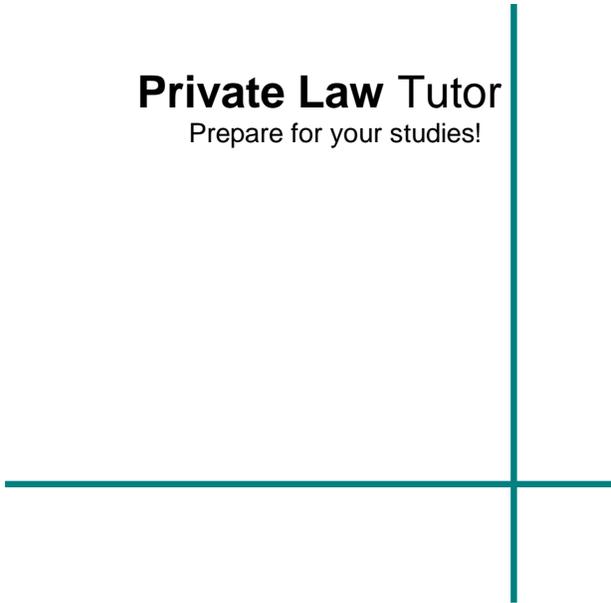
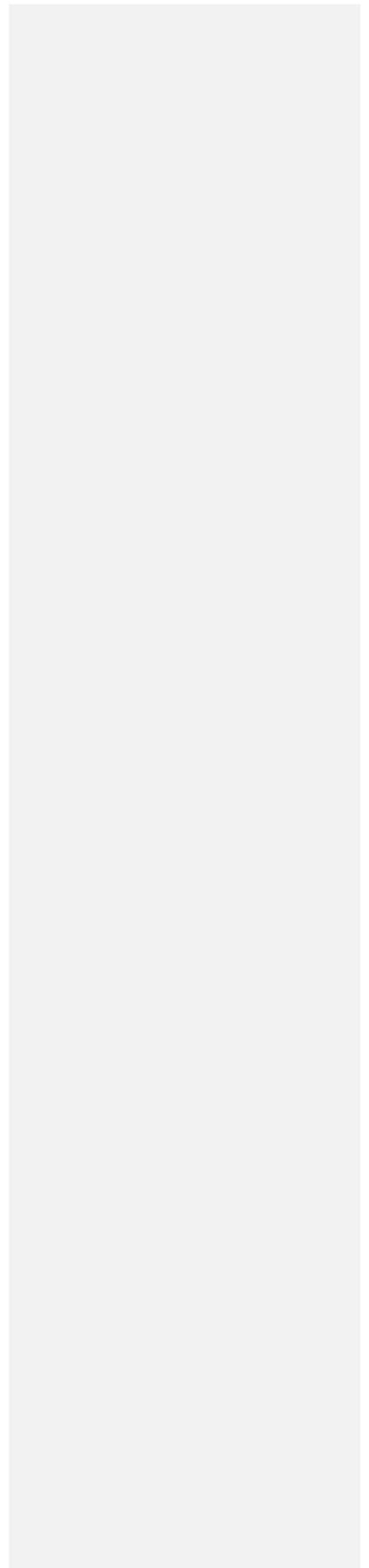


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Student Assessment Response



Care should be taken when drawing upon the tutoring services provided in view of Academic Misconduct policies of your university. The work provided should be used as a guide only. It should not be used as a basis for final submission of any assessment tasks whatsoever.

The question is:

Discuss the legal issues that arise with respect to “compensation” under the Native Title Act 1993 (Cth)

Introduction

The Native Title Act 1993 Cth (NTA) was enacted to formalise the rights and protections recognised in the landmark High Court case of Mabo & Ors v Queensland (No 2) (1992) 175 CLR 1 (“Mabo”). In this case, it was held that the prior existence of indigenous rights to land and water operated to prevent the Crown from obtaining absolute beneficial ownership of land when sovereignty was acquired. As a result, the loss or impairment of native title rights was held to give rise to an entitlement to compensation in certain situations. The NTA lays down a framework for the calculation of compensation for the diminution, reduction or loss of native title rights and interests. Although the ~~the~~ NTA formalises the general principles to be applied in determining compensation, it does not provide any methodology for how it is to be calculated.

Comment [V1]: Which Native Title Act? I know subsequently that it is the NTA of the Commonwealth jurisdiction, but you need to mention this fully in your opening remarks. Each State has comparable Acts.

Comment [V2]: Your case name should be written out fully here. You may then subsequently refer to “Mabo”.

Comment [V3]: Depending on your view of the law, it is here you can say “This has / has not caused

This essay will explore the legal issues arising from the NTA compensation provisions, specifically in relation to how compensation is to be calculated

The NTA provisions

The NTA makes provision in Division 5 of Part 2 for compensation for extinguishment or impairment of, native title rights and interests, brought about by the operation of Divisions 2, 2A, 2B, 3 or 4. ~~For the purposes of this essay it is not necessary to outline in detail the acts that give rise to a right to compensation.~~

Comment [V4]: I would suggest to reword this, rather than making it a series of references to the Act. Consider what do these provisions do, why are they important. This will assist to re-write this paragraph. I have provided you with an example.

The NTA makes provision for compensation for the loss, diminution and impairment of native title that occurs during three temporal periods. These periods are referred to as ‘past acts’ which consist of those occurring pre-Mabo, ‘intermediate period acts’ which consist of those occurring effectively between the Mabo and Wik decisions and ‘future acts’ which consist of those occurring post Mabo. The categorization of an act into one of these three temporal periods is critical to determining whether loss, diminution or impairment to Native Title has occurred.

Comment [V5]: You should consider this. Do you understand what I have written here?

The criteria for determining compensation are set out in Section 51 of the NTA Division 5.² The main guiding principle is that compensation must be made on just terms,³ however this is subject to a number of qualifications:

- if the act which has affected native title rights is made under a Compulsory Acquisition Act, just terms compensation must still be paid but may be determined in accordance with the criteria contained in that Act;⁴

Comment [V6]: What you have said is correct, however, where possible, I would remove dot points from your essay and use full sentences and paragraphs.

¹ Native Title Act 1993 (WACth) s 48

² Native Title Act 1993 (WACth) s 51

³ Native Title Act 1993 (WACth) s 51(1)

⁴ Native Title Act 1993 (WACth) s 51(2)

- where native title is affected but not extinguished (such as by the grant of a mining tenement over the land), native title holders are entitled to compensation in accordance with the State law under which freehold title holders would be compensated; this is called the 'similar compensable interest test:'
- the total compensation payable for an act that extinguishes all native title rights must not exceed the amount which would have been payable if the act that extinguished native title had been the compulsory acquisition of a freehold estate. This is subject to the requirement that the compensation be on 'just terms' if it would amount to an 'acquisition of property' for the purposes of Section 51(xxxi) of the Australian Constitution.⁵

These provisions give rise to the following legal issues that will be discussed in this essay:

- What is the meaning of just terms compensation in the context of native title rights?
- What are the implications of the freehold cap requirement in s51A
- The similar compensable interest test.

Measuring compensation under the NTA

Just Terms

The main principle for measuring compensation under the NTA is that compensation must be made on just terms. it is to amount to just terms. This principle of just terms is derived from section 51 (xxx) of the Australian Constitution,⁶ ~~that deals with the compulsory acquisition of property.~~⁷ The NTA itself does not provide any definition of this concept or any methodology for how it is to be calculated.

In addition, ~~there is also~~ no clear authority on the definition of just terms in ~~the~~ case law,⁸ however some general guidance can be found. One commonly quoted definition found in the case of *Nelungaloo Pty Ltd v Commonwealth*⁹ is that "unlike 'compensation', which connotes full money equivalence, 'just terms' are concerned with fairness."

According to Litchfield¹⁰, the distinction made in *Nelungaloo* means that it cannot be assumed that just terms have a relationship to "market values to the exclusion of a broader range of concerns that ultimately may constitute a set of criteria for 'fairness'." In fact, it is possible that a compensation determination that does not take into account broader considerations of fairness may be found to be open to review at a later date.¹¹

⁵ Native Title Act 1993 (WACth) s 51A

⁶ Litchfield John, 'Compensation for loss or impairment of native title rights and interests : an analysis of suggested approaches (Part I)' (1999) 18 *Australian Mining And Petroleum Law Journal* 253, 256

⁷ Litchfield John, 'Compensation for loss or impairment of native title rights and interests : an analysis of suggested approaches (Part I)' (1999) 18 *Australian Mining And Petroleum Law Journal* 253, 256

⁸ Graham Neate, 'Determining Compensation for Native Title: Legislative Issues and Practical Realities' in *Compensation for Native title: Issues and Challenges*, National Native Title Tribunal (1997) 3, 76

⁹ (1948) 75 CLR 495 and 507 (Dixon J) (*Nelungaloo*)

¹⁰ Litchfield, above n6, 256

¹¹ Ibid.

Comment [V7]: This should appear in your introduction. You have devoted approximately 1.5 pages before identifying the nub of the issues you will discuss.

I would suggest to you to put these in your introduction so you respond directly to the issues immediately in your question.

I agree with the factors you have identified.

Comment [V8]: Consider this then. Section 51 of the NTA provides the criteria for compensation on just terms. In light of the comments in *Nelungaloo*, is there an inherent conflict in the section? Or does the context of compensation mean here its definition is to be read down?

Comment [V9]: You need to reference this quote at the end of the sentence. I know you have referenced earlier in the sentence, but the reference should go at the end of the excerpt.

Comment [V10]: You need to reference this quote at the end of the sentence. I know you have referenced earlier in the sentence, but the reference should go at the end of the excerpt.

The first and only NTA compensation case that has been litigated to judgment is the Federal Court case of *Jango v Northern Territory of Australia*.¹² Whilst the case was unsuccessful on the basis of threshold issues, it does provide some indication of how compensation claims may be measured. Justice Sackville's comments indicated that compensation may take into consideration the particular connection with country that Indigenous peoples may have when evaluating 'just terms' and consequently compensation may exceed the freehold value of land.¹³ ~~His Honour's Sackville's~~ comments reflect the views of the High and Federal Courts of Australia that Aboriginal ownership is primarily a spiritual affair, rather than a bundle of property rights as considered by the common law, what the High Court and Federal Court have recognized previously, that "Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights."¹⁴

Comment [V11]: Can you identify them?

~~His Honour's~~ However, Justice Sackville's comments were only obiter and do not provide any methodology as to how the indigenous people's special relationship to the land is to be measured. Therefore, although it is recognised that native title is a "unique title which is to be valued according to its unique characteristics," the method for measuring the value of native title rights is no further clarified, still unsettled.¹⁵

This being so, there has been some assistance provided by the The Native Title Tribunal ("NTT") as to the construction and application of the phrase 'just terms'. The NTT has indicated that market value may be a good starting point to the ascertainment of just terms compensation,¹⁶ despite the recognition of the difficulty in applying land valuation principles to ascertain "the actual intrinsic value of the land to indigenous people."¹⁷

One example is the agreement between the NSW Government and the Dughetti People in relation to the compulsory acquisition of land at Crescent Head on the New South Wales coast. The parties agreed on a compensation amount on the basis of the market value of the land (as freehold) plus 50% for loss of special attachment.

Comment [V12]: This is actually a great point. Can you please reference it?

However, this agreement was reached prior to the 1998 NTA Amendments which inserted s51A to limit the amount of compensation payable for an act that extinguishes all native title rights to the amount that would be payable if the act had been the compulsory acquisition of a freehold estate.

Comment [V13]: This is all one sentence. Can you improve this by perhaps cutting it into 2 or even 3 sentences?

Freehold cap

The freehold cap requirement found in section 51A of the NTA is problematic because it caps raises a further issue because it is arguably in friction with the requirement of just terms compensation. Whilst this section is subject to the requirement that the compensation be on 'just terms' if it would amount to an 'acquisition of property' for the

¹² [2006] FCA 318 (*Jango*)

¹³ Social Justice Commissioner, Native Title Report 2007, 171

¹⁴ *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 358, *Milirrpum v Nabalco* (1971) 17 FLR 141, *Commonwealth v Yarmirr* (2000) 168 ALR 426

¹⁵ Litchfield above n 6, 256

¹⁶ Northern Territory of Australia/Bill Risk on behalf of the Larrakia People (DC 96/7); Tibby Quall on behalf of the Danggalaba Clan (DC) [1998] NNTTA 11

¹⁷ Social Justice Commissioner, above n 12.

purposes of Section 51 (xxxi) of the Australian Constitution, friction is possible in instances where all native title rights have been extinguished by an act that does not amount to a compulsory acquisition. In order to assess the interaction of these two requirements it is necessary to define what is meant by 'freehold value.'

According to Litchfield, 'freehold value' is often mistakenly seen as equating to market value, whereas valuers actually determine freehold value by adding together a number of factors, with 'market value' being one of them.¹⁸ He further observes that it is "not generally limited to market value but extends to compensation for severance, injurious affection, disturbance, special value and solatium." According to this definition of freehold value, it is possible for just terms compensation to take into account a variety of considerations, such as the Native Title holder's special attachment to the land without necessarily exceeding the freehold value. However, as there is no judicial authority as to how these provisions will be interpreted, it remains risky to predict the outcome of a compensation determination.

Can you outline the implications of this? You identified earlier some of the implications, but you haven't expressed those here. Can you do so?

Similar compensable interest test

An additional way in which compensation for impairment of NT rights can be measured is according to the similar compensable interest test. The similar compensable interest test is set out in sections 51(3) and 240 of the NTA and states that where native title is affected but not extinguished, and compensation is payable under a law on the assumption that the native title holders instead held ordinary title, compensation is to be paid in accordance with that law. If the law does not provide for compensation to native title holders, Division 5 of Part 2 (ss 48– 54) of the NTA¹⁹ provides for compensation to be provided in accordance with that law.

Whilst it does not state that compensation must be on just terms, it cannot be assumed that the similar compensable interest test can be applied without regard to similar principles that condition just terms. Neate illustrates this point by outlining the WA State government's submission to the Tribunal in the Future Act cases of 1996, in which it: "vigorously contended that in no circumstances could the amount of compensation payable to native title holders, as determined in accordance w s123 of the Mining Act, exceed the compulsory acquisition value of the relevant land." However the tribunal did not accept this submission finding that compensation was not limited to the freehold value.

¹⁸ Litchfield, Above n6, 257

¹⁹ Native Title Act 1993s 24MD(3).

Comment [V14]: This is all one sentence. What you are trying to convey is correct, but you need to communicate it better.

Can you rephrase it? The freehold cap is subject to s53. S53 stipulates that if an action would have the effect of a compulsory acquisition made on a constitutional "just terms" basis, then any compensation should reflect this, even if the act occurred on non constitutional "just terms"

Also, I wouldn't refer to friction. If you believe there is an inherent conflict in the law, then you can make that statement, so long as you can support it.

Comment [V15]: Reference.

Comment [V16]: I wouldn't phrase it in this way. I would suggest to you to consider saying that freehold value is a term of art which can be defined to include a number of factors, some of which include an Indigenous person's connection with land. Perhaps then consider going on to say that whilst this method of construction is open to the court, it has not yet been considered.

Comment [AF17]: Sorry this is unfinished, I'm not sure if I need to address this point.

VL: I am unsure what you are trying to say about this test?

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