IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D1 of 2018	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D2 of 2018	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY 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

REPLY SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

PART I: CERTIFICATION

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

PART II: ARGUMENT

2. The Claim Group set out a series of propositions (under the heading "Considerations informing assessment") that lay the foundation for their substantive arguments: Claim Group's submissions (**CG**) at [29]-[41]. The Commonwealth responds as follows.

3. At CG [32]-[33], the Claim Group place reliance upon their native title being protected by the *Native Title Act 1993* (Cth) (**NTA**). However, the protection conferred by the NTA is in its terms subject to exceptions. Native title is "recognised, and protected, *in accordance with*
10 *this Act*" (s 10) and native title is "not able to be extinguished *contrary to this Act*" (s 11). Section 11(2) specifically states that one of the ways in which a State or a Territory is able

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to extinguish native title is "by validating past acts, or intermediate period acts, in relation to the native title".[1] That limitation reflects a central policy of the NTA, articulated in the Preamble, that it recognise and protect native title *and* also validate past grants and other acts rendered invalid by native title before it was known to exist.[2] Further, to observe that, where all native title is extinguished by a validated act, the Territory has a full beneficial interest in the land, is to say no more than that validation operates in a manner comparable to the compulsory acquisition of an interest in land. Like other interests in land, native title is not, and has never been, immune from compulsory acquisition according to law.[3]

4. As to CG [34], the Claim Group conflates the human rights that are protected by s 10(1) of the RDA (in this case, the human right to own and inherit property, which includes an immunity from arbitrary deprivation of property) with the *property itself* (in this case, native title rights and interests as defined in s 223(1) of the NTA).[4] It is the native title rights that are extinguished by validated acts, and the NTA provides an entitlement to compensation on just terms for that extinguishment (and not by way of vindication of universal human rights). Further, the Claim Group's assertion that there was actionable "wrongful use" of a claimant's property notwithstanding subsequent validation is an attempt to resurrect a claim for mesne profits that was dismissed by the primary judge and not appealed: FC [112(3)], [446]-[448] (CAB.132, 210); Commonwealth submissions (**CS**) at [11]. The Claim Group cannot now re-agitate that claim collaterally as a purported "consideration informing assessment", not least because the existence of a factual foundation for the claimed "wrongful use" was disputed and no findings were made by the primary judge.

5. As to CG [36]-[38], where land is not subject to a native title right of exclusive possession, the Commonwealth contends that it may lawfully be made the subject of certain non-native title rights of use: CS [25]-[37]. If all that the Claim Group intends to convey in these paragraphs is that native title holders may voluntarily surrender their non-exclusive native

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1 See *Western Australia v Commonwealth* (1995) 183 CLR 373 (***Native Title Act Case***) at 165.

2 In the case of intermediate acts, as opposed to past acts, the dissonance between the law as it was understood to be at the time the acts were done, and the law as it was subsequently declared to be by the Court in *Wik Peoples v Queensland* (1996) 187 CLR 1 (***Wik***), was in relation to the nature of rights granted by pastoral leases rather than the common law's recognition of native title.

3 *Western Australia v Ward* (2002) 213 CLR 1 (***Ward HC***) at [278]-[280] (resumptions under the *Public Works Act 1902* (WA) that post-dated the *Racial Discrimination Act 1975* (Cth) (**RDA**) were held to be valid at common law); *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at [10], [30]-[31] (notices of proposed acquisition of native title under the *Land Acquisition Act* (NT) that post-dated the NTA were valid).

4 *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 217-218 (Brennan, Toohey and Gaudron JJ); *Native Title Act Case* at 437; *Ward HC* at [107]-[108].

title rights in exchange for consideration — just as non-native title holders can voluntarily relinquish their property to an acquiring authority — then that is not contentious. If, however, what is suggested is that the Claim Group, through a process of surrender, could have "bargained" for a monetary sum greater than the compensation that would be payable for a compulsory acquisition, then (1) there are no factual findings to support that proposition, and (2) it disregards the availability of a power in the Territory to compulsorily acquire those rights: cf. CG [48].

6. At CG [37], the Claim Group relies upon this purported bargaining power, and on the (erroneous) characterisation of validation as having extinguished the Claim Group's human rights, to contend that compensation for material loss should be measured by reference to "*gain by others*". The Claim Group asserts that "statutory validation" does not prevent such an approach. At least two matters of principle stand against that proposition: *first*, a statutory scheme that proceeds on the footing that a validated act is "taken always to have been valid" (ss 14, 22A) should not be construed as permitting compensation to be assessed on the footing that the act constituted a legal wrong (for that would be to construe the statute as contradicting itself); *secondly*, the Claim Group's approach requires the Court to disregard the orthodox principle that a claimant cannot recover damages on a compensatory *and* restitutionary basis: an election must be made prior to judgment to avoid double recovery.[5] Hence, a gains-based approach would preclude an award of compensation for loss of spiritual attachment to land: CS [93].

7. As to CG [39]-[41], the dealings described in CG [39] do not illustrate the value of the native title rights at issue in this case because all of them took place *after* the Claim Group had been determined to hold *exclusive* native title (by operation of s 47B). Further, if the 2009 surrender of native title is intended to illustrate the kind of "bargain" that the Claim Group would enter into when transacting voluntarily, then it may be observed that the agreed consideration for the surrender did not include any sum *at all* for non-economic loss[6]: cf. NTRB [37]-[38]. Otherwise, see paragraphs 4-6 above in response to CG [41].[7]

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5 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559, 569-570; *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 32 (Windeyer J); Varuhas, *Damages and Human Rights* (2016) at 118-119.

6 GFM.87 (cl 3 and 4). Attachment C to the agreement appears (in part) at CFMSupp.4-20.

7 The evidence at GFM12 (cited at CG [fn42, 44] is subject to a direction limiting its use pursuant to s 136 of the *Evidence Act 1995* (Cth): CFMSupp.21-28.

ECONOMIC LOSS

8. **Cth grounds 1 and 2:** The Claim Group does not respond to CS [12]-[21] other than to argue generally for economic loss to be assessed at full freehold value. Nevertheless, at CG [7], they appear implicitly to accept that native title rights that co-exist with non-native title interests (such as a pastoral lease) may attract lesser compensation at least for economic loss. The proposition seems to be that, while a pastoral lease is in force, the native title rights have one value, but the day after the pastoral lease expires, the native title rights increase in value. That paradigm either presupposes that a new pastoral lease could not have been granted the very next day, or that value is to be assessed on the day without any regard to what might happen the next day. A similar approach can be seen at NTRB [44]-[45]. The Commonwealth repeats CS [26]-[34] in response.

9. As to CG [50], in so far as the Claim Group points to contemporary matters as demonstrating the economic value of their native title: (1) the scheme for indigenous land use agreements in Div 3 of Pt 2 of the NTA (which enables agreements to be made with non-government parties) did not exist when the compensable acts were done[8]; (2) when intermediate period acts were done, the scheme under the NTA was limited to agreements with the Commonwealth, a State or the Territory (see now repealed s 21); and (3) the non-exclusive native title rights did not extend to commercial purposes: FC [71] (CAB.120). Further, the evidence cited by the Claim Group in relation to whether "payment or recompense are within the traditions" of the claimants was contentious, but the primary judge did not make findings on the issue because the evidence related to what was then a dispute about the operation of s 94 of the NTA (which subsequently was resolved on a different basis).[9] In the absence of findings, the Claim Group cannot now rely upon contentious evidence in this Court.

10. **Claim Group ground 2(1):** *Rights not exclusive in fact*: As to CG [51]-[52], the Claim Group asks the Court to read the statement of agreed facts as if the words in clause (3) mean something other than what they say: FC [71]-[72] (CAB.119). Clause (3) describes the *nature* and *extent* of the native title rights that the parties agreed continued to exist (prior to the compensable acts) in areas where there had been partial extinguishment by an earlier act. The liability hearing proceeded on the basis of the agreed facts, such that when the primary judge held that a historical pastoral lease had partially extinguished native title, his Honour

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8 Div 3 of Pt 2 formed part of the 1998 amendments to the NTA following the decision in *Wik*.

9 (Concurrent evidence of anthropologists) CFM.560(12)-589(20); 595(35)-602(34). (Status of evidence) CFMSupp.29(10)-31(8); CFM.560(12)-561(7); CFMSupp.32(18)-34(47).

found that this left the *non-exclusive* native title rights and interests: *Liability #1* [16], [43] (CAB.12, 18). The passages from *Ward HC* (at [52]-[53]) do not assist the Claim Group: there is no "unresolved question of extinguishment" and the term "non-exclusive" says nothing about what is to happen in the event of competition between the exercise of rights (which is the concern of s 225(d), but not s 225(b)): cf. *Ward HC* at [49]. There is no basis for the Claim Group's attempt to limit the finding as to its "non-exclusive rights" to "co-existing" non-native title interests, such that exclusive rights spring back when any "co-existing" interest ceases. Instead, the finding that the Claim Group had "non-exclusive" native title rights and interests conveys the consequence of the grant of a pastoral lease as determined by *Ward HC* (at [417]):[10]

> [T]he grants of the respective pastoral leases were inconsistent with the continued existence of the native title right *to control access to and make decisions about the land.* (emphasis added)

11. As to CG [53]-[56], this highlights the difficulty with the availability of general law remedies for holders of non-exclusive native title rights. Factual possession says nothing about the nature and extent of the native title rights: a person who is in possession of land, even wrongfully, can bring a claim in trespass[11]: cf. NTRB [20]. To the extent that CG [55] is to be understood as advancing a contention that some sort of *qualified* right to control access to the land (by anyone lacking better title) survived the grant of the historical pastoral lease, then that is precluded by the holding in *Ward HC* (reproduced in the preceding paragraph). The Commonwealth repeats CS [25], [35]-[36].

12. As to CG [57]-[60], a constant refrain in the Claim Group's submissions is that compensation ought to reflect loss of the native title rights "as rights equivalent to other titles". In truth, however, the only "other title" that the Claim Group will accept as a proxy for value is full freehold, irrespective of whether the actual rights that exist in accordance with traditional law resemble the rights associated with freehold title. The Claim Group's reliance on the *Native Title Act Case* to support that position is misplaced. The Court was there dealing with a Western Australian statute that purported to extinguish all native title in the State and replace it with statutory rights of traditional usage.[12] The statutory rights were found to "fall short of the rights and entitlements conferred by native title", and the shortfall was

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10 See also *Ward HC* at [192].

11 *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 299 (Williams J).

12 *Land (Titles and Traditional Usage) Act 1993* (WA).

"substantial", yet the legislation precluded the allowance of compensation for the effective downgrading of the rights.[13] It is *this* aspect of the scheme that the Court is referring to when describing a State law that purports to authorise expropriation of property "on less stringent conditions (*including lesser compensation*)": cf. CG [59]. In contrast, the Court had no difficulty with compensation for the extinguishment of native title itself being assessed as the amount "that could have been determined under the *Public Works Act 1902* if the land had been held under or subject to a title and had been taken or resumed compulsorily", in circumstances where "title" included any interests arising from Crown grant, whether proprietary or otherwise (including a use for mining purposes).[14] As that provision equated the measure of compensation payable to the holders of native title to the compensation payable to holders of other forms of title, it did not appear on its face to be discriminatory. Nothing said by the Court suggests that native title had to be attributed with an equivalent *value* to any *particular* title or any title, let alone freehold title: cf. NTRB [20].[15] The Commonwealth otherwise repeats CS [38]-[43].

13. As to CG [61] and the complaint that native title should not be compared to another form of title so as to produce a "fractionable compensable worth", this is the exact process used to derive a value for freehold title in the cases discussed at CS [18] where the title is subject to *constraints* on alienability and use. There is no reason why applying the same methodology to native title (by analogy) would be discriminatory. As to CG [62]-[63], the Commonwealth repeats paragraphs 5-6 above. Otherwise, the Commonwealth repeats CS [25]-[34].[16]

14. As to CG [64]-[65], [69], the Claim Group misstates the Commonwealth's submissions (at CS [34]) and then responds to an argument that was not put. The cases upholding the validity of pastoral leases renewed after the commencement of the RDA contradict the Claim Group's contention as to when the RDA operates to invalidate an act. Where native title has been partially extinguished, further grants that would not have any further extinguishing effect on

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13 Native Title Act Case at 449.9-450.1.

14 *Native Title Act Case* at 434 (definition of "title"), 450 (compensation provision).

15 Contrary to what is said at NTRB [fn34], the plurality in *Ward HC* at [320] were referring to native title holders being able to obtain the same rights to compensation as an "occupier" of land, having already found that they were unable to obtain compensation as an "owner": see *Ward HC* [318]-[319].

16 As for CS [27], the Claim Group has resiled from the position in the Application for Special Leave with respect to an occupation licence: CG [63], fn89. In that respect, the governing legislation up to 26 June 1992 was *Crown Lands Ordinance* 1931 (NT), s 108; followed by *Crown Lands Act 1992* (NT), s 90. In each case, an occupational licence could be granted in relation to "any particular Crown Lands". Crown lands was defined in s 5 of the 1931 Act, and s 3 of the 1992 Act, and was not limited to unalienated Crown land.

native title are valid (CS [34(d)]). The Claim Group do not confront the consequence that, if their approach were to be adopted, every pastoral lease granted after 31 October 1975 that was still in force on 1 January 1994 would be invalid, but then validated by the NTA (or State or Territory cognates) on terms that *wholly* extinguish native title (CS [34(a)-(c)]).[17]

15. As to CG [66]-[67], the Commonwealth repeats paragraph 7 above in relation to the Claim Group's reliance on dealings after exclusive native title rights had been recognised.[18] Use of contemporary commercial contracts with provision for solatium-type payments as a check measure for assessing *non*-economic loss is in a different category, because that sum is assessed in present day dollars: FC [384] (CAB.195).

16. *Value to the Territory*: As to CG [68], [75]-[77], the American cases cited by the Claim Group (at fn105) do not advance their arguments as each involved *exclusive* Indian titles. For example, in *Tlingit v United States*,[19] the Supreme Court described the Indian title as "the complete beneficial ownership based on the right of *perpetual and exclusive* use and occupancy". Otherwise the Commonwealth repeats CS [44]-[46].

17. As to CG [84], there is no basis for the Claim Group's assertion that the grant of co-existing interests was "never likely to occur", their suggestion being that interests of that kind were never granted in the town. To the contrary, the Claim Group brought an unsuccessful claim for compensation for the grant of three such interests in the form of grazing licences.[20] The grant of co-existing interests such as occupation, grazing and miscellaneous licences would not have been compensable acts (because they did not have any *further* extinguishing effect on native title, the pastoral lease already having extinguished exclusive native title). For that reason, they did not feature in the liability hearing. There is no basis to infer that the Territory did not grant interests of that kind in the town.

18. *Alternative methodology*: As to NTRB [47]-[54], the NTRB asks the Court to consider a "reinstatement methodology" despite acknowledging that this is not the basis upon which

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17 NTRB [fn55] assert that, in the case of intermediate period acts, there is "no doubt" that the grant of another pastoral lease would have been an impermissible future act, citing *Narrier v Western Australia* [2016] FCA 1519 at [1068]-[1070] (Mortimer J). Mortimer J's construction of s 227 of the NTA is not free from doubt as it is against the express language of the provision. In contrast, in *Neowarra v Western Australia* [2003] FCA 1402 at [523], Sundberg J held that a pastoral lease granted in 1995 was not an intermediate period act because it covered an area previously wholly covered by at least one pre-1975 pastoral lease.

18 See fn7 regarding the direction limiting the use of the evidence at GFM12.

19 389 F 2d 778 at 782 (1968).

20 *Liability No 1* (CAB.5) at [8], [21A(1)], [43], [46], [61]-[81]. See also *Liability No 2* (CAB.71) at [9].

the Claim Group put their case in the courts below or now puts their case in this Court: NTRB [52].[21] Further, the NTRB seeks to use the methodology to show error on the part of the court below despite having participated in the appeal before that Court without advancing this argument. An intervenor should not be permitted to widen the issues in this Court in this way.[22] If the argument is permitted, the Commonwealth responds as follows:

(a) The reinstatement methodology appears directed to circumstances where the absence of a market or general demand for the property in question is because the owner has expended a considerable sum on structures or other improvements that are of no use to the general market. Hence, the "new for old" inherent in the methodology generally relates to the construction of new replacement structures on an alternative block of land. Further, as the reinstatement methodology is measured by the actual cost of replacing what the owner had previously owned, it requires identification of the actual parcel of land that is to form the replacement, and the cost of the replacement structures.[23]

(b) As for NTRB [49], if the justification for application of the reinstatement methodology is the sui generis nature of native title, that would seem to reflect at least some overlap between the "utilitarian" and "spiritual" aspects of the native title rights, with the possibility for double recovery if there is also compensation for non-economic loss. That is reinforced by the analogy the NTRB draws with the provisions of ss 51(6)-(8) of the NTA, which deal with compensation provided by way of a transfer of property or goods and services. When compensation is provided in this form, the property or goods and services constitute *full compensation* for the act. There can be no additional payment for non-economic loss.

(c) If, however, the reinstatement concept is confined only to the utilitarian aspects of the native title rights (see the analysis in NTRB [50]-[51]), then it seems essentially to be a repackaging of the market value analysis. That is, to arrive at a reinstatement value, the NTRB simply adopts all of the Claim Group's arguments to justify freehold value on a market value approach, and says that these same factors justify freehold value on a reinstatement approach. Contrary to NTRB [52]-[53], that does not warrant description of the reinstatement methodology as any sort of check measure.

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21 Although CG [76], with its reference to *Falconer* [1981] 1 NSWLR 547 (***Falconer***) at 569-72, may be an attempt to collaterally introduce a reinstatement approach.

22 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 201 CLR 501 at [155] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

23 *Falconer* at 553 (Hope JA), 564 (Glass JA), 571 (Mahoney JA); *Kozaris v Roads Corporation* [1991] 1 VR 237 at 242 (Gobbo J).

19. The NTRB at [54] acknowledges (unlike the Claim Group) that the consequence of the argument that non-exclusive rights are valued at 100% of freehold is that it is possible for compensation for the extinguishment of native title to exceed 100% of freehold value, especially if extinguishment occurs in a piecemeal manner. Given that this component of compensation is limited to the *economic* value of native title rights, no explanation is provided as to how the *economic* value of exclusive native title rights can exceed the *economic* value of freehold; let alone how the economic value of a subset of non-exclusive utilitarian rights can be equated to the economic value of freehold.

INTEREST

10 20. **Cth ground 3:** As to the submissions of the Northern Territory (**NT**) at [115]-[120] and CG [98]-[99]: In order to understand fully the reasoning in *Marine Board of Launceston v Minister of State for the Navy* (***Marine Board***),[24] it is necessary to consider the Court's earlier judgment in *Commonwealth v Huon Transport Pty Ltd* (***Huon Transport***).[25]

21. The Plaintiff in *Huon Transport* ultimately failed because the interest claimed was upon compensation for overdue hire rather than the capital value of the vessel. Justice Dixon gave detailed consideration to the equitable rule,[26] accepting that, absent statutory indication to the contrary, moneys payable as compensation for *land* compulsorily acquired bear interest from the time of dispossession; and that the same rule might be applied to the compulsory acquisition of a ship, but not to its temporary use.[27] Turning to the relevant statute (s 67 of
20 the *Defence Act 1939* (Cth)), Dixon J noted that the question whether, in the absence of an express provision, interest was payable upon unpaid compensation in respect of commodities requisitioned had been decided specifically, and negatively, by the House of Lords in *Swift & Co v Board of Trade* (***Swift's Case***).[28] While acknowledging that, "in a sense", that case had depended upon the interpretation of particular regulations, Dixon J nonetheless considered that their Lordships had proceeded "upon general principles", and his Honour framed the issue arising in the following terms (at 328) (emphasis added):

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24 *Marine Board* (1945) 70 CLR 518 (Rich, Dixon, McTiernan and Williams JJ, Latham CJ and Starke J dissenting).

25 *Huon Transport* (1975) 70 CLR 293 (Latham CJ, Starke, Dixon and McTiernan JJ, Rich and Williams JJ dissenting).

26 The term "equitable rule" has the same meaning described in CS [51].

27 *Huon Transport* at 323-324.

28 [1925] AC 520.

> ... it is probably true that regulations made under s 67 and s 124 of the *Defence Act* might have given interest. But can we extract from the word "recompense" in s 67 an authority to award it? If we work out the implications of the word "recompense" according to *ordinary legal principles*, we have the decision in *Swift's Case* for our guidance upon *the place interest takes in the conception of compensation in English law*... Our Constitution, when it refers to "just terms", is placing a qualification on the legislative power it bestows to acquire property compulsorily. But it is, I think, difficult to say that it makes it necessary for the legislature to give more than the full content of "compensation", *as compensation is understood in English law*, and we know from the House of Lords that a right to interest on the amount payable for the thing is not always or necessarily included. Section 51(xxxi) has not the effect of transferring into our Constitution the Fifth Amendment, nor all the glosses placed upon it.

22. The reference in the last sentence is to the Fifth Amendment of the Constitution of the United States, which has been interpreted as including interest within its conception of "just compensation" for compulsory taking.[29] Justice Dixon considered that the Court should follow English law, as did Starke J (who applied *Swift's Case* and found at 315 that the statute did not authorise interest). However, Rich and Williams JJ favoured the American constitutional position. Justice Rich held (at 307) that "just terms" would involve, as a matter of elementary fairness, the payment of interest on the money to which the dispossessed owner is entitled for the time during which it is withheld from him, and that interest should be allowed "as constituting a part of just compensation". Justice Williams held (at 337-338) that, in the absence of a clear statutory prohibition, it is proper to construe the words "intended to provide just terms" as including authority for the court to allow interest where it considers that such an allowance "is necessary to make the compensation adequate". Neither Latham CJ nor McTiernan J expressed a view because each held that the requisition had taken place by agreement.

23. It was against that background that the issue again came before the Court in *Marine Board*, in circumstances where the Commonwealth had compulsorily acquired full property in a ship. Justice Dixon, referring to the views he had expressed in *Huon Transport*, found (at 530) that the equitable rule applied to the acquisition, such that compensation payable in respect of the ship carried interest from the date the Government took possession. Justice McTiernan adopted the same approach, following *Swift's Case* to hold that the regulation in question did not authorise the payment of interest — noting (at 534) that compensation but without interest may represent the full content of the word "compensation" in the sense which the word has in English law — but also finding that application of the equitable rule

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[29] *Huon Transport* at 307.

was not precluded by this construction of the regulation, and that the rule applied in the case of a compulsory acquisition. Chief Justice Latham and Starke J also followed *Swift's Case*, but neither was prepared to apply the equitable rule: Latham CJ (at 527) considered that "delay in payment, though causing loss, is not something which is itself the subject matter of compensation for the taking"; and Starke J (at 529) did not think the requisitioning of a ship was comparable to a compulsory purchase.

25. Justices Rich and Williams continued to adhere to the views they had expressed in *Huon Transport*, reading the words in the regulation ("just compensation") in light of the Constitutional requirement, and construing the regulation as including a power to award interest in its content (at 527, 537). However, both were *also* prepared to allow interest in accordance with the equitable rule. Further, while Rich J did not say whether interest in that case would be on the compensation or as part of the compensation, Williams J reviewed statements of the rule in *Toronto City Corporation v Toronto Railway Corporation*,[30] and *Inglewood Pulp & Paper Co Ltd v New Brunswick Electric Power Commission* (***Inglewood Pulp***),[31] and considered the former more appropriate as it referred to interest *on* the compensation. Justice Williams did describe the statement in *Inglewood Pulp* (that "the right to receive interest takes the place of the right to retain possession and is within the rule") as being couched in terms that included interest *in* the compensation. Nevertheless, his Honour went on to say (at 537-538) that the statements in both *Toronto* and *Inglewood Pulp* make it clear that (emphasis added):

> ... if there is a compulsory purchase of property of such a nature that, if it had been purchased under a contract, the court of equity could have ordered specific performance, then the court, in assessing compensation can, in the absence of a statutory prohibition, by analogy to the equitable practice, *without any statutory authority*, order the payment of interest *on the amount awarded* from the date that the resuming authority entered into possession.

26. That interest given pursuant to the equitable rule is "without any statutory authority" is consistent with equity supplying interest in *aid* of the statutory right: it is not consistent with the equitable rule operating as a principle of construction which informs "the *content* of the statutory entitlement": cf. NT [116], [120]. Further, when Williams J considered the equitable rule in *Huon Transport* (at 334-335), after referring to *Inglewood Pulp* and *International Railway Co v Niagara Parks Commission*,[32] his Honour had this to say (at 336):

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30 [1925] AC177 at 193, cited in *Marine Board* at 537.6.

31 *Inglewood Pulp* [1928] AC 492.

32 *International Railway* (1941) AC 328.

> It is also clear from the judgments of the Privy Council to which I have referred that the instances are few in which, in the absence of a statutory prohibition, the English courts cannot *engraft* the equitable practice *onto* a statute which only provides for the payment of principal in order to award interest which it is obvious they consider is required to make the compensation fair and just. (emphasis added)

27. Again, that is not a description of the equitable rule operating as a principle of construction so as to produce an entitlement to interest *within* the terms of the statute: cf. NT [116], [120]. Indeed, in *Marine Board* (at 531), Dixon J considered *Inglewood Pulp* and specifically observed that the interest, which was made part of the award determining compensation, was *not* given by the statute — "It was the result of the application of the equitable rule".[33] The point ultimately made by Dixon J (at 532-533) was that it was not necessary to pursue a separate proceeding in a court with equitable jurisdiction in order to be given interest under the equitable rule: where a legislative instrument empowers a court or tribunal to deal with the question of compensation, the jurisdiction to determine compensation may be readily interpreted as extending to what is *consequential upon or incidental to* the award. Justice McTiernan likewise held (at 535) that, where there is a right in equity to receive interest on the compensation for a compulsory acquisition, it is an *incident* of the jurisdiction conferred upon the court to determine and award compensation, to order payment of interest *on* the compensation.

28. In summary, contrary to NT [115]-[120] and CG [98]-[99], in *Marine Board*:

(a) four members of the Court (Latham CJ, Starke, Dixon and McTiernan JJ) held that, as a matter of ordinary language and legal principle, the word "compensation" does not include interest;

(b) four members of the Court (Rich, Dixon, McTiernan and Williams JJ) held that the equitable rule applied to a compulsory acquisition and supplied a right to interest on the compensation from the date of dispossession until date of payment;

(c) three of the aforementioned members of the Court held that interest in accordance with the equitable rule is awarded *on* compensation (Rich J expressing no view);

(d) to the extent that Rich and Williams JJ concluded that interest could be awarded *as* compensation, their basis for doing so was constitutional.

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[33] That analysis is borne out by the description in *Inglewood Pulp* (at 496) of the Court below having tallied up various values, "making the *total* amount awarded $49,490", and then the Court "*also* allowed interest, refused by the arbitrator, *on the said sum* of $49,490 at the rate of 5% per annum from October 13, 1920".

29. As for NT [121], there is no relevant distinction between the form in which the statutory entitlement to compensation was conferred in *Marine Board* and s 51(1) of the NTA[34]: see also CS [55]-[56]. Nor is there any reason to construe the NTA as using the word "compensation" other than in accordance with the meaning of the term that has been established at least since *Marine Board*.[35] The language of "just terms" does not assist the Territory's argument for the reasons set out in CS [87]. Further, even when some Justices of the Court have allowed for the possibility that the provision of interest may be required by s 51(xxxi), that has not necessarily involved a departure from the established meaning of "compensation" (being a word not used in s 51(xxxi)).[36]

10 30. **Claim Group ground 2(2):** It has never been disputed that the Claim Group should receive an award of pre-judgment interest on the economic loss component of the compensation, and that interest should be calculated from the date of the compensable acts until judgment: CS [50]-[51], [58]; cf. CG [89], [90], [98], [100]. However, contrary to CG [94], the Claim Group's case is not advanced simply by stating the basis for the equitable rule (that being a matter that is not in dispute[37]). The reason for that is because the equitable rule does not inherently lead to the result contended for by the Claim Group,[38] as is clear from the absence of a single Australian or English authority in which anything other than simple interest has been awarded pursuant to the equitable rule. Thus, while it is true that the underlying foundation for the rule is that it would be inequitable not to award interest in the
20 circumstances envisaged by the rule, to date the courts have unswervingly judged the concerns of equity to be met by an award of *simple* interest: cf. CG [113]. It follows that, to say the Territory received rents and profits from the land,[39] or that interest takes the right of possession,[40] or that it is inequitable for the Territory to have had possession of the land

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34 In *Marine Board*, reg. 60D of the *National Security (General) Regulations* provided that any person who suffered or suffers loss or damage by reason of anything done under reg. 57(1) (which provided for the making of a requisition order) in relation to any property in which they had a legal interest or legal right, shall be paid compensation to be determined by agreement or a Compensation Board. Upon review, a Court could award the compensation "which it thinks just": *Marine Board* at 521.

35 See for example: *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 517 (Williams J at first instance), 555 (Starke J), 571, 584 (Dixon J); *Bank Nationalisation Case* (1948) 76 CLR 1 at 228, 397 (Latham CJ, McTiernan J concurring), 277-278 (Rich and William JJ), 316 (Starke J), 341 (Dixon J).

36 For example, *Bank Nationalisation Case* (1948) 76 CLR 1 at 228, 397 (Latham CJ, McTiernan J concurring).

37 CS [50]-[51], [58]-[59], [63]-[64]; cf. CG [95]-[97].

38 Cf. CG [101]-[103], [114].

39 Cf. CG [89], [91], [94], [101]. In any event, the Territory did not receive monies in relation to all of the parcels of land: cf. CG [91].

40 Cf. CG [94], [100], [101], [102].

without payment,[41] says no more than that the conditions for an award of simple interest are met.

31. *Pre-validation:* As to CG [88(3)], use of the subject land between the date of the compensable acts and validation cannot now be characterised as unlawful: CS [78]-[79] and paragraph 4 above. That does not preclude the period prior to validation from being regarded as one in which the Claim Group and the Territory were unable to do anything to improve their respective positions: cf. CG [89], although see CG [90]. As neither party during this period was aware that native title was to be recognised, there is no basis in principle to single out this period for different treatment in relation to interest: CS [79].[42]

32. *Delay:* As to CG [88]-[90], it has never been suggested that the Claim Group is "to be *blamed* for the passage of time". The Claim Group's submissions illustrate the point made at CS [89]: compensation claims for historical acts will often feature very long delays. Just as those circumstances should not lead to claimants being denied (simple) interest for any period, nor should they lead to a government being subjected to the burden of paying compound interest: CS [80]-[84]. That does not preclude the possibility that the particular circumstances of a given case may justify a different outcome. Further, the Claim Group and NTRB [57] say that comparisons with the acquisition of non-native titles is inapt because the time between acquisition and payment for such titles is relatively short, but neither acknowledges the role of statutory limitation periods in that result.[43] Indeed, the absence of any limitation period in the NTA is emphasised in the submission at NTRB [56] that it "may be prudent" for native title holders to wait before claiming compensation in order to ensure that "all effects of the act are taken into account",[44] that being a risk free option if, as NTRB contends for, there is a *general right to compound interest* on the economic component of native title.

33. *Risk-free rate:* As to CG [103], whether the foundation for the equitable rule in a vendor–purchaser case rests on a *mutual* trusteeship is doubtful: it is the vendor who is the "trustee"

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41 Cf. CG [93], [94], [101], [103], [111].

42 Cf. CG [92], the *Native Title Act Case* at 455 states: "The force and effect of a past act … is recognised only from and by reason of the enactment of the future State law but, from that time onwards, the force and effect of the past act is determined by the terms of the State law enacted in conformity with s 19."

43 For example, s 32 of the *Land Acquisition Act* (NT) requires a claim for compensation to be made within 3 years of notice of acquisition, unless the Tribunal grants an extension of time.

44 This appears to be a reference to s 44H of the NTA, as mentioned in NTRB [15]. However, contrary to what appears to be suggested in that paragraph, s 44H has no application to an act that extinguishes all native title.

of the legal estate, and the purchaser is a beneficiary of the trust.[45] As to CG [104], the concepts of a "trustee rate" and a higher "mercantile rate" were not shorthand terms for *compound* interest (as the submission implies). They were fixed rates of interest adopted to overcome difficulties in obtaining an account of profits where a trustee mixed trust money with his own: a trustee was charged four percent simple interest where there was no misconduct, with the mercantile rate of five percent simple interest applied where there was a breach of trust or misconduct *unless* some other circumstance indicated that a presumption of compound interest was warranted in order to ensure the trustee did not retain any profit.[46] None of the cases cited in CG [104]-[107] support the claim for compound interest.[47] In particular, decisions of American courts made under entirely different domestic law frameworks are of no assistance.

34. As to CG [108], Mr Houston gave evidence as to the accepted methodology, as a matter of economic principle, to account for the time value of money in finance and economics, the objective being to make an applicant "whole" in *economic* terms. The economic concept involved taking account of the potential income (interest) that could have been generated by having the use of a capital sum over a period of time, including by being able to *re-invest* the interest as it is received so as to earn *additional income*.[48] Those economic concepts have not found reflection in legal awards of interest, absent specific evidence as to the income producing use that would have been made of any interest received.[49] Instead, statutory entitlements to interest, and awards pursuant to the equitable rule, recognize that simple interest at reasonable rates is quite capable of accounting for things like inflationary factors or loss of a notional income stream, and is demonstrated by its routine use as an appropriate measure of interest in "vendor–purchaser" and compulsory acquisition cases.

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45 *Snell's Equity* (33rd Ed) at [24-002]-[24-003]; Heydon et al, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (95th Ed) at [6-050]-[6-055], particularly at 237-238, 242.

46 *Docker v Somes* (1834) 39 ER 1095 at 1098-1099; *Re Dawson* [1966] 2 NSWR 211 at 218, also 219; *Burdick & Garrick* (1870) L.R.5 Ch. App. 233 at 241-242.

47 *Lawrence v Broderick* [1974] BPR 1 (5% simple interest); *FH Faulding v Watson* [1969] WAR 63 (claim for compound interest rejected); *Harvela* [1986] AC 207 (simple interest at short term investment rate); *Hieber v Hieber* [1991] 1 NZLR 315 at 318(45), 319(10) (rates of interest ascertained by reference to "first mortgage interest rates and long term government stock rates", and then order for *simple* interest at the selected rate); *Yong v Nicholson* [1998] ANZ ConvR 5 (approved *Hieber*); *Glaister v Amalgamated Dairies Ltd* (2003) 1 NZLR 829 at [140] (compound interest *agreed* by the parties, 90 day bank bill rate).

48 TFM.466-468, 471 [3.2.4].

49 Whether the economic concept corresponds to an appropriate measure of interest in any given case depends upon the *purpose* served by the award of interest in the particular legal setting: *Whitaker v Commissioner of Taxation* (1998) 82 FCR 261 at 269D, 271E-274F (Lockhart J), 279G-283 (Burchett J).

35. *Just terms:* As to CG [91], [109]-[112], and NTRB [56]-[57], the Commonwealth repeats paragraphs 30-32 above and CS [85]-[92]. As to CG [113]-[114], the Commonwealth repeats paragraph 6 above, and CS [67]-[73], [93]-[94].

NON-ECONOMIC LOSS

36. As to CG [132], the primary judge identified three particular considerations of significance to the assessment of non-economic loss ("the three elements"): FC [378]-[381], [383] (CAB.194-195). These three matters were critical to the assessment and an error in any of the three is sufficient to justify setting aside the assessment.

37. **Cth ground 4(a):** CG [133]-[136] suffer from the same opaqueness as the reasons of the Full Court on this issue. The Claim Group's principal response to the Commonwealth's submissions is that the challenge is directed at a "concurrent finding of fact" (CG [131]), which it is said is not made good: CG [135]; NTRB [63]. This misstates the arguments of the Commonwealth *and* the findings made by the courts below. It was not in dispute in either court below that the evidence revealed both (1) that the ritual ground had not been used since 1975 (well before the first compensable act); and (2) why that ground was no longer used for ritual (referred to in general terms by the Commonwealth and the Territory to protect the restricted evidence, using language that while different from each other is entirely consistent with the evidence). There is therefore no basis for the Claim Group's submission that the "premise that the ritual ground was no longer secure because of some earlier non-compensible act [was] not … made good" (CG [135]). The balance of the Claim Group's submissions on this topic entirely fails to address the Commonwealth's actual submissions in chief (at CS [96]-[103]). As for NTRB [62] and [64]-[67], there was no evidence to the effect that later compensable acts had caused "a further sense of loss".

38. **Cth ground 4(b):** As to CG [137], the Claim Group perpetuates the Full Court's error in going behind the primary judge's finding that the Wilson Street development did not create a sense of grievance: CS [108(b)]. That finding reflected the primary judge's acceptance of the evidence of the Aboriginal witnesses as it was given. The Claim Group did not seek to further explore that evidence by re-examination, nor was any submission made to the primary judge about how that evidence should be understood: cf. CG fn205.

39. As for CG [138]-[140], there is no dispute that compensation for non-economic loss can include a component for diminution of spiritual connection with the land. The issue is the extent to which the primary judge wrongly inflated the award by factoring in the claimants'

perception of the compensable acts as constituting transgressions of their right (under traditional law and custom) to control access to and use of their country, in circumstances where a native title right of that kind had already been extinguished by prior non-compensable acts. That the primary judge's conception of a sense of failed responsibility included loss of this kind is reinforced by the Aboriginal evidence on this subject having been substantially about not being asked permission to go onto the land[50]: cf. NTRB [69]-[71]. In *Ward HC*, the plurality made clear that the process of translation required by the NTA, whereby the spiritual or religious is translated into the legal, requires the fragmentation of an integrated view of the ordering of affairs into rights and interests, individual components of which may be extinguished separately.[51] It must follow that compensation for extinguishment of those rights is to be assessed on the same footing.

40. **Cth ground 4(c):** At CG [150]-[154], the Claim Group constructs a straw man and then responds to it, rather than to the Commonwealth's submissions. As stated in CS [114] and in the court below,[52] the Commonwealth does not contend that the primary judge was required to make findings about the composition of the Claim Group at any specific point in time. The issue is a conceptual one: does the NTA 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 Commonwealth contends that it does not, for the reasons set out in CS [113]-[119]. The Claim Group implicitly contends that it does, but offers no reason other than that "the entitlement is communal": CG [154].

41. As for NTRB [77]-[79], s 51(1) of the NTA compensates for the effect of an act on "native title rights and interests", which, by definition, are traditional rights in relation to land that are recognised by the common law: s 223(1)(c). By its terms, s 51(1) does not compensate persons who thereafter acquire traditional rights in relation to that land for the inability to have their rights recognised by the common law: that would be compensation for not being able to acquire "native title rights and interests" to particular land, rather than compensation

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50 **CFM:** (Palmer & Asche 2012) 346-347 [172]-[174]; (JJ) 9-12 [9], [13]-[14], [16(3)], [17]; (Lorraine Jones) 16-17 [7]-[8]; (Josie Jones) 280-284 [8]-[9], [18], [33]; (Transcript) 410(11-44), 412(18)-413(4), 413(23)-414(29), 415(29)-416(21), 422(28)-424(2), 442(5)-443(25), 448(20)-449(16), 535(1-37). **TFM:** (Alan Griffiths) 11 [6]-[8], 103-112 [18], [20]-[21], [28], [32], [36], [43]-[45], [59], [31]; (JL) 177 [11], [14]; (Violet Paliti) 189-190 [15], [22]. **GFM:** (Roy Harrington) 157-158 [10]-[11]; 272 [4]; (Deborah Jones) 288 [16]; (Doris Paddy 296 [28]-[29]; (Roy Harrington) 302 [11]-[12]; (Transcript) 632(32-34), 636(4-33), 653(25)-654(1), 661(14)-662(37), 663(27)-664(17), 671(7-14).

51 *Ward HC* at [14].

52 (Appeal transcript) CFMSupp.41(25)-43(20).

for loss of such rights. As for NTRB [81], the Commonwealth's construction does not preclude an award of compensation for loss suffered by persons who were alive at the time of the compensable act but who have died prior to judgment. On the contrary, the need to prevent the statutory entitlement from abating upon death is the very rationale for construing "the native title holders" who can bring the claim for compensation as including persons who would have held the title (if it had not been extinguished): CS fn 115.[53]

42. Finally, contrary to NTRB [82], the role of s 94 in the statutory scheme cannot be put to one side when construing the scope of the compensation envisaged by the NTA. The NTRB implicitly acknowledges that there is nothing in the NTA that requires compensation to be held on trust for the benefit of a (perpetual) community.[54] Nor does s 94 necessarily "accommodate" that. Rather, s 94 requires an order that compensation is payable to include an order for the distribution of the compensation. Whilst in this case, distribution was (or will be) made to a prescribed body corporate (**PBC**), the fact that there was a PBC is due to the earlier determination of native title in favour of the Claim Group over other land in the town of Timber Creek (because s 55 of the NTA requires a PBC to be nominated whenever native title is determined to exist): FC [441]-[444] (CAB.209). There is no corresponding requirement under the NTA for a compensation claim group to establish a PBC for the purpose of *holding compensation*. Thus, if a claim for compensation is made *only* over land where it is determined that native title has been extinguished (as is contemplated by s 13(2)), there need not ever be a PBC. That does not suggest a legislative intention that compensation is to include a component for the putative loss of future generations.

43. **Cth ground 5:** As to CG [145]; NTRB [74], the proposition that not all areas of land within an Aboriginal community's traditional territory have the same significance as others may be readily accepted. However, the Claim Group adduced very little evidence about the significance of the land that was subject to the compensable acts, or even about the effect of the compensable acts (except in relation to the town water tanks). Instead, the Claim Group generally relied upon the Aboriginal evidence from the determination proceeding (where the

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53 *Stephenson v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290 at 296-297 (Wilcox J, Jenkinson and Einfeld JJ agreeing): in the absence of express provision for survival of a statutory cause of action, the legislature's intention in respect of survivorship can be inferred by determining what result best accords with the scope and purpose of the Act, as disclosed by the provisions that were inserted in it".

54 Cf. CG [fn87], *Gebadi v Woosup (No 2)* [2017] FCA 1467 (Greenwood J) does not assist as it deals with the fiduciary relationship that arises from the statutory role of an Applicant to prosecute an application for a determination of native title on behalf of a claim group, whilst that proceeding is on foot.

focus was on the strength of the claimants' connection to Timber Creek as a whole), and on anthropological evidence that largely discussed the effect of *non*-compensable acts (save for the water tanks) both within and outside of the town.[55] That may explain why the primary judge adopted a conceptual framework of a diminishing global spiritual estate. Having done so, his Honour was obliged to have regard to the overall extent of the estate and to the (very small) proportion of it affected by the compensable acts: CS [121].

44. As for CG [147]-[149], the Claim Group tries to paint as grey that which was uncontentious before the primary judge, namely, that members of the five estate groups comprising the compensation Claim Group are recognised as traditional Aboriginal owners for the areas granted under the ALRA to the Mayat Aboriginal Land Trust (**MALT**), and the Ngaliwurru/Nungali Aboriginal Land Trust (**NALT**), respectively.[56] Indeed, the Claim Group relied upon commercial dealings by each of those Land Trusts as evidence of *the claimants* engaging in commercial activity referenced to their interests in land, in support of what was then a claim for compound interest at a superannuation rate.[57]

45. **Cth ground 6:** As for CG [143], nothing said by Hayne J in *Rogers v Nationwide News*[58] denies relevance to the agreements in this case, all of which were entered into by the claimants and provided indicative sums for solatium-type payments in circumstances where there has been damage to a spiritually significant place. The agreements offered at least a check-measure in circumstances where there was no history in Australia of analogous awards of compensation and consequently no previous cases to provide guidance: FFC [393], [395].

46. **Cth grounds 7(a) and (b):** As to CG [162]-[164], the context for the Full Court's articulation of the test for manifest excess (in FFC [395]) is the Court's citation in brackets of "*Williscroft*", which, in turn, is a reference to the lengthy passage from *R v Williscroft*[59] reproduced at FFC [384]. That case was an appeal from a jury verdict of damages and postulates the test appropriate to those circumstances: CS [130]-[132].

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55 (Palmer & Asche 2012) CFM.339-342.

56 FC [28]-[31] (CAB.110) largely reproduces the Claim Group's opening submissions, which referenced the Timber Creek Land Claim Report at [30]-[105] (GFM.455-467) and the decision of Weinberg J in the determination proceeding: *Griffiths v Northern Territory* 165 FCR 300 at [76]-[123]. All of the five estate groups comprising the claimants for the Timber Creek native title claim were recognised as traditional Aboriginal owners in the Timber Creek Land Claim (which led to MALT) and the Fitzroy Pastoral Lease Land Claim (which led to the NALT): (Palmer & Asche 2004) GFM.324-325, 356-357, 372-375.

57 (Claim Group's closing submissions at trial) CFMSupp.37-39 [111]-[112].

58 (2003) 216 CLR 327 at [69], where his Honour noted that reputation is not something that is bought and sold, unlike a tradeable asset where one can look to market transactions to provide an external standard of value.

59 [1975] VR 292.

47. **Cth grounds 7(c)-(e):** As to CG [155]-[157], the Claim Group's analysis of FFC [396] ignores the progression in the Full Court's reasons from the *proposition* in that paragraph that $1.3 million reflects a "substantial acknowledgment of a high level of damage", to the conclusion (at FFC [412]) that $1.3 million is "within the permissible *range*". A fair and logical reading of the judgment is that the Full Court used the IACHR decisions and academic opinion to assist it to determine *that range*. There is no other explanation for the process of *factual* adjustment and comparison engaged in by the Full Court in relation to that material: CS [141]-[143], [146]. The Full Court's consideration of the IACHR decisions would not have been objectionable if done on notice with an opportunity to be heard, as occurred at trial with the Commonwealth's review of overseas cases: CS [135]; cf. CG [155].[60] The same could not be said of the academic opinion, use of which required consent: CS [148]. The Claim Group has no answer to the Commonwealth's criticisms of the Full Court's analysis of the material, other than to assert, without basis, that being heard "could not have produced a different result": CS [136]-[144], [147]; cf. CG [157].

48. **Cth ground 8:** As for CG [168]-[169], the Commonwealth's proposed methodology for assessing non-economic loss (reproduced at FFC [358]-[359]) is, and always has been, a submission based on the evidence. It is incorrect to characterise the Commonwealth as advocating for some sort of fixed acreage figure to be applied across the board in compensation claims generally. In the context of this claim, the allocation of the proposed figure per parcel is a device to extrapolate an appropriate sum for a communal entitlement.

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60 The rules of procedural fairness are not as inflexible or confined as the Claim Group suggest: *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [141]-[143] (Heydon J). Nor is there a bright line between "learned works" and factual material, as is illustrated by *In the Marriage of Dean* (1988) 94 FLR 32 at 36-38 (appeal allowed because trial judge had regard to valuation textbooks out of court and then wrongly analysed value of property).