IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY
No. D1 of 2018	**No. D2 of 2018**	**No. D3 of 2018**
APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN	BETWEEN	BETWEEN
NORTHERN TERRITORY OF AUSTRALIA Appellant	**COMMONWEALTH OF AUSTRALIA** Appellant	**ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES** Appellant
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 APPELLANT(D3/2018)/FIRST RESPONDENT (D1 & D2/2018)

Northern Land Council
45 Mitchell Street
Darwin NT 0801

Tel: (08) 8920 5199
Fax: (08) 8920 5251
Email: tscole@nlc.org.au
Ref: Tamara Cole

Contents

Part I: Certification

1. These submissions of the Appellant in D3 of 2018 (and First Respondent in D1 and D2 of 2018) are suitable for publication on the Internet.

Part II: Issues

2. The judgments below determined the entitlement of the Ngaliwurru and Nungali Peoples (the **Claim Group**) under s 51(1) of the *Native Title Act 1993* (Cth) (the **NTA**) to be compensated on just terms for the loss of their native title to land in the Town of Timber Creek in the Northern Territory. Their entitlement arises with respect to past acts that were invalid because of the *Racial Discrimination Act 1975* (Cth) (the **RDA**) and intermediate period acts that were invalid because of the NTA. The acts were validated by the *Validation (Native Title) Act 1994* (NT) (the **VNTA**), as enacted in accordance with the NTA, as amended. Upon validation the acts extinguish the native title, related back to the time of the act, and the native title holders have an entitlement to compensation on just terms for loss of their native title rights and interests.

3. The appeals and cross-appeal raise three assessment issues referenced to the elements of the claim which, in turn, are referenced to the statutory compensation criteria. The first two issues arise on the appeals and cross-appeal, the third on the appeals. The issues are shaped by: (1) the circumstances of the claim, involving the validation of grants of freehold (or leasehold convertible to freehold) and public works by retrospective extinguishment of the native title, and; (2) the elements of the claim by which economic or material loss was confined to the Lots covered by the grants, and the non-economic or intangible loss turned on the nature of the Claim Group's relationship with their traditional country.

4. **Benchmarking native title and non-native titles:** Before validation of the compensable acts, the rights of the Ngaliwurru and Nungali Peoples to live on and to use their land under their traditions were recognised by the common law and protected by the RDA and NTA which prohibited differential treatment of the native title. Their rights could be enforced by the grant of appropriate legal and equitable remedies. The acts were invalid because of the RDA (or NTA) and could not be valid as against the native title absent voluntary surrender or compulsory acquisition. Having regard to those matters, in the assessment of material loss, did the Full Court and the trial Judge err in their characterisation of the nature and extent of the native title rights?

5. **Compensatory interest:** It is common ground that interest should be awarded by reference to the equitable principle that moneys payable as compensation for land compulsorily acquired bear interest from the time of dispossession. The first issue is

whether interest is part of the entitlement to compensation. The second issue is what rate gives effect to the entitlement having regard to that principle. It arises where the NTA effects retrospective legal dispossession, the Territory received rents and profits under what were invalid grants, and saved on its borrowing costs by not paying compensation. Having regard to those matters, did the Full Court and the trial Judge err in holding that it was necessary that the Claim Group demonstrate a further causal link to recover compensatory interest reckoned to a return on long term government bonds?

6. **Intangible losses:** An essential element of native title is the connection the Aboriginal peoples concerned have with their country by their traditional laws and customs (s 223(1)(b)). The nature of the connection of the Ngaliwurru and Nungali Peoples to their country was the subject of claimant and anthropological evidence, and findings by the trial Judge (Mansfield J), upon which his Honour assessed the intangible effects of extinguishment. In view of that evidence and those findings, have the government parties demonstrated error in assessment or manifest excess? If error or manifest excess were shown, do the alternatives they pose accord with the statutory object to compensate the native title holders for the effects of the acts on their native title rights?

7. **This case is not about valid future acts or co-existing native title:** This case does not concern valid future acts that affect native title which, in general, cannot be done without the agreement or consultation of native title holders, and do not extinguish native title save for an act of compulsory acquisition. Nor does the case concern situations where native title co-exists with non-native title interests, for example, in relation to pastoral land or waters of the sea. The observations are made now first, to dispel the suggestion that the case sets a (high) benchmark for valid future acts or cases of co-existing native title: cf Commonwealth submissions (**CS**) at [2]–[3]. Second, in contrast to the situation that obtains for future acts, the Claim Group's native title was extinguished, not impaired, and done so retrospectively, and without consultation.

Part III: Section 78B notice

8. The issues raised by the notices of appeal and cross-appeal do not require a notice of constitutional matter, but in view of the remark at CS [86], the Claim Group has given a notice with respect to the argument at [110]-[112] below.

Part IV: Material Facts

9. The Claim Group supplements the narrative of facts at CS [7]–[11] and [7]–[14] of the Northern Territory submissions in D3 of 2018 (**NTS**), drawn from the procedural and factual background set out by the trial Judge (**TJ**) at [7]–[81] **CAB 105-23** and the Full Court of the Federal Court (**FC**) at [1]–[33] **CAB 267-79**.

10. **The affected native title:** The compensation claim group comprises the members of five descent based *yakpali* (country or estate) groups of the Ngaliwurru and Nungali Peoples, the *Makalamayi, Wunjaiyi, Yanturi, Wantawul* and *Maiyalaniwung*, together with other Aboriginal persons who have traditional rights in those estates as members of neighbouring estate groups, spouses of estate group members, and members of other estate groups with ritual authority: compensation orders par [5] **CAB 223**. The Town is within the *yakpali* of *Makalamayi*, named after a site of significance at the junction of Victoria River and Timber Creek: TJ [13], [28] **CAB 106, 110**.

11. The Ngaliwurru and Nungali Peoples joined the Wave Hill strike by pastoral workers, which contributed to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ***Land Rights Act***) through which grants of Aboriginal freehold land to Land Trusts were made, including in areas surrounding the Town. Land in the Town was unavailable for claim: TJ [27], [34] **CAB 109, 111**: *Land Rights Act* s 50 and definition of unalienated Crown land not including land in a town (s 3(1)).

12. In 1999 and 2000 the Claim Croup commenced three proceedings under the NTA for a determination that they hold native title to land within the Town. Two proceedings were defensive measures in response to notices for the compulsory acquisition of Lots 47, 97–100, 109 and 114: *Griffiths v Northern Territory* (2006) 165 FCR 300 at [8]–[10].[1] Following a trial in the native title proceedings, and appeals, in November 2007 the Full Federal Court determined that native title exists, and where historic partial extinguishment could be disregarded under s 47B of the NTA, the native title confers a right of exclusive possession, and where s 47B did not apply, the native title comprises various rights to live on and use the land: *Griffiths v Northern Territory* (2006) 165 FCR 391; FC [28]–[32] **CAB 278-9**.

13. The compensation proceedings were commenced on 29 August 2011. The parties adopted, by use of a statement of agreed facts (**TFM1** at TJ [71]–[72] **CAB 119-21**), the terms of the native title determination as a description of the native title potentially affected by the claimed compensable acts. A trial on liability held, inter alia, that the historic grant of a pastoral lease was effective at common law to partially extinguish the native title and that s 47B did not apply in the compensation proceedings to disregard that extinguishment: *Griffiths v Northern Territory* [2014] FCA 256 **CAB 6**; *Griffiths v Northern Territory (No 2)* [2015] FCA 443 **CAB 72**.

14. In the result, the native title affected by the compensable acts comprised the rights listed at par [3] of the statement, described as "non-exclusive rights" to:

---

[1] Considered by this Court in *Griffiths v Minister for Lands* (2008) 235 CLR 232 (***Griffiths HC***).

(1) hunt, fish and forage, and to gather and use natural resources;

(2) live on the land, to camp and to erect shelters and other structures;

(3) engage in cultural activities, to conduct ceremonies and hold meetings, and to participate in cultural activities;

(4) access, maintain and protect sites of significance.

The agreement as to the nature and extent of the affected native title was subject to the contentions the parties would make as to the nature and extent of any other interests, and their relationship to the native title: statement at [6]; TJ [72] **CAB 121**.

15. **Crown lands and the compensable acts:** At the time a compensable act occurred the land affected by an act comprised, in the case of an act occurring before 26 June 1992, unalienated Crown lands within the meaning of s 5 of the *Crown Lands Act 1931* (NT) (**CLA 1931**), and after 26 June 1992, Crown lands within the meaning of s 3 of the *Crown Lands Act 1992* (NT) (**CLA 1992**).[2] The subject lands were set apart as "town lands"[3] that could be alienated by the grant of leases for conversion to freehold.[4]

16. The location of the acts found to be compensable, which occurred over 1980 to 1996, are depicted on the map at FC [8] and listed in the table at [10] **CAB 269-73**.[5] The acts comprise (1) the grant of leases by the Territory to others that could be exchanged for freehold on completion of a development,[6] (2) freehold grants to government authorities, where at a later time public works were established on the land,[7] and (3) public works constructed without any underlying tenure.[8]

17. The largest group of acts involved 22 grants of development leases by the Territory in a common form, involving a contract for a grant, with covenants to effect improvements in exchange for freehold.[9] The grants were made over 1985 to 1996 on application and following earlier survey and subdivision of what became Wilson Street, Lawler Court

---

2 Notice to Admit and Notices of Dispute (ex A47 **GFM26**). Where a parcel was affected by successive acts, the land had that status at the time of the first act, but not at the time of the second act: see NT Notice of Dispute [1] re grants to government authorities followed by public works: FC [22]-[24] **CAB 276**.

3 Proclamation 10 May 1975 (ex A11 **GFM11**).

4 CLA 1931 Pt 3 Div 4 made provision for the grant of town leases, later repealed by the *Crown Lands Amendment Act (No 3) 1980* (NT) with Div 6 providing for the conversion of leases other than pastoral leases to freehold, and s 8 of the 1980 Act provided for conversion of existing town leases to freehold.

5 The map was received at trial as an aide memoir (MFI A48 **CFM 13**). The compensable acts are detailed in the annexure to the first reasons on liability: [2014] FCA 256 **CAB 36-70**.

6 Acts 2, 5-13, 31-3, 40, 45, 48-53 affecting Lots 20, 22-3, 26-32, 43-4, 46, 59, 64, 75, 79, 81, 85-6 and 88.

7 Acts 15-30 affecting Lots 34 (electricity commission) and Lots 36, 38-42 (housing commission).

8 Acts 14, 43-4, 46-7, 56-9 affecting Lots 33, 62-3, 70 (part), 72 (part), and roads and road reserves.

9 See, for example, the documents relating to Lot 22 (**GFM36**).

and George Street.[10] The Territory received purchase moneys and rental payments in the order of $200,000.[11]

18. **Elements of claim:** The elements of the compensation claim reference the compensation rules in Schedule 2 of the *Lands Acquisition Act 1978* (NT) (the **LAA**) to which regard may be had under s 51(4) of the NTA. The claim was that compensation should be determined by having regard to:[12]

    (1) The value of the land with adaptation of the criteria in rule 2(a) (market value) on the basis that the interest acquired was a freehold estate and the date of acquisition was the date of validation of the act, alternatively, the earlier date of the act. [13]

10 (2) An allowance for interest on the amount assessed by reference to the amount referred to at (1) reckoned from the date of validation, alternatively, the date of the compensable act.

    (3) Loss or diminution of connection or traditional attachment to the land and intangible disadvantages of loss of rights to live on and gain spiritual and material sustenance from the land, with adaptation of the criteria in rules 2(b) (special value) and 9 (intangible loss), to be assessed at the time of trial.

19. Economic loss (market value and interest) was referenced to the Lots listed in **bold** in the table at FC [10] **CAB 270** covered by grants,[14] and did not extend to areas covered by infrastructure (public works). Interest was reckoned to the amount assessed for those
20 Lots, and did not extend to the claimed non-economic loss, the latter being assessed in current day money values.[15] The claim for interest had three alternative measures; one based on investment returns, another on the "risk free" rate based on long-term government bonds, and the third as simple interest calculated in accordance with Federal Court Practice Note CM16 under s 51A of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth): TJ [45] **CAB 113**.

---

10 See surveys of Wilson Street 1985, Lawler Court 1985, George Street 1986; later Fitzer Road 1995 (**GFM54-57**). Lawler Court is also the location of six freehold grants to the Housing Commission that form part of material loss claim: see inset to map at FC [8] **CAB 269**.

11 Notice to Admit asserting receipts of $266,025; Notice of Dispute admitting receipts of $196,750 (ex A46 **GFM25**).

12 Amended Points of Claim on Quantum at [9]-[24] (**GFM2**); TJ [42]-[46] **CAB 112-3**.

13 In relation to (1), a claim was made in the nature of mesne profits or rent for the period between act and validation. The claim was rejected on the basis that the acts are treated as valid, having also held that selecting the earlier date did not produce unjust terms and, in that respect, allowance was made for interest: TJ [132], [171], [254], [446]-[448] **CAB 136, 145-6, 163, 210**.

14 Save for 2 Lots where there was no tenure for houses, being Lots 62-63: see table at FC [10] **CAB 270**.

15 This accorded with the basis upon which interest is allowed in equity: *Commonwealth v* ***Huon Transport*** (1945) 70 CLR 293 at 322-3 (Dixon J) considered further below, in contrast to statutory provision for interest distinct from compensation that allows for interest on all heads of compensation: *Liverpool Rifle Club v Commonwealth* (1995) 58 FCR 46 at 53 (Tamberlin J) re *Lands Acquisition Act 1989* (Cth) s 91.

20. **Judgments below:** The trial Judge assessed compensation at $3,300,661 [orders **CAB 222**]. With respect to the elements of the claim, his Honour held that:

(1) The date for assessment was the earlier date when extinguishment under the NTA is taken to have occurred (TJ [172] **CAB 146**), and assessed compensation for material loss at 80% of the unimproved freehold value of the relevant Lots, being $512,400: TJ [232], [466] **CAB 158, 214**.

(2) Interest was payable as part of the compensation, allowed on a simple basis calculated at $1,488,261 on the rates in the Practice Note, based on the principal amount referred to at (1) reckoned from the time of a grant: TJ [254], [288], [466] **CAB 163, 171, 214**.

(3) Non-economic loss was recoverable for intangible losses (not special value) and awarded $1.3m: TJ [383] **CAB 195**.

The trial Judge held that assessing land value at the date of an act rather than validation did not preclude compensation on "just terms" because the Claim Group is entitled to compensation by way of interest: TJ [132], [171], [254] **CAB 136, 145-6, 163**.

21. The Full Court varied the assessment to $2,899,446 [orders **CAB 407**] by reducing the comparable freehold amount to 65% (FC [139] **CAB 313**), being $416,325, with consequential reduction in the allowance of interest to $1,183,121.

22. **Statutory provisions:** Native title is protected in accordance with, and is unable to be extinguished contrary to, the NTA (ss 10, 11(1)), which commenced on 1 January 1994. Legislation made after 1 July 1993 is only able to extinguish native title in accordance with the confirmation of extinguishment provisions in Pt 2 Div 2B or the future act provisions in Div 3, or by validating past and intermediate period acts under Divs 2 and 2A (s 11(2)). Part 2 Div 2A (intermediate period acts) and Div 2B (previous exclusive possession acts) were inserted by the *Native Title Amendment Act 1998* (Cth) in response to the judgment in *Wik Peoples v Queensland* delivered on 23 December 1996.[16]

23. The compensable acts are past acts under the NTA (Div 2), except five that are intermediate period acts (Div 2A), and most are also previous exclusive possession acts (Div 2B).[17] The VNTA validated the past acts on 10 March 1994, and following

---

16 (1996) 187 CLR 1.

17 The grants to government authorities are past acts to which the non-extinguishment principle applies, and are not previous exclusive possession acts (ss 15(1)(d), 23B(9C)), but most were followed by a later extinguishing act of public works over the same lot, except three, which were grants in perpetuity: FC Reasons [18]–[25] **CAB 275-7**.

enactment of Pt 2 Divs 2A–2B of the NTA, validated the intermediate period acts and confirmed extinguishment for previous exclusive possession acts on 1 October 1998.[18]

24. A past act is an act that occurs before 1 January 1994 (when the NTA commenced), and an intermediate period act is an act that occurs between 1 January 1994 and 23 December 1996 (when *Wik* was decided), where the act would be invalid because of native title; relevantly, in the case of a past act, by operation of the RDA,[19] or in the case of an intermediate period act, by operation of Pt 2 Div 3 of the NTA or the RDA: ss 228, 232A.[20] The NTA and VNTA provide that such an act is valid, and is taken always to have been valid, and are given force and effect they did not have previously: NTA ss 14–15, 19, 22A–22B, 22F; VNTA Pts 2–3A.[21] A previous exclusive possession act includes a validated past and intermediate period act (s 23B(2)(a)) in relation to which extinguishment is confirmed to have happened when the act was done: NTA ss 23B(2)(a), 23C, 23E; VNTA Pt 3B.

25. Validation and confirmation conferred on the Claim Group an entitlement to compensation in accordance with Pt 2 Div 5 of the NTA, recoverable from the Territory: NTA ss 20 (past act), 22G (intermediate period act), 23J (previous exclusive possession act). Section 51(1) of the NTA provides that:

> *Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B … 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.*

Section 51(2) applies if the act is a compulsory acquisition of native title, that is, as a valid future act passing the freehold test within s 24MD(2), where regard may be had to compensation criteria set out in the relevant compulsory acquisition law. Section 51(3) applies where the similar compensable interest test in s 240 is satisfied, that is, where the act could be done and compensation would, apart from the NTA, be payable if the native

---

18 The VNTA commenced on 10 March 1994 and validated past acts attributable to the Territory (Pt 2). It was amended on 1 October 1998 to validate intermediate period acts (Pt 3A), and provide for the confirmation of extinguishment for previous exclusive possession acts (Pt 3B), following enactment of Pt 2 Divs 2A–2B of the NTA by the *Native Title Amendment Act 1998* (Cth).

19 *Western Australia v Commonwealth (**Native Title Act Case**)* (1995) 183 CLR 373 at 454 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) re s 19 and past acts.

20 A future act might be invalid and thus be an intermediate period act within s 232A(2)(c) because of inconsistency with the RDA where the RDA continues to operate on subjects outside the NTA: *Native Title Act Case* (1995) 183 CLR 373 at 483 re future acts and 233(1)(c)(iii). Here, however, the grants were impermissible future acts covered by former Pt 2 Div 3 so any invalidity would be the result of non-compliance with those provisions: see former ss 22, 235(5), 236.

21 *Native Title Act Case* (1995) 183 CLR 373 at 454-5, 470. Although s 109 of the Constitution is not engaged for past acts attributable to the Territory, no different analysis of s 19 of the NTA results given the continued operation of the RDA in relation to Territory laws: see *Western Australia v **Ward*** (2002) 213 CLR 1 at [127]-[133] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

title holders instead held freehold title, and the Court is to apply any compensation criteria in the law permitting the act.

26. Section 51(4) provides that if neither sub-s (2) nor sub-s (3) applies, as here, and there is a compulsory acquisition law for the body politic to which the act is attributable, regard may be had to any compensation criteria set out in that law. The relevant Territory law, the LAA, is to be read to provide for the acquisition of land on just terms (s 5), as required by s 50 of the *Northern Territory (**Self-Government**) Act 1978* (Cth). It provides that the compensation that is payable is an amount that will fairly compensate a claimant for the loss suffered (Schedule 2 rule 1). To the extent possible, its assessment rules in Schedule 2 are to be read to extend to and in relation to native title (rule 1A).

27. By s 51A of the NTA, subject to s 53 (containing a "just terms override"), the total compensation payable for an act that extinguishes native title must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate. The parties agreed that s 51A is not engaged in this case: FC [462]–[463] **CAB 402-3**; TJ [64] **CAB 116-7**. The issue at trial on the time for assessment raised s 53 (TJ [55], [66] **CAB 115, 117**), but the point was not taken further on appeal.

28. The compensation may only consist of the payment of money, save in cases where there is compliance with a recommendation, made on request, for the transfer of property or to provide goods or services: s 51(5)–(8).

Parts V and VI: Argument in Answer and on Cross-Appeal

29. **Considerations informing assessment:** The recognition of native title by the common law and its protection by the RDA generated novel legal problems, some of which are addressed by the NTA.[22] The same may be said about compensation for its extinguishment or impairment. The Preamble to the NTA identifies the relevant legislative considerations that acknowledge the effect of dispossession, respect for universal human rights, the need for community certainty for acts potentially made invalid because of the existence of native title, and that justice requires, if acts that extinguish native title are to be validated or allowed, that compensation on just terms be provided to native title holders.

30. The principles to assess compensation are driven by the paramount entitlement in s 51(1) of the NTA to compensation on just terms, informed by the criteria in the LAA to which regard can be had (s 51(4)), which in turn is to be read as providing just terms (s 5), as

[22] ***North Ganalanja** Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 613-4 (the Court).

required by s 50 of the *Self-Government Act*, which corresponds to s 51(xxxi) of the Constitution. In this manner, "just terms" in s 51(1) of the NTA in its application to acts attributable to the Territory is informed by the concept of "just terms" in s 51(xxxi), being common ground at trial: TJ [97] **CAB 129**. "Just terms" connotes a standard of fairness as between government and the party whose property is acquired,[23] requiring full compensation for the acquisition[24] to reflect loss of what the party had before divestiture.[25] Although no question arises here as to whether there has been a s 51(xxxi) "acquisition", the Claim Group has issued a s 78B notice on the argument for compensatory interest at [110]–[112] below to the extent it draws upon the meaning of "just terms".[26]

31. The statutory criteria is an entitlement on just terms to compensate the native title holders for the loss of their native title to land (s 51(1)), with (permissive) regard to compulsory acquisition principles (ss 51(3), (4)), and in cases where the act could be done in relation to freehold land, on the measure applicable to that form of title (s 51(3)). Compulsory acquisition principles of market value, special value, reinstatement, and so forth, provide different means to assess compensation, that is, the right to be put, so far as money can do it, in the same position as if the land had not been taken; no one principle will of itself achieve that aim in all cases.[27]

32. As was observed in the *Native Title Act Case*, validation of past acts divests from the Aboriginal native title holders their interests in land possessed by virtue of the common law and protected by s 11(1) of the NTA or s 10 of the RDA, and the duty to pay compensation is imposed on the body politic that effects that divestiture.[28] The same applies for intermediate period acts validated following the 1998 amendments. Contrary to the submission of the Attorney-General for Western Australia, this is not a situation where the common law withdrew recognition of the native title rights because of inconsistency with the valid assertion or conferral of rights on others to the land: WAS

---

23 ***Nelungaloo*** *v Commonwealth* (1948) 75 CLR 495 at 569 (Dixon J).

24 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (***Bank Nationalisation Case***) at 300 (Starke J), citing *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 85; *Johnston Fear v Commonwealth* (1943) 67 CLR 314 at 323, 324, 327.

25 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-11 (Brennan J).

26 *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315 at 327-328 (the Court) on when the interpretation of a statute may give rise to a matter involving the interpretation of the Constitution.

27 *Housing Commission (NSW) v* ***Falconer*** [1981] 1 NSWLR 547 at 569-70 (Mahoney JA) referring to *Horn v Sunderland Corporation* [1941] 2 KB 26 at 42 and *Nelungaloo* (1948) 75 CLR 495 at 569 (Dixon J).

28 *Native Title Act Case* (1995) 183 CLR 373 at 475 dealing with validation of past acts.

[22].[29] To the contrary, the rights in issue were recognised by the common law and the purported conferral of rights on others was invalid.

33. The effect of the divestiture is fourfold. First, the protection of native title by s 11(1) of the NTA and s 10 of the RDA is removed. Second, the land is cleared of native title which is extinguished. Third, the title or power of the Territory to deal with the land is freed of that restriction. Fourth, the Territory and others claiming through it gain an interest valid as against the displaced former holders of the native title. Validation forcing a transfer of property from A to B, the ordinary rationale for powers of eminent domain in the public interest is skewed.[30]

10 34. Three further considerations should be noted. *First*, the extinguished traditional legal rights to the land are universal human rights to own and inherit property.[31] The common law vindicates rights of that kind by an award of substantive compensation even where no loss results,[32] and the RDA prohibits the nullification or impairment of the enjoyment of those human rights on an equal footing, such that compensation can vindicate such a right without proof of actual damage.[33] *Second*, these traditional legal rights to land were infringed by others treating the land as if it were their own to their benefit. The common law recognises that the wrongful use of a claimant's property can result in compensation beyond the claimant's loss.[34] The NTA does provide that as from validation these acts are taken always to have been valid, but that does not erase the historical fact of
20 invalidity,[35] nor the normative importance of the extinguished rights.

35. *Third*, the traditional legal rights are held in common by members of the native title holding community concerned, the composition of which will change from time to time. What binds are the traditional laws and customs by which the relevant community is connected to their traditional country. That connection is an important aspect of the socially constituted fact of native title.[36] It will differ from peoples to peoples, but in general it is a religious relationship manifested by rights and obligations to speak and

---

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

30 Gray and Gray, *Elements of Land Law* (5th Ed) at [1.536], [11.2.4] on taking for private purposes and referring, inter alia, to *Griffiths HC* (2008) 235 CLR 232 at [111]-[114] (Kirby J).

31 ***Mabo** v Queensland **(No 1)*** (1988) 166 CLR 186 at 217-8 (Brennan, Toohey and Gaudron JJ).

32 *Plenty v Dillon* (1991) 171 CLR 635 at 654-5 (Gaudron and McHugh JJ); Varuhas, *Damages and Human Rights* (2016) Ch 2; Edelman, *McGregor on Damages* (20th Ed) Ch 17.

33 ***Wooton** v Queensland* (2016) 352 ALR 146 at [1629] (Mortimer J) re s 9 of the RDA.

34 See generally, Edelman, *McGregor on Damages* (20th Ed) Ch 14.

35 *Native Title Act Case* (1995) 183 CLR 373 at 455; *Doyle v Queensland* (2016) 249 FCR 519 at [43] (Full Ct); *University of Wollongong v Metwally* (1984) 158 CLR 447.

36 ***Yanner** v Eaton* (1999) 201 CLR 351 at [17]-[20] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

care for country.[37] Native title comprises rights to land that are utilitarian (s 223(1)(a), (2)) and that manifest that core religious connection (s 223(1)(b)).

36. *Fourth,* the power to surrender native title recognised by the common law (and expressed in the future act provisions in former s 21 and now s 24AA(3) Sub-divs B–E) is the mechanism by which outsiders not bound by those laws and customs may use traditional lands. Thus, in a case like the present, where there is historic extinguishment of a right of exclusive possession, as the surrender of native title preconditions the conferral of valid rights on outsiders, the native title community still retain through that power the right to determine the use of their country.[38]

10 37. Where, as in this case, traditional legal and human rights to own and inherit property are extinguished so as to confer valid interests on others, that could have been gotten by surrender (bargain), a measure of material loss that references gain by others remains compensatory for the normative loss inherent in the abrogation of those rights. The statutory validation does not, given the nature of the kinds of rights so lost, detract from assessment being properly informed by the general law's approach to tort losses.[39]

38. These considerations illustrate why the comment of the Full Court, in passing, that assessment of compensation for the extinguishment of native title should not be approached by reference to economic and non-economic elements of loss is, with respect, misguided: FC [144] **CAB 315**. It overlooks the statutory criteria in s 51 of the NTA and
20 proceeds from a premise, which the Claim Group rejects, that dealings in native title land lack economic value. Moreover, as with compensation for infringement of rights to land held by others, the overall award and its elements reflect a component by which compensation is referenced to the objective effect (loss of the right to bargain non-traditional use) and to the subjective effect (diminution in traditional connection) of the abrogation of these normative rights in relation to land.[40]

---

37 *Ward* (2002) 213 CLR 1 at [14]; ***Milirrpum*** *v Nabalco* (1971) 17 FLR 141 at 167 (Blackburn J).

38 Compare Merrill, "Property and the Right to Exclude" (1998) 77 *Nebraska Law Review* at 744 that "the gatekeeper right is the right to determine the use of resources, by exercising the power of exclusion and inclusion", and at 750 that in the case of common or community property the right to exclude persons outside the community form gaining access to the resource.

39 Compare the discussion in Varuhas, *Damages and Human Rights* (2016) on adoption of the tort framework at 117-22 (user and gain-based measures reflecting normative damage), 125-29 (vindicatory tort damages by distress etc); and for statutory compensation for infringement of anti-discrimination legislation, see ***Richardson*** *v Oracle Corporation* (2014) 223 FCR 334 at [114]-[118] (Full Ct); *Wooton* (2016) 352 ALR 146 at [1599]-[1618], [1622]-[1629] (Mortimer J).

40 Compare Varuhas, *Damages and Human Rights* (2016) at 475-6 on damages to address consequential factual losses and damages for interference with the right in itself.

39. *Illustrations:* Four examples illustrate these considerations. The first is Lot 47 where Mr Fogarty was granted a 10 year Crown lease for grazing[41] and later sought a further grant. This prompted a notice of compulsory acquisition of native title by the Territory "in the certainty that no conflicting interests exist in the land" to enable a sale of freehold to Mr Fogarty.[42] Ultimately, the acquisition did not proceed, and Mr Fogarty agreed to pay the Claim Group agistment fees under an agreement with provision for environmental and sacred site protection.[43] The second relates to the proposed acquisition of Lots 97–100 and 114 for the purpose of commercial development, which did not proceed, and now a company conducted by the Claim Group occupies Lots 97-98 and 114 providing business opportunities for the native title holders.[44] The third concerns a later proposed release of some small lots for residential development where the Claim Group agreed to surrender native title to the parcels and the Territory agreed to pay the Claim Group an amount equal to the market freehold value of the land.[45]

40. The fourth, which is representative of the compensable acts in this case, is a grant of a development lease over Lot 22. The parcel was offered to the public by the Territory in 1990 "over the counter" for a purchase price of $10,000 to contract for the grant of a Crown lease. The lease was later granted in 1992 to Mr Fiket for residential purposes. Mr Fiket did not comply with the covenants to effect improvements, and in 2000 another contract was made (this time for $27,000) and a lease granted to Mr Millwood who, upon effecting the improvements, later obtained a freehold grant in 2006.[46]

41. Three short points can be made now. First, the holders of a native title have power to decide and bargain upon the non-traditional use of their country, and on terms that may involve its continued protection or, if they choose, surrender. Second, so far as government and proponents are concerned, the purpose of dealing with native title is to enable the grant of non-native titles. Third, statutory retrospective extinguishment denies to the native title holders the opportunity of exploiting their land and bargaining over its use by others.

---

41 Tenure documents re Lot 47 (**GFM43**).

42 Memoranda for acquisitions Lots 47, 109 and letter of offer (ex A12 **GFM12**).

43 Stock agistment agreement Lots 47, 109 (**CFM 6**).

44 Memorandum for acquisition of Lots 97-100, 114 (ex A12 **GFM12**); affidavit Lorraine Jones 14 October 2015 (**CFM** pp.20-62).

45 Indigenous land use agreement Lots 35, 37, 80, 101-108, 110-113 (**GFM7**).

46 See tenure documents re Lot 22 (**GFM36**).

42. **Intervenors:** There are two aspects of the submissions of the Attorneys-General for South Australia (**SAS**), Queensland (**QS**) and Western Australia **(WAS)** that should be noted before proceeding further. First, there is a suggestion that compensation may be assessed by reference to factors other than those upon which the parties have joined issue: SAS [17]–[35]; WAS [47]–[50], [54]–[63]. There may well be other cases where different approaches may assist, but that is not this case. The Claim Group presumes that the submissions do not attempt to widen the issues at this late stage.[47] Second, it is assumed that the intervenors do not weigh into factual contests: cf SAS [47], QS [16](c) manifest excess; SAS [41]–[42] value of land; QS [77] effects of acts. The Claim Group proceeds on the basis that the submissions are not put as contentions of fact.

A. Benchmarking native title and non-native titles: NT Appeal grounds 1, 1.1, 2, 2.1. 3; Commonwealth Appeal grounds 1–2; Cross-Appeal ground 1

43. It is common ground that compensable loss includes an element for material or economic loss assessed by comparison to freehold: NTS [3](1); CS [12]. The comparison of native title and non-native title is, in that respect, an analytical tool in the assessment of compensation payable under the NTA (just as market value is a tool of analysis for assessing compensation in the case of non-native titles). A correct comparison, in the Claim Group's submission, requires appreciation of the terms upon which the native title was recognised by the common law and protected by the RDA and NTA.

44. **Recognition and protection of the affected native title:** At the time a compensable act occurred, and extinguishment under the NTA is taken to have happened (1980 onwards), the native title of the Ngaliwurru and Nungali Peoples was recognised by the common law on terms that: (1) it was a burden or qualification on the radical title of the Crown that may be surrendered to the Crown; (2) if surrendered (or validly extinguished), the title of the Crown was enlarged to a full beneficial fee simple interest; and (3) the rights and interests in relation to the land comprising the native title could be protected (enforced) by appropriate legal or equitable remedies.[48]

45. It may be inaccurate to refer to a "radical title" of the Crown given that prerogative powers to deal with Crown land are displaced by statute, such as that found in the Territory Crown lands legislation (CLA 1931 s 6; CLA 1992 s 4). Nevertheless, whether described as a "radical title" or a statutory right, title or power, the analysis is the same. First, it is a bare legal title. Second, it is variable in scope dependent on other interests in

---

47 *News Ltd v South Sydney* (2003) 215 CLR 563 at [9] (Gleeson CJ), [88] (Gummow J), [135]-[136] (Kirby J), [233]-[234] (Callinan J).

48 ***Mabo** v Queensland (**No 2**)* (1992) 175 CLR 1 at 60-2 (Brennan J), 109-13 (Deane and Gaudron JJ).

the land and statutory constraint. Third, on the removal (extinguishment) of native title, the right, title or power of the Crown is enlarged in corresponding terms.[49]

46. Before the enactment of the RDA (31 October 1975), the native title could be extinguished or impaired by a valid grant of rights to others in relation to the land that was inconsistent with the continued existence or enjoyment of the native title. There was no equivalent common law protection that a title derived by Crown grant not be abrogated by subsequent inconsistent grant. The RDA, however, ensured that the Claim Group, as the holders of native title, enjoyed their interests in land to the same extent as the holders of other titles derived from Crown grants, with protection against later inconsistent derogating grants. The property held by the holders of a native title could not be expropriated unless done on terms, including as to payment of compensation, that apply to members of the community generally.[50]

47. The enactment of the NTA (1 January 1994) then provided a "prima facie sterilisation" of all acts which would defeat native title (s 11(1)) unless done in conformity with the code Pt 2 provides;[51] relevantly, by validating past acts occurring between 31 October 1975 and 1 January 1994 that were invalid because of inconsistency with the RDA (Div 2) and by prescribing when future acts after 1 January 1994 that affect native title are permissible (Div 3). The RDA continued to operate on acts affecting native title on subjects outside the NTA and as the NTA adopted other forms of title as the benchmarks for the treatment of native title, it did not offend the RDA.[52] The exceptions to that sterilisation were later expanded by validating intermediate period acts occurring between 1 January 1994 and 23 December 1996 that were invalid because of inconsistency with the future act provisions of the NTA (Div 2A) and by providing for the confirmation of extinguishment for certain valid or validated acts before 23 December 1996 (Div 2B).

48. The material loss element of the claim assessed by comparison to the treatment of other titles is referenced to the Lots covered by the invalid grants.[53] Twenty five of the grants were past acts that were invalid because of inconsistency with the RDA and four were intermediate period acts that were invalid because of the NTA. The RDA (and NTA) constrained the ability of the Territory to deal with the land, absent surrender or compulsory acquisition of the native title. A valid title could only be granted if done in conformity with the RDA (or the NTA, as the case may be), and the Claim Group had

---

49 Cf *Lansen v Olney* (1999) 100 FCR 7 at [43]-[48] (Full Ct per French J).

50 *Native Title Act Case* (1995) 183 CLR 373 at 437-9.

51 *Native Title Act Case* (1995) 183 CLR 373 at 453.

52 *Native Title Act Case* (1995) 183 CLR 373 at 483.

53 See table at FC [10] **CAB 279** save that acts 43-44 re Lots 62-63 in 1980 involved houses without tenure.

standing to restrain invalid dealings.[54] As noted already, the legal effect of validation was to divest the Claim Group of the rights to the land that they possessed by virtue of the common law and which were protected by s 11(1) of the NTA or by s 10 of the RDA.[55]

49. **No basis for reduction in comparable worth:** The Full Court reasoned that an assessment of the material nature of the native title rights required freehold to be adjusted to "account for the restrictions and limitations applicable to the non-exclusive native title rights" in a process of comparing the rights of the Claim Group and the rights of a holder of a freehold title: FC [134], [137] **CAB 312, 313**. In relation to each of the reductions made by the Full Court, their Honours erred in their characterisation of the nature and extent of the native title: on those three reductions, see [70]–[77] below.

50. The Full Court's characterisation does not come to terms with the relative and relational nature of rights to land, the protection of the native title by the RDA and NTA, and the effect of surrender or extinguishment. The Full Court may have been influenced by the view expressed, in passing, that native title lacks economic value: FC [144] **CAB 315**. This is, with respect, fundamentally wrong in principle and fact. As noted, a native title holding community may, through the power to surrender native title, bargain with others outside the community on the use of their traditional lands. The future act regime on land use agreements (formerly s 21, now s 24AA(3), Sub-divs B–E) facilitates non-traditional use and commercial dealings based on the power of surrender recognised by the common law.[56] The claimant and anthropological evidence amply demonstrated that payment or recompense are within the traditions of this Claim Group.[57]

51. *Control over a resource is relative and relational:* The power relationship implicit in property or an interest in land is relative.[58] The statement of facts as to the affected native title concerns the rights under traditional law and custom that would, but for extinguishment, be determined to exist in relation to the land: NTA ss 223, 225. The terms of s 225 acknowledge that the nature and extent of rights to land held by one person is necessarily determined by the relationship with rights, if any, held by other persons. *Ward* holds, in that respect, to find that there is a right to control access but it is "not an exclusive right", may mask a question of extinguishment and:[59]

---

54 *Bateman's Bay Local Aboriginal Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247.

55 *Native Title Act Case* (1995) 183 CLR 373 at 475.

56 *Explanatory Memorandum to Native Title Bill 1993* at 15; Second Reading by Prime Minister, House of Representatives 16 November 1993 *Hansard* at 2881.

57 Report Dr Palmer and Ms Asche 2012 at [65]-[84] (**CFM9** pp. 311-8).

58 Gray and Gray, *Elements of Land Law* (5th Ed) at [1.5.12]; *Yanner* (1999) 201 CLR 351 at [17]-[20].

59 (2002) 213 CLR 1 at [52]-[53]; similarly, *Commonwealth v* ***Yarmirr*** (2001) 208 CLR 1 at [94], [100].

> *At the least, it requires close attention to the statement of "the relationship" between the native title rights and interests and the "other interests" relating to the determination area (s 225(d)).*[60]

52. This is an aspect of the intersection of two sets of rights and legal systems in the recognition of native title.[61] The phrase "non-exclusive" conveys the consequence that if there are other (valid) co-existing non-native title interests in relation to the same land, they take priority.[62] The statement of facts in this case about the nature and extent of the native title is subject to the existence of *any* other interests and their relationship to the native title: TJ [72] **CAB 121**.

53. Thus, the *first* point is that the rights of the Claim Group in relation to the land were not concurrent: cf CS [17], [25]-[37]; NTS [44], [66]-[67]. No persons held rights to the subject land that were valid as against the native title; the grants over the Lots were invalid to that extent.[63] Occupation and use of the land without a valid title was an offence under the *Crown Lands Acts*,[64] but the penal provisions did not extend to the native title holders; the exercise of their native title was not unlawful.[65] It is immaterial if the provisions did not prohibit a "liberty" in others to be present on the land: cf CS [36]; NTS [68]. The is no general common law right to traverse, access and occupy Crown land, and any liberty of members of the public to pass along Crown land is not a right in relation to land.[66] The *Crown Lands Acts* proscribed residing on the land and taking its resources,[67] things that could be done by the native title holders, *as of right*.

54. The *second* point is that the recognition of native title by the common law meant that the rights could be protected by the grant of legal and equitable remedies, enforceable as if they were common law rights.[68] The declaratory theory of the common law means that the native title existed, and was enforceable, at the time of the acts.[69] Differences in

---

60 On remittal the phrase "non-exclusive right to use and enjoy" was used in the native title determination holding that it was inappropriate to refer to "possession" or "occupy" where a right under traditional custom of "absolute control of access" cannot be recognised: *Attorney-General (NT) v Ward* (2003) 134 FCR 16 at [16]-[17].

61 ***Yorta Yorta*** *v Victoria* (2002) 214 CLR 422 at [40] (Gleeson CJ, Gummow and Hayne JJ).

62 *Western Australia v* ***Brown*** (2014) 253 CLR 507 at [64] (the Court).

63 *Mabo (No 1)* (1988) 166 CLR 186 at 232-3 (Deane J) referred to in *Ward* (2002) 213 CLR 1 at [111].

64 CLA 1931 ss 118-124; CLA 1992 ss 99-102.

65 *Ward* (2002) 213 CLR 1 at [182] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

66 *Margarula v Northern Territory* (2016) 338 ALR 464 at [80]-[89] (Mansfield J); *Stow v Mineral Holdings (Australia)* (1979) 180 CLR 295 at 311-2 (Aickin J).

67 CLA 1931 ss 199, 124; CLA 1992 s 102; *Trespass Act 1987* (NT) ss 6-7.

68 ***Wik*** *Peoples v Queensland* (1996) 187 CLR 1 at 84 (Brennan CJ); *Mabo (No 2)* (1992) 175 CLR 1 at 61 (Brennan J); *Ward* (2002) 213 CLR 1 at [21]. *North Ganalanja* (1996) 185 CLR 595 at 616 that the statutory right to negotiate in the NTA was not a windfall accretion to the bundle of native title rights recognised by the common law; it reflected the circumstance that native title may be protected against interests that are claimed by persons with whom negotiations might take place.

69 *Wik* (1996) 187 CLR 1 at 175, 182 (Gummow J); *Native Title Act Case* (1995) 183 CLR 373 at 480-1.

conceptions of "property" do not deny the normative quality of the laws and customs of the indigenous societies.[70] By definition, native title comprises interests in relation to land (s 223).[71] To the extent remedies depend upon possession as a root of title to land, that simply involves the proposition that the holder of possession may exclude others who cannot show a better right:[72] cf CS [36].

55. Here, the native title rights could be enforced against anyone without better title, and there was no one with a better title to the subject Lots. Control over access does not have a standard content and invariable intensity.[73] The ability to enforce rights to live on and use the land necessarily involves assertion of control over the land. The inquiry cannot begin and end with any *a priori* assumption about rights that are "exclusive" or "non-exclusive"; an inquiry about the content of the rights, and a conclusion on whether they carry power to control access, requires examination of the relationship with any other rights.[74] The affected native title did not include a right of exclusive possession in the sense of a power to exclude any and everyone from the land for any reason or no reason at all,[75] but it did include rights to exclude others lacking better title. It is simply not possible to point to any other person holding a better title that could disturb the Claim Groups' occupation and use of their traditional lands.

56. The *third* point, which has already been mentioned, is that historic extinguishment of any absolute or unqualified right of exclusive possession did not lessen the ability of the Claim Group to determine the use of their country by others through their power to surrender native title so as to enable the conferral of valid rights on outsiders. It is to that power of surrender that an inquiry of market value on a hypothesised sale is to be addressed, something that the trial Judge, but not the Full Court, appreciated: TJ [228], [232] **CAB 157-8**.

57. <u>*Protection by the RDA:*</u> The protection of the affected native title by the RDA against past acts presents several points that inform the meaning of "just" compensation in s 51(1) of the NTA, as permitted by s 7(2)(b) of the NTA.[76] In that respect, compensation

---

70 *Yorta Yorta* (2002) 214 CLR 422 at [40] (Gleeson CJ, Gummow and Hayne JJ).

71 *Yarmirr* (2001) 208 CLR 1 at [12] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

72 *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 285 (Rich J), 298-9 (Williams J).

73 *Yanner* (1999) 201 CLR 351 at [18]-[19] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

74 *Yarmirr* (2001) 208 CLR 1 at [14], [42], [94], [100]; Gray and Gray, *Elements of Land Law* (5th Ed) at [1.5.5], [1.5.11]-[1.5.12], [1.5.17].

75 *Brown* (2014) 253 CLR 507 at [53] (the Court). Although the exercise of the incidents of freehold titles is subjected to a range of statutory controls and, in addition, many proprietors hold title as trustees: ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 at [171] (Gummow and Hayne JJ). On the effect of statutory right of "possession", compare *Queensland v Congoo* (2015) 256 CLR 239 at [11] (French CJ and Keane J), [161] (Gageler J) possession not exclusive; contra [74] (Hayne J), [102] (Kiefel J), [144] (Bell J).

76 See *Native Title Act Case* (1995) 183 CLR 373 at 481.8, 483.8.

under s 51(1) of the NTA for a past act is "just" if it reflects the measure of compensation applicable to the affected property shaped by the protection of s 10(1) of the RDA.

58. *First*, the entitlement to compensation is for past acts rendered invalid by the RDA, and intermediate period acts rendered invalid by the NTA's former future act provisions. The acts were later validated and treated as extinguishing acts, on terms that require payment of compensation for the effect of extinguishment. Compensation ought reflect loss of those affected rights, which included their treatment by the RDA and NTA as rights equivalent to other titles: RDA s 10; NTA: ss 17(2), 51(3), 240.

59. *Second,* s 10 of the RDA operates where persons of a particular race do not enjoy a right that is enjoyed by persons of another race, or do not enjoy that right to the same extent, and confers on the holders of a native title security in the enjoyment of their title to property to the same extent as the holders of titles granted by the Crown.[77] As explained in the *Native Title Act Case*:[78]

> *Security in the right to own property carries immunity from arbitrary deprivation of the property.*[79] *Section 10(1) thus protects the enjoyment of traditional interests in land recognised by the common law. However, it has a further operation.*
>
> *If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorise expropriation of property characteristically held by the "persons of a particular race" for purposes additional to those generally justifying expropriation or on less stringent conditions (including lesser compensation) is inconsistent with s 10(1) of the [RDA]. (emphasis added)*

A law that does not equate the measure of compensation payable to the holders of native title to the compensation payable to the holders of other forms of title is, on its face, inconsistent with the protection given by s 10. Security of enjoyment by the holders of other titles is the "benchmark" by which to determine whether the holders of a native title enjoy their human rights in relation to land to a more limited extent than do persons of other races:[80] cf CS [38], [43]; NTS [37]–[38]; WAS [53]; SAS [31].

60. *Third*, as the plurality reasons in *Ward* emphasised, *Mabo (No 1)* and the *Native Title Act Case* rejected the proposition that native title can legitimately be treated differently from other forms of title because it has different characteristics and derives from a different

---

77 *Mabo (No 1)* (1988) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ); *Gerhardy v Brown* (1985) 159 CLR 70 at 99 (Mason J).

78 *Native Title Act Case* (1995) 183 CLR 373 at 437.

79 *Mabo (No 1)* (1988) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ), 230 (Deane J).

80 *Native Title Act Case* (1995) 183 CLR 373 at 438, 450, 483.

source.[81] Section 10 does not use the word "discrimination" or any like expression; the RDA and the Convention proceed by reference to an implicit declaration that those differences are irrelevant.[82] *Ward* rejected the notion that comparison is only acceptable if native title involves "full ownership" of the land: cf CS [40]; NTS [45]. The trial Judge appears to have acknowledged that these considerations informed comparison with freehold value, but only if so-called "exclusive native title rights" were lost: TJ [213]-[214], [224] **CAB 154, 156**; also FC [134] **CAB 312**.

61. *Fourth,* s 10(2) of the RDA protects "a right of a *kind*" referred to in article 5 of the Convention – to own and inherit property. The RDA is engaged by the status of traditional title as a right in relation to land held by indigenous peoples, not by the particular content or incidents of the title.[83] As native title is protected owing to its status as an indigenous right to own property, it is wrong in principle to bookend the incidents of the particular native title with another title to produce a fractionate compensable worth of native title. Rather, the RDA and NTA benchmark other forms of title (not fractions of title) for the treatment of native title: RDA s 10; ss 17(2), 51(3), 240.[84]

62. *No scope for the grant of co-existing interests in the subject Lots, and the acts in issue were not of that kind:* The invalid acts that occurred were, relevantly for the purposes of assessing exchange value, the grant of freehold or leasehold convertible to freehold. It is in relation to *those* acts that the assessment of the market value of a notional surrender of native title should be directed. Further, a generalised contention that the native title was vulnerable to diminution by grant of lesser co-existing non-native titles does not address the legal regime governing the subject land. No effective grant of rights could be made, except upon compliance with the statutory scheme which provides for the making of the grants.[85] This is found in the *Crown Lands Acts* as affected by the overriding operation of the RDA (past acts) and NTA (intermediate period acts). A grant of rights could not be made other than in conformity with those laws or unless the native title was surrendered voluntarily or acquired compulsorily.[86]

---

81 (2002) 213 CLR 1 at [117]-[122].

82 *Ward* (2002) 213 CLR 1 at [121]; ***Maloney*** *v The Queen* (2013) 252 CLR 168 at [65], [78] (Hayne J), [306] (Gageler J).

83 *Ward* (2002) 213 CLR 1 at [116]-[122] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

84 *Native Title Act Case* (1995) 183 CLR 373 at 483.

85 See the authority collected in *Forrest & Forrest v Wilson* (2017) 91 ALJR 833 at fn (3), (42).

86 In the case of past acts, surrender was governed by the common law and acquisition by a law like the LAA provided it was done in conformity with the RDA, and in the case of future acts that are intermediate period acts, by former ss 21, 23 in Pt 2 Div 3 of the NTA dealing with agreements and acquisitions considered in *Griffiths HC* (2008) 235 CLR 232 at [35]-[43] (Gummow, Hayne and Heydon JJ).

63. As noted, the security of enjoyment of interests derived from a Crown grant benchmarks the protection.[87] Land alienated by a freehold or leasehold grant could not be available for dealings by the Territory (absent surrender or compulsory acquisition). Crown land not alienated, but held under some other right, is similarly protected from derogation, absent particular statutory provision.[88] In the case of land held under a Crown lease, the *Crown Lands Acts* might have, in that respect, permitted a short term miscellaneous licence to enter the leased land and take certain things.[89]

64. The earlier partial extinguishment before the RDA by a historic pastoral lease did not provide some gateway for the Territory to grant similar interests in the relevant land post RDA: cf CS [26]–[34]; FC [135] **CAB 312**. The subject Lots were town lands. The *Crown Lands Acts* required various procedural steps distinct for the grant of a pastoral lease, a lease other than a pastoral lease, and an estate in fee simple.[90] The CLA 1931, and later the *Pastoral Lands Act 1992* (NT), made separate provision[91] for the grant of pastoral leases that did not engage with the subject town lands.[92]

65. The potential for a grant of a pastoral lease (or some other like interest) over the subject land is unreal. The relevant land comprises the Lots covered by grants made from 1985 onwards.[93] The RDA commenced on 31 October 1975 to protect native title on terms that no competing or derogating grant could be made unless that could occur for non-native titles.[94] Land in the town generally was set apart as town lands as from 10 May 1975.[95] The grants followed survey and sub-division in 1985 (Wilson Street and Lawler

---

87 *Native Title Act Case* (1995) 183 CLR 373 at 437-9, 483.

88 *O'Keefe v Williams* (1910) 11 CLR 171 at 190-1 (Griffith CJ), 212 (Isaacs J).

89 CLA 1931 s 109; CLA 1992 s 91. A Crown lease could also be resumed for specified public purposes, the power of resumption being reserved from: CLA 1931 ss 23A, 103; CLA 1992 ss 27, 76. The *Crown Lands Regulations* (NT) Pt 3 Div 3 prescribed the terms of miscellaneous licences under the CLA 1931 including their periods, which could be 3, 6 or 12 months (reg 41). A grazing licence or occupation licence could not be granted in relation to land held under lease: CLA 1931 ss 107-108; CLA 1992 ss 88, 90. As to CS [28], the grazing licences were granted over areas east of the Creek, and beyond the Town, and did not cover the (sub-divided) Lots the subject of the claim for material loss: see **GFM44-46**. The trial Judge dismissed a claim that the grants of grazing licences (acts 37-39) over other Lots were compensable category D past acts on the basis that s 47B did not apply: [2014] FCA 256 at [61], [67] **CAB 21, 22**; items 38-39 of annexure, re Lots 56-57, 59, 73, 109 **CAB 56-7**.

90 CLA 1931 ss 15-18A; CLA 1992 ss 12-18.

91 Including preconditions for gazettal of pastoral districts and of making land available for pastoral leases: CLA 1931 ss 13, 16; *Pastoral Lands Act* 1992 ss 8, 32; compare tenure report (ex NT3 **GFM29**) at p. 13 re gazettal notices, and maps 2A–2B depicting proclamations, affecting the application area.

92 Prior to the *Crown Lands Amendment Act (No 3) 1980* (NT) CLA 1931 Pt 3 Div 4 made provision for the grant of town leases, land thereafter provided for classes of leases as pastoral, term and perpetual (s 23) and for the conversion of leases other than pastoral leases to freehold.

93 Save for Lots 62-63 where houses were built in 1980 without tenure FC [10] **CAB 270**.

94 *Native Title Act Case* (1995) 183 CLR 373 at 438-9.

95 Proclamation 10 May 1975 (ex A11 **GFM11**) excised from the Commonage Reserve established in 1934, in turn excised from pastoral land: see tenure history in ALC Report (ex A33 **GFM22**) at p.1.

Court) and 1986 (George Street)[96] and notice under CLA 1931 that the Lots were available for disposal by leasehold and freehold grant.[97] There is no factual foundation to contend that there was any realistic prospect that the relevant land could, in the period after 31 October 1975 and before the compensable grants, be the subject of the grant of some other co-existing rights like a pastoral or mining lease: cf FC [135] **CAB 312-3**.[98]

66. *Effects of extinguishment on surrender or acquisition:* The surrender of the native title was a legal condition to a valid grant of leasehold or freehold to others. The reference to "the consideration that would have been paid for the land if it had been sold on the open market" (LAA Schedule 2 rule 2(a); NTA s 51(4)) directs, in this case, inquiry to the price at which the native title holders and the Territory could have, on a notional bargain, agreed upon for surrender of the native title: cf TJ [228], [232] **CAB 157-8**.

67. Dealings post the recognition of native title, where the parties transact on a freehold value when dealing with native title land,[99] are relevant to that assessment given the declaratory theory of the common law[100] and that subsequent events can throw light upon value at an earlier time of divestiture.[101] Indeed, the Commonwealth attempts to ground part of its appeal on intangible loss in this way: ground [6] **CAB 505**. That governments and proponents transact on the value of non-native titles reflects a practical reality consistent with applicable legal principle. Governments, and those claiming through governments, do not (and cannot) buy native title rights to use and occupy land under Aboriginal tradition. They gain non-native title interests in land; in this case, by each act of validation, a freehold estate.

68. The validation provisions of the NTA discharge (extinguish) the interests of the native title holders in relation to land. They have their genesis in the terms upon which the common law recognised native title in *Mabo (No 2)* that native title could be surrendered or extinguished by valid exercise of sovereign power, whereupon the Crown's radical

---

96 Surveys Wilson Street and Lawler Court 1985, George Street 1986; later Fitzer Road 1995 (**GFM55-58**).

97 See notice for disposal of Lots 22 and 23 (**GFM 36** doc 5.1); see also notices relating to Lot 20 (**GFM35** doc 2.9), Lot 26 (**GFM37** doc 7.2), Lot 27 (**GFM38** doc 8.3), Lots 28, 30 and 31 (**GFM39** doc 9.1), Lot 29 (**GFM40** doc 10.2), Lots 28, 30, 31 (**GFM41** doc 11.4), Lots 29, 32, 43, 44 and 46 (**GFM42** doc 32.1), Lot 59 (**GFM47** doc 40.5), Lot 64 (**GFM50** doc 45.4), Lot 75 (**GFM51** doc 48.6), Lot 79 (**GFM52** doc 49.4), Lots 81, 85-86 (**GFM53** doc 50.1), Lot 88 (**GFM54** doc 53.3).

98 Compare, for example, in the context of trade practices compensation, the formula of "reasonable prospect" in *Jacfun v Sydney Foreshore Authority* [2012] NSWCA 218 at [67].

99 Ministerial memoranda for the proposed acquisitions of Lots 47, 109, 97-100 and 114 to grant freehold (ex A12 **GFM12**), indigenous land use agreement for surrender of Lots 80, 101-108, 110-113 (within ex RH-2 affidavit Rebecca Hughes (**GFM7**) based on a freehold valuation (ex A40 **TFM13**); also valuation evidence T388, T409-12: **TFM20**, pp 671, 692-5 (Dudakov); economic evidence T617-20, 623-4, 653, 660-1: **TFM24** pp.726-9, 732-3, 762, 769-70 (Houston re assumptions in MFI A44 **GFM24**).

100 *Wik* (1996) 187 CLR 1 at 179-180, 184 (Gummow J).

101 *Falconer* [1981] 1 NSWLR 547 at 558 (CA per Hope JA).

title is expanded to absolute ownership to enable dealings in the land unconstrained by the burden of native title.[102] Recognition on those terms in *Mabo (No 2)* applied ***Amodu Tijani*** *v Secretary, Southern Nigeria*[103] which held, as applied in ***Geita Sebea*** *v Territory of Papua*,[104] that where native title land is acquired by surrender or compulsion, compensation is payable on the footing that the Crown acquires an estate in fee simple.[105] In *Administration of Papua v Daera Guba* Barwick CJ explained that "whatever its nature according to native custom" the title of the Papuans was confirmed by legislative acts from time to time and:[106]

> *... though the indigenous people were secure in their use of usufructuary title to land, the land came from the inception of the colony into the dominion of Her Majesty. That is to say, the ultimate title subject to the usufructuary title was vested in the Crown. Alienation of that usufructuary title to the Crown completed the absolute fee simple in the Crown.*

That outcome – completion of a fee simple by expansion of a radical title to a beneficial interest – is reached because the title of the Crown is freed and discharged of the interests of the holders of native title.

69. It is no answer to contend that reduction is warranted on the footing that there had been an earlier partial enlargement of the interest of the Territory corresponding to the earlier non-compensable partial extinguishment of the native title: NTS [66]; CS [23]. The contention overlooks the effect of the RDA outlined above. The Territory was precluded from dealing with the land by grant of leasehold or freehold, such that the earlier partial extinguishment did not lessen the value of surrender as a pre-condition to the grant of rights to others. The later entire extinguishment had the effects described in *Geita Sebea* and *Daera Guba*.

70. **Specific errors in the Full Court's reductions:** This appreciation of the terms on which the native title was recognised by the common law and protected by the RDA and NTA, and of the divestiture of those rights on validation and extinguishment, exposes error in the Full Court's reasons for reducing the trial Judge's assessment: FC [132] **CAB 312**.

---

102 (1992) 175 CLR 1 at 60 (Brennan J), 87-8, 111-2 (Deane and Gaudron JJ).

103 [1921] 2 AC 399; considered *Mabo (No 2)* (1992) 175 CLR 1 at 50 (Brennan J), 87 (Deane and Gaudron JJ).

104 (1941) 67 CLR 544 at 552 (Starke J), 557 (Williams J, Rich ACJ agreeing).

105 [1921] 2 AC 399 at 411. American cases on the assessment of compensation for the taking of Indian land proceed on a similar basis and have rejected any notion of a "value to Indians": *Miami Tribe of Oklahoma v United States* 175 F Supp 926 at 942 (1959). In *Otoe v United States* 131 F Supp 265 at 290 (1955) Littleton J remarked that "values cannot be determined on the basis of berries and wild fruits". There being no actual market (because Indian land could not, until expropriated, be alienated), fair market value is imputed on the value which would be produced when an informed seller disposes of the land to an equally informed buyer: *Tlingit v United States* 389 F 2d 778 at 782 (1968).

106 (1973) 130 CLR 353 at 397: see also *Yarmirr* (2001) 208 CLR 1 at [44]-[45]; *Griffiths v Northern Territory* (2007) 165 FCR 391 at [66]-[71] (Full Ct) (***Griffiths FC***).

71. <u>*Reduction for inalienability*</u>*:* The Full Court's conclusion that the trial Judge double counted, and that further reduction was thereby warranted, depends upon their Honours' view that alienability is a "discounting factor" (FC [113], [130] **CAB 306, 312**), as well as disregarding the trial Judge's clear statement that his assessment of exchange (surrender) value did not include allowance for connection: TJ [234] **CAB 158**.

72. *Mabo (No 2)* rejected the premise that the communal and intergenerational character of the relationship of Aboriginal people to their country placed traditional rights outside of the conception of property.[107] Alienability or transferability is not an essential qualifying characteristic of a right of "property."[108] Native title was recognised on terms that it is inalienable in that the rights comprising the title cannot be acquired by persons who do not belong to the native title holding community, but that it can be acquired outside their laws and customs by the Crown by way of surrender. And once surrendered, what was a restriction *on the title of the Crown* to deal with the land is removed.[109] On that score alone, the Full Court erred in treating inalienability as a restriction on the power of the Claim Group to deal with their title.

73. In the case of freehold land, if a restriction on title affects *both* seller and buyer, the restriction can reduce assessment of "value to owner" in the sense that phrase came to be understood in acquisition law.[110] In the case of native title land, *Geita Sebea* held that restriction on alienation of the land by the holders of that title was not a reason to reduce the assessment,[111] applying *Amodu Tijani*.[112] The Full Court cited and preferred *Corrie v MacDermott* over the reasoning in *Geita Sebea* (FC [117]-[119] **CAB 307-8**), but *Corrie* was a case where the restriction on alienation existed in the hands of the owner and successors in title.[113] That has no application to the surrender of native title where the land is cleared of that interest and removes what was a qualification on the title of the Crown: cf FC [88], [92] **CAB 300-1**. As Williams J said in *Geita Sebea*, such a restriction has no detrimental effect as when "in the hands of the Crown it would be freed therefrom":[114] cf NTS [49]; CS [19]. Further, the general principle in *Corrie* has no

---

107 (1992) 175 CLR 1 at 51 (Brennan J), 102 (Deane and Gaudron JJ) disapproving *Milirrpum* (1971) 17 FLR 141 at 270-4.

108 *R v Toohey; ex parte* ***Meneling Station*** (1982) 158 CLR 327 at 342-3 (Mason J): see generally Gray and Gray, *Elements of Land Law* (5th Ed) at [1.530].

109 *Mabo (No 2)* (1992) 175 CLR 1 at 59-60 (Brennan J) quoted in FC [416] **CAB 387**.

110 ***Leichardt Council*** *v Roads Traffic Authority (NSW)* (2006) 149 LGERA 439 at [32] (Spigelman CJ).

111 (1941) 67 CLR 544 at 552 (Starke J), 557 (Williams J, Rich ACJ agreeing).

112 [1921] 2 AC 399 at 411.

113 *MacDermott v Corrie* (1913) 17 CLR 223 at 246 (Isaacs J); 232-3 (Barton ACJ); *Corrie v MacDermott* (1914) 18 CLR 511 (PC) at 517 (agreeing with Issacs J); see also the passage in *Commonwealth v Arklay* (1952) 87 CLR 159 at 170-1 (Dixon CJ, Williams and Kitto JJ) quoted at FC [121] **CAB 308-9** re a buyer being subject to the same restrictions affecting the title of the vendor.

114 (1941) 67 CLR 554 at 557.

application where the statutory hypothesis is that the land is *able* to be sold (LAA Schedule 2 rule 2(a)) and is directed to ascertaining just compensation (NTA s 51(1); LAA Schedule 2 rule 1) as the paramount consideration.[115]

74. *Nature and extent of the native title:* The trial Judge was correct to conclude that the rights the Claim Group enjoyed were in a "practical sense" very substantial and exercisable in such a way as to prevent further activity on the land: TJ [231]–[232] **CAB 158**, cf FC [65], [78]-[79] **CAB 294, 297-8**. His Honour had noted that the native title was an impediment to the Territory dealing in the land unless surrendered or acquired, and that there were no valid acts restricting the Claim Group's use of their land: TJ [219], [228] **CAB 155, 157**. It is not, in that setting, inappropriate to refer to the "practical" operation or effect of the RDA: and see TJ [219] **CAB 155** citing the *Native Title Act Case* (1995) 183 CLR 373 at 437 dealing with the RDA's protection of native title; compare FC [84] **CAB 299**.[116]

75. *Alleged regard to the value to the Territory:* It is not irrelevant to consider what the Territory might have been prepared to pay: cf FC [89], [92] **CAB 300-1**. This is not an impermissible (*Point Gourde*) inquiry about the increased value of the land arising from the notional acquisition or a diversion from assessing value to owner: cf FC [91] **CAB 301**; LAA Schedule 2 rule 8(c). Rather, it is an inquiry about what the Territory, as the (only) notional acquirer, would be prepared to pay for the notional surrender of the native title, which is how the point was approached by the trial Judge: TJ [217], [228], [232] **CAB 155, 157-8**.

76. The trial Judge did not hold a test of market value to be irrelevant, but rather remarked, as Starke J had in *Geita Sebea*, that where there is no market it is "artificial"[117] and that the conventional approach expressed in *Spencer* "seems inappropriate": TJ [211] **CAB 154**. In many acquisition cases there is a need to adapt tools for assessment in the light of the particular statutory framework to achieve the paramount object to provide fair or just compensation.[118] The trial Judge inquired as to the price the Claim Group would have been prepared to surrender their title and what price (value) the Territory would be prepared to pay to acquire the rights by surrender. Despite use of the phrase "value to the Territory", the substance of his Honour's reasoning is perfectly correct in

---

115 *Leichardt Council* (2006) 149 LGERA 439 at [37]-[44].

116 *Ward* (2002) 213 CLR 1 at [115] referring to *Mabo (No 1)* (1988) 166 CLR 186 at 230 (Deane J).

117 (1941) 67 CLR 544 at 554 referring to improvements by an aerodrome after holding at 553 the primary judge erred in considering the improvements of no value to the natives. See also *Boland v Yates Property Corporation* (1999) 74 ALJR 209 at [265] (Callinan J) that the exercise of finding the likely price on a notional sale is a "highly artificial one, involving many uncertainties and matters of judgement".

118 *Falconer* [1981] 1 NSWLR 547 at 569-72 (Mahoney JA); *Leichardt Council* (2006) 149 LGERA 439 at [27]-[31] (Spigelman CJ).

the light of the statutory framework to provide just terms compensation for the extinguishment of native title to enable a valid grant of title on others where the native title is recognised on terms that it could be surrendered for that purpose: TJ [228], [232] **CAB 157, 158**.

77. In contrast, the Full Court wrongly approached assessment as if there were a notional purchase of the native title rights by any third party on an open market (at [135], [144] **CAB 312-3, 315**) without regard to the circumstance that the relevant hypothetical transaction would be a surrender to the Crown. In any event, the compensation criteria permit the Court to *have regard to* compulsory acquisition compensation principles (NTA s 51(4)). The approach of the trial Judge was consistent with *Geita Sebea*: TJ [225] **CAB 157**, contra FC [115]–[119] **CAB 306-8**.

78. **The Territory's case on "conventional economic analysis"** (NTS [33]–[34]) highlights the points that compulsory acquisition principles are means, not ends, to assessing compensation, and the dictum of Butler J of the US Supreme Court in *Standard Oil Co v Southern Pacific Co* that:[119]

> *Ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having basis in a proper consideration of all relevant facts.*

79. The Territory's case challenges the concurrent rejection of the expert opinion evidence it sought to adduce at trial from Wayne Lonergan that purports to estimate a "usage value" and a "negotiation value" of the native title rights: NTS [43]–[61]. It was rejected by the trial Judge (correctly) on the basis that it is not appropriate to view rights as if held in a context divorced form the terms upon which native title is recognised and held by indigenous people: TJ [212], [220], [243] **CAB 154, 156, 160**.

80. The Full Court rejected the evidence on another basis; correctly stating that each component of the opinion evidence relied on assumptions of value that involved "a certain degree of conjecture or judgment" that were "contestable": FC [128] **CAB 311**. Their Honours did not deal specifically with the Claim Group's notice of contention[120] that the economic opinion evidence also depended on matters of anthropology not established at trial. To the extent rejection on that basis is not covered by the reasons below, the Claim Group seek leave to file the same notice: cf NTS [62].

---

119 268 US 146 (1925) at 156 quoted in *Bank Nationalisation Case* (1948) 76 CLR 1 at 300 (Starke J).

120 Amended notice of contention (**GFM31**); leave to amend being granted at the hearing of the appeal: transcript 20 February 2017 T3 (**GFM32**); at trial see order 12 February 2016 (**GFM4**) on the Lonergan report (ex NT5 **TFM15**) excluding pars [111]-[125], [134], [139]-[142], [154](a)-(c), (e)-(j) and (m), and receiving pars [14]-[17], [23] last sentence, [46]-[47], [54]-[91], and [92] and [99] subject to submission on characterisation and weight..

81. Mr Lonergan's opinions assume that native title can be disaggregated and then equated and lined up (bookended) to the incidents of other titles: TJ [243] **CAB 160**; cf NTS [46].[121] The opinions proceed from a legally flawed base; an inquiry about native title cannot proceed from an *a priori* assumption that the rights correspond with common law rights[122] (putting aside the effect of benchmarking titles by the RDA, which is not accommodated by Mr Lonergan's opinions).

82. Further, Mr Lonergan accepted that his opinions depend upon matters of anthropology for which he has no expertise.[123] And these suppositions were not explored in the primary evidence. For example, the land the subject of the material loss was unimproved at the time of assessment. It was not put to any claimant witness that native title could not be enjoyed over the land before improvements were effected: cf NTS [48]–[49], [64].[124] And there was contrary unchallenged claimant evidence of use of the subject land before development.[125]

83. The Full Court concluded correctly that the judgments made by Mr Lonergan were "contestable"; for example, that land without road access is more valuable to native title holders: FC [128] **CAB 311**. To make matters worse, Mr Lonergan's calculation of usage value, referenced to land that is not the subject of the claimed material loss, depends upon valuation evidence rejected below: cf NTS [54]; ground [2](b) **CAB 498**.[126] Mr Lonergan's negotiation value of 50% was contradicted by the economist called by the Commonwealth.[127] As the Full Court noted, Mr Lonergan accepted that "there was no definite basis" for the value he selected: FC [128] **CAB 311**.

84. **The trial Judge's "intuitive" reduction is not required:** That leaves the trial Judge's holding that "some reduction" from freehold value is "necessary" given the earlier extinguishment of a native title right to control access, which is Honour described as an "intuitive figure": TJ [231]–[234] **CAB 158**. That reasoning does not, with respect, come to terms with the circumstances that: (1) the rights of the Claim Group were extensive, to live on and use the land for their material, cultural and spiritual sustenance, and that

---

121 Lonergan report at [63] (**TFM15**, p 336).

122 Cf *Yarmirr* (2001) 208 CLR 1 at [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

123 Transcript T602(43)-3(41), 637(34)-8(20), 651(25)-3(7) (**TFM23** pp 711, 746, 760); Lonergan report at [54] fn (7), [57]–[59], [61], [66]–[67] (**TFM15** pp 334-5, 337); compare Houston T608(1)-611(21) (**TFM23** pp 717-20) and Houston First Report at pp 16-7 disclaiming economic expertise to value traditional attachment (**TFM18** pp 465-6).

124 Lonergan report at [66]-[69] (**TFM15** p 337) cf cross examination Alan Griffiths about retaining a connection: T58-9 [**GFM32**].

125 Affidavit Lorraine Jones [6] (**CFM2** p 16), not cross-examined; quoted in part TJ [371] **CAB 192**.

126 Lonergan report at [99] and appendix F, adopting Wotton land valuation with a total of $246,764 (**TFM15** pp 342, 385-6); cf TJ [414] **CAB 202-3**.

127 Houston at T650(10)-(47), 654(26)-655(10), 660(11)-(42) (**TFM23** pp 759, 763, 769).

no other persons held valid rights in relation to the land; and (2) that co-existing interests could not be granted unless that could be done in the case of non-native titles, which had not occurred and was never likely to occur.

B. Compensatory Interest: Commonwealth Appeal ground 3; Cross-Appeal ground 2

85. It is common ground that compensable material loss of the native title includes an element of compensatory interest calculated on the amount assessed in the benchmarking of native title against freehold value: NTS [3](2); CS [12]. It is also common ground that interest is payable by reference to the equitable principle that the right to interest takes the place of the right to possession of the land: NTS [121]; CS [50]-[51]

86. The trial Judge held that:

> *... the interest is to be awarded as part of the compensation, rather than interest on the compensation. That is, the entitlement to interest in circumstances where the market value is to be determined at the date of the compensable acts necessarily includes interest on that market value to provide for compensation on fair terms, or compensation which is in a just amount.* (TJ [254] **CAB 163**).

His Honour accepted that neither authority, nor the NTA, precluded the award of interest on a compound basis, where appropriate (TJ [252] **CAB 162**). The Full Court agreed (at least) that the NTA did not preclude that course: FC [199] **CAB 331**.

87. **Statutory context:** The Preamble to the NTA gives statutory recognition to the historical fact that Aboriginal peoples have been progressively dispossessed of their lands, largely without compensation, and as a consequence, they have become, as a group, the most disadvantaged in Australian society. Thus, the Preamble goes on to state that justice requires, if acts that extinguish native title are to be validated or allowed, compensation on just terms. Despite the considerations upon which the NTA was enacted, the Full Court, and the trial Judge, reasoned that an award of compensatory interest for past extinguishment, other than by way of simple statutory interest, requires a (further) causal link between dispossession and loss: FC [211] **CAB 334**; TJ [253], [277] **CAB 163, 169**.

88. It is also necessary to take account of the broader context.

(1) In the case of a compulsory acquisition of non-native title interests, the existence of the affected interest and of a liability to compensate are taken as givens, and there are processes for pre-assessment offers and payments: see LAA ss 50(1), 62(1). The time between acquisition and (full) payment is relatively short, and fluctuation in money and land values will not be marked, and interest is needed when the assessed amount exceeds the amount pre-paid: LAA s 64(3).

(2) By contrast, the holders of a native title must first establish that they had native title prior to extinguishment, as occurred here with the earlier contested native title

proceedings. They then, as also occurred here, need to establish a liability on the part of government to pay compensation. There are no processes for pre-assessment offers and far greater fluctuations in money and land values will occur over a much longer period of time.

(3) In this case, the periods involve 15 years or so between the time of an act and validation, 20 years since validation, and up to 35 since date of act. In that time the Territory has not paid compensation, and has received payments (sale and rent) for the (invalid) use of the land,[128] and obtained a saving in its borrowing or revenue costs (computed on government bond risk free rates).[129]

10 To argue that the correct application of compensatory principle would disjoin native title cases from compulsory acquisition cases is to ignore the difference in a case of statutory retrospective extinguishment done without notice: cf NTS [111].

89. The divestiture of native title on the later validation of past acts cannot be equated to the situation of a claimant not taking action, as might occur in relation to compensable future acts done on notice. Nor can the period between compensable past act and validation be characterised as a time when the parties were unable to do anything; the validation provisions ascribe a new legal significance to those past acts: cf CS [83]–[84].[130] The traditional title of the native title holders to the land is converted into a right for compensation, and the Territory acquires good title, including in this case title to the
20 rents and profits it received, with a duty to pay that compensation, *at that earlier time*.

90. The Claim Group brought legal proceedings to have their native title to land in the Town recognised, to resist the Territory's proposed acquisitions, and to establish that the Territory had a liability to pay compensation for extinguishment. These actions were contested by the Territory: see [12] above. The Claim Group is hardly to be blamed for the passage of time. By parity to the position in equity (noted below), even where the passage of time is due to a circumstance affecting both parties (say in the period before validation), the party taking possession of the land is still obliged to pay interest from the time of possession.[131] To the extent assessment is informed by the circumstance that before the common law recognition of native the legal position was considered
30 otherwise, that may affect only the selection of different rates. For example, for the period up to validation in 1994/1998 and the period thereafter where it might be said that

---

128 Applicant's Notice to Admit 26 November 2015; NT Notice of Dispute 10 December 2015 (**GFM25**).

129 See references accompanying [108] below to the economic opinion evidence at trial.

130 *Native Title Act Case* (1995) 183 CLR 373 at 455.

131 *Fraser v Perpetual Trustees Co* [1978] 1 NZLR 620 at 625 noted in Cooper, "The Right to Interest and Rent" (1994) 7 *Auckland Uni LR* 694 at 701.

time to claim commences to run if, but which is not this case, nothing is done by a claimant group: cf CS [80].[132]

91. The Claim Group do not contend that compensation in *all* cases of past compensable acts must necessarily result in an award of interest on the measure advanced here: cf NTS [82]–[84], [111]. Nor can compensation turn on how the NTA generally balances the competing legislative considerations in validating or allowing acts that affect native title: cf CS [87]–[91].[133] Here, the claim relates to those parcels the subject of the grants by which the Territory received rents and profits, and assessment involves the respective positions of the Claim Group and Territory in relation to those dealings, and the efforts of the Claim Group to have their rights recognised. If the measure advanced by the Claim Group is appropriate on the facts of this case, then it may well be reasonably expected to be appropriate in similar cases: cf CS [94].

92. Section 51(1) is directed to compensating the effect (extinguishment or impairment) of an act on the native title, but the broader context demonstrates that no narrow approach should be taken. The retrospective validation and extinguishment is legally effective, but that does not erase the historical fact of invalidity and unlawful dispossession, as the Preamble recognises. The force and effect of an act invalid against the native title is recognised from and by reason of the enactment of the satellite State or Territory law.[134]

93. The Claim Group submit that each of the trial Judge and Full Court erred when rejecting the case for compensatory interest on the "risk free" rate by reasoning that equitable principle supporting the measure is not engaged because the acts are treated as valid and that further causal loss other than dispossession is required: TJ [259], [269]–[270] **CAB 165, 168**; FC [178]–[179], [208], [211] **CAB 325–6, 333–4**.[135]

94. Here, the question of compensatory interest arises where it is common ground that interest is payable by reference to the equitable principle that the right to interest takes

---

132 Cf FC [209] **CAB 334** that, in an appropriate case, compound interest might be payable for part of the period (albeit, in that instance, a later part of the period). Compare the approach in ***Hieber*** *v Hieber* [1991] 1 NZLR 315 awarding equitable interest (15%) on the unpaid purchase price from date of possession to settlement, and statutory interest (11%) on the unpaid equitable interest thereafter to judgment.

133 The further point at CS [92] about taxation is a distraction. First, compensation determined under the NTA is not assessable income in the hands of a common law native title holder or prescribed body corporate: *Income Tax Assessment Act 1997* (Cth) s 59.50, definitions of "native title benefit", "indigenous holding entity." Second, compensation for the compulsory acquisition of land, even where the amount determined has a component of interest, has the character of a capital sum: *Commissioner of Taxation v Northumberland Development Co* (1995) 59 FCR 103 at 105–6; *Chong v Fairfield Municipal Council* (1968) 16 LGRA 407 at 412. Third, pre-judgment interest in respect of economic loss is compensation of a capital nature: *Whitaker v Commissioner of Taxation* (1998) 82 FCR 261 at 273, 283.

134 *Native Title Act Case* (1995) 183 CLR 373 at 455.

135 Contrary to the suggestion at FC [179] **CAB 326** the Claim Group did challenge the conclusion of the trial Judge that retrospective validation precluded engagement of equitable principle: Notice of Cross-Appeal ground [2](3)-(5) **CAB 251-2**.

the place of the right to possession of the land: TJ [132], [158], [171], [173], [249], [254] **CAB 136, 142, 145-6, 162, 163**; FC [173], [226] **CAB 323, 337**. The judgments below do not, with respect, grasp the root of this principle and why it supports the measure the Claim Group propounds. In contending that interest is not part of compensation (CS [56]), and that the risk free rate is gain based (CS [69]; NTS, [94]), the government parties gloss over the very reason for the principle, namely, that it is *inequitable* for one party to take possession of land, and its rents and profits, without payment.

95. **The entitlement in equity:** Absent any contrary statutory indication, moneys payable as compensation for land compulsorily acquired bear interest from the time of dispossession; acquisition establishes a notional relation of vendor and purchaser and in equity the right to interest replaces the right to possession.[136] The equitable principle applies in the case of a compulsory acquisition even though, on acquisition, subsisting interests in the land are discharged and converted to a claim for compensation: eg LAA ss 46, 59. The power to award statutory interest in s 51A of the *Federal Court Act* does not limit the equitable entitlement: s 51A(2)(d). In the case of a compulsory acquisition of land, interest is payable under the principles of equity incidental to a power conferred on a court to determine compensation.[137]

96. In ***Marine Board*** *of Launceston v Minister for the Navy* Dixon J reviewed a settled line of authority accepting the rule in equity, derived from vendor and purchaser cases, applied in the compulsory acquisition of land so that the right to payment takes the place of the right to retain possession.[138] It is inequitable for the purchaser to retain the purchase money and at the same time take possession of the land unless it pays interest on the purchase money, representing the capital contained in the land.[139] If interest exceeds the rents and profits in fact received by the purchaser and the failure to complete is occasioned by the vendor, the court gives the vendor no interest and leaves him in possession of the interim rents and profits. In that way equity ensures that neither party profits from its wrong.[140] However, the principle does not require that, in fact, the dispossessed owner has been deprived of, and the other party has received, rents and profits of the land (although here the Territory did). It is not necessary, as the Territory

---

136 *Huon Transport* (1945) 70 CLR 293 at 323-5 (Dixon J), 334-6 (Williams J); ***Marine Board*** *of Launceston v Minister for the Navy* (1945) 70 CLR 518 at 527 (Rich J), 531-3 (Dixon J), 534-5 (McTiernan J), 537-8 (Williams J).

137 *Marine Board* (1945) 70 CLR 518 at 533 (Dixon J), 537-8 (Williams J).

138 (1945) 70 CLR 518 at 531-2; *Inglewood Pulp & Paper Co v New Brunswick Electric Power Commission* [1928] AC 492 at 499 (PC).

139 *Huon Transport* (1945) 70 CLR 293 at 323 (Dixon J).

140 *Esdaile v Stephenson* (1822) 1 Sim & St 122 at 123 [57 ER 49].

argues, that the dispossessed owner be deprived in fact of an "income stream": NTS [85]–[87], [95]. In suggesting a test that equity does not impose in the case of non-native titles, the Territory again overlooks the RDA's protection on terms that native title not be treated differently.

97. The approach in equity, as explained by Lord St Leonards in *Birch v Joy*, is that according to "equity and good conscience":[141]

> *The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they exchange characters in a court of equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. That is the settled rule of a court of equity.*

The vendor becomes a trustee of the land (and rents and profits) and the purchaser a trustee of the purchase money.[142] This limited trust arises to give effect to their mutual obligations.[143] As the ground of the rule is that the dispossessed party becomes the owner of the money, and the party taking possession the owner of the land, interest does not extend to compensation for injurious affection to the land, and interest is referenced to the material value of the land as a capital and income producing asset.[144]

98. **The place of equitable principle:** The Claim Group claims interest is payable in equity, and on that basis as part of the statutory entitlement in s 51(1) of the NTA, or on the basis that the equitable principle applies by analogy upon a proper construction of s 51(1) incidental to the statutory power to determine compensation on just terms (being the position accepted by the Territory: NTS [106]). As the entitlement applies in the compulsory acquisition of land even though the interest in land is extinguished on acquisition, native title holders are in no different position to other title holders. In *Mabo (No 2)* Deane and Gaudron JJ foreshadowed this need for adaptation of equitable principles in the case of dealings in land affected by native title.[145] The NTA

---

141 (1852) 3 HLC 565 at 590-1 [10 ER 222 at 233]; cited in *Huon Transport* (1945) 70 CLR 293 at 324 (Dixon J); see also more recently ***Harvela*** *v Royal Trust Co* [1986] 1 AC 207 at 236 (Lord Templeman) that "the vendor [is] entitled from the completion date to interest on the purchase money, which in equity belongs to the vendor, and the purchaser ought to be entitled from the completion date to the fruits of the property, which in equity belongs to the purchaser".

142 *Strahorn v Strahorn* (1905) 5 SR (NSW) 382 at 385 (Simpson CJ); see also *Lysaght v Edwards* (1876) 2 Ch D 499 at 505-7 (Jessel MR): the purchase money being "part of the personal estate of the vendor", and the land "part of the real estate" of the purchaser, results in a "constructive conversion" (at 507).

143 Heydon et al, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (5th Ed) at [6-055]; McGhee, *Snell's Equity* (33rd Ed) at [24-002]-[24-003].

144 *Huon Transport* (1945) 70 CLR 293 at 323-4 (Dixon J). Nor are the principles constrained by a common law requirement that is it necessary that the money be a sum due at a date or certain time: *Public Trustee v Schultz* (1964) 111 CLR 482 at 498 (Taylor and Menzies JJ).

145 (1992) 175 CLR 1 at 113. Although Mason CJ, Brennan and McHugh JJ did not adopt the views of Gaudron and Deane JJ that apart from the RDA and s 51(xxxi) compensation for valid but wrongful

acknowledges that in providing that validation does not affect the rights (other than native title rights) of Aboriginal peoples at common law or in equity: par (b) of ss 16(1), 22C, 23D.

99. Noting the terms of the statutory entitlement in s 51(1) of the NTA and the effect of assessing loss related back to the time of the retrospective extinguishment, the trial Judge held, correctly, that interest is *part* of compensation, not interest *on* compensation: TJ [132], [158], [171], [173], [249], [254] **CAB 136, 142, 145-6, 162, 163**; FC [173], [226] **CAB 323, 337**. The award of interest by reference to this accepted equitable principle is not simply recompense for delay in the payment of compensation, and is thus not interest *on* compensation, but is rather interest *as* compensation:[146] cf CS [56]; NTS [115]–[121]; QS [41]–[42].

100. The common law's inhibitions over interest as part of an award of compensation never affected equity's preparedness to award where the obligation is to pay money.[147] Interest in equity, on the principles outlined, is the return or consideration or compensation for the use or retention by one person of money belonging to owed to or another. On being in possession and entitled to receive the benefits of the land there is an obligation to pay money on the purchase price (compensation), an obligation that speaks in terms of paying "interest."[148]

101. The trial Judge and the Full Court disregarded the circumstances that the Territory had made use of the land, received purchase and rental monies, and made a saving in its borrowing costs, on the footing that the past acts are taken always to have been valid: TJ [259], [270] **CAB 165, 168**; FC [208] **CAB 333**. That misapprehends the basis of the accepted application of equitable principle. What is required (and what is inequitable) is that the acquiring authority has obtained enjoyment of the land and the dispossessed owner has not acquired the enjoyment of the compensation as the price of the acquisition.[149] If the reasoning below were correct, that would provide an answer to an entitlement to interest *per se*, but as Lord Warrington said in *Inglewood Pulp and Paper*

---

extinguishment by Crown grant would follow, this aspect of their reasons was not doubted, and is consistent with the accepted view that native title will be protected by such legal and equitable remedies as may be appropriate: *Ward* (2002) 213 CLR 1 at [21].

146 *Bank Nationalisation Case* (1948) 78 CLR 1 at 277-8 (Rich and Williams JJ), 316 (Starke J), 341 (Dixon J). Latham CJ at 228 characterised interest as recompense for delay, but referred back to ***Grace Bros*** *v Commonwealth* (1946) 72 CLR 269 where at 281-2 he acknowledged the rule in equity held to be applicable in *Houn Transport* and *Marine Board* and held that a provision limiting the rate of interest may validly impose a limit upon the discretion of the Court in applying the rule.

147 Edelman, *McGregor on Damages* (20th Ed) at [19-010].

148 *Commissioner of Taxation v* ***Broken Hill Co*** (2000) 179 ALR 593 at [40]-[43] (Full Ct per Hill J)

149 ***Fletcher*** *v Lancashire Railway Company* [1902] 1 Ch 901 at 908 (Buckley J).

Co v New Brunswick Electric Power Commission, that an acquisition may be made under legal authority is no reason to deny the obligation in equity to pay interest; the owner is deprived of her or his property in a case of lawful acquisition "as much as in the other."[150]

102. Whether payable in equity, or incidental to the statutory power to determine compensation, the measure and rate of interest ought to reflect the underlying rationale that the right to interest replaces the right to possession. The Full Court, however, considered that submissions on the measure and rate of interest needed to give effect to the entitlement were irrelevant, having held that absent treating government as a defaulting fiduciary or a causal link to loss, neither equity nor just terms warranted anything other than simple interest: FC [214] **CAB 334-5**.

103. The reasoning overlooks the underlying rationale that the right to interest takes the place of the right to possession because *it is inequitable* for the party in possession to retain both the land (and rents and profits) and the consideration for possession, and that equity treats the party in possession as trustee of the money. The case was not put on the basis of a fiduciary relationship between the Claim Group and the Territory: cf CS [67]; NTS [111]. The contention is that equity imposes an obligation to pay interest, that this applies equally to the consideration for extinguishment on surrender or acquisition, and that this analysis is consistent with considered dicta that obligations may attach in relation to the surrender of native title.[151] In any event, the causal link required to be shown, and what is inequitable by which the obligation in equity arises, is that a party has obtained enjoyment of the land without payment. Indeed, the Full Court relied upon this very principle to reverse the allowance for interest in relation to Lot 47 where native title revived upon the application of s 47B: FC [231] **CAB 339**.

104. **The measure and rate:** What was once termed the "trustee rate" based on conservative investment, in distinction to a higher "mercantile rate",[152] was used where a purchaser entered into possession without payment of the purchase price and in cases of compulsory acquisition.[153] Interest is allowed to a vendor by way of equitable compensation and not as matter of commercial valuation of the interest benefit denied to

---

150 [1928] AC 492 at 498-9, quoted in *Marine Board* (1945) 70 CLR 518 at 531-2 (Dixon J).

151 *Mabo No 2* (1992) 175 CLR 1 at 60 (Brennan J), 88-9, 113 (Deane and Gaudron JJ), 194, 204 (Toohey J); *Wik* (1996) 187 CLR 1 at 96 (Brennan CJ) citing *Guerin v The Queen* [1984] 2 SCR 335 where surrender to facilitate a lease grant imposed on the Crown a trust like duty to deal with the land on behalf of the Indians, and at 390, that compensation be assessed by analogy with principles of trust law: see generally Adkins et al, "Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title" (2016) 54 *Alberta Law Review* 351 at 360-71.

152 See generally, *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 391-2 (Kearney J); *Re Tennant; Mortlock v Hawker* (1942) 65 CLR 473 at 507-8 (Dixon J).

153 Battersby, *Williams' Title to Land* (4th Ed) at 722 referring to use of 4% pa and *Fletcher* [1902] 1 Ch 901 at 909, a compulsory acquisition case, that 4% pa represents a proper return on purchase money.

the vendor by not having the purchase money.[154] Investment rates applicable to funds in court have been also been used in defaulting purchaser cases.[155]

105. As the underlying principle is that the acquiring authority (purchaser) holds the compensation (purchase price) on trust for the dispossessed owner (vendor), and the vendor has a charge or lien over the land to secure payment, the rate of interest to be fixed should represent a fair or mean return which might have been expected over the relevant period on a mortgage or in long-term government bonds.[156]

106. The legally correct application of these principles on the economic evidence at trial supports the "risk free" rate. That rate approximates the recompense for dispossession with interest as part of compensation, whereas the rate selected below applies interest on compensation without reference to those principles: cf NTS [91].

107. **The evidence on the rate of return:** The economic opinion evidence at trial was that the "risk free rate" is a fair or mean return which a borrower might have expected over the relevant period on long-term government bonds. It is not to the point that the calculation assumes a progressive deposit of each compensation payment for each act, with interest similarly being re-invested year by year: TJ [287] **CAB 171**; CS [75]; NTS [89]; QS [75]. Principle requires a rate that represents a fair or "mean" rate of return over the relevant period.[157] Yields on government bonds have been used in the United States on the basis that the seizure of land is an act by the government by which it substitutes for ownership of land an obligation to pay which is free of the risk of default.[158]

108. The unchallenged opinion evidence of Gregory Houston was that having regard to the relevant period (25 to 30 years) and the level of risk (low), the appropriate measure of yield was provided by 10-year government bonds. The risk free rate, in Mr Houston's opinion, referenced both standpoints of loss by the native title party and gain by the Territory.[159] This was a conservative approach, and reflected the borrowing costs of the Territory, as an appropriate proxy for time risk,[160] and compounding "is the widely

---

154 *Lawrence v Broderick* [1974] BPR 1 at 7 (NSWSC Holland J) referring to *Re Dawson* [1966] 2 NSWR 211 at 219; 84 WN (NSW) 399 at 410 (Street J); ***FH Faulding** v Watson* [1969] WAR 63 at 65-6 (Hale J).

155 *Harvela* [1986] AC 207 at 236-7 applying the short term investment rate.

156 On defaulting purchasers, see *FH Faulding* [1969] WAR 63 at 66 (Hale J); *Hieber* [1991] 1 NZLR 315 at 317-9 (CA); see also *Yong v Nicholson* [1998] ANZ ConvR 5 at 12 (NZCA); *Glaister v Amalgamated Dairies* [2003] 1 NZLR 829 at 857-63.

157 *FH Faulding* [1968] WAR 63 at 65-6 (Hale J) in a case of a defaulting purchaser.

158 *United States v **Blankinship*** 543 F 2d 1272 (1976) at 1276; on remittal 431 F Supp 403 (1977).

159 Houston First Report at [3.2.1] (**TFM18** pp 467-8).

160 Houston First Report at [3.2.1]-[3.2.4] (**TFM18** pp 467-71).

accepted standard in finance and economics."[161] As government bonds pay yields on a semi-annual basis, Mr Houston calculated interest in half-year periods on a compounding basis.[162] The risk free government bond rate is a much lower percentage than the statutory prescribed rate,[163] but over a lengthy period (1980 to 2016), compounding on the lower yield produces a higher overall total. The difference for that period is in the order of $2.6m on a base market land value of $640,500.[164]

109. **Application of principles to the entitlement under NTA s 51(1):** As noted, in holding that compensation should be assessed at the earlier date of the act when extinguishment is taken to have happened under the statutory scheme, and not at the later date of validation, the trial Judge acknowledged that compensation by way of interest would be needed to achieve fair or just compensation: TJ [132], [171], [173], [254] **CAB 136, 145-6, 163**. On the facts of this case, the "risk free rate" on government bonds supplies the appropriate rate to meet the entitlement in s 51(1) for compensation on just terms.

110. There is no clear and settled High Court authority on whether, *as a general rule*, just terms for the purposes of s 51(xxxi) of the Constitution require interest as part of compensation *in all cases*.[165] There is, however, acceptance that in the absence of any contrary statutory indication, moneys payable as compensation for land compulsorily acquired bears interest from the date of dispossession in accordance with equitable principle.[166] That informs the statutory "just terms" entitlement conferred by s 51(1) of the NTA and, as the Territory accepts (NTS [121]), is consistent with interest being part of the entitlement. The Claim Group submits that this also informs why the "risk free" rate, and not simple statutory interest, supplies the measure and rate that is most likely to approximate just terms. In that respect, two related points are to be taken from the standard of fairness or fair dealing between a dispossessed owner and government.[167]

---

161 Houston First Report at [3.2.4] (**TFM18** p 471). Thus compounding "reflects economic reality": *Sempra Metals v IRC* [2008] 1 AC 561 at [35], [41] (Lord Hope). Likewise, see *Bank of America Canada v Mutual Trust Company* [2002] 2 SCR 601 at [44] (Can Sup Ct) that the "common law now incorporates the economic reality of compound interest"; cited in *Easterday v Western Australia* [2005] WASCA 202 at [7]; *GEC Marconi Systems v BHP Information Technology* (2003) 128 FCR 1 at [1126].

162 Houston Second Report at [3.3] **CFM12** p 382-4).

163 Houston Second Report Table 11 (**CFM12** p 395-7).

164 Houston Second Report Tables 2 and 4 (**CFM12** pp 388, 392) using 100% of the land valuation by Ross Copland accepted by the trial Judge as the base for the 80% market sale value award (Reasons [463] **CAB 213**), being the base value used in the notice of cross-appeal, order [2](1)-(2) **CAB 251**.

165 *Bank Nationalisation Case* (1948) 76 CLR 1 at 228 (Latham CJ), 277 (Rich and Williams JJ), 316 (Starke J), 343 (Dixon J).

166 *Bank Nationalisation Case* (1948) 76 CLR 1 at 277-8 (Rich and Williams JJ); *Marine Board* (1945) 70 CLR 518 at 529 (Starke J), 531-2 (Dixon J), 534-5 (McTiernan J), 537 (Williams J).

167 *Nelungaloo* (1948) 75 CLR 495 at 569 (Dixon J).

111. The *first* is that equitable treatment is inherent in the notion of just terms. The conception of just terms as fairness matches the concern of equity when awarding interest to insist upon fair dealing between the parties.[168] Something offends just terms if it is "inequitable."[169] It is inequitable (unfair) that government retain both the compensation money and the land. Simple interest unfairly favours government where, as here, there is a lengthy period (which includes times of high inflation),[170] including a lengthy time where the claimant seeks recognition of the infringed rights, and where government gains by saving on its borrowing costs that are computed on a compound basis,[171] as well as having the benefit of rents and profits of the land. That result would not conform to the notion of just terms, which is concerned with fairness. In addition to rents and profits received at the time of the acts over 1985 to 1996 (around $200,000) the Territory gains in its savings on borrowing costs (around $2m) if only simple interest is allowed from the date of the acts:[172] cf NTS [87]. The Attorney-General for Queensland characterises the Territory as "passive in any enrichment", but that affords no reason not to use a rate that addresses that circumstance of enrichment.[173]

112. *Second*, just terms prima facie requires assessment of compensation by reference to the time of acquisition. Although the correlation need not be exact, any disparity that is arbitrary will offend just terms.[174] There is over a decade between past act (1980) and retrospective validation (1994/1998). The trial Judge accepted, correctly, that this is why an award of interest was necessary to provide just terms compensation. The equitable principle imposing an obligation of interest addresses the unfairness of receiving the benefit of property without contemporaneous payment.[175] The statutory scheme of retrospective validation is that as and from the enactment of the Territory law validating

---

168 *Nixon v Furphy* (1926) 26 SR (NSW) 409 at 414 (Long Innes J).

169 ***PJ Magennis*** *v Commonwealth* (1949) 80 CLR 382 at 418 (Williams J).

170 See interest rates over the period in Table 11, Houston Second Report (**CFM12** pp 395-7).

171 Houston First Report at [3.2.1] (**TFM18** pp 467-8) reflecting that governments have lower borrowing costs, as recognised in *Blankinship* 543 F 2d 1272 (1976) at 1276; *Sempra Metals v IRC* [2008] 1 AC 561 at [49] (Lord Hope), [128] (Lord Nicholls).

172 Houston Second Report, Pt A1 Table 2 (simple interest on Practice Note rate) and Table 4 (compound interest at risk free rate) (**CFM12** pp 388, 392). The Full Court thus erred in holding that there was no evidence as to the Territory's borrowing costs: FC [210] **CAB 334**.

173 Compare in a case of "passive breach" of trust, ie a failure to do something that a prudent trustee ought to have done, see *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] 1 Ch 515 at 546 interest payable at short-term investment rate, with a proportion added to the capital to maintain the value of the corpus.

174 *Grace Bros* (1946) 72 CLR 269 at 279 (Latham CJ), 285 (Starke J), 291-2 (Dixon J); *PJ Magennis* (1949) 80 CLR 382 at 403 (Latham CJ), 418-9 (Williams J, Rich J agreeing), 428-9 (Webb J).

175 *Broken Hill Co* (2000) 179 ALR 593 at [43] (Full Ct per Hill J) referring to *International Railway Co v Niagara Parks Commission* [1941] AC 328 at 345; *Public Trustee v Schulz* (1964) 111 CLR 482 at 498, *Harvela* [1986] 1 AC 207.

the acts (1994/1998), such acts were then given force and effect they did not have previously.[176] As the evidence on changes in value of the land between the time of compensable act (1980 onwards) and validation (1994/1998) shows,[177] the statutory relation back keeps the value of the land down at that anterior point in time.

113. Use of the risk free rate measure does not focus impermissibly upon the gain by the Territory. The borrowing costs of the Territory are commensurate with the measure of interest on long term government bonds, which is consistent with the measure in equity: see [104] above. This is a *proxy* for the relevant loss consistent with the applicable measure. It is accepted that the Claim Group did suffer some loss in the nature of interest by the Territory not paying compensation; there is no reason why it should not be valued by reference to use of the retained money by the Territory.[178] Notional loss and gain are two sides of the one coin, and the "risk free" rate measures, in a broadly just manner, the proper rate as a guide to the value of the loss during the period.[179]

114. In equity, where a broad approach is taken, there is no sustainable reason for limiting the availability of compound interest artificially in a way which may prevent the court doing equity.[180] The underlying informing principle here is that government is required to offer the former owner interest to do equity.[181] There is no apparent reason why a statutory entitlement to just terms compensation should be narrower.

C. Intangible Loss: NT Appeal grounds 4.1–4.4; Commonwealth Appeal grounds 4(a)–(c), 5, 6, 7(a)–(d), 8

115. The government parties advance a number of grounds, with sub-grounds, challenging the trial Judge's assessment, upheld by the Full Court, of the intangible effects of the extinguishment of the traditional rights of the Ngaliwurru and Nungali Peoples to live on and use their land for material, cultural and spiritual purposes. The grounds are various and overlapping, but broadly may be seen as alleging failure by the trial Judge to have regard to particular factual matters said to be relevant to assessment.

---

176 *Native Title Act Case* (1995) 183 CLR 373 at 454-5, 470.

177 See land values over the period in [7.4] of Copland valuation report (**TFM16** pp 413-5).

178 Compare in the case of proof of some loss caused by defaulting trustees or fiduciaries the presumption as to extent of loss as the highest value: Heydon et al, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (5th Ed) at [23-260]-[23-325].

179 Cf *Heydon v NRMA (No 2)* (2001) 53 NSWLR 600 at [22]-[23] (CA).

180 *Hungerfords v Walker* (1989) 171 CLR 125 at 148 (Mason CJ and Wilson J), cited in ***SCI Operations*** *v Commonwealth* (1998) 192 CLR 285 at [74] by McHugh and Gummow JJ when referring to equity decreeing compound interest for money obtained and retained by fraud and money withheld and misapplied by a trustee, which in *Hungerfords* were given as examples of the broad approach of equity to award interest, including compound interest, when justice so demands.

181 *SCI Operations* (1998) 192 CLR 285 at [75] (McHugh and Gummow JJ).

116. **Appellate constraints:** The constraints on review of findings on non-pecuniary loss are greater than the usual constraints about other findings of fact given the evaluative nature of assessment turning on matters of impression rather than definite fact. An appeal court will not interfere with an assessment by a trial judge unless it is shown that the judge acted on a wrong principle or a misapprehension of the facts, or for some other reason the assessment is a wholly erroneous estimate of the loss. A trial judge, unlike a jury, states reasons, but that cannot obscure the fact that assessment results from observation of the claimant, and judgment of the effects on the claimant derived from inference. The fact that an appeal court may assess loss at a greater or lesser sum had it been in the position of the trier of fact is not a sufficient reason for interfering. What must be demonstrated is material error by which the assessment can be said to be wholly erroneous.[182]

117. *Manifest excess:* To contend that an award is manifestly excessive invokes the last of the bases for appellate review in *House v The King*[183] that the assessment is self-evidently wrong as involving *manifest* excess.[184] This assumes a standard against which the award can be measured, but judges as well as juries hold differing views as to what might be a proper sum even when they do not materially differ as to the nature, extent and consequences of the loss.[185] The point is illustrated here by the rival substitute figures on the appeals: the Territory, 10% of economic loss equalling $93,848 (NTS [162]); the Commonwealth, $230,000 as the bottom of a range of $5,000 to $20,000 per parcel: CS [150] referring to FC [358] **CAB 370**.

118. An assessment of intangible loss is not capable of mathematical precision.[186] The standard depends on a judgment of what is reasonable. That measure, not being supplied by the collective wisdom of a jury, must be distilled from within transactions of the law, not by any external standard supplied by transactions within a market. That permits some comparison of assessments of non-pecuniary loss in different kinds of cases.[187] The task by the trier of fact is to determine a reasonable amount of money to compensate for what are incalculable imponderables, in relation to which there will be a large element of evaluation and necessary latitude for human reaction.[188]

---

182 ***Miller*** *v Jennings* (1954) 92 CLR 190 at 194-7 (Dixon CJ and Kitto J); ***CSR*** *Readymix v Payne* [1998] 2 VR 505 at 508-9 (Winneke P).

183 (1936) 55 CLR 499 at 504-5 (Dixon, Evatt and McTiernan JJ).

184 ***Rogers*** *v Nationwide News* (2003) 216 CLR 327 at [62]-[64] (Hayne J; Gleeson CJ and Gummow J agreeing).

185 ***Australian Iron and Steel*** *v Greenwood* (1962) 107 CLR 308 at 322 (Windeyer J).

186 *Srbinovski v Americold Logistics* [2015] VSCA 139 at [42] and the cases collected at fn (10).

187 *Rogers* (2003) 216 CLR 327 at [67]-[68] (Hayne J).

188 *Moran v McMahon* (1985) 3 NSWLR 700 at 707-8 (Kirby P); *CSR* [1998] 2 VR 505 at 508-9.

119. *Constraints in native title hearings:* These are equally well known. The appeal court has neither seen nor heard the witnesses. Citing passages in the evidence which appear to contradict particular findings to invite an appeal court to re-evaluate the evidence before a trial judge is impractical. Considerable caution is appropriate before an appeal court can infer that crucial evidence was not evaluated and necessary findings of fact not made.[189]

120. **Evidence and findings:** The trial Judge heard evidence on country from claimants required for cross examination (Alan Griffiths, JJ (since deceased), Josie Jones, Chris Griffiths), and restricted men's evidence on country (Alan Griffiths, JJ, Chris Griffiths), and inspected the claim area.[190] The witnesses were senior members of the native title community,[191] who had also given evidence in the earlier native title proceedings, again including restricted men's evidence. Pursuant to s 86 of the NTA the trial Judge received the claimant witness statements (in chief) and the transcript of their oral evidence from the earlier native title proceedings.[192]

121. The trial Judge heard evidence by the anthropologists called by the Claim Group, Dr Palmer and Ms Asche, and by the Territory, Prof Sansom,[193] who had also given evidence in the earlier native title proceedings, including, in the case of Dr Palmer, restricted evidence. Pursuant to s 86 of the NTA the trial Judge received the anthropological reports and transcript of the evidence from the earlier proceedings.[194]

122. Having received evidence from the earlier proceedings, including that of the witnesses his Honour saw and heard, the trial Judge adopted the findings in the earlier proceedings on that evidence under s 86 of the NTA.[195] That evidence included findings about the

---

189 The cases are collected in *Banjima People v Western Australia* (2015) 231 FCR 456 at [58] (Full Ct).

190 Inspection orders and program (**GFM3**); transcript of (open) evidence 8-9 February 2016 (**GFM29-30**, **CFM14-17**): transcript of (*restricted*) evidence 9 February 2016 (**CFM23** in redacted form): drawing in *restricted* hearing by Christopher Griffiths (ex A9 [*not reproduced*]).

191 See evidence in chief per affidavits Alan Griffiths, JJ (deceased), Lorraine Jones (not cross examined) (**TFM1, CFM1-2**), witness statements Josie Jones, Roy Harrington (not cross examined) (ex A8-9, A13 **GFM10, 13, 15**; **CFM8**).

192 Transcript of (open) evidence (ex A2 [*not reproduced*]); witness statements Alan Griffiths (and paintings), Josie Jones, Lorraine Jones, JJ (deceased), Christopher Griffiths, PJ (deceased), Sammy Darby, Georgie Jones, Deborah Jones, JL (deceased), Doris Paddy, WG (deceased), Roy Harrington (ex A3-A7, A20-A29 (**GFM 8-9, 15-20**; **TFM 4-7, 9-11**). Transcript of *(restricted*) evidence Alan Griffiths and JJ (deceased) (ex A35 [*not reproduced*]). Also received under s 86, report and evidence in Timber Creek Land Claim made under the *Land Rights Act* (ex A33 **GFM22**, ex A34 [*not reproduced*]).

193 Transcript of evidence 22-23 February 2016 (**CFM23**); report Dr Palmer and Ms Asche 2012 (ex A14 **CFM9** & **GFM14** (appendices)), *restricted* report Dr Palmer 2016 (ex A41, **CFM22** in redacted form); report Prof Sansom 2015 (ex NT7 **GFM23**).

194 Transcript of (open) evidence Dr Palmer and Ms Asche (ex A2 **[***not reproduced*]); transcript of (*restricted*) evidence Dr Palmer (ex A35 [*not reproduced*]); Dr Palmer and Ms Asche (open) reports (ex A30 **GFM21**, ex A31 [*not reproduced*]); Dr Palmer (*restricted*) report (ex A32 [*not reproduced*]).

195 Pursuant to the Applicant's Notice of Findings and Evidence to be Adopted and Received under s 86 filed 2 November 2015 **GFM6**. The Applicant's Further Notice of Evidence on the Claim for Non-Economic

belief systems of the native title community, and the value of their ritual and traditions, including that revealed by the restricted men's evidence in the earlier proceeding: TJ [329]–[332] **CAB 180-1**.

123. The trial Judge summarised the approach to assessment in the following terms:

> *It is … a matter for the Court to consider questions of causation, the nature of the claimed loss, the evidence before the Court, including the greater spiritual significance of certain places within traditional country, and the effects of the compensable acts, the nature and extent of intangible loss and the extent of traditional country affected.* (TJ [315] **CAB 177**)

10 His Honour then elaborated upon those matters by reference to: the communal nature and content of the traditional laws and customs; identification of relevant compensable intangible effects; the extent to which other land remained available and the effects of non-compensable acts; the need to ascertain (as a matter of causation) non-economic effects confined to the compensable acts; the issue of comparative significance of different areas of country; and impairment of attachment in relation to country in and around the specific location of compensable acts: TJ [316]–[327] **CAB 177-80**.

124. The trial Judge then set out his findings on the evidence: TJ [328]–[367] **CAB 180-91**. His Honour found that the expert anthropological opinions of Dr Palmer and Ms Asche about rights and duties under Ngaliwurru-Nungali custom, including that protecting land
20 is a way of protecting oneself, that sites need to be understood as "meta-place", and that Dreaming imbued sites in the Town with spirituality, was supported by the primary evidence of the claimant witnesses: TJ [337] **CAB 182-3**. His Honour found that:

> *The evidence given by the traditional owners was strong and compelling. The beliefs expressed were genuinely held and demonstrated a deep connection to country.* (TJ [348] **CAB 186**)

125. The trial Judge found that the evidence from the claimants, supported by the evidence of Dr Palmer and Ms Asche, was of loss that caused "emotional, gut-wrenching pain and deep or primary emotions … accompanied by anxiety": Reasons [350], [352] **CAB 187**. His Honour referred to examples in the evidence relating to *wirip ngalur katpan* (the rear
30 of Lot 20)[196] and *kulungra* (an area that includes water tanks on Lot 70):[197] TJ [350]–

Loss filed 10 September 2015 set out the findings on loss sought in reference to the evidence in the earlier proceedings **GFM5**. See TJ [68] **CAB 118**.

196 Waterhole behind Timber Creek Wayside Inn, final resting site of the Dingo, *Wirrip* myth line: see item 162 1984 Site List ex SW3 affidavit Simon Watkinson **TFM2C**. See location of act 2/Lot 20 and act 49/Lot 79 on map of compensable acts (MFI A48 **CFM13**) and tenure maps (ex NT3 **GFM27**).

197 A broad pocket of a large hunting and foraging area: TJ [370] **CAB 192**; see item 35 1984 Site List ex SW3 affidavit Simon Watkinson **TFM2C**. On the referenced 1:000,000 map the points given equal an area of 1.5km x 400m. The area has a relationship to *winan* (TJ [353] **CAB 187**; JJ (deceased) T39 (**CFM15**, p 427) which has an open secular trade dimension and a restricted ritual aspect: Dr Palmer *restricted* report 2015: (ex A41 **CFM22** in redacted form). This area overlaps or abuts the cemetery

[354] **CAB 187-8**. The "depth of the relationship between self and country" was supported and informed by the evidence of Dr Palmer and Ms Asche, and demonstrated in the claimant evidence: TJ [355]–[356] **CAB 188**. Prof Sansom opined that the claimant evidence showed that his theory in a published paper[198] on the effects of dispossession was in operation in this case. The effects involve "primary feelings socially recognised" as "epic", and unless land is restored, these feelings continue and are persistently aggravated. The "feeling" is about an Aboriginal person's experience of engaging with the Dreaming: TJ [357]–[358] **CAB 188**.

126. On the restricted men's evidence given on country the trial Judge found that:

> *... without going into the evidence, the ritual described and the need for its secrecy are very valuable to the native title holding community. There was evidence in this proceeding of a place that is no longer a secure ritual ground, and evidence in the earlier proceeding of another place that is no longer secure for ritual.* (TJ [361] **CAB 189**).

Even when an act has not destroyed the claimants' ability to practice their traditions entirely, the ability is impeded in various ways demonstrated on the evidence in the examples cited: TJ [359]–[360], [363]–[364] **CAB 189, 190**. There was also evidence that some developments in the Town were acceptable: TJ [365] **CAB 190**.

127. The trial Judge found:

> *The evidence was that for the Ngaliwurru-Nungali Peoples, ancestral spirits, the people, the country and everything that exists on it, are viewed as organic parts of the one indissoluble whole*[199] *and that the evidence of loss was significant and keenly felt. The evidence of the effects of those acts is particularly significant in circumstances where the acts took place some thirty years ago, and where the effects have ongoing present day repercussions.* (TJ [363] **CAB 190**)

128. His Honour then considered the compensation criteria for intangible disadvantages (LAA Schedule 2 rule 9), and proceeded to make general observations about his findings in that connection: TJ [368]–[377] **CAB 191-4**. Having made those findings, and those general observations as to the findings, the trial Judge then addressed "three particular considerations of significance" to the task of assessment respecting (1) distress caused by construction on the path of the dingo Dreaming, (2) impairment to related areas, in particular upon the capacity to conduct ceremony, and (3) the collective diminution of connection by incremental detriment: TJ [378]–[381] **CAB 194-5**.

---

reserve (act 41/Lot 60): see location on map of compensable acts (MFI A48 **CFM13**) and tenure maps (ex NT3 **GFM27**).

198 Sansom, "A Frightened Hunting Ground: Epic Emotions and Land Holding in the Western Reaches of Australia's Top End" (2002) *Oceania* 72 (ex A43 **GFM23**).

199 And see TJ [327] **CAB 180**, quoting the often-cited observations of Blackburn J in *Milirrpum* (1971) 17 FLR 141 at 167: see, for example, *Meneling Station* (1982) 158 CLR 327 at 356; *Yanner* (1999) 201 CLR 351 at [37]; *Ward* (2002) 213 CLR 1 at [14].

129. The trial Judge found that the evidence showed that the effects of acts had not dissipated over the three decades or so since their occurrence. His Honour considered the compensation should be assessed on that basis and for a time into the future. Noting that an appropriate level of compensation is not "a matter of science or of mathematical calculation", having regard to the matters to which his Honour had referred, the appropriate award for non-economic compensation should be assessed at $1.3m: TJ [382]–[383] **CAB 195**.

130. The Full Court upheld the trial Judge's award of $1.3m for non-economic loss, having concluded that no error in evaluation had occurred and that the amount was not manifestly excessive: FC [394], [413] **CAB 381, 387**.

131. **Grounds challenging concurrent findings of fact:** The following grounds of appeal seek in substance to re-agitate concurrent findings of fact on matters taken into account by the trial Judge. His Honour accepted the government parties' submissions as to principle, but formed a different view as to what the evidence established. There is no proper basis for disturbing the findings.

132. *No single consideration determinative:* In addition, the present proceeds from a premise that the "three particular considerations" identified by the trial Judge were determinative of the assessment: TJ [378] **CAB 194**; CS [95]; NTS [124]. As the Full Court held, correctly, this overlooks the survey of findings and evidence undertaken by the trial Judge that were brought to bear upon his assessment: FC [287]–[290] **CAB 352**.

133. Cth ground 4(a); NT ground 4.3: Findings of effects in relation to a ritual ground: CS [96]–[103]; NTS [128]–[138]. This turned on the trial Judge's evaluation of the claimant evidence given at the ground: FC [300]–[303] **CAB 355-7**; TJ [361] **CAB 189**.

134. There is no challenge to the findings that the ritual described in the *restricted* evidence, and the need for its secrecy, are very valuable to the Claim Group: TJ [361], also [331] **CAB 189, 181**. The evaluation of the evidence about the ritual ground was quintessentially a matter for the trial Judge. The point is highlighted by the government parties' different contentions: the Commonwealth contends the evidence should be read on the basis that ritual at the ground stopped because of Victoria Highway (CS [96]), the Territory contends it is because of a lookout (NTS [130]).

135. The challenge overlooks the relevant findings that the ground is "no longer secure for ritual" and that the effect of an act is not confined to the bounded area of a Lot, such that there was an effect on the capacity to conduct activities on the area of the ground and adjacent areas: TJ [361], [379]–[380] **CAB 189, 195**; FC [300] **CAB 355**. The trial Judge's findings depended upon an assessment of all of the evidence that was given, and

on an understanding of evidence given on site by witnesses pointing as they spoke.[200] His Honour saw and heard the evidence when on the country to which the men's evidence referred, and was able to see its proximate relationship to nearby Lots 62-63 subject to compensable acts in the form of houses with a road leading to the houses.[201] His Honour considered the evidence on why the place still remains important but cannot be used today: TJ [361] **CAB 189**. There can be no doubt that the trial Judge was in a much better position to assess the evidence than an appellate court.[202]

136. The premise that the ritual ground was no longer secure because of some earlier non-compensable act not being made good, the complaint on causation falls away: CS [102]; NTS [136]. Be that as it may, the case the Territory put at trial was that compensation was confined to consequences that "directly" arise from the compensable acts, which his Honour rejected (correctly): TJ [321] **CAB 179**.[203] The trial Judge identified the question correctly as "what, if any, non-economic effect there was upon the pre-existing native title by the compensable acts": TJ [322] **CAB 179**. That accords with the statutory text and purpose, especially in cases of permanent extinguishment: NTA ss 51(1), 237A cf CS [102].[204] In relation to the ritual ground, the trial Judge found, on the evidence, that the effects extended beyond the particular Lots: TJ [379]–[380] **CAB 194**.

137. Cth ground 4(b): Findings on a sense of failed responsibility: CS [104]–[112]. The Full Court correctly held that the trial Judge had "directly confronted" this issue: FC [312]–[319], [323]–[327], [343]–[346] **CAB 359-66**. That included, in weighing in the balance, the extent to which connection was maintained and some acts did not create a sense of grievance: TJ [364]–[365], [375] **CAB 190, 193**. As the Full Court also noted, a contention that there was approval and a reduced feeling of loss was simply not established in the evidence: FC [345] **CAB 365** cf CS [108]–[109].[205]

---

200 *Restricted* Transcript T7(19)-(24), 17(41)-18(40); also 21(26-39) (**CFM 23** pp 634, 644-5; 648).

201 See *Restricted* Transcript T2(29-33) (**CFM23**, p 629); inspection program (**GFM3**); maps depicting location (SW1 **TFM2A**) and Lots 62-63 (SW2 **TFM2B**); see tenure material for Lots 62-63 (government houses) (**GFM48-49**). The cartographer, Simon Watkinson, gave evidence on the impossibility and inappropriateness of maps accurately locating sites of significance: affidavit [6]–[10] (**TFM2** p 20); oral evidence T586(14)–7(11) (**TFM22**, p 703). See also Dr Palmer on sites not being parcels: T515(34–43), 517(1–11), 521(42–45), 536(24)–537(10) (**CFM18**, pp 536, 538, 542, 557-8); Palmer and Asche 2004 report at [4.8], [8.4] (ex A30 **GFM21**). See also the evidence of Dr Palmer on Dreaming and its need not to be conflated with a bounded physical place (T526(40)-532(5): **CFM18**, pp 547-53).

202 *Yarmirr* (2001) 208 CLR 1 at [77]-[79].

203 Citing *March v Stramare* (1991) 171 CLR 506 and noting its context of apportionment legislation.

204 Referring to *Comcare v Martin* (2016) 258 CLR 467 at [42] (the Court).

205 Wilson Street: transcript T24 (**CFM** p.412): evidence of JJ (deceased) re what "CDEP" is and "what came up" not explored; T91 evidence of Josie Jones (**CFM** p.443) evidence of Josie Jones re "I should say yes, yeah" signifies understanding the question only, and Lorraine Jones was not cross examined on her affidavit [6] (**CFM** p.16) on adverse effects of Wilson Street quoted at TJ [371] **CAB 192**.

138. The entitlement to compensation is "for any loss, diminution, impairment or other effect" of the act on the native title rights: NTA s 51(1). By definition (s 223(1)), they are rights possessed under traditional laws and customs (par (a)) by which the Aboriginal peoples concerned have, by those laws and customs, a "connection" with the land (par (b)). That "connection" is descriptive of the relationship declared by those laws and customs,[206] well recognised to involve having to care for, and being able to speak for, country.[207]

139. The trial Judge found, as fact, that the nature of the Claim Group's connection was that everything that exists, people, land, ancestral spirits and organic parts of the one indissoluble whole: TJ [363] **CAB 190**, set out at [127] above. His Honour further found that loss of country impacted deeply on duties to care for country, and on the exercise of their rights to use country, but that effects are not simply about access and use given the nature of the connection: TJ [348]–[362], [370]–[373] **CAB 186-90, 192-3**.

140. Assessment of the effects of acts on native title rights to live on and use country under traditional law and customs necessarily requires consideration of these aspects of connection that the peoples concerned have with their country. To say they can depend upon an enforceable native title right to control access (CS [110]–[112]) overlooks the effects of acts on customary duties and the element of par (b) in the statutory definition of native title: TJ [372]–[373] **CAB 192-3**; FC [313]–[319] **CAB 359-60**. It also overlooks that connection is manifested in various ways. To speak for country involves more than assertion of control; it involves engaging with country in various material, cultural and spiritual ways as an aspect of the "socially constituted fact" of native title.[208] The findings of the trial Judge were about diminution of connection in those various ways: TJ [350]–[363], [370]–[372], [381] **CAB 186–193, 194**.[209]

141. <u>NT ground 4.4.1: Findings on an overall erosion of connection with country</u>: NTS [139]. The Full Court correctly held that the trial Judge had given due regard to this issue: FC [321]–[322] **CAB 361**; TJ [24], [323], [326], [376]–[377] **CAB 109, 179, 180, 193-4**. The trial Judge took into account other non-compensable acts affecting the native title both generally in the area and specifically in the subject parcels: TJ [322]–[323], [375]–[377] **CAB 179, 193-4**. And to provide context, the anthropological opinion evidence was that the effects of acts had to be understood in terms of the pervasiveness of Dreaming that cannot be understood in relation to a particular (bounded) place in

---

206 *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [68], [88], [93] (Full Ct).

207 *Ward* (2002) 213 CLR 1 at [14].

208 *Ward* (2002) 213 CLR 1 at [90]; *Yanner* (1998) 201 CLR 351 at [38].

209 And on use of country see Dr Palmer and Ms Asche 2012 report (**CFM9**) [161]-[163]; 2004 report [8.12]-[8.25] (ex A30 **GFM21**); affidavit Lorraine Jones [6] (**CFM2** p 16); affidavit Alan Griffiths [6]-[7] (**TFM1** p.2) cf SAS [41].

isolation: TJ [375] **CAB 193**.[210] The weight that the trial Judge gave to these considerations as part of the overall assessment does not reveal error of principle.

142. Cth ground 6: Agreements for non-traditional use of country: CS [126]–[129]. The Full Court correctly held that the trial Judge had considered the extent to which the Claim Group considered some interference with country to be acceptable, and further that the transactions cited by the Commonwealth were not material to assessment: FC [343]–[351] **CAB 365-7**; TJ [365], [375] **CAB 190, 193**.

143. The measure of what is reasonable compensation is not supplied by negotiated transactions.[211] The very point of compulsory acquisition concepts of solatium or injurious affectation is to allow compensation to cover the effects of a compulsory acquisition because the owner has been deprived of an opportunity to bargain the consideration.[212] In addition to provable (quantifiable) loss, allowance is made for the intangible effects of disruption, inconvenience and distress.[213] The point is highlighted by the very transactions cited by the Commonwealth that include provision for the non-extinguishment of native title, and so far as sacred site damage is concerned, provide pre-estimates rather than agreed fixed amounts: FC [350]–[351] **CAB 367**.[214]

144. Cth ground 5; NT ground 4.4.2: Findings about interests in other land: CS [120]–[124]; NTS [152]–[155]; also WAS [36]. The Full Court correctly held that the trial Judge had considered this issue: FC [371]–[373] **CAB 373-4**; TJ [10]–[13], [29]–[31], [302]–[304], [319], [377] **CAB 106, 110, 175, 178, 195-6**.

145. The argument that compensable loss is lessened if a native title holding community retains other land says nothing about the effects of the loss of the land in issue. The logical conclusion is that incremental extinguishment is less noticed than a wholesale single step extinguishment. The argument also assumes that the affected area can be given a value proportionate to the remaining area. It is met by the findings of the trial Judge that the acts did not remove all of the native title within the Town, but in "terms

---

210 Dr Palmer T515(34-43), 517(1-11), 521(42-45), 536(24)-537(10) (**CFM18** pp 536, 538, 542, 557-8).

211 *Rogers* (2003) 216 CLR 327 at [68].

212 *Leslie v Board of Works* (1876) 2 VLR (L) 21 at 24 (Stephen J); *Spencer v Commonwealth* (1907) 5 CLR 418 at 422 (Higgins J) declining where an owner holds land only for speculation and does not want the land for its own sake. The allowance had its origins in the practice of the courts to add a percentage to the assessed value of the land so taken (Parish, *Cripps on Compulsory Acquisition of Land* 11th Ed at [4-046], [4-202]) now governed by statutory provisions that are to be construed with all the generality that their words permit: *Marshall v Director General Transport* (2001) 205 CLR 603 at [38] (Gaudron J).

213 *March v City of Frankston* [1969] VR 350 at 335-6 (Barber J).

214 Bradshaw Contracting lease over Lots 97, 98 and 114 12 November 2013, cl 26 (**CFM3** pp 50-1); Stock Agistment agreement 7 October 2011, cl 16 (**CFM6** pp 234-5); Gravel extraction agreement 26 February 2013, cl 7 (**CFM7** 264-5). See also Bradshaw Indigenous Land Use Agreement 16 July 2003, cl 15 (**CFM5** pp 147-8) relating to land outside the Town.

of the area affected, it is a not insignificant area", and not all "areas had the same significance as others": TJ [377] **CAB 193-4**.

146. **Grounds lacking proper factual foundation:** Other grounds of appeal lack a proper factual foundation in the findings of the trial Judge.[215]

147. Cth ground 5; NT ground 4.4.2: interests in other land: NTS [152]-[155]; CS [120]–[124]. The compensation Claim Group described at [5] of the orders by reference to (1) membership of five descent based estate groups and (2) other Aboriginal persons who, in accordance with traditional laws and customs, have rights in respect of the estates of the groups, being members of estate groups from neighbouring estates, spouses of estate group members, and members of other estate groups with ritual authority. The native title determination for land in the Town where native title exists uses similar descriptors.[216] The composition of the group will change from time to time by births, deaths, marriage, and as traditional affiliations wane and wax.[217]

148. Some country beyond the Town is freehold Aboriginal land held by Land Trusts under the *Land Rights Act* granted following a finding by the Commissioner under s 51 that there are traditional Aboriginal owners (as defined in s 3). On becoming Aboriginal land, the Land Trusts hold the land for the benefit of Aboriginals entitled to the occupation and use of the land under Aboriginal tradition (ss 4, 10–12, 71),[218] a class wider than although inclusive of the traditional Aboriginal owners.[219] The evidence below includes a report of the Commissioner in 1985 on the Timber Creek Land Claim to an area adjacent to the Town finding that certain senior members of six estate groups answered the definition of traditional Aboriginal owners,[220] being the five groups within [5](1) of the compensation orders [**CAB 223**], plus another group *Kuwang*. The Commissioner also reported on the Fitzroy Pastoral Lease Claim in 1993 made by seven estate groups, being the six in the Timber Creek Land Claim plus *Wanimiyn/Yiritjpinti*.[221] The evidence below did not include the report on any findings as to traditional Aboriginal owners.

---

215 *Cassegrain v Gerard Cassegrain* (2015) 254 CLR 425 at [64] (French CJ, Hayne, Bell and Gageler JJ).

216 The native title determination reproduced as an annexure to the Further Amended Compensation Application (**GFM1**) describes the native title holding group (at pars [3]-[5]) in substantially the same terms as the description of the compensation claim group at par [5] of the orders (**CAB 223**).

217 *Meneling Station* (1982) 158 CLR 327 at 359 (Brennan J). In relation to listings of members of the five estate groups within par [5](1) of the compensation orders, see Appendix C of the 2004 Palmer-Asche report (ex A30 **GFM21**) and in ex RH1 to affidavit Rebecca Hughes 23 July 2015 **(CFM 4** pp 69-77).

218 See generally, *Meneling Station* (1982) 158 CLR 327 at 354-60 (Brennan J).

219 *Re Toohey; ex parte Stanton* (1982) 57 ALJR 73 at 77 (Wilson J), 79 (Brennan J).

220 See *ALC Report on Timber Creek Land Claim 1985* at [99]-[105] (ex A33 **GFM22**) and compare with the listings of all (not just senior members) at 2004 and 2015 in the references in preceding footnote.

221 See the summary in *Griffiths FC* (2007) 165 FCR 391 at [109]-[114].

149. In view of the descriptors used in [5](1) and (2) of the compensation orders [**CAB 223**], the different compositions of the claim groups and the different rights conferred by the *Land Rights Act* on wider groupings that are not sourced in native title,[222] there is no factual foundation to the government parties' contentions: CS [120]; NTS [153]; SAS [40]; WA [36]. All that can be said is that the descriptors of the compensation Claim Group, the composition of which will change from time to time, are the same as those used for the group that holds native title to land in the Town where unextinguished. The trial Judge took that into account: TJ [364], [377] **CAB 190, 193**.

150. Cth ground 4(c): ongoing loss: CS [113]–[119]. Despite accepting that the native title holders who can bring a compensation claim need not be those who held title at the time of extinguishment, the Commonwealth contends that assessment of loss should not have regard to ongoing effects after that time, on the footing that the NTA does not confer an entitlement to compensation on persons who have later become members of the title holding group: CS [113].

151. As with the previous issue, the Commonwealth's argument depends upon findings about the composition of the Claim Group from time to time, that is, at the time of each earlier act that occurred over 1980 to 1996. The premise is, in that respect, that compensable loss is suffered by a "finite group" that has an "end point": CS [113]. The trial Judge was not asked to make any findings on these matters, and did not. The contention also overlooks that the relevant findings that the effects have been ongoing for three decades, and continue (TJ [382] **CAB 195**), are sourced in the evidence of the current members of the claim group of their life experiences: see, for example, TJ [371] **CAB 192**.

152. The Commonwealth's argument is also unreal in assuming that even if each and every individual that may be within the description of the Claim Group could be identified and counted at the time of each act, the rights and duties of all members of the fluctuating group are uniform. The anthropological evidence was that the effects of extinguishment will be experienced differently by members depending on the person's connection to the place, age, ritual knowledge, responsibility and so forth.[223] The Commonwealth did not attempt to identify the "finite group" at a relevant point in time, and that opinion evidence demonstrated the impracticability of doing so.

153. The course now put also cuts across the statutory scheme. On a determination of native title a prescribed body corporate (**PBC**) acts as trustee or agent of the common law holders (s 55) who are described in terms to reflect the communal or group rights. In that

---

222 *Risk v Northern Territory* (2007) 240 ALR 75 at [110] (Full Ct); *Wurridjal* (2009) 237 CLR 309 at [145] (Gummow and Hayne JJ).

223 Transcript T460(36)-473(31), 478(22)-504(15) (**CFM 18** pp 481-94, 499-525).

way issues of composition are resolved in accordance with the statutory functions of the PBC.[224] So too the approach to compensation where there is a communal or group entitlement and a PBC has statutory functions to hold, invest and apply the compensation: see ss 58(c), 94 and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth); compensation orders, notes A–D and par [6] **CAB 222-3**.

154. In any event, the Full Court was correct to reject the argument; the duration (and intensity) of the effects of extinguishment was relevant: FC [333]–[336] **CAB 363-4**. No party contends that the trial Judge should not have considered (by adaptation) the criteria for compensating intangible disadvantages resulting from a compulsory acquisition: LAA Schedule 2 rule 9: TJ [368] **CAB 191-2**. That criteria includes the length of time during which a claimant has resided on the land and the period during which the claimant would have been likely to reside on the land: rule 9(2)(b) and (e). The circumstance that the composition of the group changes by death, birth, marriage, succession etc is no reason for differential treatment; the entitlement is communal: TJ [443] **CAB 209**.

155. **Comparative material:** Commonwealth grounds 7(c)–(e): CS [134]–[148]. The reference by the Full Court ([396]–[408] **CAB 382-6**) to three decisions of the Inter-American Court of Human Rights (**IACHR**) and an academic paper needs to be viewed in context. *First*, the Full Court asked each party whether there was relevant comparative material in overseas jurisdictions, and the Commonwealth provided excerpts from its review of the comparative literature in submissions before the trial Judge.[225] *Second*, procedural fairness can be denied where a court acts on factual material without notice to the parties.[226] The material referred to by the Full Court did not go to facts in issue,[227] to be established by evidence, but rather, formed part of a body of available literature. The Full Court did not make findings of fact on the IACHR decisions (cf CS [136]–[144]) or accept any opinion in the academic paper as proof of a fact in issue: cf CS [145]–[147].

---

224 *Gumana v Northern Territory* (2005) 141 FCR 457 at [138] (Selway J).

225 Transcript of appeal T52 (Territory), T69, 77 (Commonwealth), T 286 (Claim Group) (**GFM32**).

226 ***Stead*** *v State Government Insurance Commission* (1986) 161 CLR 141 at 145 (the Court). As to the cases cited at CS [134], [148], *Gordon M Jenkins v Coleman* (1989) 23 FCR 38 at 47-8 involved reference to a Practice Note of Architects used as evidence of negligence or breach of duty, thus the trial judge had had informed himself out of court "on a question of fact or opinion vital to the issue and by no means free of controversy", citing *Cavanett v Chambers* [1968] SASR 97 at 101 (Bray CJ). *Kuhl v Zurich Financial Services* (2011) 243 CLR 361 involved a finding that the party-witness was "reluctant" to say what happened and thus failed to tell the whole truth, without being given an opportunity to deal with the criticism: at [62], [67]. ***International Finance Trust*** *Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 was a case about ex parte applications.

227 And compare, for example, that international law, unlike proof of foreign law, is not a question of fact: *Mokbel v R* (2013) 40 VR 625 at [20]-[27] (CA).

156. *Third,* there is no substantive difference between the comparative material in issue, the writings referred to at FC [388]–[392] **CAB 379-80**,[228] and the judgments in different areas of the law referenced by the Full Court when considering how to approach manifest excess: FC [383]–[384], [410], [417] **CAB 377-8, 386, 387-8** (including overseas cases). There is no error if an appellate court does not invite parties to comment on such material.[229] The consideration of the weight to be given by an appellate court to decisions that are not authoritative does not attract an obligation to invite submissions directed specifically to those decisions.[230] No different position obtains for the material in issue.

157. *Fourth*, the Full Court stated (at [402] **CAB 384**) that the overseas decisions provide "some, albeit limited, validation of the appropriateness of the solatium award", and (at [406] **CAB 385**) that the approach taken in the academic paper provided a "broad validation." The material was one of several reference points used in considering whether the figure reached by the trial Judge was manifestly excessive. The Full Court arrived at its conclusion upholding the assessment of the trial judge independently of the literature in issue, and had reached that view *before* referring to the material: FC [396], [409]–[418] **CAB 381, 386-8** cf SC [136]–[144]. On a fair reading of the judgment, being heard in relation to the material could not have produced a different result.[231]

158. **Asserted manifest excess:** NT grounds 4.1, 4.5; Cth grounds 7(a)–(b), 8: NTS [156]–[161]; CS [130]-[133], [149]. The Commonwealth's appeal to the Full Court did not include any ground about excess. Rather, it asserted that the trial Judge committed specific errors that warranted re-assessment: FC [279] **CAB 350-1** (grounds 6–7). The Territory's appeal included a ground that the award was "extravagant and excessive and not consistent with" a principle of fairness and moderation: FC [278] **CAB 349**, NT ground 5.6. The Full Court treated this as an "implicit" residual complaint of manifest excess along *House v The King* lines (FC [381] **CAB 377**), in the sense explained by Hayne J in *Rogers v Nationwide News* in the context of awards for non-pecuniary loss.[232]

159. NT grounds 4.1 and 4.5: The Territory repeats in this Court the submission to the Full Court as to a restraining principle of moderation: NTS [156]–[158]; also WAS [62]. The Full Court concluded, correctly, that it is "ambitious to describe fairness and moderation

---

228 Compare also the use of scholarly writings in *Yorta Yorta* (2002) 214 CLR 422 at [49] (Gleeson CJ, Gummow and Hayne JJ).

229 In *International Finance Trust* (2009) 240 CLR 319 at [146], Heydon J distinguished between making findings of fact (the Court "is not entitled" to take account of material without giving the parties notice) and having recourse to learned works ("ought give the parties an opportunity"); *Thomas v Mowbray* (2007) 233 CLR 307 at [618], [637] (Heydon J) requiring notice before making findings of fact.

230 *Parker v Comptroller-General* (2009) 83 ALJR 494 at [137] (Gummow, Hayne and Kiefel JJ).

231 *Stead* (1986) 161 CLR 141 at 147.

232 (2003) 216 CLR 327 at [62]-[66] (Hayne J, Gleeson CJ and Gummow J agreeing).

as constituting a principle" of assessment,[233] and that s 51(1) of the NTA did not require compensation to be assessed with any particular restraint or limitation, but rather required an assessment of what is "just": FC [376] **CAB 375**. That is plainly correct. The Territory sought to justify a "supplementary award of 10%" (NTS [162]) by reference to statutory caps in compulsory acquisition laws. As the provisions vary, and some have overrides, the Full Court correctly held that they do not provide any sure guide to determining the proper amount: FC [377] **CAB 375-6**.

160. The Territory's appeal to this Court does not press that point. It argues the amount is disproportionate to the area of extinguishment on the premise that the Claim Group hold rights in other areas of land, or that the uniqueness of the Claim Group's traditional connection should be put aside, or that the amount should be reduced given the other element of the award for material loss is substantial: NTS [159]–[161]. The first argument has been addressed already. As for the third, given that its case is that non-pecuniary loss is simply 10% of whatever is the assessed material loss, the Territory cannot call in aid any proportionality between the two amounts.[234]

161. The argument that compensation should be likened to and tied to compensation for non-native titles ignores the core of native title, reflected in par (b) of s 223(1), as rights under traditional laws and customs that connect the Aboriginal peoples concerned to their country. The significance has been addressed at [138]-[140] above on Commonwealth ground 4(b), and is developed further below in the context of the trial Judge's evaluation of the evidence. Presently, it suffices to note that the Territory's case pays no regard to the effects on *this* Claim Group: TJ [317]–[318] **CAB 178**.

162. Cth grounds 7(a)–(b): The Commonwealth does not contend for manifest excess as an independent ground, but rather asserts that the award is wrong "because" of specific error: see chapeau to ground 7 [**CAB 505**]. It argues that the Full Court erred by postulating a test of whether the amount awarded is "substantially beyond the highest figure which could reasonably have been awarded", fastening upon the third sentence in FC [395] **CAB 381**: CS [131]. However, that statement in [395] must be read in context.

---

233 The cases cited in NTS [156] do not support the asserted proposition. In *Skelton v Collins* (1966) 115 CLR 94 Windeyer J (at 130-2) made a different point that life and money are essentially incommensurable, while Gibbs and Stephen JJ in ***Sharman*** *v Evans* (1977) 138 CLR 563 at 584-5 only cautioned against thinking that compensation for non-economic loss can be "perfect".

234 Compare *Sharman* (1977) 138 CLR 563 where the overall amount of $300,457.50 was reduced to $270,547.50 because of error in allowance for certain nursing costs, assessment of future loss of earnings and of life expectancy, with Gibbs and Stephen JJ noting at 589 that when those amounts are determine properly the additional sum of $80,000 for pain and suffering is excessive. And see the observations on imprecision in rigid distinctions in components of economic and non-economic loss making up overall compensation in ***Papanayiotou*** *v Heath* (1969) 43 ALJR 433 at 436 (Windeyer J).

The Full Court, after referring (at [394]) to the trial Judge's findings on the nature of the Claim Group's relationship with their country, reasoned (at [395]):

> *These findings were the foundation for the intuitive leap taken to reach the figure for solatium. The ultimate touchstone is provided by the NTA, namely, that the compensation reflect just terms. The question for this Court is whether the figure is substantially beyond the highest figure which could reasonably have been awarded (Williscroft).*[235] *… The question then is whether the award for solatium would be judged by the Australian community as fair to the Claim Group. Whilst the loss of rights so intertwined with the identity of a people cannot be valued in money, the award must signify by its amount a recognition of the level of the impact on the Claim Group. The findings of the primary judge demonstrate that the impact on the Claim Group was at a very high level. What amount is required to recognise a severe and lasting impact on the loss of such rights?* (emphasis added)

163. The third sentence in FC [395] does not materially depart from the standard of appellate review of an award by a judge where the ground of appeal is manifest excess or inadequacy.[236] The question will be whether the amount is "so extremely high or so very small as to make it, in the judgment of [the appeal] court, an entirely erroneous estimate of the damage", so as to engage a residual category of error in evaluation.[237] Their Honours' question of whether the amount is substantially beyond the highest figure which could reasonably be awarded is no different to asking if it is "so extremely high" as to be an entirely erroneous estimate. The Full Court had earlier set out their appreciation that a *House v The King* inquiry as to whether there had been an erroneous assessment was required: FC [380]–[381] **CAB 376-7**.

164. The reference in [395] to the "ultimate touchstone" provided by the NTA that compensation "reflect just terms" is perfectly correct, so too the statement that "the question then is whether the award would be judged by the Australian community as fair to the Claim Group." The statements, and FC [395] **CAB 381** read as a whole, demonstrate that there is no error in how the Full Court approached the matter. The Commonwealth's case selects only a small part of their Honours' reasoning. That the Full Court approached the matter correctly is confirmed by the conclusion (at [412] **CAB 387**) that the amount assessed by the trial Judge was:

---

235 [1975] VR 295: quoted at FC [384] **CAB 377-8**.

236 When an award by a jury is not affected by misdirection, but it said to be manifestly excessive or inadequate, the question is in like terms, that is, whether the amount is "so large or so small as to be out of all proportion to the harm suffered" such that the jury is taken to have failed to perform their duty: *Australian Iron and Steel* (1962) 107 CLR 308 at 322 (Windeyer J), noting also at 324 that the suggestion of substantive differences in cases of judge and jury awards is not "logically satisfactory"; see also *Miller* (1954) 92 CLR 190 at 196 (Dixon CJ and Kitto J).

237 *Lee Transport v Watson* (1940) 64 CLR 1 at 13 (Dixon J), quoting and applying *Flint v Lovell* [1935] 1 KB 354 at 360 (Greer LJ). To like effect in the same line, *Nance v British Columbia Electric Railway* [1951] AC 601 (PC) at 613 – either "so inordinately low or so inordinately high that it must be a wholly erroneous estimate" – cited (among other authorities) in *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 369 (Gibbs J, with Stephen J agreeing).

> *... within the permissible range on the evidence before him, taking into account the nature of the rights and the nature of the loss as his Honour articulated then.* (emphasis added)

That also answers the Commonwealth's suggestion (CS [132]) that the Full Court failed to test the award by determining a "permissible range" – an exercise that does not, contrary to the way it puts it case (including before the Full Court) require identification of an upper and lower (acreage) sum: see FC [359] **CAB 370**.[238]

165. A ground of manifest excess or inadequacy is a particular form of the general objection of an award being against the evidence or weight of evidence.[239] The assessment by the trial judge, upheld by the Full Court, turned upon an evaluation of a plethora of factors which influenced his understanding and impression of the claimant evidence given at different locations, and of the anthropologists, including evidence about that country and its normative importance, the extensive documentary material, including the claimant and anthropological evidence in the earlier native title proceedings, and the relationship between that evidence and material and the country to which they relate: TJ [290]–[383] **CAB 172-95**, esp. the findings at [328]–[383].

166. These findings were, as the Full Court noted, the "foundation" for an assessment that was within a permissible range *on the evidence*, taking into account the nature of the loss, as found by the trial Judge: FC [395] **CAB 381**. That turned on evaluating the effects on the rights and duties under Ngaliwurru-Nungali custom, including that protecting land is a way of protecting oneself, that sites need to be understood as "meta-place" and are not bounded, and that Dreaming imbued sites in the claim area with spirituality: TJ [317]–[318], [334]–[337] **CAB 178, 181-2**. The trial Judge evaluated the effects, having seen and heard the claimant witnesses, and finding that their evidence "was strong and compelling" and the "beliefs expressed were genuinely held and demonstrated a deep connection to country": TJ 348 **CAB 186**. There can be no doubt that the trial Judge was in a much better position than an appellate court to assess the evidence upon which the assessment depended.

167. **Compensation is not supplied by a percentage or Lot figure:** The measure propounded by the Territory that compensation for intangible losses be fixed as 10% of material loss will not meet the statutory object of compensating the Claim Group *for the effects* of extinguishment of *their* native title rights: s 51(1). The figure is arbitrary in being fixed without regard to the effects demonstrated on the evidence; the measure it puts means the amount will differ depending on the base assessment of material loss.

---

238 *Sharman* (1977) 138 CLR 563 at 589-90 (Gibbs and Stephen JJ), 590 (Jacobs J) that a computation, although useful, does not provide a final answer as to the proper amount to be awarded.

239 *Public Transport Corporation v Sartori* [1997] 1 VR 168 at 177 (Brooking JA), 180 (Callaway JA).

168. Nor can the measure be supplied by any acreage figure of $5,000 per Lot plus one $20,000 payment for one public work, as the Commonwealth suggests: CS [150] referring to FC [358] **CAB 188-9**. There are no "appropriate brackets" within which an award for non-pecuniary loss can be sufficiently on target.[240] Rather, as Mahoney ACJ remarked in *Crampton v Nugawela*, in cases of non-pecuniary loss what is needed is a "normative or social assessment of what is appropriate, fair or just".[241] That the Commonwealth's formula does not meet the statutory task to assess the effects of extinguishment, as revealed by the evidence, is underscored by the its submission that this Court is in as good as position of the trial Judge to evaluate the evidence without detailing how the evidence is to be brought to bear upon assessment: CS [149].[242]

169. The need for a normative or social assessment of compensable intangible loss (and not fixing a percentage or range) has been recognised in other cases where statute confers a right to compensation. In *Richardson* the Full Federal Court substituted $100,000 for an award of $18,000 for sexual discrimination. Although an award of $18,000 was not out of step with past awards in cases of that kind, it was out of step with the general standards prevailing in the community regarding the monetary value of losses involving the experience of hurt and humiliation in other areas.[243] There is a need to ensure an appropriate or rational relationship between awards of compensation for non-pecuniary losses in different areas of the law.[244] And that assessment must take into account the effects on the *particular* claimant, that is, the *subjective* response of the claimant.[245] The Full Court, and the trial Judge, approached the task correctly: TJ [313]–[315], [383] **CAB 177, 195**; FC [394]–[396] **CAB 380–1**.

170. **Conclusions:** Complaints about an overemphasis or magnitude of elements weighed in the balance when assessing intangible loss, even if made good, do not portray error, or that the assessment is for some other reason beyond the limits of a sound discretionary or evaluative judgment.[246] It follows that the appeals should be dismissed.[247]

---

240 *Papanayiotou* (1969) 43 ALJR 433 at 436 (Windeyer J).

241 (1996) 41 NSWLR 176 at 195D, and see also 191G quoted at TJ [313] **CAB177**.

242 As one example of the task, contrast the Further Notice of Evidence on the Claim for Non-Economic Loss filed 10 September 2015 setting out the findings on loss sought in reference to the evidence in the earlier proceedings (**GFM5**).

243 (2014) 223 FCR 334 at [114]-[118].

244 *Carson v John Fairfax & Sons* (1993) 178 CLR 44 at 56-60 (Mason CJ, Deane, Dawson and Gaudron JJ); *Rogers* (2003) 216 CLR 327 at [70] (Hayne J).

245 *Rogers* (2003) 216 CLR 327 at [75], [80]-[81] (Hayne J).

246 Compare *Miller* (1954) 92 CLR 190 at 197 (Dixon CJ and Kitto J).

247 If, contrary to the foregoing, the appeals were allowed to an extent, there may difficulties as to whether this Court is in a position to reassess non-economic loss. As apparent from the findings below (TJ [348] **CAB 187**), assessment depends upon seeing and hearing the witnesses, and might require fact finding not

Part VIII: Orders Sought and Oral Address

171. The Claim Group seeks the orders in the notice of cross-appeal and estimates that it will require approximately 4.5 hours for the presentation of oral submissions in answer to the appeals and on the cross-appeal.

Dated: 4 May 2018

Sturt Glacken
T 03 9225 8171
F 03 9225 7728
glacken@vicbar.com.au

Graeme Hill
T ~~03 9225 6701~~
F 03 9225 8668
graeme.hill@vicbar.com.au

Laura Hilly
T 03 9225 6324
F 03 9225 8668
laura.hilly@vicbar.com.au

determined by the trial Judge, and upon which the present state of the evidence does not admit answers, for example, on the extent of unaffected areas of country other than the Town area or the composition of the Claim Group from time to time. On limits to appeal courts undertaking reassessment, see generally, *CSR* [1998] 2 VR 505 at 515-6. Assessment would also require reference to evidence not in the Books of Materials, particularly the transcripts of evidence in the earlier native title and land claim proceedings (ex A2 and A34) referenced in Notices of Findings and Evidence (**GFM5** and **6**).The parties would need to address the Court on what course to take (reassessment or remittal) and on what terms: *Judiciary Act* 1903 (Cth), s 77C; *Trustees of the Roman Catholic Church v Hogan* (2001) 53 NSWLR 343 at [37]-[51] (CA).