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

## APPELLANT'S (D1/2018) REPLY

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**Part I:**

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

**Part II:**

**Introduction**

2. These submissions reply to the submissions of the native title party and the submissions of the fourth and fifth intervenors (**intervenors**).[1] Abbreviations used in the Territory's consolidated submissions in chief are continued in these reply submissions. These submissions follow the structure of the claim and deal with matters of reply where they arise under each pleaded head of loss.

**Economic loss**

3. *The* Spencer *test is appropriate in this case*: The parties have proceeded on the foundation that economic value should be determined by the application of conventional economic tools of analysis and principles adapted where necessary to accommodate the unique character of native title and the statutory context.[2] Issue is joined between the parties as to how the *Spencer* test[3] should be applied in the circumstances,[4] not whether it should be applied at all.[5]

4. The intervenors should not be heard to argue against the application of the *Spencer* test to assess market value on the basis that an alternative valuation approach is to be preferred.[6] The principle of reinstatement is little developed[7] and typically understood in connection with a claim of economic disturbance.[8] No such claim is brought or developed in evidence here. It is doubtful that even if such a claim had been pursued, the principle would assist where there has been a considerable passage of time since the compensable acts.

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[1] The term "intervenors" is used in this limited sense and without reference to the first to third intervenors.

[2] Native title party submissions (**NTPS**) [30]-[31], [77]-[78]; Territory consolidated submissions (**TCS**) [32]; Commonwealth consolidated submissions (**CCS**) [12]-[13].

[3] Referring to *Spencer v Commonwealth* (1907) 5 CLR 418.

[4] NTPS [66]-[69], [76].

[5] Cf Intervenors' submissions (**NTRBS**) [35]-[37].

[6] NTRBS [47]-[54].

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

[8] *Roads and Traffic Authority of NSW v McDonald* (2010) 79 NSWLR 155.

5. In any event, reinstatement as formulated by the intervenors in terms of a restoration of the "utilitarian aspects of the extinguished native title",[9] is consistent with the notion of "usage value" employed by Mr Lonergan[10]

6. *Inalienability and non-commerciality are significant*: The native title party and the intervenors fail to join issue with the Territory[11] or the Full Court[12] as to the significance of the instant native title rights not being able to be sold (except on surrender), mortgaged, subdivided, leased or otherwise commercially exploited for profit. The implicit concession is significant in the first place because of the unchallenged economic evidence[13] that these factors are important drivers of freehold market value. On an assessment of market value of land or rights in relation to land their absence from the bundle of rights would be significant. The concession is sufficient to dispose of the faint submission by the native title party that the market value of their native title rights would be the same as freehold market value.[14] To say that the native title rights were nevertheless extensive[15] is not to the point if they were less extensive than freehold rights with which they are compared and contrasted. Less extensive rights affording their holders less potential usage and cash flow are valued lower than more extensive rights in the marketplace.

7. The failure of the native title party to come to terms with these further aspects of the wider concept of inalienability (loss of control over the sale, inability to mortgage, lease or subdivide) in its criticism of the Full Court's reasons for taking into account the inalienability of the rights[16] also explains why that criticism misfires from the outset. Even assuming that the native title party's submissions as to the principle for which *Leichardt Council*[17] stands were correct and applicable, the principle would not preclude a downward adjustment for the broader concept of inalienability.

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[9] NTRBS [50].

[10] See TCS [53]-[54].

[11] TCS [45]-[46], [68]-[69].

[12] *Griffiths FC* at [135] [**CAB 312-313**].

[13] See the evidence cited at TCS fn 72. See additionally Transcript, 24 February 2016 (Lonergan) [**Territory Book of Further Materials (TBFM) Vol 2 p 746-747**].

[14] NTPS [84].

[15] NTPS [84].

[16] NTPS [71]-[73].

[17] *Leichardt Council v Roads and Traffic Authority (NSW)* (2006) 149 LGERA 439.

8. However, the native title party and intervenors misinterpret the principle for which *Leichardt Council* stands. The decision stands only for the proposition that a statutory prohibition on sale does not impinge on a process of valuation under compulsory acquisition legislation which expressly assumes that sale.[18] In reaching that conclusion, the Court of Appeal was concerned with the inconsistency between two statutory regimes where one statute proceeded on a statutory hypothesis which the other denied.[19] Any wider reading of the decision is inconsistent with earlier authority in *Sydney Sailors' Home v Sydney Cove Redevelopment Authority*[20] and *Corrie v McDermott*,[21] of which the former was not overruled and the latter was binding on the Court of Appeal. There is no analogous statutory intersection here and the Full Court below was correct to apply the general principle in *Corrie v McDermott*.[22]

9. Further points of distinction from *Leichardt Council* are that the Court of Appeal was not there dealing with restrictions on alienation which were inherent aspects of the rights and interests being valued,[23] and the statutory framework in *Leichardt Council* suggested that the concept of "value to the owner", to which *Corrie v McDermott* attaches[24] and to which the LAA gives primacy,[25] was not intended to apply.[26]

10. *Surrender to the Crown*: Contrary to the opinions of the economists at trial,[27] the native title party now submits that inalienability except on surrender to the Crown elevates market value because the Crown would be prepared to pay a premium to free the land of the encumbrance of native title.[28] That submission should not be accepted. It is speculative without support in, and contrary to, the evidence, and it lies outside the *Spencer* framework of a willing but not anxious buyer.

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[18] (2006) 149 LGERA 439 at [44].

[19] (2006) 149 LGERA 439 at [46] and [51].

[20] (1977) 36 LGRA 106.

[21] [1914] AC 1056.

[22] *Griffths FC* at [115]-[122].

[23] (2006) 149 LGERA 439 at [42]-[43].

[24] (2006) 149 LGERA 439 at [26].

[25] LAA, sch 2 r1.

[26] (2006) 149 LGERA 439 at [38]-[39].

[27] Transcript, 24 February 2016, P-653 (lines 15 – 30) (Lonergan and Houston) [**TBFM Vol 2 p 762**].

[28] NTPS [68], [75]-[77].

11. *Non-exclusivity, relational nature of rights*: It is an agreed fact that the native title rights and interests extinguished by the compensable acts were non-exclusive rights.[29] That description is not contingent.[30] It reflects the withdrawal of recognition by the common law, prior to the compensable acts, of the right, recognised by the traditional laws and customs of the native title party, of exclusive use and enjoyment of their rights.[31]

12. In that context, to characterise native title rights as relational,[32] by analogy with proprietary rights recognised by the common law, is to say no more than that these native title rights accommodated the equal priority of corresponding rights and interests in the subject allotments held by the Crown. A loose analogy may be drawn with the position of tenants in common who each enjoy a right of possession, neither right having priority over the other. The characterisation does not alter the substance of what was extinguished and for which compensation is payable. Nor does it expand the enforcement rights of the native title party beyond the enforcement of their rights recognised by the common law.[33] The only native title rights recognised by the common law and enforceable against anyone without a better title were non-exclusive usufructory and ceremonial rights.

13. *Status as town lands or Crown land is irrelevant*: The declaration of the subject allotments as town lands and their character as unalienated Crown lands (until alienation by grant from the Crown comprising the compensable acts) do not alter the market value of the native title rights.[34] To sustain that submission, the effect of those designations would have to be that the grant of interests coexisting with the native title was practically impossible. Neither designation had that effect. There was no statutory impediment to the grant of pastoral leases, mining rights or similar interests over Crown land set aside as town lands. The procedural requirements for a valid alienation of Crown land did not remove "any realistic prospect" of alienation,

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[29] *Griffiths FC* at [33] [**CAB 279**].

[30] Cf NTPS [52].

[31] *Western Australia v Ward* (2002) 213 CLR 1 at [21].

[32] NTPS [51].

[33] Cf NTPS [54].

[34] Cf NTPS [62]-[65].

as the fact of alienation by the compensable acts themselves establishes.[35] The assessment of the prospects of the grant of other kinds of lesser interests cannot be made with the benefit of hindsight.[36]

14. *Notice of contention*: The notice of contention filed by the native title party seeks to re-agitate a complaint that the opinion evidence of Mr Lonergan should not have been accepted for the reason that it is dependent on anthropological assumptions not established at trial or opinion beyond Mr Lonergan's expertise. Those criticisms were rejected by the trial judge.[37] The impermissible assumptions or opinions are said to reside in the uplift valuation component (referred to as "negotiation value") where Mr Lonergan considered the exit value on surrender of native title. There are two answers to the complaint. First, this is a hypothetical inquiry about the price a willing but not anxious buyer and seller would agree in respect of a commodity which by its nature cannot be bought or sold. Anthropology has nothing to say about that inquiry. It is not directly related to observable experience. No anthropological evidence was adduced about it. The intervenors speculate that the price would be impossibly high because the native title party would be unwilling to sell.[38] But that displaces the starting assumption of a willing seller and, as the Full Court correctly found,[39] introduces subjective components of value which inform the solatium award but are excluded from the head of economic loss. Economic game theory relied on by Mr Lonergan[40] (and with which Mr Houston agreed generally[41]) says that a meeting in the middle between the actual content of the rights and freehold market value is the best approximation in the circumstances having regard to a range of factors, including indigenous attachment to land (a matter established by anthropological evidence at trial). It is no part of Mr Lonergan's valuation framework that he purports to have valued indigenous attachment to country. Rather, he has recognised it as a factor relevant to the hypothetical bargaining

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[35] See also the invalid future acts comprising grants of pastoral leases: *Griffiths* at [61] [**CAB 21**].

[36] Cf NTPS [65].

[37] The notice of contention refers to a preliminary ruling on admissibility dated 12 February 2016 which order was varied on final hearing: *Griffiths* at [235], [240]-[243] [**CAB 158, 160**].

[38] NTRBS [37].

[39] *Griffiths FC* at [111]-[114] [**CAB 305-306**].

[40] Transcript, 24 February 2016 P-643 (Line 35) – P-646 (line 15) (Lonergan) [**TBFM Vol 2 p 753-755**].

[41] Transcript, 24 February 2016 P-650 (lines 20 – 35) (Houston) [**TBFM Vol 2 p 759**].

process. The second answer is short. To the extent that Mr Lonergan incorporates indigenous attachment to country in the uplift at all he is affording the native title party a windfall where that aspect and the reasons for it (the unique cultural and spiritual association with country) are already counted towards the solatium award.

**Interest**

15. *Native title is not capital earning*: The failure of the native title party and the intervenors to join issue as to the significance of these native title rights not being able to be mortgaged, subdivided, leased or otherwise commercially exploited for profit frustrates the claim for compound interest.

16. The claim is framed by the native title party in terms that "reflect a fair or mean return which might have been expected over the relevant period on a mortgage or in long-term government bonds"[42] and the native title party relies on[43] the exposition of principle by Dixon J in *Commonwealth v Huon Transport* that the interest award represents "capital contained in the land".[44] The inherent flaw is that the native title rights were not capital earning and could not be secured by mortgage.

17. *Sufficiency or proportionality of interest*: Relatedly, the native tile party fails to join issue with the Territory[45] (just as it failed to do so below[46]) on the sufficiency or proportionality of the interest award by reference to the evidence of either the native title party's loss or the Territory's gain. This is an insuperable obstacle to the claim which calls in aid "elementary fairness"[47] as requiring "full and adequate compensation"[48] to found the entitlement to compound interest. The native title party refers to the receipt by the Territory of rents and profits of $196,750 in relation to various allotments within the town of Timber Creek.[49] The native title party

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[42] NTPS [105].

[43] NTPS [97].

[44] (1945) 70 CLR at 323 per Dixon J.

[45] TCS [99]-[102].

[46] *Griffiths FC* at [209]-[210] [**CAB 333-334**].

[47] *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518 at 526 per Latham CJ.

[48] *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518 at 522 per Latham CJ.

[49] The admitted receipts do not coincide neatly with the native title party's economic loss claim: cf NTPS [91]. The receipts relate to some allotments over which interest is not claimed or which are not covered by a compensable act at all – acts 38-40, 50A, and 53-54. And there were no rents or profits in respect acts 1, 36, 43-44 in relation to allotments 16, 52, and 62-63 over which economic loss including interest is claimed. Further, some of the receipts were received across long periods of up to 10 years.

submits that it is inequitable for the Territory to retain these receipts without paying compound interest on the market value of the rights. What the submission noticeably omits to account for is the inherent disproportionality between those receipts and the sum of compensation by way of compound interest assessed at the risk-free rate. The award of simple interest by the Full Court, on economic loss assessed at 65% of the freehold value of the Lots, fixed at the Practice Note rate was $1,183,121. This is more than sufficient to account for the Territory's gain throughout the relevant period. Compound interest at the risk-free rate on economic loss assessed at 100% of the freehold value of the Lots comes to $4,489,931.[50] Compound interest would be grossly disproportionate and for that reason inequitable and unjust.

18. Where the fact of receipt of rents and profits in this case is the native title party's only answer to the Territory's submission that compound interest will be required in every compensation claim under the NTA on the reasoning in the native title party's argument,[51] the failure to account for the above disproportionality is critical.

19. The same point may be made in respect of fluctuations in freehold land value and inflation. The native title party submits[52] that the lengthy period of time between the compensable acts and judgment during which there have been fluctuations in money and land values justifies compound interest. The submission is made without regarded to the evidence that interest fixed at the Practice Note rate is sufficient to cover and proportionate to those matters.[53]

20. The sufficiency or proportionality of simple interest at the Practice Note rate is confirmed in the circumstance of historical non-recognition of native title at the time of the compensable acts. At that time, the native title holders were not known and the nature of their rights were not recognised. Payment to the native title party or into court of a sum reflecting the value of those rights was not a real possibility. In those circumstances, an award of interest which is proportionate does justice to the parties in the unique circumstances of a native title compensation claim.

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[50] Supplementary Expert Economist's Report of Gregory Houston [**CBFM Vol 1 p 392**].

[51] NTPS [91] responding to TCS [82]-[84].

[52] NTPS [88].

[53] TCS [98]-[99].

**Solatium**

21. *Findings of fact*: The native title party's primary submission is that the Court should not entertain the Territory and Commonwealth appeals from the solatium award as they require the Court to review the trial judge's findings of fact which an appellate court in native title proceedings generally ought not do.[54] The submission is overstated and misrepresents the substance of the challenges brought against the solatium award.

22. The Territory's submission in general terms is that the facts as found, or open to be found where findings were not expressed with the requisite clarity,[55] do not support the award on proper interpretation and application of the statutory compensation framework.[56] Alternatively, the trial judge applied an erroneous causal analysis,[57] failed to adhere to the statutory limits on compensation,[58] and failed to properly account for matters relevant to the determination.[59]

23. *Ritual ground evidence*: The native title party's submission that the trial judge's reference to "the effect of *a particular act*"[60] upon the capacity to use the ritual ground should be understood as a reference to acts 43 and 44 on Lots 62 and 63 "in the form of houses with a road leading to the houses",[61] and that this Court is poorly placed to go behind that finding not having seen or heard the evidence as it was given, should be rejected. The trial judge referred to an act, singular; not acts, plural. Further, acts 43 and 44 involved the construction of the houses only. The road already existed and is not a compensable act.[62] It is highly improbable, therefore, that the native title party's explanation accords with the trial judge's.

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[54] NTPS [115]-[136].

[55] See the discussion at TCS [128]-[132] and below concerning the ritual ground.

[56] See by analogy *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [2], [54], [65] per McHugh J, [77], [95], [103] per Gummow, Hayne and Heydon JJ.

[57] TCS [134]-[136].

[58] TCS [139], [142]-[144], [151].

[59] TCS [152]-[154].

[60] *Griffiths* at [379] (emphasis added) [**CAB 194**].

[61] NTPS [135].

[62] See tenure materials for lots 62-63 [**Native Title Party Book of Further Materials (NTPBFM) p 799-810**].

24. In any event, the ritual ground evidence does not support a conclusion that members of the native title party felt pain or anxiety[63] in respect of the ritual ground by reason of acts 43 and 44. The site of the ritual ground was somewhere in the bush (at an undisclosed and undiscernible location) and not in any immediate proximity to Lots 62 and 63. Neither act was referred to or referenced indirectly in the restricted evidence.

25. *Aboriginal land rights*: In response to the submission of the Territory that the courts below failed to take proper account of the extensive land rights remaining to the native title party members, the native title party says that adjacent Aboriginal land under the *Land Rights Act* is properly distinguishable from native title within the town of Timber Creek and its existence not a factor relevant to the claim for solatium.[64]

26. The basis of the distinction pressed is that the class of persons for whom the Aboriginal land is held wholly includes, but is wider than, the members of the native title party. That distinction is immaterial. The fundamental point remains that vast tracts of nearby land remain available to the native title party within which they continue to enjoy the exercise of their traditional usufructory and ceremonial rights. This is a relevant consideration when attributing value to their subjective sense of loss arising from the extinguishment of such rights on nearby land.

27. Further, if the implicit reason behind the distinction is that, because the Aboriginal land interests are shared with others (ie non-exclusive) their loss is less subjectively valuable to their holders, then by parity of reasoning non-exclusive native title rights holders should be afforded less solatium than exclusive native title rights holders. The anthropological evidence underlying the solatium claim[65] was premised on the existence of exclusive native title rights,[66] but no adjustment has been made in respect of the solatium claim to account for the non-exclusivity of the rights. Consistently with the native title party's approach to their claim, the distinction asserted to make Aboriginal land rights irrelevant should be rejected.

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[63] NTRBS [65].

[64] NTPS [147]-[149].

[65] *Griffiths* [372]-[373] [**CAB 192-193**].

[66] *Griffiths* [349] [**CAB 162**].

28. *Clarification*: The Territory should not be understood to be abandoning its submission that a solatium of 10% can be justified or supported by reference to limits on solatium awards in compulsory acquisition laws.[67] Applicable statutory provisions appear in the judgment below.[68] The factor of 10% reflects the upper limit of an approximate mean limit drawn from those statutes. The point to be taken from those laws is that a solatium which is broadly consistent with those limits – an approximate mean – signals by its award a meaningful acknowledgment of an incalculable loss for which money is a solace only.[69] It is to this point that TCS [160] is directed.

Dated: 23 May 2018

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[67] Cf NTPS [160].

[68] *Griffiths FC* at [377] referring to *Lands Acquisition and Compensation Act 1987* (Vic) s 44(1); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 60(2); *Land Administration Act 1997* (WA) ss 241(8) and (9).

[69] *Skelton v Collins* (1966) 115 CLR 94 at 132.