Compensation

James Cook University
Native Title Law and Policy LA4035

Member Graham Fletcher, 20-24 July 2009
Procedural distinctions for compensation

- Past Acts affecting native title
- Intermediate Period Acts affecting native title
- Future Acts affecting native title

Classes:
- Acts notified with a right to comment
- Acts involving compulsory acquisition for a public purpose
- Acts involving compulsory acquisition for the benefit of a third party
- Acts attracting the Right to Negotiate
- Acts validated by means of an Indigenous Land Use Agreement (ILUA)

Questions are often asked with regard to compensation for native title. These are often aimed at the simple question of how much compensation is to be paid for a particular effect on native title.

However, there are a number of questions that need to be answered before a response to the above can be provided. The fundamental questions are:

1. What is the act that affected native title?
2. When did the act happen?
3. How is the act that affected native title validated?
4. How is compensation to be calculated?
5. Who are the people to whom compensation is payable?
6. What traditional rights and interests are affected?

Perhaps the first thing to consider is a timeline that deals with the major points in terms of legal cases and legislation that affect the consideration of those native title compensation matters. Briefly, some of the key points in time are 31 October 1975, when the Racial Discrimination Act came into effect. The next point in time was 1 July 1993 which had relevance for changes in legislation and commitments that may affect native title in the future. The next key date was the enactment of the Native Title Act on 1 January 1994; then, significantly, the date of the Wik decision on 23 December 1996; and finally the changes that occurred in the regime for certain acts that arose from the amendments to the Native Title Act on 30 September 1998.

Dealing with these points in time sequentially, we note that prior to the 31 October 1975, acts that were carried out that affected native title were valid because of the fact that there was no Racial Discrimination Act to prevent them being implemented. For this reason, compensation is not payable for acts that affected native title prior to 31 October 1975.

After that date, when it was invalid for governments to make grants that affected native title rights and interests or take those private native title rights and interests in a discriminatory manner and native title was invalidly impacted adversely, compensation was payable but the regime for claiming that compensation did not come into effect until 1 January 1994 with the enactment of the Native Title Act.
The range of acts that affected native title during the period from 31 October 1975 until 31 December 1993, are defined as “past acts” under the Native Title Act and give rise to the potential for claiming compensation for the invalid effect on native title under section 61 of the Native Title Act. The Native Title Act also validated the invalid acts.

Acts that took place, such as public works or grants of leases or other titles that have affected native title after 1 January 1994, are generally termed “future acts”.

There is another class of acts, being those that occurred between 1 January 1994 and 23 December 1996 which are termed “intermediate period acts”. Intermediate period acts were those grants and public works, for example, that affected native title during the period when the presumption by the governments of Australia was that pastoral leases and other forms of leasehold grants in particular, had extinguished native title. This false assumption was corrected in the High Court’s decision in the Wik case on 23 December 1996. At that point, State and Territory and Commonwealth governments were on notice that the presumption was incorrect and subsequently the new regime for dealing with future acts was enacted on 30 September 1998 with the amended Native Title Act 1993 (Cwth).

It is important to clarify what the act is that has affected native title. In other words, the question that needs to be answered is whether all native title rights and interests are affected, or, if only some - which are they, and whether by one or more grants or public works?

The criteria for determining compensation for many of the acts that affect native title is set out in section 51 of the Native Title Act. Sub-paragraph 1 requires that the entitlement to compensation under certain provisions is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

Section 51A seeks to define the limit of compensation by reference to the compensation payable in the event that it was a freehold estate. However, sub-section 2 of section 51A notes that this section has effect subject to section 53 which requires that compensation be provided on just terms, in accordance with the Constitution.

Importantly, acts that are generally grants for the benefit of a third party or private party attract the right to negotiate, as do the grants of mining tenures. The right to negotiate includes certain things that are set out in section 33 of the Native Title Act. Section 33(1) states that,

Without limiting the scope of any negotiations, they may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:

(a) the amount of profits made; or
(b) any income derived; or
(c) any things produced;
by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.¹

Indeed the intention is that the negotiations be all-encompassing and it is intended to be able to derive the most practical and the most suitable outcome for the parties. There is a requirement that the parties negotiate in good faith for a period of at least six months and then, provided that the parties have so negotiated, they may extend that period or may seek to have the matter determined by arbitration.

The requirements for consideration under arbitration are set out in section 38(1B)(2) whereby the Native Title Act states that:

(2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:

   (a) the amount of profits made; or
   (b) any income derived; or
   (c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.²

For this reason it can be seen that there is considerable benefit to the parties wherever possible to reach an agreement in goodwill, good faith negotiations to ensure that the widest possible range of outcomes and benefits can be considered in the settlement. It is also in the interests of the party wishing to proceed with the future act to negotiate in good faith to achieve an outcome which is satisfactory but also which is as timely as possible.

Indigenous land use agreements (ILUAs) as set out in subdivisions B, C and D of Division 3 of the Native Title Act also provide a very wide range of options and alternatives for parties to negotiate without the need for statutory timeframes potentially limiting the period within which they can negotiate. The matters that can be considered in negotiating ILUAs are very broad and almost without limitation. Because they are agreements they are not bound by statutory notification and procedural arrangements that affect the right to negotiate. ILUAs are increasingly the instrument of choice across the country for resolving a wide range of native title issues. In some cases where there are multiple negotiations with similar elements, such as grants of mining leases, governments and Indigenous bodies are negotiating framework agreements or templates that can guide negotiations of specific matters while allowing for individual requirements.

Returning to the question of compensation for past acts, the Native Title Act defines “past acts” under section 228 of the Act and lists categories of past acts which have different effects, under sections 229-232. In a brief summary form, past acts are acts that would have been valid except for native title and for legislative acts that took place before 1 July 1993 or for grants and public

¹ Native Title Act 1993, s33(1).
² Native Title Act 1993, s38(1B)(2).

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works before 1 January 1994. If it was a public work and had ‘commenced construction’ prior to 1 January 1994, it was classed as a “past act”. Provision was made for prior commitments that were entered into in good faith prior to 1 July 1993.

If compensation is payable for past acts, then claims may be made under section 61 of the Native Title Act, whereby the native title parties can make a claim to the Federal Court seeking to have the compensation calculated and paid in accordance with the provisions of Division 5 of the Act and, in particular, section 51, which sets out the criteria for determining compensation.

Similarly, compensation claims may be lodged for intermediate period acts and a range of future acts. The categories of past acts that are defined by the Native Title Act, in brief, are Category A Past acts that include commercial, agricultural, pastoral or residential leases that have been granted between 31 October 1975 and 31 December 1993 or prior commitments made during that period that are valid except for native title, but have affected native title. They do not include Crown to Crown grants and they do not include grants for the benefit of Aboriginal people or Torres Strait Islanders. They do include public works. The effect of Category A past acts as set out in section 15 of the Native Title Act is that they extinguish native title.

Category B past acts are acts in the same period of time that are not Category A past acts and are not mining leases. They extinguish native title to the extent of any inconsistency with the act that is done.

Category C past acts are defined by section 231 as acts consisting of the grant of a mining lease. These do not extinguish native title but suppress native title to the extent of the inconsistency while the valid act is being carried out.

Category D past acts are defined by section 232 as any past act that is not a Category A past act, Category B past act or a Category C past act. In the case of Category D past acts, the non-extinguishment principle applies. Section 238(2) states that, with regard to the non-extinguishment principle, that if the act affects any native title in relation to the land or waters concerned, the native title is nevertheless not extinguished, either wholly or partly. In essence, the native title is suppressed while the valid act is in place but native title is not extinguished.

With regard to intermediate period acts, there are similar provisions as those for past acts. Section 232A, deals with the definition of “intermediate period acts” and sections 232B, C and E set out similar provisions to the Category A, Category B, Category C and Category D acts explained above. There are some differences in that the Category A intermediate period act requires that the act must be valid except for native title and also there must previously have been a grant of freehold or leasehold other than a mining lease or a public work over the land in order for it to have been considered to be able to be validated as an intermediate period act. This was designed to ensure that only those grants that were made on the, albeit false, assumption that leasehold interests such as pastoral leases had extinguished native title had been considered before the grant was made. Hence, if there are grants in this intermediate period where there had been no previous impact from leasehold interests or other grants that could reasonably have been
expected to have extinguished native title, or public works, then the provisions of section 232A would not apply.

It is also interesting to note that Category A intermediate period acts do not include non-exclusive pastoral leases as Category A past acts do.

Another class of acts which need to be considered are those that are set out in the hierarchy established in section 24AA(4) of the *Native Title Act*, where a range of acts may be carried out by providing notice and generally the right to comment, before grants for various licences, permits and activities can be carried out. The hierarchy is:

(a) section 24FA (future acts where procedures indicate absence of native title);
(b) section 24GB (acts permitting primary production on non-exclusive agricultural or pastoral leases);
(c) section 24GD (acts permitting off-farm activities directly connected to primary production activities);
(d) section 24GE (granting rights to third parties etc. on non-exclusive agricultural or pastoral leases);
(e) section 24HA (management of water and airspace);
(f) section 24IA (acts involving renewals and extensions etc. of acts);
(g) section 24JA (acts involving reservations, leases etc.);
(h) section 24KA (acts involving facilities for services to the public);
(i) section 24LA (low impact future acts);
(j) section 24MD (acts that pass the freehold test—but see subsection (5));
(k) section 24NA (acts affecting offshore places).  

Where the activities listed do not attract the right to negotiate as, for instance, some acts under section 24MD do, claims for future act compensation may be made. For this reason, notification is required, as well as the right to comment prior to the grants being made, to ensure that the Traditional Owners, as far as possible are aware of their right to claim compensation. Also the decision-maker is aware of the Traditional Owners’ views (if such are provided before the decision is made) before making a grant or approving a public work that may impact the rights and interests of native title holders.

Acts that attract the right to negotiate under section 24MD relate to the extinguishment of native title by compulsory acquisition where that acquisition is for the benefit of a third party or private party. The acquisition of native title for the benefit of a third party, of necessity, must be an acquisition that could apply to private freehold title as well in order to be non-discriminatory. For this reason it is necessary to check whether or not there is State legislation which would allow the acquisition to take place if it were in fact a freehold interest. In Queensland, for instance, there are some provisions which allow acquisitions for the benefit of a private party under some legislative

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3 *Native Title Act 1993*, s24AA(4).
schemes but generally the provisions do not apply as they do for acquisitions for public works, for example.

The other crucial question which needs to be considered is who pays the compensation. For past acts and intermediate period acts that are validated, the compensation is payable by the State and Commonwealth governments. The proponent and/or land holder for whom the act may have been granted to benefit them or their interests is not liable for the past or intermediate period act compensation. Similarly, for the bulk of the permits and licences that are granted under the provisions as listed in section 24AA(4), the compensation is payable by the State and Commonwealth on a cost-sharing basis.

The right to negotiate however, is a matter for the proponent and/or government wishing to make the grant or carry out the acquisition that gives rise to the right to negotiate.

In the case of Indigenous land use agreements where a proponent, whether a State government or a private corporate entity or both, wish to enter into an agreement to secure validity for some act or project that will affect native title, it is the State and/or corporate proponent that will benefit from the agreement that is liable to pay whatever arrangements are entered into under the agreement.

As with all of these different forms of compensation, there is a need to consider, to varying degrees, the effect on native title. The right to negotiate and Indigenous land use agreements that are worked through by negotiation to reach agreed settlements can include a much wider range of possible outcomes and possible compensatory arrangements. There is the potential under each of the forms of compensation for non-monetary compensation, where such is appropriate and agreed. With regard to past acts, intermediate period acts and those future acts which are covered by notification procedures and the right to comment only, the provisions for compensation relate to compensation claims that are lodged and are subject to section 51.

There are some procedural issues that must be considered when dealing with compensation-related issues under the Native Title Act. For example, section 61 applications for compensation require that the persons who make the application are either the registered native title body corporate, if any, or a person or persons authorised by all the persons (the compensation claim group) who claim to be entitled to the compensation, provided the person or persons are also included in the compensation claim group. The right to negotiate provisions, on the other hand, require that the native title party or parties engaging in the right to negotiate have either a registered native title claim within the prescribed notification period or a determination that native title exists. By contrast, Indigenous land use agreements may be entered into before there is a native title claim or, if there is a native title claim or if there is a determination that native title exists.  

Whilst the procedures and options seem rather complex, there are some specific questions and considerations that can guide people to the correct option to deal with particular issues as they arise. In order to understand these issues the best method may be to consider some simple scenarios. The following are some scenarios for discussion as to the compensation implications in relation to native title.
Scenario No 1
You are a lawyer who is being asked to provide advice in the following case: someone has found, while out prospecting with a metal detector, a source of gold on a pastoral lease. They wish to apply for a mining lease and the prospects appear good that there will be a worthwhile supply of gold that can involve a mining operation. What considerations and what advice would you give? What questions would you ask? What further information do you require in order to provide the advice that is sought?

Scenario No 2
A major tourist development took place in the late-1960s/early-1970s where the developer owned a freehold parcel of land near the Queensland coast. Incorporated into the development with the freehold was Crown land, Reserved land, Esplanade, and land below high water mark as the development extended to a marina with reclamation and dredging works on the adjacent tidal coastlands. What native title compensation implications are there for a prospective purchaser of the development today? What enquiries need to be made?

Scenario No 3
The same facts as Scenario No 2 but this time it is ten years later, being a development that received its approvals and took place in the late 1970s/early-1980s.

Scenario No 4
The same as Scenario No 2 but this time it is a proposed development commencing today.

Scenario No 5
A pastoralist wishes to obtain a water licence to pump water for both stock and domestic requirements from the water course that runs along the boundary but just outside of the property. What are the native title compensation issues for you to consider? Are there any different considerations if the property for which the water is required is freehold or a pastoral lease?

With all of the above scenarios, is there more than one option? If so, which would you recommend and why?

In considering these scenarios together with the key dates that apply to the native title process and compensation matters in particular, along with the options that are available for dealing with the issues, it is hoped that we will gain an understanding of the questions to ask and the considerations required as well as the sources of information that will assist.