

IN THE HIGH COURT OF AUSTRALIA	IN THE HIGH COURT OF AUSTRALIA	IN THE HIGH COURT OF AUSTRALIA
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
and	and	and
ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	NORTHERN TERRITORY OF AUSTRALIA First Respondent
COMMONWEALTH OF AUSTRALIA Second Respondent	NORTHERN TERRITORY OF AUSTRALIA Second Respondent	COMMONWEALTH OF AUSTRALIA Second Respondent
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 THE ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA (THIRD INTERVENOR)

Date of Document: 20 April 2018

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PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Western Australia (**Western Australia**) intervened in the Full Court of the Federal Court pursuant to s 78A of the *Judiciary Act 1903* (Cth), and pursuant to s 78A(3) is taken to be a party to these appeals. Insofar as Western Australia seeks to make submissions in relation to non-constitutional issues, it relies upon the matters set out in Part III.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

- 10 3. Having intervened pursuant to s 78A, and being taken to be a party to the appeals, Western Australia does not require leave to intervene. However, for the reasons set out below, it is not necessary for the Court to consider the constitutional matter in relation to which Western Australia intervened as of right in the Full Court, namely whether the operation of any provision of the *Native Title Act 1993* (Cth) (*Native Title Act*) would result in an acquisition of property within the meaning of s 51(xxxi) of the *Constitution*.
4. Nevertheless, the general principles in relation to the assessment of compensation in relation to the extinguishment of native title rights and interests are of significance to Western Australia, having regard to current and future claims for
20 compensation against the State for extinguishment of native title. Western Australia seeks to make limited submissions with respect those general principles insofar as they arise in these appeals.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

5. The relevant legislative provisions as they existed at the relevant time, and as amended, are set out in Annexure A.

PART V: SUBMISSIONS

Matters not raised in these appeals

6. The submissions outlined at [7]-[13] below, are common submissions as between the Attorneys-General for Queensland, South Australia, and Western Australia.
- 30 7. The core provision of the *Native Title Act*, Part 2, Division 5, upon which the parties conducted the proceedings below, is s 51(1). It provides that the

entitlement to compensation under Divisions 2-4 is "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".

8. The relevant ancillary provision of s 51 is subsection (4) which permits (but does not require) the court which is determining compensation on just terms to have regard to any principles or criteria set out in the relevant compulsory acquisition law (here the *Lands Acquisition Act* (NT) (*LAA*)).
9. Section 51A(1) limits or caps the compensation otherwise payable by operation of s 51 by providing that the total compensation payable under Part 2, Division 5 for an act that extinguishes all native title must not exceed the amount that would be payable if the extinguishing act were instead a compulsory acquisition of a freehold estate. By section 51A(2), the limit imposed by s 51A(1) is subject to s 53 which preserves an entitlement to compensation on just terms where necessary to ensure constitutional validity. The Northern Territory did not rely upon the limit in s 51A at trial or on appeal.
10. Western Australia applied for leave to intervene in the Full Court to make submissions that s 51A of the *Native Title Act* applied to limit the compensation payable by the Northern Territory to the amount that would have been payable for the compulsory acquisition of a freehold estate in the land. Western Australia also submitted that, if the entitlement under the *Native Title Act* to pay compensation on just terms required the payment of any further amount above the statutory cap, that was payable by the Commonwealth under s 53. The submissions which Western Australia wished to make in the Full Court were not made by any party or intervener at first instance. As the Northern Territory had not relied upon s 51A, the Full Court recorded that the Territory had agreed that it would pay whatever compensation is awarded. In those circumstances, the Full Court refused Western Australia's application for leave to intervene to advance those arguments¹.
11. In those circumstances, it is submitted that it is not necessary and would not be appropriate for this Court to consider or decide the issues identified in paragraph 10 above.

¹ *Northern Territory v Griffiths* [2017] FCAFC 106 (*Griffiths - Full Court*) per North ACJ, Barker & Mortimer JJ at [462]-[463]. (CAB 402-3)

12. Similarly, because it was not necessary for the Full Court to consider the constitutional issue whether the operation of any provision of the *Native Title Act* would result in a s 51(xxxi) acquisition of property (and if so whether the acquisition was other than on s 51(xxxi) just terms)², it is submitted that it is not necessary and would not be appropriate for this Court to consider or decide that issue.
13. The operation of s 51A, and therefore s 53, raises an interest on the part of the States which was not dealt with in the proceedings below as a consequence of the Northern Territory not having relied upon s 51A. Accordingly it is submitted that the determination of those issues should await a case in which they are squarely and properly raised.
14. For the same reason, Western Australia adopts Queensland's submissions at [87]-[92] in relation to the issue as to whether interest should be awarded *on*, or *as*, compensation.
15. As a result of paragraphs [7]-[14] above, Western Australia limits its submissions to:
- (a) The nature of extinguishment of native title under the *Native Title Act*;
 - (b) The significance of the expression "compensation" in Part 2 of the *Native Title Act*;
 - (c) The significance of the *sui generis* nature of native title; and
 - (d) The relevance of freehold value to the assessment of compensation under the *Native Title Act*.
16. Before turning to those issues, it is necessary to identify certain findings of the learned Trial Judge and Full Court to put them in context.

Findings of the Full Court and Trial Judge

17. The learned Trial Judge and Full Court, correctly with respect, proceeded on the basis that compensation under the *Native Title Act* is for "any loss, diminution, impairment or other effect" of the compensable acts on the particular non-exclusive native title rights and interests determined to have existed in relation to the land or waters immediately prior to when the relevant compensable act was

² *Griffiths - Full Court* per North ACJ, Barker & Mortimer JJ at [458]. (CAB 401)

done³.

18. The compensable acts were done by the Northern Territory between 1980 and 17 December 1996. They comprised forty-eight past acts⁴ validated by the *Validation (Native Title) Act* (NT) on 10 March 1994⁵ and five⁶ intermediate period acts validated by that same Act as amended by the *Validation of Titles and Actions Amendment Act 1998* (NT) on 1 October 1998. Many of the compensable acts are also previous exclusive possession acts.
19. Fifty of the compensable acts resulted in the extinguishment of native title⁷. The relevant effect on native title for the purposes of s 51(1) of the *Native Title Act* is their loss. Compensation for that loss was payable by the Northern Territory under s 23J of the *Native Title Act*.
20. The other three compensable acts⁸ resulted in the application of the non-extinguishment principle⁹ so that native title continues to exist but is of no effect for the duration of the compensable act. The relevant effect on native title for the purposes of s 51(1) of the *Native Title Act* is their diminution or impairment. Compensation for that diminution or impairment was payable by the Northern Territory under s 20 of the *Native Title Act*. However, the primary judge found that, because of their nature and extent, these three compensable acts had an effect that could be equated to extinguishment¹⁰. That finding was not challenged on appeal.
21. For the purposes of assessing compensation, it is appropriate for this Court to proceed on the assumption that all compensable acts effected an "extinguishment" of native title. The relevant compensation, accordingly, was for "extinguishment" of native title.

³ *Native Title Act*, s 50(1). The learned Trial Judge relied on the approved determination of native title previously made by the Full Court of the Federal Court in *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391: see *Griffiths v Northern Territory (No 3)* (2016) FCA 900 (*Griffiths*) per Mansfield J at [14]. (CAB 106)

⁴ Acts 1-34, 36, 40, 41, 43-46, 47, 48, 49, 56-59.

⁵ The Act was then known as the *Validation of Titles and Actions Act 1994* (NT).

⁶ Acts 50-54.

⁷ Acts 2-34, 40, 43-46, 47, 48, 49, 56-59.

⁸ Acts 1, 36 & 41. These were category D past acts.

⁹ *Native Title Act*, s 238.

¹⁰ *Griffiths* per Mansfield J at [392]. (CAB 196-197)

The nature of "extinguishment" of native title

22. Extinguishment of native title is "the obverse of recognition": the native title rights and interests cease to be recognised by the common law and are no longer native title rights and interests within the meaning in s 223 of the *Native Title Act*¹¹. The requirement of recognition by the common law in s 223(c) is no longer satisfied.
23. The effect of extinguishment, however, is not, or at least not necessarily, that native title rights and interests are extinguished for the purposes of the traditional laws acknowledged and traditional customs observed by the native title holders¹².
- 10 24. So, for example, the Martu People are native title holders in relation to a vast area of the Great Sandy Desert and Little Sandy Desert in the Pilbara region of Western Australia. They could not, however, be recognised as native title holders to that part of their country comprising the Karlamilyi National Park because of a vesting of that area under s 33 of the *Land Act 1933* (WA) in the National Parks and Nature Conservation Authority on 22 April 1977¹³. In reasons for decision accompanying the consent determination reported as *James on behalf of the Martu People v State of Western Australia* French J (as his Honour then was) found that the extinguishment did not affect the Martu People's traditional attachment to the land¹⁴:
- 20 "There are certain areas that are excluded from the determination, in some cases because native title is thought to have been extinguished by operation of the Act or by operation of the common law. It is on that basis that the [Karlamilyi] National Park is not included in the determination. This simply means that native title in such cases cannot be recognised by the Courts. There is a limitation on the recognition which can be granted under the *Native Title Act*. The relationship of the people to their country in those areas is not changed by the limits that the Act or the common law place on recognition. If it is their country under their traditional law and custom it remains so under their law and custom
- 30 whatever the Act or the common law say about recognition."

¹¹ *Akiba v Commonwealth* [2013] HCA 33; (2013) 250 CLR 209 per French CJ & Crennan J at 219-20 [10].

¹² *Akiba v Commonwealth* [2013] HCA 33; (2013) 250 CLR 209 per French CJ & Crennan J at 219-20 [10].

¹³ See *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 (*Ward – High Court*) per Gleeson CJ, Gaudron, Gummow & Hayne JJ at 146-9 [249]-[258].

¹⁴ *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 per French J at [12].

25. Similarly, the Court in *Fejo v Northern Territory*¹⁵ recognised that acknowledgement and observance of traditional laws and customs (including those which are productive of rights under traditional laws and customs) may continue long after recognition by the common law has ceased. Their Honours found complete extinguishment of native title by a grant in fee simple in 1882 despite the "fact of continued connection with the land"¹⁶. It was in this context that the Court held:

10 "The underlying existence of the traditional laws and customs is a necessary pre-requisite for native title but their existence is not a sufficient basis for recognising native title."¹⁷. (emphasis in original)

26. In this matter it may be accepted that, despite the history of development of the town of Timber Creek, the Ngaliwurru and Nungali Peoples (**Native Title Party**) would continue to satisfy both s 223(a) and (b) of the *Native Title Act* in relation to the whole of the area covered by the compensable acts.

27. The effect of extinguishment is that rights possessed under the traditional laws acknowledged and traditional customs observed are no longer enforceable under the common law system¹⁸ and, in turn, the *Native Title Act*. It is that effect, and that loss, which ultimately is compensable under the *Native Title Act*.

28. The effect of withdrawal of recognition is highly fact-specific. That is, in part, because of the *sui generis* nature of native title (discussed in more detail below) which means the circumstances of its extinguishment are as unique as those surrounding its recognition.

29. The effect of the extinguishment of native title, it is submitted, will therefore depend on the nature and extent of the native title rights and interests lost, seen in the context of the rights and interests otherwise possessed under the traditional laws acknowledged and the traditional customs observed. Also, the nature of the extinguishing act is relevant to its effect and that will vary depending on the circumstances of the particular case.

30. The extinguishment of native title may have had little or no effect at all, even

¹⁵ *Fejo v Northern Territory* [1998] HCA 58; (1998) 195 CLR 96.

¹⁶ *Fejo v Northern Territory* [1998] HCA 58; (1998) 195 CLR 96 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ at 128 [46].

¹⁷ *Fejo v Northern Territory* [1998] HCA 58; (1998) 195 CLR 96 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ at 128 [46].

¹⁸ *Wik Peoples v Queensland* (1996) 187 CLR 1 per Toohey J at 126-7.

where the rights lost included the right to control access.

31. Take, for example, an area of remote desert where traditional attachment is strong but where native title was extinguished over a large area by a vesting of a reserve under s 33 of the *Land Act 1933* (WA)¹⁹, the purpose of which is "Use and Benefit of Aboriginal Inhabitants". A native title determination application made over the area, claiming the benefit of s 47A of the *Native Title Act* to disregard any prior extinguishment by the vesting of the reserve, might result in a determination that native title exists and comprises possession, occupation, use and enjoyment to the exclusion of all others. In those circumstances, the effect of the extinguishment by the vesting of the reserve will have been minimal.
- 10
32. Indeed, the statutory revival of native title rights and interests by operation of ss 47, 47A and 47B of the *Native Title Act* may overcome all effects of extinguishment. An example is to be found in this matter: the Court below upheld the Commonwealth's appeal in relation to Lot 47, finding that the Native Title Party "ceased to suffer any loss from the compensable act" after 28 August 2006 when the Court determined that s 47B applied to that area²⁰. That aspect of the decision is not challenged in the appeals.
33. By contrast, a future act involving the compulsory acquisition of exclusive possession native title rights and interests in relation to a much smaller area for the purpose of conferring a right to mine which authorises the destruction of a culturally significant and sensitive place would likely have a much greater effect.
- 20
34. It is this range of effects that attracts the entitlement to compensation on just terms under the scheme provided by Part 2, Division 5 of the *Native Title Act*²¹.
35. It follows that the effect of extinguishment must be considered on a case-by-case basis.
36. Generally, as in the present case, the effect of extinguishment has been that particular native title rights and interests have been extinguished in relation to particular land or waters comprising only part of a group's traditional country. In those circumstances it is relevant to consider the effect of extinguishment having regard to the geographical extent of the compensable acts in the context of the whole of the area with which the group is traditionally connected. Of particular
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¹⁹ See *Ward - High Court* per Gleeson CJ, Gaudron, Gummow & Hayne JJ at 146-7 [249]-[258].

²⁰ *Griffiths - Full Court* per North ACJ, Barker & Mortimer JJ at [233]. (CAB 339)

²¹ See also Northern Territory submissions at [159].

relevance is the extent to which those same rights and interests continue to be possessed under traditional laws and customs and are otherwise exercisable as of right elsewhere. In this regard, Western Australia respectfully adopts the Northern Territory's submissions at [152]-[155] and the Commonwealth's submissions at [120]-[125].

The significance of the expression "compensation" in Part 2 of the *Native Title Act*

37. It is significant, for the purposes of construing Part 2 of the *Native Title Act*, that the Act uses the expression "compensation".

38. In that regard, "compensation" has a well understood meaning, in the context of the acquisition of, and diminution of, interests in land. As Dixon J stated in *Nelungaloo Pty Ltd v Commonwealth*²²:

"Now "compensation" is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived.

20 Compensation prima facie means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it. You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes Equally you exclude any diminution of value arising from the same cause. The hypothesis upon which the inquiry into value must proceed is that the owner had not been deprived by the exercise of compulsory powers of his ownership and of his consequent rights of disposition existing under the general law at the time of acquisition."²³ (citations omitted)

39. This understanding of "compensation" has important consequences in the present case.

40. First, the value of the interest acquired by the Northern Territory was irrelevant,

²² *Nelungaloo Pty Ltd v Commonwealth* [1947] HCA 58; (1947) 75 CLR 495 per Dixon J at 571-2.

²³ See also *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; (2008) 233 CLR 259 per Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ at 271 [34].

as the Full Court held²⁴. In this regard, Western Australia respectfully adopts the Commonwealth's submissions at [44]-[47] and Northern Territory's submissions at [39]-[42].

41. Secondly, the focus on "recompense for loss" will be relevant to the approach to the awarding of interest. An award of expenses incurred, and opportunity costs arising from money paid away or withheld, based on the principles in *Hungerfords v Walker*²⁵, requires proof of loss that was foreseeable and not too remote²⁶. Although the Native Title Party did not argue for compound interest on that basis, the principles in *Hungerfords v Walker* demonstrate that compensatory damages must be evidenced by actual loss²⁷.
- 10
42. Western Australia otherwise respectfully adopts the Commonwealth's submissions at [74]-[94] in relation to the interest claim.

The *sui generis* nature of native title

43. As noted above, the highly "fact-specific" effect of extinguishment, is, in part, because of the *sui generis* nature of native title itself.
44. Western Australia respectfully adopts the Northern Territory's submissions at [44] in relation to the *sui generis* nature of the native title rights and interests extinguished by the compensable acts.
45. As native title is *sui generis* and highly fact-specific²⁸, the assessment of compensation for its extinguishment must proceed by first having regard to the nature and extent of the particular rights lost in relation to the particular land or waters concerned. There may be more than one right or interest as well as several *kinds* of rights and interests in relation to land that exist under traditional law and custom²⁹.
- 20
46. The *sui generis* nature of the native title, it is submitted, has an even broader significance for the general approach to the assessment of compensation.

²⁴ *Griffiths - Full Court* per North ACJ, Barker & Mortimer JJ at [88]-[92]. (CAB 300-301)

²⁵ *Hungerfords v Walker* [1989] HCA 8; (1989) 171 CLR 125.

²⁶ *Hungerfords v Walker* [1989] HCA 8; (1989) 171 CLR 125 per Mason CJ & Wilson J at 145-6; Brennan & Deane JJ at 152.

²⁷ *Griffiths - Full Court* per North ACJ, Barker & Mortimer JJ at [163]. (CAB 320)

²⁸ *Commonwealth v Yarmirr* [1999] FCA 1668; (1999) 101 FCR 171 per Beaumont & von Doussa JJ at 184 [16]; see also *Wik Peoples v Queensland* (1996) 187 CLR 1 per Gummow J at 169; *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 per Gummow J at 396 [109].

²⁹ *Ward - High Court* per Gleeson CJ, Gaudron, Gummow & Hayne JJ at 95 [95].

47. In that regard, it is respectfully submitted that the distinction drawn by the learned Trial Judge (and indeed the parties) in the present case between "economic" and "non-economic" loss, while of some conceptual use, tended to divert attention from the nature of the task prescribed by the *Native Title Act*. Native title rights and interests find their origin in traditional laws and customs and reflect connection with the land which is essentially spiritual³⁰, but also cultural and social³¹. The rights are inalienable. As the Full Court below recognised, there is much scope for error if the assessment of loss proceeds by applying common law concepts involving elements of loss that are divorced from the nature of the rights concerned. The adoption of principles or criteria in compulsory acquisition legislation in relation to "non-economic" loss compounds the difficulty: the Court below found that such reliance "led [the learned Trial Judge] into error in a number of respects"³².
- 10
48. For this reason, Western Australia joins with South Australia in submitting, in support of the Full Court's observations, that a more holistic approach is preferable to "bifurcated" approach between "economic" and "non-economic" loss.
49. In particular, it is respectfully submitted that the value of the loss arising from the extinguishment of the Native Title Party's non-exclusive native title rights and interests should not have been assessed by first equating the rights with those held under an estate in fee simple.
- 20
50. *Firstly*, native title as defined in the *Native Title Act* is not a single set of rights relating to land that is analogous to a fee simple³³. In that regard, at one level, it is submitted, the freehold market value of land is an entirely arbitrary measure for assessing the value of the loss of native title rights and interests, because of the *sui generis* nature of native title. It also has the potential to lead to inequity between claimant groups: native title holders in more settled areas would receive a comparative windfall compared to those in more remote areas. For large remote

³⁰ *Ward - High Court* per Gleeson CJ, Gaudron, Gummow & Hayne JJ at 64-5 [14].

³¹ *Yanner v Eaton* [1999] HCA 53, 69; (1999) 201 CLR 351 per Gleeson CJ, Gaudron, Kirby & Hayne JJ 373 [38].

³² *Griffiths - Full Court* per North ACJ, Barker & Mortimer JJ at [144]. (CAB 315)

³³ *Ward - High Court* per Gleeson CJ, Gaudron, Gummow & Hayne JJ at 93 [88]-[90]. Accordingly, non-exclusive native title rights and interests are usually expressed by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.

areas, it may not be possible to ascribe a freehold market value to land at all.

51. *Secondly*, the rights here comprised non-exclusive rights only and did not include a right to control access.

52. *Thirdly*, the analogy with freehold market value is inapt because native title is inalienable.

53. *Fourthly*, contrary to the Native Title Party's Ground 2, the *Racial Discrimination Act 1975* (Cth) does not operate so as to require the loss to be assessed by reference to the freehold market value of the land, without reduction. In that regard, Western Australia respectfully adopts the Commonwealth's and Northern Territory's submissions in answer to the Native Title Party's reliance on the *Racial Discrimination Act 1975* (Cth)³⁴.

Freehold value only directly relevant to s 51A

54. For the reasons set out above, in the present case, which focusses only upon s 51 of the *Native Title Act*, the freehold value of the land can only have been indirectly relevant to the assessment of compensation, by providing an analogy with other interests in land (from which adjustments might be made to reflect the differences).

55. Nevertheless, in a case in which s 51A of the *Native Title Act* is relied upon, the freehold market value of land (and the compensation payable for the acquisition of such an interest in land) is made **directly** relevant. That is because, in that case, by reference to the amount payable on the compulsory acquisition of a freehold estate, s 51A applies a statutory limit on the total compensation payable to native title holders for all circumstances of extinguishment, subject only to s 53. As stated above, the extent to which s 53 would operate in the circumstances in which s 51A is applied does not arise in these appeals.

56. It is sufficient to note that there may be circumstances in which the compensation payable on the compulsory acquisition of a freehold estate will be directly relevant, and, Western Australia submits, controlling.

57. This distinction is particularly evident in relation to what is referred to by the Full Court, and the parties, as "solatium".

58. In this regard, it is submitted, a distinction must be drawn between the

³⁴ Commonwealth's submissions at [38]-[43]; Northern Territory's submissions at [37]-[38].

circumstances in which the principles applicable to awards of "solatium" will be directly relevant to the task of the Court under Part 2, Division 5 of the *Native Title Act*, and those in which it may be indirectly relevant.

59. The Northern Territory, for example, in contending that the award for "non-economic loss" should be 10% of the award for "economic loss", calls in aid the principle that awards for solatium for compulsory acquisition of other forms of title should be guided by "fairness and moderation"³⁵.

60. In that regard, the meaning of "solatium" is taken from its statutory context and the power to award solatium is discretionary³⁶. In the context of the *Land Acquisition and Compensation Act 1986* (Vic), for example, which allows for compensation for the "intangible and non-pecuniary disadvantages of acquisition", solatium has been described as "an expression apt to describe an award of some amount to cover inconvenience and in a proper case distress caused by compulsory taking"³⁷. As recognised in the authorities (and the statutory limits imposed on the solatium component in compensation awards in other jurisdictions³⁸), identification of solatium in this sense is modest and proportionate to the value of the acquired land, as assessed.

61. In that context, it is submitted, the principles in relation to "solatium" can apply only indirectly, by way of analogy with other forms of title. The solatium that might have been paid for an acquisition of a freehold estate is not necessarily to be equated to the compensation necessary to provide "just terms" for the effect on the intangible cultural and spiritual effects unique to the extinguishment of native title.

³⁵ Northern Territory's submissions at [156].

³⁶ In New South Wales compensation is for "non-financial disadvantage resulting from the necessity of the person to relocate his or her place of residence as a result of the acquisition": *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 60. In Victoria compensation is for the "intangible and non-pecuniary disadvantages of acquisition": *Land Acquisition and Compensation Act 1986* (Vic), s 44(1). In Western Australia compensation is for "the taking [of an interest in land] without agreement": *Land Administration Act 1997* (WA), s 241(8).

³⁷ *March v City of Frankston (No. 1)* [1969] VR 350 at 356. On the facts of that case it was found that solatium was not payable but the Court assessed solatium in the alternative at 5%, against a maximum of 10%, to compensate the claimants for the "nuisance and annoyance resulting from the disruption of their business and the trouble, caused them by the acquisition": see p. 358.

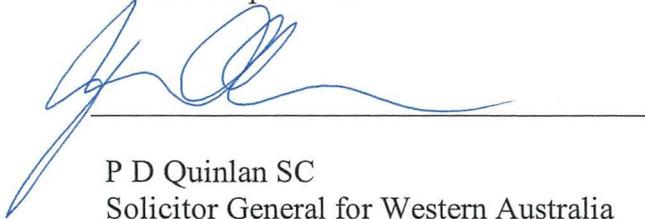
³⁸ See *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 60(2) (the maximum amount is \$15,000 or such higher amount as may be notified by the Minister); *Land Acquisition and Compensation Act 1986* (Vic), s 44(1) (solatium is capped at 10% of the market value of the land); *Land Administration Act 1997* (WA), s 241(8), (9) (compensation "for the taking without agreement" cannot be greater than 10% of the amount otherwise ordered unless exceptional circumstances exist).

62. In a case in which s 51A is relied upon, however, the appropriate "solatium" for the compulsory acquisition of a freehold estate would be **directly** relevant, and indeed, **controlling** as to the total compensation payable under that section. In such a case, it would be necessary to determine the compensation payable for the compulsory acquisition of a notional freehold estate under, for example, Part V, Division 1 of the *LAA* as in force when the compensable acts were done. That is an assessment of compensation on "just terms"³⁹ having regard to the rules set out in Schedule 2 to the *LAA* including rule 9 that provides for "intangible disadvantages". Any intangible disadvantages or solatium attaching to the value of the notional freehold estate assessed for the purposes of applying s 51A(1) is that payable under statute having regard to ordinary principles of land acquisition law⁴⁰. They include the principles of fairness and moderation applicable to the compulsory acquisition of a freehold estate.
- 10
63. As noted above, it is respectfully submitted that the value of the loss arising from the extinguishment of the Native Title Party's non-exclusive native title rights and interests should not have been assessed by first equating the rights with those held under an estate in fee simple. Nevertheless, in the circumstances of the present case, where s 51A was not relied upon, compensation payable for "intangible disadvantages" under the *LAA* for a freehold estate (which does not provide a statutory limit on compensation), became indirectly relevant by reason of s 51(4).
- 20

PART VI:LENGTH OF ORAL ARGUMENT

64. It is estimated that the oral argument for Western Australia will take 20 minutes.

Dated: 20 April 2018



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³⁹ *LAA*, s 5 & s 66(4).

⁴⁰ And in this respect, the Northern Territory's submissions at [156] would be determinative in a case where s 51A of the *Native Title Act* is pleaded and therefore enlivened.

ANNEXURE A

Relevant Constitutional Provisions And Legislation

COMMONWEALTH CONSTITUTION

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

- (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

10

NATIVE TITLE ACT 1993 (CTH)

20 Entitlement to compensation

Compensation where validation

- (1) If a law of a State or Territory validates a past act attributable to the State or Territory in accordance with section 19, the native title holders are entitled to compensation if they would be so entitled under subsection 17(1) or (2) on the assumption that section 17 applied to acts attributable to the State or Territory.

Compensation where no validation

- (2) Native title holders are entitled to compensation for the past act attributable to a State or Territory that, at the time when the claim for compensation is determined, has not been validated by the State or Territory in accordance with section 19.

20

Recovery of compensation

- (3) The native title holders may recover the compensation from the State or Territory.

States or Territories may create compensation entitlement

- (4) This section does not prevent a law of a State or Territory from creating an entitlement to compensation for a past act or for the validation of a past act.

Note: Paragraph 49(b) deals with the situation where there are multiple rights to compensation under Commonwealth, State and Territory laws.

30

23J Compensation

Entitlement

- (1) 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.

Commonwealth acts

- (2) If the act is attributable to the Commonwealth, the compensation is payable by the Commonwealth.

10

State and Territory acts

- (3) If the act is attributable to a State or Territory, the compensation is payable by the State or Territory.

47 Pastoral leases held by native title claimants

When section applies

- (1) This section applies if:
- (a) an application under section 61 is made in relation to an area; and
 - (b) when the application is made, a pastoral lease is held over the area by:
 - (i) any of the persons who made the application claiming to hold the native title or any other persons with whom they claimed to hold the title; or
 - (ii) a trustee, on trust for any of those persons; or
 - (iii) a company whose only shareholders are any of those persons.

20

Prior extinguishment to be disregarded

- (2) For all purposes under this Act in relation to the application, any extinguishment of the native title rights and interests by any of the following acts must be disregarded:
- (a) the grant of the lease itself;
 - (b) the creation of any other interest itself in relation to the area;
 - (c) the doing of any act under the lease or by virtue of holding the interest.

30

Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

Effect of determination

- (3) If the determination on the application is that the native title exists and is held by the persons mentioned in subparagraph (1)(b)(i), (ii) or (iii):

- (a) the determination does not affect:
- (i) the validity of the lease; or
 - (ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and
- (b) the non-extinguishment principle applies in relation to the grant of the lease and any other prior act affecting the native title; and
- (c) any person, trustee or company holding the lease as mentioned in subparagraph (1)(b)(i), (ii) or (iii) has no procedural rights as holder of the lease in relation to any act, in relation to the land or waters, to which Subdivision P of Division 3 (which deals with the right to negotiate) applies.

10

47A Reserves etc. covered by claimant applications

When section applies

- (1) This section applies if:
- (a) a claimant application is made in relation to an area; and
 - (b) when the application is made:
 - (i) a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
 - (ii) the area is held expressly for the benefit of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and
 - (c) when the application is made, one or more members of the native title claim group occupy the area.

20

Prior extinguishment to be disregarded

- (2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by any of the following acts must be disregarded:
- (a) the grant or vesting mentioned in subparagraph (1)(b)(i) or the doing of the thing that resulted in the holding or reservation mentioned in subparagraph (1)(b)(ii);
 - (b) the creation of any other prior interest in relation to the area, other than, in the case of an area held as mentioned in subparagraph (1)(b)(ii), the grant of a freehold estate for the provision of services (such as health and welfare services).

30

Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

Effect of determination

- (3) If the determination on the application is that the native title claim group hold the native title rights and interests claimed:
- (a) the determination does not affect:
 - (i) the validity of the grant or vesting or of the creation of the trust or reservation; or
 - 10 (ii) the validity of the creation of any other prior interest in relation to the area; or
 - (iii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and
 - (b) the non-extinguishment principle applies to the grant or vesting or the creation of the trust or reservation or any other prior interest.

Exclusion of Crown ownership of natural resources

- (4) For the purposes of this section, a reference to the creation of an interest in relation to an area does not include a reference to the creation of an interest that confirms ownership of natural resources by, or confers ownership of natural resources on, the Crown in any capacity.

10

20

47B Vacant Crown land covered by claimant applications

When section applies

- (1) This section applies if:
- (a) a claimant application is made in relation to an area; and
 - (b) when the application is made, the area is not:
 - (i) covered by a freehold estate or a lease; or
 - (ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or
 - (iii) subject to a resumption process (see paragraph (5)(b)); and
 - (c) when the application is made, one or more members of the native title claim group occupy the area.

30

Prior extinguishment to be disregarded

- (2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.

Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

Effect of determination

- 10 (3) If the determination on the application is that the native title claim group hold the native title rights and interests claimed:
- (a) the determination does not affect:
 - (i) the validity of the creation of any prior interest in relation to the area; or
 - (ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and
 - (b) the non-extinguishment principle applies to the creation of any prior interest in relation to the area.

Renewals and extensions of leases

- 20 (4) For the purposes of paragraph (1)(b), if, after a lease covering an area expires or is terminated, the lease is bona fide renewed, or its term is bona fide extended, the area is taken to be covered by the lease during the period between the expiry or termination and the renewal or extension.

Defined expressions

- (5) For the purposes of this section:
- (a) the **creation of a prior interest** in relation to an area does not include the creation of an interest that confirms ownership of natural resources by, or confers ownership of natural resources on, the Crown in any capacity; and
 - (b) an area is **subject to a resumption process** at a particular time (the **test time**) if:
 - (i) all interests last existing in relation to the area before the test time were acquired, resumed or revoked by, or surrendered to, the Crown in any capacity; and
 - (ii) when that happened, the Crown had a bona fide intention of using the area for public purposes or for a particular purpose; and
 - (iii) the Crown still had a bona fide intention of that kind in relation to the area at the test time.
- 30

50 **Bodies that may determine compensation**

Division exhaustive

- (1) A determination of the compensation may only be made in accordance with this Division.

Note: Such compensation is generally for acts that are validated or valid. Native title holders would ordinarily be entitled to compensation or damages for invalid acts under the general law. The Federal Court may be able to award such compensation or damages in proceedings in relation to the invalidity of the act: see subsection 213(2).

10

Applications to Federal Court

- (2) An application may be made to the Federal Court under Part 3 for a determination of the compensation.

Jurisdiction to hear appeals, to review etc. not affected

- (3) Nothing in this Division affects:
- (a) any jurisdiction of a court, person or body to hear appeals against, to review or otherwise to affect, a determination of compensation made in accordance with this Division; or
 - (b) the jurisdiction of the High Court.

20 51

Criteria for determining compensation

Just compensation

- (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is 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.

Acquisition under compulsory acquisition law

- (2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place.

30

Compensation where similar compensable interest test satisfied

- (3) If:
- (a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and
 - (b) the similar compensable interest test is satisfied in relation to the act;
- the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for

determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines *similar compensable interest test*).

Compensation not covered by subsection (2) or (3)

- (4) If:
- (a) neither subsection (2) nor (3) applies; and
 - (b) there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth) or for the State or Territory to which the act is attributable;
- the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria set out in that law for determining compensation.

10

Monetary compensation

- (5) Subject to subsection (6), the compensation may only consist of the payment of money.

Requests for non-monetary compensation

- (6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:
- (a) must consider the request; and
 - (b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a specified period, transfer property or provide goods or services in accordance with the recommendation.

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Where recommendation not complied with

- (7) If the person does not transfer the property or provide the goods or services in accordance with the recommendation, the person claiming to be entitled to the compensation may request the court, person or body to determine instead that the whole or the part of the compensation concerned is to consist of the payment of money.

30

Where recommendation complied with

- (8) If the person does transfer the property or provide the goods or services in accordance with the recommendation, the transfer of the property or provision of the goods or services constitutes full compensation for the act, and the entitlement to it is taken to have been determined in accordance with this Division.

51A Limit on compensation

Compensation limited by reference to freehold estate

- (1) The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.

This section is subject to section 53

- (2) This section has effect subject to section 53 (which deals with the requirement to provide “just terms” compensation).

10

53 Just terms compensation

Entitlement to just terms compensation

- (1) Where, apart from this section:
- (a) the doing of any future act; or
 - (b) the application of any of the provisions of this Act in any particular case; would result in a paragraph 51(xxxi) acquisition of property of a person other than on paragraph 51(xxxi) just terms, the person is entitled to such compensation, or compensation in addition to any otherwise provided by this Act, from:

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- (c) if the compensation is in respect of a future act attributable to a State or a Territory—the State or Territory; or

- (d) in any other case—the Commonwealth;

as is necessary to ensure that the acquisition is made on paragraph 51(xxxi) just terms.

Federal Court's jurisdiction

- (2) The Federal Court has jurisdiction with respect to matters arising under subsection (1) and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.

223 Native title

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Common law rights and interests

- (1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

- (2) Without limiting subsection (1), **rights and interests** in that subsection includes hunting, gathering, or fishing, rights and interests.

Statutory rights and interests

- 10 (3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression **native title** or **native title rights and interests**.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

Subsection (3) does not apply to statutory access rights

- (3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

Case not covered by subsection (3)

- 20 (4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):
- (a) in a pastoral lease granted before 1 January 1994; or
 - (b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

238 Non-extinguishment principle

Effect of references

- (1) This section sets out the effect of a reference to the non-extinguishment principle applying to an act.

Native title not extinguished

- 30 (2) If the act affects any native title in relation to the land or waters concerned, the native title is nevertheless not extinguished, either wholly or partly.

Rights and interests wholly ineffective

- (3) In such a case, if the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the rights and interests have no effect in relation to the act.

Rights and interests partly ineffective

- (4) If the act is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency.

Who the native title holders are

- 10 (5) Despite the fact that the native title rights and interests have no effect (as mentioned in subsection (3)) or have only limited effect (as mentioned in subsection (4)) in relation to the act, the persons who are entitled in accordance with the traditional laws and customs, as applying from time to time, to possess those rights and interests continue to be the native title holders, subject to Division 6 of Part 2 (which deals with the holding of native title on trust).

Complete removal of act or its effects

- (6) If the act or its effects are later wholly removed or otherwise wholly cease to operate, the native title rights and interests again have full effect.

Partial removal of act or its effects

- (7) If the act or its effects are later removed only to an extent, or otherwise cease to operate only to an extent, the native title rights and interests again have effect to that extent.

20 *Example of operation of section*

- (8) An example of the operation of this section is its application to a category C past act consisting of the grant of a mining lease that confers exclusive possession over an area of land or waters in relation to which native title exists. In such a case the native title rights and interests will continue to exist but will have no effect in relation to the lease while it is in force. However, after the lease concerned expires (or after any extension, renewal or re-grant of it to which subsection 228(3), (4) or (9) applies expires), the rights and interests again have full effect.

30 **LANDS ACQUISITION ACT (NT)**

5 Just terms

This Act shall be read so as to provide for the acquisition of land on just terms.

66 Assessment of compensation

- (1) Subject to this section, in assessing compensation under this Act, the Tribunal must have regard to, but is not bound by, the rules set out in Schedule 2.
- (2) The Chairperson of the Tribunal may, for the purpose of the assessment of compensation for land comprising or involving native title rights and interests, make rules modifying the rules set out in Schedule 2.

- (3) Where a claim is made for compensation in respect of the acquisition of native title rights and interests, the Tribunal must have regard to, but is not bound by, the rules set out in Schedule 2 as modified under subsection (2).
- (4) Nothing in this section derogates from the requirement that compensation under this Act is to be on just terms.

Schedule 2 Rules for the assessment of compensation

section 66

1. Value to the owner

10 Subject to this Schedule, the compensation payable to a claimant for compensation in respect of the acquisition of land under this Act is the amount that fairly compensates the claimant for the loss he has suffered, or will suffer, by reason of the acquisition of the land.

1A. Rules to extend to native title rights and interests

To the extent possible, these rules, with the necessary modifications, are to be read so as to extend to and in relation to native title rights and interests.

2. Market value, special value, severance, disturbance

Subject to this Schedule, in assessing the compensation payable to a claimant in respect of acquired land the Tribunal may take into account:

- 20 (a) the consideration that would have been paid for the land if it had been sold on the open market on the date of acquisition by a willing but not anxious seller to a willing but not anxious buyer;
- (b) the value of any additional advantage to the claimant incidental to his ownership, or occupation of, the acquired land;
- (c) the amount of any reduction in the value of other land of the claimant caused by its severance from the acquired land by the acquisition; and
- (d) any loss sustained, or cost incurred, by the claimant as a natural and reasonable consequence of:
 - 30 (i) the acquisition of the land; or
 - (ii) the service on the claimant of the notice of proposal,

for which provision is not otherwise made under this Act, other than costs incurred as a result of attending, participating in or being represented at consultations for the purposes of section 37(1) or mediation under section 37(4).

3. Market value for use other than existing use

If the amount referred to in rule 2(a) is determined upon the basis of a use for a purpose which is not the purpose for which the land was used on the date of acquisition, no amount shall be allowed under rule 2(d) in respect of any:

- (a) loss that would have been sustained; or
 - (b) costs that would have been incurred,
- 40 in adapting the land for use for that other purpose.

4. Circumstances peculiar to the claimant

For the purposes of rule 2(d), in determining whether a particular loss sustained, or cost incurred, by a claimant is a natural and reasonable consequence of:

- (a) the acquisition of the land; or
- (b) the service on the claimant of the notice of proposal,

the Tribunal shall take into account any circumstances peculiar to the claimant.

6. Determinable interests

If, at the date of acquisition, the interest of the claimant in the land was:

- (a) due to expire; or
- (b) liable to be determined,

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the Tribunal shall take into account any reasonable prospect of renewal or continuation of the interest, and the likely terms and conditions of that renewal.

7. Cost of acquiring other land

(1) If:

- (a) the acquired land:
 - (i) was, immediately before the date of acquisition, used for a purpose for which there is no general demand or market for land; and
 - (ii) but for the acquisition, would have continued to have been used for that purpose; and

20

- (b) the claimant has acquired, or genuinely intends to acquire, other land suitable for that purpose,

the Tribunal shall take into account, in place of the amount referred to in rule 2(a), an amount ascertained by adding:

- (c) the cost of acquiring the other land; and
- (d) the cost and losses incurred or likely to be incurred by the claimant as a result of, or incidental to, relocation, in each case calculated at the date when, in all the circumstances, it was or would be reasonably practical for the claimant to incur the cost or losses.

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(2) In assessing the amount of compensation under subrule (1) the Tribunal shall have regard to the amount, if any, by which the claimant has improved, or is likely to improve, his financial position by the relocation.

8. Matters not to be taken into account

The Tribunal shall not take into account:

- (a) any special suitability or adaptability of the acquired land for a purpose for which it could only be used:
 - (i) in pursuance of a power conferred by law; or
 - (ii) by the Commonwealth or the Territory, a statutory corporation to which the *Financial Management Act* applies, or a council constituted under the *Local Government Act*;

- (b) any increase in value of the acquired land resulting from its use or development contrary to law;
- (c) any increase or decrease in the amount referred to in rule 2(a) arising from:
 - (i) the carrying out; or
 - (ii) the proposal to carry out,the proposal; or
- (d) any increase in the value of the land caused by construction, after the notice of proposal was served on the claimant, of any improvements on the land without the approval of the Minister.

10

9. **Intangible disadvantages**

(1) If the claimant, during the period commencing on the date on which the notice of proposal was served and ending on the date of acquisition:

- (a) occupied the acquired land as his principal place of residence; and
- (b) held an estate in fee simple, a life estate or a leasehold interest in the acquired land, the amount of compensation otherwise payable under this Schedule may be increased by the amount which the Tribunal considers will reasonably compensate the claimant for intangible disadvantages resulting from the acquisition.

20

(2) In assessing the amount payable under subrule (1), the Tribunal shall have regard to:

- (a) the interest of the claimant in the land;
- (b) the length of time during which the claimant resided on the land;
- (c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land;
- (d) the period after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land;
- (e) the period during which the claimant would have been likely to continue to reside on the land; and
- (f) any other matter which is, in the Tribunal's opinion, relevant to the circumstances of the claimant.

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10. **Mortgage debts**

The amount of compensation payable to a mortgagee in respect of a debt secured by a mortgage over acquired land shall not exceed the amount of compensation that would be payable for the acquisition of all interests in the land if there had been no mortgage secured over that land.

11. **Loans**

(1) If the amount of compensation assessed in accordance with this Schedule is insufficient to enable a claimant who occupied the acquired land as his principal place of residence continuously between the date of service of the notice of intention and the date of acquisition and:

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- (a) who held an interest in fee simple in the acquired land;
- (b) in whom an equity of redemption in respect of that land was vested; or
- (c) who held a lease of that land granted under an Act:
 - (i) in perpetuity;
 - (ii) for a term of not less than 99 years;
 - (iii) with a right of purchase; or
 - (iv) which contained terms and conditions prohibiting the claimant from erecting or using any building on the land other than a dwelling-house,

10 to purchase land to be used as a principal place of residence providing accommodation reasonably comparable with the accommodation on the acquired land, the Minister may offer to grant a loan to the claimant of an amount which, when added to the amount of compensation otherwise payable in respect of the acquired land, would be sufficient to enable the claimant to purchase land on which there is accommodation reasonably comparable with the accommodation on the acquired land.

(2) The Minister shall, when making an offer under subrule (1), specify the maximum amount of the loan he is prepared to grant.

20 (3) Repayment of a loan granted in accordance with this rule shall be secured by a mortgage to the Territory of the land purchased to provide the comparable accommodation.

(4) A mortgage under subrule (3):

(a) shall provide for the amount secured to be repayable forthwith if:

- (i) the land the subject of the mortgage is sold;
- (ii) the claimant and his spouse or de facto partner cease to use the land as a principal place of residence; or
- (iii) if both the claimant and his spouse or de facto partner have died; and

30 (b) shall contain such other terms and conditions as the Minister thinks fit to secure the repayment of the loan.

12. Interpretation

In rules 9 and 11, a reference to a claimant includes a reference to any spouse or de facto partner of the claimant.

LAND ACQUISITION (JUST TERMS COMPENSATION) ACT 1991 (NSW)

60. Disadvantage resulting from relocation

(1) In this Act:

disadvantage resulting from relocation means non-financial disadvantage resulting from the necessity of the person entitled to compensation to relocate the person's principal place of residence as a result of the acquisition.

(2) The maximum amount of compensation in respect of the disadvantage resulting from relocation is \$75,000.

10 **Note.** Schedule 1A provides for the amendment of this section to enable the maximum amount of compensation to be increased by regulation and for the automatic indexation of the maximum amount in line with inflation.

(3) In assessing the amount of compensation in respect of the disadvantage resulting from relocation, all relevant circumstances are to be taken into account, including:

- (a) the interest in the land of the person entitled to compensation, and
- (b) the length of time the person has resided on the land (and in particular whether the person is residing on the land temporarily or indefinitely), and
- (c) the inconvenience likely to be suffered by the person because of his or her removal from the land, and

20 (d) the period after the acquisition of the land during which the person has been (or will be) allowed to remain in possession of the land.

(4) Compensation is payable in respect of the disadvantage resulting from relocation if the whole of the land is acquired or if any part of the land on which the residence is situated is acquired.

(5) Only one payment of compensation in respect of the disadvantage resulting from relocation is payable for land in separate occupation.

(6) However, if more than one family resides on the same land, a separate payment may be made in respect of each family if:

- 30 (a) the family resides in a separate dwelling-house, or
- (b) the Minister responsible for the authority of the State approves of the payment.

(7) If separate payments of compensation are made, the maximum amount under subsection (2) applies to each payment, and not to the total payments.

LAND ACQUISITION AND COMPENSATION ACT 1986 (VIC)

44 Solatium

40 (1) The amount of compensation may be increased by such amount, not exceeding 10% of the market value of the land, by way of solatium as is reasonable to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition.

- (2) In assessing the amount payable under subsection (1), there must be taken into account all relevant circumstances applicable to the claimant including, without limiting the generality of the foregoing—
- (a) the interest of the claimant in the acquired land; and
 - (b) the length of time during which the claimant had occupied the land; and
 - (c) the inconvenience likely to be suffered by the claimant by reason of removal from the land; and
 - (d) the period of time after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land; and
 - (e) the period of time during which, but for the acquisition of the land, the claimant would have been likely to continue to occupy the land; and
 - (f) the age of the claimant; and
 - (g) where the claimant at the date of acquisition is occupying the land as the claimant's principal place of residence, the number, age and circumstances of other people (if any) living with the claimant.
- (3) If no solatium is paid to a claimant, a person other than a claimant who, at the date of acquisition, had occupied the acquired land for a continuous period of not less than 12 months before that date as the person's principal place of residence may claim from the Authority such amount, not exceeding 10% of the market value of the land, by way of solatium as is reasonable to compensate the person for intangible and non-pecuniary disadvantages resulting from the acquisition.
- (4) In determining the amount payable under subsection (3), there must be taken into account all relevant circumstances applicable to the person, including the matters referred to in subsection (2)(b), (c), (d), (e), (f) and (g).
- (5) If the Authority rejects a claim for solatium made by a person under subsection (3), that person is to be taken to be a claimant and the claim to be a disputed claim for the purposes of this Act.

30 ***LAND ADMINISTRATION ACT 1997(WA)***

241. How compensation to be determined

- (1) In determining the amount of compensation (if any) to be offered, paid, or awarded for an interest in land taken under Part 9, regard is to be had solely to the matters referred to in this section.
- (2) Regard is to be had to the value of the land with any improvements, or the interest of the claimant in the land, assessed as on —
 - (a) in the case of an interest taken for a railway or other work authorised by a special Act — the first day of the session of Parliament in which the Act was introduced; or

- (b) in the case of an interest taken by agreement under section 168 — the date of the execution of the agreement, unless the agreement provides otherwise; or
- (c) in the case of an interest to which paragraphs (a) and (b) do not apply — the date of the taking,

and discounting any increase or decrease in value attributable to the proposed public work.

- 10 (3) If a notice of intention was registered in relation to the interest on a date before the date referred to in subsection (2), and a transaction relating to the land made between those dates affected the value of the interest, regard may be had to the value of the interest assessed as at the date referred to in subsection (2) and discounting the effect of the transaction.
- (4) No regard is to be had to the value of any improvements made without the consent of the Minister after the registration of a notice of intention.
- (5) Subject to subsection (4), in the case of a railway or other work authorised by a special Act, the value of any improvements made after the first day of the session of Parliament in which the Act was introduced but before the registration of the taking order are to be allowed, not exceeding their actual cost.
- 20 (6) Regard is to be had to the loss or damage, if any, sustained by the claimant by reason of —
 - (a) removal expenses; or
 - (b) disruption and reinstatement of a business; or
 - (c) the halting of building works in progress at the date when the interest is taken and the consequential termination of building contracts; or
 - (d) architect's fees or quantity surveyor's fees actually incurred by the claimant in respect of proposed buildings or improvements which cannot be commenced or continued in consequence of the taking of the interest; or
 - 30 (e) any other facts which the acquiring authority, the court, or the State Administrative Tribunal considers it just to take into account in the circumstances of the case.
- (7) If the fee simple in land is taken from a person who is also the holder in fee simple of adjoining land, regard is to be had to the amount of any damage suffered by the claimant —
 - (a) due to the severing of the land taken from that adjoining land; or
 - (b) due to a reduction of the value of that adjoining land,however, if the value of any land held in fee simple by the person is increased by the carrying out of, or the proposal to carry out, the public work for which the land was taken, the increase is to be set off against the amount of compensation that would otherwise be payable under paragraph (b).
- 40 (8) If the interest in land is taken without agreement, an amount considered by the court or the State Administrative Tribunal or, for the purposes of making an offer,

by the acquiring authority, appropriate to compensate for the taking without agreement may be added to the award or offer.

(9) The additional amount under subsection (8) must not be more than 10% of the amount otherwise awarded or offered, unless the court or the State Administrative Tribunal, or, for the purposes of making an offer, the acquiring authority, is satisfied that exceptional circumstances justify a higher amount.

(10) If the interest in land taken produces any rent or profits, then at the option of the acquiring authority, either —

10 (a) the amount of the rent or profits received by the acquiring authority, less the reasonable cost of collection, for the period from the date of registration of the taking order to the date of the payment of compensation or the date of the award, whichever is earlier, is to be added to the compensation payable; or

(b) interest is to be paid on the amount of compensation for the same period, at the rate of 6% per annum, or such higher rate as the acquiring authority, the court, or the State Administrative Tribunal considers adequate having regard to the circumstances of each case,

but if the interest in land ceases to produce any rent or profits after the taking, interest is to be paid in accordance with paragraph (b).

20 (11) If the interest in land taken does not produce any rents or profits, interest is to be paid at the rate prescribed under section 8(1)(a) of the *Civil Judgments Enforcement Act 2004* as at the date of entry for construction or carrying out of the work or the date of registration of the taking order, whichever is earlier, and the interest is payable from —

(a) the date of the service of the claim on the acquiring authority; or

(b) the date of entry for construction or carrying out of the work,

whichever is earlier, to the date —

30 (c) when the offer was served on the claimant, if the compensation awarded by the State Administrative Tribunal or the court of competent jurisdiction is not more than the amount offered by the acquiring authority; or

(d) of settlement of the claim, in any other case.

(12) Subject to subsections (10) and (11) —

(a) when any amount representing an advance payment of compensation is paid to a claimant, interest on the total amount of compensation is payable only to the date of the first payment, and interest is payable thereafter only on the balance outstanding from time to time; and

40 (b) when any amount is offered by the acquiring authority as an advance payment of compensation under section 248 and the offer is not accepted by the claimant within 30 days of the day on which it was made, no interest is payable thereafter in respect of the amount so offered.

- (13) If—
- (a) the amount of any purchase money or compensation, or any payment on account, is payable under this Part or Part 9; and
 - (b) the acquiring authority causes a notice to be published once in a daily newspaper circulating throughout the State stating that the authority intends to make the payment; and
 - (c) 3 months after the publication of the notice, no person has been able, or being able has not agreed, to give a sufficient discharge and receipt in respect of that amount, or any portion of that amount,
- 10 the acquiring authority may cause the moneys to be paid into the Supreme Court and dealt with under section 249, and thereafter is not liable for any further interest payment on the moneys.

LAND ACT 1933 (WA) (REPEALED)

33 Vesting leasing, etc. of reserves

- (1) In this section, unless the contrary intention appears —
- “**land**” means land reserved under this Act;
- “**the designated purpose**” means the purpose for which land is reserved under this Act and any purpose ancillary, and beneficial, to that purpose.
- 20 (1a) An order made under this section shall —
- (a) describe the land affected by that order;
 - (b) specify the purpose for which the land affected by that order is reserved under this Act, or may be leased or granted in fee simple;
 - (c) name the person —
 - (i) in whom the land affected by that order is directed to be vested; or
 - (ii) to whom a lease of, or the fee simple in, the land affected by that order is directed to be granted,by that order; and
- 30 (d) specify the conditions and limitations subject to which the Governor by that order —
- (i) directs the vesting of the land affected by that order or the grant of a lease of, or the fee simple in, that land; or
 - (ii) confers any power to lease or sub-lease the land affected by that order.
- (2) By Order the Governor may direct that any land shall vest in and be held by any person for the designated purpose, subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the designated purpose, and by the same or any subsequent Order the Governor may,

subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the designated purpose, confer upon that person, power to lease for the designated purpose the whole or any part of the land.

(3)(a) By Order the Governor may direct that any land shall be leased for the designated purpose, by instrument of lease in accordance with the prescribed form to any person.

(3a) The person to whom the land is leased under subsection (3) may, with the consent of the Governor, sublet, for the designated purpose, the whole or part of the land, or mortgage for the designated purpose, the whole of the land.

10 (ii) The consent of the Governor may be given under subsection (3) (a) subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the designated purpose and the consent shall be endorsed on the instrument of sub-lease or mortgage, as the case may be.

(4) (a) By Order the Governor may direct that any land shall be granted in fee simple to any person subject to the condition that the person shall not lease or mortgage the whole or any part of the land without the consent of the Governor and subject to such other conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the designated purpose.

20 (b) The consent of the Governor may be given subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the designated purpose.

(5) When the mortgagee of any land mortgaged with the consent of the Governor, whether before or after the commencement of the Land Act Amendment Act 1948, completes the exercise of the power of sale or foreclosure pursuant to the mortgage, the land shall by force of this enactment be freed from any trust, condition, limitation, or other restriction, created or imposed in relation to the designated purpose.

30 (6) The provisions of this section shall apply in respect of all land reserved pursuant to the provisions of this Act prior to or after the commencement of the *Land Act Amendment Act 1948*.