

COMPENSATION FOR LOSS OR IMPAIRMENT OF NATIVE TITLE RIGHTS AND INTERESTS: AN ANALYSIS OF SUGGESTED APPROACHES (PART II)

John Litchfield*

Part I of this article was published in (1999) 18(3) AMPLA 253. It reviewed the literature that discusses various approaches to the determination of compensation for native title. This Part II considers the future development of compensation assessment for native title, particularly the treatment of compensation in native title related agreements.

Possible directions in agreement-based compensation

Calculating compensation for future acts can be achieved through negotiated agreements in addition to recourse to court-based determination processes. However, court-based processes involve requests that mediation takes place, and agreements-based processes can refer matters to the courts. Bearing this interaction in mind, this Part will focus on agreement-based processes.

The rhetoric that accompanies *Native Title Act 1993* (Cth) (NTA) agreement provisions often asserts that native title outcomes, including those involving compensation, can be achieved with less time and resources than litigation-based processes. While this is likely to be true, agreement-based compensation presents a unique range of challenges.

A fundamental challenge presented by the NTA agreement-based compensation provisions is their modest level of guidance to parties. Without adequate guidance the word 'compensation' can represent any number of payment outcomes that have different and possibly conflicting underpinning principles. The type of conflict that ensues is likely to produce dissatisfaction among stakeholders.

The discussion in this Part undertakes two main tasks. First, identify how a lack of definition in the subject matter of compensation negotiations can become a main source of dissatisfaction among stakeholders. Second, analyse some of the possible outcomes from agreements if this distinction is applied in negotiations.

Making the main distinction: compensation or commercial payments

The basic definition of compensation used in this discussion follows the guidance of Lavarch and Riding, who rely on the *Oxford Dictionary* definition.⁷⁴ The *Oxford* defines compensation as 'making up for'. Compensation in the context of native title makes up for the loss of native title rights and interests, and is calculated according to the effect of an act on native title.⁷⁵ According to this definition, commercial payments are not necessarily compensatory. Commercial payments are calculated according to what the estimated or actual financial profitability of an act can afford.

Ritter has emphasised a deficiency in the NTA's compensation provisions by observing that this distinction is not incorporated. He writes:

* Senior Research Officer, Research Section, National Native Title Tribunal, Perth.

⁷⁴ *A New Way of Compensating*, 4.

⁷⁵ The effect of an act on native title rights and interests, as stipulated in *Mabo* and the NTA, refers primarily to what the common law recognises of any effect (see a discussion of this by Neate *Determining Compensation*, 5).

“It is arguable that the term compensation [in the NTA] is a clumsy expression, a euphemism that often does not accurately describe the true nature of the payments in question... The money that is paid by resource companies to Aboriginal communities is often not truly compensation or is not perceived as ‘compensation’ by one or other of the parties. It may instead be perceived as a production cost, or a means to an economic end, or a mere gesture or token of compensation or a benefit that can be obtained by trading away a statutory right”.⁷⁶

Altman has identified the same basic phenomenon in a policy context. He argues that there is significant evidence, by virtue of the history of outcomes from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA), about how *not* to set up a compensation regime. The NTA, however, largely follows the ALRA model. A key deficiency of the ALRA is that commercially based payments are not adequately distinguished from compensation payments. Altman writes:

“The ALRA and NTA frameworks have more commonalities than differences. Both have a tradeable property right, which can be provided quickly with the right commercial inducements.⁷⁷ The right is probably less valuable under the NTA than the ALRA. Both provide recourse to arbitration, and at this time the potential for trade declines and then eventually disappears. But in arbitration there is a requirement to tangibly and transparently assess compensation according to stipulated statutory guidelines...

The issue of compensation has often been based on ad hoc and confused objectives....

Critical ambiguities exist in this area of policy and hence in practical implementation of compensation regimes. In particular, mining payments to regional indigenous interests are often confused with compensation and the compensatory components of payments are rarely differentiated from the non-compensatory commercial payments. These problems have a long history in the land rights arena in the Northern Territory... Many of these policy legacies have been replicated in the NTA and, unless understood and addressed soon, they will bedevil the financial operations of the NTA in much the same way as they have the ALRA.⁷⁸

Ritter further supports Altman in this regard by asserting that the character of payments need to be clearly identified if their benefits are to be realised.⁷⁹ The benefits Ritter envisages from processes that are founded in clear distinctions include:

- unambiguous basis for calculating the quantum of payments;
- increased understanding between parties about the process and possible outcomes;
- diffused intra-indigenous conflict over the level and purpose of payments; and
- provision of a more equal basis for negotiation between parties.

⁷⁶ *The Compensation Question*, 10-11.

⁷⁷ Altman is specifically comparing the ALRA’s compensation provisions with the NTA’s RTN compensation.

⁷⁸ *Ibid* 2.

⁷⁹ *The Compensation Question*, 11-12.

A further key concern is how the outcomes of a compensation agreement are managed. Altman sustains his criticisms of the ALRA in this regard, and by implication, the NTA's RTN provisions also. Altman observes that the ALRA fails to provide necessary guidance to parties because there is:

"no clear stipulation about how direct compensation payments (areas affected moneys) should be used and no requirement that they be earmarked for communities, with incorporated groups also being potential beneficiaries. This imprecision has frequently resulted in regional disputation".⁸⁰

Smith makes specific reference to a similar scenario under ILUA provisions also. She writes:

"When future act compensation [is] fully settled by agreement, there will be considerable pressure on the native title group to ensure they obtain full and fair compensatory treatment under the terms of an ILUA. There are no provisions requiring ILUA monies or other beneficial payments to be held in trust until claimants are proven to be holders (as there is under current native title arbitration arrangements). The onus will be on the native title group and those organisations representing them to ensure that all potential holders and claimants are comprehensively identified and included within the agreement process, and that distributive equity of benefits is ensured (both within the group and over time)".⁸¹

The most common practice in native title negotiations is the making of payments according to commercial frameworks. Commercial approaches offer the path of least resistance under the NTA. The question remains, however, whether a commercial path is necessarily the best path for any party.

Issues to consider in agreement-based payment processes

Establishing clarity in the distinct meanings of commercial payments and compensation prepares the way for a number of practical considerations. One of the most basic considerations is whether a decision *not* to consider the effect of an act on native title will best suit all parties.

In general, non-native title parties are more likely to favour commercial arrangements.⁸² This is because commercial arrangements provide autonomy from the (compensatory) constraints of considering an act's effect on native title itself and, thus, is a way of obtaining a quicker outcome.

This is not to suggest that native title parties necessarily have to be forced into a commercial process, but simply, commercial frameworks are likely to be most suitable to the interests of non-native title parties. A primary reason for most non-native title interests in land is for financial profit. Native title interests, by contrast, are much more complex. For this reason, time is needed to work at improving levels of understanding between parties.⁸³ Nonetheless, when a commercial negotiation involving native title

⁸⁰ Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime, 4.

⁸¹ *Indigenous land use agreements*, 17.

⁸² McDonald (1997) 'Commercial Implications of Native Title for Mining and Resources' in Horrigan and Young (eds). *Commercial Implications of Native Title*. The Federation Press: Sydney, 122-123; Wootten (1997) 'Mediating between Aboriginal communities and industry', in Meyers (ed), *Implementing the Native Title Act. The Next Step: Facilitating negotiated agreements. Selected Discussion Papers of the National Native Title Tribunal 1996*, National Native Title Tribunal: Perth, 179.

⁸³ See, for example, Farley (1997) 'Regional agreements as alternatives to mediation—What is the commercial impact of the historic Cape York agreement', in Meyers (ed), *Implementing the Native Title Act. The Next Step:*

holders does occur, the holders of native title can trade their procedural right to negotiate for other values (expressed, for example, in monetary amounts). Thus, it can be concluded that native title rights provide traditional owners with real commercial power that has been used on occasions. McDonald has noted that this provides native title holders, or registered claimants, with significant leverage in commercial negotiations.⁸⁴ But other commentators have noted that, on balance, the procedural right to negotiate is a weak form of property right.⁸⁵

In addition to non-native title interests, it is always a possibility that native title holders will initiate the rejection of a compensation process. This decision may, however, have little to do with perceived benefits of commercial arrangements directly. An acceptance of commercial processes may, for example, signify the *greater* unacceptability of compensation processes if an outcome can only be obtained in exchange for the extinguishment of native title rights and interests. In short, the specific issues that arise in either a commercial or a compensatory negotiation context need to be worked through on a case by case basis.

Recognition of specific issues also need to be maintained in relation to a range of broader contextual factors that frame agreement making processes and outcomes. It can be reasonably expected, for example, that agreements will increasingly be made according to ILUA provisions, and as such Smith's ILUA discussion paper outlines a range of benefits and opportunities that may subsequently occur.⁸⁶ This list includes:

- improved party control of the process;
- greater certainty and flexibility in process and outcomes;
- increased breadth of issues that can be covered;
- wider recognition of potential parties to a negotiation;
- improved mode for recognising the specific character of indigenous rights and interests; and
- lower levels of cost to all parties.

Against this, Smith also notes that there are a number of potential threats and challenges. These can be related to technical complexities in the ILUA provisions that may translate into difficulties at the practical level of agreement implementation. Examples of the technical complexities are:

Facilitating negotiated agreements. Selected Discussion Papers of the National Native Title Tribunal 1996, National Native Title Tribunal: Perth, 119.

⁸⁴ Commercial Implications, 122-123).

⁸⁵ See, for example, Altman *Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*, 7-8; O'Faircheallaigh (1998) *Reorienting and encouraging indigenous land use agreements*. Paper presented to the AIC conference 'A practical guide to working with the Native Title Amendment Act 1998' Brisbane, 4-5).

⁸⁶ Indigenous land use agreements. Note also that ILUAs are a construct that only emerged formally in the 1998 amendments to the NTA. Thus the opportunities and benefits are generally implicitly and explicitly compared to the agreement possibilities under s 21 of the pre-amended NTA as well as a litigative alternative. It should also be noted that the NTA provides that agreements can be made outside of the ILUA provisions, but this will bring specific benefits and risks (see, for example, Neate *Indigenous land use agreements - what certainty for pastoralists?*, 5).

- notification, certification and authorisation difficulties;
- procedural complexities of the objection process; and
- the relationship and roles of Native Title Representative Bodies and Prescribed Bodies Corporate.

There are also 'moral hazards' that may affect ILUA outcomes.⁸⁷ For example, situations may arise where stakeholders adopt politically or ideologically intractable positions in a negotiation. It has been noted that the moral hazards may be held in a 'win-lose' attitude, in which an ideal outcome is thought to only eventuate after successfully 'planting one's foot squarely in the throat of the other'.⁸⁸ However, in a better considered negotiation process, this type of behaviour is understood to be counter-productive for all participants.⁸⁹

The context of a negotiation can be constituted by any number of inter-related, conflicting and confused intentions that operate between and within parties. The mismatch of intentions is compounded by differing levels of resourcing, power imbalances, negotiation-specific points of leverage, and material conditions affecting parties.⁹⁰ While an actual mediation has little capacity to immediately rectify any of these contextual difficulties, it is within the scope of a mediation process to highlight the impacts of these factors through mediation techniques such as inviting parties to 'reality check' their various options. Such

⁸⁷ Indigenous land use agreements, 17.

⁸⁸ O'Faircheallaigh *Reorienting*, 5; Howitt (1997) 'The other side of the table: corporate culture and negotiating with resource companies', in Moore (ed) *Land, Rights, Laws: Issues of Native Title*. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies. Regional agreements paper No.3. Canberra, ACT, 6.

⁸⁹ In the widely accepted mediation model developed by the Harvard Business School, and used widely from commercial disputes to international politics to native title, the recognition of limitations in both one's own position and in the other is done so as to assist in achieving mutually beneficial outcomes. See Fisher and Ury (1994) (2nd ed) *Getting to yes: Negotiating and agreement without giving in*, Century Business: London, p.x.

⁹⁰ These types of issues—among others—appear routinely in literature on agreement making. See for example, Altman and Smith (1995) 'Funding Aboriginal and Torres Strait Islander Representative Bodies under the *Native Title Act 1993*', in Fingleton (ed), *Land, Rights, Laws: Issues of Native Title*. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, issues paper no.8. Canberra, ACT; ATSIC (1995) *Regional Agreements Seminar, Cairns, 29-31 May*, Canberra; Edmunds (1995) 'Conflict in native title claims', in Fingleton (ed), *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, issues paper no.7, Canberra, ACT; Farley *Regional agreements*; French (1997) 'The National Native Title Tribunal and the Native Title Act, Agendas for change', in Meyers (ed), *Implementing the Native Title Act. The Next Step: Facilitating negotiated agreements. Selected Discussion Papers of the National Native Title Tribunal 1996*, National Native Title Tribunal: Perth, 24-52; Howitt *The other side*; Sullivan (1997) 'Regional Agreements in Australia: an overview paper', in Pyle (ed), *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, issues paper no.17, Canberra, ACT; Wootten *Mediating*; Altman, *Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*; O'Faircheallaigh *Reorienting* and 'Process, Politics and Regional Agreements', in Moore (ed) *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, regional agreements paper no.5. Canberra: ACT; Dolman (1999) 'Native Title Mediation: Is it Fair?', in *Indigenous Law Bulletin*, June, vol.4, no.21, Faculty of Law, UNSW: Sydney, 8-10; Neate *Indigenous land use agreements—what certainty for pastoralists?*

techniques within mediation can constitute a forum that makes it easier to maintain focus on the resolution of specific issues.

Relating compensation to the value of an act's effect on native title

Any agreement-based compensation process, as distinct from a commercial payment process, should incorporate the procedures outlined for Court-ordered mediation in ss 86A(2). The ss 86A(2) procedures require that a mediation in a case involving compensation begins by focussing primarily upon the effect of an act on native title (ss 86A(2)(a)). This approach requires extensive consultation and discussion among parties, and as Altman has noted, this task is a major one.⁹¹

Within the context of this review of the compensation literature, the type of approach proposed by Lavarch and Riding appears to be a particularly constructive way forward, and deserves further consideration.⁹² The key connection that Lavarch and Riding propose is to link the effect of an act to a strategic concern with maintaining 'unaffected' native title. In other words, calculating compensation for what is lost or impaired is subject to questions about how the remaining native title will be maintained, and how much this maintenance will cost.

The strength of Lavarch and Riding's observation regarding the link between compensation and the maintenance of culture is that an act is unlikely to affect the whole of a native title group's traditional land. An act will typically affect native title by either extinguishing only in part, or be subject to the non-extinguishment principle. Even where native title is wholly extinguished in an area affected by an act, it is still likely that a group's native title extends outside of that area. In short, a group's native title is unlikely to be wholly or permanently affected by any particular act. However, it also stands to reason that when 'a part' of native title is lost or impaired, 'the whole' is, to some extent, diminished. The question becomes, in this context, how can the diminished native title be re-dressed?

It is important to emphasise that this scheme does not attempt to compensate for an affected 'part' of a group's native title in isolation from the continuing native title 'whole'. The whole, in this context, will always refer to the foundational work of any compensation agreement process which will produce agreement about what the native title rights and interests are/were in an area prior to an act being done (s 225(b)). However, in moving to the point where calculating a compensation amount is the required task, the foundational work must be translated into a suitable (that is, compensation cognisant) frame.

⁹¹ *Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*, 9.

⁹² Lavarch and Riding (*A New Way of Compensating*) share a policy and social/cultural impact assessment approach with writers such as Altman and O'Faircheallaigh (see, for example, Altman *Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*; O'Faircheallaigh *Reorienting and Process*). Lavarch and Riding's approach has also explicitly been emphasised as a practical and fair approach in the 1999 *Native Title Report* by HREOC (Acting Aboriginal and Torres Strait Islander Social Justice Commissioner (1999) *Native Title Report*, Human Rights and Equal Opportunity Commission, Commonwealth of Australia: Sydney, 145-147).

Native title compensation: different ways of telling the story

From the review of the literature on native title, there are six dimensions of native title that appear in discourses about compensation. The six dimensions structure the various narratives, or stories, about compensation. The dimensions are:

- spatial (geographic area and physical occupation of that area);
- material (economic interests);
- non-material (cultural, social, political and spiritual);
- temporal (relations to the past, present and future);
- individual; and
- communal.

The compensation narrative that was outlined in Part I (in relation to property valuation and property law principles) is typically told with the following basic structure: the spatial, material and non-material dimensions are the categories in which compensable rights and interests are located. If this version of a native title compensation story carries a sophisticated structure, it will also highlight that the categories of rights inter-relate and, at times, are indistinguishable.

In general, the Part I description bore out a compensation narrative by describing how land valuers and ordinary property law concepts focus on adapting approaches that value physical space in freehold terms (in which a market can be either utilised or created). This way of compensating for loss of native title rights and interests was observed to be problematic; it struggles to account for non-material dimensions. It was further shown that some commentators have responded to these challenges by proposing that compensation can be calculated by adding freehold value to other ways of accounting for affects on native title holders. These other ways include unique forms of special attachment and personal injury principles.

Further to this, it is recognised that the compensability of rights and interests in these categories are conditioned by the temporal dimension in which they are found. That is, in a compensation determination, past act effects on native title rights are recognised according to different criteria than rights affected in the present, and in estimating effects in the future.⁹³ The past, present or future dimensions introduce a kaleidoscope of possible configurations in attempting to compensate for the effects of an act as they exist in their respective categories.

Even further to these 'kaleidoscopic possibilities', native title rights are also defined in the NTA as both communal and individual in character (s 223(1)). This adds further possible texture and layering to the narratives. However, the Part I discussion did not cover the communal character of native title compensation (apart from the embryonic appearance of intellectual property rights). In the general tradition of Western compensation narratives, it is difficult to accommodate a resolution whereupon any entity other than 'the individual' receives payment for loss or damage. In this sense, native title presents a

⁹³ For a discussion of the discrete categories of native title rights and interests within a temporal context see Sheehan *Assessing compensation*.

challenge, and a possible rupture, in orthodox Western stories about compensation because of its character as communal.

The communal character of native title has, however, been addressed in the social impact and policy orientated compensation literature of, for example, Altman, O'Faircheallaigh and Lavarch and Riding.⁹⁴ In the policy perspectives of these writers, attention is directed toward developing principles by which compensation is linked to the social and cultural impacts on native title by valid acts. This approach allows for a different type of compensation narrative - one that provides new ways to understand the way compensation may be able to develop in the native title context.

The social impact approach to compensation can be illustrated by drawing attention to the type of effects that are likely to stem from a compulsory acquisition act. This act may affect the material dimensions of native title by restricting access to traditional food and trading resources. This perspective takes note of the diminishing that occurs to a native title group's traditional economic base. However, the act is also likely to affect the social well-being of a group through an overall reduction of, for example, education opportunities by making it less likely that stories and law associated with the area will be passed on. There may also be more direct links between the economic and the social. For example, ready access to particular types of traditional foods (economy) assists in providing good health (social). Furthermore, there is also likely to be political and religious consequences of the act as it affects the group as a whole, and within the group, certain individuals will be more acutely affected than others.⁹⁵

If the compulsory acquisition is subject to an agreement-based compensation process, then the first step is to acknowledge native title in the area as lost or impaired. There needs to be a recognition by all parties that there is a gap created in the fabric of a native title group's traditional rights and interests. The task of an evolving compensation process is to develop strategies that can bridge this gap. This bridging cannot occur with the same thing that has been lost or impaired. Indeed, the issue of compensation (in the strict sense of its definition) only arises because certain native rights and interests have been extinguished or suspended.

An example of the 'making-up-for', or 'bridging' strategy could be of a group that have had their native title affected by a compulsory acquisition choosing their compensation in the form of a business enterprise development. An enterprise would have a compensatory role to the extent that it makes-up-for an act through the provision of alternative types of economic and social benefits.

It also needs to be emphasised that the Lavarch and Riding approach is an exercise in patching over lost or impaired native title with something that is different. Lavarch and Riding recognise that no native title 'making up for' will ever replace the integrity of the native title that existed prior to the extinguishing or suspending act.⁹⁶ The compensatory scheme is at best, a second best solution. The best solution is to

⁹⁴ Altman *Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*; O'Faircheallaigh *Process and Reorienting*; Lavarch and Riding *A New Way of Compensating*.

⁹⁵ John Koowarta (*Koowarta v Bjelke Petersen* (1982) 39 ALR 417) was able to list a number of anticipated future losses when threatened with an act affecting his traditional activities. These losses involved not being able to educate the younger people and being denied business enterprise opportunities (discussed in Sheehan *Assessing compensation*, 21).

⁹⁶ *A New Way of Compensating*, 5.

avoid the need for it by not affecting native title rights and interests. This does not mean acts cannot be done, but it does suggest that creative thinking about how acts might be done differently should be considered.

The input of policy and social impact research is crucial to this compensatory scheme.⁹⁷ This type of input is already signalled in, but would improve upon, the 'contingent valuation' approach (discussed earlier). The difficulty with contingent valuation is that it asks people to estimate the value of their life-style in dollar equivalents, and assumes that informants have access to, and skills with, the quite specialised information that this requires. Such access and skills cannot be assumed. The approach being proposed here, by contrast, is to listen to native title groups statements about what will be of benefit to them in relation to the impact of an act. Determining compensation amount in this scheme focuses on the maintenance of culture primarily by taking direction from affected native title holders. Valuing loss to native title rights and interests would leave the costing of outcomes to those who are trained for such a task. The advantages of this approach are that:

- social and cultural impact concerns are consistent with the type of matters specified in s 86A(2) as the substance of mediation. This allows for consistency in compensation mediation processes and a clear basis for distinguishing compensation from commercially-based negotiations;
- valuing or costing compensation negotiation outcomes will be related to parties' sense of experience rather than abstract formula that have a higher risk of alienating parties. Alienating parties increases the possibility that the sustainability of the agreement will be compromised; and
- the process of costing compensation options (generated by native title holders) by those with appropriate expertise allows for a relatively objective process in comparison with other (more abstract) approaches that have been discussed in this paper.

Even though there are risks in committing to an agreement-based compensation process, the question is whether the possible benefits outweigh the risks. The most significant risk with an agreement-based compensation process is the likelihood of its resource and time intensiveness. The elaboration of a social impact-focussed approach links compensation to a careful planning process that will require extensive consultation. Indeed, a thorough strategic planning process may well be an intrinsic part of what compensation means in a native title context. Even so, if the alternative is drawn out litigation, then ruling out a commitment to compensation agreement processes prior to serious consideration may be the result of a lack of strategic thinking about how to best advance one's interests in an effective manner.

CONCLUSION

For all the complexity in the NTA's compensation regime, the basis upon which amounts are actually calculated is, at one level, very straightforward. Compensation is calculated according to either a court-based process or an agreement-based process (or a combination).⁹⁸

⁹⁷ See, for example, Altman *Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*, 7-8.

⁹⁸ The RTN provisions replicate both the determination and agreement processes on a smaller scale (dealing only with specific future acts).

As was discussed in Part I, if compensation is subject to a court determination then the process will revolve around how to meet the requirements of just terms. At the present time, property valuers and lawyers have contributed the bulk of the perspectives in the relevant literature. But among this group of commentators it is acknowledged that moving beyond the present impasse depends upon broadening the range of contributors to the debates. Indeed, as Altman has noted that the lack of a more diverse range of perspectives is hindering the effective implementation of the NTA's objectives.⁹⁹ This acknowledgment gave Part II much of its impetus.

Part II was concerned with future act compensation within agreements in addition to a formal determination process. It was highlighted that agreement-based compensation must be distinguished from commercial payments. If a compensation path is embarked upon in a negotiation, many of the native title determination requirements become relevant, particularly those that ensure a focus on the effect of an act on native title rights and interests. However, the major difference between a court-based litigated determination and an agreement-based compensation process is the broader scope and greater flexibility for developing creative ways to meet the compensation entitlements of native title holders. In the still novel area of native title law and political experience, new approaches to compensation, based in a detailed understanding of social and cultural impact, may assist in answering some questions about how to deliver just terms compensation through the courts. This is particularly the case when considering that the NTA provides for a dynamic relation between the court and the Tribunal's role as mediator in compensation matters.

⁹⁹ (1998) *Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*.