore, Table 7.31 shows the Kaiser-Meyer-Olkin (KMO) and Bartlett’s test for variables under general compensation issues (GCI) component. Due to the KMO measure of sampling adequacy (MSA) scored at 0.782 (i.e. more than 0.5 point) and significant coefficient of Bartlett’s test of sphericity is less than 0.05, the data is suited for Factor Analysis method. According to Jantan & Ramayah (2006), MSA measures degree of intercorrelation among variables; it ranges from 0 – 1 and, when less than 0.5 it is considered inadequate.

Table 7.30
Measure of Sampling Adequacy (MSA)

Measure of Sampling Adequacy (MSA)	Comment
0.80 and above	Meritorious
0.70 – 0.80	Middling
0.60 – 0.70	Mediocre
0.50 – 0.60	Miserable
Below 0.5	Unacceptable

Source: Jantan & Ramayah (2006)

Hence, Table 7.32 shows the Communalities Table for GCI. The communality is defined as amount of shared or common variance among the variables. The general guidelines mentioned that the score after extraction should be more than 0.5 point. Again, the variables under the component of GCI showed that all variables scored more than 0.5. Therefore, this set of data input is justifiable for application of the Factor Analysis method.

Table 7.31
KMO and Bartlett's Test of GCI (Professionals)

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.782
Bartlett's Test of Sphericity	Approx. Chi-Square	286.297
	df	45
	Sig.	.000

Table 7.32
Communalities of GCI (Professionals)

	Initial	Extraction
Deprivtn of NL	1.000	.710
Deprivtn of Freedom	1.000	.927
Deprivtn prod of forest	1.000	.994
Deprivtn of future living	1.000	.557
No compensation for NL	1.000	.927
Lack protection on land rights	1.000	.994

Extraction Method: Principal Component Analysis.

To examine which variable significantly contributes to dependent variable (GCI), a Principal Components Analysis (PCA) was applied with varimax rotation to validate which constructs to be distinct (as perceived by the respondents). Table 7.33 shows that the total variance explained for all variables under GCI component. The results showed that there are two (2) factors / components with eigenvalues greater than 1.0 and the total variance explained was 81.809 % of the total variance. Again, KMO measure of sampling adequacy was 0.782 indicating sufficient intercorrelations while the Barlett's Test of Sphericity was significant (Chi-square=286.297; $p < 0.01$). The next issue of interpretations is which items to

which factors? This task must be done uniquely; i.e. one item can be loaded onto one and only one factor. The purpose is to assign uniquely each item to only one factor by looking at the factor loadings.

Table 7.33
Total Variance Explained of GCI (Professionals)

Compt	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %
1	3.428	57.134	57.134	3.428	57.134	57.134	2.858	47.630	47.630
2	1.481	24.675	81.809	1.481	24.675	81.809	2.051	34.179	81.809
3	.720	12.008	93.818						
4	.371	6.182	100.000						
5	.000	.000	100.000						
6	.000	.000	100.000						

Extraction Method: Principal Component Analysis.

Table 7.34 shows the results after applying rotation method of Varimax with Kaiser Normalization. They represented the correlation between the item and the factor. Thus, when an item has significant (> 0.3) loadings on more than one factor, then the problem of cross-loadings existed. However, after varimax rotation, a clearer pattern of assignment is attainable with minimal problem of cross-loadings. By applying the criteria used by Igbaria et.al. (1995), to identify and interpret factors which were; each item should load 0.5 or greater on one factor and 0.35 or lower on the other factors. Therefore, Factor 1 consists of ‘no compensation for native land’; deprivation of freedom’; ‘deprivation of native land’; and, ‘deprivation of future living’. Factor 2 consists of ‘lack protection on land rights’; and, ‘deprivation of produce of forest’. The summary of the results as reproduced from SPSS is presented in Table 7.35.

Table 7.34
Rotated Component Matrix(a) of GCI (Professional)

	Component	
	1	2
No compensation for NL	.950	-.156
Deprivtn of Freedom	.950	-.156
Deprivtn of NL	.836	-.103
Deprivtn of future living	.533	-.269
Lack protection on land rights	-.184	.980
Deprivtn prod of forest	-.184	.980

Extraction Method: Principal Component Analysis.
Rotation Method: Varimax with Kaiser Normalization.
a. Rotation converged in 3 iterations.

Table 7.35
Summary of Results by Applying PCA for GCI (Professional)

Items	Components		Communalities
	1	2	
No compensation for NL	.950	-.156	.927
Deprivation of Freedom	.950	-.156	.927
Deprivation of NL	.836	-.103	.710
Lack protection on land rights	-.184	.980	.994
Deprivation produce of forest	-.184	.980	.994
Eigenvalue	2.858	2.051	
Variance (81.809 %)	47.630	34.179	

On the other hand, as reported in paragraph 7.2.2.1, the Orang Asli in general do not support the acquisition exercises involving their native lands. The tables below shows the PCA results with regard to the reasons for not supporting, which can be considered as Orang Asli perception with regards to land acquisition and compensation. As explained in paragraph 7.5.1, KMO and Bartlett's test are used to test the suitability of data under GCI component. Table 7.36 and Table 7.37 revealed the results of its suitability i.e. KMO measure of sampling adequacy was 0.845 indicating sufficient intercorrelations while the Barlett's Test of Sphericity was significant (Chi-square=275.293; $p<0.01$) and, the values extracted communalities for all factors are higher than 0.5.

Table 7.36
KMO and Bartlett's Test of GCI (Affected Orang Asli)

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.845
Bartlett's Test of Sphericity	Approx. Chi-Square	2755.293
	df	66
	Sig.	.000

Table 7.37
Communalities of GCI (Affected Orang Asli)

	Initial	Extraction
Encroachment	1.000	.820
Short notice	1.000	.885
Inadequate compensation	1.000	.721
Resettlement location not suitable	1.000	.771
Loss of traditional jobs and skill	1.000	.755
No place for traditional lifestyle	1.000	.737
Life more difficult	1.000	.751
Integration problems	1.000	.895
Cultural shocks, isolation	1.000	.844
Promises not fulfill	1.000	.818
Culture, belief and heritages affected	1.000	.605
Govnt should find alternative site	1.000	.795

Extraction Method: Principal Component Analysis.

Furthermore, Table 7.38 depicts the results of total variance explained. The results showed that there are three (3) factors / components with eigenvalues greater than 1.0 and the total variance explained was 78.303 % of the total variance. By applying the criteria used by Igbaria et.al. (1995) (each item should load 0.5 or greater on one factor and 0.35 or lower on the other factors) and, after varimax with Kaiser Normalization rotation – Table 7.39 shows the results. Factor 1 consists of nine (9) items namely; ‘promises to protect Orang Asli interests not fulfilled’; ‘encroachment on rights, heritages and interests of Orang Asli’; ‘the government should find alternative site and preserve Orang Asli land’; ‘location of resettlement project not suitable’; ‘loss of traditional jobs and skills’; ‘life becomes more difficult’; ‘inadequate compensation’, ‘cultures, beliefs and

heritages of Orang Asli are affected' and; 'no place to practise traditional lifestyle'. Factor 2 consists of 'integration problems with neighborhood community'; while Factor 3 consist of 'notice for evacuation is too short' and, 'cultural shocks, isolation of Orang Asli'.

Table 7.38
Total Variance Explained of GCI (Affected Orang Asli)

Compnt	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cum'tive %	Total	% of Variance	Cum'tive %	Total	% of Variance	Cum'tive %
1	6.354	52.947	52.947	6.354	52.947	52.947	6.302	52.519	52.519
2	1.847	15.389	68.336	1.847	15.389	68.336	1.599	13.328	65.847
3	1.196	9.967	78.303	1.196	9.967	78.303	1.495	12.456	78.303
4	.567	4.722	83.025						
5	.451	3.755	86.780						
6	.333	2.773	89.553						
7	.304	2.535	92.088						
8	.281	2.345	94.433						
9	.242	2.018	96.451						
10	.182	1.519	97.970						
11	.148	1.237	99.207						
12	.095	.793	100.000						

Extraction Method: Principal Component Analysis.

Table 7.39
Rotated Component Matrix(a) of GCI (Affected Orang Asli)

	Component		
	1	2	3
Promises not fulfill	.899	.080	.060
Encroachment	.896	.035	.129
Govnt should find alternative site	.891	-.028	.002
Resettlement location not suitable	.877	.028	.042
Loss of traditional jobs and skill	.867	-.057	.027
Life more difficult	.865	-.046	-.017
Inadequate compensation	.792	-.225	-.207
Culture, belief and heritages affected	.697	.332	.091
No place for traditional lifestyle	.605	-.488	.365
Integration problems	.192	.925	.049
Short notice	-.138	.082	.927
Cultural shocks, isolation	.308	-.569	.653

Extraction Method: Principal Component Analysis. Rotation Method: Varimax with Kaiser Normalization.

a Rotation converged in 6 iterations.

As a conclusion, the summary of the results as reproduced from SPSS is presented in Table 7.40.

Table 7.40
Summary of Results by Applying PCA for GCI (Affected Orang Asli)

Items	Components			Communalities
	1	2	3	
Promises not fulfill	.899	.080	.060	.818
Encroachment	.896	.035	.129	.820
Government should find alternative site	.891	-.028	.002	.995
Resettlement location not suitable	.877	.028	.042	.771
Loss of traditional jobs and skill	.867	-.057	.027	.755
Life more difficult	.865	-.046	-.017	.757
Inadequate compensation	.792	-.225	-.207	.721
Culture, belief and heritages affected	.697	.332	.091	.605
No place for traditional lifestyle	.605	-.488	.365	.737
Integration problems	.192	.925	.049	.895
Short notice	-.138	.082	.927	.885
Cultural shocks, isolation	.308	-.569	.653	.605
Eigenvalue	6.302	1.599	1.415	
Variance (78.303 %)	52.519	13.328	12.456	

7.4.2 Monetary Compensation

As explained in paragraph 7.5.1, KMO and Bartlett's tests are used to test the suitability of data under monetary compensation (MC) component. Table 7.41 and Table 7.42 revealed the results of its suitability i.e. KMO measure of sampling adequacy was 0.537 indicating sufficient intercorrelations while the Bartlett's Test of Sphericity was significant (Chi-square=87.247; $p<0.01$) and, the values extracted communalities is higher than 0.5, except the factor of 'fail to consider the impact of land loss'.

Table 7.41
KMO and Bartlett's Test of MC (Professional)

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.537
Bartlett's Test of Sphericity	Approx. Chi-Square	87.247
	df	10
	Sig.	.000

Table 7.42
Communalities of MC (Professional)

	Initial	Extraction
Fail to consider the impact of land loss	1.000	.185
No obvious economic benefits	1.000	.600
NL imbued with cultural, spiritual	1.000	.731
Compn elements not uniform	1.000	.651
Sec 11 and 12 not a fair basis of compn	1.000	.761

Extraction Method: Principal Component Analysis.

On the other hand, Table 7.43 shows the results of total variance explained for monetary compensation (MC). The results depict that there are two (2) factors / components with eigenvalues greater than 1.0 and the total variance explained was 58.669% of the total variance. By applying the criteria used by Igbaria et.al. (1995) and, after varimax with Kaiser Normalization rotation – Table 7.44 shows the results. Factor 1 consists of ‘Native lands imbued with cultural, spiritual’ and ‘compensation elements not uniform’, while Factor 2 consists of ‘sections 11 and 12 not a fair basis of compensation’; and ‘no obvious economic benefits’.

Table 7.43
Total Variance Explained of MC (Professional)

Compnt	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %
1	1.757	35.132	35.132	1.757	35.132	35.132	1.722	34.439	34.439
2	1.172	23.437	58.569	1.172	23.437	58.569	1.207	24.130	58.569
3	.968	19.354	77.923						
4	.691	13.811	91.734						
5	.413	8.266	100.000						

Extraction Method: Principal Component Analysis.

Table 7.44
Rotated Component Matrix(a) of MC (Professional)

	Component	
	1	2
NL imbued with cultural, spiritual	.845	.132
Compn elements not uniform	.802	.091
Fail to consider the impact of land loss	-.405	.144
Sec 11 and 12 not a fair basis of compn	-.279	.827
No obvious economic benefits	.351	.691

Extraction Method: Principal Component Analysis. Rotation Method: Varimax with Kaiser Normalization.
a. Rotation converged in 3 iterations.

As a conclusion, the summary of the results as reproduced from SPSS is presented in Table 7.45.

Table 7.45
Summary of Results by Applying PCA of MC (Professional)

Items	Components		Communalities
	1	2	
NL imbued with cultural, spiritual	.845	.132	.731
Compensation elements not uniform	.802	.091	.651
Sec 11 and 12 not a fair basis of compensationn	-.279	.827	.761
No obvious economic benefits	.351	.691	.600
Eigenvalue	1.722	1.207	
Variance (58.569 %)	34.439	24.130	

Nevertheless, tables below show the PCA results with regard to the monetary compensation (MC) perceived by the Orang Asli. As explained in paragraph 7.5.1, KMO and Bartlett's test are used to test the suitability of data (under GCI component). Table 7.46 and Table 7.47 have revealed the results of its suitability i.e. KMO measure of sampling adequacy was 0.642 indicating sufficient intercorrelations while the Bartlett's Test of Sphericity was significant (Chi-square=73.888; $p<0.01$) and, the values extracted communalities for all factors are higher than 0.5.

Table 7.46
KMO and Bartlett's Test of MC (Affected Orang Asli)

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.642
Bartlett's Test of Sphericity	Approx. Chi-Square	73.888
	df	3
	Sig.	.000

Table 7.47
Communalities of MC (Affected Orang Asli)

	Initial	Extraction
Growing trees	1.000	.730
MV of the ancestral land	1.000	.878
Ex-gratia / solatium	1.000	.828

Extraction Method: Principal Component Analysis.

Furthermore, Table 7.48 has depicted the results of total variance explained of MC. The results show that there are two (2) factors / components with eigenvalues greater than 1.0 and the total variance explained was 81.206 % of the total variance. By applying the criteria used by Igbaria et.al. (1995) (each item should load 0.5 or greater on one factor and 0.35 or lower on the other factors) and, after varimax with Kaiser Normalization rotation – Table 7.49 shows the results. Factor 1 consists of ‘growing tress’; while Factor 2 consists of ‘ex-gratia / solatium’ and, ‘market value of ancestral land’. Furthermore, the summary of the results as reproduced from SPSS is presented in Table 7.50.

Table 7.48
Total Variance Explained of MC (Affected Orang Asli)

Component	Initial Eigenvalues			Extraction Sums of Squared Loadings		
	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %
1	1.401	46.698	46.698	1.401	46.698	46.698
2	1.035	34.508	81.206	1.035	34.508	81.206
3	.564	18.794	100.000			

Extraction Method: Principal Component Analysis.

Table 7.49
Rotated Component Matrix(a) of MC (Affected Orang Asli)

	Component	
	1	2
Growing trees	.854	-.018
Ex-gratia / solatium	.246	.741
MV of the ancestral land	-.504	.790

Extraction Method: Principal Component Analysis.
a 2 components extracted.

Table 7.50
Summary of Results by Applying PCA of MC (Affected Orang Asli)

Items	Components		Communalities
	1	2	
Growing trees	.854	-.018	.730
Ex-gratia / solatium	.246	.741	.828
MV of the ancestral land	-.504	.790	.878
Eigenvalue	1.401	1.035	
Variance (81.206 %)	46.698	34.508	

7.4.3 Non-Monetary Compensation

According to Table 7.51 and Table 7.52, KMO measure of sampling adequacy was 0.526 indicating that sufficient intercorrelations between variables existed, while the Barlett's Test of Sphericity shows a significant results (Chi-square=114.534; $p < 0.01$) and, the values of extracted communalities is higher than 0.5. This means that data under 'non-monetary compensation (NMC)' component is suitable to be analysed by Factor Analysis Method.

Table 7.51
KMO and Bartlett's Test of NMC (Professional)

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.526
Bartlett's Test of Sphericity	Approx. Chi-Square	114.534
	df	10
	Sig.	.000

Table 7.52
Communalities of NMC (Professional)

	Initial	Extraction
Resettlement enhance quality of life	1.000	.580
Provides ownership	1.000	.566
Not provide facilities as promised	1.000	.545
Location unsuitable	1.000	.639
Uneconomic size of land	1.000	.805

Extraction Method: Principal Component Analysis.

Furthermore, Table 7.53 has shown the results of total variance explained for non-monetary compensation (NMC). The results illustrate that there are two (2) factors / components with eigenvalues greater than 1.0 and the total variance explained was 62.70% of the total variance. By applying the criteria used by Igbaria et.al. (1995) and, after varimax with Kaiser Normalization rotation – Table 7.54 shows the results. Factor 1 consists of items ‘uneconomic size of land’ and ‘location not suitable’; and Factor 2 consists of items ‘not provide facilities as promised’ and ‘resettlement enhance quality of life’. Hence, as a conclusion, the summary of the results as reproduced from SPSS is presented in Table 7.55.

Table 7.53
Total Variance Explained of NMC (Professional)

Compnt	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %
1	1.842	36.840	36.840	1.842	36.840	36.840	1.835	36.709	36.709
2	1.293	25.861	62.701	1.293	25.861	62.701	1.300	25.992	62.701
3	.805	16.099	78.799						
4	.710	14.199	92.999						
5	.350	7.001	100.00						

Extraction Method: Principal Component Analysis.

Table 7.54
Rotated Component Matrix(a) of NMC (Professional)

	Component	
	1	2
Uneconomic size of land	.892	.100
Location unsuitable	.798	-.044
Not provide facilities as promised	-.100	.732
Resettlement enhance quality of life	.361	.671
Provides ownership	-.513	.550

Extraction Method: Principal Component Analysis. Rotation Method: Varimax with Kaiser Normalization.
a Rotation converged in 3 iterations.

Table 7.55
Summary of Results by Applying PCA of NMC (Professional)

Items	Components		Communalities
	1	2	
Uneconomic size of land	.892	.100	.805
Location unsuitable	.798	-.044	.639
Not provide facilities as promised	-.100	.732	.545
Resettlement enhance quality of life	.361	.671	.580
Eigenvalue	1.835	1.300	
Variance (62.701 %)	36.709	25.992	

Nevertheless, the tables below show the PCA results with regard to the non-monetary compensation (NMC) as perceived by the Orang Asli. As explained in paragraph 7.5.1, KMO and Bartlett's test are used to test the suitability of data. Table 7.56 and Table 7.57 have revealed the results of its suitability i.e. KMO measure of sampling adequacy was 0.547 indicating sufficient intercorrelations while the Bartlett's Test of Sphericity was significant (Chi-square=45.476; $p<0.01$) and, the values of extracted communalities for all factors are higher than 0.5.

Table 7.56
KMO and Bartlett's Test of NMC (Affected Orang Asli)

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.547
Bartlett's Test of Sphericity	Approx. Chi-Square	45.476
	df	6
	Sig.	.000

Table 7.57
Communalities of NMC (Affected Orang Asli)

	Initial	Extraction
Housing, infra and amenities	1.000	.672
Guarantee of job	1.000	.680
Living allowances	1.000	.799
Motivational program	1.000	.731

Extraction Method: Principal Component Analysis.

Moreover, Table 7.58 shows the results of total variance explained. There are two (2) factors / components with eigenvalues greater than 1.0 and the total variance explained was 81.206 % of the total variance. By applying the criteria used by Igbaria et.al. (1995) (each item should load 0.5 or greater on one factor and 0.35 or lower on the other factors) and, after varimax with Kaiser Normalization rotation – Table 7.59 shows the results. Factor 1 consists of 'living allowances'; while Factor 2 consists of 'guaranteed of jobs' and, 'housing, infra and

amenities'. The summary of the results as reproduced from SPSS is presented in Table 7.60.

Table 7.58
Total Variance Explained of NMC (Affected Orang Asli)

Compnt	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cum'tive %	Total	% of Variance	Cum'tive %	Total	% of Variance	Cum'tive %
1	1.307	32.663	32.663	1.307	32.663	32.663	1.209	30.215	30.215
2	1.076	26.897	59.560	1.076	26.897	59.560	1.174	29.345	59.560
3	.969	24.228	83.787						
4	.649	16.213	100.000						

Extraction Method: Principal Component Analysis.

Table 7.59
Rotated Component Matrix (a) of NMC (Affected Orang Asli)

	Component	
	1	2
Living allowances	.870	.206
Gurantee of job	-.671	.471
Motivational program	.037	.854
Housing, infra and amenities	.022	.624

Extraction Method: Principal Component Analysis. Rotation Method: Varimax with Kaiser Normalization.
a. Rotation converged in 3 iterations.

Table 7.60
Summary of Results by Applying PCA of NMC (Affected Orang Asli)

Items	Components		Communalities
	1	2	
Living allowances	.870	.206	.799
Motivational program	.037	.854	.731
Housing, infra and amenities	.022	.624	.672
Eigenvalue	1.209	1.174	
Variance (59.560 %)	30.215	29.345	

7.4.4 Challenges in Determination of Compensation for Acquisition of Orang Asli Native Lands

Based on Table 7.61 and Table 7.62, KMO measure of sampling adequacy was 0.593 indicating that sufficient intercorrelations between variables existed, while

the Barlett's Test of Sphericity showed a significant results (Chi-square=184.638; $p<0.01$) and, the values extracted communalities is higher than 0.5. This means that the data of 'challenges in quantification of compensation for Orang Asli native lands' component is suitable to be analysed by using Factor Analysis Method.

Table 7.61
KMO and Bartlett's Test of Challenges in Determination of Compensation

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.593
Bartlett's Test of Sphericity	Approx. Chi-Square	184.638
	df	10
	Sig.	.000

Table 7.62
Communalities of Challenges in Determination of Compensation

	Initial	Extraction
Legal framework	1.000	.705
Monetary and non-monetary	1.000	.905
Issues of land rights	1.000	.868
The most reliable valn approaches	1.000	.116
Negotiation of compensation	1.000	.657

Extraction Method: Principal Component Analysis.

Furthermore, Table 7.63 shows the results of total variance explained for challenges in quantification of compensation for Orang Asli native lands. The results depict that there are two (2) factors / components with eigenvalues greater than 1.0 and the total variance explained was 65.040% of the total variance. By applying the criteria used by Igbaria et.al. (1995) and, after varimax with Kaiser Normalization rotation the results are presented in Table 7.64. Factor 1 consists of items 'monetary and non-monetary compensation', and 'issues of land rights'; while, Factor 2 consists of items 'legal framework', and 'negotiation of compensation'.

Table 7.63
Total Variance Explained of Challenges in Determination of Compensation

Compnt	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %
1	2.025	40.494	40.494	2.025	40.494	40.494	1.651	33.012	33.012
2	1.227	24.546	65.040	1.227	24.546	65.040	1.601	32.028	65.040
3	.984	19.672	84.712						
4	.531	10.627	95.339						
5	.233	4.661	100.000						

Extraction Method: Principal Component Analysis.

Table 7.64
Rotated Component Matrix(a) of Challenges in Determination of Compensation

	Component	
	1	2
Monetary and non-monetary	.947	.088
Issues of land rights	.857	.347
Legal framework	.113	.832
Negotiation of compensation	.078	.807
The most reliable valn approaches	.029	.339

Extraction Method: Principal Component Analysis. Rotation Method: Varimax with Kaiser Normalization.
a. Rotation converged in 3 iterations.

Hence, as a conclusion, the summary of the result as reproduced from SPSS is presented in Table 7.65.

Table 7.65
Summary of the Results by Applying PCA for Challenges in Determination of Compensation for Acquisition of OANL

Items	Component		Community
	1	2	
Monetary and non-monetary	.947	.088	.905
Issues of land rights	.857	.347	.868
Legal framework	.113	.832	.705
Negotiation of compensation	.078	.807	.657
Eigenvalue	1.651	1.601	
Variance (65.040 %)	33.012	32.028	

7.4.5 Suggestions on Compensation Framework

Based on Table 7.66 and Table 7.67, KMO measure of sampling adequacy was 0.599 indicating that sufficient intercorrelations between variables existed, while the Barlett's Test of Sphericity has revealed a significant results (Chi-square=271.683; $p < 0.01$) and, the values of extracted communalities is higher than 0.5 (after rescaled). This means that the data of 'suggestions on compensation framework' component is suitable to be analysed by using the Factor Analysis Method.

Table 7.66
KMO and Bartlett's Test of Suggestion on Compensation Framework

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.599
Bartlett's Test of Sphericity	Approx. Chi-Square	271.683
	df	21
	Sig.	.000

Table 7.67
Communalities of Suggestion on Compensation Framework

	Initial	Extraction
Consider compensation for land	1.000	.614
Make existing structure a law	1.000	.721
Recognise in law the land rights of OA	1.000	.673
Implemented Sagong Tasi decision	1.000	.648
Amend LAA 1960 to incorporate compn for OANL	1.000	.900
Adopt other countries practices	1.000	.653
Non-monetary compn makes uniform	1.000	.850

Extraction Method: Principal Component Analysis.

Furthermore, Table 7.68 illustrates the results of total variance explained for suggestions on compensation framework. There are three (3) factors / components with eigenvalues greater than 1.0 and the total variance explained was 72.273% of the total variance (after rescaled). By applying the criteria used by Igbaria et.al.

(1995) and, after varimax with Kaiser Normalization rescaled rotation – Table 7.69 shows the results. Factor 1 consists of items ‘recognise in law the land rights of Orang Asli; and ‘consider compensation for land’. Factor 2 consists of item; ‘non-monetary compensation makes uniform’, while, Factor 3 consists of item ‘amend the Land Acquisition Act 1960 to incorporate compensation for Orang Asli native lands’. On the other hand, Table 7.70 summarizes the results of PCA with regard to this component.

Table 7.68
Total Variance Explained of Suggestion on Compensation Framework

Compt	Initial Eigenvalues(a)			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cum'tive %	Total	% of Variance	Cum'tive %	Total	% of Variance	Cum'tive %
1	.565	33.342	33.342	2.320	33.146	33.146	1.977	28.242	28.242
2	.433	25.554	58.896	1.618	23.116	56.262	1.828	26.107	54.350
3	.247	14.598	73.494	1.121	16.011	72.273	1.255	17.923	72.273
4	.180	10.597	84.091						
5	.132	7.764	91.855						
6	.072	4.274	96.128						
7	.066	3.872	100.000						

Extraction Method: Principal Component Analysis.

Table 7.69
Rotated Component Matrix(a) of Suggestion on Compensation Framework

	Component		
	1	2	3
Recognise in law the land rights of OA	.763	.200	-.225
Consider compn for land	.737	.167	.206
Implemented Sagong Tasi decision	-.655	.465	-.053
Make existing structure a law	-.602	-.355	-.483
Non-monetary compn makes uniform	.024	.915	-.113
Adopt other countries practices	-.245	-.760	-.126
Amend LAA 1960 to incorporate compn for OANL	.004	-.059	.947

Extraction Method: Principal Component Analysis. Rotation Method: Varimax with Kaiser Normalization.
a Rotation converged in 5 iterations.

Table 7.70
Summary of Results by Applying PCA for Suggestions on Compensation Framework

Items	Component			Communality
	1	2	3	
Recognise in law the land rights of OA	.763	.200	-.225	.673
Consider compensation for land	.737	.167	.206	.614
Non-monetary compensation makes uniform	.024	.915	-.113	.850
Amend LAA 1960 to incorporate compensation for OANL	.004	-.059	.947	.900
Eigenvalue	1.977	1.828	1.255	
Variance (72.273 %)	28.242	26.207	17.923	

7.4.6 Valuation Approaches

According to Table 7.71 and Table 7.72, KMO measure of sampling adequacy was 0.544 indicating that sufficient intercorrelations between variables existed, while the Bartlett's Test of Sphericity has revealed a significant results (Chi-square=114.534; $p < 0.01$) and, majority of the values of extracted communalities is higher than 0.5. This means that data under 'valuation approaches' component is suitable to be analysed by the Factor Analysis Method.

Table 7.71
KMO and Bartlett's Test of Valuation Approaches

Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		.544
Bartlett's Test of Sphericity	Approx. Chi-Square	9.632
	df	3
	Sig.	.022

Table 7.72
Communalities of Valuation Approaches

	Initial	Extraction
Simulation of the most probable buyer's price fixing	1.000	.421
Inference from past transactions	1.000	.657
Normative Modeling e.g. Contingent Valn Method (CVM)	1.000	.642

Extraction Method: Principal Component Analysis.

Hence, Table 7.73 shows the results of total variance explained for challenges in quantification of compensation for Orang Asli native lands. The results showed that there is only one (1) factor / component with eigenvalues greater than 1.0 and the total variance explained was 49.945% of the total variance. By applying the criteria used by Igbaria et.al. (1995) and, after varimax with Kaiser Normalization rotation – Table 7.74 illustrates the results. The Factor consists of items ‘inference from past transactions’, and ‘Normative Modeling e.g. Contingent Valuation Method (CVM)’. In addition, Table 7.75 summarizes the PCA results.

Table 7.73
Total Variance Explained of Valuation Approaches

Component	Initial Eigenvalues			Extraction Sums of Squared Loadings		
	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %
1	1.498	49.945	49.945	1.498	49.945	49.945
2	.891	29.696	79.641			
3	.611	20.359	100.000			

Extraction Method: Principal Component Analysis.

Table 7.74
Rotated Component Matrix(a) of Valuation Approaches

	Component
	1
Simulation of the most probable buyer's price fixing	-.811
Inference from past transactions	.749
Normative Modeling e.g. Contingent Valn Method (CVM)	.748

Extraction Method: Principal Component Analysis.
a Only one components was extracted, therefore the solution cannot be rotated.

Table 7.75
Summary of Results by Applying PCA for Valuation Approaches

Items	Component	Communality
	1	
Inference from past transactions	.749	.657
Normative Modeling e.g. Contingent Valuation Method (CVM)	.748	.642
Eigenvalue	1.498	
Variance	49.945	

7.5 INFERENCE ANALYSIS – PEARSON CORRELATION

The purpose of the correlation test is to prove whether the correlation between the dimensions of General Compensation Issues; Monetary Compensation; and Non-Monetary Compensation and the development of Compensation Framework is positive or otherwise. This result is important because the dimensions used are the main components that contributed in the development of a compensation framework. The analysis is based on non-directional hypothesis as explained in the following paragraphs.

7.5.1 Is there any statistically significant relationship between perceptions on protection by the laws, land rights issues, negotiation and challenges in determining the compensation (i.e. general compensation issues) with development of the compensation framework?

Table 7.76 shows the analysis of correlation between 'General Compensation Issues (GCI)' and 'Compensation Framework (CF)'. From the analysis, it is notable that there are positive relationships between GCI and CF with value of $r = 0.240$, $p < .05$. In other words, GCI relates with CF in such way that the needs of GCI is proportional with the needs of CF and vice-versa. Therefore, the non-directional hypothesis of: Is there any statistically significant relationship between perception on protection by the laws, land rights issues, negotiation and challenges in determining of the compensation (i.e. general compensation issues) with development of the compensation framework is answered and accepted. This is because the value of $p = 0.002$ is smaller than $\alpha = .01$.

Table 7.76
Correlation Test to Prove a Relationship between General Compensation Issues
and Compensation Framework

Variables		General Compensation Issues	Compensation Framework
General Compensation Issues	Pearson	1	.240**
	Correlation		.002
	Sig. (2-tailed)	.	158
	N	158	
Compensation Framework	Pearson	.240**	1
	Correlation		.002
	Sig. (2-tailed)	.002	158
	N	158	

** Correlation is significant at the 0.01 level (2-tailed).

7.5.2 Is there any statistically significant relationship between perceptions on market value of the land, ex-gratia and other claims of monetary in nature (i.e monetary compensation) with development of the compensation framework?

Table 7.77 shows the analysis of correlation between 'Monetary Compensation (MC)' and 'Compensation Framework (CF)'. From the analysis, it is notable that there are positive relationships between MC and CF with value of $r = 0.452$, $p < .05$. In other words, MC relates with CF in such way that the needs of MC is proportional with the needs of CF and vice-versa. Therefore, the non-directional hypothesis of: Is there any statistically significant relationship between perceptions on market value of the land, ex-gratia and other claims of monetary in nature (i.e monetary compensation) with development of the compensation framework is answered and accepted. This is because the value of $p = 0.000$ is smaller than $\alpha = .01$.

Table 7.77
Result of Correlation Test to Prove a Relationship between Monetary Compensation and Compensation Framework

Variables		Monetary Compensation	Compensation Framework
Monetary Compensation	Pearson Correlation	1	.452**
	Sig. (2-tailed)	.	.000
	N	158	158
Compensation Framework	Pearson Correlation	.452**	1
	Sig. (2-tailed)	.000	.
	N	158	158

** Correlation is significant at the 0.01 level (2-tailed).

7.5.3 Is there any statistically significant relationship between perceptions on resettlement, motivation program and other benefits of non-monetary in nature (i.e non-monetary compensation) with development of the compensation framework?

Table 7.78 shows the analysis of correlation between 'Non-Monetary Compensation (NMC)' and 'Compensation Framework (CF)'. From the analysis, it is notable that there are positive relationships between NMC and CF with value of $r = 0.174$, $p < .05$. In other words, NMC relates with CF in such way that the needs of NMC is proportional with the needs of CF and vice-versa. Therefore, the non-directional hypothesis of: Is there any statistically significant relationship between perceptions on resettlement, motivation program and other benefits of non-monetary in nature (i.e non-monetary compensation) with development of the compensation framework is answered and accepted. This is because the value of $p = 0.029$ is smaller than $\alpha = .05$.

Table 7.78
Result of Correlation Test to Prove a Relationship between Non- Monetary
Compensation and Compensation Framework

Variables		Non-Monetary Compensation	Compensation Framework
Non-Monetary Compensation	Pearson	1	.174*
	Correlation		.029
	Sig. (2-tailed)	.	158
	N	158	158
Compensation Framework	Pearson	.174*	1
	Correlation		.
	Sig. (2-tailed)	.029	158
	N	158	158

*Correlation is significant at the 0.05 level (2-tailed).

As a conclusion, the correlation test has revealed that positive correlations exist between them and the relationships are not pure, but causal relationship existed. However, this research does not cover the study of the cause and effect of the relationship. Thus, the researcher suggests that separate study is needed to highlight and explore that causal relationship.

7.6 THE ANALYSIS BY DELPHI METHOD

7.6.1 Participation of Experts in Delphi Technique

Eleven (11) renowned experts participated in Delphi technique. Table 7.79 shows the response rates of the experts involved in two rounds of Delphi technique. It recorded a moderately high participation rate of 77.3%. The good participation rate has been received due to direct approach and good networking linkages established between the researcher and the experts.

Table 7.79
Participation of Experts in Delphi Technique

No	Organisations / Professionals	No. of Experts Identified	No. of Experts Participated
1	Valuation and Property Services Department, Ministry of Finance.	2	2
2	Department of Orang Asli Affairs (JHEOA), Ministry of Land and Rural Development	2	2
3	Pusat Pengajian Pribumi Malaysia (PPPM), Universiti Malaya	1	1
4	Office of the Orang Asli Senator	1	1
5	Academics, Journalists and Lawyers	5	3
6	Centre for Orang Asli Concern (COAC), Malaysia	2	1
7	Persatuan Orang Asli Semenanjung Malaysia (POASM)	2	1
Total / Percentage		15	11 (77.3%)

7.6.2 Analysis and Discussion of Delphis' Findings

Table 7.80 shows the results of Round I and II of Delphi Technique. The overall results of parts A, B, C, and D revealed that both rounds achieved mode and mean value of five (5) point and above (i.e. slightly agree/implementable). This means that the experts are optimistic that the pre-compensation framework being developed from previous research methodologies could be implemented in due manner subject to minor amendment and enhancement of the existing rules and regulations. This is proven by the mean values of 6.13 and 6.29 in Round I and Round II respectively. These results are consistent with the results of quantitative survey of Q1 (questionnaire for the affected Orang Asli – paragraph 7.2.4) and Q2 (questionnaire for professional respondents – paragraph 7.3.11) that all listed variables and sub-variables are important to be considered in developing a compensation framework for acquisition of Orang Asli native lands. The results are also consistent with literature analyses as revealed by Ismail (2005), Cheah (2004b), Endicott & Dentan (2004), Nicholas (2003), Smith (2001), Humphry (1998), Sheehan (1997), Whipple (1997), Awang (1996), Dollah (1996); Mah (1995), and Myers (1986).

With regards to whether the environmental concern is attached and being considered in land acquisition of Orang Asli native lands, the experts agreed that that factor is being considered appropriately. For instance, as discussed in Case Study No. 5 (paragraph 6.25, Chapter 6) EIA Report is prepared and DEIA Report is approved on 24 February 2001 for the Kelau Dam project. Furthermore, it is interesting to highlight that the experts found that due to land rights of Orang Asli being not spelt out in laws, this is considered as an obstacle to payment of market value for the ancestral land. Experts also revealed that negotiations for compensation, which are normally conducted by the JHEOA and representative of Orang Asli hardly meet the expectations of the interested parties. As an overall opinion, the experts agreed that the proposed compensation framework for land acquisition of Orang Asli native land should consist of the elements as stated in Part D of Question No. 24 of the Table 7.80.

Table 7.80
The Results of Round I dan II of Delphi Technique

Compensation Variables	Round I		Round II	
	Mode	Mean	Mode	Mean
A. GENERAL COMPENSATION ISSUES				
• Perceptions on land acquisition of Orang Asli Native Lands:				
1. Land acquisition is an encroachment of rights, interest, heritage and culture of Orang Asli native lands	6	5.45	7	6.30
2. In most of the land acquisition cases, promises to protect Orang Asli interests are not fulfilled	5	5.20	5	5.35
3. State Authority and Federal Government owe fiduciary duty towards the Orang Asli, which has been breached	6	5.56	6	5.87
4. Disparity existed in compensation packages (i.e. elements of compensation) among state authorities / projects	5	5.20	6	5.90

5. Environmental concern is attached and being considered in land acquisition of Orang Asli native lands	6	5.89	7	6.57
• Laws and Regulations – Land Rights Issues				
6. Existing laws in Malaysia (i.e. The Aboriginal Peoples Act 1954 (Act 134) and Article 13, Federal Constitution 1957) provided fewer protections to the effects of an acquisition to Orang Asli native lands.	6	5.45	6	5.83
7. Land rights of Orang Asli are not recognized in Malaysian legal systems.	5	5.20	6	5.72
8. Due to land rights of Orang Asli being not spelt out in laws, this is considered as an obstacle to payment of market value for the ancestral land	6	5.55	7	6.21
9. Related acts and regulations must be amended to incorporate and recognize legal rights of Orang Asli toward their native lands	6	5.42	7	6.35
10. The meaning of 'land occupied under customary rights' under section 2 (First Schedule) of Land Acquisition Act 1960 should be interpreted to include Orang Asli native lands	5	5.20	6	5.91
• Negotiation of Compensation				
11. The nature of negotiations influenced the quantum of compensation received by the Orang Asli	6	5.57	6	5.88
12. Negotiations for compensation which are normally conducted by the JHEOA and representative of Orang Asli hardly achieve to expectations of the interested parties	6	5.47	6	5.59
• Challenges				
13. The main challenge in land acquisition compensation of Orang Asli native lands is to resolve the problem of land rights	6	5.45	7	6.30
14. At present, methods to determine the compensation are based on the discretion of the state authorities through negotiation between parties concerned	5	5.20	6	5.90
15. It is vital to introduce a uniform approach among states in dealing with the elements of monetary and non-monetary compensation	7	6.49	7	6.31

B. MONETARY COMPENSATION

16. As currently practised, payments for loss of trees and building which were based on JPPH's advice are perceived by the Orang Asli as low and inadequate	7	6.45	7	6.87
17. Payment for the market value of ancestral land ought to be considered to replace payment on loss of trees (section 11 and 12, Act 134)	6	5.23	6	5.88
18. Payment for solatium due to spiritual and cultural attachment to land ought to be considered	6	5.48	7	6.33
19. Payment of other monetary headings (e.g. living/support, evacuation allowances and shares of unit trust) that being practised in certain acquisition compensations, is requested by Orang Asli to be included in all compensation packages.	6	5.27	6	5.76

C. NON-MONETARY COMPENSATION

20. Its important for the state authorities to develop a Regroupment Scheme which provides an appropriate and adequate housing, infrastructure and amenities in every land acquisition that affects Orang Asli native lands	7	6.19	7	6.28
21. The motivational programs and training are very much appreciated by the Orang Asli and so far have been conducted at satisfactory level	5	5.05	6	5.82
22. Orang Asli require a guarantee of employment for them to earn living for their future	6	5.48	6	5.91
23. Other types of non-monetary compensation e.g. size of agriculture, orchard and residential plot are not adequate	5	5.09	6	6.08

D. SUGGESTIONS

24. The proposed compensation framework for land acquisition of Orang Asli native land should consist the following elements:	6	5.67	7	6.48
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i. Monetary Compensation

- MV of ancestral land and other claims permitted by Land Acquisition Act 1960 (with the assumption that the land rights issues could be solved).
 - Solatium / ex-gratia payment in respect of special attachment to land, insults, mental distresses and the future of young generation
 - Living allowances for certain period
 - Evacuation allowance
 - Shares of unit trust
-

-
- f) If the acquisition for economic development – shares of equity for Orang Asli community

ii. Non-Monetary Compensation

- a) Resettlement program – housing, infrastructure and communal amenities
- b) Motivation program and training
- c) Employment
- d) Economic size of agriculture land for their sources of income.

25. Opinion on whether the above compensation framework is workable and implementable in Malaysia.	6	6.13	6	6.29
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Legend (Q1 – Q24): 1=strongly disagree 2=disagree 3=slightly disagree 4=neutral
5=slightly agree 6=agree 7=strongly agree

Legend (Q25): 1=strongly unimplementable 2=unimplementable 3=slightly unimplementable
4=Indifference 5=slightly implementable 6=implementable
7=strongly implementable

7.7 SUMMARY

This chapter has provided the empirical analysis of the quantitative survey, which administered questionnaires for affected Orang Asli (Q1) and questionnaires for Professionals (Q2). Further, an analysis of Delphi technique was done to evaluate the practicality of the pre-compensation framework that was established from the results of the quantitative survey, case studies, and reviewing of the template of Australian native title compensation framework (which was developed based on requirements spelt out in the Native Title Act 1993). The summary of the empirical findings by adopting the triangulation of approaches is tabulated in Table 7.81.

The results of the empirical findings, which are summarised from the above research methodologies, strongly recommended the followings:

- the Orang Asli land rights need to be recognized under the law

- pay compensation for market value of the Orang Asli native lands
- amend the Aboriginal Peoples Act 1954 (Act 134) to provide ownership of Orang Asli Reserves/Areas
- amend the Land Acquisition Act 1960 to incorporate Orang Asli lands
- adopt other countries framework as a benchmark e.g. Australian Native Title framework
- disparity in compensation packages between projects and among state authorities need to be reviewed
- develop uniform framework of compensation for all states

Finally, the research revealed that the proposed compensation framework for land acquisition Orang Asli should employ the following elements:

- ***Monetary Compensation***

- a) MV of ancestral land and other claims permitted by Land Acquisition Act 1960 (with the assumption that the land rights issues could be resolved).
- b) Solatium / ex-gratia payment in respect of special attachment to land, insults, mental distresses and the future of young generation
- c) Living allowances for certain period
- d) Evacuation allowance
- e) If the acquisition for economic development – shares of equity for Orang Asli community

- ***Non-Monetary Compensation***

- a) Resettlement program – housing, infrastructure and communal amenities
- b) Motivation program and training
- c) Employment
- d) Economic size of agriculture land for their source of income.

RESEARCH ANALYSIS	GENERAL COMPENSATION ISSUES (GCI)	MONEY COMPENSATION (MC)	NON-MONETARY COMPENSATION (NMC)
QUANTITATIVE SURVEY ANALYSIS	<ul style="list-style-type: none"> • Encroachment on rights, interest, heritage and culture of Orang Asli • Promises to protect Orang Asli interest are not fulfilled • JHEOA is not serious in taking care of Orang Asli interest • Compensation for ancestral land is not given. • Inadequate compensation • Methods of compensation are based on the discretion of the government • Negotiation for compensation which is conducted by JHEOA hardly achieved up to expecting requirement. 	<p>Questionnaire for Affected Orang Asli (Q1)</p> <ul style="list-style-type: none"> • Value of crops per tree is relatively low • Orang Asli request for payment of MV for their native land • Orang Asli request for payment of ex-gratia / solatium for loss of culture and spiritual • Orang Asli request for payment of living allowance 	<ul style="list-style-type: none"> • Orang Asli badly needed the regroupment scheme which provides acceptable size and quality of houses; good infrastructures, and adequate amenities. • Guarantee of job / source of income • Orang Asli need motivational program for them to adjust their lifestyle in regroupment scheme.
	<ul style="list-style-type: none"> • Lack of protection given by acquisition laws to Orang Asli land rights • The meaning of 'land occupied under customary rights' under Section 2 (First Schedule) of LAA 1960 should be given wider interpretation so as to cover Orang Asli lands as well. • The absence of uniform approach among states in dealing with the quantum of compensation – monetary and non-monetary aspects • Negotiation is based on discretion of JHEOA • Main challenge in compensation is an issue of land rights 	<p>Questionnaire for Professional (Q2)</p> <ul style="list-style-type: none"> • Payment on loss of growing trees and buildings are perceived by Orang Asli as low and inadequate • No consideration is given for payment of solatium due to spiritual, and cultural attachment to land • Payment of other monetary claims such as living, evacuation allowances and unit trust are adequate. 	<ul style="list-style-type: none"> • Generally, the facilities given in regroupment program is at unsatisfactory level • The transitional / motivational programs is satisfactorily conducted by JHEOA • The other benefits of compensation such as, size of agricultural, orchard, and residential land is at unsatisfactory level.

<p>PRINCIPAL COMPONENT ANALYSIS (PCA)</p>	<ul style="list-style-type: none"> • Orang Asli want compensation for their native land. • Land acquisition deprives their freedom, forest produce, culture and, of future living. • Lack of protection on land rights • Promises to protect Orang Asli interests not fulfill • Land acquisition is no more than encroachment on rights, heritages and interests of Orang Asli • Orang Asli want the government finds an alternative site and preserve Orang Asli land • The location of resettlement project that provided by the authority not suitable to Orang Asli lifestyle. • They suffer of loosing traditional jobs and skills • Their life becomes more difficult • Issue of inadequate compensation • The cultures, beliefs and heritages of Orang Asli are affected and; • No more place to practice traditional lifestyle • Problem of integration with neighborhood community • Notice for evacuating is too short • Cultural shocks, isolation of Orang Asli 	<ul style="list-style-type: none"> • Orang Asli native land is imbued with cultural and, spiritual; need special valuation approach to value it. • The compensation elements of either MC nor NMC are not uniform states • Compensation based on sections 11 and 12 not a fair basis of payment of compensation • No obvious economic benefits • Orang Asli want payment of growing trees • Ex-gratia / solatium payment is considered as over and above rigid compensation regime. • Basis of compensation must be based on market value of ancestral land 	<ul style="list-style-type: none"> • Alienation of uneconomic size of land • Not provide facilities as promised • Resettlement program enhanced the quality of life • NMC package must include living allowances, guaranteed of jobs, appropriate housing, infrastructures and amenities
<p>INFERENTIAL ANALYSIS (PEARSON CORRELATION)</p>	<ul style="list-style-type: none"> • There is statistically significant relationship between perceptions on protection by the law; land rights issues; negotiation and; challenging in determining of compensation (i.e. GCI) with development of the compensation framework. 	<ul style="list-style-type: none"> • There is statistically significant relationship between perceptions on market value of the land; ex-gratia; solatium and; other claims of monetary in nature with development of the compensation framework. 	<ul style="list-style-type: none"> • There is statistically significant relationship between perceptions on resettlement; motivational programs and; other benefits of non-monetary in nature with development of the compensation framework.

<p style="text-align: center;">DELPHI TECHNIQUE ANALYSIS</p>	<ul style="list-style-type: none"> • Land acquisition is an encroachment of rights, heritage and culture of Orang Asli. • Promises to protect Orang Asli interest is not fulfill • Breach of fiduciary duty by State Authority and Federal Government • Existed of disparity in compensation packages between projects • Environmental issues is considered • Land rights are not recognized in legal system • Due to no legal rights – market value concept cannot be implemented. • It is crucial to amend the related laws. • Negotiation of compensation is hardly achieving the expectations of parties concerned. • It is vital to introduce a uniform approach in dealing with compensation packages. 	<ul style="list-style-type: none"> • Need to implement the market value concept in valuing native land. • Need to consider spiritual and cultural attachment to land. • Other monetary headings (e.g. living allowance, unit trust, etc.) must be given due consideration. 	<ul style="list-style-type: none"> • Develop regroupment scheme with infrastructures and amenities. • Provide motivational programs • Ensure job opportunities • Alienate an appropriate size of agriculture land and residential plot.
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Table 7.81: Summary of the Empirical Findings by Adopting Triangulation of Approaches

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1 INTRODUCTION

This Chapter summarises the works that have been undertaken pursuant to the objectives of the research and highlights the findings based on the investigations performed.

Based on the research methodologies employed (i.e. case study; quantitative surveys and, Delphi technique), this research managed to carry out survey, collect relevant data and information with regard to land acquisition affecting Orang Asli native lands. This information is very important and significant because it has exposed the real insight into land acquisitions involving Orang Asli lands. Furthermore, it has explained the elements and factors that should be taken into consideration for developing a compensation framework for land acquisition affecting Orang Asli native lands. In order to ensure that the compensation framework being developed is acceptable and implementable by the parties concerned, this research revealed that the compensation framework must be based on two main components - monetary or material and non-monetary or non-material component.

This Chapter discusses the overall summary of the research (conclusions); important findings; recommendations; significant contribution to knowledge; limitations of the research and, as well as suggestions for future work.

8.2 SUMMARY OF THE RESEARCH

Acquisition of Orang Asli native lands cannot be avoided since land is scarce and developments are needed to meet the planned socio-economic growth and development of the country. The Authorities proudly declared that the acquisition

of Orang Asli land is for the improvement of the Orang Asli's standard of living as well as to provide better facilities and amenities to their settlements or kampongs. On the other hand, the Orang Asli perceived that they are being resettled forcibly on plots of land far smaller than the one acquired from them. However, they are furnished with modern housing and amenities. This non-consultative top-down imposition of development schemes results in mismatches between the Orang Asli's needs and the facilities provided by the Authorities.

In reality, the Orang Asli in Malaysia are in much hope for the government of Malaysia to resolve the long outstanding problems of land rights. They urge recognition of their rights to land; rights to adequate compensation when their lands are being acquired; rights to determine the kind of development they want; rights to indigenous education and way of life; and rights to equal access to basic facilities. Specifically, in the cases mentioned, it is hoped that the government will take positive action to resolve the issues that have been arisen. Whenever the issue of land rights managed to be resolved, other matters, concerning with land can be dealt in appropriate manner. This includes the issue of unstructured compensation packages for acquisition of their lands.

In this research, the main issue that was highlighted from employing the triangulation of methods relates to land rights, which have resulted from the unstructured nature of acquisition compensation. Due to uncertainty of the rights of Orang Asli lands, the acquisition of Orang Asli native lands does not fall under the jurisdiction of the Land Acquisition Act 1960. This creates the problems of un-uniform structure of compensation and disparity existed among state governments on compensation packages offered to community of Orang Asli when their ancestral land being acquired for projects. There were obvious examples from case studies that certain community of Orang Asli has been given lucrative package of compensation, but on the other projects, they were compensated inadequately. In consequence, if the land rights of Orang Asli native land could be resolved, compensation for market value can be established to replace compensation as required under Sections 11 and 12 of the Aboriginal

Peoples Act, 1954 (compensation for growing trees and building so affected). Therefore, consideration of compensation under the Land Acquisition Act 1960 can be implemented, which is being given wider, total and exclusive nature of acquisition compensation. Thus, the unstructured compensation packages of acquisition of Orang Asli native lands need to be improved, and this research has achieved its initial goal to develop the so-called uniform compensation framework for acquisition affecting Orang Asli lands.

In light of the foregoing, the specific objectives of this research as also outlined in Chapter 1 (paragraph 1.5) have been set as follows:

1. To determine the extent to which current laws are adequate in protecting Orang Asli native land rights to compensation.
2. To determine the extent of compensation problems from the perspectives of those concerned and decided cases.
3. To assess current practices of the State Governments with regard to compensation for acquisition of Orang Asli native land.
4. To evaluate the applicability of the pre-compensation framework (being developed based on the results of quantitative survey, case study and the compensation practices of Australia).
5. To propose a compensation framework for land acquisition affecting Orang Asli native lands.

All of the objectives have been met and as discussed in Chapter 6 and 7. In the following sections, important findings are discussed pursuant to each of the objectives above.

8.3 IMPORTANT FINDINGS

8.3.1 Protections of the Laws toward Orang Asli Land Rights to Compensation

This research revealed that laws of Malaysia are lacking with regard to the protections of Orang Asli lands and rights to fair and just compensation. This research found that ownership of land for their ancestral land is the issue that is yet to achieve its objective. From investigation, professionals (quantitative survey) and experts (Delphi method) opined that ownership should be given to Orang Asli for their ancestral lands by the way either of individual or by group ownership of the Group Settlement Act 1960 or both. But, they suggest that stringent restrictions of ownership must be imposed to ensure continuous ownership of land within Orang Asli community. As stated under Article 8(1) of the Constitution, all citizens are equal before the law and entitled to equal protection, so everyone has a right to security of tenure and eligible for adequate compensation when their lands is acquired by the government. In this regard, Orang Asli is no exception to this entitlement as has so long been enjoyed by other Malaysian citizen.

Malaysian law cases have attempted to give legal recognition to Orang Asli land rights. In Adong Kuwau (1997), Malaysian court declared that Orang Asli have a 'tribal rights' while, in Sagong Tasi (2002) court recognized the Orang Asli land rights as similar to titled land. However, till to-date Sagong Tasi case is pending decision by the Federal Court. Due to this, Orang Asli rights to land are still under the equitable rights e.g. tribal rights, meaning that they can use the land for their subsistence but not own it legally. Since Orang Asli have no legal ownership toward lands, when acquisition of land happened, there is a deprivation of rights existed. So what equitable rights have been deprived? As mentioned in Adung Kuwau (1997), there are at least two deprivations happened when Orang Asli lands are being acquired namely; to gather produce from land surrounding their native lands and, to be involved in development projects for their lands.

Therefore, the acquisition of Orang Asli native lands is not within the purview or jurisdiction of the Land Acquisition Act 1960 that can offer an exclusive compensation structure.

8.3.2 Problems of Acquisition and Compensation

From the research investigation and findings, it revealed that the critical problems attached in acquisition and compensation of Orang Asli lands are as follows:

- a) In general, Orang Asli do not support the acquisition due to the failure in delivering promises to protect their interests. In most of the cases their life becomes more difficult as compared to the situation before the acquisition. The main problem arose after their lands are being acquired is the loss of their sources of income. As forest produces and hunting are their main activities, the acquisition made their subsistence activities impossible. Therefore, Orang Asli perceive that acquisition does not bring any obvious benefits to their community.
- b) Due to the unresolved land rights issue, the present structure of compensation as spelt out under the sections 11 and 12 of the Aboriginal Peoples Act 1954 fell below the reasonable level. VPSD, the department responsible to value the compensation for trees and buildings is still using the value list of trees that is considered outdated.
- c) As is being practiced now, the determination of compensation is solely based on discretion of the authority. This happens because there is no guideline and regulations being set or established by the government to quantify how the compensation should be awarded. On top of that, methods in assessing the compensation by the authorities are not clear. There are authorities that apply the act rigidly, while others generously awarded the compensation under two components i.e. monetary and non-monetary packages. This contributes to disparity among state governments due to no uniform structures of compensation. Acquisition by private entities for development of township or residential area

normally received lucrative package of compensation, while for public projects are awarded inadequately.

8.3.3 Current Compensation Packages Practised by the State Authorities

The compensation package awarded by various state authorities in acquisition of Orang Asli native lands could be categorised into three natures; firstly, generous compensation packages; secondly, fair and equitable (appropriate) compensation packages and, thirdly as per requirements of laws (inadequate) compensation packages.

Although compensation packages given by certain states are considered generous, these are fully at the discretion of the states. Examples of land acquisitions that fall under this category are; Bukit Lanjan township project in Damansara; Kampong Air Kuning, Bukit Cherakah Shah Alam; Kampong Sungai Rasau, Daerah Petaling and, Kampong Tanjong Rabok and Kampong Bukit Kemandul, Kuala Langat. There are many reasons behind such decision, among them are:

- i. The nature of the project which is privatisation, thus the project's proponent trying to minimise problems with Orang Asli
- ii. NGOs play important roles in educating the community of Orang Asli to safeguard their rights.
- iii. Negotiations between JHEOA, representative of Orang Asli, State Authority and, project proponent (developer) are conducted in a harmonious and friendly manner. The negotiation is considered as fruitful negotiation between parties concerned.
- iv. The state herself willingly awards generous compensation packages to Orang Asli due to precedent cases within the state.
- v. To avoid legal dispute between Orang Asli and State Government, this may tarnish the reputation of the State Government.

- vi. The subject of Orang Asli is a very sensitive matter. NGOs (local and international) are prone to report and manipulate any issue arising in international arena due to the policy of over-protection by United Nation towards indigenous matters.

Furthermore, fair and equitable (i.e. appropriate) compensation packages awarded by the State Authorities are normally awarded for privatised projects but located outside the development area. Example of such projects are; Splash Project – Privatisation Project for Sungai Selangor Water Supply Phase 3 (SSF 3); and, Kelau Dam in Raub. The compensation package values are slightly lower than category one package. Normally under sub-headings of non-monetary component, the package is not so attractive and lacking of certain items such as unit trust, living allowances and job guarantee.

On the other hand, the last category of compensation packages (inadequate) are normally awarded for the projects that are purely ‘public projects’ initiated and developed by the government or semi-government agencies. Example of such projects are; Sungai Kinta Dam, Ulu Kinta; and Sungai Linggui Dam, Kota Tinggi. Under this category the compensation package strictly follows the requirement of Sections 11 and 12 of Act 134 i.e. payment for affected productive trees and buildings in the acquisition exercise.

8.3.4 Evaluation of the Practicality of Pre-Compensation Framework

As discussed in paragraph 7.6.2 of Chapter 7, the experts for Delphi Method’s revealed that pre-compensation framework being established from application of quantitative and case study methodologies is implementable and workable. The experts believe that the successfulness of the implementation is subject to if the Orang Asli land rights is recognised. This needs for amendments of laws especially the laws with regard to land acquisition and affairs of Orang Asli. The Aboriginal Peoples Act 1954 (Act 134), Land Acquisition Act 1960 and, National

Land Code 1965 are among the major acts and regulations that need for amendments for the full recognition of Orang Asli land rights.

8.3.5 Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands.

The research is of the view that a workable and implementable compensation framework for land acquisition affecting Orang Asli native lands in Malaysia is illustrated in Table 8.1. The developed framework is different from compensation structure, which affected private title land where the compensation solely based on monetary compensation as spelt-out in Schedule 1 of Land Acquisition Act 1960. But, for land acquisition affecting Orang Asli native lands, there are variations where such compensation consist of the monetary and non-monetary components. This research found that non-monetary compensation is very much needed by the Orang Asli in order to sustain their survivility. The research results proved that Orang Asli have still not achieved the required stage of being able to manage their own financial and investment.

In this regard, the basis for calculation of the compensation is still the same as market value basis. After determining the total sum of compensation, a certain percentage of it will be in the form of non-monetary component. Percentage wise, it was mentioned by some respondents that this takes a big portion i.e. 70% - 80% of the total compensation due to high development costs incurred in providing infrastructure and amenities in the resettlement area.

Table 8.1
Compensation Framework for Land Acquisition Affecting Orang Asli Lands

General Compensation Issues	Monetary Compensation	Non-Monetary Compensation
<ul style="list-style-type: none"> • The Orang Asli land rights need to be recognized under the law • Amend the Aboriginal Peoples Act 1954 (Act 134) to provide ownership of Orang Asli Reserves/Areas • Amend the Land Acquisition Act 1960 to incorporate Orang Asli lands • Adapt other countries framework as a benchmark e.g. Australian Native Title framework 	<ul style="list-style-type: none"> • MV of ancestral land and other claims permitted by Land Acquisition Act 1960 (with the assumption that the land rights issues could be resolved). • Solatium / ex-gratia payment in respect of special attachment to land, insults, mental distresses and the future of young generation • Living allowances for certain period • Evacuation allowance • Shares of unit trust • If the acquisition for economic development – shares of equity for Orang Asli community 	<ul style="list-style-type: none"> • Resettlement program – housing, infrastructure and communal amenities • Motivation program and training • Employment • Economic size of agriculture land for their sources of income.

8.4 RECOMMENDATIONS

Below are some suggestions to upgrade the acquisition compensation of Orang Asli native lands:

- The Aboriginal People's Act 1954 has many weaknesses and is not favourable to the Orang Asli i.e. giving them only tenant rights (tenant-at-will) over their ancestral land. Therefore, the Act needs to be strengthened and amended where necessary. The Orang Asli needs to be accorded the same rights as the other citizens by giving them an ownership to land. The Malay Reserves Enactment, the Group Settlement Act 1965 or Felda Scheme could be used as reference so that similar provisions could be made for Orang Asli lands.

- The power of state authorities has to be limited in cases of proposed abolition of Orang Asli lands, to enable consultations with Orang Asli to be carried out beforehand. Alternative land with the same expanse and quality need to be alienated to Orang Asli or gazetted as Orang Asli Reserves, as provided for under articles 8(5)(c) and 89(5) & (6) of the Federal Constitution.

- An action committee consisting of government agencies and departments and Orang Asli should be set up in every district to act on Orang Asli demands related to land. This committee may organise dialogues, seminars and forums on the demands and seek solutions to strengthen cooperation between the government and Orang Asli.

- Further loss of Orang Asli lands could be prevented if state authorities had procedures for screening out any Orang Asli lands, before ownership is given to the concerned party.

- The Orang Asli must be involved in the development of their land based on their needs and aspirations. The human development aspect must not be neglected and it should be the basis of the land development agenda of the government. The development of the Orang Asli native lands should be institutionalised in the form of a Trust.

- Sustainable development and the eradication of poverty are only possible when carried out within a human rights framework, with the aim of empowering the citizenry instead of encouraging dependence.²² Only thus will the Orang Asli have a sense of ownership and a stake in the nation's development.

- Orang Asli are encouraged to give up their traditional lifestyle due to present national environment of development. They need to change in order to suit with rapid physical development of Malaysia. Land is needed for developments for the benefits of peoples, not only for traditional subsistence means. To encourage them to change, intensive motivational and training need to be implemented properly, in quest for achieving overall social engineering of Orang Asli communities.
- If Orang Asli lands have to be acquired for national interests, fair and just compensation should be based on current market value and the potential of the property; and this is to be paid entirely to the Orang Asli.
- Valuation approaches to quantify market value of Orang Asli native lands need to be developed by the valuers in Malaysia. As far as this research is concerned, CVM is the most appropriate method to value the Orang Asli native lands. However, this method has yet to be established and popularly used in valuation community.
- Should such acquisition involve relocation of people and the destruction of livelihood resources, consultation with Orang Asli must take place beforehand. The relocation site must provide a strong economic base and better facilities.
- The factors of spiritual and cultural attachment to land by Orang Asli need to be considered in determining the market value of ancestral land via solatium, ex-gratia or special value clauses. In addition, this consideration is also inline with United Nation Declarations who recognized special attachment to land by the indigenous peoples. In considering of this matter, the Land Acquisition Act 1960 needs to be amended, as present First Schedule of the Act does not cover any special matter towards ownership of the land. To make it possible and implementable in due manner, additional section e.g. section 1A of First Schedule can be added in Land Acquisition Act 1960 specifically to deal with Orang Asli lands (if ownership issues have been resolved). If the present First Schedule is used, there will possibility be a double counting in valuation as market value is determined based on land and any improvement on the land, and no consideration is given for any additional value due to special attachment. This clause is applied

in valuing land of private ownerships. Therefore, Orang Asli lands require special clause that allows double counting by permission or requirement of law.

8.5 SIGNIFICANT CONTRIBUTIONS TO EXISTING KNOWLEDGE

The significant contributions of this research to the existing knowledge (literature) are explained in the following paragraphs:

This research has proved that the acquisition of Orang Asli native lands need for establishment of proper and guided compensation framework. Until today, there is no existing empirical study on acquisition and compensation of Orang Asli native lands in Malaysia. Based on that, this research can offer significant contribution to the government agencies in the aspect of further and uniform compensation framework for acquisition of Orang Asli native lands. This research would prove useful to the decision makers in acquisition of Orang Asli native lands in organizing process and negotiation of compensation to avoid conflicts and creates win-win situation for both Orang Asli and acquiring body. The compensation framework established from the research will help the government agencies to compensate an adequate or just compensation for acquisition of Orang Asli land and to minimize disparity of compensation package among states. Hence, this will further enhance the so-called sections 11 and 12 of Aboriginal Peoples Act, 1954 compensation structure.

This research is expected to be a communication link between academics and practitioners with regard to land acquisition of Orang Asli native lands. It is hoped that this newly developed framework of compensation will offer a valuable contribution to property development sector and provide answers in area of uncertainty in payment of compensation for acquisition of Orang Asli native lands.

8.6 LIMITATIONS OF STUDY

Besides the fact that the research has been carried out successfully, in the process of doing it the researcher had faced problems that were beyond his control. The researcher sincerely hopes that those problems are considered as guidelines and considerations in doing other researches in future. Among the main problems faced are - field researches; management, availability of data and quality of data.

8.6.1 Field Researches

This research adopted triangulation of methods of the research i.e. case study, quantitative questionnaires and, qualitative survey (Delphi Method). As a result, the field research became very challenging and incurred a financial burden to the researcher. The researcher is aware that, in order to present a rigorous study, the research must be expanded to more than five case studies, and involve a greater number of affected Orang Asli, and professional respondents in the survey, as well as more experts in Delphi Technique. Due to resource constraints (time and financial), this exercise only managed to research into five case studies located in - northern, central, southern and eastern parts of Peninsular Malaysia; returned and answered questionnaires by 370 affected Orang Asli, 158 professionals and; managed to structurally interviewed 11 experts. The most challenging and time consuming part in the field research exercise was in administering questionnaires on the affected Orang Asli because most of them are illiterate and filling and explaining the questionnaires' requirements was most difficult and taxing. Another problem faced by the researcher was to interview the experts due to their busy schedules and limited time allocated in each interview. Thus, the field researches alone took about one and half years to complete. However, based on the number of feedbacks and commitments received, it is more than sufficient to generalize the results and therefore, the results highlighted in this research is

trustworthy to represent the population. Nevertheless, as mentioned in paragraph 8.7, for the extension study of this research more land acquisition cases need to be investigated.

8.6.2 Management, Availability and Quality of Data

This study in relation to land acquisition of Orang Asli native lands is the first one in Malaysia either at undergraduate or postgraduate levels. Printed and published data related to this topic are difficult to get and not readily available. If available, the status of data is 'confidential' or only 'clues' of data at one organization. To get one aspect of full and credential data the researcher had to source from many organizations or agencies. However, published data in relation to anthropological, social, socio-economic, language, culture, tribes, and agriculture projects of Orang Asli are readily available and easily accessible. To overcome the data collection problems, most of the information and data were gathered through interviews, discussions with officers, developers and consultants; data tracking based on clues; personal notes / records kept by respondents, officers or other parties as well as newspaper clippings. More time spent in re-check, re-track, re-assessment and re-confirmation of data with various sources in order to ensure the credibility of data reported and used in this research.

Furthermore, the quality of data very much depends on information management system and methods used in seeking them. From observations, it is noted that information management system concerning property development and acquisition of Orang Asli native lands was ineffective. Most information are kept in general files, personal keeping by officers, and are located in various places and organizations. There is no central repository for this purpose.

8.7 SUGGESTIONS FOR FUTURE WORK

For a more comprehensive development of a compensation framework for land acquisition affecting Orang Asli native lands, a more extensive study need to be undertaken. Thus, suggestions for future work in this topic are:

- In depth evaluation of current practices of compensation packages for land acquisition affecting Orang Asli native lands. Indeed, this research was based on five (5) previous acquisition projects (case studies) in four (4) states, field surveys, and Delphi technique. In order to enhance the research findings, more thorough study need to be carried out in every state in Peninsular Malaysia. This will prove whether the problems of land acquisition and compensation are similar or unique based on states.
- Although the implementation aspect was highlighted in Delphi Technique and the result showed that, it is 'implementable', the details of the implementation aspects were not discussed. This lacuna needs to be studied in depth on the degree, suitability and problems of implementation in real practices.
- The spiritual element or special attachment of the aboriginals to land as mentioned in this research (Chapter 3 – 5), and been recognized in various United Nations' Declarations is a very important aspect to consider in compensation valuation. This research has not dealt with the issue of how the spiritual element can be valued, the approach to incorporate it or whether this is possible or practical. A separate research into this matter will be very much desirable and contribute to the search for a fair and equitable compensation in the process of acquiring Orang Asli lands, as well as to the development of the valuation profession.

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Minit Perjumpaan MMK Bil.1190 pada 4 April 1990.

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Case Study No. 2:

JHEOA-IBU PEJABAT: Projek Perbandaran di Bukit Lanjan, Damansara, Kuala Lumpur. Jld. 1

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Case Study No. 3

JHEOA-JA1.070: Maklumat dan Perkembangan Projek Empangan Linggui, Kota Tinggi, Johor

JHEOA – Kota Tinggi, Johor: Projek Empangan Sungai Linggui di Tanah Orang Asli Kampong Orang Asli – Semangar, Pasir Asam dan Sungai Sayong, Kota Tinggi

Dalam Mahkamah Tinggi Malaya Di Johor, Saman Pemula No: 24-8-28- 1994, Diantara Adong bin Kuwau dan 51 yang lain (Plaintif-Plaintif) dan Kerajaan Negeri Johor dan Pengarah Tanah dan Galian, Johor (Defendan-Defendan)

Dalam Mahkamah Rayuan, Rayuan Sivil No: J-01-65-1997 dan Dalam Perkara Award Pampasan Kepada 52 Orang Plaintif-Plaintif dan Dalam Perkara Akta Amanah 1949, Diantara Adong bin Kuwau dan 51 yang lain (Plaintif-Plaintif) dan Kerajaan Negeri Johor dan Pengarah Tanah dan Galian, Johor (Defendan-Defendan).

Minit Mesyuarat Kedua Ahli Panel 'Ad-Hoc' Bagi Membincangkan Laporan Kajian Penilaian Terperinci Kesan-Kesan Alam Sekitar (EIA) Projek Empangan Linggui, Pada 29 September 1990.

Minit Mesyuarat Kaedah Melaksanakan Pampasan kepada Masyarakat Orang Asli Berkaitan Dengan Pembinaan Empangan Sungai Linggui, Pada 26 Mei 2000.

JPPH-Johor, 29 September 1995, Tuntutan Pampasan Oleh Orang Asli Di Atas Tanah Linggui Dam, Negeri Johor Darul Takziam

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Case Study No. 4

JHEOA-SEL/WPKL: Projek Lebuhraya PLUS Hubungan Tengah KL-KLIA (Kampung Orang Asli Bukit Tampoi, Mukim Dengkil)

JPPH-Bangi: Nilai Tanaman Bagi Kawasan Perkampungan Orang Asli Kampung Bukit Tampoi, Mukim Dengkil, Daerah Sepang.

Dalam Mahkamah Tinggi Di Shah Alam, Guaman Sivil No: MTI-21-314-1996, Diantara Sagong bin Tasi & 6 Ors (Plaintif-Plaintif) dan Kerajaan Negeri Selangor & 3 Ors (Defendan-Defendan) - Judgment

Case Study No. 5

JHEOA-Raub: Projek Penyaluran Air Mentah dari Pahang ke Selangor (Kampung Orang Asli Sungai Temir, Raub).

JHEOA-CA1.053.Sj.01: Laporan Kedudukan Penempatan Semula Orang Asli Sungai Temir ke Sungai Bilut, Raub Kerana Projek Penyaluran Air Mentah Pahang ke Selangor.

JHEOA-Raub: Program Pembangunan Minda Masyarakat Orang Asli Kg. Sg. Temir, Daerah Raub.

LKPP Property Sdn Bhd: Cadangan Penempatan Semula Orang Asli di Sg. Temir, Lurah Bilut Daerah Raub, Pahang Darul Makmur

Minit Mesyuarat Jawatankuasa Teknikal Projek Penyaluran Air Mentah Dari Pahang ke Selangor Bil. 1/2002 Pada 15 April 2002.

Minit Mesyuarat Jawatankuasa Pemandu Projek Penyaluran Air Mentah Dari Pahang ke Selangor Bil. 1/2002 Pada 19 Julai 2002.

Minit Mesyuarat *Pre-Council* Jawatankuasa Teknikal Projek Penyaluran Air Mentah Dari Pahang ke Selangor Bil. 1/2006 Pada 20 Mac 2006.

Minit Mesyuarat Jawatankuasa Teknikal Projek Penyaluran Air Mentah Dari P Pahang ke Selangor Bil. 1/2006 Pada 13 April 2006.

Minit Mesyuarat Projek Penyaluran Air Mentah Dari Pahang ke Selangor (Penempatan Semula Orang Asli Sg. Temir Ke Sg. Bilut) Pada 30 Jun 2006.

Minit Mesyuarat Jawatankuasa Teknikal Projek Penyaluran Air Mentah Dari Pahang ke Selangor Bil. 1/2007 Pada 5 Mac 2007.

General:

JKPTG: Undang-Undang Tanah Negara: Kertas Dasar Pemilikan Tanah Orang Asli.

JHEOA: Kertas Cadangan Dasar dan Kaedah Pemilikan Tanah Orang Asli.

JHEOA-SEL/WPKL: Projek Tebatan Banjir dan Canal City di Kampong Orang Asli Tanjong Rabok dan Bukit Kemandol, Mukim Tanjong 12, Kuala Langat, Selangor.

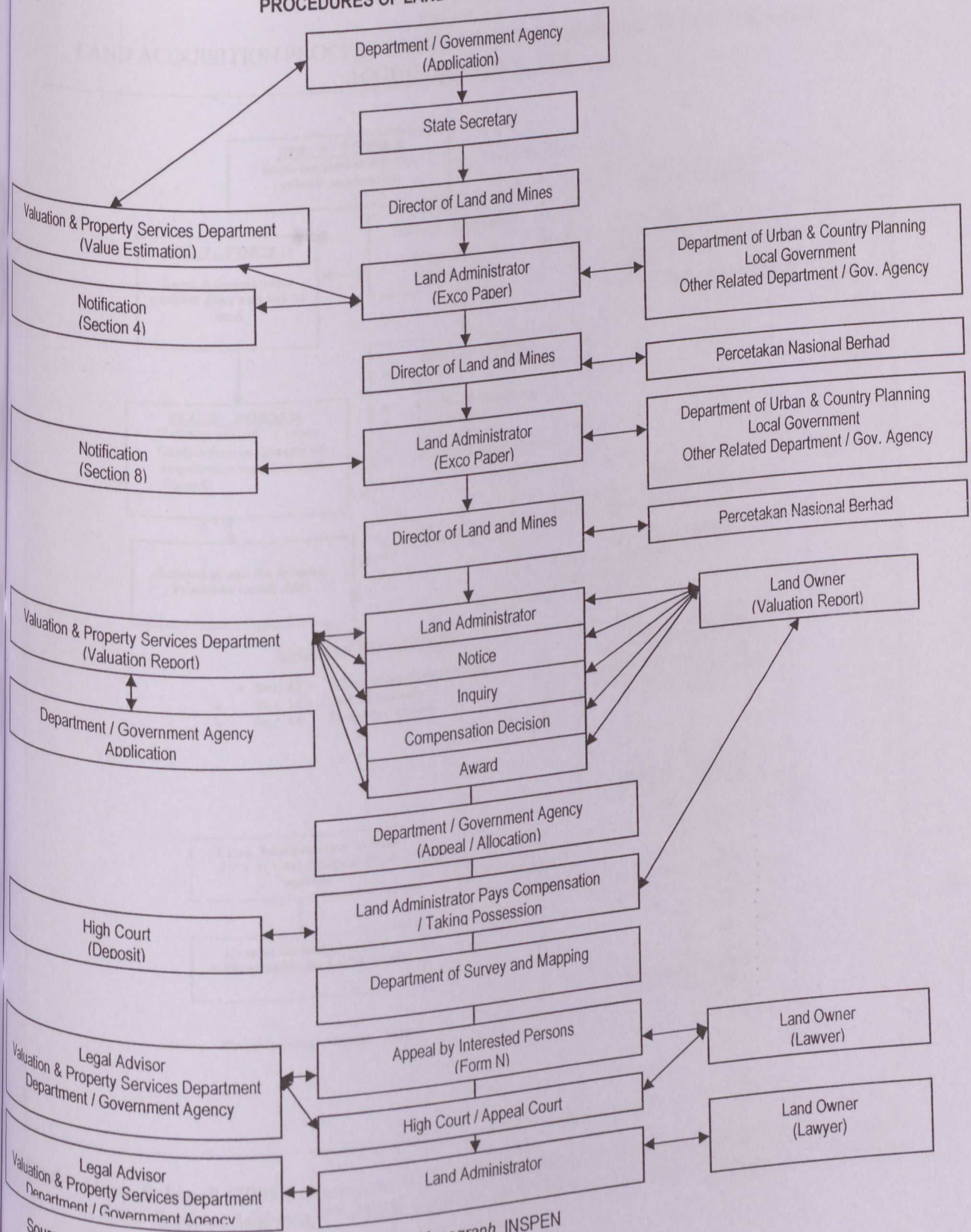
JHEOA-SEL/WPKL: Projek Penswastan di Kampong Orang Asli Air Kuning, Bukit Cherakah, Daerah Petaling, Seksyen U11, Shah Alam.

JHEOA-SEL/WPKL: Projek Pensawastan Skim Bekalan Air Sungai Selangor Fasa 3 (SSF 3).

Tetuan Anggun Sdn Bhd: Cadangan Pembangunan Bercampur Di atas Sebahagian Tanah Hutan Simpan Kekal Bukit Air Hitam, Mukim dan Daerah Petaling yang Melibatkan Kampong Orang Asli Sungai Rasau.

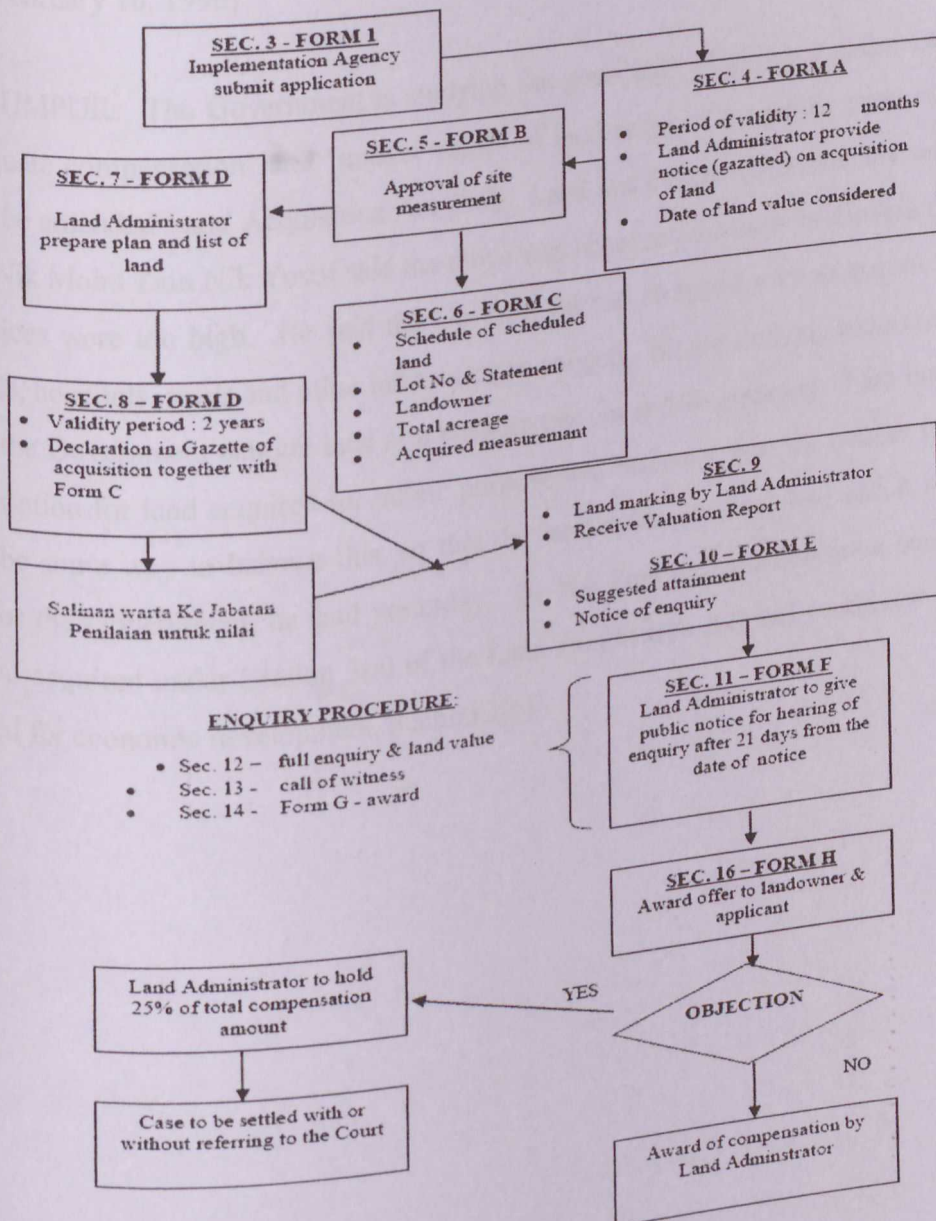
Tetuan Anggun Sdn Bhd: Cadangan Pembangunan Bercampur Secara Penswastan Di atas Sebahagian Tanah Hutan Simpan Kekal Bukit Air Hitam, Blok B, Seluas 80 Ekar, Mukim dan Daerah Petaling yang Melibatkan Kampong Orang Asli Sungai Rasau Hilir.

Chart 1
PROCEDURES OF LAND ACQUISITION IN MALAYSIA



Source: Modified from Mahadi (1999), *Land Acquisition Monograph*, INSPEN

CHART 2
LAND ACQUISITION PROCESS BASED ON THE REQUIREMENTS OF THE LAND
ACQUISITION ACT, 1960



Source : Writer's interpretation, 2005

Source: Omar & Ismail (2005), *Discrepancies in Defining Adequate Compensation in Land Acquisition: A Case Study in Malacca*, 1st REER Conference, UTM City Campus, K.Lumpur, 6-7 September 2005.

[The Star - February 10, 1996]

KUALA LUMPUR: The Government is studying the possibility of giving a definition to the terms "adequate compensation" and "market value" of land acquired for public purposes under the soon-to-be amended Land Acquisition Act 1960. Land and Co-operative Ministry secretary-general Dr Nik Mohd Zain Nik Yusof said the move was necessary because the Government felt that land prices were too high. He said the Government had to spend a lot to acquire land to build schools, hospitals, roads and other infrastructure projects. We are studying ways and means to see how the Government can get land at a cheaper rate for public purposes. I am not saying that compensation for land acquired for public purpose will be lower than the market value but there must be some way to balance this, so that the landowner does not lose and it is not so expensive for the Government, he said yesterday. Dr Nik Zain said the definition would only apply to land acquired under Section 3(a) of the Land Acquisition Act and would not apply to land acquired for economic development, Section 3(b)'.

[NST - May 23, 1996]

'The Government has, with immediate effect, ordered all State Governments to stop acquiring land for economic purposes under the Land Acquisition Act, following complaints that there have been some cases of abuse. Parliamentary Secretary to the Land and Co-operative Development Ministry Datuk Fauzi Abdul Rahman said there would be no more acquisition of land for the purpose of commercial development until the was amended. Acquisition for the purpose of public infrastructure, such as the building of schools, hospitals, clinics, roads, telecommunication facilities and community halls will, however, still be allowed. The instruction, he added, was relayed to all State Governments a few days ago by Deputy Prime Minister Datuk Seri Anwar Ibrahim. State Governments have been asked to stop acquiring land to build for instance, more golf courses, commercial estates and condominiums, he told reporters after winding up his debate on the Seventh Malaysia Plan at Dewan Rakyat today. This is until the Government can clearly define the difference between public and commercial purposes in the Act'.

[The Star - June 6, 1996]

'.....those who bought their land for higher price after the land had been developed with infrastructure by the Government would be adequately compensated if their land was acquired for public purposes. The landowner will have to prove that he bought the land at that value and will not be deprived of adequate compensation - meaning the minimum given to him should be the cost price plus the interest accrued over the years'.

OTHER ISSUES AND CHALLENGES CONFRONTING ORANG ASLI**1. Healthcare**

The median for the infant mortality rate during the period 1998-2004 was about 10.4 infant deaths per thousand live births for the Orang Asli, as compared to 6.2 for the general population of Malaysia. This showed that the Orang Asli in Peninsular Malaysia recorded a lower health status than the general population. The relatively high level of infant mortality for the Orang Asli contributed significantly to their high general level of mortality, as indicated by the life expectancy at birth. Life expectancy at birth for the Orang Asli is estimated to be 52 years for females and 54 years for males as compared to 72 and 68 years for females and males respectively for the general population. Orang Asli females experienced lower life expectancy at birth probably due to their higher maternal death rates resulting from childbirth or poor maternal health (Ng, et al 1987).

Based on JHEOA statistics in 2004, the Orang Asli are also relatively high in infected cases of leprosy (Hansen Disease) and tuberculosis (TB). The median for these diseases during the period of 1998-2004 were about 10.28 and 124.36 persons infected per hundred thousand of Orang Asli, as compared to only 0.90 and 63.60 persons infected per hundred thousand for general population of Malaysia respectively. In the case of malaria disease, the total cases from 1996 to 2004 were 20,715 cases for Orang Asli, from the total of 33,332 cases in Malaysia. This showed that 62.14% of the cases involving the Orang Asli. According to Lin (1994) and Baer (1999), the Orang Asli health and nutrition are at about the same level as in 1960s.

2. Education

Education was a main mechanism in the JHEOA campaign to assimilate Orang Asli and to improve their standard of living by giving them new occupational opportunities (JHEOA, 2004; Edo, 1991; Salleh, 1990). The key objective of the initial program was to supplement, not

replace, the national educational system, to compensate for the Orang Asli's isolation from government schools and their lack of familiarity with formal education (Salleh, 1990).

Prior to 1995, the JHEOA ran a three-tier educational program aimed at preparing Orang Asli children to enter the national education system (Salleh, 1990; Idris et al. 1983; Iskandar, 1976). It was implemented at about 80 schools in remote areas. During the first three years, children went to village schools taught by JHEOA field staff, some Malays and some Orang Asli. None were trained teachers, and most had a low level of education themselves. Students who continued after three years went to central primary schools in larger Orang Asli communities where they could continue until standard six. Teachers there were Malays, provided by the Ministry of Education. Students who completed their standard six could go to normal government secondary schools in nearby rural or urban areas (Salleh, 1990 in Endicott & Dentan, 2004). Until 2006, JHEOA maintained 14 hostels in the urban areas to accommodate these children.

The initial JHEOA's educational program was admitted by all parties to have failed to achieve its objectives (Edo 1991; Salleh, 1990; Idris et al. 1983; Iskandar 1976; Jamaludin 1997). According to JHEOA statistics (in Idris et al., 1983), the dropout rate in the 1980s was extremely high, especially in the lower grades. On average 25% of the children who started primary school, mostly in JHEOA schools, dropped out after only one year, and about 70% of all students dropped out by the end of standard five (Salleh, 1990). According to a study in October 1994, about 65% of Orang Asli children (47,141 out of 70,845) between the ages of five and eighteen were not attending school at all (de Paul 1995). The few Orang Asli who made it to the tertiary level of education had most or all of their schooling in ordinary government schools.

Apparently, in 1995 realising the ineffectiveness of its efforts, the JHEOA returned the responsibility for Orang Asli education to the Ministry of Education. The Ministry allocated RM45.5 million for building the schools, but from the very beginning an official of the ministry expected problems because many qualified teachers are reluctant to teach in Orang Asli schools due to the lack of facilities and because the environment is not conducive to learning (de Paul 1995). A recent trend showed that the dropout rate among Orang Asli is still extremely high during the period of 1994-1999 whereby the median of dropouts was about 39.13 % for the

primary school. However, it's showed tremendously decreased during the period of 2000-2004 whereby the median of dropouts was only 4.44 % (JHEOA, 2004).

JHEOA educational programs for Orang Asli failed for many reasons. JHEOA officials tend to blame the Orang Asli. According to Idris (1986), a former Director-General of JHEOA,

'Firstly, it must be realised that there is no formal education in Orang Asli society. None of the Orang Asli tribes have their own alphabet or writing. Moreover, the introduction of a formal education process was met with general apathy. Orang Asli children go to school because there is a hot-meal programme. They will stay away from school if they are scolded by their teachers. Then there is the problem of parents taking their children away for weeks, to look for wild fruits during the season' – The Malay Mail, 1986.

The Director-General blamed the high dropout rate on Orang Asli lack of self-discipline and the lack of parental pressure to study (Jamaludin, 1997). The improved rate for year 2000 onwards was due to consistent and tireless motivational programs by JHEOA and self-awareness within younger generation of Orang Asli.

These problems arises were due to clash between some features of Orang Asli cultures, like their strong objection toward 'corporal punishment' in school, Malaysian formal education requirements as well as problems derived from the educational program itself (Endicott & Dentan, 2004; Salleh, 1990). One major difficulty was that all primary education was in Malay, a language many Orang Asli children do not know when they begin school. Another problem was the curriculum, it centered on the needs and experiences of urban children from other ethnic groups, that was irrelevant and often incomprehensible to Orang Asli children (Endicott & Dentan, 2004; Salleh, 1990; Jimin et al. 1983).

In regular government schools Orang Asli students face another set of special problems. Although the teachers are generally better and possibly more sympathetic, they do not know much about Orang Asli way of life. Moreover, students from other ethnic groups often harass Orang Asli students and treat them cruelly (Tan 1992; Lim, 1984). The cost of sending children to secondary school are also a burden for many Orang Asli families; since 1999 the JHEOA apparently stopped subsidizing Orang Asli children, leaving them of sole responsibility for paying school fees and incidental expenses (Baer 1999). Orang Asli students at secondary

schools and some in primary schools have to live in hostels far from their families.. Parents often resist sending their children to school if it requires them to leave home.

Now that the Education Ministry has taken over the responsibility of looking into the schooling needs of Orang Asli communities from the JHEOA with the hoped that the quality of education and the facilities provided will improve. To improve Orang Asli education significantly, the Ministry of Education will have to develop an educational programme moulded to the special needs of Orang Asli, by hiring qualified teachers who were trained to respect Orang Asli and their cultures (Endicott & Dentan, 2004). In addition, Salleh (1990) suggests for a curriculum which builds on the people's own traditions and experiences and improves the skills they need in everyday life.

3. Poverty

The JHEOA has spent RM 240,573,513.40 of the allocation under 8th Malaysia Plan for upgrading the infrastructures and socio-economic of Orang Asli community. However, there is still 50% of the Orang Asli live below the poverty line compared with 7% nationally, and that 25% are among the hardcore poor as compared to 2.5% nationally (JHEOA, 2006). One effort to eradicate poverty is through housing provision. Thus, under 9th Malaysia Plan JHEOA had asked the Federal Government to allocate a sum of RM 137.080 million to construct 11,412 unit of houses for Orang Asli in Peninsular Malaysia. However, as mentioned by the Vice-Chairman of POASM Selangor Branch, Encik Yusof Alip a decade ago, only 10 to 15 houses are allocated annually, per district, under the 7th Malaysia Plan. This means that, *'less than 5% of the Orang Asli populations receive houses each year'* (The Star, 17th October, 1996). This trend had not significantly increase in the 8th Malaysia Plan.

Nevertheless, the suitability of the houses was questionable. For example, Orang Asli from Kampung Bukit Kecil, Kuala Kubu Bharu was given a two-room house measuring 4.8 x 5.4m as part of a poverty eradication programme (The Star, 17th October 1996). The house is not only small but has heat-trapping zinc roofs and concrete walls. The marginalisation of the Orang Asli is further evident in the lack of provision of basic amenities such as electricity and piped water

and basic infrastructure such as tarred roads. Based on JHEOA statistics in 2004 only 63% of Orang Asli kampongs / regroupment schemes have electricity and 70% have clean water supply compared with 90% of the total population nationally.

In line with Malaysia's projected poverty reduction programme of 1% by the year 2020, about RM 40 million has been allocated to JHEOA throughout 9th Malaysia Plan (2006 – 2010) to upgrade the socio-economic including to implement healthcare programmes of Orang Asli communities. This shows that the government is concerned about the welfare of Orang Asli. However, to go to the root cause of the problems, a more integrated approach that considers Orang Asli world-views, lifestyles, cultural and spiritual traditions are needed. More importantly, given the fact that the Orang Asli are trapped in a cycle of poverty due to their dispossession from their native customary land, there is an urgent need to recognise and protect their rights to land.

**THE ABORIGINAL PEOPLES ACT, 1954
(ACT 134)**

(AS AT 15TH DECEMBER 2005)

ARRANGEMENT OF SECTIONS

Section

1. Short title and application
 2. Interpretation
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 5. Appointment of Commissioner and Deputy Commissioners
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 8. Rights of occupancy
 9. Dealings in land by aborigines
 10. Aboriginal communities not obliged to leave areas declared Malay Reservations, etc.
 11. Compensation on alienation of State land upon which fruit or rubber trees are growing
 12. Compensation
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 14. Exclusion of persons from aboriginal areas and aboriginal reserves
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- SCHEDULE

THE ABORIGINAL PEOPLES ACT, 1954²³

(ACT 134)

An Act to provide for the protection, well-being and advancement of the aboriginal peoples of West Malaysia.

[25th February, 1954]

1. Short title and application.

- (1) This Act may be cited as the Aboriginal People Act, 1954.
- (2) This Act shall apply only in West Malaysia.

2. Interpretation

In this Act unless the context otherwise requires –

- “aboriginal area” means an aboriginal area declared to be such under this Act;
- “aboriginal community” means the members of one aboriginal ethnic group living together in one place;
- “aboriginal ethnic group” means a distinct tribal division of aborigines as characterised by culture, language or social organization and includes any group which the State Authority may, by order, declare to be an aboriginal ethnic group;
- “aboriginal inhabited place” means any place inhabited by an aboriginal community but which has not been declared to be an aboriginal area or aboriginal reserve;
- “aboriginal language” includes any language and such dialectal modifications or archaic forms of the language as any aborigines habitually use;
- “aboriginal racial group” means one of the three main aboriginal groups in West Malaysia divided racially into Negrito, Senoi and Proto-Malay;
- “aboriginal reserve” means an aboriginal reserve declared to such under this Act;
- “aboriginal way of life” includes living in settled communities in kampongs either inland or along the coast;
- “alienated” in relation to land has the meaning assigned to it in the written law relating to land in force in West Malaysia;
- “Commissioner” means the Commissioner for Aboriginal Affairs appointed under section 5;
- “Deputy Commissioner” means a Deputy Commissioner for Aboriginal Affairs appointed under section 5.

3. Definition of aborigine

- (1) In this Act an aborigine is-

²³ Enacted in 1954 as Ordinance No. 3 of 1954. Revised and published in 1974 as Laws of Malaysia Act 134. The revised Act came into force on 1.7.1974.

- (a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;
- (b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or
- (c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remain a member of an aboriginal community.

(2) Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be aborigine by reason only of practising that religion.

(3) Any question whether any person is or is not an aboriginal shall be decided by the Minister.

4. **Administration of aborigine**

The Commissioner shall be responsible for the general administration, welfare and advancement of aborigines;

Provided that nothing in this section shall be deemed to preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community or any aboriginal ethnic group.

5. **Appointment of Commissioner and Deputy Commissioners**

(1) The Yang di-Pertuan Agong may appoint a Commissioner for Aboriginal Affairs, and as many Deputy Commissioners for Aboriginal Affairs and other officers as may consider necessary for the purposes of this Act.

(2) It shall be lawful for the Commissioner to do all acts reasonably necessary and incidental to or connected with the performance of his functions under this Act including the conducting of research into any aspects of aboriginal life.

(3) All the powers of the Commissioner under this Act shall be exercisable by the Deputy Commissioners.

(4) Every person appointed under this section shall be deemed to be public servant within the meaning of the Penal Code.

6. **Aboriginal areas**

(1) The State Authority may, by notification in the *Gazette*, declare any area predominantly or exclusively inhabited by aborigines, which has not been declared an aboriginal reserve under section 7, to be an aboriginal area and may declare the area to be divided into one or more aboriginal cantons;

Provided that where there is more than one aboriginal ethnic group there shall be as many cantons as there are aboriginal ethnic groups.

(2) Within an aboriginal area-

- (i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;
- (ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;
- (iii) no land shall be alienated, granted, leased or otherwise disposed of to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Commissioner; and
- (iv) no licences for the collection of forest produce under any written law relating to forests shall be issued to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Commissioner and in granting any such licence it may be ordered that a specified proportion of aboriginal labour be employed.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal area made under subsection (1).

7. **Aboriginal reserves**

(1) The State Authority may, by notification in the *Gazette*, declare any area exclusively inhabited by aborigines to be an aboriginal reserve:

Provided-

- (i) when it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and
- (ii) an aboriginal reserve may be constituted within an aboriginal area.

(2) Within an aboriginal reserve-

- (i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;
- (ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;

- (iii) no land shall be declared a reserved forest under any written law relating to forests;
- (iv) no land shall be alienated, granted, leased or otherwise disposed of except to aborigines of the aboriginal communities normally resident within the reserve; and
- (v) no temporary occupation of any land shall be permitted under any written law relating to land.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal reserve made under subsection (1).

8. **Rights of occupancy**

(1) The State Authority may grant rights of occupancy of any land not being alienated land or land leased for any purpose within any aboriginal area or aboriginal reserve.

(2) Rights of occupancy may be granted-

(a) to-

- (i) any individual aborigine;
- (ii) members of any family of aborigines; or
- (iii) members of any aboriginal community;

(b) free of rent or subject to such rents as may be imposed in the grant; and

(c) subject to such conditions as may be imposed by the grant,

and shall be deemed not to confer on any person any better title than that of a tenant at will.

(3) Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigine.

9. **Dealings in land by aborigines**

No aborigines shall transfer, lease, sell, convey, assign, mortgage or otherwise dispose of any except with the consent of the Commissioner and any such transaction effected without the Commissioner's consent shall be void and of no effect.

10. **Aboriginal communities not obliged to leave areas declared Malay Reservations, etc.**

(1) An aboriginal community resident in any area declared to be a Malay Reservation, a reserved forest or a game reserve under any written law may, notwithstanding anything to the contrary contained in that written law, continue to reside therein upon such conditions as the State Authority may by rules prescribe.

(2) Any rules made under this section may expressly provide that all or any of the provisions of such written law shall not have effect in respect of such aboriginal community or that any such provisions of that written law shall be modified in their application to such aboriginal community in such manner as shall be specified.

(3) The State Authority may by order require any aboriginal community to leave and remain out of any such area and may in the order make such consequential provisions, including the payment of compensation, as may be necessary.

(4) Any compensation payable under subsection (3) may be paid in accordance with section 12.

11. Compensation on alienation of State land upon which fruit or rubber trees are growing

(1) Where an aboriginal community establishes a claim to fruit or rubber trees on any State land which is alienated, granted, leased for any purpose, occupied temporarily under licence or otherwise disposed of, then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just.

(2) Any compensation payable under subsection (1) may be paid in accordance with section 12.

12. Compensation

If any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation thereof and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Commissioner to be held by him as a common fund for such persons or for such aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister.

13. Compulsory acquisition of land for aboriginal areas or reserves

When any immovable property, not being State land, is needed to be acquired in order to declare the same to be an aboriginal area or an aboriginal reserve, the property may be acquired in accordance with the written law relating to the acquisition of land and any declaration required by that law that the property is so needed shall have effects as if it were a declaration that the property is needed for a public purpose in accordance with that written law.

14. Exclusion of persons from aboriginal areas and aboriginal reserves

- (1) The Minister may, if he is satisfied that having regard to the proper administration of the welfare of the aborigines in any aboriginal area or aboriginal reserve or aboriginal inhabited place it is desirable that any person or class of person should be prohibited from entering or remaining in the area, reserve or place, make an order to that effect in the form prescribed in the Schedule.
- (2)
 - (a) The order when addressed to an individual person, may be served on the person named therein by a police officer or by any person whom the Minister may direct to serve the same.
 - (b) The order shall if practicable be served personally on the person named therein by showing him the original order and by tendering or delivering to him a copy thereof signed by the Minister.
 - (c) If service cannot conveniently be effected as aforesaid the serving officer shall affix a copy of the order to some conspicuous part of the house or other place where the person named in the order ordinarily resides and thereupon the order shall be deemed to have been duly served.
 - (d) A certificate signed by the Minister that an order has been duly served on the person named therein shall be admissible in evidence in any judicial proceeding and on the production of such a certificate the court shall presume until the contrary is proved that the order was duly served.
- (3) The order, when addressed to a class of persons, shall be published in the *Gazzete*.
- (4) Any person on whom an order has been served in accordance with this section who is found within any aboriginal area, aboriginal reserve or aboriginal inhabited place mentioned in the order and any person who is a member of any class of persons which has been prohibited from entering or remaining in any aboriginal area, aboriginal reserve or aboriginal inhabited place who is found within the area, reserve or place shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit.
- (5) Any person found committing an offence under subsection (4) may be arrested without warrant by the Commissioner or any police officer.

15. Removal of undesirable persons.

- (1) The Commissioner and any police officer may detain any person found in any aboriginal area, aboriginal reserve or aboriginal inhabited place whose activities he has reason to believe are detrimental to the welfare of any aborigine or any aboriginal community and shall remove any such person from the area, reserve or place within seven days from the date of detaining him.

(2) The Commissioner or any police officer who detains or removes any person in accordance with subsection (1) shall as soon as possible report all the circumstances in writing to the Minister.

16. Headman

(1) The hereditary headman of an aboriginal community shall be the headman thereof or, in the case of an aboriginal community in which the office of the headman is not hereditary, a person selected to be headman by the members of the community shall be the headman thereof, subject in each case to confirmation by the Minister.

(2) The Minister may remove any headman from his office.

17. Aboriginal not to be excluded from any school.

(1) No aboriginal child shall be precluded from attending any school by reason only of his being an aborigine.

(2) No aboriginal child attending any school shall be obliged to attend any religious instruction unless the prior consent of his father or of his mother if his father is dead, or of his guardian should both parents be dead, is notified to the Commissioner in, and is transmitted by the Commissioner in writing to the headmaster of the school concerned.

(3) Any person who acts in contravention of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred ringgit.

18. Aboriginal children not to be adopted, etc.

(1) No person who is not himself an aborigine of the same ethnic group shall adopt or assume the care, custody or control of any aboriginal child except with the consent of the Commissioner and in giving the consent the Commissioner may impose such conditions as he thinks fit.

(2) Any person who acts in contravention of this section or commits a breach of any condition imposed by the Commissioner shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

19. Regulations.

(1) The Minister may make regulations for carrying into effect the purposes of this Act and in particular for the following purposes:

- (a) the creation, nature and regulation of aboriginal settlements within aboriginal areas and aboriginal reserves;
- (b) prohibiting either absolutely or conditionally and controlling the entry into aboriginal reserves, aboriginal areas, aboriginal inhabited places and aboriginal settlements of any person or any class of persons;
- (c) providing for the appointment of, and prescribing the qualifications of and the method of appointing, any headman;
- (d) providing for the registration of aborigines;
- (e) the manner of evidencing and recording rights of occupancy granted to aborigines under this Act;
- (f) prohibiting the planting of any specified product on lands over which rights of occupancy have been granted;
- (g) permitting and regulating the felling of jungle within aboriginal areas and aboriginal reserves;
- (h) permitting aborigines to take forest produce in aboriginal areas;
- (i) regulating the taking of wild birds and animals by aborigines;
- (j) providing for the establishment of schools in aboriginal areas, aboriginal reserves or aboriginal inhabited places and prescribing the curricula of the schools and the qualifications of teachers in the schools;
- (k) prescribing the terms and conditions upon which aborigines may be employed, and the regulations may provide for the recovery by the Commissioner on behalf of the aborigine of any wages or salary due to the aborigine in accordance with the regulations;
- (l) prohibiting either absolutely or conditionally the entry into or the circulation within any aboriginal area, aboriginal reserve, aboriginal inhabited places of any written or printed matter, any cinematography film and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas and every copy and reproduction or substantial reproduction thereof;
- (m) prohibiting either absolutely or conditionally the sale or gift of any intoxicating liquor as defined in any written law relating to excise to any specified aborigine or aboriginal community or within any aboriginal area, aboriginal reserve, aboriginal inhabited place; and
- (n) prescribing the terminology by which aborigines, aboriginal communities and aboriginal ethnic group shall be referred to.
- (o) *(omitted)*.

(2) No regulations shall be made for the purposes of subsection (1) (a), (e), (f), (g), (h), or (i) unless the Government of the State in which the regulations shall have effect has first been consulted.

SCHEDULE

ABORIGINAL PEOPLES ACT, 1954

(Section 14(1))

To,
.....
.....

Whereas the Minister is satisfied that having regard to the proper *administration/welfare/ well-being of the aboriginal peoples in *aboriginal area/ aboriginal reserve/ aboriginal inhabited place you should be prohibited from *entering/remaining therein;

Now therefore in exercise of the powers conferred upon me by section 14(1) of the Act, I Minister charged with responsibility for the welfare of aborigines, hereby order that you as from the date of this order are hereby prohibited from *entering/remaining in the *area/reserve/place aforesaid.

Date this day of, 19

.....
Minister



UNIVERSITI MALAYA

LETTER OF PERMISSION

RESEARCH TOPIC – DEVELOPING A COMPENSATION FRAMEWORK FOR LAND ACQUISITION
AFFECTING ORANG ASLI NATIVE LANDS

Researcher: Anuar Alias – University Malaya

I, _____ holding a post of _____
_____ of (name of organization)

hereby declared as follows:

- a. I agree to be interviewed by the researcher due to my knowledge and experiences in relation to the research topic.
- b. I hereby agree that my opinions and views in the interview shall be included and written in any manner by the researcher in the research report as long as the meanings of my opinions and views are retained.
- c. My opinions and views in the interview solely based on my own, and not representing my organization where I worked for. Thus, my organization is not responsible for any problems that arise due to the opinions and views expressed in the interview session.
- d. In relation to clause (b) of this permission letter, the researcher needs to show a final write-up of my opinions and views in his research report and my confirmation must be endorsed in a duly manner.
- e. I wish to be known in the research report by real name and post/ real name only/ post only/ referred name (e.g. Officer A) and post / referred name only *.

* circle whichever appropriate.

Therefore, I hereby give my permission to the above.

Signature: _____

Date : _____



UNIVERSITI MALAYA

LETTER OF ENDORSEMENT

RESEARCH TOPIC – DEVELOPING A COMPENSATION FRAMEWORK FOR LAND ACQUISITION
AFFECTING ORANG ASLI NATIVE LANDS

Researcher: Anuar Alias – University Malaysia

I, _____ holding a post of
_____ of (name of organization)

hereby declared that,

I have read the relevant clauses and phrases that had been written in the research report of the above topic. I understood that the clauses and phrases were written based on my opinions and views during the previous interview with me. I found that it had been written in proper manner whereby the meanings of my opinions and views were retained to my satisfaction.

Therefore, I hereby give my endorsement to the above.

Signature: _____

Date: _____



UNIVERSITI MALAYA

**KAJIAN TERHADAP ORANG ASLI YANG TERLIBAT DENGAN PENGAMBILAN TANAH REZAB
ORANG ASLI UNTUK PROJEK PEMBANGUNAN**
(*Research on Aborigines that affected by the Acquisition of Orang Asli Reserve for Development Projects*)

A. LATARBELAKANG RESPONDEN
(*Respondent Background*)

1. Nama Projek Pengambilan (*Name of Project*): _____
2. Nama (pilihan) (*Name, optional*): _____ 3. Kaum (*Tribe*): _____
4. Umur, tahun (*Age, year*): ☐ < 21 ☐ 21-40 ☐ 41-60 ☐ > 60
5. Tahap Pendidikan: ☐ Tiada Pendidikan ☐ Rendah ☐ Menengah ☐ Kolej
(*Education level*) (*No education*) (*Primary*) (*Secondary*) (*College*)
6. Bil. Ahli Keluarga : ☐ < 5 Orang ☐ 6 – 10 Orang ☐ > 10 Orang
(*Number of family members*) (*< 5 persons*) (*6 – 10 persons*) (*> 10 persons*)

B. PERSEPSI TERHADAP PENGAMBILAN TANAH REZAB ORANG ASLI
(*Perceptions on acquisition of Orang Asli Reserve*)

1. Apa pandangan anda terhadap pengambilan balik tanah yang dilakukan oleh kerajaan terhadap Rezab/Kawasan Orang Asli? (*What is your opinion on acquisition of Orang Asli reserve/area carried out by the government*)

Menyokong
(*Support*)

☐

Tiada Pandangan
(*No Opinont*)

☐

Tidak Menyokong
(*Do Not Support*)

☐

(Jika anda 'menyokong' atau 'tiada pandangan', teruskan ke soalan 3) (*if you 'support' or 'no opinion', continue to question 3*)

2. Kenapa anda tidak menyokong? (*Why do you not support*)

- a. Pencerobohan terhadap hak, warisan dan kepentingan Orang Asli (*Encroachment on rights, heritages and interests of Orang Asli*)

Tidak Setuju
(*Not Agree*)

☐

Tak Pasti
(*Not Sure*)

☐

Setuju
(*Agree*)

☐

b.	Tidak diberikan tempoh notis yang mencukupi Untuk berpindah (<i>Notice for evacuating is too short</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c.	Pampasan yang tidak mencukupi (<i>Inadequate compensation</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d.	Lokasi penempatan baru tidak sesuai (<i>Location of resettlement project not suitable</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e.	Hilang pekerjaan tradisi dan kemahiran (<i>Loss of traditional jobs and skills</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f.	Tidak mempunyai tempat untuk mengamalkan kehidupan secara tradisi (<i>No place to practise traditional lifestyle</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g.	Kehidupan Orang Asli semakin sukar (<i>Life becomes more difficult</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h.	Masalah interaksi dengan masyarakat sekeliling (<i>Integration problems with neighbourhood community</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i.	Kejutan budaya (Orang Asli semakin terpinggir) (<i>Cultural shocks, isolation of Orang Asli</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j.	Janji untuk menjaga kepentingan Orang Asli tidak ditepati (<i>Promises to protect Orang Asli's interest not fulfilled</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
k.	Budaya, kepercayaan dan warisan Orang Asli terjejas (<i>Culture, beliefs and heritages of Orang Asli are affected</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
l.	Kerajaan patut mencari alternatif lain dan mengekalkan tanah rezab Orang Asli (<i>Government should find alternative site and preserve Orang Asli land</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m.	Lain-lain, nyatakan (<i>Others, please specify</i>) _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

3. Apa kebaikan pengambilan ini kepada anda dan keluarga (*What are the advantages of land acquisition to you and your family?*)

	Tidak Setuju (Not Agree)	Tak Pasti (Not Sure)	Setuju (Agree)
a. Taraf ekonomi keluarga lebih baik (<i>Better economic standing</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Kehidupan yang lebih selesa (<i>Life is more comfortable</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Peluang untuk memiliki tanah sendiri (<i>Opportunity to own land</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Masa depan keluarga lebih terjamin (<i>The family future is more secure</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Kerajaan lebih mudah untuk membantu Orang Asli (<i>Easy for the Government to help Orang Asli</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Wang pampasan boleh dilaburkan (<i>Compensation money can be invested</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Mempunyai pekerjaan berpendapatan tetap (<i>permanent job</i>)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Lain-lain, nyatakan (<i>Others, please specify</i>) _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

C. PERSEPSI TERHADAP PAMPASAN YANG DIBERIKAN
(Perceptions on payment of compensation)

4. Beri pandangan anda terhadap pampasan yang diberikan oleh kerajaan (Give your opinion on compensation given by the government)

	Tidak Cukup (Inadequate)	Munasabah (Reasonable)	Sangat Cukup (Exceedingly adequate)
a. Pokok (buahan, getah, kelapa sawit, petai, sagu dsb) (trees – fruits, rubber, oil palm, petai, sagu etc)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Bangunan (rumah, bangsal, pondok, dsb) (Buildings – house, shed, hut etc)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Lain-lain, nyatakan (Others, please specify) _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

5. Sekiranya pampasan yang anda terima kurang atau tidak mencukupi, mengapa ianya kurang? (If the compensation you received is inadequate, why do you think it is inadequate?)

	Tidak Setuju (Not Agree)	Tak Pasti (Not sure)	Setuju (Agree)
a. Rundingan dibuat oleh JHEOA bagi pihak kami (Negotiations are done by JHEOA on our behalf)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. JHEOA tidak bersungguh menjaga kepentingan kami (JHEOA is not serious in taking care of our interests)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Pampasan terhadap tanah warisan Orang Asli tidak diberikan (Compensation for ancestral land is not given)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Hubungan erat Orang Asli dengan tanah secara spiritual dan adat tidak diambil kira dalam pakej pampasan (Spiritual and cultural attachment of Orang Asli to their lands are not considered in compensation)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Nilai per pokok bagi tanaman adalah rendah (Value of crops per tree is relatively low)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Kaedah menentukan pampasan tidak jelas (Methods in determining a compensation are not clear)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Tidak mengambilkira kesusahan akibat pengambilan (No consideration given for difficulties due to the acquisition)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Tiada garispanduan apa yang boleh/sepatutnya dituntut (No guidelines on what should/should not be claimed)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Kaedah pemberian pampasan ikut budibicara kerajaan (Methods of Compensation are based on the discretion of the government)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j. Lain-lain, nyatakan (Others, please specify) _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

6. Pada pandangan anda, apakah jenis pampasan yang patut diberikan oleh kerajaan terhadap pengambilan balik tanah Rezab Orang Asli (*In your opinion, what are the types of compensation that should be awarded by the government in acquiring of Orang Asli Reserve*)

Tidak Perlu
(Not required)

Tak Pasti
(Not sure)

Sangat Perlu
(Most required)

I. Pampasan Kewangan (*Monetary Compensation*)

- | | | | |
|---|--------------------------|--------------------------|--------------------------|
| a. Nilai Pokok dan Bangunan (Sek 11 and 12, Akta Orang Asli, 1954) (<i>Value of trees and buildings</i>) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| b. Nilai Pasaran Tanah Rezab Orang Asli (<i>Market value of the land</i>) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| c. Bayaran 'ex-gratia / solatium' kerana pengambilan paksa dan hubungan spiritual/adat Orang Asli dengan tanah. (<i>Ex-gratia/solatium payment due to compulsory acquisition and spiritual/cultural attachment to the land</i>) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

II. Pampasan Bukan Kewangan (*Non-monetary compensation*)

- | | | | |
|---|--------------------------|--------------------------|--------------------------|
| d. Kemudahan perumahan, infrastruktur dan 'amenities' di penempatan baru (<i>Housing, infrastructures and amenities at new resettlement area</i>) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| e. Jaminan pekerjaan / sumber pendapatan (<i>Guarantee of job / source of income</i>) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| f. Elaun bulanan untuk tempoh 3 tahun dari tarikh pindah (<i>monthly Allowance for the period of 3 years from the date of evacuations</i>) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| g. Bimbingan motivasi untuk penghidupan cara baru (<i>Motivational program for new way of life</i>) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| h. Lain-lain, nyatakan (<i>Others, please specify</i>) _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

7. Komen menyeluruh anda terhadap pengambilan tanah Rezab Orang Asli, jika ada (*Your overall comments on acquisition of Orang Asli Reserve, if any*)

Terima kasih atas kerjasama anda dalam penyelidikan ini
(*Thank you for your cooperation in this research*)



UNIVERSITI MALAYA

Date: 28th February 2007

To the Respondent

Dear Sir/Madam,

Re: Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands

The above survey is conducted by Anuar bin Alias from the Department of Estate Management, Faculty of the Built Environment, University of Malaya.

The purpose of this survey is to collect information on the payment of compensation for land acquisition affecting Orang Asli native land in Malaysia, with the aims to assess whether the existing compensation framework as practised in Malaysia, is effective and adequate in safeguarding the interests of the Orang Asli. The results of the research are expected to contribute towards identifying the elements and perceptions on existing compensation structure, and consequently to provide guidelines in developing a compensation framework for acquisition of Orang Asli native lands.

Your participation in this survey is much needed and, it is on a voluntary basis. You are kindly requested to complete the attached questionnaire and return it via prepaid self-addressed envelope on or before 30th March 2007. The questionnaire consists of eight pages and will take approximately 20-25 minutes to complete. I would like to assure you that **your responses will be treated with strict confidence and this is strictly for academic purposes only.**

If you have any queries regarding this survey, please feel free to contact:

Associate Professor Dr. Md Nasir Daud
Deputy Dean (Postgraduate and Research)
Faculty of the Built Environment
University of Malaya
50603 Kuala Lumpur.
Tel / E-mail: 03-79676880 / mdnasir@um.edu.my

I hope you will find the questionnaire interesting and thought-provoking. Thank you for your time and Participation.

Yours faithfully,

Anuar bin Alias
Department of Estate Management
Faculty of the Built Environment
University of Malaya
50603 Kuala Lumpur.
Tel / E-mail: 013-4803155 / anuar_a@um.edu.my

(This is a computer generated letter and no signature is required)



UNIVERSITI MALAYA

DEVELOPING A COMPENSATION FRAMEWORK FOR LAND ACQUISITION AFFECTING ORANG ASLI NATIVE LANDS

[This survey is anonymous and confidential. No person or company will be identified or identifiable in any report arising from it].

Please answer the following questions based on your own experience and judgments by ticking/circling the appropriate box/number. There is no right or wrong answer.

Please answer Parts A to F. If you are a valuer, please also answer Part G.

PART A: RESPONDENT'S BACKGROUND

1. Name (optional): _____

2. Company Name and Address: _____

3. Organization: ☐ Government ☐ Semi-Government ☐ Private ☐ NGO
/ Government Agency

4. Designation:

☐ Valuation Officer / Valuer ☐ JHEOA Officer ☐ Land Administrator
☐ NGO's Activist ☐ Academician (Involved in any study on Indigenous People)
☐ Others, please specify: _____

5. Age:

☐ 21 – 30 yrs ☐ 31-40 yrs ☐ 41-50 yrs ☐ 51-60 yrs ☐ > 60yrs

6. Sex: ☐ Male ☐ Female

7. Please state your experience in terms of number of years of your involvement in dealing with Orang Asli affairs (in any aspects)

☐ < 2 years ☐ 2 – 5 years ☐ 6-10 years ☐ >10 years

8. If you have been involved in any land acquisition of Orang Asli Native Land, please indicate the number of land acquisitions that you have been directly involved in

☐ 1 Project ☐ 2 – 5 Projects ☐ 6-10 Projects ☐ > 10 Projects

PART B: MEASUREMENT ON DEVELOPING OF THE COMPENSATION FRAMEWORK

1. Please state your opinion on the constructs/components for developing of the compensation framework for acquisition of Orang Asli native lands

	1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
a. To settle the problems of general compensation issues (e.g. land rights, acts, etc)	1	2	3	4	5
b. To pay monetary compensation (e.g. trees and buildings)	1	2	3	4	5
c. To pay non-monetary compensation (e.g. resettlement program, alienation of land, etc)	1	2	3	4	5

PART C: MEASUREMENT ON THE CONSTRUCTS IN DEVELOPING THE COMPENSATION FRAMEWORK

Section 1.0 : General Compensation Issues

2. Please indicate your level of agreement/disagreement on the general compensation issues as listed below.

	1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
a. They suffer from deprivation of ancestral land	1	2	3	4	5
b. Deprivation of freedom of inhabitation or movement under Article 9(2) Federal Constitutions (1957)	1	2	3	4	5
c. Deprivation of produce of the forest	1	2	3	4	5
d. Deprivation of future living for himself, family and his descendants	1	2	3	4	5
e. Under any laws, no compensation for ancestral lands	1	2	3	4	5
f. Lack of protection given by acquisition laws to Orang Asli land rights	1	2	3	4	5
g. Others, (please add your own statement , if any)	1	2	3	4	5

Section 2.0 : Monetary Compensation

3. Please indicate your level of agreement/disagreement on the monetary compensation as listed below.

	1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
a. Existing laws fail to adequately take into consideration the needs and impact of land loss on the lives of Orang Asli	1	2	3	4	5
b. No obvious economic benefits from proposed development	1	2	3	4	5

c. Orang Asli native lands are imbued with cultural, spiritual, communal and economic dimensions far beyond private registered land's market value	1	2	3	4	5
d. Compensation element/component (s) for land acquisition of Orang Asli reserves are not uniform among states in Malaysia	1	2	3	4	5
e. Payment of compensation based on Sections 11 and 12 of Aboriginal Act, 1954 not a fair basis of compensation for land acquisition	1	2	3	4	5
f. Others, (please add your own statement , if any)					
_____	1	2	3	4	5

Section 3.0 : Non-Monetary Compensation

4. Please indicate your level of agreement/disagreement on the non-monetary compensation as listed below.

1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
---------------------	-------------	------------	----------	-------------------

a. Generally, resettlement program enhances the quality of life of Orang Asli	1	2	3	4	5
b. It provides ownership toward property (via an agriculture and residential land alienated to them)	1	2	3	4	5
c. Resettlement program does not provide facilities as promised	1	2	3	4	5
d. Location of resettlement area is normally unsuitable for Orang Asli	1	2	3	4	5
e. They are alienated to uneconomic size of agriculture land to earn a living	1	2	3	4	5
f. Others (please add your own statement, if any) _____	1	2	3	4	5

PART D: MEASUREMENT OF DIMENSIONS IN DEVELOPING THE COMPENSATION FRAMEWORK

SECTION 1.0 : GENERAL COMPENSATION ISSUES

1.1 General Perspectives on Acquisition of Orang Asli Native Lands

5. Please indicate your level of agreement/disagreement on acquisition of Orang Asli native lands

1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
---------------------	-------------	------------	----------	-------------------

a. The land acquisition is done via the provisions within the Aboriginal Act, 1954 and Article 13, Federal Constitution (1957), and these laws provide less protection to the affects of an acquisition to Orang Asli native lands	1	2	3	4	5
--	---	---	---	---	---

b.	Process / procedures of acquisition on Orang Asli lands Not spelt out in any laws	1	2	3	4	5
c.	Land acquisition powers of Orang Asli native land are for public purposes only	1	2	3	4	5
d.	The absence of uniform approach among states in dealing with the quantum of compensation	1	2	3	4	5
e.	Consideration on payment of compensation for the ancestral land	1	2	3	4	5
f.	No uniform methods in determining the monetary and non-monetary compensation	1	2	3	4	5
g.	Compensation proposal is made available for review and consideration by representatives of Orang Asli and JHEOA before inquiry.	1	2	3	4	5
h.	Orang Asli should be allowed to challenge the land Acquisition	1	2	3	4	5
i.	Joint-venture with private sector creates productive asset and potential value through plantation or development project	1	2	3	4	5
j.	Others (please add your own statement, if any) _____	1	2	3	4	5

1.2 Laws, Regulations and Land Rights Issues

6. State your opinion on the laws, regulations and land rights issues on acquisition of Orang Asli native lands

	1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree	
a.	In all states, Orang Asli land rights fall victim to politically marginalization, are poorly managed and are not accorded the adequate protection.	1	2	3	4	5
b.	No laws regard the Orang Asli as the legal owner of Orang Asli Reserves; their rights are only as Tenant-at-will of State Land	1	2	3	4	5
c.	Due to the undeclared status of most of Orang Asli land and the lack of mechanism to keep track of Orang Asli land, State Government often ends up awarding the ancestral land to private developers	1	2	3	4	5
d.	The meaning of 'land occupied under customary rights' under section 2 of Land Acquisition Act 1960 should be given a wider interpretation so as to ensure that compensation would be paid for acquisition of Orang Asli native land	1	2	3	4	5
e.	Others, if any _____	1	2	3	4	5

1.3 Negotiation of Compensation

7. Compensation for acquisition of Orang Asli Reserve is calculated based on discretion and negotiation between state governments, JHEOA and acquiring body. Give your opinion on this approach:

	1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
a. Negotiation with representative of Orang Asli is made mandatory before compulsory acquisition	1	2	3	4	5
b. The interest of Orang Asli is taken care of	1	2	3	4	5
c. Not fair to Orang Asli	1	2	3	4	5
d. The right of Orang Asli is not recognized	1	2	3	4	5
e. This approach is appropriate and effective	1	2	3	4	5
f. Administratively justified if Orang Asli is not involved	1	2	3	4	5
9. Others, if any _____	1	2	3	4	5

1.4 Challenges in the Determination of Compensation

8. State your opinion on the challenges in determining of compensation for Orang Asli native lands

	1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
a. Legal framework - Federal Constitution 1957; Land Acquisition Act 1960; Aboriginal Peoples Act 1954	1	2	3	4	5
b. Monetary and non-monetary compensation	1	2	3	4	5
c. Issues of land rights	1	2	3	4	5
d. The most reliable valuation approaches	1	2	3	4	5
e. Negotiation of compensation	1	2	3	4	5
f. Others, if any _____	1	2	3	4	5

SECTION 2.0 : MONETARY COMPENSATION

2.1 Economic / Market Value

9. State your perceptions on monetary compensation as recognized and currently practised in Malaysia

	1=inadequate	2= hardly adequate	3= adequate	4= generous	5= exceedingly generous
a. Payment on loss of growing trees	1	2	3	4	5
b. Payment on affected buildings and other improvements on land	1	2	3	4	5
c. Others, if any _____	1	2	3	4	5

2.2 Solatium / Premium

10. State your perceptions on solatium payment as listed below

	1=inadequate	2= hardly adequate	3= adequate	4= generous	5= exceedingly generous
a. Additional compensation to reflect spiritual / cultural attachment of Orang Asli to the land	1	2	3	4	5
b. Additional compensation to reflect socio-culture dimensions loss (e.g. disturbance, mental distress, insult and the future of young generation)	1	2	3	4	5
c. Others, if any _____	1	2	3	4	5

2.3 Other Claims:

11. State your perceptions on compensation of other claims as listed below

	1=inadequate	2= hardly adequate	3= adequate	4= generous	5= exceedingly generous
a. Support allowance due to loss of income	1	2	3	4	5
b. Unit Trust	1	2	3	4	5
c. Evacuation allowance	1	2	3	4	5
d. Equity shares in development projects	1	2	3	4	5
e. Others, if any _____	1	2	3	4	5

SECTION 3.0 : NON-MONETARY COMPENSATION

3.1 Resettlement Programme

12. State your perceptions on compensation for resettlement program as recognized and currently practised in Malaysia

	1=very unsatisfied	2= unsatisfied	3= neutral	4= satisfied	5= very satisfied
a. Quality of houses provided	1	2	3	4	5
b. Size of the houses	1	2	3	4	5
c. Infrastructures	1	2	3	4	5
d. Amenities	1	2	3	4	5
e. Others, if any _____	1	2	3	4	5

3.2 Transitional / Motivational Programme

13. State your opinion on compensation for transitional and motivational program as listed below

	1=very unsatisfied	2= unsatisfied	3= neutral	4= satisfied	5= very satisfied
a. Mind Development Program for affected Orang Asli	1	2	3	4	5
b. Program objectives	1	2	3	4	5
c. Frequent and period of the program	1	2	3	4	5
d. Others, if any _____	1	2	3	4	5

3.3 Other Benefits

14. State your opinion on compensation for other benefits as listed below

	1=very unsatisfied	2= unsatisfied	3= neutral	4= satisfied	5= very satisfied
a. Size of agriculture land	1	2	3	4	5
b. Type of crops planted	1	2	3	4	5
c. Size of residential land	1	2	3	4	5
d. Job / employment opportunity	1	2	3	4	5
e. Others, if any _____	1	2	3	4	5

PART E : SUGGESTIONS ON COMPENSATION FRAMEWORK

15. The following are suggestions on how to upgrade the unstructured nature of existing compensation for acquisition of Orang Asli native land. Please indicate your level of preference.

	1=strongly not recommended	2= not recommended	3= neutral	4= recommended	5= strongly recommended
a. Compensation for land should be given due to consideration based on its market value	1	2	3	4	5
b. Make the existing structures (monetary and non-monetary compensation) a law	1	2	3	4	5
c. Land rights of Orang Asli native land must be recognized in law	1	2	3	4	5
d. The decisions by the High Court in Sagong Tasi case that recognized Orang Asli land rights and compensation for acquisition of their land must be implemented in due course by related parties	1	2	3	4	5
e. Land Acquisition Act, 1960 must be amended to incorporate compensation for Orang Asli native land	1	2	3	4	5

f.	There is a need for Malaysia to adopt other countries' practices to develop compensation framework for Orang Asli native land	1	2	3	4	5
g.	Payment of non- monetary compensation must be made uniform for all states in Malaysia	1	2	3	4	5
h.	Others, (please add your own statement, if any)	1	2	3	4	5

16. Please indicate your preferences on the proposed compensation framework for acquisition of Orang Asli native land:

1= strongly not recommended	2= not recommended	3= neutral	4= recommended	5= strongly recommended
-----------------------------	--------------------	------------	----------------	-------------------------

A. Monetary Compensation:

a.	Components of compensation should include market value + other claims (<i>disturbance, severance, Injurious affection</i>) + solatium/premium	1	2	3	4	5
b.	Basis of valuation for land is market value of the whole gazetted area of Orang Asli Reserve	1	2	3	4	5
c.	Solatium/premium is not less than 10% of market value	1	2	3	4	5
e.	Others, (if any) _____	1	2	3	4	5

B. Non-Monetary Compensation:

d.	Resettlement program	1	2	3	4	5
e.	Transition and Motivation Program for a minimum period of 1 year for Orang Asli to adjust their life into new environment.	1	2	3	4	5
f.	Guaranteed employment (based on their education level) for them to earn a living for a minimum period of 3 years.	1	2	3	4	5
g.	Monthly allowance for the period of 3 years from the date of evacuation.					
h.	If the acquisition is for economic development purposes, certain percentage (e.g. 2%) of development units must be granted to Cooperative of Orang Asli under close supervision of JHEOA.	1	2	3	4	5
i.	Others, (if any) _____	1	2	3	4	5

17. According to Burke (2002), non-monetary compensation structure for acquisition of indigenous peoples should includes the socio-culture dimension losses of the following. Please indicate your level of preference.

1= strongly not recommended	2= not recommended	3= neutral	4= recommended	5= strongly recommended
-----------------------------	--------------------	------------	----------------	-------------------------

a. Insults	1	2	3	4	5
b. Mental Distresses	1	2	3	4	5
c. Disturbances	1	2	3	4	5
d. The future of the young generation	1	2	3	4	5

PART F: MISCELLANEOUS

18. Please give your further comments on the issues of land acquisition/encroachment of Orang Asli native land in Malaysia where they have not been covered previously.

PART G: VALUATION METHODS

(Note: This Section Is Specifically For Valuation Officer / Valuer)

19. Please indicate your level of agreement/disagreement to the following basis for determining of market value for compensation of Orang Asli native land

	1=strongly disagree	2= disagree	3= neutral	4= agree	5= strongly agree
a. Valuation is based on the assumption that 'valuers can assess the appropriate range of values of partial and co-existing property rights of Orang Asli'.	1	2	3	4	5
b. Orang Asli have stronger ties to land and this creates differing viewpoint of the worth of land which consist the components of spiritual and cultural value.	1	2	3	4	5
c. To Orang Asli, the concept of individual exclusive title is traditionally unacceptable.	1	2	3	4	5
d. Orang Asli rate the property on its spiritual or cultural value to the community rather than its productive value.	1	2	3	4	5
e. There is a growing awareness of environmental, cultural and institutional factors which at times, cause duality in the market of Orang Asli land.	1	2	3	4	5

- f. There are more than one market for Orang Asli land, when the market players are from different cultures.

12345
- g. Others, if any _____

12345

20. According to Whipple (1995), there are three (3) appropriate valuation approaches to determine market value of native title (Australia). Please state your opinion if these approaches are apply to Orang Asli native land.

1=strongly not recommended	2= not recommended	3= neutral	4= recommended	5= strongly recommended
----------------------------	--------------------	------------	----------------	-------------------------

- a. Inference from past transactions (market evidence)

12345
- b. Simulation of the most probable buyer's price fixing (where no direct market evidence is available but market based scenarios are known)

12345
- c. Normative Modeling (e.g. Contingent Valuation Methodology (CVM) uses when factual market information is not available. It is largely based on expected prudent behaviour of the market i.e. Willingness To Pay (WTP) concept).

12345

'Thank you very much for your time and participation'



UNIVERSITI MALAYA

Date: 31st July 2007

Dear Expert,

Re: Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands

I refer to the above matter.

Your academic excellence, active involvement in aboriginal researches and related career background, you have been selected as one of 15 experts to participate in my PhD research project entitled as above. The main objective of this research is to assess whether the existing compensation framework as practised in Malaysia, is effective and adequate in safeguarding the interests of Orang Asli.

One of the research methodologies employed in this research is the used of Delphi Technique which is to bring about convergence of opinion among experts towards pre-compensation framework being developed from the results of quantitative survey; case study; and the Australian practices of Native Title Act 1993.

As an expert, I would like to request you to participate in two (2) repeated rounds in which at every subsequent round you would be invited to respond to questionnaires. Enclosed herewith is the Round 1 Delphi Questionnaire for your kind action.

This survey is on a voluntary basis and your participation is very much appreciated. I would like to assure you that your responses will be treated with strictest confidence.

I hope that you will agree to be an expert panelist, and if you have any questions and concerns please do not hesitate to contact me. Thank you for your time and participation.

Yours faithfully,

Anuar bin Alias
Department of Estate Management
Faculty of the Built Environment
University of Malaya
50603 Kuala Lumpur.
Tel: 013-4803155
E-mail: anuar_a@um.edu.my

(This is a computer generated letter and no signature is required)



UNIVERSITI MALAYA

Code No. _____

RESEARCH QUESTIONNAIRE – ROUND 1 OF DELPHI TECHNIQUE

'Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands'

Notes and instruction to an expert:

1. The questions in this questionnaire are formulated based on the results of the following surveys:
 - a. Quantitative survey – questionnaires distributed to; i) Professional respondents (Valuation Officers/ Valuers; JHEOA officers; Land Administrators; Aboriginal Activists; and Academicians); ii) the Orang Asli which are affected by land acquisition in five geographical locations.
 - b. Case study – FIVE (5) previous land acquisition projects were chosen as a case study - located at Perak, Selangor, Johor and Pahang.
 - c. Practices of the Australian Native Title Act 1993.
2. Generally, the results showed that an appropriate compensation framework for land acquisition of Orang Asli native lands could be classified into THREE (3) main headings:
 - a. General acquisition compensation
 - b. Monetary compensation
 - c. Non-monetary compensation
3. Based on your experience and judgment, please circle your level of agreement / disagreement for each of the items in the questionnaire by using the following rating scale:-

1=strongly disagree

2= disagree

3= slightly disagree

4= neutral

5= slightly agree

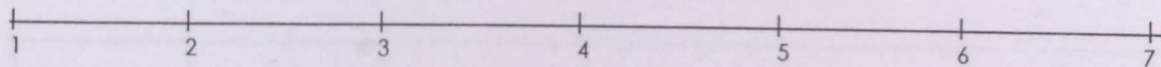
6= agree

7=strongly agree

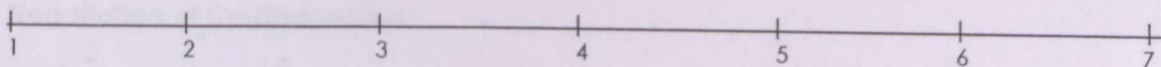
A. GENERAL COMPENSATION

• Perceptions on land acquisition of Orang Asli Native Lands:

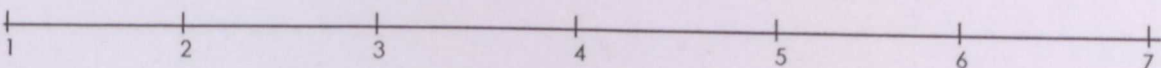
24. Land acquisition is an encroachment of rights, interest, heritage and culture of Orang Asli native lands



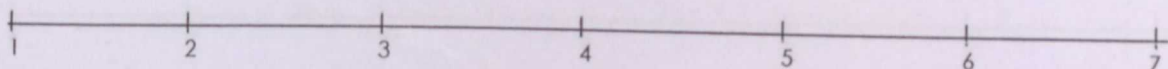
25. In most of the land acquisition cases, promises to protect Orang Asli interests are not fulfilled



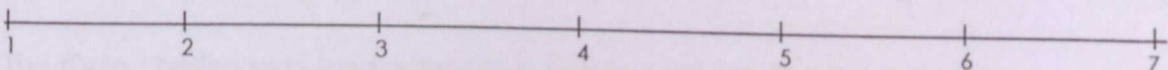
26. State Authority and Federal Government owe fiduciary duty towards the Orang Asli, which has been breached



27. Disparity existed in compensation packages (i.e. elements of compensation) among state authorities / projects

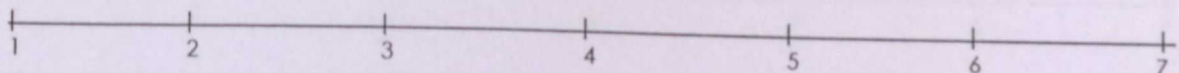


28. Environmental concern is attached and being considered in land acquisition of Orang Asli native lands

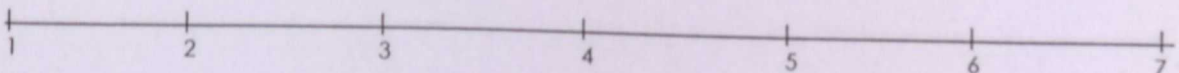


• Laws and Regulations – Land Rights Issues

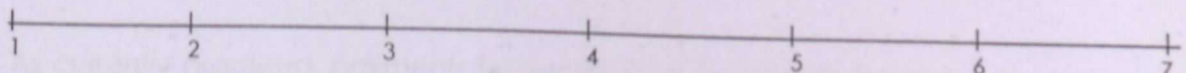
29. Existing laws in Malaysia (i.e. The Aboriginal Peoples Act 1954 (Act 134) and Article 13, Federal Constitution 1957) provided fewer protections to the effects of an acquisition to Orang Asli native lands.



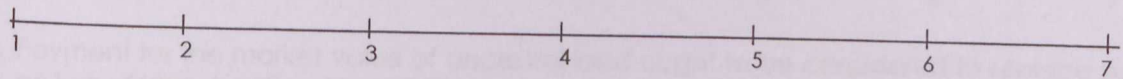
30. Land rights of Orang Asli are not recognized in Malaysian legal systems.



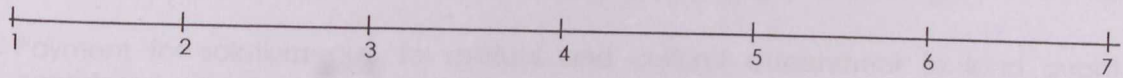
31. Due to land rights of Orang Asli being not spelt out in laws, this is considered as an obstacle to payment of market value for the ancestral land



32. Related acts and regulations must be amended to incorporate and recognize legal rights of Orang Asli toward their native lands

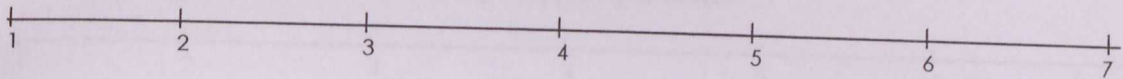


33. The meaning of 'land occupied under customary rights' under section 2 of Land Acquisition Act 1960 should be interpreted to include Orang Asli native lands

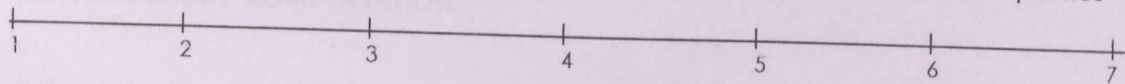


• **Negotiation of Compensation**

34. The nature of negotiations influenced the quantum of compensation received by the Orang Asli

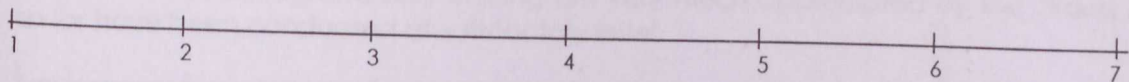


35. Negotiations for compensation which are normally conducted by the JHEOA and representative of Orang Asli hardly achieve to expectations of the interested parties

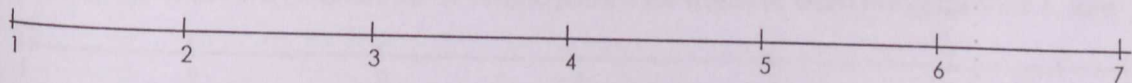


• **Challenges**

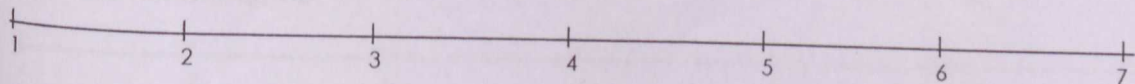
36. The main challenge in land acquisition compensation of Orang Asli native lands is to resolve the problem of land rights



37. At present, methods to determine the compensation are based on the discretion of the state authorities through negotiation between parties concerned

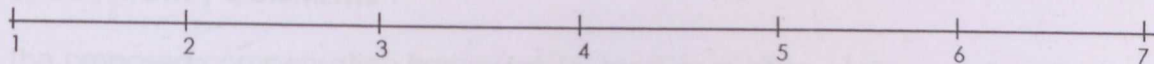


38. It is vital to introduce a uniform approach among states in dealing with the elements of monetary and non-monetary compensation

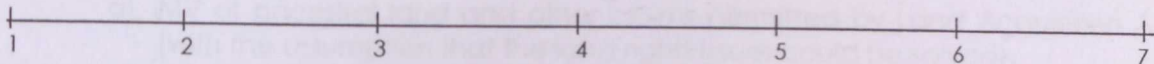


B. MONETARY COMPENSATION

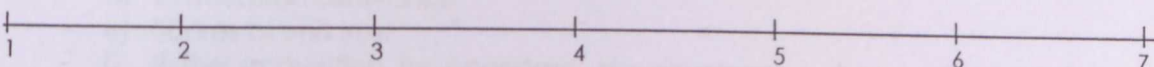
39. As currently practised, payments for loss of trees and building which were based on JPPH's advice are perceived by the Orang Asli as low and inadequate



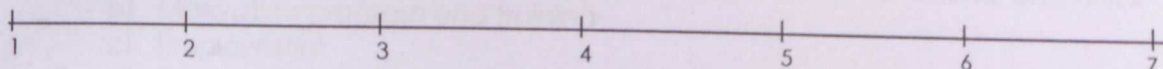
40. Payment for the market value of ancestral land ought to be considered to replace payment on loss of trees (section 11 and 12, Act 134)



41. Payment for solatium due to spiritual and cultural attachment to land ought to be considered

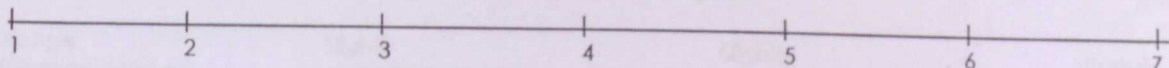


42. Payment of other monetary headings (e.g. living/support, evacuation allowances and shares of unit trust) that being practised in certain acquisition compensations, is requested by Orang Asli to be included in all compensation packages

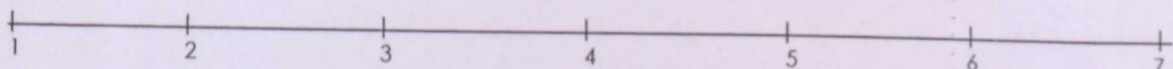


C. NON-MONETARY COMPENSATION

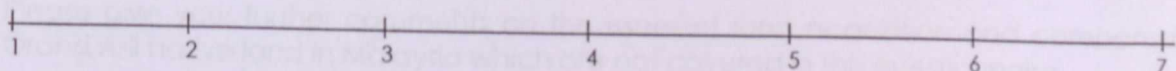
43. Its important for the state authorities to develop a Regroupment Scheme which provides an appropriate and adequate housing, infrastructure and amenities in every land acquisition that affects Orang Asli native lands



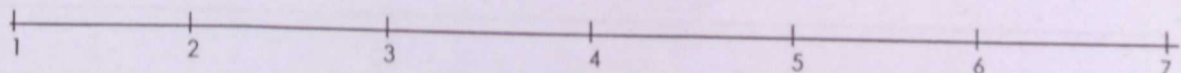
44. The motivational programs and training are very much appreciated by the Orang Asli and so far have been conducted at satisfactory level



45. Orang Asli require a guarantee of employment for them to earn living for their future



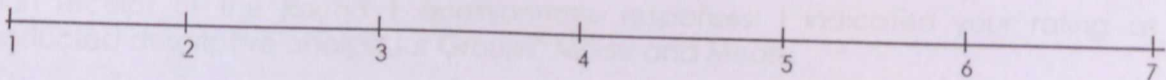
46. Other types of non-monetary compensation e.g. size of agriculture, orchard and residential plot are not adequate



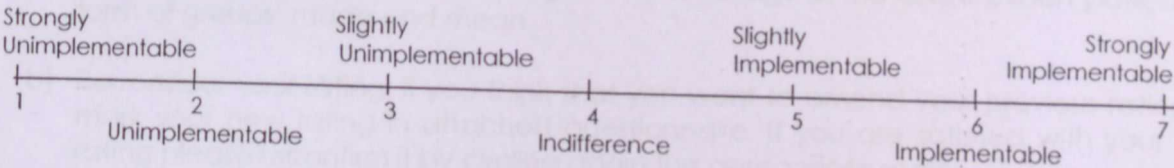
D. SUGGESTIONS / COMMENTS

24. The proposed compensation framework for land acquisition of Orang Asli native land should consist the following elements:

- iii. Monetary Compensation
 - a) MV of ancestral land and other claims permitted by Land Acquisition Act 1960 (with the assumption that the land rights issues could be solved).
 - b) Solatium / ex-gratia payment in respect of special attachment to land, insults, mental distresses and the future of young generation
 - c) Living allowances for certain period
 - d) Evacuation allowance
 - e) Shares of unit trust
 - f) If the acquisition for economic development – shares of equity for Orang Asli community
- iv. Non-Monetary Compensation
 - a) Resettlement program – housing, infrastructure and communal amenities
 - b) Motivation program and training
 - c) Employment
 - d) Economic size of agriculture land for their sources of income.



26. Based on the scale below, please give your opinion on whether the above compensation framework is workable and implementable in Malaysia.



E. MISCELLANEOUS

26. Please give your further comments on the issues of land acquisition and compensation of Orang Asli native land in Malaysia which are not covered in this questionnaire.

'Thank you for your time and participation'



UNIVERSITI MALAYA

Date: 31st July 2007

Dear Expert,

Re: Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands

Please allow me to express my sincere gratitude to you for completing and returning the Round 1 questionnaire of my Delphi Technique. Your opinions have been most valuable to my research leading to developing a compensation framework for land acquisition affecting Orang Asli native lands.

Upon receipt of the Round 1 questionnaire responses; I indicated your rating as well as conducted descriptive analysis for Groups' Mode and Mean.

Attached herewith is the Round 2 Delphi Questionnaire for your kind action. In this round, please allow me to ask further opinions and comments with regard to your previous feedbacks:

- a) Compare your own previous ratings and the ratings of the entire expert panelists in the form of groups' mode and mean.
- b) Reconsider your rating; if you think that you want to amend your previous rating please mark your new rating in attached questionnaire. If you are satisfied with your previous rating please reconfirm it by circling again the appropriate scale.

Please accept my most sincere thanks for your valuable time and kind assistance.

Yours faithfully,

Anuar bin Alias
Department of Estate Management
Faculty of the Built Environment
University of Malaya
50603 Kuala Lumpur.
Tel: 013-4803155
E-mail: anuar_a@um.edu.my

(This is a computer generated letter and no signature is required)



UNIVERSITI MALAYA

Code No: _____

RESEARCH QUESTIONNAIRE – ROUND 2 OF DELPHI TECHNIQUE

'Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands'

Notes and instructions to an expert:

1. Based on your experience and judgment, indicate your level of agreement / disagreement on the components for developing a compensation framework for land acquisition affecting Orang Asli native lands.

2. Please review (where is necessary) your previous positions on each item; and if you think that you want to make amendment, please circle your responses using the following 7-point rating scale. If you are satisfied with your previous rating please reconfirm it by circling again the appropriate scale.

1= strongly disagree

2= disagree

3= slightly disagree

4= neutral

5= slightly agree

6= agree

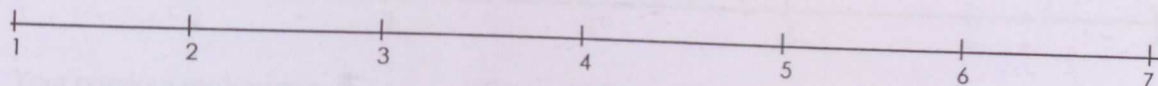
7= strongly agree

3. In the event that your responses to a particular question were more than one classification away from the group's mode, please state your reason(s) for differing from the majority opinion.

F. GENERAL COMPENSATION

• Perceptions on land acquisition of Orang Asli Native Lands:

47. Land acquisition is an encroachment of rights, interest, heritage and culture of Orang Asli native lands



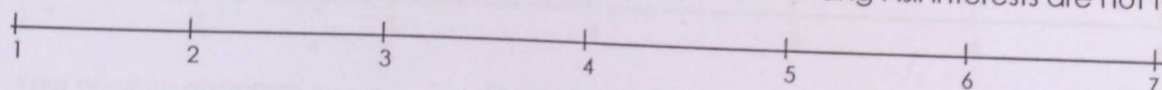
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

48. In most of the land acquisition cases, promises to protect Orang Asli interests are not fulfilled



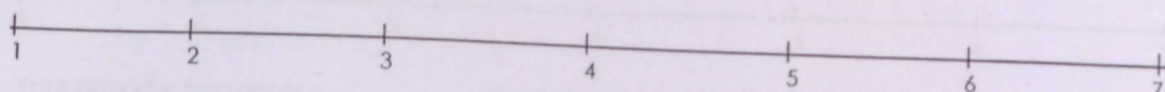
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

49. State Authority and Federal Government owe fiduciary duty towards the Orang Asli, which has been breached



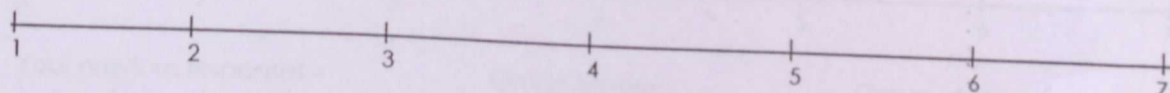
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

50. Disparity existed in compensation packages (i.e. elements of compensation) among state authorities / projects



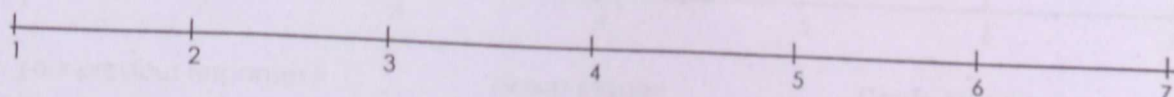
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

51. Environmental concern is attached and being considered in land acquisition of Orang Asli native lands



Your previous responses =

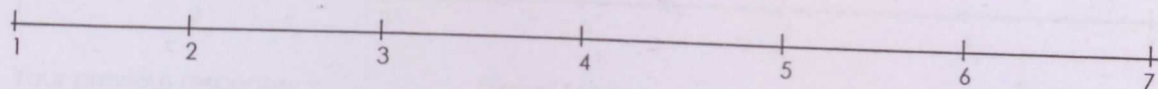
Group Mode=

Group Mean=

Reason for differing (if any) _____

• **Laws and Regulations – Land Rights Issues**

52. Existing laws in Malaysia (i.e. The Aboriginal Peoples Act 1954 (Act 134) and Article 13, Federal Constitution 1957) provided fewer protections to the effects of an acquisition to Orang Asli native lands.



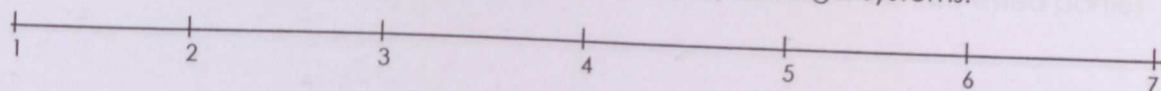
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

53. Land rights of Orang Asli are not recognized in Malaysian legal systems.



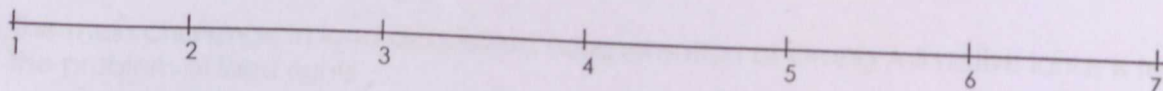
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

54. Due to land rights of Orang Asli being not spelt out in laws, this is considered as an obstacle to payment of market value for the ancestral land



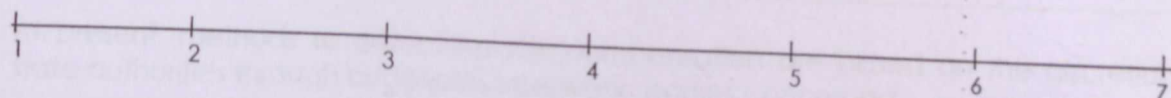
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

55. Related acts and regulations must be amended to incorporate and recognize legal rights of Orang Asli toward their native lands



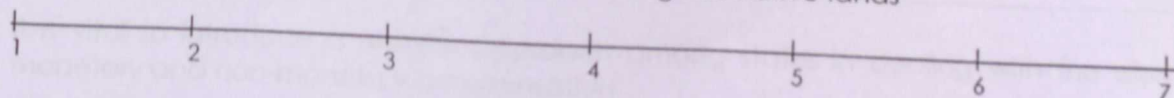
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

56. The meaning of 'land occupied under customary rights' under section 2 of Land Acquisition Act 1960 should be interpreted to include Orang Asli native lands



Your previous responses =

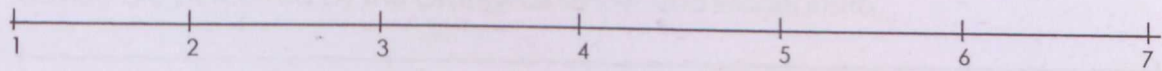
Group Mode=

Group Mean=

Reason for differing (if any) _____

• **Negotiation of Compensation**

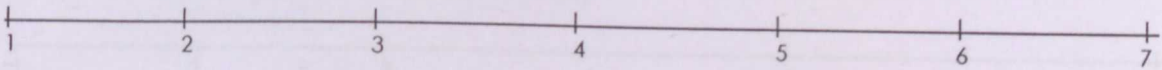
57. The nature of negotiations influenced the quantum of compensation received by the Orang Asli



Your previous responses = Group Mode= Group Mean=

Reason for differing (if any) _____

58. Negotiations for compensation which are normally conducted by the JHEOA and representative of Orang Asli hardly achieve to expectations of the interested parties

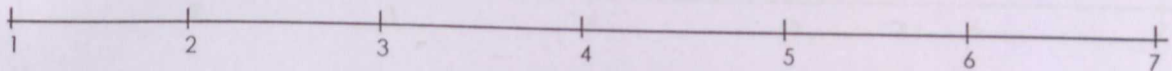


Your previous responses = Group Mode= Group Mean=

Reason for differing (if any) _____

• **Challenges**

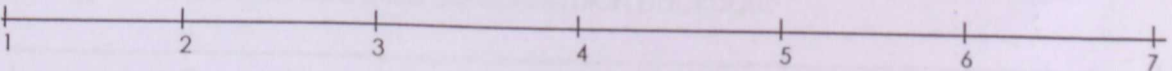
59. The main challenge in land acquisition compensation of Orang Asli native lands is to resolve the problem of land rights



Your previous responses = Group Mode= Group Mean=

Reason for differing (if any) _____

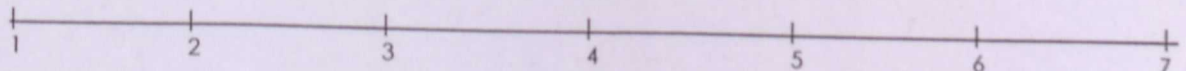
60. At present, methods to determine the compensation are based on the discretion of the state authorities through negotiation between parties concerned



Your previous responses = Group Mode= Group Mean=

Reason for differing (if any) _____

61. It is vital to introduce a uniform approach among states in dealing with the elements of monetary and non-monetary compensation

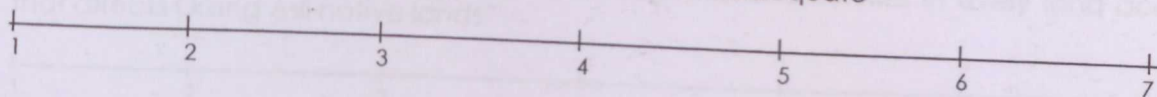


Your previous responses = Group Mode= Group Mean=

Reason for differing (if any) _____

G. MONETARY COMPENSATION

62. As currently practised, payments for loss of trees and building which were based on JPPH's advice are perceived by the Orang Asli as low and inadequate



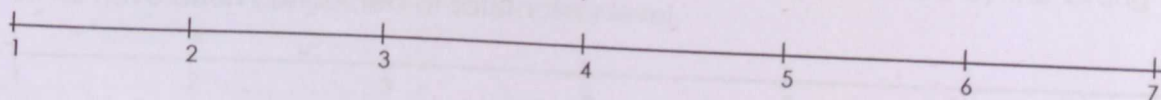
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

63. Payment for the market value of ancestral land ought to be considered to replace payment on loss of trees (section 11 and 12, Act 134)



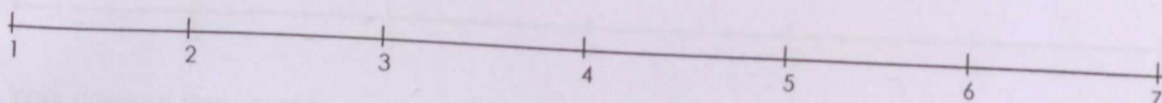
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

64. Payment for solatium due to spiritual and cultural attachment to land ought to be considered



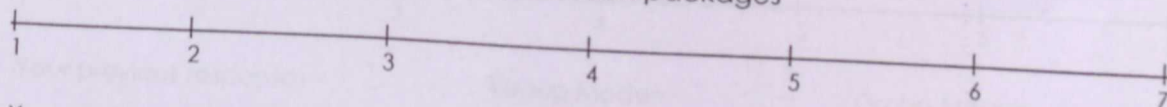
Your previous responses =

Group Mode=

Group Mean=

Reason for differing (if any) _____

65. Payment of other monetary headings (e.g. living/support, evacuation allowances and shares of unit trust) that being practised in certain acquisition compensations, is requested by Orang Asli to be included in all compensation packages



Your previous responses =

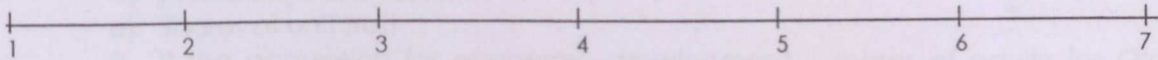
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Reason for differing (if any) _____

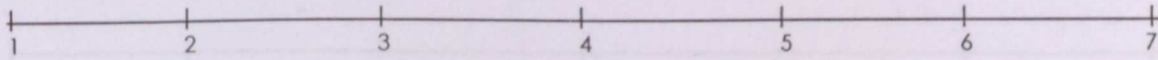
H. NON-MONETARY COMPENSATION

66. Its important for the state authorities to develop a Regroupment Scheme which provides an appropriate and adequate housing, infrastructure and amenities in every land acquisition that affects Orang Asli native lands



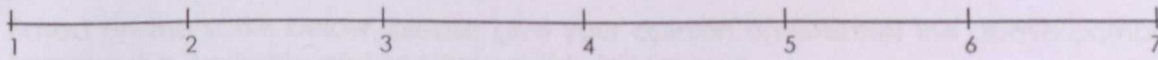
Your previous responses = Group Mode= Group Mean=
Reason for differing (if any) _____

67. The motivational programs and training are very much appreciated by the Orang Asli and so far have been conducted at satisfactory level



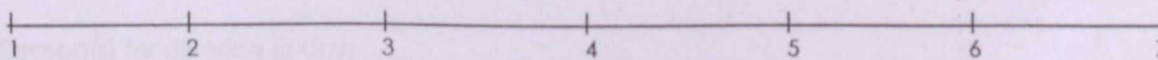
Your previous responses = Group Mode= Group Mean=
Reason for differing (if any) _____

68. Orang Asli require a guarantee of employment for them to earn living for their future



Your previous responses = Group Mode= Group Mean=
Reason for differing (if any) _____

69. Other types of non-monetary compensation e.g. size of agriculture, orchard and residential plot are at not adequate



Your previous responses = Group Mode= Group Mean=
Reason for differing (if any) _____

I. SUGGESTIONS

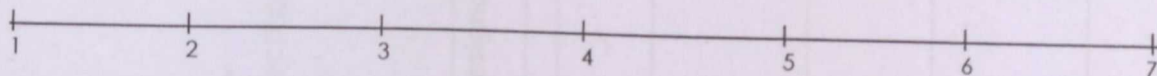
24. The proposed compensation framework for land acquisition of Orang Asli native land should consist the following elements:

i) Monetary Compensation

- MV of ancestral land and other claims permitted by Land Acquisition Act 1960 (with the assumption that the land rights issues could be solved).
- Solatium / ex-gratia payment in respect of special attachment to land, insults, mental distresses and the future of young generation
- Living allowances for certain period
- Evacuation allowance
- Shares of unit trust
- If the acquisition for economic development – shares of equity for Orang Asli community

ii) Non-Monetary Compensation

- Resettlement program – housing, infrastructure and communal amenities
- Motivation program and training
- Employment
- Economic size of agriculture land for their sources of income.



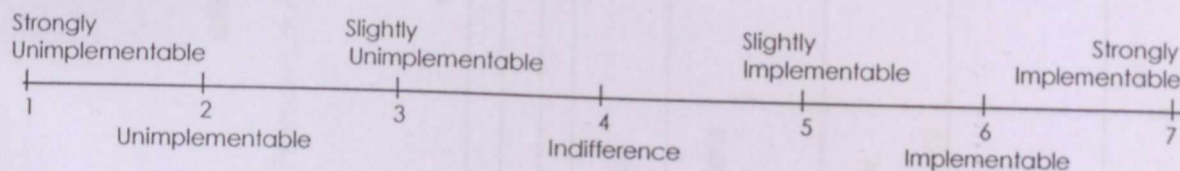
Your previous responses =

Group Mode=

Group Mean=

Reason(s) for differing (if any) _____

27. Based on the scale below, please give your opinion on whether the above compensation framework is workable and implementable in Malaysia.



Your previous responses =

Group Mode=

Group Mean=

Reason(s) for differing (if any) _____

'Thank you for your time and participation'



UNIVERSITI MALAYA

Research Topic: Developing A Compensation Framework For Land Acquisition Affecting Orang Asli Native Lands
Researcher : Anuar Alias – University Malaysia

Date: _____

Structured Interview Questions – DEVELOPER

Name of the Project: _____ **Designation:** _____

Name of Interviewee: _____

No.	Question	Answer
1.	Why did your company chose the Orang Asli lands for this project?	
2.	Did you encounter any problems or obstructions in the process of an acquisition of Orang Asli lands for this project? What were those problems?	
3.	How did you determine the compensation for the land acquisition of Orang Asli lands in this project? What was the basis of the calculations?	
4.	How was the atmosphere of the negotiation between your company, JHEOA and representatives of Orang Asli in this project?	
5.	What were the factors of consideration in finalising the quantum of compensation for Orang Asli in this project?	



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Research Topic: Developing A Compensation Framework For Land Acquisition Affecting Orang Asli Native Lands
Researcher : Anuar Alias – University Malaysia

Structured Interview Questions – JHEOA PERSONNEL

Date: _____

Name of the Project: _____

Name of Interviewee: _____ **Designation:** _____

No.	Question	Answer
1.	What is your opinion on the acquisition of the Orang Asli lands for this project?	
2.	How did the Orang Asli perceive the acquisition of their lands for this project?	
3.	What is your opinion on the compensation payable to Orang Asli in this project?	
4.	Are you involved as JHEOA representative in negotiations of the compensation in this project? What roles do you played in safeguarding the interest of Orang Asli.	
5.	How far the claims demanded by the Orang Asli and JHEOA are being considered in the final compensation of this project?	

EXAMINATION OF THE THESIS

DATE OF VIVA-VOCE: 13TH FEBRUARY 2009

VENUE:

MAIN MEETING ROOM, FACULTY OF THE BUILT ENVIRONMENT
UNIVERSITY OF MALAYA

CHAIRMAN:

Professor Dr Hamzah Bin Abd Rahman
Dean
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