



AIATSIS

**AIATSIS Submission: Valuer
General's Policy – Compensation
for Cultural Loss Arising from
Compulsory Acquisition**

Kieren Murray and Dr Lisa Strelein

Contents

| | | |
|----|----------------------------------|---|
| 1. | About AIATSIS_____ | 2 |
| 2. | Executive Summary _____ | 2 |
| 3. | Recommendations _____ | 3 |
| 4. | Summary of Recommendations _____ | 8 |
| 5. | Reference list _____ | 8 |

1. About AIATSIS

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is Australia's premier national institute dedicated to telling the story of Aboriginal and Torres Strait Islander Peoples' knowledge, societies and cultures. We are the custodian of Australia's national collection of Aboriginal and Torres Strait Islander heritage materials and a publicly funded research agency. Subject to our founding Act¹, AIATSIS is also tasked with providing advice to government on Aboriginal and Torres Strait Islander cultures, heritage, native title, governance, land and water management. Following the *Mabo* decision in 1992 AIATSIS established the Native Title Research Unit (NTRU). Through the NTRU, AIATSIS seeks to promote the recognition, protection, and self-determination of the rights of Aboriginal and Torres Strait Islanders with respect to their lands and waters. We provide independent research and assessment of the impact of policy and legal developments. Our comments are based upon 29 years of research and practice by AIATSIS researchers in the native title area. We hope they will assist in the ongoing evaluation of this policy.

2. Executive Summary

AIATSIS welcomes the opportunity to comment on the NSW Valuer General's Policy – Compensation for Cultural Loss Arising from Compulsory Acquisition ('the Policy'). We were happy to note that recommendations made in our previous submission were considered and adopted in part. However, we would like to resubmit a number of those recommendations that were not adopted for your ongoing consideration. Before beginning we would like to reiterate that compulsory acquisition is at odds with the rights of Indigenous People to exercise Free, Prior and Informed Consent (FPIC) over developments on their lands.² Access to traditional lands underpins almost all of the rights of Indigenous people under international law, and is of particular importance to their ability to practice and teach traditions, customs, ceremonies and languages.

We are unchanged in our stance that wherever possible strong safeguards against compulsory acquisition should be in place, particularly over native title lands. And we would like to re-emphasise that cultural loss should be a head of compensation on just terms for any land held by traditional owners regardless of the nature of the title they possess over it. Where compulsory acquisition of native title lands does occur, valuation must be broad, generous and centre the perspective of Aboriginal and Torres Strait Islander People.³

¹ Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth).

² United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') arts 8(2)(b), 10.

³ Mia Stone, Dr Lisa Strelein & Kieren Murray, 'AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition' (21 August 2021).

In addition to the evaluation of cultural loss, exceptional weight should be given to the extreme inconvenience of compulsory acquisition to traditional owners who have already been through the native title process. Native title claims take a considerable amount of time, effort and resources, and revisiting the difficulties associated with that process imposes a burden that should not be shouldered by traditional owners. We understand active involvement from native title holders is a fundamental part of this process. We are also aware that it is not up to the Valuer General to decide on where the burden of proof lies in the case of compulsory acquisition. However, it is our view that a positive determination that native title exists is proof of a very high level of cultural connection, and therefore, loss. Compensation should be awarded accordingly.

In our previous submission, we also posited that treating and referring to native title holders as claimants in an ongoing capacity was incorrect and disrespectful. It suggests the policy is largely unsympathetic to the difficulty of obtaining a native title determination and ignores the substantial hardship associated with revisiting these matters. On this note, we would like to reiterate the importance of taking a culturally-sensitive, trauma-informed approach to compensation valuation. One that is open to merits and judicial review, and beneficially renegotiable as the jurisprudence develops.

In putting together this submission we have removed recommendations that have been flagged as a matter for government and not the Valuer General. However, we maintain our previous submissions to the review of this policy should be given significant weight in further considerations. Finally, we thank you for your ongoing consultation.

3. Recommendations

Recommendation 1: That the approach taken by the Valuer General in assessing compensation for cultural loss take a positive native title determination as proof of cultural connection of the highest and most significant form.

The native title determination process is lengthy, costly, onerous and traumatic for traditional owners. Claimants wait, on average, six to seven years for a determination.⁴ Functions such as compulsory acquisition highlight the ongoing struggle for traditional owners, even once they have obtained a positive determination of native title. Compulsory acquisition in its own right is a colonising, dispossessing and disempowering act, likely to be traumatic for traditional owners. On top of this, native title holders are forced to revisit the difficulties associated with proving their connection their traditional cultural lands.

In our previous submission we recommended that the burden be on the acquiring authority to demonstrate that cultural loss is not of the highest and most significant form. We appreciate that this is not a matter for the Valuer General to decide upon. However, the evidence and the methodology used to interpret that evidence is entirely up to the

⁴ Australian Law Reform Commission, *Review of the Native Title Act 1993* (Discussion Paper, 2014) 56.

Valuer General and we believe it to be in the interests of fairness and justice to consider a positive native title determination as proof of cultural connection of the highest and most significant form. It therefore follows that cultural loss should be valued by that same framework.

This proposed methodology takes into consideration the extraordinarily involved, complex and time-consuming effort associated with compiling the evidentiary materials required for a native title claim. The restrictive manner s 223 of the *Native Title Act* (Cth) ('NTA') has been interpreted as well documented. Many submissions to the Australian Law Reform Commission's 2015 review of the NTA⁵ criticised the 'unnecessary technicality and legalism' of the process.⁶ In our submission to that review we noted that 'much of this work is unwarranted and costly'.⁷ The standard of proof that has developed through the native title jurisprudence has even been criticised by the United Nations as failing to meet human rights standards.⁸ Reimposing that burden, perhaps to higher degree, is entirely unnecessary and should be avoided where possible.

Options for reducing burdens have been extensively canvassed in relation to the requirements of s 223 of the NTA and could be adapted in this context.⁹ For example, Justice French's proposal in 2008 to introduce a presumption of continuity¹⁰ could be transposed in this context by applying a presumption that cultural loss is of the highest and most significant form (being that which would attract the highest level of compensation per the proposed process).¹¹ In the context of s 223, such a presumption has been advocated by many in the sector as more appropriately distributing the burden and helping to ameliorate the injustice of requiring native title holders to continually prove their connection to Country.¹²

⁵ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, April 2015).

⁶ Goldfields Land and Sea Council, Submission No 22 to Australian Law Reform Commission, *Inquiry into the Native Title Act 1993 (Cth)* (20 May 2014) 5.

⁷ Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission No 70 to Australian Law Reform Commission, *Inquiry into the Native Title Act 1993 (Cth)* (18 February 2015) 14.

⁸ In 2005 the United Nations Committee on the Elimination of Racial Discrimination recommended 'that [Australia] review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of Indigenous peoples to their land': United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (14 April 2005) [17].

⁹ Options were extensively canvassed in a 2014 enquiry by the Australian Law Reform Commission and have been the subject of several private members Bills: Lisa Strelein, 'Reforming the Requirements of Proof: The Australian Law Reform Commission's Native Title Inquiry' (2014) 8(10) *Indigenous Law Bulletin* 6.

¹⁰ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, April 2015).

¹¹ Review 36.

¹² Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, April 2015).

Recommendation 2: That the amount of compensation determined by the Valuer General be independently reviewable by an appropriate body.

AIATSIS is pleased to note the explicit inclusion of the availability to challenge the Valuer General's decision in the Land and Environment Court. As we noted in our previous submission, an independent right of review is crucial to ameliorating power imbalances between parties. We would like to emphasise the importance of avoiding the pitfalls of the review mechanism currently operating with respect to future acts under the NTA. Under that scheme, of the thousands of s 39 applications heard by the National Native Title Tribunal (NNTT) only one has been resolved in favour of the native title holder. This emphasises the importance that native title holders are empowered to effectively negotiate within the premise of a strong and independent review framework.

We would also like to remind this review that, because compulsory acquisition is a future act, it is reviewable under the Federal Court's jurisdiction. The Federal Court already hears claims for compensation for acts that diminish or impair native title rights and interests.¹³ AIATSIS suggests the Federal Court may be more appropriately placed to review decisions made with respect to compensation for cultural loss caused by compulsory acquisition.

Recommendation 3: That cultural loss be understood holistically from the perspective of the traditional owner group.

AIATSIS welcomes the ongoing commitment to an approach evaluating compensation for cultural loss whereby 'the various forms of cultural loss and sub-forms therein are considered as a cumulative whole rather than individually.'¹⁴ Cultural loss must be understood from the perspective of the group experiencing the loss based on a holistic view of how the loss impacts culture, identity, knowledge, family and community connections, physical and emotional well-being, access to places and livelihoods.

Again, we caution against an overreliance on the breakdown of cultural loss into various categories and sub-categories as they appear in section 1.4 of the draft policy. This approach risks over-particularising the rights and interests of native title holders, creating the erroneous impression that they are capable of disaggregation.¹⁵ For Aboriginal and Torres Strait Islander People, connection to country is something to be understood in a holistic manner. This has been acknowledged by the High Court in *Akiba*, where it was affirmed that native title rights and interests should not be severed or cut down into incidents.¹⁶ Additionally, a majority of the High Court in *Griffiths* noted

¹³ Native Title Act 1993 (Cth) s 51(1).

¹⁴ Review 34; Policy 6.

¹⁵ Mia Stone, Dr Lisa Strelein & Kieren Murray, 'AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition' (21 August 2021).

¹⁶ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209 [26].

that 'there was no dispute that the assessment of the effects of the acts causing cultural loss could not be divorced from the content of the traditional laws and customs acknowledged and observed by the claim group.'¹⁷ Under the current policy framework, the Land and Environment Court would be bound by the logic of the High Court if the Valuer General's decision is challenged in that forum. It follows that the Valuer General would apply this logic consistently.

Recommendation 4: That the assessment of compensation for cultural loss be conducted by an Aboriginal or Torres Strait Islander person, or on the advice of Aboriginal and Torres Strait Islander advisers.

AIATSIS understands that the Valuer General is tasked with determining compensation for the compulsory acquisition of land under s 7A of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). We would, however, respectfully like to question the level of cultural competency the Valuer General has to undertake the assessment of cultural loss, and consider structural reforms that incorporate Indigenous knowledge and decision-making in this area. Nowhere in part 1.5 of the policy is there reference to potential Indigenous advisory other than the hearing of evidence from the 'claimant'.

As we submitted previously, the process and outcome of a compensation determination of this kind must recognise that Aboriginal and Torres Strait Islander people are the experts of their own culture. The significance of particular acts on culture may be virtually impossible for a non-Indigenous person to comprehend.¹⁸ While Aboriginal and Torres Strait Islander cultures are diverse, an Aboriginal or Torres Strait Islander person is much better placed to provide appropriate processes and assessment of the quantum of damages for cultural loss.¹⁹

The unique authority of Aboriginal and Torres Strait Islander people on questions of culture is well-recognised in the health space, where Identified Positions for Aboriginal and Torres Strait Islander health workers are commonplace not only as a measure to address historic and ongoing disadvantage in employment opportunities, but also in recognition of the unique role they play in ensuring healthcare is culturally safe, appropriate and holistic.²⁰ Again, to reiterate, we are aware of that the Valuer General being non-Indigenous is not a matter for this review. However, it is imperative that the assessment of compensation for cultural loss be conducted with the advice of Aboriginal and Torres Strait Islander advisers.

¹⁷ *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 [158] ('Griffiths').

¹⁸ Mia Stone, Dr Lisa Strelein & Kieren Murray, 'AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition' (21 August 2021).

¹⁹ Mia Stone, Dr Lisa Strelein & Kieren Murray, 'AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition' (21 August 2021).

²⁰ See Stephanie M Topp et al., 'Unique Knowledge, Unique Skills, Unique Role: Aboriginal and Torres Strait Islander Health Workers in Queensland, Australia' [2021] *BMJ Global Health* 1.

Additionally, structural reform and education is essential to improve the cultural competency of those involved in the compulsory acquisition and valuation process. Within the legal profession, it has been noted that:

[T]here has been very little attention paid to the cultural competency of lawyers ... Australian legal professional standards do not prescribe Indigenous cultural competency as a learning outcome for legal education nor as essential content of courses for admission as a legal practitioner.²¹

Similar considerations are likely to apply to the valuation sector, undermining the ability for those involved to appropriately and comprehensively be involved in decision-making in relation to compensation for cultural loss. Broader structural reform should be considered to ensure the NSW Valuer General's office is equipped to deal with cultural loss compensation.

Recommendation 5: That consideration be given to the provision of non-monetary benefits, if requested by the traditional owner group, as contemplated by s 37A of the Act.

AIATSIS is pleased that the draft policy makes reference to non-monetary compensation under part 1.5. Noting this, we recommend that consideration be given to a broad range of benefits as part of a comprehensive settlement package. Consistent with UNDRIP art 28(2), return of land should be the first consideration for compensation for loss of traditional lands. Where it may be possible for lands to be returned after the compulsory acquisition has occurred, this should always be built into any comprehensive settlement. We know this is possible, as it has already occurred with respect to a number of mining leases in the Northern Territory.²²

Additionally, depending on the use to which the land will be put, there should be scope for native title holders to share in income generated and receive other benefits that stem from the use of the land for that purpose. Some US settlement agreements provide for a portion of mining or other resource royalties to be paid to the traditional owners of the land on which the mine is located.²³ PBCs may also wish to be considered for preferential employment opportunities on the site, where relevant. Consideration should also be given to the provision of social benefits that may be required in communities where compulsory acquisition is taking place. We would like to resubmit that any non-monetary

²¹ Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals in Australia' (2013) 12(1) *The International Education Journal: Comparative Perspectives* 226, 229-30.

²² <https://www.riotinto.com/sustainability/environment/land>

²³ See, eg, *Alaska Native Claims Settlement Act 1971* (US) s 9; *Crow Boundary Settlement Act 1994* (US) s 1776D(b)).

benefits should be agreed in consultation with traditional owners and should not detract from the provision of substantial monetary compensation.²⁴

4. Summary of Recommendations

Recommendation 1: That the approach taken by the Valuer General in assessing compensation for cultural loss take a positive native title determination as proof of cultural connection of the highest and most significant form.

Recommendation 2: That the amount of compensation determined by the Valuer General be independently reviewable by an appropriate body.

Recommendation 3: That cultural loss be understood holistically from the perspective of the traditional owner group.

Recommendation 4: That the assessment of compensation for cultural loss be conducted by an Aboriginal or Torres Strait Islander person, or on the advice of Aboriginal and Torres Strait Islander advisers.

Recommendation 5: That consideration be given to the provision of non-monetary benefits, if requested by the traditional owner group, as contemplated by s 37A of the Act.

5. Reference list

Articles, reports, papers and books

Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, April 2015)

Australian Law Reform Commission, *Review of the Native Title Act 1993* (Discussion Paper, 2014)

Lisa Strelein, 'Reforming the Requirements of Proof: The Australian Law Reform Commission's Native Title Inquiry' (2014) 8(10) *Indigenous Law Bulletin* 6

Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals in Australia' (2013) 12(1) *The International Education Journal: Comparative Perspectives* 226

Stephanie M Topp et al., 'Unique Knowledge, Unique Skills, Unique Role: Aboriginal and Torres Strait Islander Health Workers in Queensland, Australia' [2021] *BMJ Global Health* 1

²⁴ Mia Stone, Dr Lisa Strelein & Kieren Murray, 'AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition' (21 August 2021).

Tran Tran et al., 'Comprehensive Settlement: Heads of Agreement' (Toolkit, August 2021) (in press)

Submissions to parliamentary inquiries

Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission No 70 to Australian Law Reform Commission, *Inquiry into the Native Title Act 1993 (Cth)* (18 February 2015)

Goldfields Land and Sea Council, Submission No 22 to Australian Law Reform Commission, *Inquiry into the Native Title Act 1993 (Cth)* (20 May 2014)

Mia Stone, Dr Lisa Strelein & Kieren Murray, 'AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition' (21 August 2021)

Internet materials

<https://www.riotinto.com/sustainability/environment/land>

International instruments

United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (14 April 2005)

United Nations Declaration on the Rights of Indigenous People, GA Res 61/295, UN GAOR, UN Doc A/RES/61/295 (13 September 2007)

Cases and legislation

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) 250 CLR 209

Alaska Native Claims Settlement Act 1971 (US)

Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)

Crow Boundary Settlement Act 1994 (US)

Native Title Act 1993 (Cth)

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