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IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY
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	MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant
and	and	and
MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	MR A. GRIFFITHS (DECEASED) 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

COMMONWEALTH'S OUTLINE OF ORAL ARGUMENT

Filed on behalf of the Appellant, the Commonwealth of Australia

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PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: PROPOSITIONS

Economic loss

2. The economic value of the non-exclusive native title rights cannot properly be assessed at more than 50% of the market value of freehold (as a proxy for exclusive native title), once regard is had to restrictions flowing from: (1) inalienability; and (2) the absence of a right to control access to the land: Commonwealth submissions in chief (**CS**) [12]-[24]; Commonwealth reply submissions (**CR**) [7]-[10], [15], [19].

3. The non-exclusive native title rights were not in practical terms exclusive because:

   (a) neither the *Racial Discrimination Act 1975* (Cth) (**RDA**) nor the principle of non-derogation from grant prevented the Northern Territory from validly granting co-existing interests in the land that had no greater extinguishing effect on native title than the historical pastoral lease granted in 1882: CS [25]-[34]; CR [10], [14], [17];

   (b) the native title holders could not avail themselves of any legal or equitable remedies that had, as an element, a right to control access to the land: CS [35]-[37]; CR [11].

4. Neither the RDA nor the *Native Title Act 1993* (Cth) (**NTA**) require non-exclusive native title to be valued as exclusive native title, or as having equivalent economic value to freehold: CS [38]-[43]; CR [12]-[13].

5. Value to the Northern Territory (that is, a gains-based approach) is not an appropriate measure of economic loss under the statutory scheme for compensation provided by the NTA: CS [44]-[47]; CR [16].

Interest

6. Interest is not part of the compensation payable under s 51(1) of the NTA: CR [20]-[29].

7. The courts below had power to award interest on the economic loss component of the compensation by analogy with the operation of equitable principles concerning the compulsory acquisition of property (the equitable rule), but the equitable rule gives interest on compensation, not as part of compensation: CS [50]-[58].

8. The rationale for the payment of interest in accordance with the equitable rule (namely, that it is inequitable for a purchaser/acquiring authority to have possession of the land and to receive rents and profits from the land without payment of the purchase

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price/compensation) has never resulted in an award of compound interest by an Australian or English court, and does not, in and of itself, justify anything other than an award of simple interest: CS [63]-[74], [78]; CR [30], [33]-[34].

9. The statutory scheme for compensation under the NTA does not permit compensable acts to be treated as unlawful prior to the date of validation of the acts, and consequently does not support a different measure of interest on compensation during this period: CS [77]-[79]; CR [31].

10. The existence of a lengthy delay between a compensable act and payment of compensation does not provide a basis for an award of compound interest, particularly when no part of the delay was occasioned by the Northern Territory: CS [80]-[84]; CR [32].

11. Invocation of the "just terms" standard in s 51(xxxi) of the Constitution does not answer the question of compound interest because:

    (a) even when some Justices of this Court have allowed for the possibility that the provision of interest may be required by s 51(xxxi), there has never been any suggestion that an award of compound interest would be required to meet that standard: CS [86]-[87];

    (b) considerations of fairness as between the native title holders and the broader community do not support an award of compound interest: CS [88]-[91].

12. A gains-based approach is not appropriate under the statutory scheme for compensation provided by the NTA: CS [93].

Non-economic loss

13. The causal relationship required by s 51(1) of the NTA between a compensable act and claimed loss is not capable of being met where an earlier non-compensable act impacted on the exercise of native title in some way, and the later compensable act had no further effect on the exercise of native title: CS [96]-[103]; CR [37].

14. Compensation for non-economic loss cannot include a component for a sense of failed responsibility to protect the land when that sense of failure flowed from the historical loss of recognition of a native title right to control access to the land, and not from any compensable act: CS [104]-[112]; CR [38]-[39].

15. The NTA does not permit compensation to be assessed on the premise that the effect of a compensable act will be experienced indefinitely by a community with a perpetual existence. The persons who are conceived of by the NTA as having suffered loss from

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the extinguishment of native title are the persons who actually held the native title that has been extinguished, with provision for the survival of the entitlement to compensation in the event of the death of such persons: CS [113]-[119]; CR [40]-[42].

16. Loss of spiritual connection with land must be assessed in the context of the totality of the land that remains available for the exercise of traditional rights. It was not open to the Full Court to find that the primary judge had undertaken this analysis: CS [120]-[125]; CR [43]-[44].

17. The correct test for whether an award of compensation under the NTA is manifestly excessive is not the test applicable to appeals from a jury verdict of damages - it is whether the amount awarded was a wholly erroneous estimate of the damages suffered; the ultimate question being whether the total award is outside the limits of a sound discretionary judgment: CS [130]-[131]; CR [46].

18. The Full Court either failed completely to determine for itself the permissible range of a sound discretionary judgment, or alternatively, impermissibly and erroneously determined a range by having recourse to material:

    (a) that was not provided to the parties; and

    (b) was either not capable of supporting the award of non-economic loss, or not capable of being the subject of judicial notice: CS [132]-[148]; CR [47].

19. The methodology proposed by the Commonwealth for calculating non-economic loss avoids arbitrariness and produces a fair and just amount of compensation for non-economic loss in the circumstances of this case: CS [149]-[150]; CR [48].

Dated: 4 September 2018

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Extract from the Commonwealth's opening submissions before the trial judge dated 4 December 2015:

APPENDIX A

Cases Involving Cultural Loss as an Aspect of Damages

489. In *Roberts v Devereux* (unreported, 22 April 1982, Forster CJ, Supreme Court of the Northern Territory), a tort / personal injury case, his Honour awarded damages of $1,000 for "loss of enjoyment of life" constituted, in part, by the plaintiff's inability "to play his full part in ceremonies".

490. In *Napaluma v Baker* (1982) 29 SASR 192 (Napaluma), Zelling J awarded damages in a tort / personal injury case under the head of loss of amenity, arising from a loss of ability to participate in indigenous cultural activities, rituals and ceremonies: 194-195 (Zelling J). Justice Zelling found that, because of his injuries, the plaintiff would be unlikely to have "higher degrees" of cultural "secrets" entrusted to him: at 194. He also found that the plaintiff was "left out of some ceremonies and play[ed] a merely minor passive role in others and [the plaintiff was] therefore less than a full member of the aboriginal community": at 194. Justice Zelling described the loss as being "basically a loss of position in the aboriginal community": at 194. It is not perfectly clear from the judgment, but it appears that Zelling J awarded damages for loss of amenity arising from this loss of position in an amount of $10,000: at 195.

491. In *Dixon v Davies* (1982) 17 NTR 31 (Dixon v Davies), a tort case, O'Leary J awarded damages of $20,00 for "loss of cultural fulfilment" under the heads of pain and suffering and loss of amenity: at 34-35. That damage was constituted by "loss of standing within [the plaintiff's] Aboriginal community and his lowered expectation of ever being able to enjoy full tribal rites": at 34. There was evidence that it was extremely unlikely that the plaintiff would "ever achieve the full responsible adult status gained by participation in ceremonies and strenuous rituals which are an essential part of subsequent initiation", that he would "be denied access to tribal secrets" and he would retain the pejorative description of "young boy": at 34. There was also evidence that his marriage prospects would be reduced because of his lowered status: at 35.

492. In *Namala v Northern Territory* (1996) 131 FLR 468 (Namala), Kearney J awarded damages in a tort / personal injury case under the head of "subjective suffering",

"resulting from a loss of cultural fulfilment through inability to fully participate in traditional cultural ceremonies and activities": at 474. Justice Kearney also awarded damages under the head of "subjective suffering" by virtue of "the cultural importance of having a large number of children within her community", which her injuries prevented her from having: at 474. There was anthropological evidence going to the importance of having children to the plaintiff's status in her community: at 470. Justice Kearney did not separate out the damages attributable to that subjective suffering from the damages attributable to other heads. He ultimately awarded the plaintiff $80,000.

493. In *Weston v Woodroffe* (1985) 36 NTR 34, a tort / personal injury case, Muirhead ACJ awarded damages under the heads of pain and suffering and loss of amenities for some damage arising from the plaintiff's cultural pursuits. Before his injury, the plaintiff had been a "fine dancer" and had regularly danced at ceremonies in Australia and overseas: at 45. However, those activities were "now beyond him": at 45. His Honour found that the "social consequences of [his injury] appear almost Draconian. He can still attend ceremonies, play the didgeridoo and use clap sticks. But he cannot participate further in dance": at 45. There was evidence that his injuries caused "considerable 'shame'" in his community and would prevent him from being with women: at 45. His Honour awarded damages of $45,000, but did not separate out culturally-influenced suffering and loss of amenity from other kinds of suffering and loss of amenity.

494. In *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240 (Milpurrurru), von Doussa J awarded damages under s 115(2) and 115(4) of the *Copyright Act 1968* (Cth) for infringements of copyright held by indigenous persons. He did so in a context where s 115(4)(b) of the Act permitted the award of "additional damages" having regard to "all other relevant matters". There was authority that s 115(2) damages could include compensation for personal suffering caused by insult and humiliation: at 277. However, his Honour relied exclusively on s 115(4)(b) to award damages covering all the non-pecuniary factors referred to below: at 280. His Honour ultimately awarded damages of $82,000 in total, of which $70,000 was attributable to s 115(4) "additional damages". In calculating those additional damages, his Honour appeared to incorporate a component for the fact that the infringements had "caused personal distress and, potentially at least, ha[d] exposed the artists to embarrassment and contempt within their communities", which losses were "a reflection of the cultural environment in which the artists reside[d]": at 277. His Honour also appeared to incorporate a component for what he called "cultural damage", by which he may have meant "the pirating of cultural heritage" (at 277). His Honour also appeared to suggest

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that, so far as the criterion was personal suffering, it may be necessary for damages to vary from artist to artist: at 277. Further, because some of the copyright holders were dead by the time of judgment and because the damages were at least in part calculated by reference to personal suffering which had ended for the deceased, he awarded less compensation to the deceased: at 277, 280-281. His Honour undertook an aggregate assessment of "additional damages" totalling $70,000, and then apportioned on the basis that the three living applicants would receive $15,000 each, and the estates of the other artists would receive $5,000 each.