Cultural Loss: Issues for Negotiation of Compensation Settlements

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Overview

- How did the High Court assess compensation?
- How was cultural loss considered by the Court?
- What issues arise in approaching compensation settlements?
- What are some options for consideration of cultural loss?
How does compensation arise?

- 1975: Racial Discrimination Act (Cth)
- 1994: Native Title Act (Cth)
- 1996: Wik v Qld

Past Acts:
- 1992: Mabo (No 2) v Cth

Intermediate Period Acts:
- 1995: Public Works Act (WA) amended

Future Acts:
- 1998: Land Administration Act (WA) commences

Common Law Extinguishment
How did the High Court assess compensation?

Bifurcated approach

1. Native title has both a physical and spiritual aspect
2. Economic loss:
   1. Objective: What is reasonable?
   2. Physical aspect – effect on rights
3. Non-economic loss (‘cultural loss’):
   1. Subjective: what else was lost from claim group’s perspective?
   2. Spiritual aspect – effect on traditional connection to country
Part 1: Economic Loss

- Court keen for precision
- Compensation for loss of rights – physical aspect
- **Only** about an *objective hypothetical negotiation value* (‘surrender value’) at the date of extinguishment
- Economic loss is capped at the equivalent of freehold:
  - exclusive native title is the same as freehold.
  - non-exclusive native title is something less than freehold.
Part 2: Cultural Loss

• Court not so keen for precision

• Compensation for effect on ‘inherent value’ of the land to the claim group

• The inherent value lies in the spiritual attachment that native title holders have to country, i.e. ‘cultural value’

• ‘Cultural loss’ is compensation for the spiritual aspect being the effect on cultural value

• But cultural loss does not mean a total loss of rights, or that there is no longer any cultural value
Cultural Loss is not solatium

- Solatium is a statutory concept
- Can include an award for ‘distress caused by compulsory taking’
- Mansfield J at first instance treated cultural loss as solatium
- High Court overturned Mansfield J on this point – cultural loss is not an award to cover the distress caused by extinguishment
Court’s task in assessing cultural loss

1. Identify the **compensable act(s)**.

2. Identify the **native title holders' connection** with the land or waters by their laws and customs.

3. Consider the **particular and inter-related effects** of the compensable act(s) on **that connection**.
Some challenges for Anthropologists in determining cultural loss

- How do you reconcile the continuity argument relied upon to provide native title with the evidence required to show cultural loss for compensation?
- How do you collect the evidence?
- How do you assess cultural loss as at the date of extinguishment?
- How do you explain intergenerational loss when dealing with past acts?
What options exist for resolving native title compensation?

- Compensation claim filed in Federal Court (s50(2) of the NTA):
  - Resolved by the Court following a contested hearing
  - Settled by agreement
- Negotiated approach – settled by agreement (including as part of broader settlements incorporating claim resolution)
What could a settlement framework include?

- Co-designed policy approach – initially broad
- Fair, informal, empowering process
- Consistency across State / jurisdictions, including Commonwealth guidance
- Guiding principles for recognition & truth telling
- Use of connection evidence where available
- Consider learnings from other jurisdictions
What issues might arise in cultural loss settlement discussions?

- Requirements for information about cultural loss
- Emotional impact of talking about cultural loss
- Separating impact of pre-1975 acts from the post 1975 compensable acts
- Identifying impact of compensable acts on a global scale
- Equity across the State / other jurisdictions
- Compensation options
What could be included as compensation in an agreement?

NB – not all are applicable or achievable, and are dependent on aspirations of native title holders, government approvals

• Cash: for PBC operational support, investment in future funds to provide sustainability

Other components to facilitate economic independence, including:

• Transfer of Crown land, provision of commercial land
• Access to water for commercial purposes
• Joint management and joint vesting arrangements
• Revenue streams
• Business & tourism development & support
• Access to housing assets, Land Trust estate
• Support for management of cultural information & records
• Support for development of revitalisation of language and culture
What opportunities exist?

- Links to broader reconciliation discourse
  - Truth telling & recognition
- Defining regional structures and representative forums
- Developing broad Principles to commence compensation policy discussions
Questions