

Native Title Compensation Annotated Reference List

Policy making and compensation

Altman, J.C and Pollack, D.P, *Native title compensation: historic and policy perspectives for an effective and fair regime*, Centre for Aboriginal Economic Policy Research Discussion Paper No 152/1998, The Australian National University, Canberra, 1998.
<http://ntru.aiatsis.gov.au/ntpapers/ip20web.pdf>

This paper contains a discussion about policy making and land rights compensation. It seeks to clarify some of the ambiguities which have arisen under key Federal and Territory legislation in regards to compensation. It emphasises the need for policy makers to understand both the principles and implementation processes that underpin compensation regimes and be aware of existing differences between State and Territory legislation. The authors call for policy makers to strike a balance between Native Title aspirations and regional interests in order to produce a fair and effective compensation regime.

Models and methods for assessing compensation

Burke, Paul. 2002. [*'How can judges calculate native title compensation?'*](#), Discussion Paper Native Title Research Unit, AIATSIS, Canberra.

This paper makes an initial exploration of some possible principles for determining native title compensation. The author notes the problem of awarding compensation on 'just terms' given areas with the strongest native title are often land with a limited financial value. Principles which accommodate non-economic losses arising from loss of native title compensation are proposed and applied to a number of hypothetical examples. The author uses a series of compensation subheadings which address the possible emotional and cultural effects resulting from loss of native title. The author suggests these findings provide foundation for developing a compensation 'heads of damage'.

Campbell, David, 'Economic Issues in Valuation of and Compensation for Loss of Native Title Rights', *Land, Rights, Laws: Issues of Native Title*, vol.2, no.8, May 2000.
<http://ntru.aiatsis.gov.au/ntpapers/IPv2n8.pdf>

The paper discusses how economic analysis can further illuminate the nature of Native Title rights and interests and compensation. It highlights the ambiguity which exists as to whether the loss of cultural benefit should be always be included when determining the amount of compensation payable for loss of Native Title. The author offers alternate methods of valuing native title rights which incorporate the 'special rights and features of native title'. This is demonstrated through the use of a consumer interest model which shows the impact of the loss of Native Title and the choices available to the community based on its budget.

Humphrey, Chris, 'Compensation under the Native Title Act', *Murdoch University Electronic Journal of Law (E-Law)*, vol.5, no.1, 1998
<http://www.murdoch.edu.au/elaw/issues/v5n1/humph51.html>

This article contains a general summary on compensation entitlements under Federal, State and Territory land legislation. It outlines the tests Native Title holders must fulfill to gain compensation and the methods of valuation under the Acts. Flexible land valuation principles must be applied to ensure compensation assessments are based on both 'material' and 'non-material' factors. Discussion includes review of the compensation claim process and the right to negotiate procedure.

Lavarch, Michael and Riding, Allison, 'A New Way of Compensating: Maintenance of Culture through Agreement', *Land, Rights, Laws: Issues of Native Title*, no.21, April 1998

<http://ntru.aiatsis.gov.au/ntpapers/ip21web.pdf>

This paper explores existing models of compensation and offers a new approach that overcomes limitations in other models. The authors reject existing suggestions about the assessment of compensation for native title as it treats native title as a commodity with its own market value. They offer a western scheme of reference for understanding loss of native title which suggests resumption of a home-owner's possessions is more akin to loss of native title than loss of property. It also notes the failure to recognise a native title holder's responsibility to country, which still exists even when native title is impaired. It suggests compensation for native title should concentrate on maintenance of culture and agreement which would accommodate native title holder's responsibility to country.

Litchfield, John, 'Compensation for loss or impairment of Native Title rights and interests: an analysis of suggested approaches (Part I)', *Australian Mining and Petroleum Law Journal*, no.18, 1999.

This paper reviews the growing body of literature that discusses the various approaches to determining compensation for native title. It focuses on the *Native Title Act's* provisions for compensation on 'just terms'. The author discusses the court based process of awarding compensation. It notes the problems with awarding adequate compensation a situation exacerbated by a lack of legal precedent.

Litchfield, John, 'Compensation for loss or impairment of Native Title rights and interests: an analysis of suggested approaches (Part II)', *Australian Mining and Petroleum Law Journal*, no.19, 2000.

This paper expands on the information provided in the previous article. It considers the future development of compensation for native title, particularly the treatment of compensation in native title related agreements. It reviews the methods of calculating compensation for future acts, noting the greater opportunities for developing more creative and flexible ways to meet compensation entitlements under the agreement based model.

Mah, Daniel C.H, 'The National Native Title Tribunal: Compensation Issues – A Discussion Paper', *Murdoch University Electronic Journal of Law (E-Law)*, vol.2, no.1, 1995

<http://www.murdoch.edu.au/elaw/issues/v2n1/mah.txt>

This paper reviews the compensation scheme established under the *Native Title Act 1993* (Cth) and the process of claiming compensation before the National Native Title Tribunal (NNTT). It considers three key elements of the compensation process: liability for compensation under the Act, forms and measures of compensation and compensation applications. The tribunal's processes are discussed at length as its purpose is not to undertake full inquiry into the legal and factual matters leading to compensation but be satisfied some legal and factual basis exists for a determination. The author stresses the tribunal's role is an evolving one with the liability to pay compensation and the quantum of compensation a dynamic not fully defined.

Neate, Graham, 'Determining Compensation for Native Title: Legislative Issues and Practical Realities' in *Compensation for Native title: Issues and Challenges*, National Native Title Tribunal, 1997, pp. 3-96

The chapter discusses the nature of native title compensation as it is recognised under the *Native Title Act* and at common law. The author argues that the judgments of the High Court had not, at that time, given a comprehensive statement of what native title means for Indigenous Australians. The author canvasses a number of approaches which might be taken into account when determining compensation on a case by case basis. The author concludes with a discussion of how compensation is calculated and who should be responsible for determining the amount and form of compensation.

Sheehan, John, 'Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia' Paper from the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji, 10-12 April 2002.

<http://www.usp.ac.fj/fileadmin/files/faculties/islands/landmgmt/symposium/PAPER53SH EEHAN.PDF>

The paper outlines the conceptual framework within which compensation has evolved in Australian land law. The author promotes a more culturally appropriate and inclusive compensation model developed in the knowledge that 70% of Australia may contain native title. The paper canvasses existing problems between Indigenous customary land ownership and industrial development aspirations and argues greater acknowledgement of Indigenous cultural and spiritual attachment to land must occur. Australia's method of assessing compensation should be informed by the experiences of other common law countries such as New Zealand, Canada and Papua New Guinea who rely on ad hoc negotiated agreements instead of a formulaic approach.

Smith, D.E, 'Valuing native title: Aboriginal, statutory and policy discourses about compensation', Centre for Aboriginal Economic Policy Research Discussion Paper No

222/2001, The Australian National University, Canberra, 2001.

http://www.anu.edu.au/caepr/system/files/Publications/DP/2001_DP222.pdf

The author outlines key issues in native title compensation. It focuses on the overlooked discourse of compensation derived from Aboriginal law and custom. The author notes the incompatibility of customary methods of compensation with Western legal principles. Methods of incorporating Aboriginal compensatory processes into the common law compensation framework are discussed. The paper calls for a new, innovative approach to native title compensation, supported by a 'Heads of Damages' developed on the basis of actual losses experienced by individual, communal and future generation native title holders.

Legal sources and compensation

Jowlett, Tina and Williams, Kevin, 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title*, vol.3, no.8, May 2007. (Put in alphabetical order)

[http://ntru.aiatsis.gov.au/publications/2007pdfs/reports%20and%20other%20pdfs/Jango%20\[final\].pdf](http://ntru.aiatsis.gov.au/publications/2007pdfs/reports%20and%20other%20pdfs/Jango%20[final].pdf)

The paper contains a discussion on financial compensation in the case, *Jango v Northern Territory* [2006] FCA 318. It highlights the complexity of compensation provisions which form part of the Native Title validation and extinguishment regime under the *Native Title Act 1993* (Cth). In *Jango* the right to compensation arises when the extinguishment is taken to have happened, the date the *act* occurred, for *acts* other than public works. *Jango* prevents any further compensation claims for the added value of public works and other improvements to land subsequent to compensation acts. The paper notes Justice Sackville's comments on quantum of damages which suggest the possibility of increased compensation for extinguished land which contains a significant site(s). In *Jango* persons entitled to compensation are those who held native title at the date of the compensation act. This creates a potential evidentiary burden for claimants seeking to demonstrate compensation acts that occurred before their lifetime.

Orr, Robert, 'Compensation for Loss of Native Title Rights' in Richard H Bartlett, Gary D Meyers (eds.), *Native Title Legislation in Australia*, University of Western Australia, Perth, 1994, pp.110-121

The chapter discusses the compensation rights recognised in the *Mabo* decision and *Native Title Act*. The author reviews both the federal and West Australian compensation regimes noting the difficulties in awarding adequate non-monetary compensation.

Ritter, David and Garnett, Merilee, 'Winning a deduction for compensation payments: Cape Flattery Silica Mines Pty Ltd v Federal Commissioner of Taxation', *Indigenous Law Bulletin*, vol. 41, 1998

This paper summarises *Cape Flattery Silica Mines Pty Ltd v Federal Commissioner of Taxation*. Justice Spender discusses the tax deductibility of compensation payments made

by resource companies to Aboriginal communities. Justice Spender emphasises the need to draft agreements between resource companies and indigenous groups which obtain the maximum tax-minimisation advantages for each party. The case also highlights the successful existence of 'normal' commercial dealings on Aboriginal land.

Sheehan, John, 'A guarantee for compensation for Native Title', *Land Rights Queensland*, July 1999.

<http://www.faira.org.au/lrq/archives/199907/stories/a-guarantee-story.html>

The article discusses the High Court's interpretation of native title compensation. The author refers to the case of *Newcrest Mining (WA) Ltd v The Commonwealth of Australia* (1997) 147 ALR 42 where the court reaffirmed the concept of 'just terms' in native title compensation. *Newcrest* suggests native title can be viewed as a bundle of rights within Australian property law and will accommodate a 'just terms' approach to compensation.

Stephenson, M.A, 'Compensation and Valuation of Native Title' in M.A Stephenson (eds), *Mabo: The Native Title Legislation*, Queensland University Press, St Lucia, 1995, pp. 134-154.

The chapter assesses the effectiveness of Native Title legislation in enshrining compensation rights. It canvasses the different circumstances where valuation and compensation issues may arise. Valuation of Native Title on the basis of 'just terms' is discussed in detail, including existing principles set out in the Compulsory Acquisition Acts.

Taxation and compensation

Strelein, Lisa, 2008, [*Taxation of Native Title Agreements*](#), Research Monograph 1/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

This monograph examines the agreement-making environment that surrounds native title through the operation of the *Native Title Act 1993* (Cth) (NTA) or the common law native title context. Specifically it discusses how taxation treatments may apply to native title and explores the complexity which arises when dealing with these two intricate legal regimes. The author suggests resolving the complexity of native title compensation is a policy priority. The author also calls for native title compensation payments to be exempt from Income Tax and GST regimes.

Black, Warren, 'Tax implications to native title holders of compensation payments', *Journal of Australian Taxation*, vol. 2, issue 5, September/October, 1999.

This article discusses the tax implications of compensation payments payable under the *Native Title Act* (NTA). It focuses on compensation paid as a result of determinations made by the Federal Court and whether they are subject to personal or capital gains tax (CGT). In most cases tax is not payable on compensation for extinguishment of, or impairment or damage to, native title pursuant to a Federal Court determination. This is

subject, however, to the Tax Commissioner's willingness to link compensation payments to the underlying asset rather than the statutory right to compensation arising under the NTA.

Whipple, RTM, 'Assessing compensation under the provisions of the Native Title Act 1993 – Part 1', *Native Title News*, vol.3, no.3, June 1997.

And

Whipple, RTM, 'Assessing compensation under the provisions of the Native Title Act 1993 – Part 2', *Native Title News*, vol.3, no.4, August 1997.

This paper discusses the application of native title and the application of the valuation process to estimating compensation. It suggests valuing native title compensation is not as complex as it appears provided the Federal Court determines all non-material or spiritual rights. It advocates a formulaic approach to valuing market based compensation and offers a number of techniques for assessing non-market values.