

IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY
<p style="text-align: center;">No. D1 of 2018</p>	<p style="text-align: center;">No. D2 of 2018</p>	<p style="text-align: center;">No. D3 of 2018</p>
<p>APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA</p>	<p>APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA</p>	<p>APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA</p>
<p>BETWEEN</p>	<p>BETWEEN</p>	<p>BETWEEN</p>
<p style="text-align: center;">NORTHERN TERRITORY OF AUSTRALIA Appellant</p>	<p style="text-align: center;">COMMONWEALTH OF AUSTRALIA Appellant</p>	<p style="text-align: center;">MR A GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant</p>
<p style="text-align: center;">and</p>	<p style="text-align: center;">and</p>	<p style="text-align: center;">And NORTHERN TERRITORY OF AUSTRALIA First Respondent</p>
<p style="text-align: center;">MR A GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent</p>	<p style="text-align: center;">MR A GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent</p>	<p style="text-align: center;">COMMONWEALTH OF AUSTRALIA Second Respondent</p>
<p style="text-align: center;">COMMONWEALTH OF AUSTRALIA Second Respondent</p>	<p style="text-align: center;">NORTHERN TERRITORY OF AUSTRALIA Second Respondent</p>	<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor</p>
<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor</p>	<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor</p>	<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor</p>
<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor</p>	<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor</p>	<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor</p>
<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor</p>	<p style="text-align: center;">ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor</p>	<p style="text-align: center;">CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor</p>
<p style="text-align: center;">CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor</p>	<p style="text-align: center;">CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor</p>	<p style="text-align: center;">YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor</p>
<p style="text-align: center;">YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor</p>	<p style="text-align: center;">YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor</p>	<p style="text-align: center;">YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor</p>

Outline of Oral Argument by Appellant (D3)/First Respondent (D1, D2)

Claim Group’s Outline of Oral Argument

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

- 1. **Assessment considerations:** If past acts that are invalid against native title are validated, native title holders are to be compensated on just terms. Validation provides certainty in the title of others at the expense of native title holders. The normative loss inherent in the abrogation of the human right to own and inherit property equally with others is not expunged by validation. Compensation is properly referenced to (1) the objective effects of extinguishment done to confer title to the land on others (see [2]-[3] below) and (2) the subjective effects upon the Claim Group’s relationship with their country (see [4] below): CG [29]-[41] cf FC [142], [144] **CAB 314-5**.

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Native Title Act 1993 (Cth) (the **NTA**) Preamble, ss 7, 14, 19, 22A, 22F, 23B-C, 23J, 51, 51A, 53, 223; *Nelungaloo v Commonwealth* (1948) 75 CLR 495 at 569, 571; *Griffiths v Minister for Lands* (2008) 235 CLR 232 at [157], [181]-[183]; Michelman, “Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165 at 1176; *Racial Discrimination Act 1975* (Cth) (the **RDA**) s 10 and Convention (Preamble, art 5); Varuhas, *Damages and Human Rights*, 117-8, 475; *Native Title Act Case* (1995) 183 CLR 373 at 437, 451, 455, 475.

- 2. **Exchange worth on surrender of the native title:** The Full Court erred in discounting the accepted freehold reference point: FC [129]-[139] **CAB 312-3**. The trial judge erred in holding that some reduction was needed on the supposition that the native title rights were less than exclusive: TJ [231] **CAB 158**; CG [70]-[77], [84].

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- (1) Native title cannot be acquired, but it can be surrendered to the Crown through which general law estates are acquired. The correct tool of analysis is exchange worth on a notional surrender of the native title upon which the Crown expands its title to absolute ownership and, in this case, grants freehold to others: cf FC [135] **CAB 313**. Inalienability was not a reason to deny that indigenous people owned their land, nor a restriction on their power of disposition by surrender, or a discounting factor. A burden on the Territory’s title is removed; it then acquires rights to control and exploit the land to the benefit of its title: CG [44], [66]-[73].

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Mabo (No 2) (1992) 175 CLR 1 at 50-3, 60, 88-9, 93, 111, 186, 194; *Amodu Tijani v Southern Nigeria* [1921] 2 AC 399 at 403; *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 at 552, 557; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [45], [47], [49]; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [171]; *Leichardt CC v RTA* (2006) 149 LGERA 439 at [31]-[32], [44], [51], [59].

- (2) Validation by the Territory divested the Claim Group of their inter-generational (perpetual) and communal title to live on the land that provided religious, cultural and material sustenance: CG [47]-[48]. The RDA had conferred security in the enjoyment of that title to the same extent as other titles, including the same immunity from deprivation. It constrained Territory power to create other rights that could be valid against native title, which did not happen, nor could that happen. The lands were set apart as town land and covered by the grants: CG [53], [65]: cf FC [135] **CAB 312**. The grants could not be valid against the native title without

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its surrender, nor could native title be singled out and acquired (extinguished) compulsorily for that purpose. The Claim Group had (and lost on validation) power to constrain dealings in and use of the land, subject to anyone else having a better title. But because of the RDA, no one had a better title: CG [51]-[56], [62]-[65].

Native Title Act Case (1995) 183 CLR 373 at 437-9, 454, 469, 475; *Crown Lands Ordinance* (NT) ss 6, 23(1)(c), 24(c), 103, 107-111, 118-119; *Griffiths* (2008) 235 CLR 232 at [29]-[30], [39] cf Commonwealth Reply [3].

- (3) Native title is more than a right to ownership of land. Here it is extinguished to convey a freehold estate granting rights the equivalent of full ownership of the land. A just terms measure of exchange worth ought not be less than that estate.

Yanner v Eaton (1999) 201 CLR 351 at [17]-[20], [37]-[38]; NTA ss 51(1), (3), 51A, 240; *Native Title Act Case* (1995) 183 CLR 373 at 437, 450, 458-9, 481.

- 3. **Compensatory interest:** Where market value (exchange worth) is assessed at the earlier time of retrospective extinguishment, interest is necessary to provide compensation on fair terms: TJ [254] **CAB 163**. On the accepted principle that compensation moneys bear interest from the time of dispossession, the correct measure on the evidence is the “risk free” government bond rate. It is irrelevant that the acts are now treated as having been valid, and the Claim Group need not establish further causal loss: CG [93]; cf TJ [259], [269]-[270] **CAB 165-8**; FC [178]-[179], [208], [211] **CAB 325-6, 333-4**.

- (1) Retrospective extinguishment converted the Claim Group’s title to the land to an entitlement to compensation, with a concomitant obligation on the Territory to pay. It is inequitable for the Territory both to retain the compensation money and take possession of the land or receive its rents and profits. Given acceptance of that principle and that there has been some loss, in view of the statutory relation back period of extinguishment, the Claim Group is not required to show it would have re-invested: cf TJ [287] **CAB 171**; **TFM24** p.811. The analysis is consistent with referencing what is acquired on extinguishment (see [2] above) and the interposition of the Crown in the surrender of native title: CG [93]-[103]: cf TJ [217], [259], [277] **CAB 155, 165, 169**; FC [208], [211] **CAB 333-4**.

Marine Board v Minister for Navy (1945) 70 CLR 518 at 522, 527, 531-2, 532-3, 537-8; *Fletcher v Lancashire Railway* [1902] 1. Ch 901 at 908; *Mabo No 2* (1992) 175 CLR 1 at 194; *Guerin v The Queen* [1984] 2 SCR 335 at 362-3, 382-3; Heydon et al, *Equity Doctrines and Remedies* 5th Ed [23-325]; Finn, “Public Trusts, Public Fiduciaries” (2010) 38 *Federal Law Review* 335 at 349-51.

- (2) In equity there is a constructive conversion in ownership where the party taking possession becomes the owner of the land and trustee of the compensation money. The correct measure is therefore a fair return over the relevant period reckoned to trustee investment or secure government loan. This is supplied by the “risk free” government bond rate: CG [97], [104]-[105]. The rate also reflects the Territory’s savings on its (compounded) borrowing costs in not paying compensation, thus addressing the inequity of the Territory gaining at the expense of the native title holders necessary to compensate them on just terms: CG [111].

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Commonwealth v Huon Transport (1945) 70 CLR 293 at 323-4; *Hungerfords v Walker* (1988) 171 CLR 125 at 148-9; *Re Pigott* (1881) 18 Ch D 146 at 150-4; *Re Lambert* [1897] 2 Ch 169 at 180.

4. **Intangible losses:** The evaluation of the claimant and anthropological evidence on the nature of the connection of the Claim Group to their country, and of the intangible effects of extinguishment, was quintessentially a matter for the trial judge who heard the evidence on country: CG [120]-[130], [166]; TJ [325]-[383] **CAB 179-95**.

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(1) The assessment turned upon the trial judge's observations of the claimants and his judgment of the effects of extinguishment upon the group's customs. The evidence was "strong and compelling" and the "beliefs expressed were genuinely held and demonstrated a deep connection to country": TJ [348] **CAB 186**. The claimant evidence, supported by anthropological observation and opinion evidence, was of "emotional, gut-wrenching pain and deep or primary emotions", "accompanied by anxiety", with "ongoing present day repercussions": TJ [336]-[337], [350], [352], [363] **CAB 182, 187, 190**.

CSR Readymix v Payne [1998] 2 VR 505 at 508-9; *Yarmirr* (2001) 208 CLR 1 at [79]; *Yorta Yorta* (2002) 214 CLR 422 at [63].

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(2) The assessment was approached correctly. The ultimate touchstone is provided by the NTA's requirement that compensation reflect just terms for the loss established on the evidence, so that an award be judged by the community as fair: FC [394]-[396] **CAB 381-2**; TJ [313]-[315] **CAB 177**. The assessment reasonably translated into compensation the effects of extinguishment upon a complex connection by which the Claim Group is obliged to care for one indissoluble whole of ancestral spirits, people and country: TJ [291], [326]-[327], [331], [363], [375], [381]-[382] **CAB 172, 180-1, 190, 193-5**; FC [395] **CAB 381**.

NTA ss 51(1), 223(1)(b); *Meneling Station* (1982) 158 CLR 327 at 356-8; *Yorta Yorta* (2002) 214 CLR 422 at [40], [49]-[50]; *Yanner* (1999) 201 CLR 351 at [38]; *Richardson v Oracle Corp* (2014) 223 FCR 334 at [83]-[86], [95], [118].

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(3) The trial judge did not act on any wrong principle or misapprehend the facts, or for any other reason make a wholly erroneous assessment of loss. The considerations advanced by the government parties were addressed, and the assessment was open on the evidence: CG [133]-[145]; TJ [290]-[383] **CAB 172-95**; FC [278]-[378], [394], [412] **CAB 349-76, 381, 387**. The evaluation may lend itself to reasonable differences of opinion, but that provides no basis to interfere with the judgment at first instance: CG [115]-[118]; FC [409]-[412] **CAB 386-7**.

Lee Transport v Watson (1940) 64 CLR 1 at 13; *Miller v Jennings* (1954) 92 CLR 190 at 194-7; *Rogers v Nationwide News* (2003) 216 CLR 327 at [62]-[64], [81]-[82].

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(4) The different and formulaic alternatives proposed by the government parties would not, on the findings and evidence, compensate for the effects of the extinguishment: NTA s 51: CG [115]-[117], [167]-[169]; NTS [162]; CS [150] and FC [358] of FC [350], [412], [418] **CAB 370, 367, 387-8**.