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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
BETWEEN: NORTHERN TERRITORY OF AUSTRALIA Appellant	BETWEEN: COMMONWEALTH OF AUSTRALIA Appellant	BETWEEN: 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

Solicitor for the Northern Territory
Solicitors for the Appellant, the Northern Territory of Australia
Level 1, 68 The Esplanade
DARWIN NT 0801

Telephone: (08) 8935 7770
Fax: (08) 8935 7857
Email: jennifer.laurence@nt.gov.au
Ref: Jennifer Laurence 20163116~0129

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OUTLINE OF ORAL ARGUMENT OF THE NORTHERN TERRITORY OF AUSTRALIA

PART I: PUBLICATION ON THE INTERNET

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

PART II: STATEMENT OF ARGUMENT

A. Introduction

2. The claim is for compensation for economic loss, non-economic loss and pre-judgment interest in respect of the effects of 53 compensable acts on 39 lots within the Town of Timber Creek upon the non-exclusive native title rights and interests subsisting after the earlier (non-compensable) grant of pastoral leases. **Submissions (TS) [16]**

3. The compensable acts were done between 1980 and December 1996 and comprised "past acts" or "intermediate period acts" which were invalid because of the existence of the native title rights and interests. The acts were validated, and taken always to have been valid, by the *Validation (Native Title) Act* (NT). The compensable acts wholly extinguished the non-exclusive native title rights and interests, or have been so treated, from the time each act was done. **TS [10], [17]**

4. Compensation is payable by the Northern Territory in accordance with Div 5, Pt 2 under: (a) s23J(1) of the *Native Title Act 1993* (Cth) (**NTA**), "for any extinguishment...by an act, but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under" the NTA; or (b) s20 read with s17(1) of the NTA, "for the act". The compensation is to compensate the native title holders "for any loss, diminution, impairment or other effect of the act on their native title rights and interests" (s51(1)), having regard to the usual criteria for determining compensation in a non-native title context (s51(2), (3), (4); *Lands Acquisition Act* (NT), Sched 2). Each of the trial judge, the Full Court, and the parties have made a different assessment of the proper measure of that compensation (see Annexure). **TS [20]-[26]**

B. Economic loss: "the comparator issue"

5. Compensation (the money equivalent of the loss) for economic loss is determined by conventional economic analysis, in the ordinary compulsory acquisition context, as the market price or value of the property acquired determined according to the test in *Spencer v Commonwealth* (1907) 5 CLR 418. That test values the rights actually held and compensates for their loss. That is the approach required by s51(1) of the NTA in relation to the native title rights and interests extinguished by the compensable acts. **TS [32]-[36]; Reply Submissions (TRS) [3]-[4]**

6. The native title rights and interests differ from freehold in four ways negatively affecting their value by comparison with freehold: (1) they are non-exclusive (notwithstanding no other rights existed); (2) there is no right to confer permission to enter or use the land (notwithstanding a capacity to surrender them to the Crown); (3) there is no capacity to commercially exploit; (4) they are inalienable. **TS [45]-[46], [64]-[69]; TRS [6]-[7]**

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7. Further, unlike freehold value, the usage benefits (value) of which are enhanced by land development and proximity to infrastructure, the usage benefits (value) of native title rights and interests are diminished thereby. **TS [48]-[50]**

8. It follows that to value native title by making a direct comparison with freehold value, reduced (as the Full Court did) or not (as the claim group seeks), is erroneous. **TS [51].** The *Racial Discrimination Act 1975* (Cth) (**RDA**) does not yield a different view. Noting especially s7 of the NTA, the RDA requires parity of treatment between native title holders and the holders of titles (freehold, leasehold, etc) granted by the Crown. Compensating for extinguishment of native title by applying the *Spencer* test to assess the value of the native title rights actually held (in their nature and incidents) satisfies the requirements of the RDA. **TS [37]-[38]**

9. The Lonergan methodology applies the *Spencer* test and conventional economic analysis to value the native title rights and interests by reference to the usage benefits flowing from their nature and incidents ("usage value") and the proceeds on future exit ("negotiation value"). Usage value for any particular lot (Lot X) is determined from the freehold value of a large parcel of remote land in Timber Creek (Lot 16) shorn of the component of value attributable to proximity to development infrastructure and services (the Wotton valuation). Negotiation value is 50% of the difference between the usage value and the freehold value of Lot X. **TS [53]-[55]** The Full Court erroneously rejected this methodology in favour of an intuited proportion of freehold value, as the methodology was founded on assumptions or observations supported in the evidence and has an express and appropriate theoretic foundation. **TS [56]-[61]** The claim group's notice of contention seeking to exclude Mr Lonergan's evidence should be dismissed. **TS [62]; TRS [14]**

C. Economic loss: "the interest issue"

10. The claim for compound interest at the "risk free rate": (i) applies a flawed analogy because the native title rights and interests were not "the land" or "possession" or a capital asset [**TS [85], [87], TRS [15]-[16]**], which even in cases where the analogy is good has not been applied to award anything other than simple interest [**TS [103]-[113]**]; (ii) is inherently restitutionary, not compensatory [**TS [87], [94]-[95]**]; and (iii) contains assumptions contrary to found facts [**TS [86], [88]-[89], [93]**].

11. There was no error in the award, in this case, of simple interest at the rates prescribed by the Practice Note as part of compensation under s51(1). That interest (4% pa above the Reserve Bank cash rate) is fair and reasonable compensation for being deprived of the use of money, including over a long period. The claim group have not established that their loss was greater. **TS [96]-[102]; TRS [17]-[20]**

D. Non-economic loss: "the solatium issue"

12. The award must compensate the native title holders for any loss, diminution, impairment or other effect *of the acts*. The practical test for causation approved in *March v Stramare (E&MH)* (1991) 171 CLR 506 applies. **TS [134]-[135]**

13. The trial judge's solatium award expressly rested on three particular considerations of significance. The second of these was the effect of a particular (but unidentified) act upon the capacity to conduct ceremonial and spiritual activities on a ritual ground. The evidence was that the ritual ground had not been used since 1975

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because the area could be seen from a look out, which continues to exist. A compensable act could not have had an effect upon the capacity to conduct activities on the ritual ground when the cause of the cessation of activities continues to exist. The ongoing importance of the ritual ground is irrelevant to that conclusion. In holding otherwise, the Full Court has erred in applying the test for causation. The award is excessive because it erroneously took this factor as a significant consideration. **TS [128]-[138]**

14. The trial judge's third consideration was the incremental effect on spiritual connection with country of each compensable act. The error was to infer that the claim group suffered hurt, grievance and a sense of loss from each compensable act when the evidence established that: (a) that was the effect of one compensable act (the water tanks); (b) there was no evidence of such effects from any other compensable act; (c) there was evidence of such effects from some non-compensable acts; (d) there was evidence that some acts (both compensable and non-compensable) were acceptable to the claim group and did not cause any such effects. The totality of the evidence necessarily precluded the factual inference that each compensable act had an incremental effect on the claim group's spiritual connection with their country. In upholding the inference, the Full Court did not address the flaw and reversed the onus of proof. Further, the inference removed from proper consideration comparison of what the claim group lost by the compensable acts (rights in 127 hectares in the Town) against what they continue to hold (exclusive rights in 2,053 hectares in the Town, and rights in 1461 km^2 of freehold land held under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)). The award is excessive because it erroneously took this inference into account. **TS [139]-[155]**

15. The solatium award seeks to quantify the essentially spiritual relationship Aboriginal people have with their country and translate the spiritual or religious hurt into compensation. It has the same immeasurable qualities as the amenities of life. Fairness and moderation must guide the award, providing a restraint on extravagance and counsel as to the manner of assessment. The award is excessive as it does not properly represent the position of this case at the lower end of the spectrum of possible compensable act scenarios. That position would be reflected in an award of 10% of economic loss, which is a rough average of the Australian State/Territory statutory approaches to intangible disadvantage in the compulsory acquisition context. **TS [156]-[162]; TRS [28]**

Dated: 4 September 2018

Sonia Brownhill SC
Solicitor-General for the
Northern Territory