



AIATSIS

**AIATSIS Submission: Review of
Forms of Cultural Loss and the
Process and Method for
Quantifying Compensation for
Compulsory Acquisition**

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1. About AIATSIS

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is Australia's premier national institute dedicated to 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 which provides advice to government on Aboriginal and Torres Strait Islander culture and heritage including native title, land and water management and Indigenous governance. The AIATSIS Native Title Research Unit (NTRU) was established in 1992 following the *Mabo* decision. Through the NTRU, AIATSIS seeks to promote the recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples to their lands and waters and self-determination. 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 developing the NSW Valuer General's policy for quantifying compensation for compulsory acquisition.

2. Executive Summary

AIATSIS welcomes the opportunity to comment on the NSW Valuer General's Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition ('Review').

In responding to the policy proposed by the Review, the starting point must be an acknowledgment of the rights of Indigenous peoples to enjoyment of the highest standards of human rights, as outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Compulsory acquisition is at odds with the rights of Indigenous peoples to Free, Prior and Informed Consent (FPIC), their lands and their cultures.¹ Access to traditional lands underpins almost all of the rights of Indigenous peoples under international law, including the rights to practice and teach traditions, customs, ceremonies and languages.

For Aboriginal and Torres Strait Islander peoples, land is not a fungible commodity that can be replaced, it is a spiritual and cultural connection; a reciprocal relationship of rights and responsibilities that is integral to collective and individual identity. As described by senior women from the Fitzroy Valley who provided input into Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar AO's *Wiyi Yani U Thangani* (Women's Voices) Report:

All our ancestors, all our spirits are people still living in the country so when we talk about being on country and why it is important for woman to be on country, it is so that we can

¹ UNDRIP arts 8(2)(b), 10.

be in touch with ourselves and our non-human relatives and our connection to our ancestors and their spirits that still dwell in all of these places. And we remember them. We come back and we speak to them and when we come to that place we talk in that language to say we are here, you can hear us, you can see us, we have come back, we haven't forgotten you.²

Our response to the Review emphasises the need for strong safeguards against the compulsory acquisition of Indigenous lands and the return of lands wherever possible. While our comments here relate primarily to acquisition of native title lands, we would 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.

Where compulsory acquisition of native title lands occurs, valuation must be broad, generous and driven by Aboriginal and Torres Strait Islander perspectives. In this regard, it is important to respect Indigenous law as 'law' and take seriously the values and worldviews that inform Aboriginal and Torres Strait Islander peoples' assessment of the impact that acquiring acts may have on their culture.³ Here we define culture as the knowledge, laws, philosophies, expressions, art and creativity, and connections to people and places that are transmitted from generation to generation while adapting to change; culture is the interactions that define a society and provide them with a sense of continuity and identity.⁴

Relatedly, it is essential that the fragmentation of cultural loss into component elements does not detract from a holistic assessment of the impact of acquisition on culture. The apparent limitations imposed by the requirement in s 56 of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* ('Act') to determine compensation on the basis of 'market value' are acknowledged. Consideration should be given to removing or amending this requirement in light of what the Review correctly notes as the problematic nature of evaluating on a market basis, something for which there is no market.⁵ Nevertheless, the conclusion 'that the compensation amount be determined intuitively'⁶ is unsatisfactory, given this is precisely what is sought to be avoided.

Our recommendations emphasise that additional burdens should not be placed on native title holders to respond to notice of an intention to compulsorily acquire their land by way of a requirement to produce extensive evidence of cultural connection to land and waters. While the involvement of traditional owners is essential to ensure that cultural loss is not undervalued, efforts should be made to reduce the burden, including through

² Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices)* (Report, October 2020) 333.

³ Val Napoleon and Hadley Friedland, 'Indigenous Legal Traditions: Roots to Renaissance' in Markus Dubber and Tatjana Hörnle (eds), *Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 240.

⁴ *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006).

⁵ Review 21.

⁶ Review 35.

appropriate resourcing for negotiations. We note with concern the use of the language of ‘claimant’ throughout the policy to refer to traditional owners facing compulsory acquisition of their lands. This language incorrectly implies that the impetus and burden for securing just compensation rests with traditional owners.

Finally, it is imperative that any process be culturally sensitive and trauma-informed, open to merits and judicial review, and (beneficially) renegotiable as the jurisprudence evolves.

3. Process for the determination of compensation

Onus and burden of proof

Recommendation 1: That the burden be on the acquiring authority to demonstrate that cultural loss is not of the highest and most significant form.

The proposed process for the determination of compensation contemplates that during the Proposed Acquisition Notice (PAN) period, native title holders will prepare and lodge a claim for compensation identifying the forms of cultural loss suffered, nominating the amount of compensation sought and supplying detailed supporting evidence.⁷

This is extraordinarily involved, complex and time-consuming. The evidentiary materials contemplated – affidavits, on-country interviews, videos, artwork, historical documents and other materials – are akin to the kinds of evidence required to prove connection in native title determination proceedings. This evidence can take years to gather and document. While existing connection material may be available to draw upon in many cases, limited or no material may be available if the affected native title holders have not yet had a determination or if native title was determined by consent. In any case, as the material is directed not merely to the existence of connection but to the depth of that connection, the burden is likely to be even greater than that for native title proceedings.

The incredible burden placed on traditional owners as a result of the restrictive manner in which s 223 of the *Native Title Act 1993 (Cth)* (‘NTA’) has been interpreted is well-documented. Many submissions to the Australian Law Reform Commission’s 2015 review of the NTA⁸ criticised the ‘unnecessary technicality and legalism’ of the process.⁹ In our submission to that review we noted that ‘much of this work is unwarranted and costly’.¹⁰

⁷ Review 31.

⁸ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, April 2015).

⁹ 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.

¹⁰ 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.

It is imperative that the level of technicality and standard of burden of proof that has accompanied native title determination proceedings be avoided in the context of entitlements to compensation for the compulsory acquisition of native title lands. This is particularly so where the need to produce such evidence is initiated by state parties. The high standard of proof that has developed through the native title jurisprudence has been criticised by the United Nations as failing to meet human rights standards.¹¹ Consistent with the beneficial purpose for which the NTA was intended, the burden on native title holders to prove the impact that acquisition will have on their culture should be minimised.

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.¹² For example, Justice French's proposal in 2008 to introduce a presumption of continuity¹³ 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).¹⁴ 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 gross injustice of requiring native title holders to prove their connection to Country.¹⁵ A reversal of the burden of proof (such that the burden would be on acquiring authorities to demonstrate why the highest level of compensation should not be awarded) would be welcomed by AIATSIS, provided the policy framework established a climate of willingness to reach agreement on the part of acquiring authority and government parties, noting that:

any reversal of the onus of proof that becomes contested by the States, rather than utilised to facilitate consent agreements, could ... result in native title groups having to answer the rebuttable [presumption] in similar terms to the current burden of proving connection.¹⁶

¹¹ 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].

¹² 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.

¹³ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, April 2015).

¹⁴ Review 36.

¹⁵ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, April 2015).

¹⁶ 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) 34.

Evidence-gathering

Recommendation 2: That the negotiation and PAN periods appropriately reflect the length and complexity of the evidence-gathering and negotiation process.

AIATSIS considers that the total period of 270 days to negotiate (comprised of an initial 180 days, followed by a further 90 days after the PAN notice is served) does not appropriately reflect the complexity of the task. The negotiation period proposed is the same as that for regular acquisition processes.¹⁷ However, the process is vastly different. In addition to a market valuation of the land, substantial documentation of culture and connection to Country is contemplated. This requires considerably more time to gather and prepare the required materials as well as negotiate. The timeframes indicated are particularly short given that it is contemplated that a s 39 form will only be prepared and lodged during the PAN period.¹⁸

Native title compensation proceedings can be exceedingly lengthy. The Ngaliwurru and Nungali peoples who received compensation in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 ('Griffiths') first lodged their claim in 2011, but did not receive a determination of compensation until 2019. Other compensation claims are still yet to be heard, despite the process commencing as early as 2018. Central Desert Native Title Services has noted the labour-intensive process required to research claims.¹⁹

While much of the delay involved in native title and compensation cases is unnecessary, it is important at the same time not to place undue time pressures on native title holders. Acquiring authorities must allow sufficient time for Indigenous decision-making and consultation,²⁰ and recognise that communities may have other commitments, for example, cultural obligations and sorry business, that disrupt rigid timelines. Given that the Act prescribes only minimum negotiation and notice periods, there should be no barrier to increasing this as a matter of policy and practice in cases involving the compulsory acquisition of native title lands, in recognition of the substantially greater complexity involved in determining an adequate amount of compensation in these instances. One option would be to provide that the 90-day PAN period does not commence until all evidence-gathering has concluded.

¹⁷ A minimum of six months for negotiation is prescribed by s 10A of the Act, while s 13 mandates a period of at least 90 days between the serving of the PAN and the compulsory acquisition of the land.

¹⁸ Review 31.

¹⁹ Michael Allbrook and David Reger, 'Compensation Claims Post-Griffiths', AIATSIS Working Paper (in press) 1.

²⁰ See Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice Flexible and Sustainable Agreement Making* (Guidelines, August 2009) cl 44.

Recommendation 3: That native title holders be appropriately resourced to negotiate.

Native title holders must be appropriately resourced to negotiate in the event of a proposed compulsory acquisition of their native title lands. As noted above, the proposed process is extremely burdensome and time-consuming. Without appropriate resourcing, native title holders are unlikely to be able to negotiate effectively. This is already a significant issue in the native title system. In an earlier report on the *Native Title Amendment Bill 2012 (Cth)*, submissions highlighted the need for proper resourcing for claimants during the process.²¹

The need for resourcing is even greater in the context of compulsory acquisition where the acquiring authority has directly imposed a burden. This is recognised in the Act and related policy documents, which provide that the acquiring authority will pay for landowners' reasonably incurred legal and valuation fees.²² It is unclear whether this would extend to cover payments to native title holders directly for their time and expertise in gathering cultural evidence. Although native title holders may wish to engage private lawyers or Native Title Representative Body and Native Title Service Provider (NTRB/SP) lawyers to assist in the evidence-gathering process, significant time and expertise is required of native title holders as only they can speak to their culture and connection to Country. This is in contrast to standard compulsory acquisition in which valuation and other legal tasks can generally be almost entirely outsourced. It may in any case be difficult to engage NTRB/SP lawyers for this purpose as there may be limited time and funding available and competing pressures for claim-based activities, particularly from the Federal Court.²³

In Canada, funding is provided for First Nations communities to negotiate comprehensive settlement agreements with Canada and British Columbia. Since 2018, this funding has been non-repayable.²⁴ This is important as previously funding was provided at least partly on a loan-basis, indebting many First Nations communities to the colonial governments they were negotiating with.²⁵ Funding is also available to traditional owner groups negotiating Treaty of Waitangi claims in New Zealand.²⁶ Generous funding

²¹ Carolyn Tan, In-house Legal Counsel for Yamatji Marlpa Aboriginal Corporation, told the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs: 'Because we have to go through all these levels of proof, we need a level of funding for this sort of research that we have to do to run claims. From the Yamatji Marlpa point of view, we would not probably survive as a representative body if not for funding from other sources other than FaHCSIA such as money from proponents et cetera.' Transcript of Evidence (Sydney, 8 February 2013) 30.

²² *Land Acquisition (Just Terms Compensation) Act 1991 (NSW) s 59*; NSW Government, *Minimum Negotiation Period for Acquisition of Land (Guidelines)*, July 2019) 5.

²³ Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (Discussion Paper, June 2013).

²⁴ British Columbia Treaty Commission, *Annual Report 2020* (Report, 2020) 51.

²⁵ *Ibid* 52.

²⁶ New Zealand Government, 'Funding' (Web Page) < <https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/funding/>>.

arrangements should be provided to traditional owners and/or representatives of their choosing to support them to meet evidentiary demands under the proposed process.

Recommendation 4: That negotiations be culturally-sensitive and trauma-informed.

Elsewhere, we have argued that the (de)colonisation project does not start or end but rather is judged through distinct choices.²⁷ Compulsory acquisition is a colonising, dispossessing and disempowering act likely to be hugely traumatising for traditional owners. The intergenerational trauma experienced by Aboriginal and Torres Strait Islander peoples is compounded by the divisive, distressing and emotionally exhausting nature of the native title legal process,²⁸ which can take years to decades to reach determination. Despite these challenges, many native title holders persist in the process of seeking a determination, viewing native title as a path to healing from the trauma occasioned by colonisation.²⁹ For land to be compulsorily acquired after such an arduous process opens up these wounds and inflicts fresh ones.

Against the backdrop of this context, negotiations in relation to compulsory acquisition must be culturally-sensitive and trauma-informed. This involves prioritising the physical, psychological and emotional safety of traditional owners throughout the process.³⁰ Evidence of cultural impact may involve culturally sensitive or gender-restricted information, and it is imperative that cultural protocols are followed in the handling of such materials. Best practice negotiation protocols should also be followed.³¹ Existing support options, including the Property Acquisition Support Line,³² are grossly inadequate and inappropriate in the context of cultural loss.

While incommensurable, some approaches considered by the Review go a ways towards working through the specific impacts of the relevant act on the Indigenous community. For example, the Gift Lake Métis Settlement case study notes that the

²⁷ Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving Awa from "Fitting In" to Creating a Decolonized Space' (2013) 18(1) *Review of Constitutional Studies* 19.

²⁸ This has been noted by AIATSIS in past submissions, reflecting the sentiments of many traditional owners. See, eg, Lisa Strelein and Cedric Hassing, Submission to Australian Human Rights Commission, *Wiyi Yani U Thangani (Aboriginal and Torres Strait Islander Women's Voices)* (30 May 2019). Nolan Hunter, Bardi man and former CEO of the Kimberley Land Council notes in the native title compensation context that 'like native title, the process can be quite traumatic for people': Gartry, Laura, 'Garma: Native Title Compensation Payouts are Likely to Cost Billions of Dollars — So How Does it Work?', ABC News (online, 7 August 2019) <<https://www.abc.net.au/news/2019-08-07/cultural-loss-payouts-likely-to-cost-billions-how-does-it-work/11389052>>.

²⁹ Lisa Strelein and Cedric Hassing, Submission to Australian Human Rights Commission, *Wiyi Yani U Thangani (Aboriginal and Torres Strait Islander Women's Voices)* (30 May 2019) 6.

³⁰ Cedric Hassing and Cleonie Quayle, 'Trauma informed practice: Working with Communities affected by Intergenerational Trauma and Managing Vicarious Trauma' (2019) 1 *Native Title Newsletter* 15.

³¹ For example, Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice Flexible and Sustainable Agreement Making* (Guidelines, August 2009).

³² See NSW Government, 'Property Acquisition Support Line' (Fact Sheet) <https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/property_acquisition_support_line_residents_and_tenants_factsheet.pdf>.

respondent company based their valuation for impact on traditional knowledge on the cost of holding a one-week cultural camp once a year.³³ Acquiring authorities should consider, in consultation with communities, options for mitigating the specific impacts of the acquisition, in addition to financial compensation.

Merits review

Recommendation 5: That a decision to compulsorily acquire native title lands be independently reviewable against strict criteria.

The 'public purposes', for which land may be acquired under the Act, are not well defined.³⁴ In accordance with international best practice, there should be a high burden on the acquiring authority to show cause for the acquisition of native title land.

As noted in the Review, the New Zealand government 'endeavours not to acquire Maori land where possible'.³⁵ Governments and acquiring authorities in Australia should, at a minimum, make a similar commitment. Many US and Canadian Settlement Agreements go further, making explicit the exceptional circumstances in which Indigenous land may be compulsorily acquired. Under the Yekooche Agreement between Canada and the Yekooche First Nation, acquiring authorities must demonstrate that 'there is no other reasonably feasible alternative land to expropriate'.³⁶ A similar provision is contained in the *(Maine) Indian Claims Settlement Act 1979 (US)*, which further provides that in determining whether a reasonably feasible alternative exists, consideration must be given to 'cost, technical feasibility and environmental and social impact of the available alternatives'.³⁷ These principles are reflected in the resettlement policies of several major world banks, including the Inter-American Development Bank, which provides that:

When a large number of people or a significant portion of the affected community would be subject to relocation and/or impacts affect assets and values that are difficult to quantify and to compensate, after all other options have been explored, the alternative of not going ahead with the project should be given serious consideration.³⁸

The satisfaction of these standards should be subject to merits and/or judicial review.

Native title is a lengthy, costly, onerous and traumatic process. Claimants wait, on average, six to seven years for a determination.³⁹ Even so, many note that determination

³³ Review 16.

³⁴ See generally, L Strelein, 2008, 'Compulsory Acquisition powers: Griffiths v Minister for Lands Planning and Environment [2008] HCA (15 May 2008)' [2008] *Native Title Newsletter*

³⁵ Review 10.

³⁶ Yekooche Agreement cls 47-50.

³⁷ *(Maine) Indian Claims Settlement Act 1979 (US)* § 6205(3).

³⁸ Inter-American Development Bank, 'Involuntary Resettlement' (Web Page) <<https://www.iadb.org/en/about-us/about-us-7>>.

³⁹ Australian Law Reform Commission, *Review of the Native Title Act 1993* (Discussion Paper, 2014) 56.

is just the start of a long struggle for self-determination and recognition.⁴⁰ Every effort should be made to avoid inflicting further trauma through the compulsory acquisition of these lands.

Recommendation 6: That the amount of compensation determined by the Valuer General be independently reviewable by an appropriate body.

The proposed process does not refer to a right of review of the Valuer General's determination of the amount of compensation to be paid for cultural loss. While it appears that the review mechanism outlined in s 66 of the Act (which provides a right of appeal to the NSW Land and Environment Court) would apply, this should be explicitly confirmed.

An independent right of review is crucial to ameliorating power imbalances between parties. In this respect, the pitfalls of the review mechanism currently operating with respect to future acts under the NTA should be avoided. Under div 3, sub-div P of the NTA, native title holders have a 'right to negotiate' (RTN) with respect to certain proposed dealings over their land. If no agreement has been reached after six months, either party may apply to the National Native Title Tribunal (NNTT) for resolution.⁴¹ As many commentators have noted, this does not effectively encourage genuine negotiation.⁴² Of the thousands of s 39 applications that have been heard by the NNTT, as of 2009 only one had been resolved in the native title holders' favour.⁴³ While there are relevant differences between the schemes – most notably in the sense that native title holders risk receiving no benefit in the event of an adverse determination by the NNTT – it is nonetheless important that native title holders are empowered to effectively negotiate under the safeguard of a strong, independent right of review.

Consideration might also be given to nominating a more appropriate review body in the case of compensation for cultural loss arising out of the compulsory acquisition of native title lands. For example, the Federal Court of Australia (FCA) which hears claims for compensation for acts which diminish or impair native title rights and interests (NTA s 51(1)) and has relevant experience in this area. Although the Act is a NSW statute, compulsory acquisition constitutes a future act which is reviewable under the Federal Court's jurisdiction.

⁴⁰ Ibid 29.

⁴¹ NTA s 35.

⁴² See, eg, David Ritter, 'Black and Green Revisited: Understanding the Relationship between Indigenous and Environmental Political Formations' (2014) 6(2) *Land, Rights, Laws: Issues of Native Title* 1.

⁴³ Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title* 1.

4. Forms of cultural loss

Recommendation 7: That cultural loss be understood holistically from the perspective of the traditional owner group.

AIATSIS welcomes the commitment to an approach to 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’.⁴⁴ In doing so, we caution against an overreliance on the breakdown of cultural loss into various categories and sub-categories as enumerated on pages 33 and 34 of the Review. Such an approach risks carrying over into compensation what has been described in the determination space as the ‘over-particularisation’⁴⁵ of rights and interests, creating the erroneous impression that they are capable of disaggregation. For Aboriginal and Torres Strait Islander people, connection to Country is understood in a holistic manner. This has been acknowledged by the High Court in *Akiba*, in which it was affirmed that native title rights and interests should not be ‘severed or cut down’ into incidents.⁴⁶ As Brennan J has remarked ‘Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights’.⁴⁷

In addition, categories (despite the qualification that they are indicative rather than exhaustive) may undermine the ability for native title holders to describe the cultural impact of acquisition on their own terms. This is because categories risk creating, whether explicitly or implicitly, a pressure to describe such loss in a way that can more easily be understood by non-Indigenous evaluators. In relation to compensation for cultural loss, the majority in *Griffiths* noted 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’.⁴⁸ 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.

⁴⁴ Review 34.

⁴⁵ Sean Brennan, ‘Statutory Interpretation and Indigenous Property Rights’ (2010) 21 *Public Law Review* 239, 259.

⁴⁶ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209 [26].

⁴⁷ *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 358.

⁴⁸ *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 [158] (*Griffiths*).

5. Quantification of compensation

Recommendation 8: 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 recommends the Valuer General of NSW carefully consider whether it currently has an appropriate level of cultural competency to undertake the assessment of cultural loss and consider structural reforms that incorporate Indigenous knowledge and decision-making in this area. Both the process and outcome of a determination of the quantum of compensation to be paid to traditional owners for cultural loss in the event of compulsory acquisition of native title lands 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. This has been acknowledged in the New Zealand case of *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* where it was said that:

We start with the proposition that the meaning and sense of a Maori value should primarily be given by Maori ... Since section 6(e) [of the Resource Management Act 1991 (NZ)] does refer to Maori culture and traditions we have to be careful not to impose inappropriate 'Western' concepts. The appellants expressed concerns about that in various ways. Implicit in much of the appellants' evidence is the idea that each culture can only be explained in its own terms.⁴⁹

Similarly, in referring to the NTA – which in turn provides a pathway to the recognition of Aboriginal and Torres Strait Islander law and custom – the Act requires an appropriately deferential approach to the assessment of cultural impact. While Aboriginal and Torres Strait Islander culture is 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.

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.⁵⁰ It is therefore imperative 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.

⁴⁹ *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (NZEnvC) (NZ) [43], [46].

⁵⁰ 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.⁵¹

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 9: 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 recommends that consideration be given to offering a broader range of benefits as part of a comprehensive settlement package. Our *Comprehensive Settlement: Heads of Agreement* guide provides a detailed analysis of the kinds of benefits that parties might wish to consider in negotiating a comprehensive settlement agreement.⁵² Many benefits can be implemented even in the absence of title to land.

Consistent with UNDRIP Article 28(2), compensation for the loss of traditional lands should first be considered in the form of the return of lands. This may include lands that are unable to be claimed under native title. Indeed it may be possible for the Valuer General to require the State to justify why return of lands is not an option as part of a compensation settlement package.

For example, depending on the use to which the acquired land is to be put, there may be scope for native title holders to share in income generated, receive other benefits stemming from the use of the acquired land or be involved as joint venturers in the relevant enterprise. Some US settlement agreements, for example, 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.⁵³

PBCs may also wish to be considered for preferential employment opportunities on the site, where relevant. Employment opportunities can be facilitated through dedicated positions or exemptions from competitive tendering processes. Recent settlement

⁵¹ Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals in Australia' (2013) 12(1) *The International Education Journal: Comparative Perspectives* 226, 229-30.

⁵² Tran Tran et al., 'Comprehensive Settlement: Heads of Agreement' (Toolkit, August 2021) (in press).

⁵³ See, eg, *Alaska Native Claims Settlement Act 1971* (US) s 9; *Crow Boundary Settlement Act 1994* (US) s 1776D(b)).

agreements in Western Australia have included provision for both.⁵⁴ Employment opportunities can help to build capacity within a PBC and provide an independent source of income for groups to pursue social, cultural and economic development aspirations.

Consideration might also be had to the provision of social benefits, common in mining agreements. For example, the building and maintenance of cultural centres, offices, schools or housing.⁵⁵

Non-monetary benefits can increase the practical utility of compensation and may assist in the maintenance of culture and language in the event of compulsory acquisition. However, any non-monetary benefits should be agreed in consultation with the native title holding body, and should not detract from the provision of substantial monetary compensation.

Recommendation 10: That compensation be renegotiable in certain circumstances, where such renegotiation would lead to a better outcome for the traditional owner group.

The Review proposes that compensation will be in the form of ‘a single capital sum for all generations’.⁵⁶ AIATSIS considers that compensation should, in certain circumstances, be open to renegotiation in the future where this would benefit the native title holding party. This is because compensation and native title are evolving areas of law. While the policy set out in the Review determines a method for evaluating compensation on a comparative basis (impacts that will occasion greater or lesser compensation), it does not determine a quantitative baseline from which these comparisons might be made. With just one decision on compensation from the Courts so far, compensation is certainly not settled law. Indeed, the majority in *Griffiths* acknowledged that the price of cultural loss may evolve over time for reasons entirely external to the objective suffering experienced by the native title holding group:

Given that this is the first compensation determination to come before this Court, ... what, in the end, is required is a monetary figure arrived at as the result of a social judgment, made by the trial judge and monitored by appellate courts, of what, in the Australian community, at this time, is an appropriate award for what has been done; what is appropriate, fair or just.⁵⁷

A determination of native title may be varied or revoked under s 13 of the NTA where subsequent events mean the determination is no longer correct or where the interests of

⁵⁴ For example, under the South West Native Title Settlement Agreement, Western Australia has agreed to establish a ‘National Water Industry Traineeship Program’ for members of the claimant group (sch 10, cl 13.6). Noongar businesses are also exempt from competitive tendering processes for procurements of less than \$150, 000 (Annexure S). The Yamatji people have secured funding for the establishment of a water monitoring business under the Yamatji Nation Indigenous Land Use Agreement (cl 17).

⁵⁵ See Australian Government, *Working with Indigenous Communities: Leading Practice Sustainable Development Program for the Mining Industry* (Report, September 2016).

⁵⁶ Review 35.

⁵⁷ *Griffiths* [2019] HCA 7, 95 [237].

justice require the variation or revocation to be made. This provision has been used on several occasions to benefit native title holders. For example, the Court in *Yindjibarndi Aboriginal Corporation RNTBC v State of Western Australia*⁵⁸ modified the Yindjibarndi People's 2007 determination⁵⁹ to recognise exclusive possession where previously only non-exclusive rights and interests had been recognised. Justice Rares held that the variation was required in the interests of justice as a result of changes to the law since the initial determination.⁶⁰

Furthermore, that compensation be renegotiable in certain circumstances is consistent with practice in other areas of law. For example, the ATO Code of Settlement provides that tax settlements can be reopened in certain circumstances, such as where the ATO subsequently changes its view of the law on which the settlement was based and the change benefits the taxpayer.⁶¹

6. Summary of Recommendations

Recommendation 1: That the burden be on the acquiring authority to demonstrate that cultural loss is not of the highest and most significant form.

Recommendation 2: That the negotiation and PAN periods appropriately reflect the length and complexity of the evidence-gathering and negotiation process.

Recommendation 3: That native title holders be appropriately resourced to negotiate.

Recommendation 4: That negotiations be culturally-sensitive and trauma-informed.

Recommendation 5: That a decision to compulsorily acquire native title lands be independently reviewable against strict criteria.

Recommendation 6: That the amount of compensation determined by the Valuer General be independently reviewable by an appropriate body.

Recommendation 7: That cultural loss be understood holistically from the perspective of the traditional owner group.

Recommendation 8: 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.

⁵⁸ [2020] FCA 1416.

⁵⁹ *Moses v State of Western Australia* [2007] FCAFC 78.

⁶⁰ *Yindjibarndi Aboriginal Corporation RNTBC v State of Western Australia* [2020] FCA 1416 [60].

⁶¹ Australian Taxation Office, 'Practical Guide to the ATO Code of Settlement' (Web Page, 13 February 2017) < <https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Settlement/A-practical-guide-to-the-ATO-code-of-settlement/>>.

Recommendation 9: 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.

Recommendation 10: That compensation be renegotiable in certain circumstances, where such renegotiation would lead to a better outcome for the traditional owner group.

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