IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY No. D1 of 2018

BETWEEN: **NORTHERN TERRITORY OF AUSTRALIA**
Appellant
and
ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES
First Respondent
COMMONWEALTH OF AUSTRALIA
Second Respondent
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 WESTERN AUSTRALIA
Third Intervenor
CENTRAL DESERT NATIVE TITLE SERVICES LIMITED
Fourth Intervenor
YAMATJI MARLPA ABORIGINAL CORPORATION
Fifth Intervenor

APPELLANT'S CONSOLIDATED SUBMISSIONS

Part I: Form of submissions

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

Part II: Statement of issues

2. The three appeals (D1, D2 and D3 of 2018) raise, for the first time in this Court, the assessment of compensation, payable pursuant to the *Native Title Act 1993* (Cth) (**NTA**), for the extinguishment or impairment of non-exclusive native title rights and interests. The proper principles and their application arise within the structure of the native title party's pleaded claim, which sought compensation under three heads of loss:

(1) economic loss;

(2) non-economic loss or intangible disadvantage; and

(3) pre-judgment interest.

3. It is convenient to group the issues arising on the appeal under three categories reflecting the pleaded heads of loss:

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(1) Economic comparator issue. There is common ground that the compensation award should include a component reflecting the economic value of the rights and interests. In the absence of a market for native title rights and interests, it is similarly common ground that the assessment of this economic value must be made by reference to, or comparison with, rights or title in respect of which a market exists. How that comparison is to be drawn and the value-driving factors which bear comprise the "economic comparator issue", which is the subject of the following grounds of appeal:

(a) D1 (Territory appeal) grounds 1 to 3.

(b) D2 (Commonwealth appeal) grounds 1 and 2.

10 **(c)** D3 (native title party appeal) ground 1.

(2) Interest issue. There is common ground that the compensation award should include a component reflecting the period of time between extinguishment of the native title rights and interests and the compensation determination, and that this should be reflected in an award of pre-judgment interest on the economic value of those rights and interests assessed at the time of their extinguishment. Whether the pre-judgment interest award should be compounded and, if so, the appropriate interest rate, and whether that award is in addition to or part of the compensation payable pursuant to s 51(1) of the NTA comprise "the interest issue", which is the subject of the following grounds of appeal:

(a) D2 (Commonwealth appeal) ground 3.

20 **(b)** D3 (native title party appeal) ground 2.

(3) Solatium issue. There is common ground that the compensation award should contain a component reflecting the intangible disadvantage or solatium component of the native title party's loss arising from the diminution of or disruption in traditional attachment to country and the loss of rights to live on, and gain spiritual and material sustenance from the land to the extent not already covered by the award for economic loss. It is similarly common ground that this should be a single *in globo* amount aggregating the loss suffered in respect of all of the compensable acts. How to determine an appropriate award reflecting the nature of the loss in all the circumstances comprises "the solatium issue", which is the subject of the following grounds of appeal:

30 **(a)** D1 (Territory appeal) ground 4.

(b) D2 (Commonwealth appeal) grounds 4 to 8.

4. Separation of the issues in this manner should not obscure the interrelationship between them or between the claimed heads of loss. Nor should it detract from the task,

which is to ensure that the total award of compensation accords with the compensation provisions of the NTA and affords just terms of compensation for the extinguishment or impairment of the native title party's native title rights and interests.

Part III: Notice

5. The appellant does not consider that notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Judgments below

6. The judgment at first instance is reported as *Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362 (***Griffiths***). The judgement of the Full Court is reported as *Northern Territory of Australia v Griffiths* (2017) 346 ALR 247 (***Griffiths FC***).

Part V: Narrative statement of facts

7. Timber Creek is a tributary of the Victoria River in the north-western corner of the Northern Territory.[1] The township of Timber Creek is on the Victoria Highway about halfway between Katherine and Kununurra.[2] It has a population of approximately 230 people, comprising about two thirds Aboriginal people, principally native title holders.[3] The economy of the town relies on tourism and associated services and regional service delivery.[4] The town's principal buildings are a road house and general store, a hotel and caravan park, local council offices, a police station, a primary school and a health clinic.[5]

8. The area was first explored by non-Aboriginal people in the mid-19th Century and around the end of that century a number of pastoral leases were granted in the district, including over the area which now comprises the town of Timber Creek.[6]

9. On 10 May 1975, the Town of Timber Creek was proclaimed near the junction of the Victoria River and Timber Creek.[7] The township is bounded by the Victoria River to the north, with Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) to the south, east, and west of the town.[8] The township comprises an area of approximately 2,362 hectares.[9]

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[1] *Griffiths* at [23] (**Core Appeal Book (CAB) 108**). References to the CAB are to the pages within that Book.
[2] *Griffiths FC* at [7] (**CAB 268**).
[3] *Griffiths* at [32] (**CAB 110 – 111**).
[4] Ibid.
[5] Ibid.
[6] *Griffiths* at [24] (**CAB 109**).
[7] *Griffiths* at [28] (**CAB 110**).
[8] *Griffiths* at [29] (**CAB 110**); Annexure JM4 to the Affidavit of Julie Miller dated 29 January 2016 (**Northern Territory's Book of Further Materials (TFM) 3A**). References to the TFM and Commonwealth's Further Book of Materials (**CFM**) are to the tabs within those Books.
[9] *Griffiths* at [33] (**CAB 111**).

10. Between 1980 and 17 December 1996, the Northern Territory was responsible for 53 acts, on 39 lots and four roads, comprising various grants of tenure or the construction of public works which impaired or extinguished native rights and interests within the Town of Timber Creek and for which compensation is claimed (**compensable acts**).[10] The total area of land the subject of the compensable acts comprises some 1.27 km^2 (127 hectares).[11]

11. In 2006 and 2007, the Federal Court determined that, by operation of s 47B of the NTA, the prior extinguishment of native title effected by the grant of pastoral leases could be disregarded, such that the native title party held possession, occupation, use and enjoyment to the exclusion of all others in respect of the vacant Crown land within the town of Timber Creek.[12] The total area of land the subject of the determined native title comprises approximately 2,053 hectares.[13]

12. On the basis of the determination, the parties agreed[14] that the native title rights and interests held by the native title party in the land the subject of the compensable acts at the time they were done comprised non-exclusive rights: (a) to travel over, move about and have access to the land; (b) to hunt, fish and forage on the land; (c) to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin; (d) to have access to and use the natural water of the land; (e) to live on the land, to camp, to erect shelters and structures; (f) to engage in cultural activities, conduct ceremonies, hold meetings, teach the physical and spiritual attributes of places and areas of importance on or in the land, and to participate in cultural practices related to birth and death including burial rights; (g) to have access to, maintain and protect sites of significance on the application area; and (h) to share or exchange subsistence and other traditional resources obtained on or from the land (but not for any commercial purposes).

13. On 24 August 2016, the trial judge ordered the Northern Territory to pay to the native title party compensation for the compensable acts totaling $3,300,661, comprising $512,400 for economic loss, simple interest on this sum at the rates prescribed by the Federal Court Practice Note CM 16 (**Practice Note**) of $1,488,261, and solatium of $1,300,000.

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[10] *Griffiths FC* at [8]-[9] (**CAB 268-270**). The table at [9] briefly describes the compensable acts and the map shows their location.
[11] *Griffiths FC* at [370] (**CAB 373**).
[12] *Griffiths* at [10]-[12] (**CAB 106**) referring to *Griffiths v Northern Territory* (2006) 165 FCR 300 and *Griffiths v Northern Territory* (2007) 165 FCR 391.
[13] *Griffiths FC* at [370] (**CAB 373**); Affidavit of Julie Miller dated 29 January 2016 at [7] (**TFM 3**).
[14] *Griffiths* at [14] (**CAB 106-107**) referring to the Interim Statement of Agreed Facts (**TFM 4**).

14. On 9 August 2017, the Full Court varied this order, such that the Northern Territory was ordered to pay to the native title party compensation for the compensable acts totaling $2,899,446, comprising $416,325 for economic loss, simple interest on this sum at the same interest rates of $1,183,121, and solatium of $1,300,000.

Part VI: Argument

15. Following an introductory section, the argument in these consolidated submissions is structured to follow the division of issues identified in paragraph 3 above.

STRUCTURE OF THE CLAIM AND COMPENSATION FRAMEWORK

Claim to compensation for the compensable acts

16. The 53 compensable acts (on 39 lots and four public roads) may conveniently be grouped into three categories:[15]

(a) "previous exclusive possession acts" (grants of leases to non-Crown entities or construction of public works without underlying tenure) within the meaning of s 23B of the NTA, which had the effect of completely extinguishing native title;[16]

(b) "Crown to Crown grants" (grants of leases to Crown entities) within the meaning of s 23B(9C) which were "category D past acts" within the meaning of s 232 of the NTA and to which the non-extinguishment principle in s 238 applied (subsisting native title was wholly suppressed for the duration of the act), which were contiguously followed by a previous exclusive possession act affecting the same land (construction of public works and one transfer to a non-Crown entity); and

(c) three acts (acts 1, 36 and 41) which were "Crown to Crown grants" (freehold grants) and a reservation for a public purpose, which were "category D past acts" to which the non-extinguishment principle applied.

17. The parties approached compensation in the second category on the basis that the earlier act should be compensated as if it wholly extinguished native title, and the later act had no further effect on native title. The parties approached compensation in the third category as if they wholly extinguished native title on the pragmatic foundation that there is no foreseeable prospect of the revival of the native title rights and interests.

18. In total there are 31 allotments subject to the claim for economic loss by reason of the extinguishment of native title in those lots. The difference between that number and the total number of compensable acts arises from two factors. First, the approach to the

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[15] *Griffiths FC* at [11] (**CAB 273-274**).

[16] NTA, s 23A. Once extinguished, native title cannot revive (s 237A).

acts in the second category referred to above, where there were two compensable acts affecting each lot.[17] Secondly, the native title party did not claim economic loss in relation to the infrastructure lots (ie the allotments the subject of critical town infrastructure such as the school, power and water infrastructure and roads) on the basis that the infrastructure was reflected in the freehold values of the other lots affected by the compensable acts.[18]

19. The claim for non-economic loss (solatium or intangible disadvantage) was made in respect of all 53 acts on an *in globo* basis.

Compensation provisions

20. The entitlement to compensation in respect of previous exclusive possession acts is found in s 23J(1) of the NTA, and the corresponding obligation on the Territory to meet that entitlement is imposed under s 23J(3). This provision applies to the compensable acts either in its terms or by analogy where the act has been treated as if it extinguished native title.

21. The entitlement is to "compensation in accordance with Division 5 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 this Act".

22. The exclusion of the effects of extinguishment of native title at common law reflects the general scheme of the NTA and the context in which it was enacted: it operates upon rights and interests defeasible at common law but protected from 31 October 1975 onwards by force of the *Racial Discrimination Act 1975* (Cth) (**RDA**).[19] As was acknowledged in the *Native Title Act Case* (at 454): "An act which was wholly valid when it was done and which was effective then to extinguish or impair native title is unaffected by the *Native Title Act.* Such an act neither needs nor is given force and effect by the Act". It follows that the effects upon native title or the native title party of earlier non-compensable acts must be excluded from the assessment of compensation.

23. Division 5 comprises ss 48 to 54 of the NTA. Section 51(1) of the NTA prescribes the entitlement to compensation under s 23J(1), and the entitlements under the other compensation provisions,[20] as "an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act (**loss etc or other effect**) on their native title rights and interests".

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[17] In addition, acts 15-18 all occurred on Lot 34.
[18] *Griffiths FC* at [12] (**CAB 274**).
[19] *Western Australia v Commonwealth* (1995) 183 CLR 373 (***Native Title Act Case***) at 453 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[20] See NTA, s 48.

24. The phrase "just terms" has a meaning, drawn from the law relating to the term as used in pl 51(xxxi) of the Constitution, connoting terms of fairness and fair dealing between the individual whose thing is taken and the state (on behalf of the community),[21] so the entitlement under s 51(1) is to fair compensation for the loss etc or other effect of the 53 compensable acts on the native title rights and interests.

25. In determining what is fair compensation, the court may have regard to any principles or criteria set out in the *Lands Acquisition Act* (NT) (**LAA**) for determining compensation (s 51(4)). There is a limit on the fair compensation payable under s 51(1) laid down by s 51A(1) of the NTA, which provides that the total compensation payable under Div 5 for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount which would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.[22]

26. The LAA provides a scheme for determining the compensation payable on compulsory acquisition of land in the Northern Territory. Relevantly, Sch 2 to the LAA provides rules for the assessment of compensation on acquisition. Section 66 of the LAA provides that the rules in Sch 2 are not binding but must be considered in assessing compensation under the LAA. The LAA allows for interest on compensation.[23]

ECONOMIC COMPARATOR ISSUE

Introduction

Common ground

27. The common position of the parties is that freehold market value provides a point of reference or comparator for the assessment of the economic value of native title rights and interests, including the native title party's non-exclusive native title rights and interests.

Trial judge's award – 80% of freehold value

28. The trial judge approached the comparison from the perspective that exclusive native title rights and interests over an area of land should be valued at the equivalent of the

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[21] *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 (***Nelungaloo***) at 569 per Dixon J, 600 per Kitto J; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [190] per Gummow and Hayne JJ. The NTA appears to distinguish between "just terms" appearing in s 51(1) and "paragraph 51(xxxi) just terms" appearing in s 53, a term defined in s 253 of the NTA. This is likely a consequence of the fact that s 53 is a "historic shipwrecks clause" directed to ensuring the constitutional validity of the compensation provisions in Division 5.

[22] The Native Title Amendment Bill 1997 Explanatory Memorandum explained that s 51A(1) was to clarify the amount of compensation that native title holders can get under Div 5 for extinguishment of their native title, stating that the maximum compensation "will be capped at the same level that a person with freehold title would have got if their land was compulsorily acquired" (at [24.8]).

[23] LAA, ss 64-65.

freehold market value in that land. His Honour expressly rejected the application to native title of conventional valuation methodology reflected in the hypothetical sale test described in *Spencer v Commonwealth*[24] (***Spencer***), because native title is inalienable (except by surrender) and so could not be subject to sale, hypothetical or otherwise.[25] The trial judge intuited that the economic value of the particular rights and interests held by the native title party was 80% of the freehold market value of the affected land at the time the acts took place.[26]

Full Court's award – 65% of freehold value

29. The Full Court correctly held the trial judge erred by excluding a conventional *Spencer* analysis of value,[27] and had erroneously incorporated aspects of intangible disadvantage when referring to the "real character" of native title to justify the analogy of freehold value with exclusive native title.[28] The Full Court also correctly overturned the trial judge's findings that: (a) despite being non-exclusive, the native title party's rights and interests were "in a practical sense" exercisable exclusively;[29] (b) the value of those rights should not be reduced because they were inalienable;[30] and (c) that the benefit to the Territory as the acquiring authority was relevant to the assessment of economic loss.[31]

30. Having correctly identified those errors, the Full Court undertook a two-step valuation process: starting with an analogy between freehold market value and the value of exclusive native title rights and interest; and then deriving the value of the non-exclusive native title rights of the native title party by adjusting the freehold value to account for the restrictions and limitations applicable to the rights.[32] By that approach the Full Court made an "evaluative judgment" and reached a 35% reduction from the freehold market value arriving at a value of 65% of freehold on account of the non-exclusive native title rights being less economically valuable than unencumbered freehold title.[33]

Issues on the appeals

31. Each of the appeals presses a different outcome on the economic comparator issue. The native title party contends that its rights should have been valued as equivalent to

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[24] (1907) 5 CLR 418 (***Spencer***) at 432 per Griffiths CJ.
[25] *Griffiths* at [211] (**CAB 154**).
[26] *Griffiths* at [231]-[233] (**CAB 158**).
[27] *Griffiths FC* at [122] (**CAB 309-310**).
[28] *Griffiths FC* at [110]-[113] (**CAB 305-306**) referring to *Griffiths* [213]-[214] (**CAB 154**).
[29] *Griffiths FC* at [84] (**CAB 299**).
[30] *Griffiths FC* at [115] (**CAB 306**).
[31] *Griffiths FC* at [92] (**CAB 301**).
[32] *Griffiths FC* at [134] (**CAB 312**).
[33] *Griffiths FC* at [138]-[139] (**CAB 313**).

freehold market value (D3, ground 1). The Commonwealth contends that the rights should have been valued at no more than 50% of freehold (D2, grounds 1, 2). The Territory contends that the rights should have been valued in accordance with the methodology proposed by economist, Wayne Lonergan, (D1, grounds 1, 2) or alternatively, at no more than 50% of freehold value (D1, ground 3). The issues which underlie these positons can be conveniently examined via consideration of the following questions:

(a) whether the economic loss from extinguishment of native title rights and interests should be valued by conventional economic analysis;

(b) assuming the answer to question 1 is "yes", whether a percentage of freehold value or the methodology proposed by Mr Lonergan better reflects the conventional economic analysis;

(c) assuming the answer to question 2 is that a percentage value better reflects conventional economic analysis, what percentage value should be adopted.

Conventional economic analysis is appropriate

32. It is self-evident that conventional economic analysis is appropriate to determine an award for economic loss, particularly where the native title party structured their claim to incorporate a head of economic loss. However, the native title party eschews aspects of conventional analysis by contending that their native title rights should be valued as equivalent to freehold title regardless of their non-exclusive nature and incidents, by reason either of the operation of the RDA or, alternatively, because the inalienability of native title cannot be accounted for on conventional analysis. The Full Court correctly rejected these arguments.

Principles of conventional economic analysis

33. The entitlement to compensation created by s 51(1) of the NTA to compensation on just terms for any loss etc or other effect of an act on the native title rights and interests is broadly consistent with ordinary statutory compensation for the compulsory acquisition of property, which confer a right to the money equivalent of the *loss* a person has sustained by deprivation of the property.[34] This obviously reflects conventional economic analysis. The starting point for determining that loss is the market price or value of that property determined according to the test in *Spencer*, namely the price which a willing vendor might reasonably expect to be obtained from a willing purchaser.[35] That principle is expressly

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[34] *Turner v Minister of Public Instruction* (1956) 95 CLR 245 (***Turner***) at 264 per Dixon CJ.
[35] *Spencer* at 432 per Griffiths CJ.

prescribed in r 2(a) of Sch 2 of the LAA to which regard may be had by reason of s 51(4) of the NTA. Section 51(4) itself is an express statutory acknowledgment of the applicability of conventional economic analysis, as are ss 51(2), (3) and 51A(1), which generally contemplate the application to native title rights and interests of orthodox rules relating to compulsory acquisitions of land.

34. The ultimate task in such compensatory schemes (including under the NTA) is to ascertain the value of the property to the owner,[36] in which market value is "a useful and conventional method of arriving at a basic figure to which must be added in appropriate cases further sums for disturbance, severance, special value to the owner and the like."[37]

10 In this case, the native title party has disavowed any claim to special economic value,[38] and intangible disadvantage is to be dealt with separately. Therefore, here, compensation for economic loss is the market value of what has been lost.

35. In the application of the *Spencer* test, it is fundamental that the value of property is assessed according to the rights and interests actually held.[39] There must be equivalence between the loss and the compensation.[40] Thus, the loss of a property right less economically valuable than freehold is not compensated as if it were freehold. That principle is elementary and has been applied many times. The value of a lease depends on its terms,[41] the value of mineral rights depend on the value of the minerals available,[42] and the value of a mortgage depends on the interests it confers.[43] Even encumbered freehold is

20 not valued equivalent to unencumbered freehold.[44]

36. Always, the price arrived at by the hypothetical seller and buyer is for the bundle of rights the subject of their hypothetical transaction. It is therefore necessary from the outset to consider the limits of the bundle of rights to be valued. Any value ascribable to a use of

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[36] *Turner* at 264 per Dixon CJ; see also LAA, Schedule 2, Rule 1 ("Value to the Owner").
[37] *Minister for Public Works v Thistlewaite* [1954] AC 475 at 491 per Lord Tucker, cited with approval in *Boland v Yates Property Corp Pty Ltd* (1999) 167 ALR 575 at [83] per Gleeson CJ.
[38] In any event, there was also no evidence of such value. The fact that the rights and interests were non-commercial would prevent any such claim: *Dangerfield v Town of St Peters* (1972) 129 CLR 586 at 590 per Barwick CJ.
[39] *Rosenbaum v The Minister* (165) 114 CLR 424 (***Rosenbaum***) at 429-430 per Kitto J (compensation assessed as the value of an estate in fee simple in reversion upon the tenancies).
[40] *Horn v Sunderland Corp* [1941] 1 All ER 480 at 496C-E per Scott LJ. See also *Nelungaloo* at 571 per Dixon J.
[41] *Rugby Joint Water Board v Foottit* [1972] 1 ALL ER 1057; *Minister v New South Wales Aerated Water & Confectionary Company Ltd* (1916) 22 CLR 56 at 64-65 per Griffiths CJ.
[42] *Googong Pty Ltd v Commonwealth* (1977) 13 ALR 449 at 477 per Waddell J.
[43] *Lensworth Finance Ltd v Commissioner of Main Roads* (1978) 5 QLCR 261 at 268.
[44] *Rosenbaum* at 429-430 per Kitto J; *Stephen v Federal Commissioner of Taxation* (1930) 45 CLR 122 at 134 per Isaacs CJ.

the land for a purpose beyond the incidents of those rights cannot properly be taken into account for the purpose of assessing compensation on just terms.[45] For example, where land has been zoned as a park and playing fields and may only be used for those purposes, it must be valued subject to those statutory restrictions on its use.[46] Similarly, the value of a right will be reduced if it is subject to encumbrances on its future alienation.[47]

The RDA does not require native title rights and interests to be valued at freehold value

37. The native title party contends that s 10(1) of the RDA requires native title rights and interests to be valued the same as freehold despite their different incidents.[48] The effect of this contention is that the RDA requires all native title rights to be valued alike at the market value of freehold. The submission is that the RDA is engaged because native title is held by Indigenous peoples and, so engaged, the RDA prevents native title being impaired or expropriated on less favourable conditions (including as to compensation) than other titles, such that the extinguishment of native title must be compensated on the same footing as freehold title regardless of its incidents. The argument must fail for at least four reasons.

38. First, what is required by s 10(1) of the RDA is parity of treatment.[49] No disparity arises if native title rights and interests are valued in the same manner as non-native title rights and interests, that is, on conventional economic terms. Secondly, the argument incorrectly assumes that race is a reason for the difference ascribed to the economic value of native title rights vis-à-vis freehold title. It is not. The difference is explained entirely by conventional economic principles of valuation.[50] The same principled explanation justifies the different valuation of leasehold vis-à-vis freehold. Thirdly, the argument inexplicably rests on a comparison between freehold and native title. The proper point of comparison is between native title "and other forms of title" which includes freehold but also leasehold and lesser interests.[51] The native title party cannot sustain the necessary case, that native title is treated less favorably than all other forms of title. Fourthly, the

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[45] *Minister for Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 at 495 per Latham CJ.
[46] *Roads and Traffic Authority of NSW v Hurstville City Council* (2001) 112 LGERA 233 at [43]. A limited exception to this general proposition was recognised in *Leichardt Council v Roads and Traffic Authority* (2006) 149 LGERA 439 at [32] and [43] by reason of the particular and dissimilar statutory context.
[47] *Corrie v McDermott* (1914) 18 CLR 511 at 516; [1914] AC 1056 at 1062, per Lord Dunedin; *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106 (***Sydney Sailors' Home***); *Stephen v Federal Commissioner of Taxation* (1930) 45 CLR 122 at 134 per Isaacs CJ.
[48] *Griffiths FC* at [56], [62], [72] (**CAB 292, 294, 296-297**).
[49] *Native Title Act Case* at 437-8 and 462-3 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[50] *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 271 ALR 624 at [47] per Chesterman and Applegarth JJA.
[51] *Native Title Act Case* at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

case rests on a premise that there is less favorable compensation to the native title party than there would be on a compulsory acquisition of freehold. However, this can only be assessed by reference to the total award, comprising both economic and intangible components of loss, and to what would be payable for a compulsory acquisition of a freehold estate in the land. The native title party makes no such comparison.

The value of the rights and interests "acquired" by the Territory was irrelevant

39. The native title party contends that the value of the Territory's absolute or full beneficial fee simple estate which arose with the removal of the burden of native title on its radical title on extinguishment is an appropriate perspective from which to assess the value of native title rights and interests.[52]

40. On conventional economic analysis, the acquiring authority's gain is irrelevant because it is the value *to the owner* of an interest that must be assessed.[53] The purpose of compensatory awards is to find a money equivalent for a person's *loss*, not an acquirer's *gain*.[54] The focus on rights in the hands of the native title party is consistent with the statutory entitlement to compensation under s 51(1) of the NTA and with the application of the rules in Sch 2, LAA, r 1 of which provides that the overarching objective of an award is to fairly compensate an owner for the loss suffered by reason of an acquisition.

41. It matters not that the Territory was the only notional acquirer. Even where a market does not exist, or where the market may be limited, the *Spencer* test postulates a hypothetical marketplace without such restrictions.[55] That is reflected in the principle that neither party is taken to be acting under compulsion,[56] even where the only notional purchaser is the acquiring authority,[57] and that value must not be increased or decreased merely because the interest is being acquired.[58]

42. If the Territory were to compulsorily acquire a non-native title interest less than freehold (such as a pastoral lease), the existence of which restricted the Territory's ability to grant greater interests (such as freehold), the Territory would not pay compensation (to the pastoral lessee) on the basis that it is acquiring unencumbered freehold title. The

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[52] *Griffiths FC* at [56], [88] (**CAB 292-293, 300**).
[53] *Corrie v McDermott* (1914) 18 CLR 511 at 516; [1914] AC 1056 at 1062, per Lord Dunedin, cited with approval in *Sydney Sailors' Home* at 117 per Hope JA (Moffitt P and Glass JA agreeing); *Raja Vyricherla Narayayana Gajapatiraju v Revenue Division Officer, Vizipatam* [1939] AC 302 (***Raja***) at 312 per Romer LJ.
[54] *Nelungaloo* at 571 per Dixon J.
[55] *Spencer* at 431-432 per Griffiths CJ; *Boland v Yates* (1999) 167 ALR 575 at [79] per Gleeson CJ, [265] per Callinan J.
[56] *Raja* at 312 and 318 per Romer LJ; *Nelungaloo* at 571 per Dixon J.
[57] *Raja* at 323 per Romer LJ.
[58] *Raja* at 312 per Romer LJ.

Territory would pay the value of the pastoral lease to the lessee. The Full Court correctly found that the decision in *Geita Sebea v The Territory of Papua* (1941) 67 CLR 544 does not mandate a different result in respect of native title.[59] That case was decided in a different factual and statutory context to the present.[60] There, the native title rights and interests were equivalent to "full ownership of the land", including the right to perpetual and exclusive occupation.[61] Those rights had not been extinguished or diminished. Further, the inability to dispose of their rights arose, not from the nature of the rights themselves, but from the statutory regime established after 1888, when the protectorate of New Guinea was constituted as a Crown possession. Additionally, s 3 of the *Lands (Kila Kila Aerodrome) Acquisition Ordinance 1939* expressly provided that compensation was payable on the basis that what was acquired from the native title holders was an estate in fee simple freed and discharged from all trusts and encumbrances. Finally, that statute required compensation to be determined in the manner prescribed by the *Land Acquisition Ordinance 1914*, s 29 of which provided the appropriate measure of compensation was the "value of the land" acquired.

The Full Court failed to properly apply conventional economic analysis

43. Having correctly held that the economic value of the native title rights and interests extinguished fell to be determined on conventional analysis, the Full Court fell into error by adopting its two step valuation methodology. By starting with an analogy between freehold and exclusive native title,[62] the first step foreclosed any proper consideration of the specific incidents of the native title rights and interests or the drawing of an appropriate comparator from them, and distorted the overall assessment of value.

44. The starting point should have been the non-exclusive native title rights and interests themselves.[63] To start elsewhere is "artificial and capable of misleading".[64] The error is firstly one of principle. It is erroneous to start from the premise that native title rights and interests are equivalent to forms of common law tenure.[65] Native title is *sui generis*.[66] It

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[59] *Griffiths FC* at [115]-[118].
[60] *Sydney Sailors' Home* at 118 per Hope JA (with whom Moffitt P and Glass JA agreed).
[61] *Geita Sebea v The Territory of Papua* (1941) 67 CLR 544 at 551 per Starke J (referring to a "perpetual right of possession"), 557 per Williams J (referring to "a communal usufructuary title equivalent to full ownership of the land").
[62] *Griffiths FC* at [134] (**CAB 312**).
[63] *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[64] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (***Mabo No. 2***) at 178 per Toohey J.
[65] Ibid at 58 per Brennan, 85 per Deane and Gaudron JJ, 178 per Toohey; *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) at [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[66] *Mabo No 2* at 89 per Deane & Gaudron J.

has its origin in the traditional laws acknowledged and the customs observed by the native title party, not by the common law.[67] As Gummow J recognised in *Yanner v Eaton*:[68] "native title does not exhibit the uniformity of rights and interests of an estate in land at common law and 'ingrained habits of thought and understanding' must be adjusted to reflect the diverse rights and interests which arise under the rubric of 'native title'." The necessary starting point is therefore the rights and interests themselves, rather than an *a priori* assumption of equivalence.[69]

45. The error is secondly one of coherence. The Full Court correctly found that the inalienability of native title, whether exclusive or not, negatively affects its value.[70] Inalienability is an aspect of the essential nature of native title held pursuant to traditional laws and customs.[71] It is an important difference between native title rights and interests and freehold title, and it is economically significant.[72] Inalienability goes beyond inability to sell for profit; it means that native title cannot be leased[73], sub-divided or secured by mortgage to raise capital.[74] All things being equal, an interest in land which could be mortgaged, leased, subdivided and sold would have a substantially higher economic value than one which could not.[75] The Full Court's starting point was internally inconsistent with its finding that the inalienability of native title reduces its value. This incoherence was not remedied by the later reference to inalienability when taking a percentage adjustment to freehold value.[76] First, the degree of adjustment (if any) attributable to inalienability is undisclosed, being one of a number of factors from which 65% was intuited. More importantly, the Full Court appears to equate exclusive native title with

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[67] Ibid. at 58 per Brennan J; *Fejo v Northern Territory* (1998) 195 CLR 96 at [46] and *Yanner v Eaton* (1999) 201 CLR 351 at [72] per Gummow J.
[68] (1999) 201 CLR 351 at [72].
[69] *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[70] *Griffiths FC* at [115], [119] (**CAB 306-307, 308**).
[71] *Mabo No. 2* at 60, 70 per Brennan J and 110 per Deane and Gaudron JJ. There was no evidence led that the enjoyment of the rights can be varied and dealt with under the traditional law or custom, nor do the determined rights provide for such.
[72] *Corrie v McDermott* (1914) 18 CLR 511 at 516; [1914] AC 1056 at 1062, per Lord Dunedin; *Sydney Sailors' Home*, esp at 116-118; *Stephen v Federal Commissioner of Taxation* (1930) 45 CLR 122 at 134 per Isaacs CJ. Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [51], [56], [63], [65] (**TFM 15**); Expert Economist's Report by Gregory Houston dated 18 November 2015, p16 (**TFM 18**); Transcript, 24 February 2016, P-605 (lines 20-25) (Houston), P-640 (lines 40-45) (Lonergan) (**TFM 23**).
[73] To the extent that the holders of exclusive native title rights are able to achieve something analogous to a lease or licence by means of an Indigenous Land Use Agreement permitting third parties to enter upon and use the land, that is not open in the case of non-exclusive native title rights and interests, where the legal capacity to confer permission upon third parties has been extinguished.
[74] *Griffiths FC* at [135] (**CAB 312-313**).
[75] See footnote 72.
[76] *Griffiths FC* at [135] (**CAB 312-313**).

freehold (ignoring its inalienability) and to account for inalienability only as affecting non-exclusive native title, demonstrating a fundamental misapprehension as to its economic significance. This point is reinforced by the apparent view that inalienability would not "necessarily significantly" reduce the economic value of the native title rights and interests.[77]

46. The error is thirdly one of focus. Focusing on the native title rights and interests held by the native title party directs attention towards the subject of the loss to be compensated. That focus reveals the essentially usufructuary and ceremonial character of the rights and interests[78] and the absence of any right to say who could or could not come onto the land or to make decisions about its use.[79] There were four important differences between the rights held by the native title party and the rights which comprise an unencumbered freehold title, which confers the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination:[80] (1) non-exclusivity; (2) no right to confer permission; (3) non-commerciality (inability to exploit the resources for commercial purposes); and (4) inalienability.[81] Each bore significantly upon economic value and required careful consideration.[82] The mistaken focus on exclusive native title diverted from the proper assessment.

47. The Full Court's erroneous first step includes, but is more than simply, an undervaluation of these material differences. In addition, it assumed some direct comparability between the economic value of non-exclusive native title rights and interests and freehold, on a lot by lot basis, inconsistently with both the nature of the rights and the evidence at trial.

48. As usufructuary and ceremonial rights (to hunt, fish and forage, camp and live on the land, and to engage in cultural and ceremonial activities), their fullest exercise and

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[77] *Griffiths FC* at [122] (**CAB 309-310**).
[78] *Ward* at [331] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Native Title Act Case* at 474; *Akiba v Commonwealth* (2013) 250 CLR 209 at [9] and [28] per French CJ and Crennan J and at [63] per Hayne, Kiefel and Bell JJ; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169 per Gummow J; *Yanner v Eaton* (1999) 201 CLR 351 at [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; *Commonwealth v Commonwealth v Yarmirr* (2001) 208 CLR 1 at [44] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[79] *Griffiths FC* at [80] (**CAB 298**).
[80] *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 at 623 per Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ.
[81] With the exception of inalienability, which has been addressed in detail, each of these matters is addressed in paragraphs 63 to 69 below.
[82] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [63] and [65] (**TFM 15**). See, for example, *Rosenbaum* at 429-430 per Kitto J regarding restrictions or encumbrances upon freehold.

enjoyment, and so, the conditions under which they are most valuable to their holders, is in respect of unimproved and undeveloped land where flora, fauna and privacy can be found.

49. The exercise and enjoyment of the rights is self-evidently impaired or diminished by the clearing of native vegetation, the construction of roads and the erection of town infrastructure, which eliminate vegetation, reduce wildlife and introduce non-native title holders such as tourists into the area. That is the fundamental premise on which compensation (in the form of non-economic loss) is claimed in respect of acts 56 to 59 (public roads) and the various acts which comprised public works and the grant of title in respect thereof, including act 46 (the construction of water tanks and associated infrastructure) about which evidence was adduced to establish that the compensable acts interfered with the spiritual integrity of the land.[83] The native title holders adduced evidence at trial to the effect that tourists and non-Indigenous persons nearby impair the spiritual enjoyment of the land,[84] and that the development of the town of Timber Creek generally impaired enjoyment of hunting rights.[85] No challenge was made to, or evidence adduced against, the proposition that town developments interfered with the exercise and enjoyment of native title.[86] The recognition that the effects of non-compensable town development had to be excluded from the compensation assessment[87] similarly confirms it.

50. In stark contrast, road access, utilities, and services are powerful upward drivers of market value in freehold land.[88] This is because they increase the actual uses to which the freehold can be put. Compensable acts 15-16, 40-41, 47, 53-54, and 56-59, comprising acts for such developments, all contributed to freehold market value of lots in the Town of Timber Creek, but they adversely affected the use and enjoyment, and therefore the value to the owner, of the native title rights and interests.

51. On the Full Court's direct comparison approach, native title becomes exponentially more valuable in heavily developed urban centres where freehold land value is at its highest and native title rights are difficult or impossible to exercise or enjoy; whereas in

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[83] Transcript, 8 February 2016, P34-36 (Alan Griffiths) (**CFM 15**).
[84] Transcript (gender restricted), 9 February 2016, P17-18 (**CFM 23**); Affidavit of JJ (now deceased) affirmed on 7 July 2016 at [14] (**CFM 1**).
[85] Affidavit of Alan Griffiths affirmed 7 July 2016 at [7] (**TFM 1**); Export Anthropologist's Report – Timber Creek Native Title Compensation Application by Kinglsey Palmer and Wendy Asche dated November 2012 at [161]-[163] (**CFM 9**).
[86] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [66] – [68], [72] (**TFM 15**).
[87] *Griffiths FC* at [318] (**CAB 360**).
[88] Expert Valuation Report by Ross Copland dated 16 November 2015 at [4.1], [4.2], [7.2], p18 (**TFM 16**); Expert Valuation Report of Brian Dudakov and Les Brown dated 12 August 2015, p6 (**TFM 12**); Transcript, 11 February 2016, P251 (line 40) – P252 (line 5) (Wotton) (**TFM 20**); Letter from the Australian Valuation Office to Mr Richard Morris dated 9 October 2008, pp 1-2 (**TFM 13**).

remote parts of the country, where traditional resources remain plentiful and tourists do not encroach, native title rights are most exercisable but have a relatively limited economic value.

52. This direct comparison between freehold and native title was not necessary on conventional economic analysis. Mining rights and other exploitative interests in land are commonly valued in terms other than as a percentage of freehold value.[89] These rights are valued according to their incidents. The same approach is required for native title by drawing an appropriate economic comparator for native title from freehold title by reference to their divergent drivers of value. Only the methodology proposed by Mr Lonergan does so.

The Lonergan methodology properly applies conventional economic analysis

53. The methodology takes as its starting premise the nature and incidents of the native title rights and interests. It formulates the economic value of those rights in terms of their "usage value", reflecting the conditions of their highest and best use, plus their "negotiation value", reflecting an even compromise exit or sale value. This best reflects conventional economic analysis. The two part formulation is derived from economic models which value property that produces no cash flow.[90] The two components reflect the benefits derived from the exercise and enjoyment of the rights and interests and the proceeds from a hypothetical future exit or divestiture, respectively.[91]

Usage Value

54. Usage value represents the market value of utilising native title rights and interests in perpetuity.[92] In the absence of a relevant market or comparable sales data, an approximation of that value is required. Freehold is the most suitable comparator but freehold market value is heavily driven by the availability of infrastructure. Freehold value in developed areas is much greater than in less developed areas as a product of the higher usage value freehold obtains from services and infrastructure. The use of native title does not depend on infrastructure and is adversely affected by it. The Full Court erroneously disputed the correctness of that assumption[93] as, for the reasons already given, it is an

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[89] *Unimin Pty Ltd v Commonwealth; Universal Sands & Minerals Pty Ltd v Commonwealth* (1977) 18 ACTR 1 at 27-8 per Connor J (*profits a prendre*), *Googong Pty Ltd v Commonwealth* (1977) 13 ALR 449 at 477 per Waddell J (mineral rights), *Chino Pty Ltd v Transport Infrastructure Development Corp* (2006) 153 LGERA 136 at [140] per Pain J (easements).
[90] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [51] (**TFM 15**).
[91] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [54] and [58] (**TFM 15**).
[92] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [58] (**TFM 15**).
[93] *Griffiths FC* at [128] (**CAB 311**).

essential premise underlying the accepted basis of the compensation claim itself and consistent with the evidence adduced at trial. The appropriate freehold comparator is therefore freehold market value stripped of that which reflects services and infrastructure. That value can be determined by reference to the market value of any large nearby parcel of undeveloped and un-serviced land.[94] In this case, Lot 16 was utilised.[95] It is a large rural block, surrounded on three sides by Lot 65 and on the other by the airstrip.[96] It lacks road access, power or water.[97] For this purpose, the valuation of Lot 16 provided by Mr Wotton ($15,000) is appropriate and to be preferred to that of Mr Copland ($70,000) because the latter assumed services and road access.[98] On the Lonergan methodology, Mr Wotton's value of Lot 16 is adjusted in its application to each of the compensable acts to account for the time the act was done and allotment size differences.

Negotiation Value

55. To usage value is added an uplift for negotiation value. The component of negotiation value represents, adopting the *Spencer* approach, the negotiated value that the native title party and a hypothetical purchaser might reach.[99] It is arrived at by splitting the difference between market freehold value of the lot in question and usage value of the native title rights and interests, and adding that difference to the usage value. The figure of 50% is not a product of valuation methodology or mathematical calculation but is derived from: (a) principles of behavioural economics and game theory; (b) what economic experience shows is the typical negotiated bargaining result, and (c) notions of fair dealing.[100]

56. The Full Court erroneously rejected the component of "negotiation value", noting that Mr Lonergan had said "there is no definite basis for deciding what outcome within the relatively wide negotiating range will be achieved."[101] The comment was taken without

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[94] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [66] – [74] (**TFM 15**).
[95] Amended Economist's Report of Wayne Lonergan at [94] (**TFM 15**).
[96] *Griffiths FC* at [149] (**CAB 317**); Annexure JM4 to the Affidavit of Julie Miller dated 29 January 2016 (**TFM 3A**).
[97] See the map of the Town of Timber Creek in the Full Court's reasons (**CAB 269**). These are confined to the township areas: Expert Valuation Report by Brian Dudakov and Les Brown dated 12 August 2015, p6 (**TFM 12**); Expert Valuation Report by Ross Copland dated 16 November 2015 at [4.1] (**TFM 16**); Transcript, 12 February 2016, P-358 (Wotton) (**TFM 20**).
[98] Transcript, 12 February 2016, P-358 (Copland) (**TFM 20**); Expert Valuation Report by Ross Copland dated 16 November 2015, pp10 and 19 (**TFM 16**).
[99] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [75]-[87] (**TFM 15**).
[100] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [81] (**TFM 15**). *Nelungaloo* at 600 per Kitto J.
[101] *Griffiths FC* at [128] (**CAB 311**); Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [79] (**TFM 15**).

the context of the process of reasoning which followed it, and which provide a rational and theoretical basis for arriving at the 50% difference.[102] In any event, to the extent that there is some element of a contestable judgment in the 50% figure, it is less contestable than deriving the value of non-exclusive native title rights and interests intuitively as somewhere between 1 and 100% of freehold value.

The Lonergan methodology should have been preferred

57. It was an error by the Full Court to characterise the methodology as "not particularly more attractive" than an evaluative judgment.[103] Even if that characterisation is apt (which it is not, for the reasons set out above), and the methodology was not substantially better or worse than a "broad brush" intuitive judgment by the Court, it was erroneous to prefer the latter for a number of reasons.

58. First, the methodology is preferable because it has an express theoretic foundation, namely the net present value method of valuation,[104] applying economic models which value property that produces no cash flow.[105] The desirability of such expertise in valuations,[106] and in litigation involving matters of economic theory,[107] is well recognised. Secondly, Mr Lonergan was well placed to provide an opinion regarding these matters, having both expertise as an economist and valuer and extensive experience valuing *sui generis* rights and interests.[108]

59. Thirdly, the process of reasoning in the methodology is clearly articulated and examinable. The selection of a "broad-brush" figure between 1 and 100% of freehold value by reference to an unidentified diminution in value is impenetrable compared to a methodology which selects a consistent usage value and uplift.

60. Fourthly, the methodology produces greater uniformity of value across claims in different locations. It fosters consistency in the application of economic principles.[109] Further, it softens the difference in value between claims which happen to now lie in highly developed and sought after locations, where market freehold values are high but

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[102] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [79]-[82] (**TFM 15**).
[103] *Griffiths FC* at [128] (**CAB 311**).
[104] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [53], [55] (**TFM 15**).
[105] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [55], [58] (**TFM 15**).
[106] *De Ieso v Highways* (1981) 27 SASR 248 at 252 per Wells J, referring to *Spencer* at 440-441 per Isaacs J. Brown D, *Land Acquisition,* (2009) at [3.14].
[107] *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at [661], [667] per Tamberlin J; *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [107] per Parker J; *Australian Gas Light Company v ACCC* (2003) 137 FCR 317; *Sampi v State of Western Australian* [2005] FCA 777 at [792] per French J.
[108] *Griffiths* at [242] (**CAB 305**).
[109] See, by analogy, *R v Pham* (2015) 256 CLR 550 at [28(2)] per French CJ, Keane and Nettle JJ.

where the value of usufructuary rights would be low, and remote areas where freehold values are relatively low and usufructuary rights relatively high.

61. Finally, the methodology takes as its starting point the nature and incidents of the native title rights and interests, rather than an *a priori* (and erroneous) assumption of equivalence between exclusive native title rights and interests and freehold.

Notice of contention

62. The native title party appears to maintain that the expert evidence of Mr Lonergan should not have been admitted by the trial judge.[110] The Full Court did not deal with this issue expressly, but should be understood to have impliedly rejected it. The effect of assumptions made by Mr Lonergan was the subject of the Full Court's considerations in rejecting his methodology as the preferred approach, but not on the basis of inadmissibility.[111] It is not the subject of any ground of appeal or contention for which special leave has been granted. The admissibility of his evidence must now be beyond challenge.

The native title was worth no more than 50% of freehold value

63. If, contrary to the submissions above, a direct comparison between freehold market value and native title is adopted, the Full Court nevertheless erred in arriving at 65% and should have valued the rights at no more than 50% of freehold value. An assessment of 100% of freehold value would be equally erroneous. When assessing the price a willing buyer would pay to a willing seller to obtain the rights and interests, there are four critical considerations, which compel the conclusion that the native title rights and interests should not have been valued at any more than 50% of the freehold value.

The rights were non-exclusive

64. Exclusivity is a significant driver of value in land,[112] and its absence is economically significant. The native title party could not prevent access to the land by third parties and the specific incidents of the native title party's rights (to camp, hunt, fish, etc) were not exclusive to them; third parties could do those things too. The potentiality for resource

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[110] Native Title Party's Amended Notice of Contention dated 17 February 2017 in NTD 51 of 2016 at [2].
[111] See paragraphs 54 and 56 above.
[112] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [63], [65], [67] (**TFM 15**); Supplementary Valuation Report by Ross Copeland dated 20 November 2015, p2, 6 (**TFM 17**).

depletion and privacy concerns are relevant value drivers[113] and it is necessary to take these potentialities into consideration when determining value.[114]

65. The extent to which the native title party's rights were enforceable[115] to prevent others doing things on the land subject to their non-exclusive rights depends on those activities being inconsistent with their rights. The decision in *Western Australia v Brown* (2014) 253 CLR 507 demonstrates the breadth of conduct that can be undertaken consistently with non-exclusive native title rights and interests. In that case, the mineral leases and extensive mining activities undertaken pursuant to those leases were not inconsistent with the continued existence, exercise or enjoyment of the claimants' non-exclusive native title rights and interests.[116]

66. Contrary to the native title party's case, the rights and interests held by them were not practically exclusive for the purpose of s 51(1) of the NTA (because there were not, and could not have been, any other interests in the land). That argument seeks to disregard the prior extinguishment of exclusivity. It is untenable where the entitlement to compensation under s 51(1) is confined to native title rights and interests which were lost or impaired by the compensable acts. The right to control access to the land or make decisions about its use having been extinguished before the compensable acts, there is no entitlement to compensation under s 51(1) in respect of it. Upon extinguishment, that right ceased to be a native title right and interest within the meaning of the NTA, and for the purpose of s 51(1) in particular.[117] The native title party cannot be compensated on the footing that such a right existed when it did not. The native title party's subjective understanding or experience of their rights, or how they exercised them in fact, are irrelevant. To hold otherwise would be to conflate the existence of rights with the manner of their exercise.[118]

67. A derivative proposition is that the native title was subject to the grant of coexisting rights and interests. After reversion to the Territory of the interest comprising the historic

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[113] Amended Economist's Report of Wayne Lonergan dated 11 February 2016 at [63] n5 and [67] (**TFM 15**); Transcript (gender restricted), 9 February 2016, P17-18 (**CFM 23**); Affidavit of JJ (now deceased) affirmed 7 July 2016 at [14] (**CFM 1**); Affidavit of Alan Griffiths affirmed 7 July 2016 at [7] (**TFM 1**); Export Anthropologist's Report – Timber Creek Native Title Compensation Application by Kinglsey Palmer and Wendy Asche dated November 2012 at [161]-[163] (**CFM 9**).

[114] *Spencer* at 441 per Isaacs J; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 301 per Williams J.

[115] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 61 per Brennan J.

[116] At [46], [55] and [57] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.

[117] *Akiba v Commonwealth* (2013) 250 CLR 209 at [10] per French CJ and Crennan J.

[118] *Western Australia v Brown* (2014) 253 CLR 507 at [59] and *Akiba v Commownealth* (2013) 250 CLR 209 at [21] per French CJ and Crennan J, [67] per Hayne, Kiefel and Bell JJ.

pastoral leases, it was open for the Territory to make grants of interests which had no greater effect on the native title party's rights and interests than the earlier pastoral leases.[119] This would include the rights identified by the Full Court, namely grazing licences, occupation licences and miscellaneous licences,[120] but also other kinds of interests consistent with the non-exclusive native title such as mining interests[121] and pastoral leases.[122] The Full Court did not consider those greater potentialities. Nor did it consider the equally possible potentiality that an interest inconsistent with the native title rights (such as a freehold estate) could have been granted (at least until 1 January 1994 when the NTA commenced), and if it had been, the interest would have been validated pursuant the NTA and the native title rights extinguished.

No right to confer permission

68. The native title party's rights did not include the right to confer permission upon non-native title holders to enter upon, occupy or use the land.[123] The right to invite others onto the land, which a freeholder enjoys, is a significant component of freehold value. The Full Court did not consider this factor at all.

No commercial use

69. The native title rights could not be commercially exploited. This has a significant bearing upon value because it severely limits the use to which the rights could be put. The land and its resources could not be used for business or commercial activities,[124] unlike freehold interests. The Full Court mentioned this factor fleetingly without examination.[125]

Inalienability

70. The importance and economical significance of this feature has been addressed in paragraphs 45 to 46 above.

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[119] *Ward* at [108] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[120] *Griffiths FC* at [82] (**CAB 298-299**).
[121] *Western Australia v Brown* (2014) 253 CLR 507. All but three of the acts took place before 1 January 1994, therefore the future acts regime in Part 2, Division 3 of the NTA, and the right to negotiate provisions in Subdivision P regarding the grant of mining interests, did not apply to those acts: NTA, s 233(1)(a). See also *Ward* at [309], *James v Western Australia* (2010) 184 FCR 582 at [47]-[49] and *Neowarra v Western Australia* [2003] FCA 1402 at [524] per Sundberg J.
[122] *Ward* at [417]; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Neowarra v Western Australia* [2003] FCA 1402 at [523], [526] per Sundberg J.
[123] *Ward* at [192] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[124] Cf. *Rrumburriya Borroloola Claim Group v Northern Territory of Australia (No.2)* [2016] FCA 908; *Akiba v Commownealth* (2013) 250 CLR 209.
[125] *Griffiths FC* at [135] (**CAB 313**).

INTEREST ISSUE

Introduction

Common ground

71. The following matters are not in contention:[126] (1) The compensation award should incorporate an amount for pre-judgment interest on the economic loss component of the award. (2) Pre-judgment interest should run from the date of extinguishment (when the compensable act was done) until the date of judgment (**interest period**). (3) The function of an award of pre-judgment interest in the circumstances is to compensate the native title party for being kept out of their money, while having been deprived of their native title, during the interest period.

Trial judge's award – simple interest calculated via the Practice Note

72. The interest awarded by the trial judge comprised simple interest on the economic loss component calculated at the rates prescribed in the Practice Note.[127] This reflected the terms proposed by the Territory and the Commonwealth.

73. At trial, the native title party argued for pre-judgment interest compounded to reflect a median superannuation return of 10.4 percent under a managed superannuation fund model.[128] The native title party adduced expert economic evidence seeking to justify and calculate interest in that manner.[129] In response to that evidence, the Commonwealth adduced expert economic evidence from Gregory Houston who opined that, assuming the objective was to make the native title party whole in economic terms, the superannuation rate was inapposite because it assumed a degree of investment risk not borne by the native title party. On that basis, Mr Houston proposed a "risk free" investment rate equated with the return on long term government bonds, compounded with half yearly rests (**risk free rate**). The native title party subsequently adopted this risk free rate as an alternative to the superannuation rate.

74. The trial judge's justifications for awarding simple interest at the Practice Note rates were as follows:

(a) At common law, and more recently under the Practice Note, pre-judgment interest is routinely awarded on a simple interest basis.[130]

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[126] *Griffiths* at [246] (**CAB 161**).
[127] *Griffiths* at [279] (**CAB 170**). See paragraph 13 above.
[128] *Griffiths* at [266] (**CAB 167**).
[129] *Griffiths* at [67(3)], [69] (**CAB 117-119**).
[130] *Griffiths* at [248] (**CAB 161-162**).

(b) At common law, compound interest is only allowed in accordance with the principles in *Hungerfords v Walker* (1988) 171 CLR 125 (***Hungerfords***) on proof of loss, which was not a case made by the native title party.[131]

(c) The principle in equity relied on by the native title party in support of a compound interest award does not operate so as to require (rather than permit) an award of compound interest at the risk free rate, or any other.[132]

(d) On the evidence relating to the financial circumstances of the native title party, their likely reinvestment of interest earnings and, in all the circumstances of the claim, compound interest did not reflect just or fair terms of compensation.[133]

10 **(e)** An award of interest compounded at the government borrowing or risk free rate would not reflect the terms of s 51(1) of the NTA.[134]

75. The award did not rest on s 51A of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**); interest was awarded as part of the compensation awarded under s 51(1) of the NTA.[135]

Full Court's award – upheld simple interest calculated via the Practice Note

76. The native title party appealed against the interest award, abandoning the superannuation rate case and pressing an award at the risk free rate. The Full Court found no error in the trial judge's award of pre-judgment interest in accordance with the Practice Note,[136] finding the following additional justifications for that interest award:

20 **(a)** The relationship between the Territory and native title party was not, and could not be regarded analogously with, a fiduciary relationship. The rationale for awarding compound interest in cases of defaulting fiduciaries did not apply.[137]

(b) The principle in equity relied on by the native title party has not developed as far as to require an award of compound interest.[138]

(c) Just or fair terms of compensation in the context of the substantial interest period did not require compound interest to make the native title party whole and, in any

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[131] *Griffiths* at [248] (**CAB 161-162**).
[132] *Griffiths* at [249] (**CAB 162**).
[133] *Griffiths* at [253]-[255], [258], [263]-[265], [275]-[278] (**CAB 163, 165, 166-167, 169-170**).
[134] *Griffiths* at [259] (**CAB 165**).
[135] *Griffiths* at [254] (**CAB 163**). This is contrary to the native title party's complaint (D3, ground 2(a)) that the court "allowed only statutory interest on compensation under s 51A of the FCAA calculated on a simple basis under" the Practice Note.
[136] *Griffiths FC* at [213]-[215] (**CAB 334-335**). See paragraph 14 above, noting that the Full Court also found that interest should only run up to 28 August 2006 (the date of the determination of native title) in respect of act 34 on Lot 47: *Griffiths FC* at [234] (**CAB 339**).
[137] *Griffiths FC* at [176]-[178] (**CAB 324-326**).
[138] *Griffiths FC* at [180]-[205] (**CAB 326-333**).

event, the native title party did not argue that, in fact on the evidence, the trial judge's interest award fell short of full compensation for their loss.[139]

77. The Full Court also upheld the trial judge's characterisation of the interest award as part of the compensation awarded under s 51(1) of the NTA.[140]

Issues

78. The primary issue for resolution by this Court is whether an award of interest in terms of the Practice Note is erroneous and should be substituted by an award for interest at the risk free rate (D3, ground 2). The subsidiary issue is whether an award of pre-judgment interest on the economic component constitutes compensation under s 51(1) of the NTA or is awarded on, or in addition to, compensation and derives from some other statutory or implied/inherent power (D2, ground 3). On both issues, the Full Court's upholding of the trial judge's award was not erroneous and should be upheld.

Risk free rate of compound interest

79. Ground 2(b) of the native title party's notice of appeal presses the approach of Mr Houston. Relevantly, in justification for the risk free rate, his evidence was that:[141]

(a) the potential for capital investment to generate income over time results in a time value of money reflecting the potential income stream;

(b) the most appropriate means of retrospectively valuing a lost income stream is the risk free rate determined by the yield on government-issued bonds;

(c) the risk free rate assumes perfect reinvestment of capital over the interest period without assuming any risk of investment losses; and

(d) the risk free rate reflects the borrowing costs of the Territory.

80. Mr Houston provided a methodology for approximately calculating the risk free rate on the available data.[142]

81. The native title party contends that: (1) the risk free rate reflects the terms of the NTA which prescribe an entitlement to just terms of compensation in the historical context of Indigenous land rights, dispossession and resultant disadvantage; and (2) the risk free rate is the accepted measure of compensation in cases of defaulting purchasers of land and so ought to be applied in the analogous native title context. Before addressing those

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[139] *Griffiths FC* at [209], [211] (**CAB 333-334**).
[140] *Griffiths FC* at [219]-[226] (**CAB 335-337**). Again, this is contrary to the native title party's complaint in D3, ground 2(a).
[141] Expert Economist's Report by Gregory Houston dated 18 November 2015 at [3.2] (**TFM 18**).
[142] Supplementary Expert Economist's Report by Gregory Houston dated 4 December 2015 at [3.3] (**CFM 12**).

contentions, it is convenient to address the consequences of the native title party's adoption of Mr Houston's economic model and the inapplicability of its underlying assumptions.

Consequences of the native title party's case

82. There is nothing about the particular circumstances of this case (eg the character of the compensable acts, their particular effects, the personal situations of the members of the native title party (as distinct from native title holders generally) and the particular native title rights and interests) which offer support for the imposition of interest compounding at the risk free rate. Indeed, the native title party is seeking the award *despite* the particular circumstances of the native title party and their native title rights and interests.[143] It follows that the native title party is not arguing for the imposition of the risk free rate in the specific circumstances of this case; it is arguing for the risk free rate in the circumstances applicable to *every* compensation application under s 61 of the NTA. Indeed, by reliance on equitable principle derived from compulsory land acquisitions, which in turn, are analogised with the position of defaulting purchasers of land, the native title party is effectively arguing for the risk free rate in all compulsory acquisition cases.

83. Even confined to native title compensation claims, the result impermissibly strains the terms of the statute. Consistently with the native title party's case,[144] interest has been awarded as compensation under s 51(1) of the NTA. The effect of the native title party's argument must be that s 51(1) of the NTA requires in every case the payment of interest at the risk free rate (at least). In other words, on the terms of s 51(1), the Court has discretion to award interest (which is not in dispute) including compound interest *but* cannot exercise that discretion to award anything less than interest compounding at the risk free rate. That is a substantial constraint on judicial discretion without textual foundation.

84. Extended to compulsory acquisitions and other cases involving proprietary interests to which it is said the equitable principle applies, the outcome pressed by the native title party encroaches considerably on the principles in *Hungerfords* by delineating a substantial body of cases (not merely exceptional ones) in which proof of loss is not required. Similarly, in the context of statutory interest provisions such as s 51A of the FCAA, there is a difficulty arising from a judicial determination, the practical effect of which is, in a substantial body of cases, to "override statute by claiming a superior sense of injustice to parliament's".[145]

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[143] *Griffiths* at [275], [276], [278] (**CAB 169-170**); *Griffiths FC* at [169]-[170], [209] (**CAB 322, 333-334**).
[144] *Griffiths* at [256] (**CAB 164**); *Griffiths FC* at [161] (**CAB 319-320**).
[145] *National Australia Bank Ltd v Budget Stationery Supplies* (1997) 217 ALR 365 at 371 per Mason P.

Economic assumptions

85. Underlying Mr Houston's economic modelling is an assumption that the extinguishment of the non-exclusive native title rights and interest resulted in the loss of an income stream which loss can only be made whole by payment of compound interest. That assumption is neither established nor sustainable. First, the assumption is contrary to the nature of the native title rights and interests held by the native title party, which have the four features referred to in paragraphs 45-46 and 63-69 above. At common law (ie prior to the passage of the NTA), native title rights and interests did not confer an income stream (such as rent[146]). The specific incidents of the native title in this case were incompatible with the assumption of a substantial income stream.

86. Secondly, the assumption was contrary to the evidence at trial. There was no evidence to support the viability of rental income in the subject allotments during the interest period. The land valuers investigated the rental market in the town of Timber Creek and found that it was non-existent.[147] The native title party's evidence sought to identify, *inter alia*, all dealings in Timber Creek land where native title is recognised.[148] Excluding from that list agreements which were not at arm's length (ie they were agreements between bodies owned and run wholly or predominantly by members of the native title party), the only transaction in Timber Creek was a stock agistment agreement granting Warren Pty Ltd a right to graze cattle over Lots 47 and 109 between October 2011 to October 2013 at $2,000 per annum. As to this evidence, the trial judge found that there is no evidence that use of the land for commercial purposes has been profitable in a way that generates profits at levels equivalent to the sorts of outcomes which would justify the imposition of compound interest.[149] In other words, the trial judge rejected Mr Houston's starting premise that the native title party lost a significant income stream on extinguishment of their title. There was no appeal from that aspect of the judgment.[150]

87. Thirdly, the assumption rests upon the time value of money, which is erroneous where the relevant thing lost was not money or an income generating asset. The time value of money reflects the potential for capital to generate, over time, more capital through

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[146] *Ward* at [317]-[318]; *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 271 ALR 624 at [10] per McMurdo P, [46] per Chesterman JA and Apple.
[147] Supplementary Report of Wayne Wotton dated 29 January 2016, p8 (**TFM 14**); Expert Valuation Report by Ross Copland 16 November 2015, p25 (**TFM 16**); Supplementary Expert Valuation Report by Brian Dudakov and Les Brown dated 12 August 2015, p5 (**TFM 8**).
[148] Exhibit RH-2 to the affidavit of Rebecca Hughes sworn on 23 July 2015 (**CFM 4**).
[149] *Griffiths* at [276]-[277] (**CAB 169**).
[150] *Griffiths FC* at [209] (**CAB 333-334**).

investment, and the effects of inflation which diminish the buying power today of yesterday's capital. The time value of money is a measure of what the Territory has gained by retaining throughout the interest period the economic value of the native title rights. It is not a measure of the native title party's loss. These two modalities are treated interchangeably by Mr Houston.[151] That is an error of principle. The appropriate modality in this case is the potential income stream derived from the extinguished native title rights. That is what was lost and for which compensation is payable. To conflate that with the measure of what the Territory has gained confounds compensation and restitution. It risks incoherence in the law, which draws distinctions between compensatory and restitutionary (and other) measures of interest.[152] Where the native title rights did not constitute an income stream into the future, applying a measure of interest which reflects the time value of money risks overcompensating the native title party for extinguishment of their rights.

88. In any event, even if the time value of money was an appropriate measure of the native title party's compensable loss, it could not sustain an award of interest at the risk free rate. That is because the assumption on which the time value of money requires compound interest is perfect reinvestment,[153] an assumption displaced by the evidence, which included that:[154]

(a) In 2003, payment of at least $370,000 was made by the Department of Defence in compensation for the construction and use of a bridge and access road over the Victoria River. That money was distributed to the native title party by the Northern Land Council, which was bound to distribute the payment by or at their direction. Once distributed, the funds had been completely dissipated.

(b) In 2009, the Territory made a substantial payment to the Gunamu Aboriginal Corporation under an agreement to acquire native title in respect of the house blocks on Wilson Street. The funds were paid to the Corporation for distribution to the members of the native title party. Once distributed, the funds received were dissipated.

89. The trial judge held that the evidence supported the inference that the native title party would have spent any interest earned rather than reinvested it.[155] Again, there was no

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[151] Expert Economist's Report by Gregory Houston dated 16 November 2015 at [3.2] (**TFM 18**).
[152] J Edelman and D Cassidy, *Interest Awards in Australia* (2003), LexisNexis Butterworths, p15-18.
[153] Transcript, 24 February 2016, P688 (lines 25-35) (Houston), P701-703 (Houston) and P704-705 (Lonergan) (**TFM 23**); Expert Economist's Report by Gregory Houston dated 18 November 2015 at [3.2.4] (**TFM 18**).
[154] *Griffiths* at [264] (**CAB 166-167**).
[155] *Griffiths* at [277]-[278] (**CAB 169-170**).

appeal from that finding.[156] It is inconsistent with the assumption on which Mr Houston's economic analysis depends.

90. It follows that the economic assumption underlying Mr Houston's opinion evidence were contrary to the unchallenged factual findings of the Court, so the risk free rate does not provide a measure of compensation which properly reflects the circumstances of this case. It should be disregarded for that reason.

The risk free rate does not reflect the terms of the NTA

91. Notwithstanding the above incompatibility of Mr Houston's economic analysis with the particular circumstances of this claim, the native title party seeks to justify an award of interest at the risk free rate by reason that an award of compound interest at the risk free rate, and only an award at that rate or higher, is consistent with the terms of the NTA. The issue is not whether the NTA *permits* an award of compound interest, as the courts below accepted that an award of compound interest was within their discretion but declined to award it in this case.[157] The native title party bears the much heavier burden of establishing that the terms of the NTA *require* an award of interest at no less than the risk free rate in this case, and there was no discretion to award anything less.

Compensation for loss etc or other effects on their native title

92. The compensation provisions of the NTA do not provide expressly for any award of interest. The terms of s 51(1) of the NTA are sufficiently broad to encompass an award for interest on the value of the extinguished rights and interests assessed at the date of their extinguishment.[158] However, the terms of s 51(1) do constrain the way that pre-judgment interest falls to be assessed and determined.

93. First, the interest award must be compensatory. An interest award justified as a restitutionary, disgorging or punitive measure,[159] or on any ground dissociated from the native title party's actual loss, will not satisfy s 51(1). To award interest at the risk free rate *despite* the evidence establishing the appropriateness and the sufficiency of a lesser award in the circumstances of the case cannot be justified as compensation, or as what is fair as between the native title party and the Territory. It repeats the same species of error

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[156] *Griffiths FC* at [209] (**CAB 333-334**).
[157] *Griffiths* at [252] (**CAB 163**); *Griffiths FC* at [199] (**CAB 331**).
[158] *Griffiths* at [252]-[253] (**CAB 163**); *Griffiths FC* at [199] (**CAB 331**). Cf *Marine Board of Launceston v Minister for the Navy* (1945) 70 CLR 518 (***Marine Board***).
[159] Where "restitutionary" refers to an award to reverse a transfer of value (money) based upon an objective measure of gain to the defendant, "disgorging" refers to an award to strip a defendant of profits made as a result of a wrong, and "punitive" refers to an award made on a penal basis. See J Edelman and D Cassidy, *Interest Awards in Australia* (2003), LexisNexis Butterworths, p13-19.

in the appellant's case in *Bugmy v The Queen* (2013) 249 CLR 571, where the plurality judgment said (at [41]): "the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It ... is antithetical to individualised justice".

94. Next, as compensation, the entitlement is tied to the loss etc or other effects on their native title. Contrary to that, the risk free rate is derived from government borrowing rates measured by the return on 10 year bonds, which return rates vary between governments.[160] Mr Houston's method has linked the compensation to the identity and financial circumstances of the government responsible for the compensable act. Not only does this result in different rates of interest applying to the same kinds of acts and the same land depending on the identity of the acting entity, the problem is that the award is fundamentally restitutionary in its calculation. The risk free rate is not seeking to place the native title party in the position they were in before the extinguishment; it is seeking to transfer some assumed gain made by the Territory in having the value of the native title rights. Having regard to the significance of the interest component in the overall award and the significant variance between the risk free and Practice Note rates (see below), this is not a trifling anomaly.

95. More fundamentally, the risk free rate is not intended to be a measure of the loss etc or other effects on native title. As was submitted in paragraphs 85-90 above, the extinguishment of the native title party's rights between 1980 and 17 December 1996 did not deprive the native title party of a significant income stream, and that cannot be what a compensatory interest award is directed to. The function of an interest award in this case is to maintain a reasonable proximity or sufficient degree of parity between the economic value of the native title party's extinguished rights and interests assessed at the point in time when the compensable act occurred and that value at the date of judgment. In circumstances of lengthy delay between those two dates, a just award recognises that compensation will be incomplete if it does not account for the effects of land value appreciation. It is this notion of "elementary fairness"[161] or "full and adequate compensation"[162] which the award of interest makes good. Simple interest at the Practice Note rates was sufficient for these purposes (see paragraph 99 below).

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[160] The Commonwealth Government offers a noticeably lower return than State/Territory Governments: Supplementary Expert Economist's Report by Gregory Houston at [3.2] (**CFM 12**).
[161] *Marine Board* at 526 per Latham CJ.
[162] *Marine Board* at 522 per Latham CJ.

96. There is nothing in the general scheme of the NTA, the context in which it was enacted as articulated in the Preamble, or its objects which displaces these points. The compensation provisions for extinguishment or impairment of native title by past and intermediate period acts in the NTA were enacted to deal with the consequences of events going back to 31 October 1975 (when the RDA came into force) and occurring up to 23 December 1996 (the end date for acts to be previous exclusive possession acts). Every compensation claim for such acts will involve significant delay between the date of the compensable act and the date of judgment. The omission from the NTA of any prescribed rate or mandatory minimum rate of pre-judgment interest tells against any implication derived from its general scheme to the effect that compound interest is *required.*

97. Further, the NTA's scheme of validation, extinguishment/impairment and compensation operates upon and compensates for acts which offended against the RDA in a manner unknown until the subsequent recognition of the existence of native title in 1992. Compensation is for the "unintentionally" discriminatory acts.[163] The circumstances are not such as to justify any disgorging or punitive measure of interest.

Interest calculated according to the Practice Note reflects just terms of compensation

98. As appears from its terms, the Practice Note calculation of simple interest at the rate of 4% above the Reserve Bank cash rates was set following a referral by the Council of Chief Justices of Australia and New Zealand to the Discount and Interest Rate Harmonisation Committee. It represents a considered judgment as to what is fair and reasonable compensation for being deprived of the use of money.[164] Interest under the Practice Note is a "simplifying assumption" or "approximation" of the increase in the value of money over time.[165] It reduces to a simple interest formula the "hugely complicated"[166] calculations associated with determining compound interest including the return on investment, the percentage of return reinvested, and consequent taxation entitlements and impositions, which vary over time.[167] The Practice Note calculation is

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[163] *Native Title Act Case* at 454 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[164] *Griffiths* at [280] (**CAB 170**), referring to *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 666, where it is recognised that interest is paid to compensate a plaintiff for having been deprived of the use of their money, not because they have forgone investment opportunities. See also *Management 3 Group Pty Ltd v Lenny's Commercial Kitchens Pty Ltd (No 2)* (2012) 203 FCR 283.
[165] Transcript, 25 February 2016, P729 (lines 40-45), P730 (lines 15-30) (Lonergan); P733 (30-35) (Ho) (**TFM 24**).
[166] Transcript, 25 February 2016, P729 (line 5) (Lonergan) (**TFM 24**).
[167] Transcript, 25 February 2016, P728-729 (Lonergan) (**TFM 24**).

pegged to the Reserve Bank cash rate to take into account changes in money markets. It therefore reflects a fair return over the period.

99. On the premise that the loss to be compensated by interest is the loss of value appreciation between extinguishment and judgment (see paragraph 95 above), its sufficiency can be assessed by whether it accords with changes in land value during the interest period.[168] Interest calculated in accordance with the Practice Note will afford just terms of compensation if it broadly tracks or compensates for the effects of land value appreciation. Calculating interest at the Practice Note rate does maintain approximate parity with changes in land value over the interest period. The unimproved land value of the lots at 24 September 2015 was $2.5 million.[169] Sixty five percent of that amount is $1,625,000, which is approximately the aggregate of the Full Court's economic loss and interest awards. By contrast, an award at the risk free rate would be wholly disproportionate to the increased land value over the interest period.

Alternative perspectives

100. It is also useful to examine the interest award's fairness or sufficiency from other perspectives. The most obvious is by comparing the interest award with what the holders of a freehold title would receive under a compulsory acquisition. Section 51(4) of the NTA invites this comparison. Section 64(1) of the LAA provides an entitlement to pre- and post-judgment interest and s 65 provides that the rate of interest is the rate fixed by the Minister from time to time after consultation with the Treasurer. No such rate has been fixed. In lieu of a prescribed rate, Mr Houston calculated what he called "a proxy acquisition rate".[170] This was, in fact, an average of the rates prescribed under the compulsory acquisition laws of New South Wales, Victoria, Queensland and Tasmania. Assuming for comparison purposes an economic loss award of $640,500 (being 100% of freehold land value), the proxy acquisition rate of interest would be an amount of $1,304,486[171] being half a million dollars less than the Practice Note rate of $1,836,840 on the same award.[172] From this perspective, interest calculated on the Practice Note rates would be generous.

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[168] *Coomber v Birkenhead Borough Council* [1980] 2 NZLR 681 at 684.
[169] Expert Valuation Report by Ross Copland dated 16 November 2015, p22-24 (**TFM 16**). Values for lots 33, 59, 60, 88 and 89 (over which the claim was abandoned) have to be excluded.
[170] Supplementary Expert Economist's Report by Gregory Houston dated 4 December 2015 at [3.2] (**CFM 12**).
[171] Supplementary Expert Economist's Report by Gregory Houston 4 December 2015, p20 (**CFM 12**).
[172] Supplementary Expert Economist's Report by Gregory Houston, p18 (**CFM 12**). This is without any adjustment of the interest period in respect of act 34.

101. Another relevant perspective is to consider the size of the interest award both outright and relative to the economic loss and to interest calculated at the risk free rate. The Practice Note rate award of $1,183,121, calculated on economic loss of 65% of freehold (making adjustment for act 34), is a substantial sum and is almost three times the economic loss award of $416,325 on which it is based. By contrast, interest at the risk free rate would be six or seven times larger than the economic loss award. The difference between awarding interest at the risk free rate and awarding interest at the Practice Note rates is substantial. Again, assuming an economic loss award of $640,500, interest at the Practice Note rates would be $1,836,840[173] whereas at the risk free rate would be $4,489,931,[174] a difference of almost $2.7 million. The difference between the awards would be lower on a smaller award of economic loss but would remain very significant.

102. Finally, the award may be compared with what is allowed under statutory entitlements to pre-judgment interest, such as s 51A of the FCAA. Provisions of this kind exist around Australia,[175] and they provide some guide as to the legislatures' perspectives on what is fair in interest awards. The entitlement under s 51A is for simple interest only.[176] That stipulation does not fetter the development of the general law, but it provides some guidance as to interest awards in novel cases.

The risk free rate is not the accepted measure in cases of defaulting land purchasers

103. The native title party frames its entitlement to interest as compensation at the risk free rate by reference to the equitable principle identified in *Marine Board of Launceston v Minister for the Navy* (1945) 70 CLR 518 (***Marine Board***). In summary, the submission must fail for two reasons. First, it confounds judicial discretion to award compound interest under the equitable principle with an obligation to do so where there is some support in the authorities for the existence of a discretion but none for the existence of an obligation. Secondly, the submission seeks to substantially re-write the law governing pre-judgment interest awards in Australia in circumstances where interest at the Practice Note rates fully compensates them for their loss.

104. The equitable principle considered in *Marine Board* emerged out of the practice in Courts of Chancery in respect of contracts for the sale and purchase of land of requiring the

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[173] Supplementary Expert Economist's Report by Gregory Houston, p18 (**CFM 12**).
[174] Supplementary Expert Economist's Report by Gregory Houston, p22 (**CFM 12**).
[175] See *Supreme Court Act* (NT), s84; *Judiciary Act 1901* (Cth), s77MA(2)(a); *Federal Circuit Court Act 1999* (Cth), s76(4)(a); *Civil Procedure Act 2005* (NSW), s100(3)(a); *Supreme Court Act 1986* (Vic), s60(2)(a); *Supreme Court Act 1935* (SA), s30C(4)(a); *Supreme Court Act 1935* (WA), s32(2)(a).
[176] FCAA, s 51A(2)(a).

purchaser to pay interest on the purchase price from the date of possession.[177] The practice developed into a general but displaceable rule of equity[178] subsequently extended to cases of compulsory purchase or acquisition of land under statute.[179] In *Marine Board*, the High Court accepted the existence of this principle and its extension to compulsory acquisition cases. At issue was whether it extended to cases involving the expropriation of ships.[180]

105. The rationale for the principle is that "[t]he right to receive interest takes the place of the right to retain possession".[181] At its most basic, the rule reflects elementary notions of fairness. The true measure of compensation for the taking of a thing must account, not merely for the value of the thing taken measured at the time of its taking, but also for the effect of time passing before payment in a sum reflecting that value.

106. The existence of the principle is not in issue. Nor is it contended by any party that the principle should not operate in the case of an extinguishment of native title. The principle properly applies by analogy with compulsory acquisition cases, as both involve the non-consensual extinguishment of rights in relation to land held by members of the public by a government entity acting in the public interest. In *Inglewood Pulp*, the principle was expressed as a rule of statutory construction. Absent express language or necessary implication, a law for the expropriation of an interest in land should not be construed as depriving a party of their interest without affording terms of compensation which are objectively fair and just.[182]

107. However, the native title party's argument breaks down at the point of applying the equitable principle to their claim to interest in this case. No Australian authority has applied the equitable principle so as to award compound interest. With a single exception, every authority considered in the courts below has proceeded on the foundation that the application of the equitable principle yields an award of simple interest. Where freehold land has been acquired, simple interest has been awarded in the application of the equitable principle.[183] To the extent that the principle applies here by analogy with cases of that kind, there is considerable appeal in its analogous application and like result.

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[177] *Swift & Co v Board of Trade* (1945) 70 CLR 518 (***Swift & Co***) at 532 per Viscount Cave LC; *F H Faulding* [1969] WAR 63 at 64-65 per Hale J.
[178] *Birch v Joy* (1852) 3 HL Cas 565.
[179] *Fletcher v Lancashire and Yorkshire Railway Co* [1902] 1 Ch 901 at 908 per Buckley J.
[180] See also *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293.
[181] *Marine Board* at 532 per Dixon J citing *Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492 (***Inglewood Pulp***) at 499.
[182] *Inglewood Pulp* at 499.
[183] *Fletcher v Lancashire and Yorkshire Railway Co* [1902] 1 Ch 901;

108. The single exception is *Ben v Suva City Council* [2008] FJSC 17, a decision of the Supreme Court of Fiji, dealing with the compulsory acquisition of land under statute. The only issue for determination on the appeal was whether or not the trial judge had jurisdiction to make an award of compound interest (at [19]) in circumstances where the claimant was entitled to just compensation unconstrained or guided by statute (at [23]). The Court found that the trial judge had *jurisdiction* to make such an award. That finding says nothing about whether, in reason or legal principle, such an award should be made. The Court expressly disavowed (at [19], [24]) answering that question on the facts of the case or more broadly. The only principle which emerges from the decision is that compound interest is not precluded under the equitable principle.

109. It is unclear whether that principle reflects the law in Australia.[184] For the reasons which follow, this is not the case to decide whether it does.

110. First, longstanding authority establishes that, even where the entitlement is to compensation on just terms, the equitable principle does not mandate interest at compound rates. To decide otherwise, would require overturning that authority.

111. Secondly, the universal application of the equitable principle to cases involving the extinguishment of native title to award compound interest at the risk free rate[185] would fragment and disjoin the operation of the equitable principle in native title cases from the developed rules and principles regarding the award of compound interest. The state of authority in Australia is that compound interest is available under the general law where a party can prove their loss in those terms[186] or in discrete categories of claims where the nature of the claim requires such an award in conformity with other equitable principles. In *Commonwealth v SCI Operations Pty Ltd* (1989) 171 CLR 125 (at [74]-[75]), McHugh and Gummow JJ described those discrete categories of cases as confined to money obtained or withheld by fraud or defaulting fiduciaries.[187] The rationale for compound interest in such cases reflects equitable principle because the function of the interest award is to disgorge the unlawful profits of a trustee or fiduciary in deference to, and conformity with, the principle of equity that no fiduciary should profit from their own wrongdoing.

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[184] Compare *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316 per McHugh and Gummow JJ and *Griffiths FC* at [199] (**CAB 331**).
[185] See paragraphs 82-84 above.
[186] *Hungerfords* at 149 per Mason CJ and Wilson and 152 per Brennan and Deane JJ.
[187] Cf *Hungerfords* at 148 per Mason CJ and Wilson J (Brennan and Deane JJ agreeing at 152).

There is long-standing recognition that this is the function of the award in such cases.[188] The law in Australia confining the category of cases attracting compound interest is in conformity with that in the United Kingdom.[189]

112. It was faintly argued below by the native title party that its relationship with the Territory in respect of the extinguishment of native title could be treated as being (quasi) fiduciary in nature. That analogy was rejected in the Full Court,[190] and does not appear to be pressed on appeal to this Court. It cannot be maintained in light of the scheme for the validation and consequent extinguishment/impairment of native title under the NTA.[191]

113. To the extent that the native title party argues for an extension of the recognised categories of cases in which equity awards compound interest, no principled basis has been proffered for the acute development of the law in this way, and the matters referred to in paragraphs 85-97 above are against it.

114. Finally, it would be contrary to principle to award compound interest where the evidential findings supported the appropriateness and sufficiency of interest as awarded.[192]

Interest as compensation not interest on compensation

115. The Commonwealth contends (D2, ground 3) that *Marine Board* is authority for the proposition that interest applied in application of the equitable principle is imposed *on*, rather than *as*, compensation. The corollary is that interest is not awarded under s 51(1) of the NTA but by reason of the inherent jurisdiction of the court to perfect the total award.

116. In *Marine Board*, Williams J recognised (at 527) that there were authoritative statements of principle reflecting the application of the equitable principle both *as* and *on* compensation.[193] In *Inglewood Pulp*, the equitable principle was described (at 499) as a principle of construction which informed the content of the statutory entitlement, on the constructional premise that unless the language of the statute displaced the intention to allow interest, it should be construed as affording an entitlement to interest within its terms because the right to receive interest takes the place of the right to retain possession.

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[188] *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 at 388 per Denning MR; *Talacko v Talacko* [2009] VSC 579 at [15]-[16] per Kyrou J.

[189] *Sempra Metals v Commissioners of Land Revenue* [2008] 1 AC 561; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 701C-702D per Brown-Wilkinson LJ, 692D per Goff LJ, 718F per Slynn LJ, 726B-E per Woolf LJ, 739H per Lloyd.

[190] *Griffiths FC* at [177]-[178] (**CAB 325-326**). To the extent it was pressed by the native title party at trial, was not referred to by the trial judge.

[191] *Griffiths FC* at [178] (**CAB 325-326**).

[192] *Talacko v Talacko* [2009] VSC 579; *Coomber v Birkenhead Borough Council* [1980] 2 NZLR 681.

[193] Citing *Inglewood Pulp* at 499 per Warrington of Clyffe LJ for the award of interest as compensation in application of the equitable principle.

117. In *Marine Board*, three members of the Court (Latham CJ at 522, 527; Starke J at 528 and McTiernan J at 534) found that, on proper construction of the regulations in question, the statutory entitlement to compensation did not allow for interest. That constructional question was informed by earlier authority in *Swift & Co* and express provision being made for an award of interest as compensation in certain circumstances and, by implication, not in others. Like *Marine Board*, *Swift & Co* was dealing with wartime acquisitions legislation. In both cases, the statute prescribed a determination of compensation *for the acquired thing*. This was regarded as an entitlement to "the value of the thing taken, acquired or requisitioned" [194] and no more.[195] Having decided the unavailability of interest *as* compensation on the antecedent constructional premise, none of those three justices expressed a view that, in the application of the equitable principle, interest is always awarded *on* compensation.

118. Two members of the Court (Rich J at 527, Williams J at 538) concluded that interest *could* be awarded *as* compensation.

119. The judgment of Dixon J is less clear. His Honour posed the question for determination (at 530-531) as whether the authority of the Court was limited to awarding the capital sum as compensation or extended to the incidental award of interest. His Honour appears to have assumed the constructional premise accepted by Latham CJ, Starke and McTiernan JJ but, in any event, did not address the alternative situation (which obtains here – see below) where the entitlement itself encompasses an award of interest.

120. It follows that none of the judgments in *Marine Board* said anything against the conclusions of the trial judge and the Full Court below about the scope of s 51(1) of the NTA, and the judgments of Rich and Williams JJ support them. There is no authority against application of the equitable principle as a constructional aide to the scope of compensation awarded under that provision and longstanding support for approaching the issue in that way.[196]

121. It remains then to consider whether the terms of s 51(1) are sufficiently broad to encompass an award of interest. There are several critical features of s 51(1) of the NTA distinguishing it from the provisions considered in *Marine Board* and *Swift & Co*. The entitlement is to compensation for the loss etc or other effects of the compensable acts on their native title. The provision does not afford compensation directly for the native title ie

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[194] *Marine Board* at 528 per Starke J.
[195] *Swift & Co* at 533 per Viscount Cave LC.
[196] *Inglewood Pulp* at 499 per Warrington of Clyffe LJ.

its bare value. The NTA was enacted after much of the extinguishment had occurred. It operates upon past acts which, having occurred without payment for the value of extinguished rights, necessarily involve an effect of non-payment across the interest period. Further, the entitlement under s 51(1) is to compensation "on just terms". That language itself calls in aide appropriate rules and principles of equity including the equitable principle relied on by the native title party. Section 51(1) of the NTA contemplates an award of interest as part of compensation for the extinguishment of native title rights and interests.

SOLATIUM ISSUE

10 **Introduction**

Common ground

122. It is common ground that the compensation award should contain a component reflecting intangible disadvantage or solatium. The native title party pleaded this component of the claim in terms of: (a) the diminution or disruption in traditional attachment to country; and (b) the loss of rights to live on, and gain spiritual and material sustenance from, the land.[197] What falls to be awarded is a solatium for that loss to the extent that it fits within the compensatory scheme under the NTA and is not already compensated by the component of economic loss. The trial judge held that it was appropriate to adopt the term "solatium" to describe this compensation component as it
20 represents the loss or diminution of connection or traditional attachment to the land.[198] The term is apt in the circumstances[199] because it describes an award of an amount to cover inconvenience, nuisance, annoyance and, in a proper case, distress caused by compulsory taking, being those imponderable factors which are not otherwise specifically recoverable.[200]

123. The trial judge made, and the Full Court upheld, the following findings of fact relevant to this aspect of the appeals:

(a) Within the lands over which the native title party holds or, but for the extinguishment of title under the NTA, would have held native title rights and interests,

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[197] *Griffiths* at [295] (**CAB 173**).
[198] *Griffiths* at [300] (**CAB 174**).
[199] Cf *Griffiths FC* at [409] (**CAB 386**).
[200] *March v City of Frankston (No 1)* [1969] VR 350 at 356, 358 per Barber J; *James v Swan Hill Sewerage Authority* [1978] VR 519.

there are areas of greater and lesser cultural and spiritual importance to the native title party.[201]

(b) Because of the relative greater importance of some areas over others, acts which might be authorised by or acceptable to the native title party at one place may not be authorised or acceptable at others.[202]

(c) Some developments within, or in proximity to, the Town of Timber Creek were acceptable under Indigenous law and did not create a sense of grievance among at least some members of the native title party.[203]

(d) Notwithstanding the effects of the compensable acts (and non-compensable ones which have extinguished or impaired native title), members of the native title party have retained their spiritual connection to and exercise their traditional usufructuary rights upon land within the Town of Timber Creek.[204]

(e) Since the mid-19th Century onwards there has been a progressive dispossession of the native title party from their traditional lands within and outside the Town of Timber Creek.[205]

Trial judge's award - $1,300,000

124. The trial judge awarded a solatium of $1,300,000. The trial judge intuited this figure.[206] In arriving at it, the trial judge considered some "general observations" relating to the native title party's connection to country and the approach to the assessment of compensation for intangible disadvantage in the context of "three particular considerations of significance".[207] Those three considerations were:

(a) Act 46 involving the construction of water tanks on the path of the Dingo dreaming.[208]

(b) Intangible collateral disturbance to the enjoyment of native title outside the geographical areas of the particular allotments to which certain of the compensable acts related.[209]

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[201] *Griffiths FC* at [292], [308], [346] (**CAB 353, 358, 366**). See also the native title right to "have access to, maintain and protect *sites of significance* on the application area".
[202] *Griffiths FC* at [292], [308] (**CAB 353, 358**).
[203] *Griffiths FC* at [267] (**CAB 346**) referring to *Griffiths* at [365] (**CAB 188**).
[204] *Griffiths FC* at [266] (**CAB 346**).
[205] *Griffiths* at [322], [327] (**CAB 179-180**).
[206] *Griffiths* at [302], [383] (**CAB 175, 195**).
[207] *Griffiths* at [378] (**CAB 194**). Cf *Griffiths FC* at [290] (**CAB 353**).
[208] *Griffiths* at [378] (**CAB 194**).
[209] *Griffiths* at [379]-[380] (**CAB 194**).

(c) The incremental eroding effect of each compensable act as a contributor to the native title party's broader loss of cultural and spiritual connection to country resulting in a sense of failed responsibility felt by members of the native title party.[210]

125. The trial judge's award gave effect to the experience of the native title party of those particular considerations since the date of the compensable acts and for an extensive time into the future.[211]

Full Court's award – upheld $1,300,000

126. The Full Court upheld that trial judge's award of $1,300,000 finding that it was within the permissible range on the evidence, taking into account the nature of the rights and interests and the nature of the loss.[212] The Full Court found no error in the trial judge's approach to assessment of this component.

The Full Court erred in upholding the trial judge's award

127. It is accepted that the assessment of an appropriate solatium award involves discretionary judgment. The principles in *House v The King* (1936) 55 CLR 499 at 505 apply (D1, grounds 4.1-4.4). In relation to the manifestly excessive appeal ground (D1, ground 4.4), the Territory specifically adopts the Commonwealth's complaint concerning the test applied by the Full Court (D2, grounds 7(a), (b)). In addition, the Full Court's conclusion that the award was within a permissible range identified by the Full Court as "less than $1 million, or more than $1.3 million[213] is difficult to reconcile with authorities in which the Court has found error and intervened to make a different award.[214] The maiden and precedential character of the award under consideration demands careful scrutiny of its sufficiency to ensure that it is both fair and moderate.

Intangible collateral disturbance

128. The award for solatium made by the trial judge was premised on a finding that some of the compensable acts had an intangible collateral disturbance on other areas of native title held by the native title party.[215] As a finding of fact critical to the award (it being one of the three "particular considerations of significance" identified by the trial judge), it is expressed with an inappropriate degree of imprecision. Nowhere in the trial judge's

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[210] *Griffiths* at [381] (**CAB 194-195**).
[211] *Griffiths* at [382] (**CAB 195**).
[212] *Griffiths FC* at [412] (**CAB 387**).
[213] *Griffiths FC* at [411] (**CAB 386**).
[214] See, for example, *Sharman v Evans* (1976) 138 CLR 563 where an award of approximately $300,500 was overturned on the ground of manifest excess and an award of $270,500 was made in its stead.
[215] *Griffiths* at [378]-[379] (**CAB 194**).

reasons for judgment (or in those of the Full Court) are the compensable acts about which this finding was made identified or the nature of the collateral disturbance(s) examined. The only evidence referred to by either court below in support of this general finding governing "certain of the acts" was the evidence concerning a particular ritual ground in proximity to the Town of Timber Creek which the trial judge found was affected by a nearby (but unidentified) compensable act.

129. The ritual ground was the subject of gender restricted (male only) evidence. Some of that evidence was taken at the ritual ground and uncontroversially established that:[216]

(a) the ritual ground was not located on an allotment subject to a compensable act, but was on land at a location within the Town;[217]

(b) the ritual ground has not been used since 1975, prior to any of the compensable acts; and

(c) despite its disuse, the ritual ground remains an important place of cultural significance for members of the native title party.

130. The reason for disuse of the ritual ground was explained in the gender restricted evidence.[218] The effect of that reason was summarised by Barker J in the Full Court (in open court) as follows: "if you're a tourist on the top of the hill having a look out, you could overlook that place".[219] None of the compensable acts established, or gave tourists (or anyone) access to, the lookout on the top of the hill. The lookout remains in that location and so remains an obstacle to use by the native title party of the ritual ground.

131. The trial judge found that "a particular [compensable] act" had an effect upon the "capacity to conduct ceremonial and spiritual activities"[220] at the ritual ground. The trial judge did not identify in his reasons either the nature of the effect or which particular compensable act produced it.

132. The most obvious difficulty is that the evidence about the ritual ground did not support the finding and there is no other evidence which did. None of the compensable acts were identified (even obliquely) in the restricted evidence as a reason for disuse of the

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[216] *Griffiths FC* at [300] (**CAB 355-356**).
[217] The suggestion that the ritual ground was "adjacent" to an allotment the subject of a compensable act is incorrect: see Expert Report by Kingsley Palmer dated 9 February 2016, [4] (**CFM 22**) referring to the place name which can be located on Annexure SW-4 to the Affidavit of Simon Watkinson affirmed on 27 January 2016 (**TFM 2D**).
[218] Transcript (gender restricted), 9 February 2016, P17-18 (**CFM 23**). There was discussion of this issue during submissions made in open court before the Full Court: Transcript, 20 February 2017, P59-60 (**TFM 25**).
[219] Transcript, 20 February 2017, P60 (lines 29-30) (**TFM 25**).
[220] *Griffiths* at [379] (**CAB 194**).

ritual ground and, consequently, there was no factual basis to support the finding that "a particular act" warranted compensation for an intangible collateral disturbance by reason that it affected the native title party's use or capacity to use the ritual ground. Even on the assumption that there was such evidence, ie that a particular act was cited as a reason for disuse of the ritual ground, that act cannot found an entitlement to compensation under ss 23J and 51(1) of the NTA as a matter of causation.

133. The Full Court addressed the temporal causation problem arising from disuse of the ritual ground prior to any of the compensable acts and concluded that the ongoing importance of the ritual ground to the native title party was sufficient, as a matter of causation, to find that a compensable act affecting the ritual ground's capacity for use was an effect compensable under ss 23J and 51(1).[221] This is plainly wrong.

134. First, the Full Court's approach to causation is not a practical or common sense approach to causation as described in *March v Stramere (E & MH) Pty Ltd* (1991) 171 CLR 506, which the courts below purported to apply.[222] It comprises a species of causation reasoning of the form: A caused B even though B existed and would have continued to exist, whether or not A occurred. Generally, the law does not recognise causation in that form, a result which accords with commonly accepted or common sense notions of causation. Exceptions should only exist where there is a principled basis for departing from common sense notions.[223]

135. Secondly, the compensation provisions of the NTA do not support a departure from common sense causation and the approach taken below in respect of the ritual ground evidence. The whole past and intermediate period act validation and compensation scheme prescribed by the NTA is premised on interference with native title being invalid by reason of the RDA which commenced on 31 October 1975. The effects of extinguishment or interference with native title prior to that date, effective at common law to displace native title, are not a foundation for compensation under the NTA. That constraint is reflected in the language of s 51(1) which affords compensation for the loss etc or other effect *of the act*. Section 23J(1) is even clearer. If the compensable act does not have any greater extinguishing effect than what had already been lost then there is no entitlement to compensation.

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[221] *Griffiths FC* at [300] (**CAB 355-356**).
[222] *Griffiths* at [321] (**CAB 179**); *Griffiths FC* at [302]-[303] (**CAB 356-357**).
[223] See J Edelman, "Understanding Causation and Attribution of Responsibility", Paper presented at the Commercial Conference of the Supreme Court of Victoria, Banco Court, 7 September 2015.

136. The trial judge's justification for his approach to causation illuminates the error.[224] His Honour considered the possibility of a subsequent compensation claim in respect of adjacent land. *Either* the first claim must be capable of compensating for interference with nearby native title the subject of the later claim *or* the later claim must be capable of compensating despite the earlier interference. But to allow both is inappropriate and leads to overcompensation. The Full Court's approach was effectively to choose both. It chose the second option to avoid the temporal causation problem and bring the ritual ground evidence within the claim. But it also chose the first option when dealing with the incremental eroding effect of the compensable acts (see the discussion below). Only the first option is sustained by the terms of ss 23J(1) and 51(1) of the NTA.

137. An alternative lens for this analysis is, assuming evidence of a particular compensable act affecting the use of the ritual ground, that the compensable act had only a notional or theoretical effect, by virtue of the ongoing effect of the uncompensable development, so compensation in respect of the compensable act on capacity to use the ritual ground would be nominal only. It would not be a "particular consideration" justifying an award of $1,300,000.

138. Finally, and assuming that the evidentiary and causation difficulties with respect to the ritual ground evidence could be overcome, there would remain the problem that the ritual ground evidence was the only evidence adduced of its kind. There was no evidence adduced which suggested that "certain [other] of the compensable acts" affected the use and enjoyment of nearby native title. The particular nature of the ritual ground evidence excluded the drawing of a similar inference in respect of other compensable acts without any evidentiary basis. The particular effect of a particular act on a particular place of significance cannot, by inference only, be universalised or extended to other acts and other places of significance.

The incremental eroding effect of the compensable acts

139. The award for solatium made by the trial judge was premised on a conclusion that each of the compensable acts should be approached as part of an incremental erosion of the native title party's connection to country contributing to the native title party's sense of failed responsibility to care for and look after the land.[225] That conclusion was not available on the evidence, was arrived at in consequence of trial judge's failure to adhere to

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[224] *Griffiths* at [380] (**CAB 194**).
[225] *Griffiths* at [381] (**CAB 194-195**).

the terms of the statutory compensation entitlement, and led to impermissible inflation of the solatium award.

The Full Court took into account non-compensable development

140. When examining the evidence and considering the general compensatory principles to be applied, the trial judge directed himself to exclude any allowance for the sense of grievance and loss felt by the native title party in consequence of non-compensable acts.[226] His Honour was correct to do so since compensation for intangible disadvantage unconnected with the compensable acts would fall outside the terms of s 51(1) of the NTA.

141. However the trial judge did not follow this direction. The inclusion of non-compensable effects on the ritual ground has been addressed above. The trial judge's reliance on incremental eroding effects of the compensable acts committed the same error.

142. What the trial judge did when he took this factor into account was to generalise from evidence unrelated to the compensable acts – concerning the native title party's attachment to country in and around Timber Creek generally and the sense of grievance and failed responsibility felt by the native title party in respect of specific non-compensable acts of disturbance – that each of the compensable acts must have contributed to or caused a portion of the aggregate feelings of intangible loss. In doing so, his Honour failed to approach the compensation exercise by reference to the loss etc or other effects of the compensable acts, focusing instead on a generalised (and uncompensable) sense of loss.

143. The Full Court defended that failing in the following terms:

> The criticism that the primary judge did not untangle these threads in a way which focused on the particular lots in question and on the effects of the compensable acts on these lots is surprising in view of the complexity of the task [and the trial judge's awareness of the native title party's spiritual understanding of country as an indissoluble whole].[227]
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> ...
>
> [I]t was not possible when trying to establish the effect of the compensable acts to deconstruct the Aboriginal belief system so as to fit distinct title boundaries of each separate lot.[228]
>
> ...
>
> [The trial judge] had to determine the nature and extent of the impact of the compensable acts from the evidence about the Claim Group connection to country generally and the evidence concerning the general effect on the Claim Group of interference with country. The evidence of the nature of the Claim Group's connection with land did not allow for the type of exercise for which the Northern Territory argued whereby reactions were specific to particular lots.[229]

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[226] *Griffiths* at [301], [323], [376] (**CAB 175, 179, 193**).
[227] *Griffiths FC* at [313] (**CAB 359**).
[228] *Griffiths FC* at [317] (**CAB 360**).
[229] *Griffiths FC* at [319] (**CAB 360**).

144. These defences of the trial judge's approach miss the substance of the challenge to his Honour's reasoning. Uncontroversially, the native title party's subjective understanding of the land, and so the native title party's perception of interference with it, does not neatly coincide with allotment boundaries. This was an uncontested proposition established on the anthropological evidence. However, that proposition is very different to the notion that the trial judge was unable to untangle the threads in a way which focused on the particular *compensable acts* in question. The effect of an act need not be confined to an allotment. But s 51(1) required the trial judge to untangle the threads and focus only on the effects of the compensable acts.

145. The only compensable act about which the trial judge heard evidence of the sense of grievance and failed responsibility caused by the act was act 46 which concerned the construction of water tanks on Lot 72. The location was not a sacred site as that term is ordinarily used.[230] None of the compensable acts occurred on sacred sites.[231] However, the construction of the tanks at that place disrupted the path of the Dingo Dreaming. Alan Griffiths gave evidence that he would not have authorised the construction of the tanks at that place and that he felt a sense of "hurt" and failed responsibility for not having prevented the damage to country.[232] JJ (now deceased) expressed a similar sentiment.[233]

146. Evidence of a similar nature was adduced in relation to various non-compensable acts in and around Timber Creek and the feelings of hurt and guilt associated with them, including the construction of a causeway over the creek behind Lot 20,[234] the construction of a bridge over the Victoria River,[235] a site where gravel was extracted,[236] and a diamond mine.[237] Further incidents were referred to in the anthropological evidence.[238] The existence of this evidence demonstrates that such evidence could have been adduced in relation to any or all of the compensable acts if it existed.

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[230] See, for example, *Northern Territory Aboriginal Sacred Sites Act* (NT), s 3; ALRA, s 3(1). See also the native title right to "have access to, maintain and protect *sites of significance* on the application area".
[231] Affidavit of Simon Watkinson affirmed on 27 January 2016 (**TFM 2**). Transcript, 8 February 2016, P72 (line 20), P73 (line 10) (Alan Griffiths) (**TFM 19**)
[232] *Griffiths* at [352] (**CAB 187**).
[233] *Griffiths* at [353] (**CAB 187**).
[234] *Griffiths* at [339]-[340], [350] (**CAB 183-184, 187**).
[235] *Griffiths* at [341]-[342] (**CAB 184**).
[236] *Griffiths* at [343] (**CAB 184-185**).
[237] *Griffiths* at [344] (**CAB 185**).
[238] Anthropologists' report by K Palmer and W Asche dated November 2012 at [142]-[163] (**CFM 9**). Caution is necessary when examining the opinions expressed in that report concerning acts of interference for the reasons given at *Griffiths* at [349] (**CAB 186-187**).

147. No evidence of a similar nature was adduced in respect of the remaining 52 compensable acts. Its absence cannot, therefore, be explained in the way the Full Court did.

148. Indeed, the evidence which was adduced in relation to the remaining compensable acts was to the opposite effect. There was evidence concerning residential housing development of Wilson Street to the effect that this was acceptable under traditional law and did not create a sense of grievance.[239] Most of the compensable acts occurred on Wilson Street allotments or on similar allotments on Fitzer Road and Lawler Court which adjoin Wilson Street.[240] Reference was made to the accommodation advantages the developments brought to the predominantly Indigenous community and to the school being needed by the community (act 14 comprised the school).[241] There was also evidence that the construction of the Ngaringman Resource Centre on Lot 46 was culturally approved[242] (act 33 was the grant of title over Lot 46 which allowed that construction to occur).

149. There was also general evidence about the construction of roads, houses and other developments being acceptable to the native title party if built in some places but not others,[243] and evidence of the native title party recently approving activities of the very same nature as the compensable acts.[244] In 2009, the native title party agreed to the development of 15 residential lots on Fitzer Road and Lawler Court. This evidence was mentioned by the trial judge[245] but its obvious significance for the drawing of inferences about the effects of the compensable acts was not properly taken into account.

150. What must inescapably follow from this evidence is that some (indeed, most) of the compensable acts did not contribute to any sense of intangible loss. Members of the native title party recognised and accepted the advantages of accommodation and services in their town made possible by a number of the compensable acts. The trial judge's finding that all the compensable acts contributed to an aggregate sense of loss was not open.

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[239] *Griffiths* at [365] (**CAB 190**) referring to Transcript, 8 February 2016, P24-25 (JJ (now deceased)) (**CFM 14**) and P91 (Josie Jones) (**CFM 16**).
[240] Map marked AOS 42 handed up as an aide memoir (**CFM 13**).
[241] Transcript, 8 February 2016, P25 (JJ (now deceased)) (**CFM 14**).
[242] Transcript, 9 February 2016, P108 (JJ (now deceased)) (**CFM 17**).
[243] Transcript, 8 February 2016, P67-70 (Alan Griffiths) (**TFM 19**), P89-91 (Josie Jones) (**CFM 16**); Transcript, 9 February 2016, P107-108 (JJ (now deceased) (**CFM 17**); Witness Statement of Alan Griffiths dated 3 February 2005 at [18], [32] (**TFM 5**); Witness Statement of Josie Jones dated 2 March 2005 at [20] (**CFM 8**); Notice of Evidence of JJ (now deceased) dated 2 March 2005 at [18] (**TFM 6**); Notice of Evidence of PJ (now deceased) dated 3 March 2005 at [16] (**TFM 7**); Notice of Evidence of WG (deceased) dated 7 March 2005 at [12], [13] (**TFM 10**); Witness Statement of Violet Paliti dated 7 March 2005 at [13] (**TFM 11**).
[244] Affidavit of Rebecca Hughes affirmed on 23 July 2015 at [9] and exhibit RH-2 (**CFM 4**).
[245] *Griffiths* at [340] (**CAB 183-184**).

151. What led to the error was a failure to commence from consideration of the loss etc or other effects *of the compensable acts*. This is apparent in the Full Court's response to this issue.[246] The Full Court's answer was that "evidence as a whole" supported the trial judge's finding and that the specific lot-by-lot (non-grievance) evidence was too vague and inconclusive to displace the "general sense of loss". What those comments reveal is that the erroneous starting point was the effects of non-compensable acts – the general evidence about country. The native title party's response to those non-compensable acts was then transposed over the compensable acts in the absence of specific evidence about them, and in many cases despite it. This resulted in a reversal of onus. The burden was put on the government parties to show that the native title party did not experience a keenly felt sense of loss in respect of individual acts rather than requiring the native title party to prove their loss. Except in respect of act 46, the native title party did not prove any particular intangible loss.

The Full Court failed to take proper account of the extensive existing native title rights

152. In addition to incorporating aspects of non-compensable loss in the award, viewing each of the compensable acts as part of an incremental erosion of the native title party's connection to country distorted the assessment of appropriate compensation because it occluded the extensive rights and interests still available to and accessed by the native title party and elevated the significance of the relatively minor interference under consideration.

153. The native title party retains exclusive native title rights over most of the town of Timber Creek. An area of 20.53 km^2 (2,053 hectares) is subject to those rights. In contrast, the compensable acts occupy an area of 1.27 km^2 (127 hectares).[247] In addition, the native title party holds interests in land around the Town of Timber Creek, whether as "traditional owners" or as other interested Aboriginals pursuant to the ALRA which include the Ngaliwurru/Nugali Aboriginal Land Trust (NT Portion 4497) and the Myatt Aboriginal Land Trust (NT Portion 3122),[248] comprising some 1,461 km^2.[249] The 31 allotments subject to the compensable acts represent less than 0.1 percent of that total land in which the native title party continues to be able to exercise their rights. Of the 198 sacred sites[250] and four extensive dreaming lines across the town of Timber Creek, only act

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[246] *Griffiths FC* at [344]-[345] (**CAB 366-367**).
[247] *Griffiths FC* at [370] (**CAB 373**).
[248] Annexure JM4 to the Affidavit of Julie Miller dated 29 January 2016 (**TFM 3A**).
[249] *Griffiths FC* at [370] (**CAB 373**).
[250] Annexure SW-3 to the affidavit of Simon Watkinson affirmed on 27 January 2016 (**TFM 2B**).

46 had any discernible impact. The native title party continues to exercise hunting and foraging rights in and around the town of Timber Creek.[251]

154. The courts below acknowledged this wider context.[252] However, they did not say how it was taken into account, and what they failed to either acknowledge or appreciate was that by treating the compensable acts as part of a greater sense of loss they marginalised and excluded what had not been lost.

155. An alternative lens for this analysis is that the barely perceptible degree of incremental erosion of connection to country caused by the compensable acts in the context of the progressive non-compensable loss of connection to country since the mid-19th Century, and the relative extent of the loss measured by reference to the size of the affected area, the absence of affected or damaged sacred sites, and the remaining country left to the native title party, does not support a substantial award. It could not be a "particular consideration" justifying an award of $1,300,000.

Fairness and moderation

156. Awards for solatium should be guided by principles of fairness and moderation.[253] This was accepted by the Full Court,[254] but not applied. The principles of fairness and moderation are both a restraint on extravagant awards and a counsel as to the manner of the assessment of the award.

157. As to the first point, the principle is summarised by May LJ in *Alexander v Home Office*:[255]

> [For intangible loss] it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards.

158. The constraint on extravagance invites careful reflection on the evidence of intangible loss arising from the particular compensable acts as adduced in this claim rather than generalised understandings of Indigenous attachment to country.

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[251] *Griffiths* at [364] (**CAB 190**).
[252] *Griffiths* at [29]-[31], [302]-[304], [319] (**CAB 110, 175, 178**); *Griffiths FC* at [355], [370]-[372] (**CAB 368-369, 373-374**).
[253] *Skelton v Collins* (1966) 115 CLR 94 at 129-132 per Windeyer J; *Sharman v Evans* (1977) 138 CLR 563 at 584-585 per Gibbs and Stephen JJ recently applied in relation to property valuation in *Spencer v Commonwealth* (2015) 240 FCR 282 at [661] per Mortimer J.
[254] *Griffiths FC* at [376] (**CAB 375**).
[255] [1988] 2 All ER 118 at 122.

159. As this is the first compensation assessment of its kind, a comparison cannot be drawn with similar or analogous assessments. Constraining extravagance therefore requires that the circumstances of this claim be considered and contrasted with those of other like hypothetical claims. A substantial award might be expected if the acts wholly deprived the native title holders of all of their traditional lands and country or affected much larger areas of their country; where before the acts, the claimants had undisturbed and full (unextinguished) access and enjoyment of their traditional lands; where the acts damaged or interfered with particular sacred sites; or where the acts were performed in a malicious or deliberately insensitive manner for commercial gain, rather than as part of general town development to the benefit of the town as a community. On the spectrum of awards which might be anticipated under s 51(1) of the NTA, the circumstances and evidence of this particular claim fall towards the lower end. Fairness and moderation require that the sum reflect this. $1.3 million does not do so.

160. As to the second point, the function of a solatium is to provide solace, not to make whole.[256] It was an error for the Full Court to reject the relevance of awards in the compulsory acquisition context. The error lay in a mistaken view that the function of the award was to somehow provide recompense for the loss of a "unique and powerful bond" not existing in the freehold context.[257] Recognising that money is not a substitute for that loss, and that the purpose of the award is not to afford perfect compensation, leads to the relevance of the comparison. A solatium which is broadly consistent with the compensation payable for intangible disadvantage in respect of other forms of title is a fair award which signals a proper recognition of loss without attempting to fully compensate for it. It is meaningful recognition because it places the compensation of native title on equal terms with freehold title.

161. Further, a solatium needs to be responsive and, if necessary, adjusted to reflect other components of the total compensation award. To the extent that other components of the award already afford the native title party a substantial measure of freedom from economic uncertainty and enjoyment of life, the solatium should be reduced.[258] This leads to the necessity to check the solatium award against the total compensation award, and not

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[256] *Sharman v Evans* (1977) 138 CLR 563 at 585 per Gibbs and Stephen JJ (Jacobs J agreeing with the statement of principles); *Skelton v Collins* (1966) 115 CLR 94.
[257] *Griffiths FC* at [377] (**CAB 375-376**).
[258] *Sharman v Evans* (1977) 138 CLR 563 at 585 per Gibbs and Stephen JJ.

merely in isolation.[259] It was the total award, not merely the solatium, which required examination against community standards. The Courts below failed to do so. The total award of $2,899,446 was, in all the circumstances, excessive, because of the magnitude of the solatium award, and it therefore required downward adjustment.

162. A supplementary award of 10% of the amount awarded for economic loss (including interest) provides moderate and fair solatium in the circumstances of this claim.

Part VII: Orders sought

163. The orders of the Court should be:

(1) Appeal D1 of 2018 allowed.

(2) Appeal D2 of 2018 allowed in part.

(3) Appeal D3 of 2018 dismissed.

(4) Set aside the orders of the Full Court in relation to the award for economic loss and in their place substitute an award assessed in terms of the valuation methodology described in D1, ground 2.

(5) Set aside the orders of the trial judge and the Full Court in relation to the award for non-economic loss and in their place substitute an award assessed at 10% of the award for economic loss.

(6) Set aside the orders of the trial judge as varied by the orders of the Full Court in relation to the award for interest and in its place substitute an award calculated in the manner prescribed by the trial judge (and upheld by the Full Court) but in respect of the amended award for economic loss.

Part VIII: Time for oral argument

164. It is estimated that the presentation of the Territory's oral argument will require 3.5 hours.

Dated: 6 April 2018

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[259] Cf *Griffiths FC* at [396] (**CAB 382**).