NORTHERN TERRITORY OF AUSTRALIA v MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES OF THE NGALIWURRU AND NUNGALI PEOPLES & ANOR (D1 of 2018)

COMMONWEALTH OF AUSTRALIA v MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES OF THE NGALIWURRU AND NUNGALI PEOPLES & ANOR (D2 of 2018)

MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES OF THE NGALIWURRU AND NUNGALI PEOPLES v NORTHERN TERRITORY OF AUSTRALIA & ANOR (D3 of 2018)

Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 106

Date of judgment: 20 July 2017

Special leave granted: 16 February 2018

These three appeals, being heard together, arise from the Full Federal Court appeal as to the calculation of compensation in the "Timber Creek" litigation. The Full Court's decision marks the first time an Australian court has been required to consider the principles applicable to the calculation of compensation for the doing of acts inconsistent with native title. Compensation on just terms is required under the *Native Title Act 1993* (Cth) ('NTA") for both the doing of future acts that affect native title as well as the validation of historically invalid acts. Thus this is the first time these compensation provisions have come before the High Court.

The Timber Creek litigation has had a long history: it commenced when contested native title claims were made in 1999 culminating in a judgment in 2006 followed by an appeal in 2007 in which it was held that native title claims had been established. The subject compensation proceedings were then commenced in 2011, with two judgments on liability for the payment of compensation in 2014 and 2015 and on quantum on 24 August 2016. The Full Court gave judgment as to the amount of compensation on appeal in July 2017. It is from the ensuing orders of the Full Court made 9 August 2017 that these appeals have been lodged.

The Ngaliwurru and Nungali peoples ("the Claim Group") sought compensation from the Commonwealth of Australia ("the Commonwealth") and the Northern Territory ("the Territory") under s 51(1) of the NTA. This was as a result of the doing of 53 acts on an area of 1.27 km^2 inconsistent with their recognised native title rights over an area of 23.62 km^2 in the town of Timber Creek. Timber Creek is about half-way between Katherine and Kununurra in a remote part of the Northern Territory. It has a population of approximately 230 people, comprising about two thirds Indigenous people, principally native title holders.

The primary judge in the native title proceedings had found that a historical pastoral lease granted on 20 June 1882 was effective at common law to extinguish the native title right to control access to the land that would later be proclaimed as the town of Timber Creek. As a result, the native title holders had not enjoyed a right to *exclusive* possession since 1882. Accordingly, the compensable acts (being those which occurred between 1980 and 1996) for which compensation was sought were acts that had extinguished or impaired "*non-exclusive*" native title. The acts comprised various grants of tenure or the construction of public works by the Territory which impaired or extinguished native title rights or interest within the town of Timber Creek. The land in question is land over which the Claim Group holds only *non-exclusive* native title.

The Claim Group also holds *exclusive* title over 86% of the town of Timber Creek in addition to *freehold* title over 1,461 km^2 adjoining the town under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

At first instance Mansfield J awarded compensation in the amount of $3,300,661, comprising $512,400 for the economic value of the extinguished native title rights, $1,488,261 in interest and a solatium payment of $1,300,000 for non-economic/intangible losses arising from the loss or diminution of the native title rights. On appeal to the Full Court of the Federal Court, the award was reduced to a total of $2,899,446, with the economic loss component reduced to $416,325 and the interest component commensurately reduced.

The solatium component was not altered, the Full Court noting that Mansfield J's calculation of the award for solatium was not affected by error. The Full Court recognised the difficulty the calculation of an award of solatium for loss of native title rights poses at common law and that the process inevitably requires some "instinctive synthesis", borrowing from the language of sentencing law. This involves attempting to identify and quantify the various different types of loss which Indigenous peoples have suffered as a result of the interference with native title rights in light of the Indigenous peoples' connection with the land.

The appeals brought by the Commonwealth, the Territory and the Claim Group seek in effect to re-open all aspects of the Full Court's decision. They raise issues as to the calculation of the following components of the award of compensation:

1. Economic loss
2. Interest
3. Non-economic loss (solatium)

The States of South Australia, Queensland, Western Australia and two native title organisations in Western Australia (Central Desert Native Title Services Limited and Yamatji Marlpa Aboriginal Corporation) intervened in the Court below and are Intervenors in these proceedings also. Queensland, South Australia and Western

Australia have largely made common submissions, essentially in support of the position of the Commonwealth and the Territory in the proceedings. The fourth and fifth Intervenors have made submissions in support of the Claim Group.

Section 78B Notices were filed by the Claim Group in each of these appeals. There were no further interventions by any Attorneys-General of the States or Territories in response to those Notices.

The Commonwealth argues that the award of compensation of $2,899,445 over what is only a small proportion of the total land available to the Claim Group might be thought to set a very high benchmark in circumstances where the approach to compensation adopted in this case can be expected to be applied to vastly larger and also to less remote areas of land.

As to economic loss, it is common ground that the freehold market value provides a point of reference for the assessment of the economic value of native title rights and interests, including those which are *non-exclusive.*

Although the Full Court accepted the trial judge's use of the freehold value of the land as a "benchmark" for the calculation of compensation, the Full Court considered that the inalienability of the native title rights, and their *non-exclusive* nature meant that the rights had been "overvalued" by calculating compensation at 80% of the land's freehold value. The Full Court assessed the loss at 65% of the freehold value.

In the High Court the Claim Group argues that its rights should be assessed as equivalent to the freehold market value of the land. The Commonwealth contends that the rights should have been valued at no more than 50% of freehold. The Territory contends that the rights should have been valued in accordance with the methodology proposed by the economist, Wayne Lonergan, or alternatively, at no more than 50% of freehold value.

As to interest, it is common ground that the compensation award should incorporate an amount for pre-judgment interest on the economic loss component of the award, and that the interest should run from the date of extinguishment (when the compensable act was done) until the date of judgment. The trial judge awarded simple interest on the economic loss component calculated at the rates prescribed in Federal Court Practice Note CM16, which provided for interest at 4% above the RBA cash rate in the previous period. This reflected the terms proposed by the Commonwealth and the Territory. At the trial the Claim Group argued for pre-judgement interest to be compounded to reflect a median superannuation return of 10.4% under a managed superannuation fund model.

As to non-economic loss, it is common ground that the award should contain a component reflecting intangible disadvantage. The trial judge held that it was appropriate to adopt the term "solatium" to describe this compensation component as it represents the loss or diminution of connection or traditional attachment to the

land. The Territory and the Commonwealth contend that the award of $1,300,000 for solatium failed to take proper account of the extensive existing native title rights and took into account non-compensable developments. The Territory seeks that the award for solatium be reduced to 10% of the economic loss amount. The Commonwealth submits that the sum of $230,000 should be awarded for solatium.

The grounds of appeal of the Northern Territory and the Commonwealth include:

1. That the Full Court's assessment, that the economic value of the non–exclusive native title rights should be 65% of the freehold value of the relevant land, was erroneous or manifestly excessive.

2. That the Full Court erred in falling to find that the primary judge had erred in awarding interest as part of the compensation, rather than as interest on the compensation.

3. The Full Court erred in failing to find that the primary judge's solatium award of $1.3 million was manifestly excessive.

The grounds of appeal of the Claim Group include:

1. That the Full Court, and the trial judge, when having regard to the market value of the land, should have held that the amount be assessed by reference to the freehold market value of the land, without reduction.

2. The Full Court erred in allowing only statutory interest on compensation under s 51A of the *Federal Court of Australia Act 1976* (Cth) calculated on a simple interest basis under Practice Note CM16.