

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

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The recognition of native title in Australian law has transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementing that recognition has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

As part of the regime of the Native Title Act 1993 (Cth) the payment of compensation for impairment of native title by future acts is an area of increasing importance. In this paper Michael Lavarch and Allison Riding explore the models that have been suggested to date and recommend a new approach that overcomes the limitations inherent in other methods.

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A NEW WAY OF COMPENSATING: MAINTENANCE OF CULTURE THROUGH AGREEMENT

Michael Lavarch and Allison Riding¹

Since the Mabo Decision in 1992 there has developed a native title language. Not only lawyers and academics but members of the public have incorporated such terms as 'native title', 'extinguishment' and 'co-existence' into their vocabulary. One word in this native title language which has not to date received adequate attention is 'compensation'. The purpose of this paper is to examine the meaning of 'compensation' in the native title world. The first part of the paper will examine what the Native Title Act, the Native Title Amendment Bill and the proposed Senate amendments to the Native Title Amendment Bill say about compensation. The second part of the paper will examine the suggestions made to date about the assessment of compensation and will argue that the word 'compensation' can only have meaning if these suggestions are rejected, and a new approach - based on the maintenance of culture and agreement - is adopted.

1. The Provisions

Native Title Act 1993

The Native Title Act 1993 is not loquacious about compensation. It specifies when compensation is payable and sets out some broad principles about the assessment of compensation. For the purposes of this paper it is not necessary to examine in detail the occasions on which compensation is payable. It should simply be kept in mind that compensation is payable under the Native Title Act in three cases:

- when there are certain past acts which extinguish or impair native title;
- where there are certain future acts which extinguish or impair native title;
- when the Racial Discrimination Act 1975 has the effect that compensation is payable to native title holders.

The broad principles concerning the assessment of compensation are very broad indeed. They can be summarised as follows:

- compensation is payable only once in respect of the same act;
- the compensation is for the loss, diminution, impairment or other effect of the act on native title rights and interests;
- the compensation must be on 'just terms';
- if the act is an acquisition under a Compulsory Acquisition Act or an act which could be done in respect of ordinary titleholders under another law, then the principles in that Compulsory Acquisition Act or that other law are relevant to the determination of the compensation;
- the compensation can only consist of the payment of money except if the claimant has requested that it consist of the transfer of property or the provision of goods or services.

Native Title Amendment Bill

The Native Title Amendment Bill 1997 proposes changes both in respect of when compensation is payable and the assessment of compensation. As well as past and future acts, the Native Title Amendment Bill proposes that compensation be payable in respect of 'intermediate period acts', that is, those acts which took place between 1 January, 1994 and 23 December, 1996 which the Bill proposes to validate. In respect of the assessment of compensation, the Bill retains the broad principles set out in the Act. The compensation is still for any loss, diminution, impairment or other effect of the act on native title rights and interests. The compensation is still to be on just terms. However, the Bill seeks to limit compensation to the amount that would be payable if the act were instead a compulsory acquisition of freehold estate in the land or waters (Clause 51A). This proposed amendment encapsulates the very approach to compensation which the second part of the paper argues should be jettisoned.

Senate Amendments

The Native Title Amendment Bill was passed by the Senate for the first time in December with extensive amendments. Some of the amendments were accepted by the House of Representatives and some were not. An amendment which has been accepted by the House of Representatives concerns 'just terms'. Under the Native Title Act and under the Bill, the requirement to pay compensation on just terms was imposed only on the Commonwealth. The Senate amendments specify that where there is a future act which amounts to an acquisition of property within the meaning of s. 51(xxxi) of the Constitution, and that future act is attributable to a State or a Territory, then that State or Territory also has an obligation to pay compensation on just terms.

The other Senate amendment relevant to compensation has not been accepted by the House of Representatives. The amendment attempts to minimise the expense which will be incurred in respect of small compensation claims. Essentially, if:

- the amount of compensation claimed is unlikely to exceed \$50 000 or is expected not to exceed the cost of maintaining and prosecuting the claim by more than 50%;
- the applicant has prima facie evidence of the existence of native title rights and a connection with the land; and
- there is no unequivocal evidence that all of those native title rights and interests have been extinguished,

then the Federal Court can direct the claim to the Native Title Tribunal, the Tribunal can adopt such procedures as it wishes in order to minimise expenses, and the Tribunal can make a determination of compensation (Clause 53A). This amendment is an admirable attempt to ensure that any compensation which is payable benefits the native title holders, rather than

the lawyers acting on their behalf. If the arguments of this paper are adopted, however, such an amendment will not be necessary.

2. Assessment

The exercise of identifying the legislative provisions about compensation can only take the inquiry into the meaning of 'compensation' so far. The provisions raise multifarious questions. What is meant by 'compensation for loss, diminution or impairment'? What is meant by 'just terms'?

It is clear that the answers to how compensation is practically assessed will come from outside the relevant legislation. At this stage it will also come from outside the courts. There have so far been very few claims made for compensation. Compensation will only begin to concern the courts in a few years, once native title determinations begin to be made. To date relatively little has been written in the academic arena about the assessment of compensation.² Much of the writing on native title concerns the more immediate issues surrounding native title determinations. It is useful, however, to consider what suggestions have been made about the assessment of compensation so far.

Suggestions to date

The suggestions made to date about the assessment of compensation for native title all have a feature in common. They all identify a starting point. Further more, and perhaps not surprisingly, considering that the makers of these suggestions are lawyers and valuers - that starting point is by analogy and always the same - the value of freehold title.

There are essentially two views which have so far been expressed -

- compensation for native title should be based on the value of freehold less something;
- compensation for native title should be based on the value of freehold plus something.

The something less argument runs as follows. The defining characteristic of native title is that it cannot be alienated. Native title must therefore be worth less than freehold title - because it lacks one of the most important elements of freehold title, namely, the ability to alienate the land. Fortunately the something less argument has received little credence. It is a simplistic argument which demonstrates a lack of understanding of native title. Native title rights and interests are diverse and vary from case to case. In no case, however, is the exercise and enjoyment of native title rights and interests in any way affected by the inability of the native title holders to alienate the land. To the contrary, it is this inalienability which allows for the exercise of native title rights and interests - which allows for the continuation of traditional laws and customs. It is not logical to say that inalienability devalues native title rights and interests.

The something more argument has received considerably more credence than the something less argument. It is best explained by examining the views of Dr Whipple, the Foundation Professor in Valuation and Land Economy at Curtin University, who has written a number of articles on compensation.³ Dr Whipple draws a distinction between the 'material' aspects of native title and the 'spiritual' aspects of native title. He says that material aspects include things like fishing and hunting rights and other incidents of native title which can be equated to incidents of ordinary land tenure. Such material aspects can be valued in the same way that similar interests existing in a Western land tenure system are valued. This is the 'freehold' part of the something more argument.

The 'something more' relates to the 'spiritual' aspects of native title. Dr Whipple recognises that the spiritual attachment which indigenous people may have to land cannot be measured by traditional methods. He argues that the courts must therefore develop methods of valuing the spiritual aspects of native title. The value of the spiritual aspects of native title can then be added to the value of the material aspects of native title and the total can be the measure of compensation for native title. Dr Whipple makes no suggestions on how the spiritual aspects of native title should be valued. He believes that it is not the place of valuers to do so, but that the courts are eminently more suited to the job.

Graeme Neate has identified the arguments which are likely to be put to the courts in relation to the valuation of the spiritual aspects of native title.⁴ There are two main arguments. Both attempt to apply concepts familiar in the area of freehold valuation to native title. The first argument concerns 'special value to the owner'. This term comes from acquisition of property statutes which provide that the dispossessed owner of land is entitled as compensation to the 'special value of property' to that owner. At first glance the concept appears to be adaptable to native title. Land has 'special value' to a native title holder. When being compensated, the native title holder should therefore get the freehold value of the land plus the 'special value' of the land to the native title holder. The jurisprudence on 'special value', however, demonstrates that the concept is in fact very limited. To claim 'special value', the owner must show that there is some advantage which only she or he can derive from the property. This is an objective exercise which the courts maintain has nothing to do with sentimental or emotional attachments to the land. The amount of compensation awarded cannot exceed the commercial value of the special advantage of the land. These limitations make it very difficult to adapt the concept to native title.

The second argument concerns 'solatium'. A solatium is a payment of money designed to make up for loss or inconvenience. Acquisition of land statutes commonly provide that residential home-owners are entitled to a solatium for the extra distress and inconvenience involved in leaving a home. The argument in respect of native title would be that the native title holder is entitled to the freehold value of the land plus a 'solatium' for their loss and inconvenience in losing native title. Again, however, solatium is a concept which has been developed specifically in relation to ordinary title. It is related to Western notions of home ownership and is directly tied to the market value of property. Acquisition of land statutes, for example, often define solatium as a percentage of market value - say 10%. European home ownership and market value are concepts which do not rest easily with native title.

Rejection of suggestions to date

The suggestions which have been made to date about the assessment of compensation for native title should be discarded. The lawyers and valuers who have considered the issue must be commended for their efforts. They have attempted to identify a starting point and have attempted to incorporate compensation for native title into a scheme of reference which is already familiar to us.

The very nature of the arguments made to date, however, means that they are flawed. The value of freehold title is not an appropriate starting-point for the assessment of compensation for native title. The value of freehold title is market value. There is no market for native title. Native title cannot be bought and sold. To try to apply principles of valuation to a situation which lacks the fundamental premise on which those principles are based is a mistake and will not work. To determine how compensation for native title should be assessed it is necessary to understand the essence of 'compensation'. It is necessary to identify for what purpose we compensate. According to the Oxford Shorter Dictionary, 'to compensate' means to 'make up for, make amends for, make equal return to...'. This is what compensation is all about.

In the context of the resumption of a house on freehold title, it is possible to 'make up for, make amends for, make equal return to' with the payment of money. There are many examples of home-owners not wishing to leave their homes. However, we are able to say, in the context of a society which uses money - rightly or wrongly - as its measure of value, that these home-owners are compensated by being able to take their payment of money, and their possessions, and to use these to create a new home elsewhere.

It would be a very different matter if the resumption of freehold title involved more than the taking of a homeowner's house and land. If the resumption of freehold title also involved the taking of all of the home-owner's possessions - the home-owner's photographs, letters, diaries and keepsakes, which had been collected over many years - then it would not be possible to compensate the home-owner by a payment of money. The home-owner would have been stripped of her history and her identity. A new house and land could be bought. Photographs, letters and diaries could not.

If it is necessary to incorporate native title into a Western scheme of reference, then the loss of native title is more akin to the resumption of a home-owner's possessions than the resumption of house and land. There are few photographs, diaries, keepsakes and the like which traditional owners can salvage when obliged to leave the land. The history, tradition and personal identity of Aboriginal people is not contained in things or in writings - it is contained in the land itself. This is the fundamental obstacle to compensating for native title. It is simply impossible to replace what has been taken away.

Some would argue that the impossibility of replacing native title means that native title should not be acquired, that land should not be taken from traditional owners. However, the argument being made in this paper assumes that the acquisition or impairment of native title has been declared necessary for a public benefit. In these circumstances, how are the native title holders to be compensated?

The secret to assessing compensation for native title is to get away from freehold valuations. The challenge is to find a way to 'make up for, make amends for, make equal return for' the loss of native title. The first step in meeting the challenge is to identify what is lost when native title is lost. The point has already been made that the loss of native title is more than the loss of land. Since *Mabo No.2* the courts have developed an outline of what native title is. Native title amounts to the rights and interests which indigenous people have by virtue of their traditional laws and customs. The loss of native title therefore amounts to the loss of the ability to exercise and enjoy traditional laws and customs. But more than this, it involves the loss of the ability to perpetuate traditional laws and customs - to continue tradition, to develop culture and to confirm (and sometimes find) personal identity.

What is also lost when native title is lost, and what is not emphasised enough in discussions on native title, is the ability to exercise responsibility for country. It is generally accepted that native title holders have special obligations to the land on which they live. The oft-quoted remark which attempts to explain this to Westerners is that of Blackburn J in the *Gove Land Rights* case to the effect that the Aboriginal clan belongs to the land, rather than the land belongs to the clan.⁵ Native title holders often make the point that their responsibilities to country can never be taken away. That even if native title is acquired or impaired, these responsibilities subsist.

Even though responsibilities to country subsist despite acquisition, it must be recognised that the acquisition of native title does hinder the shouldering of these responsibilities in practice. This is a loss which must be taken account of when determining compensation for native title. This is difficult for the Western mind-set to comprehend. The Western mind-set would conclude that the relief of a burden is good - that if someone is relieved of a burden, if they no longer have to exercise onerous responsibilities, then this is a benefit for which they should pay. Nevertheless, if there is to be true 'compensation' a way must be found of coping with this concept.

New approach

It has been established that the loss of native title involves the loss of the ability to continue traditional laws and customs and the loss of the ability to shoulder responsibilities for country. If our legal system even hopes to compensate for this loss, compensation for native title must cease to revolve around the value of freehold title and instead concentrate on two completely different things: maintenance of culture; and agreement.

Firstly, maintenance of culture. As identified above, the general rule for compensation in the Native Title Act, unaltered by the Native Title Amendment Bill and the Senate amendments to the Bill, is that compensation must be money. Provision is made for compensation to include the transfer of property or the provision of goods and services, but only if the claimant requests such and only if the body making the determination of compensation decides to include it. The presumption that compensation for native title should be money should be discarded. To compensate means to 'make up for, make amends for'. To compensate for the loss of native title means to compensate for the loss of the ability to continue traditional laws

and customs and the loss of the ability to shoulder responsibility for country. This cannot be achieved by payment of a lump sum based on freehold value. Compensation can be achieved by working out how the native title holders can continue to exercise their traditional laws and customs and by devising a way that native title holders can continue to shoulder their responsibilities.

To take a practical example, if a portion of land is being resumed for a public purpose, and native title will be acquired in the process, the native title holders might say that in the circumstances they could continue their traditional laws and customs and continue to shoulder responsibility for country by:

- continuing to have access to their dreaming and other historical sites;
- bearing responsibility for the preservation of these sites;
- educating their own people and others about the value of these sites and of the value of their culture in general;
- being involved in the new use of the land - by participating in decision-making processes and employment opportunities.

It is these things which will approach 'compensation' for native title. Some of these things must be costed and converted into money terms. However, the point is that the central feature of the exercise is not the payment of a lump sum based on freehold value. The object of the exercise is to identify how, practically, the native title holders can continue their traditional laws and customs and continue to shoulder responsibility for country. Once this is accomplished, then the costing exercise can begin. In many instances, as a consideration of the above list demonstrates, the cost will be small.

The second element of the new way of compensating for native title is agreement. Only the native title holders can identify how to continue their traditional laws and customs and how to shoulder their responsibility for country in the circumstances of an acquisition or impairment of native title. The government body seeking to acquire or impair native title is the only body in a position to defend the public purpose for which the acquisition is required. The native title holders and the government body are therefore best able to work out how, practically, the loss of native title can be compensated. Courts, lawyers and valuers are less able to work out compensation. They are removed from the situation and are often fettered by their past way of doing things and penchant for analogy.

3. Conclusions

The suggestions made in this paper are hardly radical. Negotiated agreements are already popular in the native title arena. The new way of compensating does, however, require the adoption of a new mind-set. It requires putting money in the background, not in the foreground, of any negotiations.

The Crescent Head compensation agreement was a landmark agreement settled a little over one year ago. Mary Lou Buck representing the Dhunghatti people said at the time:

We shall spend the compensation funds to increase the quality of life for all Dhunghatti people. We want to revive our language, through the education system; improve housing; build a cultural centre; maintain our cultural sites. We are looking for support from the Kempsey Shire Council in renaming some of our public streets and parks after our Dhunghatti ancestors.

Mary Lou Buck's ambitions are the elements of 'compensation'. These are the things which approach making up for, making amends for the loss of native title. However, the Crescent Head agreement was certainly not negotiated with these things in the foreground. The Crescent Head agreement was negotiated on the basis of monetary calculations founded on the 'freehold plus something' argument described above. If maintenance of culture was in the foreground, it is possible that agreement may have been more easily reached and that the parties and the public may have more easily understood what the agreement was trying to achieve.⁶

It is true that striving to maintain culture through agreement is much more difficult than applying a 'freehold minus something' or 'freehold plus something' formula. It is very easy to make lump sum payments for the acquisition or impairment of native title. Nonetheless, if there is to be 'compensation' for native title, according to the true meaning of that term, payment of a lump sum will not suffice. Instead, ways must be found for native title holders to continue their traditional laws and customs and to continue to exercise responsibility for country.

The proposed new way of compensating does not import a phenomenal financial burden. In some cases the maintenance of culture may be inexpensive. It may require no more than a change in attitude - for example, enabling Aboriginal people rather than government bodies to take responsibility for the preservation of sites. In other cases, the cost of maintaining culture may be high. Education, training and cultural programs do cost money. The point is that maintenance of culture is the goal of the compensation exercise, not the payment of a lump sum.

Importantly, the proposals made in this paper invite those involved in the process of compensation to look in a new direction. A lump sum payment of compensation involves looking backwards. The loss is assessed, a payment is made and that is the end of the matter. Concentrating on the maintenance of culture and agreement involves looking forwards. The object of compensation is to continue traditional laws and customs and to continue the exercise of responsibility for country. This will involve an ongoing state of affairs and is more likely to approach compensation in the true sense of the word.

In conclusion, 'compensation' for native title is only possible if the words 'compensation' and 'native title' are truly understood. To 'compensate' means to 'make up for, make amends for, make equal return to'. Native title involves the continuation of traditional laws and customs and the shouldering of responsibility for country. There cannot be compensation for native title if compensation revolves around the value of freehold title - whether compensation be something less than freehold or something more. There can only be compensation within the true meaning of that term if we reposition ourselves - if we look forwards and not backwards, and make compensation for the loss of native title dependant on two things - the maintenance of culture and agreement.

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² The material which has been written includes J Gobbo, 'Mabo - Compensation for extinguishment of native title', *Law Institute Journal*, December 1993, pp. 1163-9; A Turello, 'Extinguishment of Native Title and the constitutional requirement of just terms', *Aboriginal Law Bulletin*, vol. 3 no. 62, 1993, pp. 11-13; MA Stephenson, 'Compensation and valuation of native title' in MA Stephenson (ed), *Mabo: The Native Title Legislation*, UQP, 1995, pp.135-154; M Lavarch, Compensation for ancient rights, paper delivered at the Working with the Native Title Act conference, 17 June 1997; R Whipple, 'Assessing compensation under the provisions of the Native Title Act 1993 - part 1', *Native Title News*, vol. 3 no. 3, 1997, pp. 30-4; R Whipple, 'Assessing compensation under the provisions of the Native Title Act 1993 - part 2', *Native Title News*, vol. 3 no. 4, 1997, pp. 49-52; G Neate, Compensation for native title: Some legal issues, paper

delivered at Compensation for Native Title Workshop, 15 August 1997; J Sheehan, Indigenous property rights: Towards a valuation methodology, paper delivered at the New Horizons conference, 31 October 1997; J Altman, 'Compensation for native title: land rights lessons for an effective and fair regime', *Land, Rights, Laws*, Issues Paper no. 20, NTRU AIATSIS, April 1998 .

³ See Whipple, 'Assessing compensation ... part 1', *op. cit.*; Whipple, 'Assessing compensation ... part 2', *op. cit.*

⁴ Neat, *op. cit.*, pp. 59-71.

⁵ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 270-1.

⁶ The front-page headline of *The Australian* on October 10 1995, reporting the Crescent Head agreement, was 'Historic Mabo payout deal'. The article emphasised the amount of the compensation package. One line said 'the money will be spent on housing, education and culture'.