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

SUBMISSIONS OF CENTRAL DESERT NATIVE TITLE SERVICES LTD AND YAMATJI MARLPA ABORIGINAL CORPORATION (FOURTH AND FIFTH INTERVENORS)

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Part I: Certification as to form of submissions

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

Part II: Basis of intervention

2. The Full Court of the Federal Court granted Central Desert Native Title Services Ltd and Yamatji Marlpa Aboriginal Corporation (**NTRB**[1] **Intervenors**) leave to intervene in the appeals before that Court, pursuant to rule 36.32 of the ***Federal Court Rules*** *2011* (Cth).[2] Central Desert Native Title Services Ltd performs the functions of a representative Aboriginal/Torres Strait Islander body under Part 11 of the ***Native Title Act*** *1993* (Cth) in respect of the central desert region of Western Australia. Yamatji Marlpa Aboriginal Corporation is a representative Aboriginal/Torres Strait Islander body under Part 11 of the *Native Title Act* in relation to the Pilbara and Murchison regions of Western Australia. Their statutory functions under the *Native Title Act* include to facilitate and assist their constituents in relation to compensation claims under the *Native Title Act*.[3]

3. The NTRB Intervenors seek to intervene in the appeals before this Court generally in support of the appellant in D3 of 2018/ first respondent in D1 and D2 of 2008 (***Claim Group***) in its appeal and in opposition to the appeals of the Northern ***Territory*** and Commonwealth. The NTRB Intervenors make the submissions below in relation to the principles applicable to the determination of:

   (a) economic loss: Territory grounds 1-3; Commonwealth grounds 1-2; Claim Group ground 2(1);

   (b) non-economic loss: Territory ground 4; Commonwealth grounds 4, 5, 8; and

   (c) interest: Claim Group ground 2(2).

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1 Short for Native Title Representative Body, a colloquial term for a representative Aboriginal/Torres Strait Islander body.

2 *Northern Territory of Australia v Griffiths* [2017] FCAFC 106; 346 ALR 247 (***Griffiths FFC***) at [4] Core Appeal Book (**CAB**) 268.

3 See the facilitation and assistance functions in s 203BB of the ***Native Title Act*** *1993* (Cth). The term "native title applications" in s 203BB is defined in s 201A as including applications under s 61 of the *Native Title Act*. Section 61 of the *Native Title Act* includes compensation applications. The term "constituents" is defined in s 203BF(2) in relation to a representative body's dispute resolution function. That definition does not apply in s 203BB but is used here as a shorthand way of referring to the entities and persons referred to in s 203BB.

Part III: Why leave to intervene should be granted

4. The NTRB Intervenors have been included in the notices of appeal and in the proceedings so far as the Fourth and Fifth Intervenors. That is consistent with the historical practice that an intervenor in the court below has the same rights as a party including in relation to any appeal. However there is authority that an intervenor under the *Federal Court Rules* does not automatically become a party to any appeal.[4] On that basis, and to the extent necessary, the NTRB Intervenors apply for leave to intervene or to be heard as an amicus curiae.

5. These appeals are the first occasion on which this Court will consider the principles by which compensation is to be assessed under the *Native Title Act*. The precedent established by this case will likely substantially affect the entitlement of the NTRB Intervenors' constituents to compensation, and affect the manner and extent of the facilitation and assistance to be given by the NTRB Intervenors to their constituents.[5] The NTRB Intervenors' constituents include native title groups with determined and claimed native title rights and interests, including non-exclusive rights similar to those of the Claim Group, over large areas of Western Australia who have or may have entitlements to compensation arising under the *Native Title Act*. Accordingly a precondition for leave to intervene is satisfied.[6]

6. The issues in respect of which the NTRB Intervenors seek to make submissions are those which are likely to arise in future compensation claims to be facilitated by the NTRB Intervenors. The NTRB Intervenors submissions should assist the Court in its determination of the entirely novel legal issues in this case.[7]

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4 *Forestry Tasmania v Brown (No 2)* [2007] FCA 604; 159 FCR 467 (Black CJ). That decision pre-dated the *Federal Court Rules 2011* but the terms of the old and new rules as regards intervention are materially the same.

5 This is consistent with the Commonwealth's Submissions filed 6 April 2018 (**Commonwealth Submissions**) at [2].

6 ***Roadshow Films*** *Pty Ltd v iiNet Limited* [2011] HCA 54; 248 CLR 37 at [2]; *Levy v Victoria* [1997] HCA 31; 189 CLR 579 at 601-602 (Brennan CJ).

7 *Roadshow Films* at [3], [7(3), (5)]. The significance of this case is similar to the appeals in *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 (***Ward HC***) concerning the recognition of native title under the *Native Title Act*. The High Court permitted representative bodies, including the Fifth Intervenor, to intervene in that case.

Part IV: NTRB Intervenors' submissions

Core concepts

7. These submissions commence by addressing some concepts concerning native title, and concerning the statutory right to compensation for extinguishment of native title, which underpin the submissions below regarding particular grounds of appeal.

Native title

8. ***Native title, society, and laws and customs***: Native title is not a tenure created by executive grant. Native title is a generic description of the rights and interests in relation to land or waters which exist under traditional laws and customs of an indigenous society, and which are recognised by the common law.[8] The indigenous society must be one which existed at sovereignty and has had continuous existence and vitality since sovereignty. There is an inextricable link between the society and its laws and customs.[9]

9. Native title does not exist otherwise than under the traditional laws and customs of the relevant society. While it is convenient to refer to persons who 'hold' native title, such a statement can create the erroneous impression that native title is a form of property separate from the persons who from time to time comprise the society.[10] Unlike a chattel or intangible property created by executive grant, native title cannot be transferred. The inalienability of native title is not, or at least not solely, because of an inherent common law characteristic of the intangible property which is native title, but arises for the reasons above i.e. native title exists under and because of the continued acknowledgment and observance of traditional laws and customs. By definition it cannot be transferred to

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8 ***Yanner*** *v Eaton* [1999] HCA 53; 201 CLR 351 at [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), [72]-[73] (Gummow J); *Commonwealth v* ***Yarmirr*** [2001] HCA 56; 208 CLR 1 at [13]. See also *Gumana v Northern Territory of Australia* [2007] FCAFC 23; 158 FCR 34 at [68].

9 *Members of the* ***Yorta Yorta*** *Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [55] (Gleeson CJ, Gummow and Hayne JJ); *Ward HC* at [17]-[20], [331].

10 See *Ward HC* [84]. The *Native Title Act* uses the term "native title holder", which is defined in s 224. The Act provides for native title to be held on trust by a prescribed body corporate. In the context of that statutory trust native title is a form of property separate from the members of the society who enjoy it; although even then the *Native Title Act* does not always use the term native title holder in that technical sense cf s 211(2). The *Native Title Act* did not apply at the time of the compensable acts.

persons who do not acknowledge the traditional laws and customs of, and are not part of, the pre-sovereignty society.[11]

10. A pre-sovereignty society has no separate legal personality. It comprises natural persons from time to time. What makes them members of the society, and native title holders, is their common acknowledgment and observance of a common body of traditional laws and customs under which they have a connection to particular land or waters. The natural persons who comprise the society from time to time are defined by the traditional laws and customs. Often that will involve biological (or in some cases, adoptive) descent from indigenous people who occupied the relevant land pre-sovereignty. That is not always so. Members of the society may post-sovereignty become entitled to exercise rights and interests in land through rules of transmission or succession where those rules are part of the traditional laws and customs.[12]

11. ***Extinguishment of native title***: It follows that native title ceases to exist upon the death of the last member of the society, or in circumstances where the persons who comprise an indigenous community or group no longer acknowledge and observe the traditional laws and customs (and therefore no longer constitute a pre-sovereignty society). No compensation is payable for such cessation, including because there is no-one to compensate.

12. Native title may be surrendered by the members of the society to the Crown. That is not necessarily a function of the traditional laws and customs of the indigenous society but is a rule of the common law. A surrender is not a transfer of the native title. That is, the Crown does not then hold the native title rights and interests. Rather, the common law ceases to recognise the existence of the native title rights and interests with the agreement or consent of the indigenous society. When that occurs, the Crown's radical title becomes

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11 *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 (***Mabo No 2***) at 60 (Brennan J), 88 (Deane and Gaudron JJ). Again this is subject now to the statutory exception of native title being held on trust by a prescribed body corporate under the *Native Title Act*, including being transferred to another prescribed body corporate: s 56.

12 *De Rose v State of South Australia* [2003] FCAFC 286; 133 FCR 325 at [267]; *Western Australia v Sebastian* [2008] FCAFC 65; 173 FCR 1 at [104]; *Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia* [2015] FCA 9; 325 ALR 213 at [717]. Cf *Dale v Moses* [2007] FCAFC 82 at [120] where the Full Court countenanced transmission to members of a different society.

a full beneficial title. No compensation is payable for surrender of native title, but the native title holders may negotiate consideration for the surrender.[13]

13. Native title may also cease to exist by reason of a legislative or executive act which creates rights or interests which are inconsistent with the native title rights and interests. This is what is commonly referred to as 'extinguishment'. The extinguishment comes about because of a withdrawal of recognition by the common law of the existence of rights or interests which exist, and may continue to exist, under the traditional laws and customs of the indigenous society.[14] That is because the common law cannot recognise two concurrent sets of inconsistent rights over the same land or waters, and there is no common law principle of suppression of native title rights.[15] The common law does not presently confer a right to compensation for this form of extinguishment of native title, however compensation may be payable by operation of statute – the *Racial Discrimination Act 1975* (Cth) **(RDA)** or the *Native Title Act*.

14. At common law, once native title is extinguished, whether by cessation of the society, surrender or inconsistent executive or legislative act, it cannot revive. That is because the Crown's radical title has become a full beneficial title, and the common law will not recognise any post-sovereignty burden on that title which arises otherwise than under the laws of the new sovereign. [16] A statutory exception exists under ss 47, 47A and 47B of the *Native Title Act*, because the Commonwealth Parliament has afforded recognition of the rights and interests under traditional law and custom which the common law otherwise would not.

15. ***The effect of extinguishment***: An executive act which extinguishes native title as referred to in paragraph 13 above does two things. Firstly, as already noted, it withdraws recognition by the common law. That has legal consequences but, in the case of a grant

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13 *Mabo (No 2)* at 60, 70. This is reflected in the terms of the *Native Title Act*: see ss 24BB(e), 24CB(e), 24MD(2A).

14 *Ward (HC)* at [21]; *Yorta Yorta* at [110] (Gaudron and Kirby JJ); *Northern Territory of Australia v* ***Alyawarr*** [2005] FCAFC 135; 145 FCR 442 at [64].

15 ***Fejo*** *v Northern Territory* [1998] HCA 58; 195 CLR 96 at [58]. Cf the non-extinguishment principle under s 238 of the *Native Title Act*.

16 *Fejo* at [45], [56]-[58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) and [112] (Kirby J); ***Western Australia v Brown*** [2014] HCA 8; 253 CLR 507 at [39]. This is reflected in s 237A of the *Native Title Act*.

of an interest, may not of itself change the fact of occupation and use of the land or waters by the members of the indigenous society. Secondly, it may authorise (or in the case of a public work, may constitute) the conduct of activities by the Crown or a third party which is inconsistent as a matter of fact with the continued occupation or use of land by the members of the indigenous society. Those activities are taken to be part of the compensable act.[17] Hence native title holders are entitled to be compensated for the effects of things which have been done and may in future be done on the land pursuant to the compensable acts.

16. As to the first consequence, the legal recognition afforded by 'native title'[18] is founded upon the 'socially constituted fact' of the spiritual, cultural and social connection of an indigenous community / group with their traditional land by their traditional laws and customs.[19] That relationship involves both rights and responsibilities, which are not separate notions but rather form one indissoluble whole.[20] Even absent a right to control access, native title constitutes recognition of the 'rightness' of occupation and use of land by members of an indigenous society under their traditional laws and customs.[21]

17. Through successive extinguishing acts, Australia's indigenous people have been dispossessed of their traditional land parcel by parcel[22] and, where native title has been extinguished, returned to the status they were presumed to universally have had before the decision in *Mabo (No 2)* i.e. 'trespassers on their own land'.[23] Thus while native title

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17 See s 44H of the *Native Title Act*; *Western Australia v Thomas* [1996] NNTTA 30; 133 FLR 124 at 153 (Hon CJ Sumner, O'Neil and Neate).

18 Cf s 223(1)(c) of the *Native Title Act*.

19 Cf ss 223(1)(a) and (b) of the *Native Title Act*; *Yanner* [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Griffiths v Northern Territory (No 3)* [2016] FCA 900 (***Griffiths TJ)*** [294] CAB 173.

20 *Ward HC* at [14]; *Griffiths TJ* [293].

21 Gray and Gray, "The Idea of Property in Land" in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) at 15-16. This article is cited in: *Yanner* at footnotes 68, 75, 98 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) and footnote 151 (Gummow J); *Ward (HC)* at footnote 817 (Callinan J); and *Western Australia v Ward* [2000] FCA 191; 99 FCR 316 at [789]-[791] (North J). Hence the occupation and use of Crown land by native title holders is not unlawful: cf ***Wik*** *Peoples v Queensland* [1996] HCA 40; 187 CLR 1 at [457]-[466] (Gummow J); *Ward (HC)* at [182]-[184] at [220] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

22 Preamble to the *Native Title Act*; *Mabo (No 2)* at 63, 68-69 (Brennan J).

23 *Mabo (No 2)* at 68-69 (Brennan J); 184 (Toohey J).

at common law is 'inherently fragile'[24], the legal recognition afforded by the common law make native title a valuable property right the extinguishment of which should be recognised as giving rise to substantive loss.

18. As to the second consequence, physical dispossession has tangible consequences for members of the indigenous society. This can include dislocation, and lack of access to traditional foods and resources. Physical dispossession can also have intangible consequences, for example resulting from damage to or loss of access to sites of significance, and from the inability to lawfully discharge social, cultural and spiritual rights and responsibilities in respect of country. These consequences can include anxiety, distress and loss of social standing.[25]

19. ***The native title in this case***: The native title rights which were extinguished in this case[26] reflect the dual nature of native title as both utilitarian and spiritual.[27] They permit the native title holders to do all things necessary to occupy their traditional land and sustain life, including to travel over and live on the land, erect shelters, hunt, fish, forage and take water, and share or exchange traditional resources. They also permit the native title holders to exercise spiritual responsibility for and maintain their spiritual connection with the land, including to engage in cultural practices on the land and access maintain and protect sites of significance.[28]

20. The native title does not include a right to control access i.e. to exclude others from the land for any reason or for no reason.[29] However an unlawful interference with the exercise of the non-exclusive native title rights could be restrained through recourse to legal or equitable remedies.[30] This would include against members of the public who

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24 *Mabo (No 2)* at 60 (Brennan J); 89, (Deane and Gaudron JJ); ***Newcrest Mining (WA) Ltd v Commonwealth*** [1997] HCA 38; 190 CLR 513 at 612-613; *Fejo* at [105] (Kirby J).

25 E.g. *Griffiths TJ* [350]-[352] CAB 187, [356]-[358] 188-189.

26 Set out in *Griffiths TJ* [71] CAB 119.

27 Although it is not usually the case, the relationship between Aboriginal and Torres Strait Islanders and their land and waters can be purely utilitarian: *Akiba v Queensland (No 2)* [2010] FCA 643; 270 ALR 564 at [172].

28 The concept of a non-exclusive right to protect sites was explained by the Full Federal Court in *Alyawarr* at [136]-[140].

29 *Western Australia v Brown* at [36].

30 *Mabo (No 2)* at 61 (Brennan J).

have no legal rights in relation to Crown land.[31] Thus if the native title holders were living on land pursuant to their native title rights, their presence and activities would not be unlawful[32] and would prevail over any liberty which a member of the public had to, for example, picnic on that land.[33] Furthermore, at the time of the compensable acts the Claim Group's native title was protected by the RDA and, in the case of the intermediate period acts, the *Native Title Act*. The native title could not be extinguished contrary to those Acts; and those Acts conferred procedural rights and rights to compensation equivalent to freehold.[34]

21. It is important to recognise that no two native titles are the same, even if the content of two determinations of native title are the same.[35] A list of rights in a determination of native title does not capture the essential relationship between the native title holders and the determination area. That is, laws and customs and the connection of indigenous societies may differ yet translate into the same or a similar list of determined native title rights. Any assessment of compensation must therefore take into account the particular circumstances of the claimants.[36]

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31 *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 35 at [47]-[55]; *Margarula v Northern Territory* [2016] FCA 1018; 338 ALR 464 at [83]-[90]. There is a statutory permission under s 212 of the *Native Title Act* which permits public access in certain circumstances, but that applies equally to exclusive native title: *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2018] FCA 275 at [14]-[24]. The existence of the statutory permission (which only came into effect after the extinguishing past acts in this case) suggests otherwise the public have no such right.

32 See Claim Group Submissions filed 4 May 2018 (**Claim Group Submissions**) at [53].

33 To use the example in Commonwealth Submissions at [36].

34 *Ward (HC)* at [108], [320]-[321]. South Australia's Submission at [43] refer to the comment in *Ward (HC)* that holders of non-exclusive native title would not be 'owners' for the purposes of the *Mining Act 1978* (WA), but the majority (at [320]-[321]) went on to say that the same rights to compensation as enjoyed by an owner were conferred by the RDA.

35 This is consistent with Northern Territory Submissions filed 6 April 2018 (**Northern Territory Submissions**) at [44], supported by Western Australia Submissions filed 20 April 2018 (**Western Australia Submissions**) at [44].

36 *Griffiths TJ* [317]-[318] CAB 178.

Compensation for extinguishment of native title

22. ***Statutory basis***: It is common ground that the claim for compensation the subject of these appeals is made under the *Native Title Act*, and therefore the appeals raise issues of statutory construction and application of statutory provisions to the facts.[37]

23. Where land in the Territory is the subject of a previous exclusive possession act (**PEPA**), native title is extinguished by force of s 9H of the *Validation (Native Title) Act* (NT) (**VNTA**) and s 23E of the *Native Title Act*, and compensation is payable by reason of s 23J of the *Native Title Act*. Section 23J(1) provides the native title holders "are entitled to compensation in accordance with Division 5 for any extinguishment under this Division of their native title rights and interests 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".

24. Where land in the Territory is the subject of a validated category A intermediate period act which is not a PEPA native title is extinguished by force of s 9B of the VNTA and s 22F of the *Native Title Act*, and compensation is payable by reason of s 22G(1) of the *Native Title Act*. Section 22G(1) provides the native title holders "are entitled to compensation".

25. In either case, the compensation is payable in accordance with Part 2 Division 5 of the *Native Title Act*. The criterion for assessment of compensation is in s 51(1), namely "an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests". These are words of very wide import, in two respects. Firstly, they encompass loss, diminution or impairment of, or any other effect of an act on, the native title rights. Secondly, the native title holders are to be compensated "for" those things. That is broad enough to encompass both the loss of a property right and other effects suffered by the native title holders which have been caused by the loss, impairment etc of the native title.

26. These provisions of the *Native Title Act* should be construed consistently with the Preamble to the *Native Title Act*. The Preamble refers to the progressive dispossession

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37 Cf *Mabo (No 2)* at 15 (Mason CJ and McHugh J speaking for the Court); *Newcrest Mining* at 613 (Gummow J); *Walker* Corporation *Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; 233 CLR 259 at [29]-[35] (the Court).

of Aboriginal people of their land and the fact it has occurred largely without compensation and without a lasting and equitable agreement with Aboriginal people concerning use of their lands; the consequence that Aboriginal people have become, as a group, the most disadvantaged in Australian society; the intention of the people of Australia that the *Native Title Act* will rectify the consequences of past injustices by the special measures it contains; and that the *Native Title Act* will take effect according to its terms and be a special law for the descendants of the indigenous inhabitants of Australia which is intended to further advance the process of reconciliation among all Australians.[38]

27. In light of the Preamble and the beneficial nature of the *Native Title Act*, the compensation provisions should be given as ample and fulsome expression as the statutory provisions reasonably allow.[39] Section 51(1) expresses the entitlement to compensation under the *Native Title Act* in very broad and imprecise terms.[40] While s 51A sets out a limit on compensation, ss 51(2) and 53 are concerned with ensuring that that any acquisition does not infringe the Constitutional requirement for just terms. Whatever the scope of operation of ss 51A and 53, if anything they count against a narrow reading of the entitlement to compensation under s 51(1).

28. In particular, there is no reason to conclude from the words of s 51(1) that the compensation is necessarily to be assessed according to any particular land valuation principles developed in the context of other statutory regimes, or land valuation principles at all. The appropriate valuation methodology (or methodologies) depend solely upon the particular statutory context. As the New South Wales Court of Appeal observed in ***Leichardt Council*** *v Roads & Traffic Authority of NSW* [2006] NSWCA 353; 149 LGERA 439 at [36]:

> "The need to determine the value of assets arises in many different legal contexts. It is the context which determines the principles of valuation to be applied. An assumption that there is in existence some abstract body of "valuation principle"

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38 See also the Second Reading Speech to the Native Title Bill 1993 (Cth) where the then Prime Minister said: "We take the view that any special attachment to land will be taken into account in determining just terms" (Hansard, House of Representatives, 16 November 1993 at 2882); and *Yarmirr* at [124] (McHugh J).

39 One relevant interpretation principle that can be applied to the *Native Title Act*, by analogy with compulsory acquisition statutes, is that doubts should be resolved in favour of a more liberal estimate: *Roads Corporation v* ***Love*** [2010] VSC 32; 31 VR 451 at [122].

40 Cf *Victims Compensation Fund Corporation v Brown* [2003] HCA 54; 77 ALJR 1797 at [33] (Heydon J, McHugh ACJ, Gummow, Kirby and Hayne JJ agreeing).

applicable in all contexts, irrespective of the statutory scheme or contractual provision, is liable to lead to error."

29. The *Native Title Act* uses the term "compensation" and refers to "loss" etc.[41] It does not use the terminology which often appears in compulsory acquisition statutes such as 'value of the land' or 'value to the owner'. The absence of any pre-determined valuation principles in the *Native Title Act* is confirmed by s 51(4), which provide that principles in land acquisition statutes may be (which by implication means are not necessarily[42]) applied. There may be more than one methodology by which compensation can be assessed. In some cases it may be appropriate to consider a methodology akin to reinstatement e.g. the need to obtain alternative housing and sustenance where occupation of and subsistence from a community's traditional lands is no longer possible because of extinguishment of their native title. In other cases there may be evidence of a loss of an economic opportunity e.g. to harvest and sell a traditional substance such as sandalwood.

30. For these reasons, there is no inherent correlation between the loss suffered by native title holders consequent upon extinguishment of native title, and the market freehold value of the land in respect of which the native title is extinguished. That is, it should not be assumed that in every case native title compensation will be a fraction, or multiple, of market freehold value. Sections 51A and 53 of the *Native Title Act* are consistent with this submission. That is, if there is a freehold value cap on native title compensation under s 51A (a matter not in issue in these appeals), it is a function of that section, not s 51, and it is subject to any just terms requirement in s 53.

31. Indeed a result whereby compensation for extinguishment of native title was assessed under s 51 at greater than market freehold value ought not be considered surprising. A freehold title (or any other non-native title interest founded in Crown grant) does not have the dual characteristics (utilitarian and spiritual) which native title possesses. Even if freehold represents the most fulsome property right in relation to land known to the common law,[43] compensation for its loss represents the loss of a property right of utilitarian value only. Furthermore, even in respect of a non-native title interest,

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41 As noted in Western Australia Submissions at [37]-[38].

42 *Acts Interpretation Act 1901* (Cth) s 33(2A).

43 *Griffiths TJ* [223] CAB 156; *Fejo* at [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), [99] (Kirby J) applying *Wik* at 226 (Gummow J).

compensation for its compulsory acquisition can exceed market freehold value, depending upon the terms of the statute under which it is acquired. Given the inherent spiritual connection which underpins native title and given the terms of the *Native Title Act*, the compensation provisions of the *Native Title Act* should be construed as providing in appropriate cases for compensation based on both the loss of a utilitarian property right and the effects of an extinguishing act on the spiritual connection of the members of the indigenous society with their traditional country.

32. ***Economic and non-economic loss***: In assessing compensation, the primary judge (having regard to the principles in the *Lands Acquisition Act* (NT)[44] and with the agreement of the parties) drew a distinction between economic and non-economic loss. In particular, his Honour was careful to distinguish special value, which he considered an aspect of economic loss, from non-economic loss.[45] In the reasons of the primary judge (*Griffiths v Northern Territory (No 3)* [2016] FCA 900 (***Griffiths TJ***) CAB 93), the terms non-economic loss, intangible disadvantages and solatium are relevantly synonymous.[46] For the reasons mentioned in paragraph 28 above and discussed further below, the NTRB Intervenors submit non-economic loss is the preferable terminology.

33. The Full Federal Court was critical of the bifurcated approach adopted by the trial judge, in line with the case presented by the Claim Group and with the agreement of the other parties. Some of the State interveners have joined that criticism.[47] However, as submitted above, the extinguished native title in this case (consistently with many other existing native title determinations under the *Native Title Act*) can be characterised partly as utilitarian and partly as spiritual. So too some loss may be capable of precise calculation and some not. The terms 'economic' and 'non-economic' are just labels. Regardless of the nomenclature, conceptually the extinguishment of native title is likely in every or at least most cases to give rise to at least two aspects of loss: (1) what has been termed in this case 'economic loss', which reflects the status of native title as a valuable property right under which members of an indigenous society are not 'trespassers in their own

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44 See s 51(4) of the *Native Title Act*; *Griffiths TJ* [89]-[93] CAB 126-127.

45 *Griffiths TJ* [204] CAB 152, [208]-[209] 153, [234] 158, [292] 172, [297] 173, [300] 174, [367] 191, [373] 193.

46 See in particular *Griffiths TJ* [204] CAB 152, [209] 153, [300] 174, [383] 195.

47 Especially Western Australia Submissions at [47]-[53].

land' and under which those members have rights of occupation and/or use; and (2) what has been termed 'non-economic loss' which reflects the severing of the inherently spiritual connection between the members of an indigenous society and their traditional land and waters, and which may include the effects of damage to places of significance.

34. The 'paradox' referred to in the Territory's and South Australia's Submissions[48], that economic loss for extinguishment of native title in a town is likely to be greater than in a remote area notwithstanding the practical exercise of the native title rights and the strength of spiritual connection is likely to be greater in a remote area, is not truly a paradox if the following is recognised. Firstly, the two aspects referred to in paragraph 33 work together to ensure compensation is on just terms. In a remote area the economic loss may be relatively lower than in a townsite, but the non-economic loss may be higher because of the relatively stronger spiritual connection (assuming that is the case, albeit that is not necessarily so). Secondly, the fact (if it be the case) that economic loss in a townsite is greater than in a remote area reflects the relative differences in land values in more densely populated and/or highly sought after areas. That does not deliver a windfall to the former native title holders any more than an owner of a non-native title interest in such an area obtains a windfall[49] benefit from generally higher property prices in their locality. Such an outcome is consistent with the submission above that native title is a valuable property right including because of its utilitarian nature.

Economic loss

35. ***The Spencer test***: The NTRB Intervenors submit that the primary judge did not err in disregarding the *Spencer* test when assessing economic loss. The Full Court was wrong to apply *Spencer* and to set aside the primary judge's assessment on that basis.[50]

36. The primary judge was correct that the *Spencer* test, involving a hypothetical purchase of property by a willing but not anxious buyer from a willing but not anxious seller, is inapposite (*Griffiths TJ* [211] CAB 154) for the reasons in paragraph 9 above; that is, the nature of native title simply does not allow for such a transaction, even a hypothetical one, because native title is not a form of property which can be transferred from the

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48 South Australia Submissions at [34] supporting Northern Territory Submissions at [51].

49 Cf Western Australia Submissions at [50].

50 *Griffiths FFC* at [120]-[122] CAB 308-310.

members of the indigenous society to another person or persons resulting in it being owned by them.

37. Furthermore, from the seller's point of view, the primary judge stated that the Claim Group would not have been willing to surrender their native title for any price: *Griffiths TJ* [232] CAB 158. His Honour did not proceed to make an assessment on that basis, as had he done so the assessment of economic loss would have exceeded freehold value. Nevertheless, this does point to a further difficulty with the *Spencer* test. As native title is highly fact specific, how is the court to conceptualise a willing but not anxious seller? Is the test to proceed by way of a factual inquiry as to how this Claim Group would actually have behaved in a hypothetical bargain, or does the analysis proceed on the basis of a hypothetical indigenous community? To what extent can an indigenous community be hypothesised to act in an economically rationalist way? These questions highlight why the nature of native title makes it incompatible with a *Spencer* analysis.

38. ***The inalienable nature of native title***: The Full Court considered the primary judge also erred in failing to take into account the inalienability of the native title, and in taking into account the Claim Group's spiritual attachment. As a matter of principle, the Full Court was correct that it would be wrong to take into account an indigenous community's unpreparedness to surrender their native title because of its spiritual dimension when assessing economic loss insofar as that spiritual dimension will be taken into account in the assessment of non-economic loss (*Northern Territory v Griffiths* [2017] FCAFC 106; 346 ALR 247 (***Griffiths FFC***) [111] CAB 305). However the primary judge's reference to the 'true character' or 'real character' of the native title does not indicate an erroneous consideration of spiritual connection leading to a double counting (cf *Griffiths FFC* [112]-[113] CAB 305). The true or real character of the compensable native title rights was that they enabled the Claim Group to lawfully occupy and use their traditional land in a way that provided everything necessary for their physical survival, and meant they were not 'trespassers in their own land'.

39. As to inalienability, even if the *Spencer* test is applied, the Full Court was wrong to find that inalienability reduced the value of the native title. In *Leichardt Council* the New South Wales Court of Appeal distinguished *Corrie v MacDermott*[51] (referred to in

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[51] *Corrie v MacDermott* [1914] HCA 38; 18 CLR 511.

Griffiths FFC [101] CAB 303) and, having regard to the statutory provisions applicable to that case, held that a restriction which affects only the person whose land has been acquired is to be disregarded when determining market value ([32], [41], [43]). Critical to that finding were words in the statute providing for compensation, which Spigelman CJ said "necessarily assume that the owner of the property is legally entitled to sell the land" and which was inconsistent with the statutory provision which prohibited sale of the land in question ([44]).

40. The *Native Title Act* does not expressly refer to a hypothetical or assumed sale of the native title. Nevertheless, the *Spencer* test does assume a hypothetical transfer of property from seller to purchaser. If the nature of the property includes that it is inalienable, and if in the hands of the purchaser the property will still be inalienable, then it stands to reason that the value of the property may be reduced by reason of that attribute. But if the property in the hands of the purchaser is freed from the restriction of inalienability then there is no logical reason why that attribute should be taken into account under a *Spencer* analysis where the question is what a willing but not anxious purchaser would pay. This is consistent with the reasoning in *Leichardt Council*. It is also consistent with the reasoning of the High Court in *Commonwealth v Arklay* [1952] HCA 76; 87 CLR 159 cited by the Full Court at *Griffiths FFC* [121] CAB 308-309, where the Court applied the *Spencer* analysis to land the subject of price controls on the assumption that the purchaser would similarly be subject to the price controls. At 87 CLR p 171 Dixon CJ, Williams and Kitto JJ said (emphasis added):

> On the other hand the existence of a regulation of land sales would be calculated itself to affect what a buyer would be prepared to give. He himself would be buying an asset of which he could not, if need arose, freely dispose at the price he would demand from a buyer free to give it. It would not be right therefore to say that the existence of a regulation of land sales must be disregarded. It must be taken into account as **it affects what a buyer would be prepared to give** to obtain the land, not as limiting his freedom to offer what he likes or his freedom to buy at what he is prepared to offer, but as it operates on his judgment in determining what he is prepared to give, that is to say, **as a consideration affecting the value of the land to him as a buyer**.

41. The majority of the 'cluster of cases' referred to at Commonwealth Submissions [18(a)] were decided before *Leichardt Council*, which distinguished *Corrie v McDermott*. *Sutherland Shire Council v Sydney Water Corp*, decided after *Leichardt Council*, expressly applied *Leichardt Council* and only discounted the land zoned 'open space' because the parties agreed the open space limitation was the highest and best use of the

land. There were two other types of restrictions which were disregarded because they only applied to the Shire selling the land. [52]

42. In the case of native title, if the purchaser was the Crown (by way of a surrender) then its radical title would, upon purchase, be freed from the burden of the native title and it could alienate interests in the land. If it is necessary to hypothesise some other purchaser, which would then hold the native title (notwithstanding that is legally impossible), the purchaser could at the least surrender the native title to the Crown and thereby free the Crown to grant some other interest such as freehold to the purchaser or to some other person. This is consistent with *Geita Sebia v Territory of Papua* where Williams J held that while the relevant legislation prohibited the disposal of land held by the owners, "the restriction could have no detrimental effect upon the determination of the value of the land when compulsorily acquired, because in the hands of the Crown it would be freed therefrom".[53]

43. The policy consideration referred to by Bryson JA in *Leichardt Council* at [89] also resonates in the context of native title. Inalienability is a feature of common law recognition of native title. At the point of its extinguishment the native title was protected by the RDA, and later the *Native Title Act*, which operated to ensure that the Claim Group enjoyed their unique property rights to the same extent as non-Aboriginal people enjoyed other forms of title notwithstanding the different attributes of native title.[54] The Preamble to the *Native Title Act*, and s 7, confirm that the *Native Title Act* is to be interpreted consistently with the RDA and the international conventions it implements. Thus in construing the compensation provisions of the *Native Title Act* the inalienability of native title should not work to the advantage of governments by reducing the amount of compensation payable for its extinguishment.

44. ***Other reasons for the Full Court's 35% discount***: In addition to the primary judge's failure to apply the *Spencer* test and to take into account the inalienability of native title, the Full Court reduced the economic loss component on the grounds that the primary judge erred for two other reasons. Firstly, the Full Court said it was inaccurate to describe the native title rights as a real impediment to any other grant: *Griffiths FFC* [78], [83]-

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52 *Sutherland Shire Council v Sydney Water Corp* [2008] NSWLEC 303 at [16], [57]-[62].

53 *Geita Sebia v Territory of Papua* (1941) 67 CLR 544 at 557 (Williams J, Rich ACJ agreeing); see also Claim Group Submissions at [73].

54 *Ward (HC)* at [122] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[84] CAB 297, 299. Whether or not, as submitted by the Territory and the Commonwealth and disputed by the Claim Group, some acts could be done which would not extinguish the subsisting native title and would not thereby engage the invalidating operation of the RDA[55], is with respect beside the point. The Claim Group has sought compensation for particular acts (grants of freehold titles and development leases, and construction of public works) which wholly extinguished native title. Compensation is to be assessed for extinguishment by those acts. When those acts were done, the then subsisting native title was not able to be validly extinguished by such acts because of the operation of the RDA.[56]

10 45. The Full Court also criticised the primary judge's reference to the practical sense in which the native title rights were exercisable (*Griffiths FFC* [78], [84] CAB 297, 299, referring to *Griffiths TJ* [231]-[232] CAB 158). The primary judge was evidently making the point that the non-exclusive native title rights, if fully exercised, would allow the Claim Group to occupy (including live on and erect shelters) and use (including hunt, conduct meetings and ceremonies) the subject land in a way which would leave no occasion for others to use the land at the same time (absent some prevailing legal right to do so, of which there were none at the time of each extinguishing act).[57] There is no error of principle in taking that into account for the purpose of ascertaining the nature and content of the rights that were extinguished as the necessary precursor to assessing its value.[58]

20 46. Secondly, the Full Court considered the primary judge erred in taking into account the value to the Territory of the notional acquisition of native title (*Griffiths FFC* [91]-[92] CAB 301). As above, in the context of applying a *Spencer* analysis which requires consideration of what a willing but not anxious purchaser would pay, there is no reason why the value to the Crown of a notional surrender of native title cannot be taken into

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55 In the case of the intermediate period acts, there is no doubt that the grant of an interest such as another pastoral lease would be inconsistent with the continued enjoyment or exercise of the subsisting native title and therefore would be a future act to which the *Native Title Act* provisions apply (*Narrier v Western Australia* [2016] FCA 1519 at [1068]-[1070]). Such a grant at that time would have been an impermissible future act and invalid on that basis.

56 *Ward (HC)* at [122] – [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

57 The Full Court referred to *Western Australia v Brown*, but that illustrates the point – a legal right may not be necessarily inconsistent with other uses of land in a legal sense but its practical exercise may prevent use of the land by others: *Brown* at [64]; and see *Ward (HC)* at [308].

58 Consistently with the direction of this Court that native title is sui generis and is not to be assumed to equate to common law tenures: *Yanner* at [72] (Gummow J); *Ward (HC)* at [14], [91], [95].

account. For the above reasons, even on the Full Court's premise that the *Spencer* test was appropriate, the Full Court erred in reducing the compensation for economic loss to 65% of market freehold value.

47. ***Alternative methodology***: Even when a non-native title interest is acquired under land acquisition statutes, there is no invariable rule that the *Spencer* test must be applied. In *Birmingham Corp v West Midland Baptist (Trust) Association*,[59] the House of Lords recognised that a standard market value analysis (even including any other elements comprising its value to the owner plus an additional amount by way of solatium) does not always produce a fair result, and said that in certain classes of cases the cost of reinstatement can be adopted as giving a better assessment of the value of the land to the owner who was being dispossessed. That approach has been applied in Australia. In ***Kozaris*** *v Roads Corporation* Gobbo J in the Supreme Court of Victoria said:[60]

> The principle of reinstatement has not been definitively analysed in judicial decisions for there have been differences in view as to what precisely it covers. It has been described as applicable where the property was of such a character that there was no market or general demand for the property. The usual instances were churches, schools, hospitals, houses of exceptional character and business that can only be carried on under special conditions...".

48. As further explained in *Kozaris* (at p 242), this is in contrast to the situation where there is a market into which the dispossessed owner could go with the market value of his former property and purchase suitable replacement land; in that situation compensation is capable of being assessed by reference to market value of that which was compulsorily acquired. The fact that under the reinstatement methodology the dispossessed owner will receive something new in replacement for something old, or that the compensation under a reinstatement methodology may exceed market value of that which was lost, is not a bar to the use of the methodology.[61] The reinstatement methodology is often used in the context of business premises, but not invariable so; in *Kozaris* the reinstatement cost of building a new house on a farming property was allowed in circumstances where the dispossessed owner had a reasonable desire to live on that particular property (p 246).

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59 *Birmingham Corp v West Midland Baptist (Trust) Association* [1970] AC 874 at 893-894.

60 *Kozaris v Roads Corporation* [1991] 1 VR 237 at 240.

61 *Kozaris* at 243-4; *Director of Building and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 127E.

49. The NTRB Intervenors submit an inquiry into the cost of putting the native title holders, to the extent possible, in the position they would have been in but for extinguishment may in a particular case, perhaps most or all cases, be more appropriate than the *Spencer* test. Firstly, it reflects the sui generis nature of native title and the absence of a market for it.[62] Secondly, it is consistent with the object of the *Native Title Act* to provide just compensation for the dispossession of traditional owners of their land, and in particular with that part of the Preamble which refers to the need to establish a special fund to assist dispossessed native title holders to acquire land. Thirdly, it is consistent with the provisions in ss 51(6)-(8) of the *Native Title Act* for compensation to be provided by way of a transfer of property or provision of goods or services.

50. In the case of exclusive possession native title a grant of freehold title would be the closest analogy to restoring the utilitarian aspects of the extinguished native title. It was accepted by the courts below that market freehold value would be an appropriate amount of compensation for extinguishment of the economic aspects of exclusive possession native title notwithstanding inalienability (*Griffiths TJ* [225] CAB 157; *Griffiths FFC* [51(4)], [134] CAB 285, 312); a proposition disputed in Northern Territory Submission [45] and Commonwealth Submission [17]. An application of or analogy with the restoration methodology provides a further justification why that is so.[63]

51. In this case the native title that was extinguished included rights to live on and obtain sustenance from the land in perpetuity. The Claim Group Submissions at [43]-[69] point out why in the circumstances of this case including the status of the land as town land, the protection of the RDA and later the *Native Title Act*, and the particular extinguishing acts involved, the subsisting non-exclusive native title was of no materially lesser value

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62 It also overcomes the conceptual difficulty with the *Spencer* test, recognised by the primary judge (*Griffiths TJ* [232] CAB 158), that an indigenous community would not sell their land for any price.

63 One justification is that both exclusive possession native title and freehold can be said to amount to full ownership of the land: *Griffiths TJ* [222]-[223] CAB 156; *Mabo (No 2)* at 88 (Deane and Gaudron JJ). While native title is not an estate or interest in land of the same kind as freehold, and has been variously described as usufructuary, proprietary and sui generis, the point remains that it can amount to a right to possess occupy use and enjoy land to the exclusion of all others including the Crown. Cf *Mabo (No 2)* at 51-2, 59, 61 (Brennan J), 88-89, 110 (Deane and Gaudron JJ), 133 (Dawson J); *Wik* at 95 (Brennan CJ), 169 (Gummow J), 215 (Kirby J); *Yarmirr* at [12]; *Ward (HC)* at [83]-[84], [118]; *Griffiths v Northern Territory of Australia* [2007] FCAFC 178; 165 FCR 391 especially at [63]-[71].

to the Claim Group than exclusive possession native title. The relevant compensable acts were (or were by agreement of the parties taken to be) grants of freehold, or leases convertible to freehold. In these circumstances market freehold value is similarly an appropriate measure of what it would take to practically, so far as possible, put the Claim Group back in the position it would have been in as regards the utilitarian aspects of the extinguished native title and therefore an appropriate amount of compensation for the loss of those aspects of the native title.

52. Although the primary judge did not use a reinstatement methodology, and that is not the basis upon which the Claim Group presented its case in the courts below and presents its case in this Court, these submissions about the restoration methodology do two things. Firstly, they reinforce the submissions above that the Full Court erred in finding the primary judge ought to have used the *Spencer* test.[64] That is not the only appropriate method of assessing native title compensation, even where as here the claim is for a separate component for economic loss. The Full Court itself recognised that test was problematic and questioned "whether any real assistance can be found in applying provisions of land compensation statutes to the task of assessing compensation for the loss of native title rights and interests" (*Griffiths FFC* [144] CAB 315). The above submissions demonstrate that existing valuation concepts other than the *Spencer* test are available and may provide a more suitable adapted methodology.

53. Secondly, the reinstatement methodology provides a check against which the outcome of the primary judge's intuitive assessment and the Claim Group's analysis can be tested. It provides a justification for the approach accepted by the primary judge and Full Court of starting with market freehold value. Even if it is accepted, as the primary judge held, that the utilitarian aspects of non-exclusive native title must intuitively have a lesser value in a market than exclusive possession native title, it does not necessarily follow that an award of 100% of market freehold value would result in erroneous over-compensation. The cost of acquiring freehold to replace the extinguished non-exclusive native title may in the circumstances still be the most appropriate measure of what it takes to place the dispossessed native title holders back in the position they would have been but for extinguishment i.e. the right to occupy their traditional lands in perpetuity.

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64 *Griffiths FFC* [122] CAB 309-310.

54. The Territory and Commonwealth submit an assessment of compensation for extinguishment of non-exclusive native title at 100% of freehold value leads to the logical conclusion that the right to control access, which had previously been extinguished and therefore was not part of the subsisting native title as at the date the compensable acts were done, has no economic value.[65] As Commonwealth Submission [23(b)] recognises, that is not necessarily so. If a compensable act extinguished only the right to control access then compensation would be assessed for that act using an appropriate methodology. That is not logically inconsistent with valuing the loss suffered as a result of total extinguishment of non-exclusive native title at 100% of market freehold value. Logical inconsistency only arises if it is assumed that the sum total of the value of the extinguished native title cannot exceed 100% of market freehold value. Even if that were true when valuing a single act which extinguished all exclusive native title at once, there is no reason why two successive extinguishing acts, the first extinguishing the right to control access and a second and later extinguishing the remaining non-exclusive rights, could not produce a sum total in excess of 100% of market freehold value. The two acts would have different effects at different times. None of ss 49, 51(1) or 51A of the *Native Title Act* mandate to the contrary.

55. ***The primary judge's 20% discount***: Alternatively, if the primary judge was correct that the compensation for economic loss must be discounted to take account of the non-exclusive nature of the subsisting native title rights (*Griffiths TJ* [197], [231] CAB 151, 158), there is no reason to conclude that the primary judge erred in assessing that discount at 20%. That reflected the primary judge's intuitive assessment of the extent to which market freehold value should be discounted to ensure the Claim Group were not over-compensated.

Interest

56. The NTRB Intervenors adopt the submissions of the Claim Group regarding interest, and in response to the submissions of the government parties and interveners[66] make the following additional submissions. Firstly, to require proof that compensation monies

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65 Northern Territory Submissions [64] – [68], Commonwealth Submissions [23(a)]. A similar observation was made by the primary judge at *Griffiths TJ* [231] CAB 158.

66 For example, Commonwealth Submissions at [66], [67]; Queensland Submissions at [51], [71] and [83].

would have been invested or used in a commercial way in order to justify an award of compound interest in any particular case jars with the recognition in the Preamble, and in many cases involving charitable status[67], that, as a result of dispossession, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society. Cf *Griffiths FFC* [211] CAB 334; Commonwealth Submission [75]. To the extent necessary, the rules of equity are readily able to adapt where justice so demands so as to recognise a general right to compound interest on the economic component of native title compensation.[68] Native title holders are necessarily delayed in obtaining compensation for past acts, as the right to compensation only arose upon
10 enactment of the *Native Title Act* and requires the antecedent step of establishing native title existed prior to an extinguishing act. It may also be prudent for native title holders to await the full exercise of rights under a past act in order to ensure that all effects of the act are taken into account in assessing compensation.[69] The obligation on States and Territories to pay compensation for past acts arises because they chose to validate past acts and, in the case of PEPAs, chose to confirm extinguishment. Validation and confirmation of extinguishment give governments the benefit that past acts are and are taken always to have been valid, and leave the native title holders (rather than governments and grantees) to bear the burden of the consequences of those acts on the native title holders' property rights.

20 57. Secondly, if (contrary to the above submissions) compound interest is not generally to be awarded, it should be recognised that the time between extinguishment and payment of the compensation may be several decades. Principles concerning payment of interest on compensation developed in existing cases seldom contemplate delays in payment of compensation over such long periods. Over time the value of the compensation decreases because of inflation. Inflation compounds. If interest is calculated as simple interest, in time the real (i.e. adjusted for inflation) value of the compensation will be eroded. If and

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67 See for example *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197 at 211-2; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and others* (1997) 115 NTR 25 at 39; *Murchison Region Aboriginal Corporation and Shire of Yalgoo* [2018] WASAT 17 at [53]-[55].

68 Cf e.g. Commonwealth Submissions [70]-[71], [94].

69 For example, in the case of a lease, the full effect of the grant (from the point of view of determining its effect on the native title holders) may not be known until the lease has expired: see s 44H of the *Native Title Act*.

when that happens in any particular case will depend upon the rates of inflation and the rate of the simple interest. Accordingly, at the very least, interest should be whatever is necessary to ensure the real value of the compensation is not less than it would have been had the compensation been paid at the time. That may require payment of compound interest, regardless of whatever may be the position at common law or in equity generally and irrespective of circumstances of the kind referred to by the primary judge at *Griffiths TJ* [248], [253] CAB 161-162, 163. As submitted above, that flows from the requirement in s 51(1) that the native title holders be compensated for any loss. The observations of the Full Court at *Griffiths FFC* [201]-[211] CAB 332-334 seems broadly consistent with this submission.

Non-economic loss

The principle of fairness and moderation (Territory ground 4.1)

58. The NTRB Intervenors submit that contrary to Territory Submission [122], compensation for non-economic loss is not a solatium in the sense 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". That is not what was pleaded and not how the primary judge or the Full Court approached the case. Rather, non-economic loss describes a substantive component of the compensation for extinguishment of native title, as addressed above. Concepts derived from statutory schemes for compulsory land acquisitions can only be taken so far in application to indigenous people who see their relationship with the land very differently from the common lawyer[70] particularly where those schemes were not designed in express contemplation of the loss of native title.

59. The principle of fairness and moderation relied upon by the Territory arises in the context of assessment of general damages for loss of amenity of life, particularly where the plaintiff has no subjective consciousness of the loss.[71] That is inapposite to the

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70 *Ward (HC)* at [90].

71 *Skelton v Collins* [1966] HCA 14; 115 CLR 94 at 97, 100. Even then, the concept of moderation can be taken too far: *Hawkins v Lindsley* (1974) 4 ALR 697 at 704 (Gibbs, Stephen and Mason JJ). Further, even in the context of an award of general damages, awards are to be proportionate to the situation of the claimant party – not to the situation of other parties in other actions, even if there is some apparent similarity between their situations: *Planet Fisheries Pty Ltd v La Rosa* [1968] HCA 62; 119 CLR 118 at 124-125.

assessment of compensation for loss of native title.[72] It may be accepted that there is an overriding requirement for fairness in the context of compensation for land acquisition, and in other contexts where compensation is to be assessed, but fairness operates in favour of the dispossessed owner as well as the acquiring authority.[73] The relevant principles are ultimately derived from the *Native Title Act* properly construed, not from common law tort cases.[74] Reference to a principle of fairness and moderation adds nothing to the statutory prescription that compensation be on 'just terms': cf Northern Territory Submissions [24].

60. There is nothing in the facts of this case, and no reason in principle, why non-economic loss must be set at 10% (or any other arbitrary percentage) of the economic loss.[75] Firstly, under s 51(1) of the *Native Title Act* the compensation must constitute just terms. Where compensation is assessed under separate components, such as economic and non-economic loss, the overall result must nevertheless satisfy the statutory criterion of just terms. The primary judge correctly approached the task that way.[76] Secondly, there is no consistent principle that solatium under acquisition statutes is 10%: acquisition legislation of each Australian jurisdiction deals with the issue differently.[77] It would also be undesirable to apply whatever solatium principle exists under the relevant jurisdiction's compulsory acquisition legislation. The *Native Title Act*, being Commonwealth legislation, should not produce differing compensation assessments for extinguishment by past acts in different jurisdictions.[78]

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72 Particularly in circumstances where not only is the loss apprehended, but also persists and is aggravated over time: see *Griffiths TJ* [358] CAB 188-189, [382] 195.

73 See as to compensation generally, *Director of Building and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 125C-E and 126D; and *McCrohon v Harith* [2010] NSWCA 67 at [55] cited in Queensland's Submission at [57].

74 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 at [26] (Gleeson CJ).

75 As recognised in *Love* at [776]-[779], [796].

76 *Griffiths TJ* [99] CAB 129, [173] 146, [210] 154, [224] 156, [229] 157.

77 See e.g. *Land Administration Act 1997* (WA) s 241(6)(e), (8), (9); *Land Acquisition Act 1989* (Cth) s 61; *Lands Acquisition Act 1994* (ACT) s 51; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 60; *Land Acquisition Act 1993* (Tas) ss 27, 30; *Land Acquisition and Compensation Act 1986* (Vic) s 44; *Mineral Resources Act 1989* (Qld) s 281(4); *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 85A; *Land Acquisition Act 1969* (SA) s 25(1)(g).

78 See by analogy with personal injury compensation, *Hendrex v Keating* [2016] TASSC 20 at [172].

61. Thirdly, as submitted above, there is no necessary relationship between economic and non-economic loss, nor between the economic value of land and its cultural and spiritual significance. Linking compensation for non-economic loss to economic loss is arbitrary and unlikely to properly value a native title group's loss, thereby failing to satisfy the s 51(1) requirement for compensation on just terms.

Causation – Ritual ground (Territory ground 4.2; Commonwealth ground 4(a))

62. ***Causation generally***: The scope of application of the causal term "for" in s 51(1) of the *Native Title Act* is to be determined by reference to the text of the *Native Title Act* construed and applied in this context in a manner which best effects its statutory purpose.[79] Reference to a "common sense" approach to causation, as referred to in Northern Territory Submissions [134] and [135], is particularly inapposite[80] in the context of the *Native Title Act*. The Territory's "common sense" may be different to that of the Claim Group, whose perspective, based on their traditional law and custom, was referred to by the Full Court at *Griffiths FFC* [314]-[317] CAB 359-360. The assessment of whether distress, hurt etc suffered by an indigenous group was caused by the doing of a compensable act or a number of compensable acts should be informed by the nature of the Claim Group's connection to country and need not necessarily conform to notions developed in other areas of the law such as tort.

63. ***The ritual ground in particular***: The Territory and Commonwealth take issue with what is said to be the primary judge's finding about a particular ritual ground, being that which was the subject of a site visit on 9 February 2016. The finding is said to raise an issue of causation. The immediate difficulty is the absence of detailed factual findings by the primary judge. *Griffiths TJ* [361] CAB 189 refers to two ritual grounds and the impugned reasoning at *Griffiths TJ* [379] CAB 194 does not refer to a ritual ground as such. The primary judge's reference in that paragraph to "the effect of a particular act upon the capacity to conduct ceremonial and spiritual activities on that area and on adjacent areas" appears to be a reference to the *principle* that a particular act (i.e. any of the compensable

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79 ***Comcare*** *v Martin* [2016] HCA 43; 258 CLR 467 at [42]. As to the statutory context, see paragraphs 26-27 above.

80 As stated in *Comcare* [42] "it is doubtful whether there is any "common sense" approach to causation which can provide a useful, still less universal, legal norm".

acts) may have an effect on adjacent areas.[81] The reasoning of the primary judge that as a general principle, the assessment of non-economic loss can take into account effects of a compensable act on native title over a broader area of land than just the land the subject of the act, accords with the proper approach to causation referred to above.[82]

64. The appeals proceed from a premise that the loss the primary judge took into account in relation to the particular ritual ground was the cessation of its use in 1975. The Full Court did not approach the issue that way. Their Honours (at *Griffiths FFC* [300] CAB 355-356) said the relevant aspect of the primary judge's finding at *Griffiths TJ* [361] CAB 189 was that "Chris Griffiths gave evidence as to why the place remains important", and their Honours said "[i]t was the character of the location of the ritual ground at the time of the compensable act and the effect of that act on the then current status of the ritual ground as a site of importance that caused the primary judge to take the effect into account".

65. At *Griffiths TJ* [326] CAB 180 the primary judge had earlier explained (emphasis added):

> Any award of compensation for loss or (sic) spiritual attachment in respect of land affected by the compensable acts must properly take into account the extent to which the spiritual attachment to that land has **already been impaired or affected by the loss or destruction of significant places on nearby land** or in Timber Creek. In my view, it is open to the Court to infer from the evidence which does not specifically relate to an act or parcel of land, that **a further sense of loss is felt in consequence of the determination acts**. The inferences to be drawn in the circumstances will necessarily depend on the direct and indirect evidence before the Court.

Particularly in light of that statement, the Full Court was correct to construe the primary judge's reasons as saying notwithstanding the particular ritual ground the subject of the Territory and Commonwealth appeals ceased to be used in fact in 1975 (for whatever reason), the place continued to be important and later compensable acts in the vicinity of the place caused a further sense of loss. That compensable loss is of the kind referred to by the primary judge at *Griffiths TJ* [350]-[354] and [372] CAB 187, 192-193 i.e. pain and anxiety at damage to the spiritual integrity of the country. Such pain and anxiety

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81 Particularly when read in the context of the paragraph as a whole, and in the context of his Honour's general observations at *Griffiths TJ* [326] and [375] CAB 180, 193; and in the context of the immediately following paragraph at *Griffiths TJ* [380] CAB 194.

82 That approach does not appear to be in issue: see Territory Submission at [136], [144]. Northern Territory Submission at [128] criticises the lack of factual findings but not the principle.

resulted from the doing of a compensable act or acts in the vicinity of a place that remained important, not from the cessation of the use of the ritual ground in 1975.

66. An analogy in a non-Aboriginal context is a cathedral which was damaged by fire and became unusable. The proposed construction of a casino on the grounds of the damaged cathedral could cause upset and distress to former parishioners notwithstanding church services were no longer conducted in the cathedral. That could be so because the site of the cathedral remains an important religious site and construction of the casino in close proximity could be perceived as a desecration of the continued sacredness of the site.

67. Contrary to Commonwealth Submission [102], the words "but only to the extent" in s 23J(1) of the *Native Title Act* are, with respect, of no relevance to this issue. At the time of the compensable acts (and afterwards) there were native title rights in respect of the ritual ground including rights to *inter alia* engage in cultural activities, conduct ceremonies, teach the spiritual attributes of places of importance, maintain and protect sites of significance. There had been no earlier extinguishment of those rights at common law. The compensable acts in adjacent areas were an 'other effect' on those native title rights.

Causation – Failed responsibility and overall erosion of connection (Territory ground 4.3; Commonwealth grounds 4(b) and 5)

68. ***Failed responsibility generally***: The majority in *Ward (HC)* ([14]) recognised that the relationship between Aboriginal people and their country is essentially spiritual and can involve "an integrated view of the ordering of affairs" in which rights and interests are bound up with duties and obligations. Their Honours observed that to focus only on the requirement that others seek permission for some activities oversimplifies the nature of the connection captured by the phrase 'speaking for country'. Those observations are apposite here, and are reflected in the findings of fact by the primary judge: see for example *Griffiths TJ* [334] CAB 181 reproduced by the Full Court at *Griffiths FFC* [257] CAB 343 and referred to in the context of this issue at *Griffiths FFC* [325] CAB 361.

69. Dispossession from country involves not just an inability to control the access of others, but an inability to perform the ceremonies and to do other things on the country which are necessary to maintain the spiritual and physical health of the country and for which native title holders have a responsibility under their traditional laws and customs. The primary judge explained the sense of failed responsibility which his Honour took into

account as "the obligation, under the traditional laws and customs, to have cared for and looked after that land"; and said "that is not geographic (sic) specific, save for the more important sites, but it is a sentiment which was quite obvious from the evidence led from the members of the Claim Group" (*Griffiths TJ* [381] CAB 194). In that same paragraph the primary judge specifically referred to the evidence about the water tanks and other areas of significant importance but spoke of the sense of responsibility for looking after country in the areas of all the compensable acts as "a failure properly to look after the country and to preserve it for future generations". It is clear his Honour was not just talking about preventing other people from accessing and damaging important sites.

10 70. The subsisting non-exclusive native title rights included the right to engage in cultural activities and conduct ceremonies; the right to teach the physical and spiritual attributes of places and areas of importance on and in the land and waters; and the right to have access to, maintain and protect sites of significance. In areas the subject of compensable acts, the Claim Group could no longer exercise those rights and hence could no longer exercise the concomitant responsibility to care for and look after country to that extent. The Full Court properly considered that this is what the primary judge took into account when assessing compensation for non-economic loss (*Griffiths FFC* [323]-[325] CAB 361-362), and was satisfied that his Honour did (as he said he did) exclude from his assessment the effects of the earlier non-compensable loss of the right to control access
20 (*Griffiths FFC* [327] CAB 362). No error of principle is involved.

71. Even if the primary judge did take into account to some extent a feeling of failed responsibility arising from interference with significant sites, the feeling of failed responsibility is a loss or other effect on the native title holders in the form of shame or loss of social standing, which is analogous to one of the bases for damages in the law of defamation.[83] There is no finding, and no reason to conclude, that such feelings arises only because of a perceived failure to exercise a right to prevent access by others. Rather, it may be inferred that the feelings arise from the fact that the site has not been maintained and protected for whatever reason. See *Griffiths TJ* [355]-[356], [364] CAB 188, 190.

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83 A matter which can be taken into account in assessing damages for defamation is the plaintiff's feelings of what other people are thinking about him or her: *Hunter v Hanson* [2017] NSWCA 164 at [43]t; applying *Gacic v John Fairfax Publications Pty Ltd* (2015) 89 NSWLR 538; [2015] NSWCA 99 (at [64]) per McColl JA citing *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1125 (Lord Diplock).

Hence that loss or other effect is referrable to the subsisting non-exclusive right without the need to rely on any right to control access.

72. ***Extrapolation against the weight of evidence***: The fact the Claim Group obtained some advantage from some of the compensable acts does not mean that they did not suffer compensable non-economic loss from the extinguishment of their native title by those acts. At *Griffiths TJ* [375] CAB 193 the primary judge said "the relationship of the claim group to their country, including Timber Creek, is a spiritual and metaphysical one". His Honour found that spiritual relationship exists with all of the country, albeit there are some places where the spiritual connection is more significant and some where it is less. The primary judge gave Wilson Street as an example of the latter. Nevertheless, at *Griffiths TJ* [371]-[372] CAB 192 the primary judge referred to evidence that members of the Claim Group felt sorry when Wilson Street was developed because "they are damaging our place"; and referred to expert evidence that the claimants' emotions regarding damage and loss of cultural places is to be understood "in terms of the spiritual integrity of the landscape as being fundamental to the native title holders". There was also a reference to evidence that construction of the houses on Wilson Street did not create a sense of grievance (*Griffiths TJ* [365] CAB 190). There is no necessary inconsistency between feeling sorry for the damage to country through clearing of the land and construction of Wilson Street itself, and not having a sense or feelings of grievance at the later construction of houses in which some of the Claim Group could then live.

73. Pointing to evidence that some developments in the town were advantageous to the Claim Group and some did not create a sense of grievance, does not compel the conclusion in Territory Submission [150] that "[t]he trial judge's finding that all the compensable acts contributed to an aggregate sense of loss was not open". This is particularly so when regard is had to the primary judge's actual finding. That finding is at *Griffiths TJ* [381] CAB 194, where his Honour took into account that:

> "each of the compensable acts to some degree have (sic) diminished the geographical area over which native title rights within the Township of Timber Creek, and more generally, may be exercised, and each in an imprecise way has adversely affected the spiritual connection with the particular allotments, and more generally, which the Claim Group have with their country".

In other words, the primary judge found all the compensable acts collectively contributed to a diminution in spiritual connection. Such a finding is not contradicted by evidence some of the compensable acts also had some other advantages for the Claim Group.

74. ***Comparative geographic extent***: It may be accepted as a matter of logic that a landowner would ordinarily be more upset at a compulsory acquisition/extinguishment of all their property compared to part only of it. However it cannot be assumed that the non-economic impact of an acquisition/extinguishment is directly proportional to the extent of the interest acquired. The fact of extinguishment at all may have a significant impact, and the extent of the impact may depend upon the relative significance of the area extinguished compared to that which remains. Furthermore, where as here the landowner is a community comprising persons with different levels of rights and interests, and different connections, in different parts of the community's lands, and where all of the land is spiritually significant but some areas are more significant than others (*Griffiths TJ* [375] CAB 193), the impact of extinguishment over a part of the community's land is likely to be highly fact specific. Mathematical calculations of the relative size of the land affected by the compensable acts[84] do not provide a sufficient basis to impute error in a primary judge's assessment of the non-economic loss based on the evidence.

Future descendants (Commonwealth ground 4(c))

75. The right to compensation is conferred upon the native title holders. They are relevantly defined in s 224(b) as "the person or persons who hold the native title". As the native title has been wholly extinguished, the reference to the native title holders must mean the persons who would hold the native title but for it having been extinguished. It is common ground that the persons entitled to bring the compensation claim are those who, as at the date the claim is brought, would hold the native title but for its extinguishment; it is not limited to those who were alive at the time of the extinguishment.[85] Section 61(1) of the *Native Title Act* requires that the claim be brought on behalf of (and be authorised by) "all

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84 Such as at Northern Territory Submissions at [152]-[155]; Commonwealth Submissions at [120]-[125]; Western Australia's Submissions at [36].

85 Commonwealth Submission [113].

the persons (the ***compensation claim group***) who claim to be entitled to the compensation".[86]

76. The question of who is entitled to make the claim for compensation is different to the question of how the compensation is to be assessed. The Commonwealth's ground of appeal concerns the latter. As the Commonwealth Submission [114] recognises, the compensation claim in its terms was brought on behalf of the native title holding community defined in the same way as in the native title determinations. The description of the native title holding community does not define a finite group of persons by reference to a particular time but rather defines who, from time to time, held the native title including at the time of its extinguishment and including those who would continue to hold the native title in the future had it not been extinguished.

77. As submitted above, and as acknowledged in Commonwealth Submission [115], the native title holding community is not a corporate entity but a collection of individuals defined by traditional law and custom. Neither is the native title a singular thing. While native title exists, each member of the native title holding community from time to time can exercise the native title rights and interests, subject to and in accordance with traditional law and custom (which may contain intramural rules as to the location and manner of exercise of the rights and interests). Once native title is permanently extinguished, each person from time to time for an indefinite period into the future who would have been entitled to exercise those rights has been deprived of that opportunity and may thereby be said to have suffered loss. Similarly, each such person who would have had their connection to their traditional country recognised and protected by the common law has lost that recognition and protection and may suffer loss as a result of the compensable act including things done pursuant to it.

78. Accordingly there is no reason in principle, nor in the way the claim was brought, why loss suffered by future members of the native title holding community ought not be taken into account in assessing the quantum of the compensation. Indeed as the Full Court observed, the inalienable characteristic of native title supports the view that compensation

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[86] See by analogy the cases concerning a native title claim group, such as *Dieri People v South Australia* [2003] FCA 187, 127 FCR 364 at [55]-[56], where it has been held a claim cannot be made by a subgroup of the community or group which is said to be the native title holder.

for non-economic loss should include loss suffered by future generations (*Griffiths FFC* [415]-[419] CAB 387-389).

79. At Commonwealth Submission [119] the Commonwealth submits that the *Native Title Act* "cannot be construed as conferring an entitlement to compensation on persons who would only have become members of the native title holding group *after* native title had been extinguished". With respect, no reasons are put forward as to why the *Native Title Act* cannot be construed that way. The NTRB Intervenors submit there are none. Indeed that submission appears inconsistent with the concession at Commonwealth Submission [113] that "the measure of compensation may be assessed at the time of judgment by reference to the members of the claim group at that time".

80. It is of course a question of fact in each case as to whether future generations have suffered any loss, and as to whether that loss can be quantified in accordance with proper principles of causation and remoteness. There were findings of fact to that effect in this case: see e.g. *Griffiths TJ* [362] CAB 189 ("...if you cannot see a Dreaming site, they will have trouble telling the young children") and [363] CAB 190 ("...the effects of those acts have ongoing present day repercussions"). There is nothing unusual in a court assessing an amount in present dollar terms to compensate for future loss caused by a past event. If such loss can be established and quantified, it is consistent with the objects of the *Native Title Act* and with the requirement in s 51(1) that compensation be on 'just terms', that it be awarded. In this case it was also consistent with rule 9(2)(e) of Schedule 2 to the LAA, which the primary judge was entitled to, and did, take into account in accordance with s 51(4) of the *Native Title Act*: *Griffiths TJ* [368]-[369] CAB 191-192.

81. If the Commonwealth submission were accepted, it would follow that not only would loss suffered by future generations be excluded from consideration, but presumably so would loss suffered by persons who were alive at the time of the compensable act but who have since died. The compensation would thus be a 'snapshot in time' based on the effect on the present persons who would, but for extinguishment, have been the native title holders, rather than compensation for "any [i.e. all] loss, diminution, impairment or other effect of the act on [the native title holders'] native title rights and interests" as required by s 51(1).

82. For completeness, the NTRB Interveners note that, firstly, only one compensation claim can be brought in respect of a particular compensable act. Once the compensation is

determined and paid, the liability of the Territory is forever discharged. That follows from ss 49(a) and 61(1) of the *Native Title Act*. Secondly, a corollary of saying that compensation can be assessed by reference to future generations but that it is paid once to a finite group who bring the claim, is that the recipients of the compensation may owe duties to those future members in relation to the compensation award.[87] Section 94 of the *Native Title Act* accommodates that to some extent. It is unnecessary to explore this further in these proceedings. Thirdly, the effect on future generations of the loss of the utilitarian aspects of the extinguished native title was, correctly, not taken into account in assessing economic loss because that component of the compensation was assessed by reference to freehold value. As freehold exists in perpetuity, effects on future generations are encompassed within the freehold value.

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$1.3m manifestly excessive (Territory ground 4.4; Commonwealth ground 8)

83. The primary judge's assessment was based on consideration of a large body of evidence. This included evidence, which his Honour accepted, that "the loss of and damage to country caused emotional, gut-wrenching pain and deep or primary emotions" (*Griffiths TJ* [350] CAB 187). The NTRB Intervenors submit that, in light of the findings made by the primary judge, and the beneficial objects of the *Native Title Act* as discussed at paragraphs 26-27 above, $1.3 million could not be considered a manifestly excessive assessment of compensation on just terms.

20 84. This was the first assessment of native title compensation. As the Full Court found (*Griffiths FFC* [395]-[396] CAB 381-382), the moral sense of the community is a relevant touchstone. See also the discussion of the relevance of general standards prevailing in the community to the assessment of compensation for discrimination in *Richardson v Oracle Corporation Australia Pty Ltd*.[88] As the Full Court recognised in that case, community standards in relation to compensation awards for pain and suffering have evolved over time and significant awards are now made in various contexts. The Preamble to the *Native Title Act* refers to the disadvantage suffered by Aboriginal people as a result of dispossession and states that the Australian people intend to rectify the consequences of past injustice. See also the recognition by this Court in *Mabo (No 2)*

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87 See for example *Gebadi v Woosup (No 2)* [2017] FCA 1467.

88 *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; 223 FCR 334 at [73]-[118] (Kenny J, with whom Besanko and Perram JJ agreed on that issue).

that "the action of governments [has] made many of the indigenous people of this country trespassers on their own land".[89] It is consistent with the statutory scheme that an award of compensation for non-economic loss, where justified by the evidence, be a substantial sum which represents an acknowledgment by the Australian legal system of the spiritual and cultural connection of Aboriginal people with their traditional country and the profound effect that the withdrawal of legal recognition of that relationship through extinguishment of native title has had on the Claim Group.

85. While $1.3 million is a substantial sum, it is, as the Full Court observed, close to the median price of a single residential house in some Australian cities. It is hardly a large amount of money in absolute terms. Australian courts regularly award multi-million dollar sums to individual plaintiffs, including in respect of matters such as defamation. The primary judge mentioned that the assessment for non-economic loss took into account that the Claim Group had a communal entitlement.[90] This is an important consideration. It should also be borne in mind that in this case economic loss was assessed in relation to some, but not all, of the compensable acts. There was no economic loss assessment, for example, for the construction of water tanks on the dingo dreaming site. All parties accept that there should be substantive compensation for that act.

86. Nor is the total compensation awarded manifestly excessive, particularly where that figure includes a significant amount by way of interest which is not disputed by the government parties and intervenors. Although Commonwealth Submission [3] is only by way of introduction, the fact that in the Commonwealth's view the award in this case "might be thought to set a very high benchmark" does not bespeak error. The size of the award in this case was assessed having regard to its particular facts; other cases with different facts will have different outcomes. In particular, the general land values in other cases will be different (as to which see paragraph 34 above) and the connection of other groups to their country will be different.

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89 *Mabo (No 2)* at 69 (Brennan J). That decision forms the background to the *Native Title Act*: *Ward (HC)* at [16].

90 *Griffiths TJ* [301] CAB 175, [307] last sentence 176, [309] first sentence 176, [316] 177, [443] 209.

Part V: Length of oral argument

87. The NTRB Intervenors estimate that they will require 30 minutes for presentation of their oral argument.

Dated: 18 May 2018

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