IN THE HIGH COURT OF AUSTRALIA	IN THE HIGH COURT OF AUSTRALIA	IN THE HIGH COURT OF AUSTRALIA
No. D1 of 2018	**No. D2 of 2018**	**No. D3 of 2018**
APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN	BETWEEN	BETWEEN
NORTHERN TERRITORY OF AUSTRALIA Appellant	COMMONWEALTH OF AUSTRALIA Appellant	ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant
and	and	and
ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	NORTHERN TERRITORY OF AUSTRALIA First Respondent
COMMONWEALTH OF AUSTRALIA Second Respondent	NORTHERN TERRITORY OF AUSTRALIA Second Respondent	COMMONWEALTH OF AUSTRALIA Second Respondent
ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor	ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor	ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor	ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor	ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor
ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor	ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor	ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor
CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor	CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor	CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor
YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor	YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor	YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor

ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA (THIRD INTERVENOR) OUTLINE OF ORAL ARGUMENT

Date of Document: 5 September 2018

Filed on behalf of the Third Intervenor by:
State Solicitor for Western Australia
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

Tel: (08) 9264 1196
Fax: (08) 9264 1440
Email: a.rorrison@sso.wa.gov.au
Ref: 716-18 (Alex Rorrison)

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PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: OUTLINE OF ORAL ARGUMENT

2. The Attorney-General for Western Australia (**Attorney**) submits that, for the reasons set out at [7] to [13] in his submissions dated 20 April 2018, these appeals do not present an appropriate vehicle to determine the correct principles applicable to the assessment of compensation under the *Native Title Act 1993* (Cth) (**NTA**) because they fail to engage, relevantly, ss 51A and 53.

3. If the proper construction of ss 51A and 53 arises for consideration the Attorney submits that the correct construction of those provisions is as follows.

Division 5 of the NTA – the legislative regime

4. The NTA provides that the entitlement to compensation under Part 2, Divisions 2, 2A, 2B, 3 or 4 of the NTA is *only* payable in accordance with Part 2, Division 5 (s 48 of the NTA).

5. The relevant 'entitlement' is an entitlement to be compensated on just terms for "any loss diminution, impairment or other effect of the act on their native title rights and interests" (NTA, s 51(1)). That is, the "effect" to be assessed and compensated is the effect of the act on *the native title rights and interests* and **not** the native title holders.

6. Such an award is only payable once for acts that are essentially the same (NTA, s 49). That is a complete answer to the Commonwealth's oral submission that s 51A is, in paraphrased summary, a provision designed to prevent 'double dipping' or the multiple awarding for compensation. It is clearly not.

7. Self-evidently, the task for the relevant tribunal of fact is to determine what would afford just terms compensation to the native title holders for the relevant compensable act. That will be a question of fact to be determined according to relevant principles.

8. Section 51A of the NTA provides the only guide as to what just terms compensation for the purposes of s 51(1) *may* be. It is (or may be) something which is no greater than the amount that would be payable if the relevant act was instead a compulsory acquisition of a freehold estate in the relevant land or waters (the **statutory cap**).

9. The plain and ordinary meaning of the words in s 51A(1) taken in their context is clear: where the compensable act has the effect of extinguishing all subsisting native title in relation to the particular land or waters, the maximum compensation payable must not exceed the amount that a person who held a freehold estate in relation to that land would have received if it were compulsorily acquired.

10. Section 51A does not mandate that the statutory cap determines what will provide just terms compensation for native title holders in all circumstances. If the award of just terms compensation to native title holders under s 51(1) requires the award of something in excess of the statutory cap, then regard must be had to s 51A(2). Section 51A(2), in turn, directs consideration to s 53 of the NTA.

11. Section 53 confirms and extends the guarantee confirmed by s 51(xxxi) of the *Constitution*. That is so because s 53 does not concern only a liability of the Commonwealth to meet the Constitutional guarantee. It confirms that, in respect of future acts (being acts which are compensable pursuant to Division 3 of the NTA), where the act is attributable to a State or Territory it is that polity which bears the relevant liability.

12. The Commonwealth's oral submission that s 53 will never apply, because there is no relevant acquisition, is inconsistent with Deane and Gaudron JJ in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 at 111 (**Consolidated Joint Book of Authorities, Volume 9**, p 3524), as cited with approval in *Griffiths v Minister for Lands* (2008) 235 CLR 232 at 244 to 245 (per Gummow, Hayne and Heydon JJ) (**Consolidated Joint Book of Authorities, Volume 7**, 2802 to 2803).

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13. Further, the Commonwealth's submission reduces to the premise that native title holders are, unlike any other holder of property, not entitled to the Constitutional guarantee. To the extent support for that submission is that native title rights are precarious to extinguishment, so much fails (at the very least) to have regard to s 11 of the NTA and s 10 of the *Racial Discrimination Act 1975* (Cth) (**RDA**).

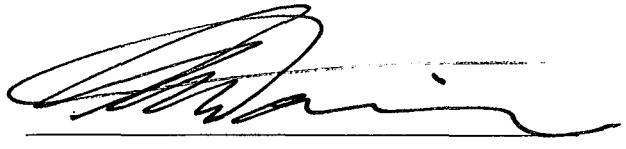
Section 51A and the Racial Discrimination Act 1975 (Cth)

14. Section 51A does not contravene the RDA. Putting to one side, for the moment, s 7 of the NTA, the following matters establish that there is no contravention of, or inconsistency with, the RDA by s 51A of the NTA.

15. *Firstly*, unlike other provisions of the NTA, s 51A does not, as a matter of construction, treat native title rights and interests as equivalent to freehold or some other title or interest in land (cf ss 24MD(2)(a) and (3), 51(3) and 240 of the NTA). So, by way of example, s 51A permits for the award of the statutory cap where non-exclusive native title rights and interests are extinguished. The question for s 51A is not what those rights and interests were or how compensation for their loss is to be assessed. In the given example, the essential fact is that all native title rights and interests are extinguished.

16. *Secondly*, s 51A does not preclude the tribunal of fact from awarding a quantum which exceeds the statutory cap so as to ensure the native title holders are compensated on just terms consistent with the Constitutional guarantee, including by imposing a relevant liability on the States and Territories for future acts.

Dated: 5 September 2018



G T W Tannin SC
State Counsel for Western Australia