

Native Title Compensation

NNTC PROPOSED RESOLUTION FRAMEWORK

Kevin Smith
QSNTS CEO and NNTC Chair
Federal Court of Australia
Native Title Forum – 31 Jan 2020
Brisbane

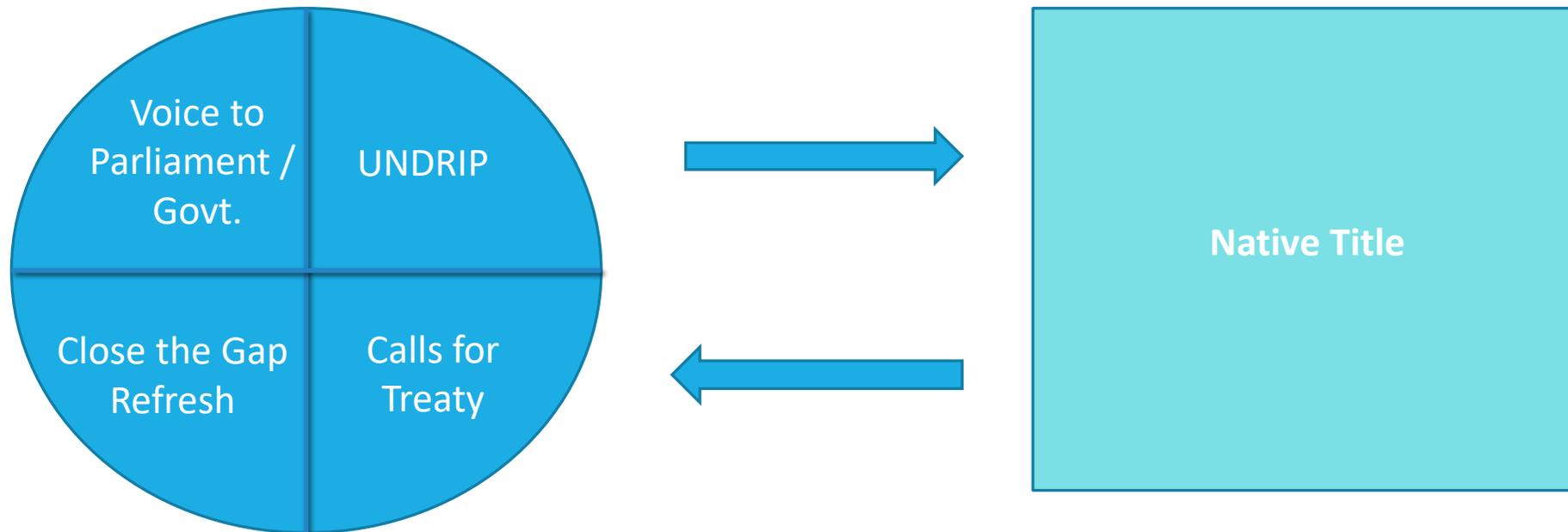
Overview

- Contextual statements
- Native title compensation resolution framework
- Interlinking strategies

Contextual Statements

- Native title and broader indigenous affairs landscape
- Observations on the native title operating environment
- New compensation era

Native Title and Broader Indigenous Affairs Landscape



Observations on the native title environment – increased complexity – common denominator is traditional owners!

- Claim, compensation, variation and non-claimant applications as well as a myriad of post determination issues are likely to interact more and add to complexity
- **Claims** – final tranche will be inherently complex, finalisation of whole-of-indigenous estate, strategically parked gap areas and trans-jurisdictional claims (trans-rep body area and states/territories)
- An increase in **non-claimant applications** – need for greater utilisation of s24FA protection to avoid negative determinations and adverse implications for compensation
- **Variation applications** – may see an increase especially if commercial native title rights and interests have not been recognised in extant determinations
- **Compensation** – need jurisprudence on a range of compensable acts, how will cultural loss be assessed, etc.
- **Post determination** – building PBC capability; managing native title, ILUAs and s31 rights and interests (also relevant to s49 offsets); and harmonising the complex relationship between PBCs and common law holders
- **Second generation issues** – fiduciary relationship between Applicant/Claim group & PBC/TOs

Compensation – the new era

Imperatives:

- need to draw on the past 25 years of agreement-making, evidence collection, recognition, institutional practice and established organising principles
- Heed the lessons of ‘under-developed’ claims haphazardly filed to secure RTN and cultural heritage procedural rights
- ‘socialising’ rights and interest more broadly across native title holders in preparation for comprehensive agreement-making
- Develop a compensation negotiation position that leverages existing rights and interest
- Develop structures and distribution models that manage inevitable disputes and look after future generations
- Rise above inter-Indigenous enmity fomented by over-lapping claims and leverage whole-of-regional society opportunities – noting relevance of ‘neighbour’ evidence to cultural loss

The Time Dilemma – reconciling ‘hasten slowly’ Vs the sad reality of Elders passing

Hasten slowly arguments:

- Compensable acts have crystallised – simple/compound interest can address
- No additional RTN/future act rights
- No overlapping claim threat
- Time to take a whole-of-estate, long term perspective
- Build on the synergies of taking a regional approach with neighbours

Role of Elders:

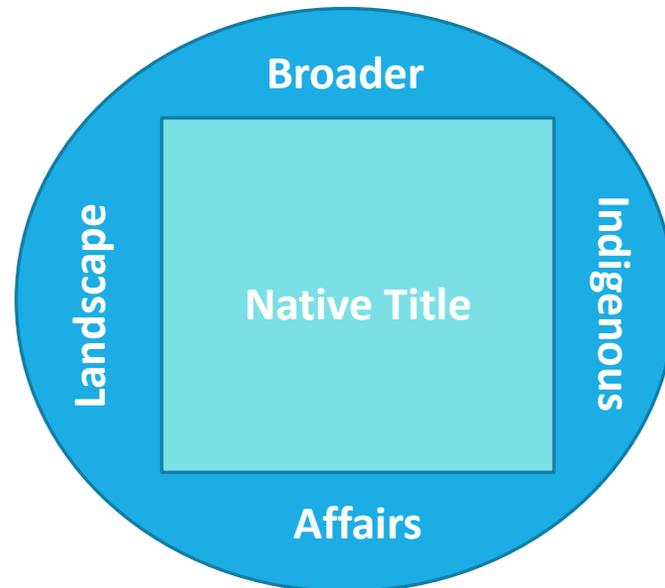
- Elders always put their people first, invariably take a holistic, long term perspective
- Critical to preserve evidence especially for cultural loss
- Next phase cannot take another 25 years
- Elders will guide decisions but the entire compensation claim group will need to make binding decisions.

Adherence to the Principle of Free, Prior and Informed Consent (FPIC) – the ‘not negotiable’

- Compensable acts must be identified – can’t get FPIC on ambit claims
- Must apply a sensible, evidence-based quantification methodology prior to authorisation – can’t get FPIC on ‘a vibe’
- The NTA enshrines FPIC principles under s251B and well-developed body of law around authorisation
- Consistent decision-making is good decision-making, so compensation decisions need to be consistent with previous and current decision-making processes made in past claims, ILUAs, s31 Agreements and in compliance with PBC Regulations and Rule Book – major deviation from practice would suggest no FPIC
- FPIC means full disclosure of risks, conflicts of interests and implications - especially where there is a ‘no costs’ jurisdiction in a public interest area of law such as native title compensation
- Risks – *Gebadi v Woosup* implications for applicants and PBC directors; liquidation risks for PBCs

What does a successful compensation era look like?

- The aspiration of “regional settlements” as expressed in the Preamble is realised
- *In rem* rights and interests are leveraged at whole-of-estate as well as whole-of-regional society levels for current and future generations
- Native title plays a greater role within broader indigenous policy landscape and Indigenous Self Determination



NNTC Proposed Resolution Framework

- The resolution of native title compensation presents an opportunity to address broader issues through a regional settlement framework
- The NNTC and the rep body sector have prioritised a national strategy
- The overarching strategy has multiple, interrelated sub-strategies
- The Framework focuses on cascading options that streamlines litigation, harnesses ADR processes, encourages the strategic development of jurisprudence, all to create an agreement-making environment conducive to comprehensive settlement

Jurisprudence and agreement-making – a necessary symbiotic relationship

*“Developing innovative ideas...in compensation agreements will continue to be the major task of native title compensation practice. No one would argue against developing such proposals and the NTA facilitates this approach through the ILUA provisions and the obligation on governments to negotiate in good faith requests for non-monetary compensation. Indeed, agreement may be the only absolutely certain way for governments to avoid the breach of international human rights standards relating to indigenous peoples. **But focusing on agreements does represent the option of avoiding the question that the courts will face, rather than trying to point them in the right direction. Principles from the eventual judicial determination of the compensation issue will also feed back into what can be achieved in negotiated compensation agreements because the question of what amount of compensation would be ordered by a court if negotiations were abandoned is always in the background. Thus agreement making and the plausible estimation of monetary compensation are inextricably linked”**(my emphasis)*

The Framework aims to “point the (system) in the right direction”

- Cascading options
- Risks
- Mitigation
- Enablers

NATIVE TITLE COMPENSATION RESOLUTION FRAMEWORK

30 Jan 2020

Options	Treaty	Comprehensive Settlement	Alternative Settlement	Streamlined Litigation	Risks	Mitigation (Implement Enablers)
	<p>Comprehensive Settlement plus:</p> <ul style="list-style-type: none"> • Shared Sovereignty • Residual law making ability local Govt • Subsoil rights • Ex officio local government representation • Proportion of tax • Stamp duty exemptions • All UNDRIP principles implemented • Mandatory 'just terms' compensation (pre-1975) 	<p>Alternative Settlement plus:</p> <ul style="list-style-type: none"> • Access to resources – royalties • Coordinated place-based planning approach for all government services • The provision of recurrent funding and in-kind support for self-governing entities • Optional 'just terms' compensation (pre-1975) 	<p>Streamlined Litigation plus:</p> <ul style="list-style-type: none"> • Monetary/Non-monetary compensation • Freehold and Aboriginal Freehold • Ownership of protected areas and joint management • Economic development fund, economic opportunities including employment and contracting preferences • Governance and financial support for PBCs • Negotiation costs • Whether the agreement is a 'full and final settlement' • PBC recurrent funding to manage State / Local Govt. common services 	<ul style="list-style-type: none"> • s37M FCA Act • s86 NTA – accept connection • s83 NTA Assessor (economic loss and cultural loss) • consent variations for commercial native title rights • reduce s 49 set off issues • Cultural Loss (potentially assessed on cultural bloc / regional society basis) 	<p>Ad hoc Litigation</p> <ul style="list-style-type: none"> ○ Litigation flood gates ○ Negative impact on claim resolution ○ Increase in variation applications ○ Increase in respondent parties • Transaction costs exceed quantum • Competition – private sector / Commercial Litigation Funders • Impact on Reconciliation • Absence of State / Federal Coordinated approach • Absence of Enablers 	
Enabler	Test Cases	Reform	Process	Capacity	Partners	
	<ul style="list-style-type: none"> • Mining • Fisheries • Water • Infrastructure 	<ul style="list-style-type: none"> • NTA Amendments • CATSI Act amendments 	<ul style="list-style-type: none"> • Finalise NTDA claims • Consolidate Indigenous Estate • Connection audits/tenure analysis • Cultural loss (potentially assessed on cultural bloc/regional society level) • Framework Agreement 	<ul style="list-style-type: none"> • Education on Options • Dispute resolution • Distribution models • Template regional agreements 	<ul style="list-style-type: none"> • Professions (valuers / economists / anthropology / legal) • Institutions (i.e. NNTT) • ILSC & IBA • Universities • AIATSIS • International bodies 	

Interlinking concurrent strategies

- Streamlined Litigation
- Test Cases
- NTRB Capability
- Environmental scan
- Education (capacity-development)
- Stakeholder engagement
- Communication