HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

D1/2018

NORTHERN TERRITORY OF AUSTRALIA — APPELLANT

AND

MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES & ANOR — RESPONDENTS

D2/2018

COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES & ANOR — RESPONDENTS

D3/2018

MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES — APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA & ANOR — RESPONDENTS

Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples
Commonwealth of Australia v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples
Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory
[2019] HCA 7
13 March 2019
D1/2018, D2/2018 & D3/2018

ORDER

Matter Nos D1/2018 and D2/2018

1. *Appeal allowed in part.*

2. *Set aside Order 2 of the Orders of the Full Court of the Federal Court of Australia made on 9 August 2017 and, in its place, order that:*

   "(1) Paragraph 3 of the further amended order made by the trial judge dated 24 August 2016 be set aside and, in its place, order:

   'The compensation payable to the native title holders by reason of the extinguishment of their non-exclusive native title rights and interests arising from the acts in paragraph 1 above is:

   (a) compensation for economic loss in the sum of $320,250;

   (b) interest on (a) in the sum of $910,100;

   (c) compensation for cultural loss in the sum of $1,300,000;

   Total: $2,530,350.

   Note: post-judgment interest is payable on this total under s 52 of the Federal Court of Australia Act 1976 *(Cth), accruing from 25 August 2016.'*

   (2) Delete order 9."

Matter No D3/2018

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

S L Brownhill SC, Solicitor-General for the Northern Territory, with T J Moses for the Northern Territory of Australia (instructed by Solicitor for the Northern Territory)

S A Glacken QC with G A Hill and L E Hilly for the Ngaliwurru and Nungali Peoples (instructed by Northern Land Council)

S B Lloyd SC with N Kidson for the Commonwealth of Australia (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland, with A D Keyes for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

C D Bleby SC, Solicitor-General for the State of South Australia, for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

G T W Tannin SC with C I Taggart for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

S J Wright SC with M Georgiou for the Central Desert Native Title Services Limited and the Yamatji Marlpa Aboriginal Corporation, intervening (instructed by the Central Desert Native Title Services)

CATCHWORDS

Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples
Commonwealth of Australia v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples
Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory

Aboriginals – Native title rights – Assessment of compensation – Where "previous exclusive possession act[s]" within meaning of s 23B in Div 2B of Pt 2 of *Native Title Act 1993* (Cth) ("NTA") extinguished non-exclusive native title rights and interests held by Ngaliwurru and Nungali Peoples ("Claim Group") – Where Claim Group entitled to compensation under Div 5 of Pt 2 of NTA – Whether economic loss and cultural loss assessed separately – Principles of assessment for compensation for economic loss – Whether economic value of Claim Group's native title rights and interests equivalent to freehold value of affected land – Whether reduction from freehold value appropriate and how calculated – Whether inalienability of native title rights and interests a relevant discounting factor – Principles of assessment for compensation for cultural loss – Whether trial judge erred in assessment of cultural loss – Whether award manifestly excessive – Whether award met community standards.

Interest – Whether simple or compound interest payable on award for economic loss – Upon what basis simple interest payable.

Words and phrases – "compensable acts", "compensation", "compound interest", "compulsory acquisition", "cultural loss", "discount", "easement", "economic loss", "exclusive native title rights and interests", "extinguishing act", "inalienability", "just terms", "manifestly excessive", "native title", "non-economic loss", "non-exclusive native title rights and interests", "objective economic value", "percentage reduction from full exclusive native title", "previous exclusive possession act", "simple interest", "solatium".

Constitution, 51(xxxi).
Lands Acquisition Act (NT), Sch 2.
Native Title Act 1993 (Cth), Pts 1, 2, 15.
Racial Discrimination Act 1975 (Cth), s 10.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. These appeals[1] concern the amount of compensation payable by the Northern Territory of Australia to the Ngaliwurru and Nungali Peoples ("the Claim Group")[2], pursuant to Pt 2 of the *Native Title Act 1993* (Cth), for loss, diminution, impairment or other effect of certain acts on the Claim Group's native title rights and interests over lands in the area of the township of Timber Creek in the north-western area of the Northern Territory.

2 The issues are extensive, and in some respects complex, but fundamentally there are three questions:

(1) how the objective economic value of the affected native title rights and interests is to be ascertained;

(2) whether and upon what basis interest is payable on or as part of the compensation for economic loss; and

(3) how the Claim Group's sense of loss of traditional attachment to the land or connection to country is to be reflected in the award of compensation.

3 For the reasons which follow, those questions should be answered thus:

(1) the objective economic value of *exclusive* native title rights to and interests in land, in general, equates to the objective economic value of an unencumbered freehold estate in that land. In these appeals, the objective economic value of the *non-exclusive* native title rights and interests of the Claim Group is 50 per cent of the freehold value of the land;

(2) interest is payable on the compensation for economic loss, and in the circumstances of this case, on a simple interest basis, at a rate sufficient to compensate the Claim Group for being deprived of the use of the amount of compensation between the date at which compensation was assessed and the date of judgment; and

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1 From a judgment of the Full Court of the Federal Court of Australia (North A-CJ, Barker and Mortimer JJ): *Northern Territory v Griffiths* (2017) 256 FCR 478 allowing in part appeals from a judgment of Mansfield J (*Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362).

2 *Griffiths* (2016) 337 ALR 362 at 366 [13], 376 [71(4)].

(3) the compensation for loss or diminution of traditional attachment to the land or connection to country and for loss of rights to gain spiritual sustenance from the land[3] is the amount which society would rightly regard as an appropriate award for the loss. The appropriate award for the cultural loss in these appeals is $1.3 million.

4 These reasons are in seven parts: facts[4]; claim for compensation[5]; legislative framework[6]; economic loss claim[7]; interest on the economic loss claim[8]; cultural loss[9]; and orders[10].

A Facts

5 Timber Creek is a tributary of the Victoria River situated in the north-western corner of the Northern Territory. The area was first explored by non-Aboriginal people in the mid-nineteenth century and, around the end of that century, a number of pastoral leases were granted in the Victoria River district[11], including one pastoral lease granted in 1882 over the area that now comprises the town of Timber Creek[12]. The town, which was proclaimed as such in 1975, is located on the Victoria Highway about halfway between Katherine and

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3 Referred to as "non-economic loss" or "solatium" in the courts below and by the parties in their appeal grounds but, for reasons to be explained later in this judgment, better expressed as "cultural loss".

4 Part A, paras [5]-[10].

5 Part B, paras [11]-[18].

6 Part C, paras [19]-[54].

7 Part D, paras [55]-[107].

8 Part E, paras [108]-[151].

9 Part F, paras [152]-[237].

10 Part G, paras [238]-[239].

11 *Griffiths* (2016) 337 ALR 362 at 368 [23]-[24].

12 *Griffiths v Northern Territory* [2014] FCA 256 at [41]-[42].

Kununurra[13] and covers an area of approximately 2,362 hectares[14]. It is bounded on the north by the Victoria River and on the east, south and west by Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). It has a population of approximately 230 people, some two thirds of whom identify as Aboriginal; principally, native title holders. The principal buildings, apart from houses, are a road-house and general store, a hotel and caravan park, local council offices, a police station, a primary school, and a health clinic. The town's economy is centred on tourism and associated services and regional service delivery[15].

Compensable acts

6 Between 1980 and 17 December 1996, the Northern Territory was responsible for 53 acts, on 39 lots and four roads within the town, comprising various grants of tenure and the construction of public works, which were later held to have impaired or extinguished native title rights and interests and which give rise to the Claim Group's entitlement to compensation under Pt 2 of the *Native Title Act* ("the compensable acts"). Twenty-two of the compensable acts were grants of development leases incorporating covenants to effect improvements in exchange for freehold title. The remainder of the acts consisted of a grant of a Crown lease, freehold grants to government authorities on which, in some cases, public works were later constructed, and public works constructed without any underlying tenure[16]. The total area of land affected by the compensable acts was approximately 127 hectares ("the application area"), comprising just over 6 per cent of the area previously determined to be land in relation to which native title exists.

History of claims

7 In 1999 and 2000, the Claim Group[17] instituted three proceedings under the *Native Title Act* for determination of native title to land within the boundaries

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13 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 484 [7].

14 *Griffiths* (2016) 337 ALR 362 at 370 [33].

15 *Griffiths* (2016) 337 ALR 362 at 369 [29], [32].

16 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 485-488 [10]-[11].

17 The claimant group found to have held native title is now the compensation Claim Group: *Griffiths* (2016) 337 ALR 362 at 366 [13]; see also at 376 [71(4)].

of the town[18]. The trial judge (Weinberg J) held[19] that the Claim Group had native title rights and interests comprised of non-exclusive rights to use and enjoy the land and waters to which s 47B of the *Native Title Act* applied in accordance with their traditional laws and customs. On appeal, the Full Court of the Federal Court (French, Branson and Sundberg JJ) varied[20] his Honour's determination, holding in relation to those parts of the determination area to which s 47B applied that the Claim Group's native title rights and interests comprised a right to exclusive possession, use and occupation, but otherwise affirmed Weinberg J's determination. The total area of land determined to be subject to exclusive native title was approximately 2,053 hectares.

8 On 2 August 2011, the Claim Group instituted a claim for compensation under s 61(1) of the *Native Title Act* in respect of the compensable acts[21]. The compensation application concerned an area wider than that the subject of the determination, and included specified areas within the town where there had been no determination that native title existed. The parties were agreed, however, that native title existed in relation to the application area at the time of the act or acts for which compensation was claimed[22]. By a statement of agreed facts, the parties adopted the terms of the Full Court's native title determination as a description of the native title potentially affected by the compensable acts[23].

9 As a preliminary issue, the trial judge (Mansfield J) determined that the historic grant of pastoral leases was effective at common law to partially extinguish native title to the application area and that, in compensation proceedings as opposed to the proceedings for the determination of native title,

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18 *Griffiths v Northern Territory* (2006) 165 FCR 300 at 305 [8]-[10].

19 *Griffiths v Northern Territory* (2006) 165 FCR 300 at 369 [703]-[705], 370 [716], 375 [797].

20 *Griffiths v Northern Territory* (2007) 165 FCR 391 at 428 [125], 429 [128].

21 *Griffiths* (2016) 337 ALR 362 at 366 [7], 370 [37]-[40].

22 *Griffiths* [2014] FCA 256 at [11]-[12], [16].

23 *Griffiths* (2016) 337 ALR 362 at 367 [18].

s 47B of the *Native Title Act*, being inapplicable, did not permit the common law extinguishment of exclusive native title to be disregarded[24].

Native title rights and interests

10 Accordingly, Mansfield J found[25] that the native title rights and interests affected by the compensable acts consisted of the following non-exclusive rights exercisable in accordance with traditional laws and customs of the Claim Group:

(1) the right to travel over, move about and have access to the application area;

(2) the right to hunt, fish and forage on the application area;

(3) the right to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin;

(4) the right to have access to and use the natural water of the application area;

(5) the right to live on the land, to camp, and to erect shelters and structures;

(6) the right to engage in cultural activities, to conduct ceremonies, to hold meetings, to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters, and to participate in cultural practices related to birth and death, including burial rights;

(7) the right to have access to, maintain and protect sites of significance on the application area; and

(8) the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters (but not for commercial purposes).

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24 *Griffiths* [2014] FCA 256 at [43], [46], [67].

25 *Griffiths* (2016) 337 ALR 362 at 376 [71(3)].

B Claim for compensation

11 The claim for compensation was framed, pursuant to s 51(4) of the *Native Title Act*, in terms that compensation for loss, diminution, impairment or other effect on native title of the compensable acts should consist of the following elements:

(1) compensation for economic loss of the native title rights and interests to be determined as if the effect of each compensable act was equivalent to the compulsory acquisition of an unencumbered freehold estate in the subject land;

(2) compound interest at the superannuation rate or alternatively on a compound "risk free rate" of yields on long-term (10 year) government bonds or alternatively simple interest at the Pre-Judgment Interest Rate fixed by the Federal Court of Australia Practice Note CM16 ("the Practice Note rate") on the amount of compensation awarded for economic loss to be computed from the date as at which the compensation is assessed until judgment or payment; and

(3) compensation for loss or diminution of connection or traditional attachment to land and intangible disadvantages of loss of rights to live on and gain spiritual and material sustenance from the land, to be assessed by adaptation of the criteria in Sch 2 rr 2(b) (special value) and 9 (intangible disadvantage) of the *Lands Acquisition Act* (NT), to be assessed as at the time of trial.

Trial judge

12 The trial judge assessed[26] compensation in the amount of $3,300,661 comprised as follows:

(1) compensation for economic loss to be assessed at the date at which native title is taken to have been extinguished under the *Native Title Act* and assessed as being 80 per cent of the unencumbered freehold value of the affected land, namely, $512,400[27];

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26 *Griffiths* (2016) 337 ALR 362 at 446 [466].

27 *Griffiths* (2016) 337 ALR 362 at 395-396 [172], 404-405 [232], 446 [466].

(2) interest payable as part of compensation for economic loss on a simple interest basis calculated at the Practice Note rate from time to time and computed from the date of extinguishment of native title until judgment, being a sum of $1,488,261[28]; and

(3) compensation for non-economic loss payable in the amount of $1.3 million[29].

Full Court

13 The Full Court varied[30] the trial judge's assessment of economic loss from 80 per cent of the unencumbered freehold value of the affected land as at the date of extinguishment to 65 per cent of the unencumbered freehold value as at that date but otherwise, relevantly, affirmed the trial judge's decision. Accordingly, the orders of the trial judge were varied to award the Claim Group $416,325 for economic loss and $1,183,121 in interest on that sum, with the total compensation award being $2,899,446.

Appeals to this Court

14 By grants of special leave, the Claim Group, the Northern Territory and the Commonwealth each appeal to this Court.

15 The Claim Group appeal on two grounds, being in substance that:

(1) the Full Court erred in assessing the Claim Group's economic loss at 65 per cent of the freehold value of the subject land and should have assessed it as being the freehold value of the land without reduction; and

(2) the Full Court erred in awarding interest only on a simple interest basis computed at the Practice Note rate and should have allowed interest on a compound basis computed at the risk free rate.

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28 *Griffiths* (2016) 337 ALR 362 at 407 [246], 408-409 [254], 413 [279], 446 [466].

29 *Griffiths* (2016) 337 ALR 362 at 416-417 [298]-[300], 433 [383], 446 [466].

30 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520 [139], 590 [468].

16 The Northern Territory appeals on grounds in substance that:

(1) the Full Court erred in rejecting the valuation methodology advocated by one of the valuers who gave evidence, Mr Wayne Lonergan, or alternatively, in assessing the Claim Group's economic loss at any more than 50 per cent of the unencumbered freehold value as at the date of extinguishment; and

(2) the Full Court erred in affirming the trial judge's assessment of compensation for non-economic loss in the amount of $1.3 million by:

(a) failing to approach the assessment as an award given as consolation or solace for distress consequent upon a loss for which no monetary value can be put;

(b) upholding the trial judge's erroneous reliance on the effects of one compensable act on a nearby ritual ground to support a finding that some other, unidentified compensable acts had a collateral detrimental effect on native title beyond the land on which those other, unidentified compensable acts occurred;

(c) failing to apply a causation analysis consistent with ss 23J and 51(1) of the *Native Title Act*, by upholding the trial judge's erroneous reliance on the compensable acts as part of an overall erosion of connection to country; and

(d) failing to find that the award for non-economic loss was manifestly excessive.

17 And the Commonwealth appeals on grounds in substance that:

(1) the Full Court's assessment of the Claim Group's economic loss at 65 per cent of the freehold value of the subject land was erroneous or manifestly excessive and should not have exceeded 50 per cent;

(2) the Full Court erred in not holding that the trial judge was in error in awarding interest under s 51(1) of the *Native Title Act* as part of compensation rather than as interest on compensation;

(3) the Full Court erred in upholding the trial judge's assessment of non-economic loss in the amount of $1.3 million because they:

(a) included a component relating to the capacity to conduct rituals on adjacent land not the subject of compensable acts despite the fact that on the facts as found by the trial judge there was no effect on that capacity which was an "effect of" a compensable act within the meaning of s 51(1) of the *Native Title Act*;

(b) included a component for a "sense of failed responsibility for the obligation under traditional laws and customs to have cared for and looked after the land" despite there being no evidence that the Claim Group experienced any such feelings over all of the land the subject of the compensable acts and, to the extent that there was evidence that they did experience such feelings, their feelings were the result of a pre-existing absence of a recognised right to control access to the land rather than the "effect of" the compensable acts within the meaning of s 51(1) of the *Native Title Act*;

(c) included a component for the purported effect of compensable acts on future descendants of the Claim Group despite the *Native Title Act* not conferring an entitlement to compensation on persons who would have become members of the Claim Group only after native title had been extinguished;

(d) failed to find that the trial judge did not consider the geographical extent of the areas of land over which the compensable acts took place in comparison to the overall area of land available to the Claim Group to exercise and enjoy their rights as "native title holders" within the meaning of the *Native Title Act* and as "traditional owners" under the *Aboriginal Land Rights (Northern Territory) Act*; and

(e) found that commercial agreements entered into by the Claim Group, which contained agreed, minimum, solatium-type payments for damage to or destruction of sacred sites, had no relevance to the assessment of compensation; and

(4) the Full Court erred in failing to hold that the assessment of $1.3 million was manifestly excessive, because they:

(a) applied the wrong test by asking whether the sum was substantially beyond the highest figure which could reasonably have been awarded, when the correct test was to ask whether the sum was a wholly erroneous estimate of compensation;

(b) failed to consider the upper limit of a sound discretionary judgment for an award of compensation for non-economic loss;

(c) wrongly had regard to decisions of the Inter-American Court of Human Rights in breach of the rules of natural justice and erroneously found that those decisions validated the sum awarded when they were incapable of doing so; and

(d) wrongly had regard to a 2002 discussion paper entitled "How Can Judges Calculate Native Title Compensation?", in breach of the rules of natural justice.

The Commonwealth contended that the sum awarded for non-economic loss should have been in the order of $230,000.

18 The Attorneys-General for the States of South Australia, Queensland, and Western Australia, and the Central Desert Native Title Services Limited and the Yamatji Marlpa Aboriginal Corporation were each granted leave to intervene.

C Legislative framework

19 It is necessary to begin by examining and considering the provisions of the *Native Title Act*[31]. The *Native Title Act* recognises, and protects, native title[32] and provides that native title is not able to be extinguished contrary to the *Native Title Act*[33]; any extinction or impairment of native title can only be in accordance with the specific and detailed exceptions which the *Native Title Act* prescribes or permits[34].

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31 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 440 [32]; [2002] HCA 58, citing *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 35 [7]; [2001] HCA 56 and *Western Australia v Ward* (2002) 213 CLR 1 at 65-66 [16]; [2002] HCA 28.

32 *Native Title Act*, s 10.

33 *Native Title Act*, s 11(1).

34 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 463; [1995] HCA 47.

20 The scheme of the *Native Title Act* reflects the context in which it was enacted – it operates upon native title rights and interests defeasible at common law but substantially protected against extinguishment, from 31 October 1975, by the *Racial Discrimination Act 1975* (Cth)[35] and, in particular, s 10(1) of that Act[36].

21 "Native title" or "native title rights and interests", elaborately defined in s 223[37], comprise a number of elements, all of which must be given effect[38]. Section 223(1) provides that the expression "native title" or "native title rights and interests" means:

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

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

36 Section 10(1) of the *Racial Discrimination Act* provides that "[i]f, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."

37 *Ward* (2002) 213 CLR 1 at 65 [15].

38 *Yorta Yorta* (2002) 214 CLR 422 at 440 [33].

22 As that definition provides, the rights and interests of Aboriginal peoples[39] may be "communal, group or individual". The rights and interests must be "in relation to land or waters" and have three characteristics: that they be possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples concerned[40]; that, by those traditional laws and traditional customs observed by those Aboriginal peoples, those peoples have a connection with the land or waters[41]; and that the rights and interests be recognised by the common law of Australia[42].

23 The first and second of those characteristics – that native title is a bundle of rights and interests possessed under traditional laws and customs and that, by those laws and customs, Aboriginal peoples have a connection with the land or waters – reflect that native title rights and interests have a physical or material aspect (the right to do something in relation to land or waters) and a cultural or spiritual aspect (the connection with the land or waters).

24 As the plurality in this Court said in *Western Australia v Ward*[43]:

> "The question in a given case whether [s 223(1)](a) is satisfied presents a question of fact. It requires not only the identification of the laws and customs said to be traditional laws and customs, but, no less importantly, the identification of the rights and interests in relation to land or waters which are possessed under *those* laws or customs. These inquiries may well depend upon the same evidence as is used to establish connection of the relevant peoples with the land or waters. This is because the connection that is required by par (b) of s 223(1) is a connection with the land or waters 'by those laws and customs'. Nevertheless, it is important to notice that there are two inquiries required by the statutory definition: in the one case for the rights and interests

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39 The definitions of "native title" and "native title rights and interests" relate to the rights and interests of both Aboriginal peoples and Torres Strait Islanders: see *Native Title Act*, s 223(1).

40 *Native Title Act*, s 223(1)(a).

41 *Native Title Act*, s 223(1)(b).

42 *Native Title Act*, s 223(1)(c).

43 (2002) 213 CLR 1 at 66 [18].

possessed under traditional laws and customs and, in the other, for connection with land or waters by those laws and customs." (emphasis in original)

25 Not only is native title recognised and protected in accordance with the *Native Title Act*[44] and not able to be extinguished contrary to the *Native Title Act*[45], but if native title is extinguished, then the *Native Title Act* provides for compensation.

26 As the Preamble to the *Native Title Act* records[46], Aboriginal peoples and Torres Strait Islanders have been progressively dispossessed of their lands, largely without compensation, and the enactment of the *Native Title Act* was intended to rectify the consequences of past injustices. The provisions of the *Native Title Act* are intended to secure the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders and to ensure that they receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire. The Preamble goes on to state: "[j]ustice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms … must be provided to the holders of the native title".

27 The system established by the *Native Title Act* to address, in a practical way, the consequences of acts impacting native title rights and interests is complex. That complexity arises because the Act seeks to deal with concepts and ideas which are both ancient and new; developed but also developing; retrospective but also prospective. It arises because the *Native Title Act* requires the just and proper ascertainment and recognition of native title rights and interests; that certain acts that extinguish native title rights and interests are to be validated or allowed; that, where appropriate, native title should not be extinguished, but should be revived after a validated act ceases; and that, where native title rights and interests are extinguished, compensation on just terms is to be provided.

28 As has been seen, there are different categories of compensable acts in issue, and those acts took place at different times. The statutory source of the

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44 *Native Title Act*, s 10.

45 *Native Title Act*, s 11(1).

46 See also *Acts Interpretation Act 1901* (Cth), s 13(2)(b).

entitlement to compensation, and the consequences that flow from validation of an act, depend on the category of act, and whether the act was a past act, an intermediate period act or a previous exclusive possession act within the scope of Divs 2, 2A and 2B of Pt 2 of the *Native Title Act*. Hence, the *categorisation* of the act and the *timing* of the act are both relevant.

29 Turning first to past acts, they are addressed in Div 2 of Pt 2 of the *Native Title Act*. A past act is, relevantly, an act which occurred before 1 January 1994[47] when native title existed in relation to particular land, which act was invalid (apart from the *Native Title Act*) to any extent but would have been valid to that extent if native title did not exist[48]. In short, a past act is a pre-January 1994 act which is invalid because of the existence of native title.

30 There are four categories of past act. A category A past act relates to a grant of certain freehold estates, a grant of certain leases and the construction of certain public works[49]. A category B past act relates to a grant of certain leases[50]. A category C past act relates to the grant of mining leases[51] and a category D past act is one that is not a category A, B or C past act[52].

31 The classification of an act affects the impact of the act on native title. Category A past acts, relevantly, extinguish native title and category B past acts extinguish any native title to the extent of any inconsistency[53]. The non-extinguishment principle applies to category C and D past acts[54]. Where the non-extinguishment principle applies, the *Native Title Act* does not extinguish

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47 The commencement date of the *Native Title Act*: see *Native Title Act*, s 4(3)(a).

48 *Native Title Act*, s 228.

49 *Native Title Act*, s 229.

50 *Native Title Act*, s 230.

51 *Native Title Act*, s 231.

52 *Native Title Act*, s 232.

53 *Native Title Act*, s 15(1)(a)-(c).

54 *Native Title Act*, s 15(1)(d).

native title but native title may be suspended wholly or in part to take account of the act[55].

32 Putting the categories aside, the classification of an act as a "past act" determines the validation mechanism in respect of that act. In the present appeals, all but five of the acts were past acts within the meaning of s 228 of the *Native Title Act*. Those past acts were attributed to the Northern Territory[56] and were validated on 10 March 1994 by s 19 in Div 2 of Pt 2 of the *Native Title Act* and s 4 of the *Validation (Native Title) Act* (NT). Both of those provisions, in their terms, provide that a past act is valid and is taken always to have been valid. That validation perfected, or made absolute, the compensable acts and removed any restriction by which the acts had no validity as against the native title holders. In short, validation effected a clearing of the native title rights and interests from the freehold title[57].

33 Separate to past acts are "intermediate period acts". In these appeals, the remaining five acts were intermediate period acts. Intermediate period acts[58] are acts which, relevantly, occurred between 1 January 1994 and 23 December 1996, where native title existed in relation to particular land, which acts were invalid (apart from the *Native Title Act*) to any extent but would have been valid to that extent if native title did not exist. Division 2A of Pt 2 of the *Native Title Act* deals with validation of intermediate period acts[59]. The intermediate period acts were validated on 1 October 1998 by s 22F in Div 2A of Pt 2 of the *Native Title Act* and s 4A of the *Validation (Native Title) Act* (NT).

34 There is a further relevant category of acts, being "previous exclusive possession acts". Division 2B of Pt 2 of the *Native Title Act*, headed

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55 *Native Title Act*, s 238.

56 See also *Native Title Act*, s 239.

57 cf *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at 283-284 [181]; [2008] HCA 20.

58 *Native Title Act*, s 232A. Intermediate period acts are also classified into four categories – category A, B, C and D: *Native Title Act*, ss 232B-232E.

59 Inserted into the *Native Title Act* following *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40, handed down on 23 December 1996. See *Native Title Amendment Act 1998* (Cth), Sch 1, item 9.

"[c]onfirmation of past extinguishment of native title by certain valid or validated acts", deals with previous exclusive possession acts. Section 23B of the *Native Title Act* provides that a previous exclusive possession act is, relevantly, a grant made before 23 December 1996 which was validated under Div 2 or Div 2A of Pt 2 of the *Native Title Act* (thereby confirming that certain validated past acts and intermediate period acts were validated). Thus, both past acts and intermediate period acts may be previous exclusive possession acts. The important distinction to bear in mind is that acts to which the non-extinguishment principle applies are not previous exclusive possession acts[60], a point to which it will be necessary to return.

35 The majority of the compensable acts in these appeals[61] were previous exclusive possession acts within the meaning of s 23B of the *Native Title Act*. Validation of a previous exclusive possession act results in extinguishment of native title[62]. The previous exclusive possession acts in these appeals, attributable to the Northern Territory, *extinguished native title*[63].

36 The exceptions were category D past acts within the meaning of s 232 of the *Native Title Act*. These acts were *not previous exclusive possession acts*, because the non-extinguishment principle applied to these acts[64]. However, all but three of the category D past acts[65] were followed by subsequent previous exclusive possession acts affecting the same lots which *extinguished native title over those lots*[66].

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60 *Native Title Act*, s 23B(9B).

61 Except for acts 1, 3, 15, 17, 19, 21, 23, 25, 27, 29, 36 and 41. As to the nature of each of the compensable acts, described by reference to act numbers, see *Northern Territory v Griffiths* (2017) 256 FCR 478 at 485-487 [10].

62 *Native Title Act*, s 23E.

63 *Native Title Act*, s 23E and *Validation (Native Title) Act* (NT), ss 9H and 9J.

64 See [31] above.

65 Acts 1, 36 and 41 remained category D past acts to which the non-extinguishment principle continued to apply.

66 By operation of *Native Title Act*, s 23E and *Validation (Native Title) Act* (NT), ss 9H and 9J.

37 Section 23J in Div 2B of Pt 2 of the *Native Title Act* provides that native title holders are entitled to compensation in accordance with Div 5 for any extinguishment under Div 2B of their native title rights and interests. Accordingly, by operation of s 23J in Div 2B, in relation to the compensable acts which were previous exclusive possession acts[67], the native title holders were entitled to compensation in accordance with Div 5 for the extinguishment of their native title rights and interests by each act.

38 For the category D past acts which were not followed by subsequent previous exclusive possession acts[68], the native title holders were entitled to compensation under s 20 in Div 2 of Pt 2 of the *Native Title Act*, which, in turn, provides that they are entitled to compensation under s 17(1) or (2) on the assumption that s 17 applied to those category D past acts. Section 17, by its terms, applies only to acts attributable to the Commonwealth. However, when read with s 20(1), s 17 is to be read and applied as if it covered acts attributable to the Northern Territory. Relevantly for the purposes of these appeals, s 17(2) provides, under the heading "[n]on-extinguishment case":

> "If it is any other past act [other than a category A or category B past act], the native title holders are entitled to compensation for the act if:
>
> (a) the native title concerned is to some extent in relation to an onshore place and the act could not have been validly done *on the assumption that the native title holders instead held ordinary title to*:
>
> (i) any land concerned; and
>
> (ii) the land adjoining, or surrounding, any waters concerned; or
>
> ..." (emphasis added)

39 These appeals were conducted on the basis that the date of validation of all acts was 10 March 1994.

40 After an entitlement to compensation has been established, the compensation payable under Div 2, 2A, 2B, 3 or 4 of Pt 2 of the *Native Title*

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67 All acts except for acts 1, 36 and 41.

68 Namely, acts 1, 36 and 41.

Act in relation to an act is payable only in accordance with Div 5[69]. As has been seen, the compensation payable to the Claim Group arises under either Div 2 or Div 2B of Pt 2 of the *Native Title Act*, and accordingly, s 51(1) applies in relation to determining the compensation claims in these appeals.

41 Section 51(1) is the core provision. It provides that:

> "Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect *of the act* on their native title rights and interests." (emphasis added)

42 Specific aspects of s 51(1) must be recognised at the outset. It is the native title holders – relevantly, the person or persons who *hold* the native title[70] – who are entitled to compensation on just terms. And those native title holders are entitled to compensation for any loss, diminution, impairment or other effect *of the act* on their native title rights and interests. Relevantly, an act[71] is an "[a]ct affecting native title"[72] if it extinguishes the native title rights and interests.

43 The *Native Title Act* does not expressly provide the date upon which the entitlement to compensation arises, or the date on which the value of the native title right and interest being extinguished is to be determined. However, as the entitlement to compensation is for the "act" itself[73] and the validation provisions deem the extinguishing act to be valid and always to have been valid from the time of the act[74], the date for the assessment of the compensation is the date of the act.

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69 *Native Title Act*, s 48.

70 *Native Title Act*, s 224.

71 Defined in *Native Title Act*, s 226.

72 Defined in *Native Title Act*, s 227.

73 *Native Title Act*, s 51(1).

74 *Native Title Act*, ss 19 and 22F and *Validation (Native Title) Act* (NT), ss 4 and 4A.

44 Next, s 51(1), in its terms, recognises the *existence* of the two aspects of native title rights and interests identified in s 223(1) to which reference has already been made – the physical or material aspect (the right to do something in relation to land) and the cultural or spiritual aspect (the connection with the land) – as well as the fact that the *manner* in which each aspect may be affected by a compensable act may be different.

45 Both aspects are addressed in terms by s 51(1) providing for an entitlement on just terms to compensation to the native title holders for "any loss, diminution, impairment *or other effect* of the act on their native title rights and interests" (emphasis added).

46 Section 51(1) thus recognises that the consequences of a compensable act are not and cannot be uniform. The act and the effect of the act must be considered. The sub-section also recognises not only that each compensable act will be fact specific but that the *manner* in which the native title rights and interests are affected by the act will vary according to what rights and interests are affected and according also to the native title holders' identity and connection to the affected land. As the trial judge held, s 51(1) does not in its terms require that the consequence directly arise from the compensable act. The court's task of assessment under s 51(1) is to be undertaken in the particular context of the *Native Title Act*, the particular compensable acts and the evidence as a whole.

47 Section 51(2) then addresses acquisition of native title rights and interests under compulsory acquisition law. Section 51(3) deals with an act which is not the compulsory acquisition of all or any of the native title rights and interests of the native title holders but which satisfies the "similar compensable interest test". That test is satisfied if, in relation to a past act, an intermediate period act, or a future act, the native title concerned relates to an onshore place and the compensation would, apart from the *Native Title Act*, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned[75]. None of the compensable acts in these appeals falls within either s 51(2) or (3). Where neither s 51(2) nor (3) applies, s 51(4) provides that if there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth) or for the State or Territory to which the act is attributable, the court, person or body

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75 *Native Title Act*, s 240.

making the determination of just terms *may*, subject to s 51(5)-(8)[76], in doing so have regard to any principles or criteria set out in that law for determining compensation. Here, there was such a law – the *Lands Acquisition Act* (NT).

48 Section 51A provides that, subject to s 53, the total compensation payable under Div 5 for an act that extinguishes all native title in relation to any particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.

49 Section 53 provides that where the application of any of the provisions of the *Native Title Act* in any particular case would result in a s 51(xxxi) acquisition of property of a person other than on s 51(xxxi) just terms, the person is entitled to compensation as is necessary to ensure that the acquisition is on just terms. Section 53 is a shipwrecks clause[77].

50 Section 51A provides a cap on compensation by providing that the *total compensation payable* under Div 5 for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters. The statutory recognition in s 51(1) that the two aspects of native title rights and interests – the economic value of the native title rights and interests and the non-economic value of those rights and interests – are to be compensated assists in understanding the work to be done by s 51A of the *Native Title Act*. As the Commonwealth submitted, those two aspects of native title rights and interests inform the operation of s 51A.

51 When introducing s 51A as part of the 1998 amendments to the *Native Title Act* following this Court's decision in *Wik Peoples v Queensland*[78], Senator Minchin said[79] that the "underlying premise of the Native Title Act is to equate native title with freehold for the purposes of dealing with native title" and

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76 Subject to a request for non-monetary compensation, the compensation may only consist of the payment of money: s 51(5) and (6).

77 A clause directed to ensuring the constitutional validity of the compensation provisions in Div 5: see, eg, *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 552 [29]; [2016] HCA 39.

78 (1996) 187 CLR 1.

79 Australia, Senate, *Parliamentary Debates* (Hansard), 3 December 1997 at 10231.

the cap "should reflect the compensation payable if native title amounted to freehold". Under the general law, the compensation for the compulsory acquisition of land comprises the freehold value of the land as well as compensation for severance, injurious affection, disturbance, special value, solatium or other non-economic loss[80].

52 Consistent with equating native title rights and interests with freehold for the purposes of compensation, s 51(2) and (4) of the *Native Title Act* refer to the fact that the court, person or body making the determination of compensation on just terms *may* have regard to any principles or criteria set out in a compulsory acquisition law for the Commonwealth, or for the State or Territory to which the act is attributable[81]. Those various acquisition laws address the non-economic aspect of the compensation in different terms.

53 It is important, however, not to allow words like "solatium" in land acquisition statutes, or cases about those statutes, to deflect attention from the nature of the rights and interests that have been acquired and the compensation that must be assessed to provide just terms for their acquisition. Asking what would be allowed as "solatium" on the acquisition of rights that owe their origin and nature to English common law distracts attention from the relevant statutory task of assessing just terms for the acquisition of native title rights and interests that arise under traditional laws and customs which owe their origins and nature to a different belief system.

54 The label "solatium" is also distracting in another way. What the *Native Title Act* requires to be compensated is the cultural loss arising on and from the extinguishment of native title rights and interests. Given that the *Native Title Act* is a Commonwealth Act which, under Div 5, equates native title rights and interests to freehold for the purposes of dealing with native title, and is intended

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80 See, eg, *March v City of Frankston* [1969] VR 350 at 355-356; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 622 [33]-[34]; [2001] HCA 37.

81 See generally *Lands Acquisition Act 1994* (ACT), s 45; *Lands Acquisition Act 1989* (Cth), s 55; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 55; *Lands Acquisition Act* (NT), Sch 2; *Acquisition of Land Act 1967* (Qld), s 20; *Land Acquisition Act 1969* (SA), s 25; *Land Acquisition Act 1993* (Tas), s 27; *Land Acquisition and Compensation Act 1986* (Vic), s 41; *Land Administration Act 1997* (WA), s 241.

to provide compensation for the extinguishment of those rights and interests on just terms to all native title holders affected by a compensable act, ss 51 and 51A are to be read as providing that the compensation payable to the native title holders is to be measured by reference to, and capped at, the freehold value of the land together with compensation for cultural loss. Principles or criteria set out in a compulsory acquisition law for the Commonwealth, or for the State or Territory to which the compensable act is attributable, may be of assistance but they are not determinative of the issues arising under s 51(1).

D Economic loss claim

55 The Claim Group are entitled to compensation on just terms for any loss, diminution, impairment or other effect of a compensable act on their native title rights and interests. In order to assess the value of the affected native title rights and interests, it is necessary first to identify the *date* on which the value is to be assessed and then the *nature* of the affected native title rights and interests.

56 The date on which the value is to be assessed was not in dispute before this Court. Following a relevant holding from the trial judge[82], the matter was conducted on the basis that the economic value of the Claim Group's native title in the application area fell to be determined according to the rights and interests actually held by the Claim Group as at the date that their native title to the land was taken to have been extinguished by the compensable acts.

57 The reason for adopting that approach was that, under the "rules for the assessment of compensation" for compulsory acquisition of land in Sch 2 to the *Lands Acquisition Act* (NT), each person having an estate or interest in land which is compulsorily acquired has a separate and independent claim to compensation for the value of the interest that is taken from him or her by the acquiring authority[83]. As was earlier observed, s 51(4) of the *Native Title Act* provides that the court, person or body making the determination of compensation on just terms may have regard to such rules or principles.

58 In identifying the nature of the Claim Group's native title rights and interests it assists to begin with the approaches adopted by the trial judge and the Full Court.

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82 *Griffiths* (2016) 337 ALR 362 at 395-396 [172].

83 *Lands Acquisition Act* (NT), s 59. See *Rosenbaum v The Minister* (1965) 114 CLR 424 at 430-432; [1965] HCA 65.

Trial judge

59 As has been noticed, the trial judge assessed the economic value of the native title rights and interests as being 80 per cent of freehold value. His Honour described[84] that assessment as an "intuitive decision, focusing on the nature of the rights held by the [C]laim [G]roup which had been either extinguished or impaired by reason of the [compensable] acts in the particular circumstances" and which reflected "a focus on the entitlement to just compensation for the impairment of those particular native title rights and interests". As it appears from the trial judge's reasons for judgment, there were four principal considerations that informed his conclusion.

60 The first was that, in his Honour's view[85], it was artificial to focus on the amount which a willing but not anxious purchaser would have been prepared to pay for the native title rights and interests which were affected by the compensable acts, because the native title rights and interests were incapable of alienation and thus could not be sold or transferred to anyone other than the Northern Territory or, possibly, the Commonwealth. Likewise, in his Honour's view, it was artificial to focus on the amount for which the Claim Group would have been willing to sell the native title rights and interests. It followed, according to his Honour, that the "conventional valuation approach expressed in *Spencer*[86] ... seems inappropriate".

61 The second was that, in his Honour's view[87], it was inappropriate "simply to proceed on the basis of a comparison of the bundle of rights held by the [Claim Group], remote from their true character, for the purposes of assessing the extent to which they might equate to, or partially equate to, the bundle of rights held by a freehold or other owner or person having an interest in land" – although his Honour added[88] that he was careful in making his assessment not to include any allowance for the elements related to the cultural or ceremonial

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84 *Griffiths* (2016) 337 ALR 362 at 405 [233].

85 *Griffiths* (2016) 337 ALR 362 at 402 [211].

86 *Spencer v The Commonwealth* (1907) 5 CLR 418; [1907] HCA 82.

87 *Griffiths* (2016) 337 ALR 362 at 402 [212].

88 *Griffiths* (2016) 337 ALR 362 at 405 [234].

significance of the land or the Claim Group's attachment to the land, which fell to be assessed separately.

62 The third was that, having regard to the express purposes of the *Native Title Act* and the recognition of Aboriginal peoples as the original inhabitants of Australia, his Honour considered[89] that it would be wrong to treat native title rights and interests in land as other than the equivalent of freehold, at least in the case of exclusive native title rights and interests, or to treat the economic value of exclusive native title rights and interests as other than equivalent to the economic value of freehold interests. In his Honour's view, the inalienability of the native title rights and interests did not constitute a significant discounting factor. For as his Honour conceived of it, that appeared to be "the undebated premise" in *Amodu Tijani v Secretary, Southern Nigeria*[90] and *Geita Sebea v Territory of Papua*[91].

63 The fourth was that, although the subject native title rights and interests were inalienable and so not transferable, the trial judge considered[92] that they existed as a real impediment to any further grants of interest in the land, and, more generally, were in a practical sense "very substantial" and "exercisable in such a way as to prevent any further activity on the land, subject to the existing tenures". The trial judge, however, rejected the Claim Group's contention that their non-exclusive rights and interests should be valued as if they were exclusive. His Honour also rejected the notion that compensation on just terms for the extinguishment of non-exclusive native title rights and interests should be assessed on the basis that upon extinguishment the Crown acquired radical or freehold title unencumbered by native title, and thus that freehold value was the appropriate measure of the compensation. His Honour stated that it was necessary to arrive at a value which was less than freehold value and which recognised and gave effect to the nature of the native title rights and interests.

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89 *Griffiths* (2016) 337 ALR 362 at 402 [213]-[214].

90 [1921] 2 AC 399.

91 (1941) 67 CLR 544; [1941] HCA 37.

92 *Griffiths* (2016) 337 ALR 362 at 403-405 [224], [227]-[228], [231]-[232].

Full Court

64 To some extent, the Full Court reasoned differently. Like the trial judge, their Honours took the view[93] that the starting point for the calculation of the economic value of the Claim Group's native title rights and interests should be the freehold value of the land and that it should be adjusted to take account of the restrictions and limitations applicable to the non-exclusivity of those rights and interests. But the Full Court considered[94] that the trial judge had erred in holding that those rights and interests constituted a real impediment to any further grants of interest in the land and, in a practical sense, were exercisable in such a way as to prevent any further activity on the land subject only to existing tenures. In the Full Court's view[95], the trial judge had also erred in holding, in effect, that the loss to the Claim Group was to be calculated by reference to the benefit to the Northern Territory of acquiring the rights and interests, and that his Honour had thereby improperly inflated the figure for compensation. Further, in the Full Court's view[96], the trial judge had erred in failing to discount the value of the Claim Group's native title rights and interests to allow for the fact that they were inalienable and also by rejecting the *Spencer* test of what a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to secure the extinguishment of those rights and interests. The Full Court, however, rejected[97] the Commonwealth's contention that the economic value of the Claim Group's native title rights and interests was no more than 50 per cent of freehold value. In the Full Court's view, they were worth 65 per cent of freehold value.

65 At this stage, one further matter should be mentioned. The trial judge assessed[98] the economic value of the native title rights and interests on the basis of the market value of freehold estates in various lots the subject of the compensable acts as valued by Mr Ross Copland, an expert land valuer called on

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93 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 519-520 [134].

94 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 508 [78]-[80].

95 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 510-511 [89]-[92].

96 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 515-516 [119], 517 [122].

97 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520 [139].

98 *Griffiths* (2016) 337 ALR 362 at 438 [414], 445-446 [463].

behalf of the Commonwealth. On appeal to the Full Court[99], the Northern Territory unsuccessfully challenged the trial judge's adoption of Mr Copland's valuations in respect of certain lots. Before this Court, the parties were agreed that Mr Copland's valuations should form the basis of the assessment of compensation save with respect to lot 16, in relation to which the Northern Territory urged this Court to adopt the valuation provided by its expert, Mr Wayne Wotton. That contention was put on the basis that Mr Lonergan's methodology for valuing native title rights and interests should be accepted. For reasons to be explained later in this judgment, Mr Lonergan's methodology is rejected.

Criteria of valuation

66 In this Court, all parties accepted that the economic value of the native title rights and interests should be determined by application of conventional economic principles and tools of analysis, and, in particular, by application of the *Spencer* test adapted as necessary to accommodate the unique character of native title rights and interests and the statutory context. The difference between the parties was as to how the *Spencer* test should be applied.

67 The Full Court were right to begin their ascertainment of the economic value of the native title rights and interests with the identification of those rights and interests[100]. At common law, freehold ownership or, more precisely, an estate in fee simple is the most ample estate which can exist in land[101]. As such, it confers the greatest rights in relation to land and the greatest degree of power that can be exercised over the land[102]; and, for that reason, it ordinarily has

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99 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 522-523 [145], 524-525 [155], [159]-[160].

100 See *Western Australia v Brown* (2014) 253 CLR 507 at 521 [34]; [2014] HCA 8. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58; [1992] HCA 23.

101 See *Amodu Tijani* [1921] 2 AC 399 at 403; *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 at 623; [1955] HCA 13; Megarry and Wade, *The Law of Real Property*, 8th ed (2012) at 52; Honoré, "Ownership" in Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107. See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 151-152 [107]; [1998] HCA 58.

102 See *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42, 45; [1923] HCA 34; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285;

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the greatest economic value of any estate in land. Lesser estates in land confer lesser rights in relation to land and, therefore, a lesser degree of power exercisable over the land; and, for that reason, they ordinarily have a lesser economic value than a fee simple interest in land.

68 Similar considerations apply to native title. Native title rights and interests are not the same as common law proprietary rights and interests but the common law's conception of property as comprised of a "bundle of rights" is translatable to native title[103], and, as has been held[104], draws attention to the fact that, under traditional law and custom, some but not all native title rights and interests are capable of full or accurate expression as rights to control what others may do on or with the land. So, therefore, just as it is necessary to determine the nature and extent of common law proprietary rights and interests as a first step in their valuation, it is necessary to identify the native title rights and interests in question as the first step in their valuation.

69 As the trial judge found, the Claim Group's rights and interests were essentially usufructuary[105], ceremonial and non-exclusive. The Claim Group's rights and interests were perpetual and objectively valuable in that they entitled the Claim Group to live upon the land and exploit it for non-commercial purposes. But they were limited. As earlier mentioned, the historic grant of the pastoral leases extinguished the Claim Group's traditional right to control access to the land and to decide how the land should be used[106]; and, once so extinguished, the right did not revive[107]. Thereafter, the Claim Group had no

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[1944] HCA 4. See also *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17]; [1999] HCA 53.

103 See *Ward* (2002) 213 CLR 1 at 95 [94]-[95], 262-264 [615]-[618]; *Yorta Yorta* (2002) 214 CLR 422 at 492-493 [186]; *Akiba v The Commonwealth* (2013) 250 CLR 209 at 239 [59]; [2013] HCA 33.

104 See *Ward* (2002) 213 CLR 1 at 95 [94]-[95].

105 See and compare *Akiba* (2013) 250 CLR 209 at 219 [9], 228 [28].

106 See *Ward* (2002) 213 CLR 1 at 82-83 [52], 131 [192], 138 [219], 196 [417].

107 *Griffiths* [2014] FCA 256 at [43], [46]; *Northern Territory v Griffiths* (2017) 256 FCR 478 at 508 [80]. See also *Native Title Act*, s 237A; *Wik* (1996) 187 CLR 1 at 169; *Yarmirr* (2001) 208 CLR 1 at 68 [98]; *Ward* (2002) 213 CLR 1 at 82-83 [52],

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entitlement to exclude others from entering onto the land and no right to control the conduct of others on the land. Nor did the Claim Group have the right to grant co-existing rights and interests in the land. And because the Claim Group's native title rights and interests were non-exclusive, it was also open to the Northern Territory to grant additional co-existent rights and interests in and over the land, including grazing licences, usufructuary licences of up to five years' duration and licences to take various things from the land[108].

70 The economic value of the Claim Group's native title rights and interests fell to be valued accordingly. The task required an evaluative judgment to be made of the percentage reduction from full exclusive native title which properly represented the comparative limitations of the Claim Group's rights and interests relative to full exclusive native title and then the application of that percentage reduction to full freehold value as proxy for the economic value of full exclusive native title.

71 The Claim Group contended that so to proceed offended the *Racial Discrimination Act* in two respects. The first was said to be that, because the Full Court did not equate the measure of compensation payable to native title holders to the compensation payable to the holders of other forms of title, the Full Court's reasoning was *ex facie* inconsistent with the protection afforded by s 10(1) of the *Racial Discrimination Act*. So much plainly followed, it was said, from the following observations of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Western Australia v The Commonwealth (Native Title Act Case)*[109]:

> "Security in the right to own property carries immunity from arbitrary deprivation of the property. 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

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131 [192], 138 [219]; *Northern Territory v Alyawarr* (2005) 145 FCR 442 at 485-486 [147]-[148].

108 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 508-509 [80]-[82]; *Crown Lands Ordinance* (NT), ss 107, 108, 109; *Crown Lands Act* (NT), ss 88, 90, 91.

109 (1995) 183 CLR 373 at 437.

> 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 *Racial Discrimination Act*." (footnote omitted)

72 In that connection, the Claim Group also relied on the observation of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward*[110] that:

> "the [*Racial Discrimination Act*] must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by persons of another race."

73 In the Claim Group's submission, it followed that s 10(1) of the *Racial Discrimination Act* required that the Claim Group's non-exclusive native title rights and interests be valued in no different fashion from exclusive native title rights and interests, and, therefore, at not less than freehold value.

74 Those contentions must be rejected. Whether or not the value of any given native title is to be equated to freehold value for the purposes of assessing just compensation must depend on the exact incidents of the native title rights and interests. If the native title rights and interests amount or come close to a full exclusive title, it is naturally to be expected that the native title rights and interests will have an objective economic value similar to freehold value. By contrast, if the native title rights and interests are significantly less than a full exclusive title, it is only to be expected that they will have an objective economic value significantly less than freehold value. There is nothing discriminatory about treating non-exclusive native title as a lesser interest in land than a full exclusive native title or, for that reason, as having a lesser economic value than a freehold estate. To the contrary, it is to treat like as like.

75 The point made in both the *Native Title Act Case* and *Ward* was that, although native title rights and interests have different characteristics from common law land title rights and interests, and derive from a different source,

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110 (2002) 213 CLR 1 at 105 [121].

native title holders are not to be deprived of their native title rights and interests without the payment of just compensation any more than the holders of common law land title are not to be deprived of their rights and interests without the payment of just compensation. Equally, native title rights and interests cannot be impaired to a point short of extinguishment without payment of just compensation on terms comparable to the compensation payable to the holders of common law land title whose rights and interests may be impaired short of extinguishment. There was no suggestion in either the *Native Title Act Case* or *Ward* that the nature and incidents of particular native title rights and interests are irrelevant to their economic worth or to the determination of just compensation for extinguishment or impairment. To the contrary, it is plain from the holding[111] in *Ward* that, because the non-exclusive native title rights and interests in that case did not amount to having "lawful control and management" of the land, the native title holders were not to be assimilated to "owners" but could at best be regarded as "occupiers" and thus could be compensated only at the lesser rate applicable to occupiers. As Gleeson CJ, Gaudron, Gummow and Hayne JJ stated[112]:

> "This result is no different from that which would obtain in respect of any holder of rights and interests that did not amount to the 'lawful control and management' of the land. The [*Racial Discrimination Act*] is therefore not engaged on this basis."

76 In sum, what the *Racial Discrimination Act* requires in its application to native title is parity of treatment and there is no disparity of treatment if the economic value of native title rights and interests is assessed in accordance with conventional tools of economic valuation adapted as necessary to accommodate the unique character of native title rights and interests and the statutory context. To argue, as the Claim Group did, that there is disparity because their native title rights and interests have a lesser economic value than the economic value of an estate in fee simple is to ignore that the Claim Group's native title rights and interests were comparatively limited and considerably less extensive than full exclusive native title. Thus, as has already been emphasised, the proper comparison was not between the native title rights and interests and the rights and interests which comprise an estate in fee simple, but between the native title rights and interests and the rights and interests of a full exclusive native title.

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111 (2002) 213 CLR 1 at 168-170 [317]-[321].

112 (2002) 213 CLR 1 at 169 [317].

77 The second respect in which it was contended that the Full Court's analysis offended the *Racial Discrimination Act* was that the Full Court took into account that the Claim Group's native title was vulnerable to diminution by the grant by the Northern Territory of lesser co-existing titles. The Claim Group contended that the operation of s 10(1) of the *Racial Discrimination Act* precluded the Northern Territory from granting any further interest in the land unless the same interest could have been granted over freehold or leasehold land under the *Crown Lands Ordinance* (NT) or the *Crown Lands Act* (NT), and thus that the Northern Territory would have been prevented from granting rights and interests over the land even if those grants were not inconsistent with the continued existence of the Claim Group's non-exclusive native title rights and interests. Alternatively, it was contended that, even if it had been open to the Northern Territory to grant such further interests, on the facts of this case the Northern Territory would not realistically have done so.

78 Those contentions must also be rejected. It is necessary to consider the treatment of pastoral leases under the relevant legislation. Pastoral leases, before the determination in *Wik*[113], satisfied the definition of a category A past act in the *Native Title Act* (an act which wholly extinguished native title if still in existence on 1 January 1994)[114]. In *Wik*[115], this Court held that a pastoral lease was not necessarily inconsistent with all native title rights and interests. The *Native Title Act* was subsequently amended[116] by the inclusion of a definition of previous non-exclusive possession act[117], and by prescription of the effect of a previous non-exclusive possession act on native title[118].

79 Whilst that amendment acknowledged there could be a grant of a non-exclusive pastoral lease, there was no reversal of total extinguishment of native title by previous exclusive possession acts as had already occurred under

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113 (1996) 187 CLR 1.

114 *Native Title Act*, ss 15(1)(a), 229(3)(a), (c).

115 (1996) 187 CLR 1 at 122, 126-127, 130, 154-155, 203-204, 242-243.

116 See *Native Title Amendment Act 1998* (Cth).

117 *Native Title Act*, s 23F.

118 *Native Title Act*, s 23G.

the *Native Title Act* (as first enacted)[119]. Accordingly, if an exclusive pastoral lease[120] granted after the enactment of the *Racial Discrimination Act* were still in force on 1 January 1994 that lease would be classified as a category A past act which wholly extinguished native title[121]. If, however, a non-exclusive pastoral lease[122] were to some extent not inconsistent with native title, the grant was not classified as a past act but rather as a previous non-exclusive possession act and thus, native title was extinguished only to the extent of any inconsistency with native title[123].

80 According to the Claim Group's argument, every pastoral lease enacted after the commencement of the *Racial Discrimination Act* that was still in force on 1 January 1994 would have been invalid. But if that were so, it would mean that, perforce of ss 23G(2) and 15(1) of the *Native Title Act*, every such pastoral lease would be taken wholly to have extinguished native title. Contrary to the Claim Group's submissions, it has consistently been held that the question of validity of pastoral leases enacted after the commencement of the *Racial Discrimination Act* is to be determined according to whether the grant of a pastoral lease had any further extinguishing effect on native title[124]. Provided such further rights and interests were not inconsistent with the continued existence of native title, they did not detract from the native title holders' rights and interests and so did not discriminate against them[125].

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119 *Native Title Act*, s 23C.

120 *Native Title Act*, s 248A.

121 *Native Title Act*, ss 15(1), 23B, 23E, 23G(2), 228, 229(3).

122 *Native Title Act*, s 248B.

123 *Native Title Act*, s 23G(1)(b).

124 See *De Rose v South Australia* (2003) 133 FCR 325 at 432 [381], 433 [387], 436 [402], [405]; *Moses v Western Australia* (2007) 160 FCR 148 at 162-163 [53]-[56], 164 [65], 165 [74], 171 [101], 174-175 [113]; *Neowarra v Western Australia* [2003] FCA 1402 at [526], [532]. See also *Ward* (2002) 213 CLR 1 at 103 [114], 110-111 [135]-[139], 129-131 [187]-[194], 165-166 [308]-[309], 196 [418], 198 [425].

125 cf *Ward* (2002) 213 CLR 1 at 106 [123].

81 The Claim Group's contention as to the improbability of the Northern Territory granting further interests in the land is beside the point. The contention as advanced focused on pastoral leases alone. It is plain, however, that the Full Court had in mind a variety of other interests, including grazing licences, usufructuary licences and licences to take things from the land. Furthermore, even if the likelihood of grants of further interests was slight, and none were in fact granted, it was the possibility of or potential for such grants that was relevant to economic value. For reasons already given and which will be discussed in more detail later in these reasons, it is the incidents of native title rights and interests and not the way in which they might be or not be exercised that is determinative of their nature and thus their economic value. The way that native title rights and interests are used and enjoyed may affect their non-economic or cultural value, which is dealt with separately, later in these reasons.

82 The Claim Group argued that, even if that were so, the native title rights and interests were not concurrent with other rights and interests, because no other person held any rights or interests in the subject land that were valid against the native title rights and interests; that the recognition of native title rights and interests by the common law meant that those rights and interests could have been protected by legal and equitable remedies as if they were common law interests in land; and that the historic extinguishment of the Claim Group's right of exclusive possession did not in fact 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 others.

83 Those arguments must also be rejected. The fact that the Claim Group may have had use and enjoyment of the subject land says nothing directly as to the nature of their native title rights and interests in the land and therefore nothing directly as to the entitlement of the Northern Territory to grant co-existing titles. Equally, the fact that infringement of the Claim Group's native title rights and interests might have been prevented by legal or equitable remedies[126] says nothing against the entitlement of the Northern Territory to grant co-existing titles. And to the extent that the argument should be understood as being that the Claim Group had some sort of qualified right otherwise to control access to land, it is precluded by analogy with the holding in *Ward* that the grants of pastoral leases in that case were inconsistent with the continued

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126 See and compare *Mabo [No 2]* (1992) 175 CLR 1 at 61; *Ward* (2002) 213 CLR 1 at 67 [21].

existence of the native title right to control access to land and make decisions as to how the land could lawfully be used by others.

Bifurcated approach to valuation

84 The parties were agreed before the trial judge and the Full Court that the approach to the assessment of just compensation should proceed according to what was described as the bifurcated approach of first determining the economic value of the native title rights and interests that had been extinguished and then estimating the additional, non-economic or cultural loss occasioned by the consequent diminution in the Claim Group's connection to country. That was an appropriate way to proceed. Just as compensation for the infringement of common law land title rights and interests is ordinarily comprised of both a component for the objective or economic effects of the infringement (being, in effect, the sum which a willing but not anxious purchaser would be prepared to pay to a willing but not anxious vendor to achieve the latter's assent to the infringement[127]) and a subjective or non-economic component (perhaps the most common instance of which is an allowance for special value[128]), the equality of treatment mandated by s 10(1) of the *Racial Discrimination Act*, as reflected in s 51 of the *Native Title Act*, necessitates that the assessment of just compensation for the infringement of native title rights and interests in land include both a component for the objective or economic effects of the infringement (being, in effect, the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the latter's assent to the infringement, or, to put it another way, what the Claim Group could fairly and justly have demanded for their assent to the infringement) and a component for non-economic or cultural loss (being a fair and just assessment, in monetary

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127 *Spencer* (1907) 5 CLR 418 at 432, 440-441; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 436 [49]-[50]; [1999] HCA 25; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 276-277 [51]; [2008] HCA 5.

128 *Minister for Public Works v Thistlethwayte* [1954] AC 475 at 491; *The Commonwealth v Reeve* (1949) 78 CLR 410 at 418-420, 428-429, 435; [1949] HCA 22; *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at 267, 280; [1956] HCA 7; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 225-226 [80]-[83], cf at 269-270 [292]-[294]; 167 ALR 575 at 596-597, cf at 654-655; [1999] HCA 64.

terms, of the sense of loss of connection to country suffered by the Claim Group by reason of the infringement).

85 Admittedly, there is a degree of artificiality about applying an adapted *Spencer* test in circumstances where it may be assumed that the Claim Group would not have been at all interested in selling their native title rights and interests and it is plain that no one could lawfully have bought them. But, at the same time, the native title rights and interests unquestionably existed and they had a recognisable economic worth which lay in the sum that might fairly and justly have been demanded for their lawful extinction in favour of the Crown. In those circumstances, it is no more artificial to seek to assess their economic value by means of the *Spencer* test of what a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor in order to buy them (or, more accurately, to obtain the latter's assent to their extinguishment) than it is to apply the *Spencer* test to the assessment of just compensation for the compulsory extinguishment of, say, a general law easement or profit à prendre[129].

86 At one point in the Full Court's reasons, their Honours reflected[130] as to whether it might have been preferable to approach the assessment task on an "holistic"[131] basis without the division of value into economic and non-economic components. Their Honours were correct to avoid that approach. There may be exceptions, but ordinarily the only way of achieving the degree of precision envisaged by s 51A of the *Native Title Act* – which, as has been seen, stipulates that the total compensation payable for an act which extinguishes native title must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters – is by the determination of economic value according to established precepts for the valuation of interests in land. Given that there is no range of decided comparable cases such as those which may be called in aid, for example, in sentencing[132] or

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129 See, eg, *Sutherland Shire Council v Sydney Water Corporation* [2008] NSWLEC 303 at [98]-[111].

130 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520-522 [140]-[144].

131 As was contended for by the Attorneys-General for the States of South Australia and Western Australia before this Court.

132 See, eg, *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45; *R v Pham* (2015) 256 CLR 550; [2015] HCA 39; *R v Kilic* (2016) 259 CLR 256; [2016] HCA 48.

when fixing damages for personal injuries[133], an holistic approach would mean that the determination of the economic value of native title rights and interests would be largely dependent on idiosyncratic notions of what is fair and just.

Determination of economic value of native title rights and interests

87 Having determined the fair value of a freehold interest in the subject land, the Full Court were right to discount that figure by reference to the more limited nature of the Claim Group's native title rights and interests in order to arrive at the economic value of those more limited rights and interests. As the Northern Territory submitted before this Court, it is fundamental that there must be economic equivalence between the value of what is lost and the compensation which is paid[134] and, therefore, that the economic value of the property that was lost must be assessed according to the rights and interests that were held[135]. Granted, as the Full Court observed[136], the process necessitates making a fairly broad-brush estimate of the percentage of rights and interests comprising freehold title which is considered to be proportionate to the native title rights and interests, but that is an unavoidable consequence of the statutory scheme. The courts must do the best they can to achieve the statutory objectives of the *Native Title Act*.

Rejection of Mr Lonergan's thesis

88 The Northern Territory contended that there was available expert evidence in the form of the opinion given by Mr Lonergan as to what he conjectured might be the amount that the Claim Group would have been prepared to pay to acquire similar rights and interests in a different, more remote and undeveloped location, and that the Full Court should have accepted it. That contention must be rejected. Evidently, Mr Lonergan's thesis was that, in the absence of a relevant

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133 See, eg, *Thatcher v Charles* (1961) 104 CLR 57 at 71; [1961] HCA 5; cf *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 124-125; [1968] HCA 62. See also Mullany, "A New Approach to Compensation for Non-Pecuniary Loss in Australia" (1990) 17 *Melbourne University Law Review* 714.

134 *Horn v Sunderland Corporation* [1941] 2 KB 26 at 49; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 571.

135 See *Rosenbaum* (1965) 114 CLR 424 at 429-430.

136 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520 [138]-[139].

market or comparable sales data, the fair value of the Claim Group's native title rights and interests was to be assayed by reference to an appropriate comparator and, because the freehold value of land increases with the availability of services and surrounding infrastructure, whereas the Claim Group's enjoyment of their native title rights and interests did not, the appropriate comparator was freehold market value stripped of so much of it as reflected the availability of services and infrastructure. According to Mr Lonergan, that figure could be gleaned by taking the market value of a large nearby rural block *without* road access, power or water, yielding what Mr Lonergan termed a "usage value", and then adding an uplift or "negotiation value" which Mr Lonergan postulated could be derived by splitting the difference between the market value of the land (which includes the value of the availability of services and infrastructure) and the usage value of the native title rights and interests as so calculated, according to what Mr Lonergan described as principles of behavioural economics and game theory, economic experience and notions of fair dealing.

89 As will be apparent, the principal difficulty with Mr Lonergan's thesis is that what it purports to value is not the economic value of the native title rights and interests in the subject land as required by the *Native Title Act*, but rather what the Claim Group might have been prepared to pay to acquire other land at a different location on which they might have lived and behaved in much the same way that they had been entitled to live and behave in the exercise of their native title rights and interests in the subject land.

90 To demonstrate the difficulty, it assists to consider first what the position would have been if the Claim Group had had full exclusive native title in the subject land. As was earlier explained, s 51A of the *Native Title Act* read in context and with regard to the purpose of Div 5 of Pt 2 of the *Native Title Act* equates the economic value of full exclusive native title to the economic value of a freehold interest. If, therefore, the Claim Group had had a full exclusive native title in the subject land, the economic value of their native title as required to be determined by the *Native Title Act* would have been the freehold value of that land as determined by Mr Copland. If, however, the economic value of the Claim Group's supposed full exclusive native title were determined according to Mr Lonergan's thesis, it would be some lesser amount based on the economic value of a freehold interest in some other land at a different location. That is not what the *Native Title Act* requires.

91 The same problem applies to non-exclusive native title of the kind in suit. Consistently with the aim of the *Native Title Act* that the economic value of full exclusive native title in land be equated to the economic value of a freehold title in that land, the economic value of non-exclusive native title in land falls to be

determined by making an evaluative judgment of the percentage reduction from full exclusive native title which properly represents the comparative limitations on the non-exclusive title relative to a full exclusive native title and then applying that percentage reduction to the economic value of a freehold estate in the land as proxy for the economic value of a full exclusive native title in the land. Application of Mr Lonergan's thesis would be most unlikely to produce the same dollar figure, and, if it did, it would be entirely adventitious.

92 There is, too, a further, pragmatic reason to eschew the sort of approach favoured by Mr Lonergan. An opinion of the kind that the Northern Territory commissioned Mr Lonergan to produce is a complex and expensive exercise, and, as experience shows in litigation, where one party introduces an expert report of that complexity and expense it more often than not leads to another party commissioning another expert to produce a similarly complex and expensive report to rebut the thrust of the first, leaving it to a trial judge, often after extensive cross-examination of both experts at further considerable cost, to decide between the two. That degree of complexity and cost can be avoided if economic value is determined by the comparatively simple and relatively thrifty means of assessing the freehold value of the subject land and applying the appropriate percentage discount according to the nature of the native title rights and interests in suit. Given the presumably limited resources of most native title claimants, such simplicity and economy is surely to be encouraged.

93 Conceivably, an approach of the kind advocated by Mr Lonergan could be of some assistance if parties were agreed that native title rights and interests are to be valued according to the kind of restorative or reinstatement approach[137] urged before this Court on behalf of the Central Desert Native Title Services Limited and the Yamatji Marlpa Aboriginal Corporation intervening; assuming of course that the relevant court were persuaded on the evidence that such an approach was likely to be productive of just compensation. In this case, however, the content of Mr Lonergan's thesis makes plain that that possibility is excluded.

94 The parties were right to agree before the trial judge and the Full Court that the Claim Group's native title rights and interests are to be valued according

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137 See and compare *Birmingham Corporation v West Midland Baptist (Trust) Association Inc* [1970] AC 874 at 893-894; *Kozaris v Roads Corporation* [1991] 1 VR 237 at 240-242.

to the bifurcated approach. It would have been wrong to act upon Mr Lonergan's thesis and the trial judge and the Full Court were right to reject it.

Differing values in different areas

95 The Northern Territory and the Attorney-General for the State of South Australia criticised the Full Court's methodology as productive of what was contended to be the irrational consequence that native title rights and interests so valued would have a higher value in developed areas, where it was likely that the enjoyment of native title rights and interests would to some extent be compromised by encroaching development, and a lower value in remote areas, where the absence of encroaching development would allow native title rights and interests to be enjoyed to the full.

96 The criticism is misplaced. As was observed in *Western Australia v Brown*[138], the identification of native title rights and interests is an objective inquiry and it is the legal nature and content of the rights and interests that must be ascertained, not the way in which they have been exercised. Likewise, the economic valuation of rights and interests is an objective exercise and so, as has been emphasised, essentially an objective question of how much a willing but not anxious purchaser would be prepared to pay to a willing but not anxious vendor to obtain the latter's assent to their extinguishment[139]. Plainly enough, a willing purchaser would be likely to pay more to achieve the extinguishment of native title rights and interests over high-value land in a developed area (given that the economic potential of that kind of land is likely to be greater) than for the extinguishment of native title rights and interests over low-value land in a remote area (where the economic potential of the property is likely to be sparse). Consequently, it is neither irrational nor surprising that the economic value of native title rights and interests in developed areas should, in many cases, prove to be greater than the economic value of comparable native title rights and interests in a remote location.

97 It is also no more than fair and just that the economic value of native title rights and interests should be assessed accordingly. With the compulsory

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138 (2014) 253 CLR 507 at 521 [34]. See and compare *Akiba* (2013) 250 CLR 209 at 224-225 [21], 241-242 [65]-[67].

139 See and compare *Spencer* (1907) 5 CLR 418 at 441; *Turner* (1956) 95 CLR 245 at 264; *Boland* (1999) 74 ALJR 209 at 265-266 [271]-[274]; 167 ALR 575 at 649-650.

acquisition of land, the value of land is generally speaking[140] not limited to the pecuniary benefit of past uses but extends to its highest and best use in light of possible benefits in the future[141]. So, too, with the valuation of native title rights and interests in land, the value of the native title rights and interests is not ordinarily to be confined to the benefit of their past uses but should be extended to their highest and best use. As Dixon CJ stated in *Turner v Minister of Public Instruction*[142]:

> "the purpose is to ascertain the full return which may reasonably be expected from the sale of the land, not the most conservative value. The ultimate purpose of the inquiry is to find a figure which represents adequate compensation to the landowner for the loss of his land. Compensation should be the full monetary equivalent of the value to him of the land. All else is subsidiary to this end."

And later[143]:

> "[The interest in land] is, of course, to be valued in cases of compensation with a view to ensuring that the actual value contained in the land is replaced in the hands of the owner by an equivalent amount of money. The value must therefore be the value to the owner which the land possessed to him in its condition at the date of resumption. *That value was necessarily affected by all the advantages which the land possessed and these might be a matter of future or even contingent enjoyment. Future advantages or potentialities must not be excluded. At the same time the value of these things must be assessed according to the condition of the land as it stood at the time of resumption: 'it is the present value*

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140 Newton and Conolly, *Land Acquisition*, 7th ed (2017) at 139-143 [3.17].

141 *Trent-Stoughton v Barbados Water Supply Company Ltd* [1893] AC 502 at 504; *Boland* (1999) 74 ALJR 209 at 265 [271]; 167 ALR 575 at 649; *ISPT Pty Ltd v Melbourne City Council* (2008) 20 VR 447 at 458-459 [37]-[41]. See also Jacobs, *Law of Compulsory Land Acquisition*, 2nd ed (2015) at 622-624 [26.55]; *Cripps on Compulsory Acquisition of Land*, 11th ed (1962) at 674 [4-003], 680-681 [4-012]-[4-013].

142 (1956) 95 CLR 245 at 264.

143 *Turner* (1956) 95 CLR 245 at 268.

alone of such advantages that falls to be determined': *Cedars Rapids Manufacturing & Power Co v Lacoste*[144]." (emphasis added)

98 It may be that any sense of loss of connection to country resulting from the infringement or extinguishment of native title rights and interests in higher-value, developed areas is likely to prove less than the sense of loss of connection to country with respect to lower-value, remote areas because, depending on the facts of the case, the sense of connection to country in higher-value, developed areas may have declined as the result of encroaching developments before the act of extinguishment or other compensable diminishment. But if so, the amount to be awarded for non-economic loss of native title with respect to higher-value, developed land will be less.

Significance of inalienability

99 The Full Court were incorrect, however, in holding that the inalienability of native title rights and interests was a relevant discounting factor in the assessment of their economic value. The assessment of the economic value of native title rights and interests is in that respect different from the assessment of the economic value of common law land title.

100 The alienability of a freehold estate is a relevant[145], although not always significant, consideration in the determination of its economic value. Valuation cases involving inalienable freehold land disclose a range of discounted values of between 10 per cent and 80 per cent according to the extent of inalienability. The lowest, of 10 per cent, involved freehold land that was wholly inalienable[146]. The highest, of 80 per cent, concerned land that was limited to trust purposes but could be sold or leased with the permission of the Governor[147]. Between those

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144 [1914] AC 569 at 576.

145 *MacDermott v Corrie* (1913) 17 CLR 223 at 232-233, 246-247; [1913] HCA 27; *Corrie v MacDermott* (1914) 18 CLR 511 at 514, 516; [1914] AC 1056 at 1062, 1064; *The Commonwealth v Arklay* (1952) 87 CLR 159 at 170-171; [1952] HCA 76.

146 *Council of the City of Liverpool v The Commonwealth* (1993) 46 FCR 67 at 68-69, 81-83.

147 *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106 at 108-109, 116-120. The 80 per cent figure is recorded in the editor's note at 106 of this report.

extremes lies a range of cases reflecting the economic significance of inalienability most commonly resulting in a reduction for inalienability of around 50 per cent[148].

101 By contrast, although native title rights and interests are inalienable, s 51A of the *Native Title Act* equates the economic value of full exclusive native title to the economic value of unencumbered, freely alienable freehold title and thus, in practical terms, deems the inalienability of full exclusive native title to be irrelevant to the assessment of its economic value. Similarly, just as the inalienability of full exclusive native title is deemed to be irrelevant to the assessment of its economic value, so too must it follow that the inalienability of non-exclusive native title is irrelevant to its economic value; for the latter, as has been explained[149], falls to be determined by applying the appropriate percentage to the economic value of a freely alienable freehold title.

102 The trial judge drew support for that conclusion from the decision of the Privy Council in *Amodu Tijani* and the decision of this Court in *Geita Sebea*. Those decisions, however, turned on the specific legislation under which land was acquired in those cases[150]. The *Native Title Act* is different. Here it is s 51A of that Act, read in light of the extrinsic materials, which makes clear that inalienability of native title is irrelevant to the assessment of its economic value.

Benefit to Northern Territory

103 The Full Court held that the trial judge erred in the assessment of the economic value of the native title rights and interests by taking into account the

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148 See, eg, *Hornsby Shire Council v Roads and Traffic Authority of New South Wales* (1998) 100 LGERA 105 at 106, 108-109; *Canterbury City Council v Roads and Traffic Authority of New South Wales* [2002] NSWLEC 161 at [8], [30]; *Canterbury City Council v Roads and Traffic Authority of New South Wales* [2004] NSWLEC 172 at [16]; *Liverpool City Council v Roads and Traffic Authority of New South Wales* [2004] NSWLEC 543 at [15], [74]-[75]; *Blacktown City Council v Roads and Traffic Authority of New South Wales* [2004] NSWLEC 772 at [4], [19]; *Blacktown City Council v Roads and Traffic Authority (NSW)* (2006) 144 LGERA 265 at 269 [16], 278-279 [46], 288 [97].

149 See [70] above.

150 See *Amodu Tijani* [1921] 2 AC 399 at 408-410; *Geita Sebea* (1941) 67 CLR 544 at 552, 557. See also *Sydney Sailors' Home* (1977) 36 LGRA 106 at 117-118.

economic value to the Northern Territory of achieving their extinguishment. Their Honours based[151] that conclusion on the trial judge's observations[152] that, although the individual bundle of rights to which the Northern Territory succeeded by reason of the compensable acts was different in character from the bundle of rights that the Claim Group had enjoyed, what the Northern Territory acquired was capable of indicating the economic value of the native title rights and interests; and so, if the valuation test focused on the value to the Northern Territory of the rights and interests which were surrendered, then the answer would be a figure close to freehold value.

104 It is not clear that the trial judge made that error. It may be that all his Honour had in mind was that, as with the economic value of any other encumbrance, the economic value of native title rights and interests accords to what a willing but not anxious purchaser is prepared to pay to a willing but not anxious vendor to obtain the latter's assent to their extinguishment. But either way, the benefit of extinguishment to the Northern Territory was relevant only in so far as it would have informed the amount that the Northern Territory, as the sole, hypothetical willing purchaser, would have been prepared to pay for the consensual extinguishment of the native title rights and interests[153]. And the Full Court were right to hold that, for whatever reason, the trial judge had significantly over-estimated the value of the native title rights and interests as a percentage of freehold value.

105 Possibly, as the Full Court observed[154], one of the factors that led the trial judge to do so was to reason[155] that it was inappropriate "simply to proceed on the basis of a comparison of the bundle of rights held by the [Claim Group], *remote from their true character*" (emphasis added). As the Full Court concluded, that observation suggests that his Honour may have included some allowance for the cultural loss or loss of connection to country despite having earlier noticed the importance of confining such considerations to the assessment

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151 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 510-511 [89]-[92].

152 *Griffiths* (2016) 337 ALR 362 at 402-403 [217], 404-405 [232].

153 See *MacDermott* (1913) 17 CLR 223 at 232-233, 251; *Corrie* (1914) 18 CLR 511 at 514; [1914] AC 1056 at 1062; *Reeve* (1949) 78 CLR 410 at 418.

154 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 514 [112]-[114].

155 *Griffiths* (2016) 337 ALR 362 at 402 [212].

of non-economic value. Whatever the reason, however, the percentage was far too high.

Manifest excessiveness

106 Given the Claim Group's native title rights and interests were essentially usufructuary, ceremonial and non-exclusive, without power to prevent other persons entering or using the land or to confer permission on other persons to enter and use the land, without right to grant co-existing rights and interests in the land, and without right to exploit the land for commercial purposes, the trial judge's estimate of the economic value of the native title rights and interests as 80 per cent of the freehold value of the land was manifestly excessive. But so, too, with great respect, was the Full Court's estimate of 65 per cent. Granted, the determination of the appropriate percentage calls for an evaluative judgment about which reasonable minds might sometimes differ[156]. But here, given the native title was devoid of rights of admission, exclusion and commercial exploitation, a correct application of principle dictates on any reasonable view of the matter that those non-exclusive native title rights and interests, expressed as a percentage of freehold value, could certainly have been no more than 50 per cent. The Full Court's estimate of 65 per cent was plainly so high relative to the limited extent of the native title rights and interests as to bespeak error of principle. That is so notwithstanding that the Full Court included inalienability as a discounting factor in its estimate.

107 Other things being equal, it would be appropriate to remit the matter to the Full Court for redetermination on that basis. But since no party suggested that the percentage should be set at below 50 per cent, it can be accepted for the purposes of the disposition of these appeals that 50 per cent is the figure.

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156 See and compare *British Fame (Owners) v Macgregor (Owners) (The Macgregor)* [1943] AC 197 at 201, cited with approval in *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 493-494; 59 ALR 529 at 532; [1985] HCA 34 and *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 92 ALJR 33 at 49 [99]; 350 ALR 381 at 400-401; [2017] HCA 53. See also *Spencer* (1907) 5 CLR 418 at 442-443; *Hornsby Shire Council* (1998) 100 LGERA 105 at 108-109.

E Interest on the economic loss claim

108 It was common ground that interest should be awarded on the economic value of the extinguished native title rights and interests in order to reflect the time between when the entitlement to compensation arose and the date of judgment, and that the function of such an award is to compensate a party for the loss suffered by being kept out of his or her money during that period. The issue was whether the interest should be calculated on a simple basis or compound basis and, if on a compound basis, at what rate it should be compounded.

109 The Claim Group argued that equity dictated an award of compound interest. As these reasons will explain, the Claim Group had no entitlement to compound interest.

Decisions below and contentions in this Court

110 The trial judge rejected[157] the Claim Group's contention that equity dictated an award of compound interest. His Honour did not consider that the authorities on which the Claim Group relied supported the proposition that, in circumstances like the present, equity regards the fact that the Claim Group had not received their entitlement to compensation for a considerable period as a sufficient basis for an award on a compound interest basis. The trial judge noted[158], however, that there was no authority which would preclude the Court from granting compound interest if persuaded that such an award was an appropriate means of securing fair compensation or compensation on just terms. Accordingly, his Honour held[159], it was necessary to decide whether, if the Claim Group had been compensated as at the date of the compensable acts, they would have made such a use of the compensation as to warrant an award of compensation on a compound interest basis to compensate the Claim Group for the damage suffered by reason of that loss of opportunity. But his Honour was not persuaded[160] that the Claim Group would have invested the moneys without expenditure, accumulating interest year by year, to the present time, or that they would have used the moneys to undertake any sort of commercial activity that

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157 *Griffiths* (2016) 337 ALR 362 at 407-408 [249]-[251].

158 *Griffiths* (2016) 337 ALR 362 at 408 [252].

159 *Griffiths* (2016) 337 ALR 362 at 408 [253].

160 *Griffiths* (2016) 337 ALR 362 at 413 [275]-[277].

would have been profitable to the same or a greater degree. Thus, his Honour held[161] that the appropriate interest calculation was simple interest at the Practice Note rate.

111 Before the Full Court, the Claim Group contended[162] that they were entitled to compound interest without proof of how they would have used compensation moneys, on the basis of the equitable principle that a fiduciary is not permitted to profit from the improper withholding of trust funds. The Claim Group further contended that, even if the Northern Territory were not a fiduciary, equity now allows for an award of compound interest without need of showing the loss suffered by being kept out of the money. Further or alternatively, the Claim Group argued that fair compensation or compensation on just terms was to be arrived at only by awarding the Claim Group the interest which the Northern Territory saved on its borrowings by retaining the compensation moneys over a very long period. The Full Court rejected[163] those contentions.

112 Before this Court, the Claim Group contended that an award of compound interest was necessary to achieve the requirement of compensation on just terms mandated by s 51(1) of the *Native Title Act* and that only compound interest at the risk free rate would satisfy that requirement. The argument was the subject of a notice issued pursuant to s 78B of the *Judiciary Act 1903* (Cth) because it was considered to raise an issue as to whether "just terms" in s 51(1) is informed by the meaning of "just terms" in s 51(xxxi) of the *Constitution*. But, in the event, that point ceased to be of any consequence, and was not pursued. In substance, the Claim Group submitted that equity informs the notion of just terms; that it was inequitable for the Northern Territory to retain both the compensation moneys and the land or its rents or profits; and that simple interest unfairly favoured the Northern Territory where, as here, there was a lengthy period, which included times of high inflation, in which the Claim Group were seeking recognition of their infringed rights while the Northern Territory gained by saving on borrowing costs that were compounded.

113 In short, as will be explained, equity allows for simple interest in proceedings for specific performance of a contract for the sale of land and although that rule has been extended to the compulsory acquisition of land,

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161 *Griffiths* (2016) 337 ALR 362 at 413 [279].

162 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 527-528 [172].

163 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 536-537 [212]-[213].

the rule provides for simple interest, not compound interest. Equity does allow for compound interest for suits for recovery of money obtained by fraud or withheld or applied in breach of fiduciary duty but the facts in these appeals do not fall into either of those categories. Finally, although a plaintiff may be able to claim restitution of a defendant's unlawful enrichment and that claim may include a claim for compound interest, the Claim Group did not make a claim for restitution of benefits; and the benefits derived by the Northern Territory are statutory and thus there was no "unjust enrichment".

114 Although the Claim Group did not before this Court devote as much attention to the panoply of cases concerning the courts' power to award interest as they did in the Full Court, those cases nonetheless underpinned the Claim Group's contentions in this Court and it remains necessary to consider them in some detail.

Interest in equity

115 As the trial judge stated[164], courts of law routinely allow pre-judgment interest on damages. But it is important to understand that the power of courts of law to award interest as such is essentially statutory. As Lockhart J observed in *Whitaker v Commissioner of Taxation*[165], up until the nineteenth century, courts of law allowed interest only in cases where it was provided for by contract or custom. Effectively, it took the enactment of statutory provisions akin to those which now appear in s 51A of the *Federal Court of Australia Act 1976* (Cth) and comparable State and Territory enactments[166] to achieve the present position. Section 51A of the *Federal Court of Australia Act* applies to actions for the recovery of money (including debt, damages or the value of any goods). In view

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164 *Griffiths* (2016) 337 ALR 362 at 407 [248].

165 (1998) 82 FCR 261 at 268.

166 See, eg, *Court Procedures Act 2004* (ACT), s 7, Sch 1, item 20 and *Court Procedures Rules 2006* (ACT), r 1619; *Civil Procedure Act 2005* (NSW), s 100; *Supreme Court Act* (NT), s 84; *Civil Proceedings Act 2011* (Qld), s 58; *Supreme Court Act 1935* (SA), s 30C; *Supreme Court Act 1986* (Vic), ss 58-60; *Supreme Court Act 1935* (WA), s 32. In Tasmania, the power of the Supreme Court to award interest is limited to "debts or sums certain" and damages in cases of conversion and trespass and insurance claims: *Supreme Court Civil Procedure Act 1932* (Tas), ss 34-35.

of the Claim Group's submissions, s 51A has no direct application to these proceedings for an award of compensation under the *Native Title Act*.

116 By contrast, in equity it was early recognised that it is proper to award simple interest on a money decree where the justice of the case requires it, and, as a result, equity developed detailed rules governing the award of interest. One such rule is that, in a suit for specific performance of a contract of sale of land where the vendor had shown title, the purchaser is required to pay interest on the purchase price, computed from the time at which the purchaser might prudently have taken possession until the date of decree[167]. As Lord St Leonards expressed the rule, in *Birch v Joy*[168]:

> "From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account[.] From the same period the seller would have been deemed owner of the purchase-money, and that purchase-money not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of Equity, as a general rule, considers this to follow. 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 …"

117 The rule for the payment of simple interest in proceedings for specific performance of a contract of sale of land was later extended in *In re Pigott and the Great Western Railway Co* ("*Pigott's Case*")[169] to a proceeding brought by summons under the *Vendor and Purchaser Act 1874*[170] for the determination, inter alia, of whether a railway company which had compulsorily acquired land under the *Lands Clauses Consolidation Act 1845*[171] was liable to pay interest on

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167 See *Esdaile v Stephenson* (1822) 1 Sim & St 122 at 123 [57 ER 49 at 50].

168 (1852) 3 HLC 565 at 590-591 [10 ER 222 at 233].

169 (1881) 18 Ch D 146.

170 37 & 38 Vict c 78.

171 8 & 9 Vict c 18.

the purchase price. Jessel MR explained[172] the application of the rule in that context thus:

> "The course of decision has been that after notice to treat has been given [by the railway company], and the price has been fixed [by arbitration under the *Lands Clauses Consolidation Act 1845*], but has not been paid, a contract is established which is enforceable in a Court of Equity, and on which an action for specific performance can be maintained. …
>
> The course of decision then being that specific performance of the contract as a contract of purchase and sale, or sale and purchase, may be enforced, I take it that, unless you find some statutory enactment in the way, all the ordinary rules apply. Consequently, … where the vendor has shewn his title, the purchaser pays interest from the time at which he might prudently have taken possession …"

Application of the equitable rule to compulsory acquisition

118 Subsequently, in *Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission*[173], the Privy Council further extended the application of the rule beyond circumstances involving specifically enforceable synallagmatic or compulsory statutory contracts of sale of land to the assessment generally of compensation under statutory schemes for the compulsory acquisition of land. In *Inglewood*, the statutory scheme provided for a notice of expropriation to be served on the owner specifying the amount of compensation which the acquiring authority was willing to pay, and that, if the owner considered the specified sum to be unacceptable, the acquiring authority could apply for compensation to be assessed by a judge of the Supreme Court of New Brunswick, whereupon the judge would designate himself or herself the sole arbitrator for the determination of the compensation to be paid. Relevantly, one of the questions in that case was whether, in the absence of express statutory provision for the award of interest, the judge *qua* arbitrator had power to award simple interest on the compensation so assessed. Lord Warrington of Clyffe, who delivered the judgment of their Lordships, held[174] that he did:

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172 *Pigott's Case* (1881) 18 Ch D 146 at 150.

173 [1928] AC 492.

174 *Inglewood* [1928] AC 492 at 498-499.

> "It is now well established that on a contract for sale and purchase of land it is the practice to require the purchaser to pay interest on his purchase money from the date when he took possession: per Lord Cave LC in *Swift & Co v Board of Trade*[175]. The law on the point has also been extended to cases under the Lands Clauses Consolidation Act, 1845.
>
> Their Lordships can see no good reason for distinguishing the present case from such cases. It is true that the expropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all that, the owner is deprived of his property in this case as much as in the other, and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule."

119 In *Marine Board of Launceston v Minister of State for the Navy*[176], to which it will be necessary to return in more detail later in these reasons, a majority of this Court reached a similar conclusion. In that case, reg 57(1) of the *National Security (General) Regulations* (Cth) provided that the Minister could by order requisition any property including ships and reg 60D provided that a person who suffered loss or damage by reason of anything done under reg 57(1) should be paid compensation to be determined by agreement or, in the absence of agreement, by a Compensation Board, and, if either party were dissatisfied with the assessment, by a court. A question arose as to whether the regulatory power to award compensation was limited to awarding a capital sum for the loss of the property or included a discretion to award interest on it. Dixon J, who was in the majority, observed[177] that it is a question of legislative interpretation whether the legislative empowerment of a court or tribunal to determine compensation extends to "incidental matters and so to enable the court or tribunal to order that interest shall be paid on the compensation assessed and

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175 [1925] AC 520 at 532.

176 (1945) 70 CLR 518; [1945] HCA 42.

177 *Marine Board* (1945) 70 CLR 518 at 532-533.

awarded, where according to legal or equitable principles it is payable", and that[178]:

> "the jurisdiction to determine compensation may be readily interpreted as extending to what is consequential upon or incidental to the award. Where the sum awarded carries interest according to the substantive law, including in that expression the doctrines of equity, it is no great step to say that the tribunal dealing with the matter may so declare."

Application of the equitable rule to the Claim Group's claim

120 As was earlier noticed, before the trial judge the Claim Group put their claim for interest on the basis of the equitable rule for the payment of interest as it applies to cases of compulsory acquisition but contended that the requirement for just compensation required that the interest be allowed on a compound basis. And as has also been seen, the trial judge rejected the argument on the basis that he could find no support for it in any of the authorities relating to the equitable rule for the payment of interest in cases of compulsory acquisition. The Full Court agreed[179].

121 Before this Court, the Claim Group did not contend that there was any authority for an award of compound interest but submitted on the basis of the authorities just referred to, together with a number of further authorities, that it would be consonant with equitable principle and just to award compound interest in the circumstances of this case.

122 The authorities already referred to[180] were relied on as establishing that, absent contrary statutory indication, moneys payable as compensation for the compulsory acquisition of land bear interest from the date of dispossession. The further authorities relied upon by the Claim Group in this Court and the courts below fall into two additional groups: cases where compound interest has been awarded in equity in suits for the recovery of money obtained by fraud or

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178 *Marine Board* (1945) 70 CLR 518 at 533; see also at 526, 536, 538.

179 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 528 [173].

180 In particular, *Marine Board* (1945) 70 CLR 518. The Claim Group also relied upon *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 277-278; [1948] HCA 7.

withheld or applied in breach of trust or other fiduciary duty[181]; and cases where a defendant has had and received moneys to the use of a plaintiff and restitution has been awarded in an amount that includes a sum for what are conjectured to be the costs that the defendant would have incurred if the defendant had had to borrow the subject moneys[182].

123 Taking each of the three groups of cases in turn, the first, as the trial judge held[183], establishes an entitlement, analogous to the equitable entitlement to interest in a suit for specific performance of a contract of sale of land, to interest on an award of compensation for compulsory acquisition of land. There is no support in that group of cases for the award of interest on a compound basis. Rather, to the contrary, in *The Commonwealth v Huon Transport Pty Ltd*, Dixon J, after recitation of Lord St Leonards' explication of the rule in equity for the award of interest on unpaid purchase money in a suit for specific performance of a contract of sale of land, stated[184]:

> "That being the ground of the rule, applying alike to voluntary and compulsory sales, it does not extend to compensation for injurious affection, upon which interest is not payable unless an intention to give interest upon unpaid compensation appears in the statute." (citation omitted)

124 Although not directly on point, Dixon J's refutation of the notion that the equitable rule for the payment of interest on the outstanding purchase price under an uncompleted contract for the sale of land can be extended to allowing interest on outstanding hire fees suggests that the application of the rule in *Pigott's Case* to compulsory acquisition proceedings requires close adherence to equitable principle. To that extent, it provides no support for expansion of the rule to any broader basis of recovery.

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181 See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 691-693, 701-702, 718; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316 [74]; [1998] HCA 20.

182 See, eg, *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] AC 561.

183 *Griffiths* (2016) 337 ALR 362 at 407 [249].

184 (1945) 70 CLR 293 at 324; [1945] HCA 5.

125 The second line of authority, as the trial judge held[185], goes no further than that compound interest may be awarded in equity in cases where money is obtained or withheld by fraud or in breach of fiduciary duty and the award is made in lieu of an account of profits. It does not suggest that, in a case of this kind where there is no fraud or breach of trust, equity would treat the fact of the Claim Group being kept out of their entitlement to compensation – even for over a decade – as a sufficient basis for the award of compound interest.

126 According to the Full Court's reasons[186], the Claim Group argued before the Full Court that the Northern Territory stood in fiduciary relation to the Claim Group on the basis that equity attached to the Northern Territory's unilateral extinguishment of native title in the same way that equity attaches to the voluntary surrender of native title, and thus that it was incumbent on the Northern Territory to exercise its power of unilateral extinguishment of the Claim Group's native title for the benefit of the Claim Group. Although not clear from their Honours' reasons, presumably it was also contended that, because the Northern Territory owed fiduciary obligations to the Claim Group, the Northern Territory had a duty not to profit at the expense of the Claim Group by delaying the payment of just compensation for the extinguishment of the native title, and thus that the Northern Territory was liable in equity to pay compound interest on the compensation for extinguishment of native title in lieu of accounting for the profit derived by not paying it any sooner. But whether or not that was the way the argument was put, the Full Court rejected it, as their Honours said[187], because, absent express statutory provision requiring the Crown to act for the benefit of native title holders, it was doubtful that equity would impose fiduciary duties on the Crown in relation to the voluntary surrender of native title, and still more doubtful that equity would impose fiduciary duties on the Crown in relation to the unilateral extinguishment of native title. Moreover and more importantly, as the Full Court observed[188], whatever may have been the position in the absence of statutory provision, it had been overtaken by the validation of the compensable acts by the *Native Title Act*, which meant that the power of the

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185 *Griffiths* (2016) 337 ALR 362 at 408 [250].

186 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 527-528 [172], 529-530 [176]-[177].

187 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 529-530 [176]-[177].

188 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 530 [178].

Crown was unrestricted by any obligation that it be exercised for the benefit of native title holders.

127 Before this Court, the Claim Group disavowed any suggestion of basing their claim for compound interest on breach of fiduciary duty. Even so, they contended in their written submissions that[189]:

> "equity imposes an obligation to pay interest [*scil*, presumably, compound 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."

128 As has been observed, there is no question that equity may impose an obligation to pay interest on an uncompleted contract of sale of land and that the rule has been transposed by courts and tribunals to the assessment of just compensation under statutory schemes for compulsory acquisition of land. It may also be accepted that the principle applies as much to statutory schemes for the compulsory extinguishment of land title (including native title) as it does to schemes for the compulsory acquisition of land. In point of principle, there is no relevant difference between a contract for the sale of land and a contract for the surrender of an interest in land, or, therefore, between the compulsory acquisition of land and the compulsory extinguishment of an interest in land. But as has already been emphasised, the rule provides for the payment of simple interest and there is no suggestion in any of the authorities, or apparent reason in principle, to extend it to compound interest[190].

129 Further, the considered dicta cited by the Claim Group in support of the view that obligations of a fiduciary nature may attach in relation to the surrender of native title do nothing to advance the contention that interest on compensation for the extinguishment of native title should be paid on a compound basis. The Claim Group cited passages from *Mabo v Queensland [No 2]* in which Brennan J posited[191] the possibility, which his Honour expressly did not resolve, that if native title holders voluntarily surrendered their native title to the Crown

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189 Referring to *Mabo [No 2]* (1992) 175 CLR 1 at 60, 88-89, 113, 194, 204 and *Wik* (1996) 187 CLR 1 at 96.

190 See *Westdeutsche Landesbank* [1996] AC 669.

191 (1992) 175 CLR 1 at 60.

in the expectation of a grant of a tenure to the native title holders, there might be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in the land so as to satisfy that expectation; in which Deane and Gaudron JJ stated[192] that, where common law native title has not been extinguished, the rights under it may in appropriate circumstances be protected by equitable remedies including the imposition of a remedial constructive trust; and in which Toohey J stated[193] that the Crown owes a fiduciary obligation to native title holders arising out of its extraordinary power to destroy or impair common law native title rights and interests. The observations of Brennan J and Deane and Gaudron JJ in *Mabo [No 2]* are equivocal. And in *Wik*, in a passage also cited by the Claim Group, Brennan CJ stated[194] that where the Crown extinguishes native title under statutory authority, the Crown is under *no* duty to exercise the power of extinguishment in the native title holders' interests:

> "The exercise of statutory powers characteristically affects the rights or interests of individuals for better or worse. If the exercise of a discretionary power must affect adversely the rights or interests of individuals, it is impossible to suppose that the repository of the power shall so act that the beneficiary might expect that the power will be exercised in his or her interests. The imposition on the repository of a fiduciary duty to individuals who will be adversely affected by the exercise of the power would preclude its exercise. On the other hand, a discretionary power – whether statutory or not – that is conferred on a repository for exercise on behalf of, or for the benefit of, another or others might well have to be exercised by the repository in the manner expected of a fiduciary. …
>
> The power of alienation conferred on the Crown by s 6 of the [*Land Act 1910* (Qld)] is inherently inconsistent with the notion that it should be exercised as agent for or on behalf of the indigenous inhabitants of the land to be alienated. Accordingly, there is no foundation for imputing to the Crown a fiduciary duty governing the exercise of the power." (footnote omitted)

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192 (1992) 175 CLR 1 at 113.

193 (1992) 175 CLR 1 at 203-204.

194 (1996) 187 CLR 1 at 96-97.

130 As the Full Court observed, those observations, taken together with the fact that the *Native Title Act* provides for the validation of certain acts that impair or extinguish native title, tend against the conclusion that fiduciary obligations exist or that an analogy to such obligations is appropriate. In short, the passages cited by the Claim Group from *Mabo [No 2]* and *Wik* do not assist the claim for compound interest.

131 The Claim Group contended that, despite the retrospective validation of the compensable acts, it remained an historical fact that there was a period of more than a decade between the commission of the compensable acts and their validation, during which the acts were invalid, and thus that the Northern Territory should be accountable on a compound interest basis for the unfairness of having had the benefit of unlawful extinguishment of title for that period; in just the same way that those who obtain money by fraud or in breach of fiduciary duty may be held accountable in equity on a compound interest basis for the benefit of their unlawful gain[195].

132 The difficulty with that argument, as the trial judge[196] and the Full Court stated[197], however, is that, by reason of the retrospective validation of the compensable acts, those acts must now be taken as always having been valid. Whatever might have been the position before the enactment of the *Native Title Act* and its validation of the compensable acts, what the Claim Group now have is neither more nor less than a statutory right to just compensation for the lawful extinguishment of their native title rights and interests. In the absence of a recognised juridical basis for the award of compound interest on compensation for the lawful extinguishment of land title, it does not appear unjust that interest should be awarded on a simple interest basis.

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195 *President of India v La Pintada Compania Navigacion SA* [1985] AC 104 at 116; *Hungerfords v Walker* (1989) 171 CLR 125 at 148; [1989] HCA 8. See also *Wallersteiner v Moir [No 2]* [1975] QB 373; *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at 344 [209]-[210]; *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488 at 504-506; *Black v Davies* [2005] EWCA Civ 531 at [87]; cf Edelman, *McGregor on Damages*, 20th ed (2018) at 639 [19-068].

196 *Griffiths* (2016) 337 ALR 362 at 410 [259].

197 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 530 [179].

133 As has been observed, it is possible that there may be circumstances in which, by analogy with an award of damages at common law for loss of use of money, it would be just to award interest on a native title compensation claim on a compound interest basis[198]. The *Native Title Act* provides that regard may be had to the rules applicable to compulsory acquisition of land, which, as has been seen, in effect import the rule in *Pigott's Case*. But the *Native Title Act* does not dictate that the rules applicable to compulsory acquisition of land are the only considerations to which regard may be had. Thus, as the trial judge posited[199], if the evidence established that, upon earlier payment of the compensation, the Claim Group would have put the compensation to work at a profit, or perhaps used it to defray costs of doing business, it may be that an award of compound interest would be warranted to compensate for the lost opportunity of investment or those costs, by analogy with damages awarded at common law to compensate for expenses incurred or opportunity costs arising from moneys paid away or withheld as a result of breach of contract or negligence[200]. But, for the present, that point need not be decided. As the trial judge found[201], there was sparse evidence that the Claim Group would have invested the compensation at a profit and no suggestion that the Claim Group incurred costs that could have been avoided with the aid of an earlier payment of the compensation.

134 That leaves the third line of authority, which was said to support a free-standing entitlement to compound interest as a means of redressing the alleged injustice of the Northern Territory having derived rents and profits from some of the land subject to extinguished native title. That contention faces difficulties at three levels, and should be rejected.

135 First, in *The Commonwealth v SCI Operations Pty Ltd*, McHugh and Gummow JJ doubted[202] that there is a free-standing right to interest where a

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198 See and compare *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) at [320]-[321].

199 *Griffiths* (2016) 337 ALR 362 at 408 [253].

200 See *Hungerfords* (1989) 171 CLR 125 at 142-146, 152. See also *Ben v Suva City Council* [2008] FJSC 17.

201 *Griffiths* (2016) 337 ALR 362 at 413 [275]-[277].

202 (1998) 192 CLR 285 at 316-317 [72]-[75].

defendant has been unjustly enriched by the use of a plaintiff's money at the plaintiff's expense:

> "Independently of their reliance upon s 51A [of the *Federal Court of Australia Act*] as the source of curial authority to award the interest they seek in these proceedings, SCI and ACI assert a 'free-standing' right to the recovery of interest where the defendant has had the use of the plaintiff's money in circumstances which indicate an unjust enrichment at the expense of the plaintiff. The existing state of authority does not favour acceptance of such a broad proposition.
>
> The present is not a case where the assertion is that the appellant's breach of contract or negligence has caused the respondents to pay away or the appellant to withhold money and as a result the respondents have been deprived of the use of the money so paid away or withheld. Nor do the respondents seek an award of damages representing compensation for a wrongfully caused loss of their money, which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money.
>
> It is true that in the administration of its remedies, equity followed a different path to the common law with respect to the award of interest. In cases of money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary, the decree might require payment of compound interest. However, in *Westdeutsche Landesbank Girocentrale v Islington London Borough Council*, the House of Lords answered in the negative the question whether, where statutes, of which s 51A(2)(a) is a local example, provide for orders for payment of simple but not compound interest upon common law claims, equity, in its auxiliary jurisdiction, will supplement the statute by providing for an award of compound interest.
>
> In other instances, equitable relief might involve the payment of simple interest. As an element in the relief administered upon rescission of a contract under which the plaintiff had paid over moneys to the defendant, the order might require the defendant to make the repayment with interest calculated from the date of the initial payment. Relief against forfeiture by a vendor of payments under an instalment or terms contract might require repayment with interest from the dates the respective instalments were paid. An account of profits would carry interest. Conversely, a party seeking equitable relief may be obliged to do equity by the payment or repayment of moneys with interest. A purchaser

> who, after the date fixed for completion, seeks specific performance will be treated in equity as having been in possession from the completion date and, in general, will be required to offer the vendor interest on the purchase price from that date. However, the present litigation does not involve the administration of any equitable relief and so call for consideration of the issue whether it was unconscientious of the appellant to make the refunds on 3 June 1994 without the addition of payments on account of interest." (footnotes omitted)

136 Secondly, properly analysed, such authority as there now is in favour of a free-standing right of the kind contended for goes no further than recognising a restitutionary entitlement at law calculated to redress a defendant's unlawful enrichment through use of moneys which the defendant is regarded as having had and received to the use of the plaintiff[203]. The Claim Group's claim is not a claim for restitution of benefits unjustly obtained by the Northern Territory at the expense of the Claim Group. It is a claim for just compensation for the loss caused to the Claim Group by the extinguishment of native title. And the purpose of compensation is to put the Claim Group, so far as money can do, in the position in which they would have been if the native title had not been extinguished. It is not in any sense to provide restitution of benefits which it might be supposed the Crown derived by reason of the extinguishment of native title. Nor is there an analogy to be drawn between a claim for compensation for extinguishment of native title and a claim for money had and received, or with the recovery of money obtained by fraud or money withheld or misapplied by a fiduciary. As the trial judge held[204], such if any benefit as the Northern Territory derived from the extinguishment of the native title is irrelevant.

137 Thirdly, and most importantly, even if benefits derived by the Crown were a relevant consideration in the assessment of compensation for extinguishment of native title, the statutory validation of the compensable acts means that any

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203 *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [No 2]* [1997] 1 WLR 1627 at 1636-1637; [1998] 1 All ER 305 at 314-315; *Sempra Metals* [2008] AC 561 at 586-587 [33]-[36], 604-605 [109]-[112], 627 [178], 628-630 [183]-[187], cf at 608-610 [132], 617 [151], 649-654 [231]-[240]; and see now *Littlewoods Ltd v Revenue and Customs Commissioners* [2017] 3 WLR 1401; [2018] 1 All ER 83. Compare *Heydon v NRMA Ltd [No 2]* (2001) 53 NSWLR 600 at 605-606 [15]-[16].

204 *Griffiths* (2016) 337 ALR 362 at 410 [259].

benefit the Northern Territory derived from the extinguishment of the Claim Group's native title was not unjust. To adopt and adapt the language of McHugh and Gummow JJ in *SCI Operations*[205], such benefits as the Northern Territory might have derived from the extinguishment of native title, or from the delay in payment of compensation, are the product of statute, and the restitutionary considerations which are present in various areas of the law cannot purport to override statute by claiming a superior sense of justice to Parliament's.

138 The Claim Group's claim for compound interest was rightly rejected.

Practice Note rate

139 Although the Claim Group made much in written submissions, and to a lesser extent in oral argument before this Court, of whether the trial judge should have allowed interest at the risk free rate rather than the Practice Note rate which his Honour adopted, the Claim Group acknowledged before this Court that, unless they were successful in their claim for compound interest, they were better off with interest at the Practice Note rate.

140 Further, apart from the Claim Group, no party contended below or before this Court that the trial judge was in error in awarding interest at the Practice Note rate, and, before this Court, the Claim Group accepted that, if the trial judge were not in error in declining to award interest on a compound interest basis, the Claim Group did not wish to be heard to say that there was any error in the selection of the Practice Note rate.

Interest on or as part of compensation

141 Finally in respect of interest, there is a question agitated by the Commonwealth of whether the trial judge and the Full Court were correct to award interest as *part of* compensation, as their Honours did[206], or whether their Honours should rather have awarded the interest as interest *on* compensation. For present purposes, it is a matter of little consequence because, either way, the amount of interest payable will be the same. But the Commonwealth pressed the issue because it sought to establish that interest of the kind that was awarded

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205 (1998) 192 CLR 285 at 317 [76], quoting *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365 at 371.

206 *Griffiths* (2016) 337 ALR 362 at 408-409 [254]; *Northern Territory v Griffiths* (2017) 256 FCR 478 at 539 [225]-[226].

does not count as part of the "total compensation" within the meaning of s 51A(1) of the *Native Title Act*. For the reasons that follow, that contention should be accepted.

142 In *Swift & Co v Board of Trade*[207], the House of Lords held that to award interest on compensation for goods which had been requisitioned under the *Defence of the Realm Regulations* (UK) would be to award compensation not for the goods themselves but for the time occupied in ascertaining their true value in accordance with the regulations, and, since the rule in *Pigott's Case* did not extend to the compulsory acquisition of goods, the power to award compensation for the goods did not extend to awarding interest. Viscount Cave LC, with whom Lord Buckmaster agreed[208], stated[209]:

> "To hold otherwise is to give compensation, not for the goods themselves, but for the time occupied in ascertaining their value in accordance with the law."

Lord Sumner, with whom Lord Dunedin agreed[210], dealt with the matter to the same effect but more explicitly[211]:

> "Now, not only is 'compensation' the word used [in the regulation] and not 'interest' but there is nothing in the regulation to attach an allowance of interest to. There is no debt, for no final award has been made; there has been no wrong done, for the requisitioning was legal and the goods became the minister's goods from the time of requisition. It is the regulation itself that prescribed arbitration, a proceeding which involves delay and causes the merchant to be out of his compensation for a substantial time, or rather postpones the date at which his compensation can be fixed and so become payable. *To give interest is really to give additional compensation for being the victim of war legislation, and this subject of compensation is not within the regulation*." (emphasis added)

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207 [1925] AC 520.

208 *Swift* [1925] AC 520 at 533.

209 *Swift* [1925] AC 520 at 533.

210 *Swift* [1925] AC 520 at 549.

211 *Swift* [1925] AC 520 at 548.

143 A similar question fell for determination by this Court in *Huon Transport*[212]. In that case, s 67 of the *Defence Act 1903* (Cth) provided that "[t]he owner of any … boat or vessel … required for naval or military purposes, shall, when required to do so by [an authorised officer], furnish it for those purposes, *and shall be recompensed therefor in the manner prescribed*" (emphasis added). The issue was whether s 67, considered in light of s 51(xxxi) of the *Constitution*, authorised the court to allow interest. It was held, by majority (Latham CJ, Starke, Dixon and McTiernan JJ, Rich and Williams JJ dissenting), that it did not. Latham CJ decided[213] the issue on a basis not presently relevant, that the matter was one of implied contract and that upon such a contract there was no liability to pay interest either at law or in equity. McTiernan J decided[214] to the same effect. Starke J held[215], in accordance with *Swift*, that interest could not be allowed in respect of a requisition of goods unless the statute or regulation authorising the requisition itself authorised the allowance of interest. Rich J, in dissent, decided[216] on the basis that, although *Swift* had determined that the power to award compensation did not include power to award interest, their Lordships had not decided what was just in respect of the payment of interest. Read in light of s 51(xxxi) of the *Constitution*, s 67 of the *Defence Act* was to be understood as providing for just compensation, and compensation was not just unless it provided for both the value of what had been expropriated and the "amount of any damage sustained by [the owner] by reason of the expropriation"[217], which included being deprived of the use of the vessel for the considerable time which it took to assess compensation. Just terms therefore involved as a matter of elementary fairness the payment of interest[218]. Williams J appears to have considered[219] that the payment of interest could have been sanctioned consistently with *Swift* on the basis that the rule in *Pigott's Case*

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212 (1945) 70 CLR 293.

213 *Huon Transport* (1945) 70 CLR 293 at 303.

214 *Huon Transport* (1945) 70 CLR 293 at 329.

215 *Huon Transport* (1945) 70 CLR 293 at 315.

216 *Huon Transport* (1945) 70 CLR 293 at 310.

217 *Huon Transport* (1945) 70 CLR 293 at 306.

218 *Huon Transport* (1945) 70 CLR 293 at 307.

219 *Huon Transport* (1945) 70 CLR 293 at 334-335.

applies to a contract of sale of a ship (such a contract being specifically enforceable), but in any event, like Rich J, his Honour held[220] that, read in light of s 51(xxxi) of the *Constitution*, s 67 of the *Defence Act* was to be understood as providing for recompense on just terms and just terms necessitated the payment of interest "to make the compensation adequate".

144 In light of subsequent developments, however, Dixon J's analysis of the issues was the most significant. His Honour rejected the notion that s 51(xxxi) of the *Constitution* required the payment of interest, on the basis that[221]:

> "the compensation represents, not the income-producing corpus, the capital value of the ships, but hire or charter moneys, a revenue item forming the income produced by the corpus. I do not think that even the American Fifth Amendment makes it necessary to add interest to compensation on revenue account while outstanding …"

145 His Honour also held in effect that, although it could be accepted that the rule in *Pigott's Case* applied to a contract for the sale of a ship, the matter was to be decided according to whether it was possible to extract from the word "recompense" in s 67 of the *Defence Act* authority to award interest. And his Honour held[222] that it was not:

> "If we work out the implications of the word 'recompense' according to ordinary legal principles, we have the decision in *Swift's Case* for our guidance upon the place interest takes in the conception of compensation in English law. As Starke J has pointed out in his judgment, the argument was fully stated by Scrutton LJ that, as his Lordship put it, 'the owner of property seized does not receive full compensation, if he loses the property in one year and only receives the value of the property at the time of loss five years afterwards.' … His dissenting judgment, however, did not prevail and the House of Lords plainly rejected the argument. Our Constitution, when it refers to 'just terms', is placing a qualification on the legislative power it bestows to acquire property compulsorily. But it is, I think, difficult to say that it makes it necessary for the legislature to

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220 *Huon Transport* (1945) 70 CLR 293 at 337-338.

221 *Huon Transport* (1945) 70 CLR 293 at 325.

222 *Huon Transport* (1945) 70 CLR 293 at 326, quoting *Swift and Co v Board of Trade* (1924) 40 TLR 424 at 429.

> give more than the full content of 'compensation', as compensation is understood in English law, and we know from the House of Lords that a right to interest on the amount payable for the thing is not always or necessarily included. Section 51(xxxi) has not the effect of transferring into our Constitution the Fifth Amendment, nor all the glosses placed upon it. But, whatever may be the correct view of compensation forming a replacement of income-producing capital assets, I do not think that we can find in s 67, interpreted in the light of s 51(xxxi), enough to enable us to award interest upon the recompense we now hold to be payable." (footnotes omitted)

146 Importantly for present purposes, it is apparent from that passage of the judgment that Dixon J took *Swift* to have established that interest allowed to compensate a claimant for being kept out of compensation for compulsory acquisition of the claimant's property is not, as a matter of general law, to be regarded as compensation for the compulsory acquisition of the property, and that, as a matter of constitutional law, s 51(xxxi) of the *Constitution* did not necessitate any different conclusion.

147 Subsequently, a similar question arose for consideration in *Marine Board*[223], in which Dixon J approached the matter consistently with the principles which his Honour had essayed in *Huon Transport* but with a different result. The issue there was whether a power to award "compensation" for the requisitioning of a ship included power also to award interest. After referring to *Swift*, Dixon J reiterated[224] that there is a clear difference between a sum awarded or assessed as compensation for the loss of property and a sum awarded for interest or compensation allowed where a claimant has been deprived of the use and occupation of the property without immediate recoupment in money. Consistently with his judgment in *Huon Transport*, his Honour also reasoned[225] that whether a court or tribunal charged under statute with awarding "compensation" for the acquisition of land has power also to award interest depended on the proper construction of the statute. But his Honour concluded[226], in apparent contradistinction to his interpretation of the power to award

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223 (1945) 70 CLR 518.

224 *Marine Board* (1945) 70 CLR 518 at 532.

225 *Marine Board* (1945) 70 CLR 518 at 532-533.

226 *Marine Board* (1945) 70 CLR 518 at 533.

"recompense" in *Huon Transport*, that, absent contrary indication, the statutory power to determine "compensation" for the requisition of a ship could readily be interpreted as extending to awarding what is consequential upon or incidental to the award according to substantive law and equity. Furthermore, his Honour in effect regarded *Marine Board* as distinguishable from *Swift* because, although the rule in *Pigott's Case* did not apply to goods of the kind which had been requisitioned in *Swift*, it did apply to the requisition of a ship of the kind that was in issue in *Marine Board* and so provided a basis in equity for the award of interest[227]. It followed, Dixon J concluded, that, upon the proper construction of the regulations conferring power to award compensation, there was incidental, implied jurisdiction to determine and order that interest be paid.

148 By contrast, Williams J held[228] that the claimant should be paid interest "on the balance of compensation" because the payment of interest was required to make the compensation full and adequate and therefore just; and hence that statutory authority to determine "just compensation" was sufficient to authorise the award of interest. McTiernan J considered[229] the Court to be bound by the authority of *Swift* to hold that interest on compensation is not generally an element in the compensation, but also concluded[230] that the power to award interest was an incident of the jurisdiction to award "just compensation". Similarly, Rich J concluded[231] that interest should be allowed as part of the compensation on just terms. Latham CJ and Starke J, in dissent, held[232] that interest was not part of compensation for compulsory acquisition but rather compensation for delay in making payment of compensation for compulsory acquisition, and, therefore, that there was no jurisdiction to award interest.

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227 *Marine Board* (1945) 70 CLR 518 at 533.

228 *Marine Board* (1945) 70 CLR 518 at 537.

229 *Marine Board* (1945) 70 CLR 518 at 534.

230 *Marine Board* (1945) 70 CLR 518 at 535.

231 *Marine Board* (1945) 70 CLR 518 at 527.

232 *Marine Board* (1945) 70 CLR 518 at 527, 528.

149 Absent authority, there would be something to be said for the view of Lord Clyde in *Commissioners of Inland Revenue v Ballantine*[233] (speaking of an arbitrator's award of interest on a claim by contractors for additional costs, losses and damages) that:

> "In all such cases, however – whether the allowance is wrapped up in a slump award or is separately stated in the decree – the interest calculation is used *in modum aestimationis* only. The interest is such merely in name, for it truly constitutes that part of the compensation decerned for which is attributable to the fact that the claimant has been kept out of his due for a long period of time."

150 As has now been seen, however, although those Justices who comprised the majorities in *Huon Transport* and *Marine Board* did not agree as to whether interest allowed to a claimant for being kept out of compensation is part of that compensation or rather interest on it for being kept out of it – and adding in the views of the dissentients on the point does not produce a majority[234] – the clear balance of persuasion lay with the view that such interest is not part of the compensation for compulsory acquisition but a separate compensation for being kept out of the money. And as a matter of principle, there is no reason to doubt that is so. To adopt and adapt the observation of Lord Sumner in *Swift*[235], an award of interest in the present proceedings is not compensation for the extinguishment of native title but, consistent with the legislative scheme for the establishment and extinguishment of, and compensation for, native title that is set up by the *Native Title Act*, is compensation for being kept out of that amount which the Claim Group should have received at the time of extinguishment. Such a conclusion is consistent with, and indeed favoured by, the terms of s 51(1) of the *Native Title Act*, which refers to the entitlement to compensation under the Act as 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*" (emphasis added).

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233 (1924) 8 TC 595 at 611-612. See also *Federal Wharf Co Ltd v Deputy Federal Commissioner of Taxation* (1930) 44 CLR 24 at 26; [1930] HCA 30.

234 See *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57 at 73-74; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188; [1974] HCA 9; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314; [1987] HCA 34.

235 [1925] AC 520 at 548.

151 The Commonwealth contended that, that being so, it followed that the interest ordered to be paid to the Claim Group was not part of the total compensation payable for the extinguishment of native title within the meaning of s 51A of the *Native Title Act*. That contention should be accepted.

F Cultural loss

152 This part of these reasons is concerned with compensation for the non-economic effect of the compensable acts, consistently with the second of the inquiries required by the statutory definition of native title – the native title holders' connection with the land by reason of their laws and customs.

153 As was observed by the plurality in this Court in *Ward*[236]:

> "the connection which Aboriginal peoples have with 'country' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd* [(1971) 17 FLR 141 at 167], Blackburn J said that: 'the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship … There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole'. It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the [*Native Title Act*]. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer."

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236 (2002) 213 CLR 1 at 64-65 [14].

154 Compensation for the non-economic effect of compensable acts is compensation for that aspect of the value of land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts. It is not just about hurt feelings, although the strength of feeling may have evidentiary value in determining the extent of it. It is compensation for a particular effect of a compensable act – what is better described as "cultural loss".

155 As the trial judge explained, his Honour's task was to determine the essentially spiritual relationship which the Ngaliwurru and Nungali Peoples have with their country and to translate the spiritual hurt from the compensable acts into compensation.

Agreed bases of assessment

156 Specific aspects of the approach to this component of the compensation claim were not in dispute before the courts below or in this Court. There was no dispute that an award of this kind was appropriate and that the award was to be made on an *in globo* basis to the Claim Group with the apportionment or distribution of the award as between members being an intramural matter.

157 Further, there was no dispute that it would not be appropriate for the award to reflect the number of native title holders *at the time that native title was determined to have existed* given that the cultural loss would be suffered by the native title holders as a whole and because of the inter-relationships between members of related country groups and their relationships to the countries of those groups.

158 And, finally, there was no dispute that the assessment of the effects of the acts causing cultural loss could not be divorced from the content of the traditional laws and customs acknowledged and observed by the Claim Group. That is unsurprising. The definition of native title rights and interests in s 223(1) comprises a number of interlocking elements, all of which must be given effect[237], and it is under the laws and customs of the Ngaliwurru and Nungali Peoples that the native title rights and interests in relation to the land are held by the Claim Group.

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237 *Yorta Yorta* (2002) 214 CLR 422 at 440 [33]. See generally *Mabo [No 2]* (1992) 175 CLR 1 at 58, 59-61.

Trial judge

159 The trial judge, in assessing compensation for cultural loss, first identified the nature and extent of the native title holders' connection or relationship with the land and waters by their laws and customs and, second, considered the effect of the compensable acts on that connection. As with the assessment of economic loss, that is also the appropriate approach to the assessment of cultural loss. Accordingly, before turning to consider the various grounds of appeal against the trial judge's determination of cultural loss, it assists to set out, in summary form, the trial judge's identification of the nature and extent of the native title holders' connection to country and the effect of the compensable acts upon it.

160 The trial judge addressed cultural loss (albeit, using different terminology) under three headings – principles, findings and evidence, and consideration – and it is appropriate to restate them under the same headings. At the same time, it is important to recognise the need to read the trial judge's reasons as a whole. As will later become apparent, the Commonwealth and the Northern Territory sought to take particular parts of the trial judge's reasons and focus attention on those parts divorced from their place in the overall findings and reasoning.

Principles

161 After setting out that the claim for this component of compensation was made by the Claim Group on two bases – for loss from diminution in or disruption to traditional attachment to country and for loss of rights to live on, and gain spiritual and material sustenance from, the land – the trial judge identified various facts and matters which he considered were to be taken into account in assessing the effects of the compensable acts on the Claim Group's native title rights and interests.

162 Those facts and matters were: the content of the native title rights and interests; the communal and collective nature of those rights and interests; the fact that the native title rights and interests were non-exclusive; and the fact that this component of compensation had to be assessed by reference to the loss or diminution of the native title rights and interests from the compensable acts and not from earlier, or subsequent, acts, events or effects.

163 The trial judge described the assessment process as complex but essentially intuitive, with the compensation being assessed by reference to the spiritual and usufructuary significance of the area of the land affected relative to the other land that remained available to the Claim Group for the exercise of the native title rights and interests. It was in that context that the trial judge stated it

was necessary to bear in mind that prior to the town of Timber Creek being proclaimed in 1975, European settlement of the area had occurred with the establishment of cattle stations in the late nineteenth century, and that progressively the township became an important centre including from the 1930s, when roads were constructed in the region. As the trial judge recorded, those events would have led to the Claim Group being partly impaired from enjoying their traditional lands – before the compensable acts – and the current claim for compensation had to take into account the extent to which spiritual attachment to the land had already been impaired.

164 The trial judge did not accept, however, that a compensation claim is to be reduced simply because there is other land over which a claim group may have native title rights and interests. Rather, his Honour stated that it is the *consequences of the compensable acts* on the native title rights and interests which are to be compensated and that those consequences do not exist in a vacuum uninformed by the wider areas in respect of which the Claim Group hold and enjoy their native title rights and interests[238]. Further, his Honour rejected the contention that the effect of the acts on native title rights and interests had to be direct. Those findings led his Honour to the conclusion that the Claim Group were entitled to compensation for the loss evoked or caused by the compensable acts but that any loss generally derived from a loss of access to country in the town of Timber Creek and the inability of the Claim Group to exercise their native title rights and interests on that country lay outside the parameters of s 51(1) of the *Native Title Act*[239].

165 Here, the nature and timing of the compensable acts had specific consequences for the assessment of the compensation claim. Many of the compensable acts occurred 30 or so years ago. As a result in part of that being so, the trial judge found that, in assessing the consequences of the compensable acts, it was not appropriate to adopt a lot by lot approach, treating each lot as a boxed quarter acre block[240]. That conclusion was also fortified by the fact that, consistent with the traditional laws and customs of the Ngaliwurru and Nungali Peoples, it was not possible to establish the comparative significance of one act over another; the consequences were necessarily incremental and cumulative and had to be understood in the terms of the pervasiveness of the Dreamings and the

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238 *Griffiths* (2016) 337 ALR 362 at 420 [319].

239 *Griffiths* (2016) 337 ALR 362 at 421 [323].

240 *Griffiths* (2016) 337 ALR 362 at 421 [324]-[325].

sites of significance. Thus, the trial judge found that, subject to the evidence before the Court, it was open to infer from evidence which did not specifically relate to an act or parcel of land that a further sense of loss was felt as a consequence of a compensable act[241].

166 As the trial judge correctly noted, not all groups will be the same and it is not sufficient to assess the effects of compensable acts by reference only to a statement of what would be the native title rights and interests were it not for extinguishment. Instead, the trial judge considered that evaluation of the compensable effects requires an understanding of the relevant effects of the acts on the Claim Group and that, in that respect, evidence about their relationship with country and the effect of the acts on that relationship is paramount. It is the trial judge's findings on those issues that are addressed next.

Findings and evidence

167 The trial judge addressed: the Claim Group's connection to the land; the effects, under their laws and customs, when country is harmed; and, then, the effects of the compensable acts. Again, it is appropriate to take each in turn.

Connection to land

168 Under s 86(1) of the *Native Title Act*, the trial judge received, uncontested, certain of the findings of, and evidence that was before, the trial judge in the native title determination application. The findings adopted[242] included findings that:

(1) the native title holders were linked to the claim area through ancestral ties that go back to *Lamparangana*[243], and well before his time;

(2) the native title holders observe essentially the same rituals and ceremonies as were practised by their ancestors more than a century ago; and that those ritual and ceremonial practices are largely and inextricably bound up with the land and waters in and around Timber Creek;

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241 *Griffiths* (2016) 337 ALR 362 at 421 [326].

242 *Griffiths* (2016) 337 ALR 362 at 421-422 [328]-[332].

243 A senior land owner and relative of members of the Claim Group.

(3) examples of ritual and ceremonial practices included high-order ritual practice, initiating rites, head wetting ceremonies (*Mulyarp*), protection of Dreaming (*Puwaraj*) sites, traditional methods of hunting, fishing and gathering food, and ongoing practice of ritual and exchange (*Winan*);

(4) the native title holders share a set of beliefs that govern the rights and obligations of Indigenous persons who wish to have access to, and use, the land and waters of the region and that those who were *Yakpalimululu* (senior owners of country) could deny access to certain foraging areas, and that if a white person wished to go onto *Yakpali* (country), that person would be expected to ask for permission; the purpose of such a request being to enable the protection of sites of importance to the Ngaliwurru and Nungali Peoples;

(5) according to the traditional laws and customs of the native title holders, spiritual sanctions are visited upon unauthorised entry onto country or, as the Full Court in the native title determination application described it, the native title holders are the gatekeepers for preventing harm to others and avoiding injury to country;

(6) certain restricted evidence, given before the trial judge in the native title determination application, pointed to a link between the symbols of the higher-order ritual, and proprietary interests in land. The rituals and ceremonies signal a right to country which stems from the Dreamings;

(7) there is in place, in Timber Creek, a system of normative rules that governs a continuing ritual tradition which articulates an "owner's" right to country that passes through descent;

(8) the laws and customs upon which the normative system rests are part of a conservative oral tradition that would be unlikely to be amenable to significant change; and

(9) the native title holders had a duty and concern to look after country.

169 These findings require some further explanation. The trial judge made extensive reference to an expert anthropologists' report by Kingsley Palmer and Wendy Asche ("the Palmer and Asche 2004 Report") on the rights and duties under Ngaliwurru and Nungali law and custom to look after and speak for

country, which his Honour found was supported by the lay evidence of the claimants[244].

170 Palmer and Asche reported sites of significance in and around the claim area and the travels of major Dreamings through the claim area. Palmer and Asche explained that Dreamings are spiritual beings that performed actions that resulted in physical and spiritual modifications to the countryside. As some Dreamings ranged widely over the landscape their spirituality is believed to encompass more than one country. The relationship between an individual and the Dreamings is a personal one. Dreaming is regarded as an absolute force and its requirements and mandates have about them the immutable quality of law.

171 Four major travelling Dreamings through Timber Creek were reported on, and documented in a map, by Palmer and Asche: *Wirip* (Dingo), *Marna* (Fish), *Wuguru* (Humpyback) and *Lirimin* (Centipede). The tracks the Dreamings took were also later documented alongside the locations of sacred sites on a map adopting the same data entered into the Northern Land Council's Geographic Information Systems to produce the map annexed to the Palmer and Asche 2004 Report. The later map was tendered before the trial judge. That map, shown below, identifies the lots on which the compensable acts occurred (in brown) as well as the sites of significance (marked with purple dots) and the tracks of the Dreamings (coloured in accordance with the key given).

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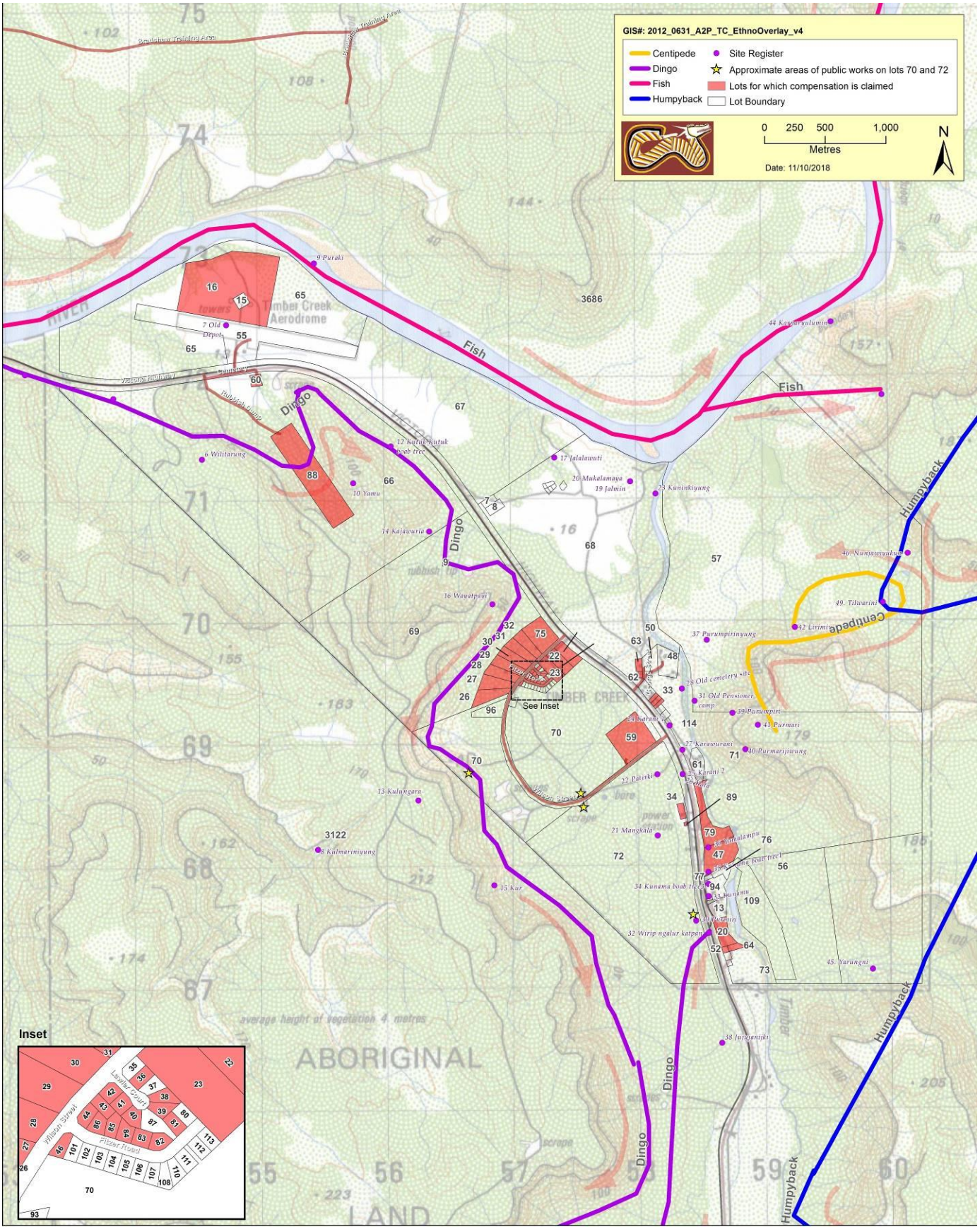
244 *Griffiths* (2016) 337 ALR 362 at 423 [337].

Kiefel *CJ*
Bell *J*
Keane *J*
Nettle *J*
Gordon *J*



172 The relationship between the spirituality of the Dreamings and the sites was described by Palmer and Asche in these terms:

> "In our view sites are a pivotal Dreaming reference and represent, in the applicants' belief, an important attestation of the powerful spirituality of the Dreaming. … [T]he power … underpins the system whereby the applicants consider their world to be ordered. … Sites are then far more than places or lists of named locations. They should also be understood as meta-place, that is a reference to a place is also a reference to a whole range of spirituality and associated imperatives that inform social exchanges, cultural activity and determine priorities." (footnote omitted)

173 As the map illustrates, there were compensable acts on lots on which there are sites of significance. By way of example, on lot 79, where the compensable act was the grant of a lease to the Timber Creek Community Government Council, there is *Yamalampu* (site 36), and on the adjacent lot 47, where the compensable act was the grant of a lease to an individual, there is the *Kunuma boab tree* (site 35). That list is not exhaustive.

174 There are also compensable acts which intersect with the Dingo Dreaming track: namely, acts 46 and 53[245] on part of lot 70 and on lot 88 respectively. And, although several sites of significance are situated outside the claim area, numerous of those sites are adjacent or close to lots on which compensable acts took place including the old depot (site 7) adjacent or close to lot 16; *Yamu* (site 10) close to lot 88; and *Wirip ngalur katpan* (site 32) close to lots 20, 52 and 64. Again, that list is not exhaustive.

175 Palmer and Asche observed that although country is defined by reference to named sites and by reference to the Dreamings which are believed to have ordained and sanctified the sites, many of the Dreamings wandered over areas of country with the result that their identity was not confined to bounded segments of the landscape but was pervasive. The sites were well understood as focal points of Dreaming spirituality, but not easily bounded.

176 The Ngaliwurru and Nungali Peoples' connection to country is unique, deep and broad. To explain the fact and nature of the link between that connection and the harm caused by the compensable acts, the trial judge had to

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245 As to the nature of those acts, see *Northern Territory v Griffiths* (2017) 256 FCR 478 at 485-487 [10].

first consider, in general terms, the effects under Ngaliwurru and Nungali laws and customs when country is harmed, before turning to consider the effects of the compensable acts.

Effects under laws and customs when country is harmed

177 The effects on the Ngaliwurru and Nungali Peoples under their traditional laws and customs, when their country is harmed, were illustrated by reference to four events that occurred in Timber Creek which were not the direct result of compensable acts.

178 The first event was the building of a causeway across Timber Creek to the rear of lot 20, without asking for permission, that interfered with site 32, *Wirip ngalur katpan* (a Dingo Dreaming site), and which the native title holders believe caused the subsequent death of the man who built the causeway, in a car accident. This event requires further explanation.

179 The Palmer and Asche 2004 Report referred to both the *Wirip* (Dingo Dreaming) – who is believed to have travelled from the west of the application area, south down the eastern side of the escarpment which forms the western wall of the Timber Creek valley, and eventually back to Timber Creek itself – and the site, at least at that time, of the caravan park – where the Dingo ended up as a rock in the creek. The track is marked in purple on the map. The Dingo was responsible for bringing the *Winan* and setting out its route. Palmer and Asche explained in a subsequent report ("the Palmer and Asche 2015 Report") that the mythological *Wirip* came and laid his spiritual presence under the rocks. The site of significance, *Wirip ngalur katpan* (site 32), appears adjacent to, not on, lot 20.

180 The evidence disclosed that at some time during the last 20 years, a European man built a large concrete causeway across Timber Creek to create a swimming pool. In the Palmer and Asche 2015 Report it is estimated that the concrete extended for some 30 m across the creek, was 10 m wide and was placed partially on top of rocks, which were by then flooded and could not be seen. The claimants gave evidence of the effect of this act – it made them feel bad; they did not want the rock under the water, they wanted it on the water. JJ (now deceased) stated that the concrete causeway at that site:

> "blocked the tunnel and cut the life out of the Dreaming. It is still there but you can't see it any more. That *Wirip* Dreaming is very important to us. We use that Dreaming story when we have initiation for the young fellas. Now it's damaged for good and we can't tell the young fellas the

full story. If they can't see the Dreaming its [sic] hard for us older fellas to tell them the full Dreaming story they need to learn to grow up.

…

There are many places in town where *gardia* [white people] have damaged sites that are important to Aboriginal people, and they stop us getting to places where we get bush tucker from. The dam at *Wirip Ngalur Katpan*, and the water tanks on the hill and Wilson Street, were built after the land claim with Justice Maurice. No one asked Aboriginal people for permission, which they should have. The water tanks were built right across the *winan* track near *Kulungara* (site 11), the cave on the hill. The resource centre in Wilson Street was built right on top of the helmet, or head dress, of the *wirip*. The water tanks are on the path of the *wirip* who brought the *winan* trade here. The old people used that track before us for the *winan*.

Winan is an old Aboriginal trade that follows the Dreaming. Different Aboriginal groups along the trade route, and along the tracks where the Dreamings travelled, have to look after each other. Each group has to look after its bit of the Dreaming. If something goes wrong with our part, others think we are no good. That's what happened when all of these things have been built in the town. Other Aboriginal people complain about it and say that we are letting them down.

…

It hurts my feelings when *gardia* do these things. They go ahead without talking to the old fella [AG (now deceased)] or me. When I see the Dreaming being damaged, I feel for my old people. I feel ashamed, like I've done the wrong thing myself in not looking after the country, the sites and the Dreaming. And [AG (now deceased)] gets cross with me. He says I am letting down the old people."

The evidence about that event is significant: it explains the breadth and depth of the claimants' spiritual connection to the land; it explains that their loss of connection to country is incremental and cumulative and has to be understood in terms of the pervasiveness of the Dreamings and the significant sites; it explains the continued significance of site 32 on which the causeway was built, a site adjacent to lot 20, a lot where a compensable act took place; it explains that failed sense of responsibility to protect the land and, thus, it explains why that compensable act itself has a compensable effect which is not one dimensional.

181 The other events are significant for substantially the same reasons. The second event was the wish of the Commonwealth Department of Defence to construct and use a bridge over the Victoria River, just outside of the town ("the Army Bridge"), which resulted in payment of compensation to the native title holders in 2003. The site first proposed for the Army Bridge was near a Dingo Dreaming site, *Palawa*. AG (now deceased) gave evidence that he told the Army that they could not build the bridge on that site and while he remained worried that the bridge might still interfere with *Marna* (Fish Dreaming) because "they been cut the body of the barramundi *wandiman* who bin walk across", he agreed that the bridge could be built at the second location away from the Dreaming. The Palmer and Asche 2015 Report recorded that whilst the Army Bridge was the subject of consultations with the native title holders, some claimants regarded the structure as damaging "the spiritual essentialities of the Dreaming".

182 The third event was the scraping of gravel from a site on the Dingo Dreaming without asking permission of the native title holders. A claimant (AG, now deceased) gave evidence that the person concerned was told to stop taking the gravel because it was cutting the *Wirip's* (Dingo's) body, and no more gravel was taken. Both AG (now deceased) and JJ (now deceased) told Palmer and Asche in 2011 that they were responsible for keeping the site safe and could get in trouble from other people if the site were damaged; that they felt guilt and shame about the damage done to the site; and that it made them feel no good inside and upset. As AG (now deceased) put it, "I feel bad every time I go down to see what been happenin'".

183 The fourth event was a proposal to mine for diamonds on a hill on the edge of the town known as *Japajani*, a site which, under traditional laws and customs, was considered dangerous. AG (now deceased) gave evidence that no one went to the hill because they would die if they did.

184 In addition to these events, the trial judge accepted[246] the evidence of another claimant (JJ, now deceased) that non-Indigenous people should stay away from sites of significance including not going to, and fishing from, the water hole known as *Tilwarni* (site 49), a site of *Wuguru* (Humpyback Dreaming). As JJ (now deceased) put it, "you can't just walk into any European's

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246 *Griffiths* (2016) 337 ALR 362 at 425-426 [345].

little block of land and do what you want to do. And why they go onto Aboriginal land and do what they want to do?"[247]

Effects of the compensable acts

185 It was against that background that the trial judge then considered the effects of the compensable acts the subject of the compensation claim.

186 The trial judge referred generally to evidence led at trial by the Claim Group about the effects of loss of country and the effects of the compensable acts on the exercise of rights to country[248]. During the hearing of these appeals, the Claim Group identified that evidence as affidavit evidence from JJ (now deceased), Lorraine Jones and AG (now deceased); oral evidence given by JJ (now deceased), AG (now deceased), Chris Griffiths, Josie Jones and Lorraine Jones; and outlines of evidence given by Josie Jones and Roy Harrington.

187 In considering that evidence it is necessary to say something about the notion of diminution in connection. As already explained, the connection is spiritual. That is, the connection is something over and above and separate from "enjoyment" in the sense of the ability to engage in activity or use. Spiritual connection identifies and refers to a defining element in a view of life and living. It is not to be equated with loss of enjoyment of life or other notions and expressions found in the law relating to compensation for personal injury. Those expressions do not go near to capturing the breadth and depth of what is spiritual connection with land.

188 Some of the evidence of the claimants was general in nature – addressing the effect of acts being done on land without permission, and damage to the Dreamings, without expressly referring to particular sites of significance or areas of land, and therefore not expressly linked to any particular compensable act. But that is unsurprising. And it does not detract from the real and significant effects on the Ngaliwurru and Nungali Peoples' connection to country.

189 The evidence given by two of the claimants, both of whom are now deceased, is illustrative. Some of the evidence given by JJ (now deceased) has

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247 *Griffiths* (2016) 337 ALR 362 at 426 [347].

248 See *Griffiths* (2016) 337 ALR 362 at 426 [348].

already been addressed[249]. The evidence of AG (now deceased) was in similar terms:

> "Every time I come … there seems to be something new in Timber Creek. Each time something new. Might be a new building, a new road, or someone taking gravel. That hurts my feelings and makes me angry. … *[G]ardia*, white fellas, don't do the right thing. …
>
> *Gardia* put up fences and build things without asking us, and we can't get to our hunting grounds and where we get bush tucker.
>
> You can't do things on Aboriginal country without first asking the traditional owners. If you do things without asking then you get into trouble.
>
> There are places in Timber Creek where the Dreaming has been cut up. I gave evidence to Justice Weinberg about that in the Timber Creek native title claim. I told the Judge about what happened at *Wirip Ngalur Katpan* and how that white fella, [who built the causeway at *Wirip Ngalur Katpan*], died because he did the wrong thing. I told the Judge that if that white fella didn't die, he would have to pay. But that wouldn't fix the Dreaming up. He damaged the *Wirip* Dreaming. That dingo is still there but we can't see it anymore because of what that white fella did. If we can't see it, we have trouble telling our young fellas in initiation the story they need to know to grow up. …
>
> Those kinds of things make me angry and sad. When things go wrong like that then the old people; and other Aboriginal people, will think that I can't look after country properly. That makes me feel ashamed."

190 After considering that evidence, the trial judge made the following further findings on the effects of the compensable acts:

(1) the effect of dispossession, being that unless the dispossession ends, the hurt feelings continue and are persistently aggravated[250];

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249 See [180], [182], [184] above.

250 *Griffiths* (2016) 337 ALR 362 at 428 [358]. See also *Northern Territory v Griffiths* (2017) 256 FCR 478 at 545 [263].

(2) by erecting fences and buildings, the acts impeded the exercise of native title rights and interests including access to hunting grounds, and there was also evidence of a reduction of bush tucker[251];

(3) there was destruction or damage to significant sites, such as the construction of water tanks on the Dingo Dreaming on part of lot 70[252], which is addressed in further detail below;

(4) the acts had effects on adjacent areas, which were still of importance to the Claim Group[253], despite, for example, the area no longer being a secure ritual ground; and

(5) the acts impeded the ability of the Claim Group to practise their traditions and customs, even when the acts had not entirely destroyed that ability[254].

191 Significant evidence was given about the effect of the construction of water tanks in 1980 on part of lot 70, which were public works and a compensable act. The location of the tanks is marked on the map by the star on the Dingo Dreaming near the south-west border of lot 70. Both JJ (now deceased) and AG (now deceased) gave evidence on country that the construction of the water tanks interfered with the Dingo Dreaming and the trade (*Winan*) for which the *Wirip* (Dingo) was responsible. Whilst on country, JJ (now deceased) put it in these terms: "Well, you look at that country what can I say there? No tank there. Why they got to build it up? Well, they've got a big mob of steel thing. Why they been build it up". The evidence of JJ (now deceased) was that in his heart the tanks should not be there, that it does not make him feel good and it hurts him – he feels *puru maring*. Palmer and Asche described *puru maring* as "[i]ntense personal feelings that accompany an act of spoiling" and likened it to English "gut wrenching".

192 Other compensable acts on lots on which there are sites of significance were specifically addressed in the evidence. For example, in relation to the grant

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251 *Griffiths* (2016) 337 ALR 362 at 428 [360]. See also *Northern Territory v Griffiths* (2017) 256 FCR 478 at 545 [264].

252 See *Griffiths* (2016) 337 ALR 362 at 427 [352].

253 *Griffiths* (2016) 337 ALR 362 at 428 [361]; see also at 432 [379].

254 *Griffiths* (2016) 337 ALR 362 at 429 [362].

of a lease to the Timber Creek Community Government Council, JJ (now deceased) gave evidence that council buildings were built (on lot 79) where there is a site of *Yamalampu* (Spider Dreaming) (site 36). He explained:

> "We were told that it was *gardia* land and that a government Department in Darwin made a decision about where the Council buildings were to go. That's not right. It is our country, not *gardia* land. If we were asked, we would have told them to build it a long way away from *Yamalampu* like where the football oval is opposite the police station."

JJ (now deceased) then said that it "hurts [his] feelings when *gardia* do these things"[255].

193 Josie Jones gave similar evidence about the adjacent lot 47, involving the grant of a lease to an individual on which there is the *Kunuma boab tree* (site 35).

194 As the trial judge explained, the evidence revealed not only a duty but also a concern to look after country[256]. That evidence, given by the claimants, was found by the trial judge to be strong and compelling and the beliefs expressed were found to be genuinely held, demonstrating a deep connection to country[257]. In short, the trial judge found that the lay evidence, supported by Palmer and Asche, was that loss of, and damage to, country caused emotional, gut-wrenching pain and deep or primary emotions accompanied by anxiety for the Claim Group[258].

195 On the other hand, the trial judge accepted that the Claim Group's attachment to country was not entirely lost because, despite the development of the town and the fencing of some of the lots, the compensable acts did not remove all of the native title within the township of Timber Creek[259], and referred to evidence that suggested that some developments in Timber Creek were acceptable under the traditional laws and customs of the Ngaliwurru and Nungali

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255 See also [180] above.

256 *Griffiths* (2016) 337 ALR 362 at 425-426 [345].

257 *Griffiths* (2016) 337 ALR 362 at 426 [348].

258 *Griffiths* (2016) 337 ALR 362 at 426-427 [350]-[354].

259 *Griffiths* (2016) 337 ALR 362 at 429 [364]; see also at 431-432 [377].

Peoples. The developments that were acceptable to at least some members of the Claim Group were identified by the trial judge as including the construction of houses on Wilson Street, the construction of the Army Bridge, to which reference has already been made[260], and the erection of the Ngaringman Resource Centre, where Indigenous law and custom recognised the helmet or headdress of the *Wirip* (Dingo) was located.

Consideration

196 The final aspect of the trial judge's consideration of the effects of the compensable acts was in four distinct, but interconnected, parts. First, his Honour found it was appropriate to have regard to considerations in r 9(2)(a)-(f) of Sch 2 to the *Lands Acquisition Act* (NT)[261]. As explained earlier, reference to the "rules for the assessment of compensation" set out in Sch 2 to that Act was permitted but not required.

197 Next, the importance of the earlier section headed "Findings and evidence", although in parts general in nature, became evident. His Honour rejected the contention that there could be a significant area of landscape that is unimportant to Aboriginal peoples, or that there could be an area devoid of spirituality, stating that such a contention "defies logic in the Aboriginal tradition"[262]. His Honour then found that dispossession, and consequential injury to feeling, had occurred after generations of ongoing traditional but impaired connection, and had an "immediate effect to the native title holders"[263]. As his Honour described it, the effects were not limited to access to and use of the land but had to be understood by the bond that existed between a person and the spirituality of country[264].

198 Those findings bring together, and emphasise the importance of, his Honour's earlier findings, in particular that: in assessing the non-economic consequences of the compensable acts it was not appropriate to adopt a lot by lot

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260 See [181] above.

261 *Griffiths* (2016) 337 ALR 362 at 430 [368]-[369].

262 *Griffiths* (2016) 337 ALR 362 at 430 [370].

263 *Griffiths* (2016) 337 ALR 362 at 431 [371].

264 *Griffiths* (2016) 337 ALR 362 at 431 [372].

approach, treating each lot as a boxed quarter acre block, given that many of the compensable acts occurred 30 or so years ago and because, under the traditional laws and customs of the Ngaliwurru and Nungali Peoples, ancestral spirits, the people, the country and everything that exists on it are to be viewed as one indissoluble whole; the consequences were necessarily incremental and cumulative; it is not possible to establish the comparative significance of one act over another; and the loss was significant and keenly felt, and the effects of the acts had ongoing present day repercussions.

199 Then, after again describing the assessment of the appropriate compensation as a most complex one, the trial judge identified, and restated, particular considerations[265]: the Aboriginal spiritual relationship to land encompasses all of the country of a particular group, and not just "sacred sites"; the destruction of a particular sacred site may have implications beyond its physical footprint because of the spiritual potency of the site or because of the level of responsibility or accountability for the site which has not been honoured; the relationship of the Claim Group to their country, including Timber Creek, is a spiritual and metaphysical one which is not confined, and not capable of assessment on an individual small allotment basis; there were areas of country of particular significance to the Claim Group and other areas less significant; and the appropriate level of compensation must take into account the fact that prior to the compensable acts, there had been a progressive impairment of native title rights and interests but that the compensable acts did not remove all of the Claim Group's native title within the area.

200 Finally, the trial judge referred to what his Honour described as "three particular considerations of significance to the assessment of the appropriate amount of compensation"[266]: the construction of the water tanks on the path of the Dingo Dreaming on part of lot 70, which had caused significant distress and concern; the extent to which certain of the compensable acts affected not only the precise geographical area of the lot on which the act took place but, in a more general way, related areas (described by the Full Court as "collateral detrimental effect"[267]); and the fact that each of the compensable acts to some degree "chipped away" at the geographical area resulting in incremental detriment to the enjoyment of the native title rights and interests over the entire area leading to a

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265 *Griffiths* (2016) 337 ALR 362 at 431-432 [375]-[377].

266 *Griffiths* (2016) 337 ALR 362 at 432 [378]; see also at 432 [379]-[381].

267 See *Northern Territory v Griffiths* (2017) 256 FCR 478 at 552-554 [293]-[303].

collective diminution of the Claim Group's cultural and spiritual connection with the land and a sense of failed responsibility, under the traditional laws and customs, to have cared for and looked after the land.

201 These "three particular considerations" were the focus of significant parts of the arguments advanced by the Commonwealth and the Northern Territory in the Full Court and in this Court. Before identifying, and dealing with, those arguments it is necessary to say more about the three considerations identified by the trial judge.

202 The evidence of the effect of the construction of the water tanks has been addressed[268]. The extent to which the compensable acts had a collateral detrimental effect has also been addressed[269]. Given the structure of and findings in the earlier parts of that section of the trial judge's judgment, it is unsurprising that his Honour referred to the collateral detrimental effect of the compensable acts. Collateral detrimental effect was and remains significant. His Honour illustrated the significance of this consideration by referring, in general terms, to gender-restricted evidence given about the effect upon the capacity of the Claim Group to conduct ceremonial and spiritual activities on an area adjacent to the compensable acts which he identified as a ritual ground ("the Restricted Evidence"). The Restricted Evidence was heard on country. It must be accepted that the Restricted Evidence does not clearly identify the adjacent lands as engendering feelings of hurt or loss in the Claim Group. Indeed, it is not easy to discern from the transcript what was conveyed to the trial judge there and then, including by gestures. It is apparent from the transcript, however, that the trial judge saw how proximate the lots in question are to the ritual grounds and it is clear that three compensable acts were adjacent to the identified area – acts 43 and 44 (which included the construction of houses) on lots 62 and 63, and act 59 (the construction of a public road leading to those lots).

203 His Honour did not find that the effect of the compensable acts was the cessation of the use of the ritual ground; that had occurred some years earlier. Indeed, subsequently, the Claim Group performed the ritual elsewhere. What his Honour sought to explain was *why* he was taking account of the effects of compensable acts on an adjacent area – a ritual ground – as diminishing the cultural and spiritual connection of the Claim Group to those grounds when the

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268 See [191] above; see also [180].

269 See [190(4)], [199] above; see also [180].

acts did not directly affect those grounds and the use of the grounds had already been significantly impaired by an earlier, non-compensable act.

204 The answer his Honour gave was that an impairment of an Aboriginal person's spiritual connection to land is not to be understood by reference to what occurs on a particular lot or lots. It is to be understood more generally by reference to his or her feelings about loss of connection with country, which can be incremental. It was for those reasons that his Honour referred to the ritual ground to reinforce the fact that it would be wrong to consider each act in isolation. Each act affected native title rights and interests with respect to a particular piece of land. But each act was also to be understood by reference to the whole of the area over which the relevant rights and interests had been claimed. His Honour accepted that account must be taken of the extent to which spiritual attachment to land has already been impaired, but said that a further sense of loss "which does not specifically relate to an act or parcel of land"[270] may be felt.

205 The earlier acts, which were not compensable, punched holes in what could be likened to a single large painting – a single and coherent pattern of belief in relation to a far wider area of land. The subsequent compensable acts punched further holes in separate parts of the one painting, and the damage done was not to be measured by reference to the holes created by the compensable acts alone, but by reference to the effect of those holes in the context of the wider area: for example, an area which, as the trial judge found, remained important to the Ngaliwurru and Nungali Peoples despite the fact that the area was no longer able to be used as a ritual ground.

206 This analysis reinforced what his Honour had said earlier: the consequences of acts can be incremental and cumulative; the people, the ancestral spirits, the land and everything on it are "organic parts of one indissoluble whole"; the effects on the sense of connection are not to be understood as referable to individual blocks of land but understood by the "pervasiveness of Dreaming"; the effects are upon an Aboriginal person's feelings, in the sense of his or her engagement with the Dreamings; an act can have an adverse effect by physically damaging a sacred site, but it can also affect a person's perception of and engagement with the Dreamings because the Dreamings are not site specific but run through a larger area of the land; and as a person's connection with country carries with it an obligation to care for it,

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270 *Griffiths* (2016) 337 ALR 362 at 421 [326].

there is a resulting sense of failed responsibility when it is damaged or affected in a way which cuts through the Dreamings.

207 After recognising that the three particular considerations had been experienced by the Claim Group for some three decades and that the effect of the acts had not dissipated over time, his Honour found that the compensation should be assessed for the loss of cultural and spiritual relationship with the lots affected by the compensable acts for that period and for an extensive time into the future[271].

208 His Honour assessed the appropriate level of compensation at $1.3 million[272].

Full Court

209 On appeal to the Full Court, the Commonwealth and the Northern Territory challenged the reasoning of the trial judge in respect of the three particular considerations to which reference has been made; put in issue the inclusion of an allowance for three decades or so of past loss, and loss for an extensive time into the future; and contended that the trial judge had failed to adequately address the Claim Group's alleged approval of acts on land over which they claimed native title rights and interests. Each appeal ground was rejected by the Full Court.

210 The Full Court also rejected a contention that the compensation award was manifestly excessive[273]. The Full Court found that the award of $1.3 million was within the permissible range on the evidence, taking into account the nature of the rights and interests and the nature of the loss[274]. Thus, no occasion arose for that Court to reassess the amount to be awarded[275].

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271 *Griffiths* (2016) 337 ALR 362 at 433 [382].

272 *Griffiths* (2016) 337 ALR 362 at 433 [383].

273 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 569-578 [379]-[420].

274 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 577 [412].

275 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 578 [420].

Appeal grounds in this Court

211 The grounds of appeal in this Court are set out at the start of these reasons. The various appeal grounds of the Commonwealth and the Northern Territory sought to raise, in substance, the same issues agitated before the Full Court, namely:

(a) the trial judge's treatment of the three particular considerations[276];

(b) the inclusion of a component for the purported effect of compensable acts on future descendants of the Claim Group;

(c) whether the trial judge had taken into account the extent of land that remained available to the Claim Group to exercise and enjoy their traditional rights, in comparison to the relatively small area of land that was subject to compensable acts;

(d) what was said to be a failure of the trial judge to adequately address the Claim Group's alleged approval (by way of commercial agreements) of acts on land over which they claimed native title rights and interests; and

(e) whether the compensation award was manifestly excessive.

212 The Commonwealth also sought to argue, as part of the reason for contending that the award was manifestly excessive, that the Full Court had breached the rules of natural justice in having regard to certain material without giving the parties the opportunity to controvert or comment on that material.

Assessment of cultural loss

213 Before addressing the specific arguments raised before this Court, it is necessary to make some overarching observations.

214 As explained above[277], there were certain aspects of the approach to assessment of cultural loss that were not in dispute: that an award for cultural loss was appropriate; that the award was to be made on an *in globo* basis to the Claim Group with the apportionment or distribution of the award being an

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276 See [200] above.

277 See [156]-[158] above.

intramural matter; that it would not be appropriate for the award to reflect the number of native title holders at the time that native title was determined to have existed given that the cultural loss would be suffered by the native title holders as a whole and because of the inter-relationships between members of related country groups and their relationships to the countries of those groups; and that the assessment of the effects of the acts for cultural loss could not be divorced from the content of the traditional laws and customs acknowledged and observed by the Claim Group.

215 Moreover, the Commonwealth and the Northern Territory face the unanimous findings of fact to which extensive reference has been made. Those findings depended, in large part, upon the trial judge's assessment of the oral evidence given by the claimants, including his visit to country and his assessment of their connection to that country and the nature and extent of the effects of the harm to country caused by the compensable acts.

216 As the trial judge said, the assessment was complex. Part of the difficulty arises because, in assessing the entitlement of the native title holders under s 51(1) of the *Native Title Act* to compensation on just terms for any loss, diminution, impairment or other *effect of the act* on their *native title rights and interests*, the Act requires compensable acts to be identified but, as the trial judge explained, the task then is to determine the essentially spiritual relationship which the Ngaliwurru and Nungali Peoples had with their country and to translate the spiritual hurt caused by the compensable acts into compensation. The grounds of appeal of both the Commonwealth and the Northern Territory, however, proceeded from a different, and incorrect, approach to the statutory task: that s 51(1) of the Act requires identification of a compensable act and, in assessing the effect of that act, s 51(1) imposes specific temporal and physical limits which do not extend to collateral detrimental effects. It does not.

217 Section 51(1) provides for compensation on just terms for any loss, diminution, impairment or other *effect of the act on native title rights and interests*. The inquiries will vary according to the compensable act, the identity of the native title holders, the native title holders' connection with the land or waters by their laws and customs and the effect of the compensable acts on that connection. Thus, what might be an appropriate award of compensation will vary according to the results of those separate but inter-related inquiries. So, for example, as noted earlier, a sense of loss of connection to country resulting from the loss, diminution, impairment or other effect of an act on native title rights and interests in areas where land has been developed may prove less than the sense of loss of connection to country in relation to native title rights and interests in remote, less developed, areas. That is because, depending on the

facts of the case, the sense of connection to country may have declined in developed areas (with higher economic value) as a result of encroaching developments before the act of extinguishment or other compensable diminishment. Where that is so, the amount to be awarded for non-economic loss will be less.

218 The court's task of assessment under s 51(1) is necessarily undertaken in the particular context of the *Native Title Act*, the particular compensable acts and the evidence as a whole. As the trial judge found, s 51(1) does not in its terms require that the detrimental consequence directly arise from the compensable act. The task required by s 51(1), as the sub-section itself recognises, requires a number of separate but inter-related steps: identification of the compensable acts; identification of the native title holders' connection with the land or waters by their laws and customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection.

219 In considering, and analysing, each of those separate but inter-related steps, the trial judge made extensive findings. Each act affected native title rights and interests with respect to a particular piece of land. But each act was also to be understood by reference to the whole of the area over which the relevant rights and interests had been claimed. As was explained earlier, each act put a hole in what could be likened to a single large painting – a single and coherent pattern of belief in relation to a far wider area of land. It was as if a series of holes was punched in separate parts of the one painting. The damage done was not to be measured by reference to the hole, or any one hole, but by reference to the entire work. Given those findings, it would be wrong to consider each compensable act in these appeals in isolation.

220 What has already been said in these reasons rejects central elements of the arguments advanced in this Court on behalf of the Commonwealth and the Northern Territory. It is, however, necessary to say something more about particular aspects of those arguments.

Three particular considerations

221 Much of the argument in this Court was directed to a contention that the three particular considerations in the final section of the trial judge's reasons on the issue of non-economic, or cultural, loss were determinative of his Honour's reasoning and that, if none of the considerations was justified (the Commonwealth and the Northern Territory taking issue in particular with the second and third considerations), the trial judge's entire reasoning was undermined.

222 That contention proceeds from a misreading, or misunderstanding, of the trial judge's assessment of compensation for cultural loss. Given the complexity of the assessment task, focusing on one aspect of one part of the trial judge's reasons is apt to result in error. The structure, content and reasoning of the trial judge's judgment have been addressed[278]. As is apparent from that analysis, the contention that the three particular considerations in the final section of the trial judge's reasons on the issue of non-economic, or cultural, loss were determinative of his Honour's reasoning is not supported by a fair reading of those reasons.

223 The use of, and reference to, the three particular considerations was to reinforce what his Honour had said earlier: the consequences of acts can be incremental and cumulative; the people, the ancestral spirits, the land and everything on it are "organic parts of one indissoluble whole"; the effects on the sense of connection are not to be understood as referable to individual blocks of land but understood by the "pervasiveness of Dreaming"; the effects are upon an Aboriginal person's feelings, in the sense of a person's engagement with the Dreamings; an act can have an adverse effect by physically damaging a sacred site, but it can also affect a person's perception of and engagement with the Dreamings because the Dreamings are not site specific but run through a larger area of the land; and as a person's connection with country carries with it an obligation to care for it, there is a resulting sense of failed responsibility when it is damaged or affected in a way which cuts through Dreamings. And it must be recalled that the trial judge did so in the context of the area of land that remained available to the Claim Group to exercise and enjoy their traditional laws and customs on country relative to the area the subject of the compensable acts[279].

224 That reasoning of the trial judge did not reveal legal error. It was the task required by s 51(1) of the *Native Title Act*: identification of the compensable acts; identification of the native title holders' connection with the land or waters by their laws and customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection. As s 51(1) itself recognises, the steps are separate but inter-related.

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278 See [159]-[208] above.

279 See *Griffiths* (2016) 337 ALR 362 at 417 [302], 420-421 [319]-[323]. See also *Northern Territory v Griffiths* (2017) 256 FCR 478 at 566-567 [370]-[373].

225 Thus, the Full Court were right to reject the specific complaints made by the Commonwealth and the Northern Territory that the trial judge was wrong to give any weight to the second and third considerations – the extent to which the compensable acts affected not only the precise geographical area of the lot on which the act took place, and the fact that each of the compensable acts to some degree "chipped away" at the geographical area resulting in incremental detriment to the enjoyment of the native title rights and interests over the entire area leading to a collective diminution of the Claim Group's cultural and spiritual connection with the land and a sense of failed responsibility, under the traditional laws and customs, to have cared for and looked after the land.

226 Contrary to the submissions of the Commonwealth and the Northern Territory, the trial judge would have been wrong not to take account of these matters. That is so given the nature and extent of the collateral detrimental effects of the compensable acts found by the trial judge[280]. Each effect was found by the trial judge to be "by the act". Each effect was, in a practical sense[281], caused by the compensable act. A failure to take account of those effects in assessing the compensation claim would have ignored critical aspects of those findings – critical parts of the overall picture – and resulted in legal error.

227 For those reasons, those complaints of legal error on the part of the trial judge should be rejected.

Effect of compensable acts on future descendants

228 The Commonwealth contended that the amount awarded by the trial judge, and upheld by the Full Court, erroneously treated future descendants of the Claim Group as suffering from compensable loss. That contention should be rejected.

229 The trial judge was not asked to, and did not, make a finding that the compensable loss (or each compensable act) was suffered by a finite group of persons for a period of time which had a definite end point. Indeed, the description of the "native title holders" who were entitled to compensation under this claim was an agreed fact and was a description that enables the

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280 See, eg, [168]-[208] above.

281 See *Griffiths* (2016) 337 ALR 362 at 420 [321], citing *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12.

composition of the group to be determined from time to time as the composition of the group changes as senior members die and new members are born. And it was because of the changing composition of the group that the trial judge recognised that, consistent with s 223(1) of the *Native Title Act*, the entitlement to compensation is a communal or group entitlement, which is of particular significance when assessing the effect of the compensable acts on cultural loss.

230 The duration of the effect of the compensable acts was a factor the trial judge properly took into account[282] and, as the Full Court explained, the loss is permanent and intergenerational. Those findings reflected the lay and anthropological evidence of the Claim Group's connection to the land and the effects, under their laws and customs, when country is harmed, including anthropological evidence that the effects of extinguishment would be experienced differently by members depending on, for example, the person's connection to the place, and his or her age, ritual knowledge and responsibility. They were findings addressing the statutory question submitted by the parties for the determination by the Court; they were not findings directed to assessing whether the loss was suffered by a finite group that has an end point.

231 Moreover, as the Claim Group submitted, on determination of native title, Div 6 of Pt 2 of the *Native Title Act* provides that the Federal Court must make a determination about whether the native title is to be held on trust by a prescribed body corporate[283] and, if such a determination is made, that prescribed body corporate has statutory functions to hold, invest and apply the compensation[284]. The compensation orders made by the trial judge reflect that statutory scheme.

Approval of, and compensation for, acts

232 At trial, the Claim Group tendered commercial contracts entered into by members of the Claim Group which contained provision for payments in the case of damage to, or destruction of, a sacred site. The Commonwealth contended that the trial judge should have considered the contracts and their terms. The Full Court rightly rejected that contention.

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282 See, eg, [165], [190(1)], [198] above; see also [157].

283 *Native Title Act*, ss 55 and 56.

284 *Native Title Act*, ss 56, 58(c), 94; *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), reg 6.

233 As the Full Court recognised, not only did the trial judge consider the extent to which the Claim Group had considered interference with their native title rights and interests to be acceptable[285], but the particular commercial contracts were not material to the assessment. The contracts provided pre-estimates rather than agreed fixed and final amounts of compensation; the contracts included additional terms, such as requiring the contracting party to remedy the damage or to reimburse the traditional owners for the cost of remedial action; and some of the contracts provided that the event (for example, the grant of a lease) did not extinguish native title rights and interests.

Comparative material

234 The Commonwealth contended that the Full Court erred in referring to materials – namely, three decisions of the Inter-American Court of Human Rights in relation to compensation awarded for non-pecuniary loss resulting from loss or impairment of traditional land rights and interests[286], and a paper entitled "How Can Judges Calculate Native Title Compensation?"[287] – without giving the parties an opportunity to controvert or comment on those materials. That contention should be rejected. The Full Court upheld the trial judge's award of compensation independently of, and before referring to, that material. With respect, it would have been preferable if the Full Court had eschewed that material or, had their Honours wished to mention it in the way they did, if they had brought it to the attention of the parties. Mentioning that material in their Honours' reasons without drawing it to the attention of the parties created the risk, which has eventuated, of a misapprehension that the material in part informed their decision, without the parties being afforded an opportunity first to be heard on it. But, for the reasons stated, it is plain that the Full Court reached their conclusion independently of the material. There was no denial of procedural fairness.

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285 See [195] above.

286 See *Northern Territory v Griffiths* (2017) 256 FCR 478 at 573-576 [397]-[405] and the decisions cited therein.

287 See *Northern Territory v Griffiths* (2017) 256 FCR 478 at 576 [406]-[408], citing Burke, "How Can Judges Calculate Native Title Compensation?" (research project commissioned by the Native Title Research Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002).

Compensation award not manifestly excessive

235 Having undertaken the necessary analysis, in relation to which no error has been demonstrated, a monetary figure had to be arrived at. To contend that an award is manifestly excessive invokes the last of the bases for appellate review in *House v The King*[288]: that the assessment is self-evidently wrong as involving manifest excess. The question for this Court is whether the amount is "so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage"[289]. It is not.

236 The trial judge – the judge who saw and heard the evidence – arrived at a figure of $1.3 million. His Honour had the substantial benefit of hearing, and seeing, first-hand the evidence from the Claim Group of their connection to the land; the effects, under their laws and customs, when country is harmed; and, then, the effects of the compensable acts on their connection to and relationship with country. That is reflected in the trial judge's detailed treatment of that evidence and related extensive findings, summarised in the preceding parts of these reasons.

237 Given that this is the first compensation determination to come before this Court, then adapting and adopting what Mahoney A-CJ said in *Crampton v Nugawela*, what, in the end, is required is a monetary figure arrived at as the result of a social judgment, made by the trial judge and monitored by appellate courts, of what, in the Australian community, at this time, is an appropriate award for what has been done[290]; what is appropriate, fair or just[291]. The trial judge was not bound to approach the assessment with particular restraint or limitation[292]. An award of compensation of $1.3 million for the effects of the compensable acts on the Claim Group is an appropriate award. There is nothing

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288 (1936) 55 CLR 499 at 505; [1936] HCA 40.

289 *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13; [1940] HCA 27, quoting *Flint v Lovell* [1935] 1 KB 354 at 360.

290 (1996) 41 NSWLR 176 at 191, quoted in *Griffiths* (2016) 337 ALR 362 at 419 [313].

291 *Crampton* (1996) 41 NSWLR 176 at 195.

292 cf *Skelton v Collins* (1966) 115 CLR 94 at 129-132; [1966] HCA 14; *Sharman v Evans* (1977) 138 CLR 563 at 585; [1977] HCA 8.

to suggest that the trial judge's award would not be accepted by the Australian community as appropriate, fair or just. The amount is not so large that it suggests a failure to apply proper principles by reference to relevant considerations[293]. The amount awarded is not shown to be inconsistent with acceptable community standards, when it is recognised that this aspect of the award is compensation to the Claim Group, on just terms, for the effect of the compensable acts on their native title rights and interests – their cultural loss.

G Orders

238 For those reasons, the following orders should be made:

Matter Nos D1 of 2018 and D2 of 2018

1. Appeal allowed in part.

2. Set aside Order 2 of the Orders of the Full Court of the Federal Court of Australia made on 9 August 2017 and, in its place, order that:

"(1) Paragraph 3 of the further amended order made by the trial judge dated 24 August 2016 be set aside and, in its place, order:

'The compensation payable to the native title holders by reason of the extinguishment of their non-exclusive native title rights and interests arising from the acts in paragraph 1 above is:

(a) compensation for economic loss in the sum of $320,250;

(b) interest on (a) in the sum of $910,100;

(c) compensation for cultural loss in the sum of $1,300,000;

Total: $2,530,350.

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293 See *House v The King* (1936) 55 CLR 499 at 505.

Note: post-judgment interest is payable on this total under s 52 of the *Federal Court of Australia Act 1976* (Cth), accruing from 25 August 2016.'

(2) Delete order 9."

Matter No D3 of 2018

Appeal dismissed.

239 Each party is to bear its own costs of these appeals.

240 GAGELER J. I agree with the proposed orders and reasoning in the joint reasons for judgment, subject to one qualification. The qualification concerns the methodology for assessing the economic value of a native title right.

241 In the joint reasons, the economic value of the non-exclusive native title rights in this case is assessed as 50 per cent of the freehold value of the land in relation to which the rights exist. I arrive at the same assessment for different reasons.

242 I agree that the economic value of a native title right to exclusive possession of land is ordinarily to be equated with the freehold value of the land in relation to which the right exists. However, I would not attempt to determine the economic value of a non-exclusive native title right simply by discounting from the freehold value of the land in relation to which the right exists.

243 Instead, I adopt the conceptual framework indicated by the evidence of Mr Lonergan to the extent of recognising that the economic value of a native title right has two components. The first component is the value, if any, of the commercial exploitation of the native title right in perpetuity. The second component is the value of the native title holder's capacity voluntarily to surrender that right in order to facilitate the grant to someone else of a form of ordinary title which would allow the land to be put to its highest and best commercial use.

244 Mr Lonergan referred to the first component as the "usage" value. He referred to the second component as the "exit" value or "negotiation" value. The negotiation value arises from the fact that native title operates as an obstacle to the grant of ordinary title, combined with the fact that native title can be surrendered so as to permit the grant of ordinary title to occur. The negotiation value is the value that a native title holder can extract from someone who wants a grant of ordinary title over the land in relation to which a native title right exists in order to put the land to its highest and best commercial use.

245 Recognition of those two components of the economic value of a native title right allows the economic value of exclusive native title rights and non-exclusive native title rights to be assessed in the same way through a fairly straightforward adaptation of the *Spencer* test[294]. There is no need to treat a native title right as if it were alienable. All that is necessary, for the purpose of determining the economic value of a native title right, is to accept that the right can be the subject of an arm's length transaction in which the holder of the right is paid to surrender the right by someone who wants a grant of ordinary title over the land in relation to which the right exists.

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294 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440-441; [1907] HCA 82.

246 The holder of a native title right can be hypothesised to be willing but not anxious to surrender their native title right for payment secure in the knowledge that they will be separately compensated for cultural loss. Conversely, it is possible to hypothesise that someone will be willing but not anxious to obtain a grant of whatever form of ordinary title is necessary to put the land to its highest and best commercial use and, for that purpose, will be willing but not anxious to pay the native title holder to surrender their native title right.

247 The holder of a native title right will have no economic incentive to surrender their native title right for less than the usage value of the right. Conversely, the seeker of ordinary title will have no economic incentive to offer more than the full value of the ordinary title for the surrender of the native title right.

248 The usage value of an exclusive native title right can ordinarily be expected to equate to the full value of freehold title. There will be no difference between the lowest price that a native title holder will be prepared to accept and the highest price that a seeker of ordinary title will be prepared to offer for the voluntary surrender of the exclusive native title right in order to facilitate the grant of freehold title. Negotiating in good faith, the parties can be expected to agree upon a price that is equal to the full value of freehold title.

249 In contrast, the limited nature of a non-exclusive native title right means that the usage value of the right can ordinarily be expected to be less than the full value of freehold title. There will be a difference between the lowest price that a native title holder will be prepared to accept and the highest price that a seeker of ordinary title will be prepared to offer for the voluntary surrender of the non-exclusive native title right. Negotiating in good faith, the parties can be expected to agree upon a price that lies somewhere between the usage value and the full value of freehold title. If each party is truly fair-minded, the price will be midway between the two.

250 In this case, the non-exclusive native title rights were not found by the primary judge to have had any significant usage value. The economic value of the rights was hence confined to their negotiation value. The form of ordinary title which would allow the land to be put to its highest and best commercial use was accepted to be freehold title. Treating the usage value of the rights as close to zero, the economic value of the rights is therefore appropriately assessed as 50 per cent of the full value of freehold title.

EDELMAN J.

Introduction

251 "To say that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd."[295] So said the Master of the Rolls more than a century ago. That principle is now well established[296]. These appeals, conducted upon the premise that the *Native Title Act 1993* (Cth) requires analogies to be drawn between Western concepts of title and the "other world of meaning and significance"[297] of native title, involve the converse situation. They involve the valuation of title which is of great value to the dispossessed party but of no particular significance to the party obtaining the benefit of the extinguishment.

252 A quarter of a century after the decision of this Court in *Mabo v Queensland [No 2]*[298], the question on these appeals is how to calculate the reasonable price that should be paid to compensate native title claimants for the extinguishment of rights of immense cultural value. To say that the party obtaining the benefit of extinguishment, here the Northern Territory, should compensate a native title claimant, here the Ngaliwurru and Nungali peoples ("the Claim Group"), solely by reference to the ordinary value of the native title to non-Aboriginal persons is absurd.

253 I have had the considerable benefit of reading the joint judgment prior to writing these reasons. I agree with the conclusions in the joint judgment and gratefully adopt the background discussion in that judgment. As to the elements described as economic loss and cultural loss, there is no single correct methodology of valuation. However, a key assumption made by the parties in this litigation was erroneous. The erroneous assumption was that the cultural loss should be assessed at the date of judgment.

254 In submissions which attracted no demur from any other party, senior counsel for the Commonwealth accepted that a different valuation methodology could have been used, namely assessing cultural value at the date of

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295 *Inland Revenue Commissioners v Clay* [1914] 3 KB 466 at 472.

296 *Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 at 316-317; *MMAL Rentals Pty Ltd v Bruning* (2004) 63 NSWLR 167 at 180 [73]-[75]; *Earl Cadogan v Sportelli* [2010] 1 AC 226 at 266 [2].

297 Stanner, *After the Dreaming* (1968) at 44.

298 (1992) 175 CLR 1; [1992] HCA 23.

extinguishment with the addition of simple interest until judgment. But he submitted that the result in this case would not be any different by applying that different methodology. In the absence of any challenge to the methodology adopted throughout this litigation by any other party and in the absence of any suggestion that the result in this case would have been different, I proceed upon that basis. But, although the result might not be affected in this case, the methodology adopted in this case is plainly erroneous. It is necessary to explain the error because the adoption of the same methodology in other cases could potentially lead to systematic undervaluing of awards of native title compensation. The reason why this is so concerns the underlying nature of the award of compensation for the extinguishment of native title rights.

255 As to the measure of interest, I also agree with the conclusion in the joint judgment that interest should be calculated on a simple rather than a compound basis. The *Native Title Act* is concerned only with interest (i) as part of an award of compensation for proved loss, or (ii) upon an award of compensation for a period of deprivation of the use of money. There is no scope for the award of compound interest as a measure of restitution or as a measure of disgorgement of profits. Since it was not proved that the Claim Group would have invested any of the money received at compound interest, the measure of interest was not for a proved loss. It was interest for the period during which the Claim Group were deprived of the use of the money they should have received. There was only one period. There is no scope for the award of interest upon interest (compound interest) that occurs where there are multiple periods.

256 In the course of these reasons I refer to "native title rights" consistently with the nomenclature of the *Native Title Act*[299], where "native title" or, as used interchangeably, "native title rights and interests" is used to encompass those rights and interests that are not exclusive as well as those that are exclusive. However, the difference between the two concepts of exclusive native title rights and non-exclusive native title rights is not a difference of degree concerning whether a right to control access to the land is included within the so-called "bundle of rights" held by native title claimants. It is a difference of "kind"[300] between an interest in the nature of a liberty to use the land and an interest in the nature of a right to control access to and exclude others from it[301].

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299 Section 223(1).

300 *Western Australia v Ward* (2002) 213 CLR 1 at 95 [94]-[95]; [2002] HCA 28.

301 *Western Australia v Ward* (2002) 213 CLR 1 at 82-83 [52].

The requirement for compensation

257 Compensation was sought for 53 acts on 39 lots and four public roads. One aspect of the claim for compensation, described below as "economic loss" or "exchange value", concerned 31 acts on 31 lots. Another aspect of the claim for compensation, described below as "cultural loss" or "cultural value", was concerned with all 53 acts on all 39 lots.

258 All but four of the 39 lots of land in this litigation were affected by (i) previous exclusive possession acts[302] that permanently extinguished native title, or (ii) category D past acts[303] that were followed by previous exclusive possession acts that permanently extinguished native title. In both of those categories, those previous exclusive possession acts extinguished native title[304] and required payment of compensation[305].

259 Of the four exceptions, three lots were not affected by an act that extinguished native title[306]. Those three lots were the subject of Crown to Crown grants in perpetuity by the Northern Territory to government authorities[307]. Compensation was also required for those acts[308]. Although two of those three acts were used in the assessment of compensation for economic loss or exchange value[309], the parties applied the principles of compensation to those acts as though they had extinguished native title. The Northern Territory described this approach as based upon a "pragmatic foundation that there is no foreseeable prospect of the revival of the native title rights and interests". That pragmatic approach is also adopted in these reasons.

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302 *Native Title Act*, s 23B.

303 *Native Title Act*, s 232.

304 *Native Title Act*, s 23E and *Validation (Native Title) Act* (NT), ss 9H, 9J. See *Northern Territory v Griffiths* (2017) 256 FCR 478 at 490 [24].

305 *Native Title Act*, s 23J.

306 See *Native Title Act*, s 23B(9C).

307 Acts 1 (part of lot 16), 36 (lot 52), and 41 (lot 60): see *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362 ("*Griffiths*") at 441 [428]; *Northern Territory v Griffiths* (2017) 256 FCR 478 at 488 [11].

308 *Native Title Act*, ss 17(2), 20(1).

309 Acts 1 and 36.

260 The fourth exception was a lot[310] that was subject to the grant of a ten year Crown lease in 1986[311]. However, on 28 August 2006, a native title determination was made in favour of the Claim Group that, by operation of s 47B of the *Native Title Act*, "disregarded" the extinguishment of native title. The primary judge ignored the effect of this determination when assessing the compensation, thus treating the native title as having been extinguished[312]. The Full Court of the Federal Court of Australia held that the effect of the determination should not have been ignored. The act was treated by the Full Court as having extinguished native title but only until the time of the determination when the extinguishment was disregarded. Interest on the exchange value in relation to that lot was not awarded after 28 August 2006[313]. There was no application for special leave to appeal from this part of the Full Court's decision. Subject to that interest adjustment, which is also reflected in the interest rate used in the orders on these appeals, all the acts were therefore treated as having the effect of extinguishing the native title rights.

261 Division 5 of Pt 2 of the *Native Title Act* provides a complete statement of the compensation payable for the acts[314]. Section 51 provides relevantly as follows:

> "**51 Criteria for determining compensation**
>
> *Just compensation*
>
> (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement [sic: obligation] 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."

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310 Lot 47.

311 Act 34.

312 *Griffiths* (2016) 337 ALR 362 at 414 [282] and Order 1(6) at 447.

313 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 540 [234], 590 [466].

314 *Native Title Act*, s 48.

262 "Compensation", in the sense in which it is used in s 51(1), has a well-established meaning. As Isaacs J said in *MacDermott v Corrie*[315], in reasons with which the Privy Council agreed on appeal[316],

> "[i]t simply imports that the exercise of the power of taking, or resumption ... will be accompanied by an equivalent in money of the property taken or resumed, or of the damage occasioned, being returned or given."

263 There are, thus, two different concepts involved in compensation. The first is the "equivalent in money of the property taken" or, here, extinguished. That is the value of the rights extinguished. As I explain below, those rights must be valued at the date of taking or extinguishment. The second is "the damage occasioned". That is subsequent, consequential loss suffered. That damage is valued at the date of judgment.

264 An act has an "effect" on native title rights and requires compensation to be paid if it extinguishes the native title rights or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise[317]. Since that extinguishing or inconsistent act is "taken always to have been valid"[318], the compensation for the value of the native title rights extinguished by the validated act must be assessed at the date of the act, which is the time of extinguishment. In this case, the relevant date of the acts of extinguishment, or impairment in the case of the three Crown to Crown grants, was treated as 10 March 1994[319].

The approach to compensation in s 51(1)

265 A general precept of the *Native Title Act* is equality of treatment between native title rights and other rights and interests where equivalent. The preamble to the *Native Title Act* concludes with reference to para 4 of Art 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and the *Racial Discrimination Act 1975* (Cth). Section 10 of the latter guarantees the equal enjoyment of rights irrespective of race, colour, or national or ethnic origin. When debating the 1998 amendments to the *Native Title Act*, Senator Minchin said that the "underlying premise of the Native

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315 (1913) 17 CLR 223 at 247-248; [1913] HCA 27.

316 *Corrie v MacDermott* (1914) 18 CLR 511 at 517; [1914] AC 1056 at 1065.

317 *Native Title Act*, s 227.

318 *Native Title Act*, ss 19, 22F; *Validation (Native Title) Act* (NT), ss 4, 4A.

319 *Griffiths* (2016) 337 ALR 362 at 378 [77].

Title Act is to equate native title with freehold"[320]. Hence, in *Western Australia v The Commonwealth (Native Title Act Case)*[321], six members of this Court explained that in regulating the competition between native title rights and other rights, "the *Native Title Act* adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title".

266 Consistently with this goal of parity of treatment, s 51(4) provides, as applied to this case, that in determining compensation for the extinguishment or impairment of native title rights, the court may have regard to the principles or criteria for determining compensation in a compulsory acquisition law of the Northern Territory (to whom the acts were attributable).

The methodology adopted in this litigation

267 The basic approach of all the parties, which was naturally followed by the primary judge and the Full Court, was to divide the compensation assessed under s 51(1) into two components, with one assessed at the date of extinguishment and the other assessed at the date of judgment.

268 The first component was described as "economic loss" and was valued at the date of extinguishment of native title. It concerned the value of the native title rights without any allowance for the "cultural or ceremonial significance of the land, or of the very real attachment to the land which the Claim Group as an Indigenous community obviously has"[322]. To this component interest was added for the period from extinguishment until judgment.

269 The second component was described as "solatium"[323] and was valued at the time of judgment. But, as I explain below, it was not solatium in the sense in which that concept should be understood in the law concerning compulsory acquisition. The second component focused upon the cultural or ceremonial

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320 Australia, Senate, *Parliamentary Debates* (Hansard), 3 December 1997 at 10231. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2880.

321 (1995) 183 CLR 373 at 483; [1995] HCA 47. See also *Western Australia v Ward* (2002) 213 CLR 1 at 106 [122]; compare at 95 [94]-[95].

322 *Griffiths* (2016) 337 ALR 362 at 405 [234].

323 *Griffiths* (2016) 337 ALR 362 at 417 [300].

significance of the land to the Claim Group. It concerned the "loss or diminution of connection or traditional attachment to the land"[324].

270 At first blush, the methodology adopted by the parties in relation to the economic loss component appears nonsensical. What does it mean to speak of the economic value to a person holding native title of a right to engage in Aboriginal cultural activities independently of the cultural value of that right? How is it meaningful to value a right to access, maintain, and protect sites of significance to Aboriginal people, or to participate in exclusively Aboriginal cultural practices relating to birth and death, including burial rites, by ignoring the ceremonial significance of that right?

271 The answer is that native title rights have two dimensions that must be valued separately to achieve parity of treatment with other rights. First, they have what can be described, for consistency with cases of compulsory acquisition, as an "exchange value" (although it is more accurately a "surrender value"). The exchange value is the price that would reasonably be paid by the person who wishes to extinguish the native title. It is not concerned with the cultural significance of the land. Compensation for that exchange value is an award for economic loss. Secondly, and consequently, there is the additional, and special, cultural value of the native title rights that is not captured by the exchange value.

272 Neither of these two dimensions is dependent upon the particular subjective distress or mental suffering arising from the disruption to a person's life that follows the compulsory, rather than voluntary, nature of the deprivation of their rights. That is the province of an award of solatium. Awards described as "solatium"[325] have also been made in different fields in law, including the field of personal injury such as for "distress and suffering caused by the death" of a

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324 *Griffiths* (2016) 337 ALR 362 at 417 [300].

325 *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 272-273, 276, 285-286, 290-291; [1945] HCA 26; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150-151; [1966] HCA 40; *Kaufmann v Van Rymenant* (1975) 49 ALJR 227 at 230; 6 ALR 153 at 160; *Jacobs v Varley* (1976) 50 ALJR 519 at 523, 526; 9 ALR 219 at 227, 233-234; *Astley v Austrust Ltd* (1999) 197 CLR 1 at 19 [40]; [1999] HCA 6. Compare *De Sales v Ingrilli* (2002) 212 CLR 338 at 382-383 [126]; [2002] HCA 52.

relative[326], and in the field of defamation for the degree of "indignity and humiliation" caused by the defamation[327].

273 The loss of the cultural value and the exchange value of the native title rights occurs immediately upon extinguishment. However, pain and suffering that is consequential upon the compulsory acquisition or extinguishment might occur slowly or gradually. That pain and suffering is measured at the date of judgment. The distress caused by the compulsory nature of the disruption "will vary greatly from case to case"[328], although, in the most common cases of compulsory acquisition, the distress will generally involve similar feelings of frustration arising from being forced to relocate. In every case, solatium is based upon the particular person's injured feelings[329], although it is sometimes capped at a fixed amount[330] or 10 per cent of the price paid[331]. Although the parties used the language of "solatium", no separate claim was made in this litigation for such subjective mental suffering based only upon the consequences of the compulsory nature of the extinguishment.

The exchange value of the native title rights

274 The exchange value of the native title rights was sometimes described in this litigation as "economic value" and its loss as "economic loss". The Full Court held that the economic value of the native title rights fell to be

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326 *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 285.

327 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 151. See also *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 69-70, 104, 108; [1993] HCA 31.

328 Australia, Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980) at 144 [271].

329 *March v City of Frankston* [1969] VR 350 at 356, 358; *Mayberry v Melbourne & Metropolitan Board of Works* (unreported, Supreme Court of Victoria, 8 June 1970) at 16; *Roberts v Commissioner for Main Roads* (1987) 63 LGRA 428 at 432.

330 See, eg, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 60(2): $75,000.

331 Cripps and Gordon, *The Law of Compensation for Land Acquired Under Compulsory Powers*, 8th ed (1938) at 213. See *Land Acquisition and Compensation Act 1986* (Vic), s 44(1); *Land Administration Act 1997* (WA), s 241(8)-(9), albeit with an override provision.

assessed by reference to the *Spencer* approach[332]. That approach, enunciated by Griffith CJ in *Spencer v The Commonwealth*, is as follows[333]:

> "the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, ie, whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?'"

275 The *Spencer* approach thus asks what price a willing but not anxious purchaser would pay to a willing but not anxious vendor in a hypothetical transaction. This hypothetical transaction approach is not a mandated legal rule. It is "merely a useful and conventional method of arriving at a basic figure [for exchange value] to which must be added in appropriate cases further sums for disturbance, severance, special value to the owner and the like"[334].

276 An extremely common application of the *Spencer* approach in land valuation cases includes considering sale prices of comparable land and adjusting those sale prices to reflect the characteristics of the land under consideration. One general difficulty with the use of agreed sale values in the circumstances of an imposed "forced taking" is that "the value of the process of agreement itself is denied to the native title holders"[335]. The answer to that concern may lie, as it does in cases of compulsory acquisition generally, in an award of solatium for the distress or inconvenience caused by the compulsory nature of the extinguishment.

277 There is a more fundamental difficulty in an approach that relies upon agreed prices in actual negotiations. Agreed prices in actual negotiations are useful as part of a process of imagining a hypothetical negotiation between reasonable persons. The *Spencer* approach thus "presupposes a person willing to give what is being valued in exchange for money"[336]. The "necessary mental process"[337] requires the prospect of a reasonable person "prepared to

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332 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 517 [122].

333 (1907) 5 CLR 418 at 432; [1907] HCA 82.

334 *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at 267; [1956] HCA 7, quoting *Minister for Public Works v Thistlethwayte* [1954] AC 475 at 491.

335 Bartlett, *Native Title in Australia*, 3rd ed (2015) at 794.

336 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 225 [79]; 167 ALR 575 at 595; [1999] HCA 64.

337 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 432.

sell"[338]. But where no reasonable person in the position of the Claim Group would have engaged in such a process, the hypothetical negotiation cannot be undertaken. By definition, any hypothetical negotiation would not be concerned with a reasonable person in the position of the Claim Group who is willing to sell. In other words, the hypothetical negotiation "breaks down in a situation where any reasonable person in the claimant's position would have been unwilling to grant a release" or a surrender of the rights[339].

278 In this case, the primary judge held[340], and the Full Court accepted[341], that the Claim Group were not willing to surrender their native title rights. The position of the Claim Group was a reasonable approach for any person in their position to take in light of the cultural value to them of their rights. Indeed, it was never contended in this Court[342] – and would have been contrary to the conclusions of the primary judge and the Full Court – that it was possible to conceive of a reasonable person in the position of the Claim Group who would have been prepared to surrender those native title rights. The absence of such a submission was unsurprising in light of the evidence from the Claim Group, supported by an expert anthropologists' report and accepted by the primary judge, that the "loss of and damage to country caused emotional, gut-wrenching pain and deep or primary emotions"[343].

279 For these reasons, the *Spencer* approach, or a version of it, cannot be applied by relying upon what reasonable persons in the position of the Claim Group might have sought to surrender their rights. Nor could the *Spencer* approach be applied, as the Northern Territory's expert economist, Mr Lonergan, considered it could, to ask what a reasonable person in the position of the Claim Group would have been prepared to pay to acquire other comparable land at a different location. It was not appropriate to attempt to value the reasonable price for this land on the basis of what the Claim Group might have been prepared to pay to acquire different land at a different location to which their attachment would have been different.

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338 *The Commonwealth v Arklay* (1952) 87 CLR 159 at 170; [1952] HCA 76.

339 *One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353 at 1377 [75]; [2018] 3 All ER 659 at 682.

340 *Griffiths* (2016) 337 ALR 362 at 404 [232].

341 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 514 [111].

342 Compare the submissions in *Northern Territory v Griffiths* (2017) 256 FCR 478 at 513 [106], 560 [340].

343 *Griffiths* (2016) 337 ALR 362 at 426 [350].

280 Although the *Spencer* approach cannot be applied without adaptation, it must be reiterated that the *Spencer* approach is no more than a common method of assessing the objective exchange value of rights. Where a hypothetical negotiation is not an appropriate mechanism because no reasonable person in the claimant's position would surrender the relevant rights, the exchange value is best measured by adapting the *Spencer* approach to focus only upon the price that a person in the position of the Northern Territory (as a willing but not anxious purchaser) would reasonably pay to obtain a surrender of the native title.

281 One consequence of adapting the *Spencer* approach to focus only upon the price that a person in the position of the Northern Territory would reasonably pay for a surrender of the native title rights, rather than conducting a hypothetical negotiation with a person in the position of the Claim Group who would reasonably never have surrendered the rights, concerns the relevance of whether the land is located near a high-value, developed area or whether it is located remotely.

282 In a hypothetical negotiation the consideration of the location of the land would be relevant to both parties. Other things being equal, in a hypothetical negotiation the party seeking to extinguish native title would pay more for the opportunity to use the land where it is located in a developed area. But a person in the position of the Claim Group might not demand as high a price if the development of the area meant that the loss of connection to country that would result from surrendering the rights was less significant. However, with a focus only upon the position of the Northern Territory it is only the former consideration that is relevant. The latter becomes a consideration in the assessment of cultural value.

283 Another significant consequence of adapting the *Spencer* approach to focus only upon the price that the Northern Territory would reasonably pay to extinguish the native title rights is that any restrictions on alienation of the native title rights are irrelevant to the exchange value measure. A restriction on alienation is relevant, and potentially very significant[344], where the question is what price would be sought by the person surrendering the right[345]. It is also significant when a purchaser is *acquiring* a right because a purchaser would pay a lower price for "an asset of which he could not, if need arose, freely dispose"[346].

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344 *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106 at 108-109, 116-120.

345 See *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083 at 1088; *The Commonwealth v Arklay* (1952) 87 CLR 159 at 171.

346 *The Commonwealth v Arklay* (1952) 87 CLR 159 at 171. See also *MacDermott v Corrie* (1913) 17 CLR 223 at 233, 242-243, 246.

But a restriction on alienation is irrelevant where the focus is only upon the price payable by the "purchaser" and the "purchaser" seeks to extinguish rights that affect the title and not to acquire them. When the rights are extinguished the title will be free from the restrictions. Hence, when considering provisions concerned to replicate compensation for compulsory acquisition "as nearly as possible"[347], compensation for the extinguishment of a communal usufructuary title, otherwise equivalent to full ownership, is not reduced because that communal title cannot be sold or leased[348].

284 In summary, since the exchange value in the circumstances of these appeals focuses only upon the price that the Northern Territory would reasonably pay to extinguish the native title, aspects of the native title rights that are peculiar to the Claim Group, and which do not affect the Northern Territory, will not affect this assessment of exchange value. But at various points in the reasoning of both the primary judge and the Full Court the focus was not exclusively upon a reasonable person in the position of the Northern Territory. It was in part – and with respect to otherwise careful and elaborate judgments, erroneously – upon the Claim Group.

285 The primary judge allowed elements peculiar to the Claim Group to interfere with his assessment of the exchange value to the Claim Group, being the price that the Northern Territory would reasonably pay to extinguish the native title. As the Full Court rightly observed[349], there are points in the primary judge's reasoning where it appears that his Honour may have allowed elements of the value of the rights peculiar to the Claim Group to enter the assessment of the exchange value of the rights extinguished by the Northern Territory. The primary judge spoke of it not being routinely "appropriate" to treat the rights as if they were held by a non-Indigenous person and referred to the "true character" of the rights[350]. But that is the value to the Claim Group of using the land, which in this case is cultural value. The exchange value to the Claim Group is only the price that a reasonable purchaser would pay for extinguishment of the rights.

286 In contrast, the Full Court was correct to conclude that in relation to this (exchange value) calculation "no allowance is made for the attachment of the

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347 *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 at 551; [1941] HCA 37.

348 *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 at 557. See also *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 409-411.

349 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 514 [112]-[114].

350 *Griffiths* (2016) 337 ALR 362 at 402 [212], 403 [220].

Claim Group to the land"[351]. However, the Full Court erroneously took into account the value to the Claim Group when assessing the exchange value by concluding that it was necessary to discount the exchange value due to the inalienable nature of the native title rights[352]. The inalienable nature of native title rights is an element of those rights relevant to the Claim Group. But a reasonable person in the position of the Northern Territory, seeking to have the rights extinguished, would be concerned only with the encumbrance that the rights impress on the title. They would not be concerned with the identity of the person who would exercise the rights. Hence, a reasonable person in the position of the Northern Territory would not be concerned with whether those rights are alienable.

287 The Full Court also concluded that the benefit to the Northern Territory of extinguishing the native title rights was not relevant to the assessment of compensation[353]. Of course, the measure of compensation is ultimately for the value lost to the Claim Group, not the value gained by the Northern Territory[354]. But to determine the exchange value lost to the Claim Group it is essential to consider the benefits to the Northern Territory that affect the price that it would reasonably pay to extinguish the native title. Thus, as the joint judgment in this Court observes[355], the benefit of extinguishment to the Northern Territory is relevant only to inform the price that it would reasonably have been prepared to pay and, hence, the exchange or surrender value of the native title to the Claim Group[356].

288 An appreciation of the proper method of determining the exchange value of the Claim Group's non-exclusive native title rights can be gained by a comparison with the method adopted to determine the price that would reasonably be paid to obtain the extinguishment of an easement.

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351 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520 [137].

352 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 514-516 [115]-[119].

353 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 510-511 [89]-[92].

354 See, eg, *The Commonwealth v Reeve* (1949) 78 CLR 410 at 418; [1949] HCA 22.

355 At [103]-[105].

356 See *MacDermott v Corrie* (1913) 17 CLR 223 at 232-233, 251; *Corrie v MacDermott* (1914) 18 CLR 511 at 514; [1914] AC 1056 at 1062; *The Commonwealth v Reeve* (1949) 78 CLR 410 at 418.

A comparison with extinguishment of an easement

289 In the exercise of an evaluative judgment concerning compensation for extinguishment of an easement there are two extreme positions. At one extreme is compensation for extinguishing an easement that entirely excluded, for all time, all relevant uses of the land by the freeholder who is subject to the easement. Compensation for extinguishment of the easement in those circumstances would be valued at, or very close to, 100 per cent of the value of the freehold title. Close to this extreme is one case where the easement was over council land that was designated for parkland recreation. The easement permitted the full use of the surface, including erecting buildings on it subject to conditions. Pursuant to the easement, several large kiosks about 1.5 m high were constructed on a concrete slab. The encroachment was valued at 90 per cent of the freehold value of the land that was subject to the easement, after other restrictions were taken into account[357].

290 At the other extreme, limited compensation is awarded for the extinguishment of an easement that has little or no effect on the relevant uses of the freeholder. One example of a limited effect is a case involving a lot subject to an easement permitting only a use for "tunnels, mains, pipes, and other works that do not project above the surface of the land"[358], on which the plaintiffs had built a substantial boatshed. If the highest and best use of the lot were for a waterside residence, a purchaser would not be discouraged by the easement but would probably just incur some additional cost "mainly in the matter of foundations"[359]. The easement was valued at 9 per cent of the value of the land that was subject to the easement[360].

291 Another small percentage was awarded as the value of an easement to construct and maintain an electric transmission line over land mainly used for grazing cattle, where the easement did not deny the claimant the grazing use of the land and imposed limited restrictions as to matters including clearing and stockpiling of soil[361]. With one exception, the easement was valued at 16 per cent of the freehold value of the land that was subject to the easement[362].

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357 *Ashfield Municipal Council v RTA of NSW* [2000] NSWLEC 117 at [90]-[92].

358 *Rogerson v The Minister* [1968] 2 NSWR 562 at 563.

359 [1968] 2 NSWR 562 at 564.

360 [1968] 2 NSWR 562 at 565.

361 *Joyce v The Northern Electric Authority of Queensland* (1974) 1 QLCR 171 at 174.

362 (1974) 1 QLCR 171 at 179.

The exception was the area occupied by the bases of the electricity pylons and for a service road, where that part of the land was unusable and the full fee simple value of that part of the land was awarded[363].

292 An example of a case between these two extremes concerned an easement over a pastoral and grazing property[364]. The easement was for the purposes of erecting a high-voltage power line, including towers. The Court held that although the use of the land for grazing was not inevitably lost, even in the immediate vicinity of each tower, the easement caused a substantial loss of the ability to use the land within the easement for grazing purposes and the loss of 80 trees[365]. The Court accepted the assessment of the plaintiff's valuer that the value of the easement was 50 per cent of the freehold value of the area of land that was subject to the easement[366].

Application

293 The departure by the primary judge and the Full Court from an assessment by reference only to the price that the Northern Territory would reasonably be prepared to pay to extinguish the native title requires reconsideration of the exercise of determining economic value.

294 Like the example of the easement cases, there will be some instances where native title rights, if they co-existed with the freehold title, would have the effect of entirely sterilising the freehold title, or limiting it to "comparatively limited rights of administrative interference"[367]. The price that a reasonable person in the position of a freeholder would be prepared to pay to extinguish the native title would be close to, or equal to, 100 per cent of the freehold value. Such a circumstance will generally arise for native title rights that are exclusive. Those rights are the functional equivalent of freehold. For instance, as the order of the Court in *Mabo [No 2]* declared, the native title of the Meriam people, with the exception of the Islands of Dauer and Waier and certain other parcels, was an entitlement "as against the whole world to possession, occupation, use and

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363 (1974) 1 QLCR 171 at 178.

364 *Longeranong Pty Ltd v Electricity Trust (SA)* (1990) 55 SASR 493.

365 (1990) 55 SASR 493 at 507-508.

366 (1990) 55 SASR 493 at 508.

367 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 410.

enjoyment of the lands of the Murray Islands"[368]. The native title rights in this case are not exclusive. They are in the nature of a liberty.

295 The area of land over which the extinguished native title rights in this case were exercised was approximately 127 hectares, or 1.27 square kilometres. The compensable acts were comprehensively described by the Full Court[369], and included development leases, freehold grants to government authorities including for public works, and public works constructed without underlying tenure. Even assuming that each of the 53 compensable acts by the Northern Territory was the highest and best use of the land and would not have been possible without extinguishment of the title, this does not mean that the Northern Territory, as a willing but not anxious "purchaser", would reasonably pay the full freehold value of the land to obtain that use. The reasonable price that it would pay depends upon other possible, and available, uses of the land, despite the existence of the native title. The existence of those other uses demonstrates value to the Northern Territory, without extinguishing native title. The other uses might also be relevant to the price at which the Northern Territory could sell the land, again subject to the native title rights.

296 In the circumstances of this case there are several important factors that all reduce the price that the Northern Territory, as a willing but not anxious "purchaser", would reasonably have been prepared to pay to extinguish the native title rights.

297 First, the native title rights were not exclusive. As the Full Court observed, the native title rights did not prevent the Northern Territory from granting "co-existing rights and interests to others such as ... grazing licences, occupation licences, and miscellaneous licences"[370]. They also did not prevent the Northern Territory from granting mining licences that could co-exist with the Claim Group's native title[371].

298 Secondly, the native title rights were personal. The Claim Group could not permit others to enter upon, or use, the land[372]. The extent of the

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368 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 217.

369 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 485-488 [10]-[13].

370 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520 [135].

371 See *Western Australia v Brown* (2014) 253 CLR 507 at 527-528 [57]-[58]; [2014] HCA 8.

372 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520 [135].

encumbrance upon use by the Northern Territory was therefore strictly limited to those persons who held native title.

299 Thirdly, the use to which the Claim Group could put the land was limited to particular purposes. For instance, they did not have the right to exploit the land, or control the mineral resources within it[373], for commercial purposes[374]. The encroachment upon use by the Northern Territory did not extend to any of these commercial or resource control purposes.

300 On the other hand, the native title rights were perpetual and extensive. As agreed by the parties and accepted by the Full Court[375], the native title rights were the following non-exclusive rights in accordance with traditional laws and customs:

> "1. the right to travel over, move about and to have access to the application area;
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> 2. the right to hunt, fish and forage on the application area;
>
> 3. the right to gather and to use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;
>
> 4. the right to have access to and use the natural water of the determination area;
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> 5. the right to live on the land, to camp, to erect shelters and other structures;
>
> 6. the right to:
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> (a) engage in cultural activities;
>
> (b) conduct ceremonies;
>
> (c) hold meetings;

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373 *Western Australia v Ward* (2002) 213 CLR 1 at 185 [382].

374 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 520 [135]. Compare *Akiba v Queensland [No 3]* (2010) 204 FCR 1 at 134-135 [528]; *Akiba v The Commonwealth* (2013) 250 CLR 209 at 218 [5]; [2013] HCA 33.

375 *Northern Territory v Griffiths* (2017) 256 FCR 478 at 492 [33].

(d) teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and

(e) participate in cultural practices relating to birth and death, including burial rights;

7. the right to have access to, maintain and protect sites of significance on the application area; and

8. the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purposes)."

301 The evaluative exercise to determine the exchange value of a claim group's native title as a percentage of freehold value is not one of precision. It must necessarily be a broad-brush approach. This is particularly so in this case, where the assessment arises for the first time in relation to native title. Following the same approach to valuation as the easement cases, a broad assessment of the extent of the encroachment of the native title upon the fee simple title would be 50 per cent of the freehold value of the land. The amount that a person in the position of the Northern Territory would reasonably pay for a surrender of the Claim Group's native title rights, and thus the exchange value of the rights to the Claim Group, is therefore 50 per cent of the freehold value of the land.

302 Although I do not accept the Commonwealth's submission that inalienability is a relevant discounting factor when considering the price that the Northern Territory would pay to extinguish native title rights rather than to acquire them, the cases involving a discount for inalienability to which the Commonwealth referred are of some limited assistance as comparators because they show the discount that arises as a consequence of a significant constraint. Those cases demonstrate that in the circumstances of compulsory acquisition, where alienability will generally be relevant, the discount for inalienability of the land ranged from 28 per cent of the freehold value (where there was a reasonable chance of rezoning)[376] to two-thirds of the freehold value[377], with many assessments clustered around 50 per cent[378]. The extent of the encroachment of

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376 *Liverpool City Council v Roads and Traffic Authority of New South Wales* [2004] NSWLEC 543 at [60]-[62], [74]-[75].

377 *Hornsby Shire Council v Roads and Traffic Authority of New South Wales* (1998) 100 LGERA 105 at 108-109.

378 *Canterbury City Council v Roads and Traffic Authority of New South Wales* [2002] NSWLEC 161 at [28]; *Canterbury City Council v Roads and Traffic Authority of*

(Footnote continues on next page)

the native title upon a fee simple title in this case might, in very rough terms, be compared with the discount upon an acquired freehold that is subject to a bar on alienation.

303 An assessment of value amounting to 50 per cent of freehold value is appropriate in this case.

The cultural value of the native title rights

The nature of cultural value

304 In conventional cases involving the valuation of land, the exchange value to the vendor will often include the value to the vendor of using the land, ie its use value. This is because the purchaser is assumed to buy the land for its highest and best use. But there are circumstances where the land has additional value to the vendor arising from a special use that the law recognises as a subject of compensation in addition to the exchange value. In this case, the "cultural value" of the land to the Claim Group was pleaded as "special value". In compulsory acquisition cases generally, a special use is exceptional. But in cases involving native title the special use, for cultural purposes, is entirely unexceptional. The special use of the land in native title cases is reflected in its cultural value, not in its exchange value.

305 The modern origin of compensation above market value of the land for a special use is s 63 of the *Land Clauses Consolidation Act 1845* (UK)[379]. That legislation permitted an award of compensation in excess of market value for the "special adaptability of land"[380]. Like the award of compensation representing the market value of the land, this subject of compensation also falls to be valued at the date of acquisition[381]. It "arises in circumstances in which

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New South Wales [2004] NSWLEC 172 at [16]; *Blacktown City Council v Roads and Traffic Authority of New South Wales* [2004] NSWLEC 772 at [12]; *Roads and Traffic Authority of New South Wales v Blacktown City Council* [2007] NSWCA 20 at [30], [51].

379 8 & 9 Vict c 18.

380 See, eg, *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 at 27-28, 32, 35; *Sidney v North Eastern Railway Co* [1914] 3 KB 629; Browne and Allan, *The Law of Compensation*, 2nd ed (1903) at 659-683. See also *In re Gough* [1904] 1 KB 417.

381 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 264 [265]; 167 ALR 575 at 647-648.

there is a conjunction of some special factor relating to the land and a capacity on the part of the owner exclusively or perhaps almost exclusively to exploit it"[382].

306 In a passage in *Pastoral Finance Association Ltd v The Minister*[383], which has been followed many times[384], the Privy Council described an approach to measuring this value. The Privy Council was there considering how to measure the additional, "special value" to an owner above the market value of the land arising from his intended use of the land to conduct a business. The approach described by the Privy Council was to ask how much a prudent purchaser in the owner's special position "would have been willing to give for the land sooner than fail to obtain it"[385]. In *Arkaba Holdings Ltd v Commissioner of Highways*[386], Bray CJ said:

> "this special value must in my view arise from some attribute of the land, some use made or to be made of it or advantage derived or to be derived from it, which is peculiar to the claimant and would not exist in the case of the abstract hypothetical purchaser. Would a prudent man in the position of the claimant have been willing to give more for this land than the market value rather than fail to obtain it or regain it if he had been momentarily deprived of it?"

307 A neat example of special value given by Callinan J in *Boland v Yates Property Corporation Pty Ltd*[387] is a blacksmith who has a protected non-

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382 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 269 [292]; 167 ALR 575 at 654.

383 [1914] AC 1083 at 1088-1089.

384 See, eg, *The Commonwealth v Reeve* (1949) 78 CLR 410 at 419-420; *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at 266, 279, 292; *Dangerfield v Town of St Peters* (1972) 129 CLR 586 at 589-590; [1972] HCA 15; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 225 [80], 245 [173], 279 [354]; 167 ALR 575 at 596, 623, 668.

385 *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083 at 1088. See also *The Commonwealth v Milledge* (1953) 90 CLR 157 at 164; [1953] HCA 6; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 226 [83]; 167 ALR 575 at 597.

386 [1970] SASR 94 at 100. See also *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 225 [80]; 167 ALR 575 at 596.

387 (1999) 74 ALJR 209 at 269 [292]; 167 ALR 575 at 654.

conforming right, which will be lost on transfer of ownership, to use land located near a racecourse as a forge.

308 The principles of special value, as enunciated, need not be confined to uses made of, or advantages derived from, land that can be immediately translated into money. Indeed, even in cases where the special value concerns a business prospect of financial gain to an owner, the increased or "special" value of the land is not the capitalised expected profits from the business but the amount that a purchaser in the position of the owner would reasonably pay to obtain the land[388]. Special value can encompass every matter of value to a claimant that extends beyond market value other than issues that are often described as mere "sentiment".

309 A circumstance of special value pertinent to these appeals is the particular cultural value of native title rights. As the primary judge recognised, the cultural value that was lost comprised (i) the diminution or disruption in traditional attachment to country, and (ii) the loss of rights to live on, and gain spiritual and material sustenance from, the land[389].

310 The *Native Title Act* recognises that loss of this cultural value must be compensated. As Prime Minister Keating said in the second reading speech on the *Native Title Bill 1993* (Cth)[390], "any special attachment to the land will be taken into account in determining just terms". The exchange value to the Claim Group is the price that the Northern Territory would reasonably pay for the native title. But, from the perspective of the Claim Group, the price that the Northern Territory would reasonably pay for the surrender of the native title does not reflect all of this special, cultural value to them of the use of the land.

311 Where, as in this case, the special value is a cultural value then, as is the case with personal injuries and other matters requiring a money figure to be placed upon matters that do not translate into money, "[a]ny figure at which the assessor of damages arrives cannot be other than artificial and ... the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases'"[391]. The difficulty is further compounded where, again as in these appeals, there are no comparable awards. The advantage of the primary

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388 *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083 at 1088-1089.

389 *Griffiths* (2016) 337 ALR 362 at 416 [295].

390 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2882.

391 *Wright v British Railways Board* [1983] 2 AC 773 at 777.

judge, who makes the assessment from experience and in light of the evidence, is significant.

Compensation for loss of cultural value is not solatium

312 An award of cultural value in addition to exchange value is compensation to the Claim Group for loss of the cultural value to them of the native title rights. Expressed more fully, it is compensation for the value of the loss of attachment to country and rights to live on, and to gain spiritual and material sustenance from, the land. That value is lost at the moment of the act of extinguishment. The valuation of this cultural loss is distinct from the subsequent inconvenience and anguish caused by the compulsory manner in which the rights were extinguished. Compensation for the latter has traditionally been described as "solatium".

313 Although the primary judge spoke of the compensation to the Claim Group for "hurt feeling"[392], this expression was not used in the sense in which it is used for solatium for two reasons. First, it was not a focus merely upon the compulsory nature of the acquisition or extinguishment. Secondly, the expression was not used to describe a particular mental state. Rather, it was used in the sense in which it had been explained in evidence by Professor Sansom in his 2015 report. He described hurt feeling as an "upset combined with justified indignation" belonging to a mob, and a "group-felt injury", where injury was used in the sense of any injustice or wrong. The "hurt feeling" is professed by a group in recognition of damage to country, which damage has been "taken into possession by the group to be owned by all its members". It is a description of the injustice rather than the mental state after extinguishment.

314 At various times in the courts below, and in this Court, the parties sought to draw analogies between compensation for cultural loss and compensation for losses suffered in personal injury law. The analogy might be thought apt given the anthropological evidence that Aboriginal people "speak of 'earth' and use the word in a richly symbolic way to mean [their] 'shoulder' or [their] 'side'"[393]. However, as I have explained, the loss of cultural value is not a measure of mental state. It is quite different from the pain and suffering endured by an individual consequent upon a tortiously inflicted injury, including the suffering arising from the sense of injustice. The cogency of the analogy is, instead, that it serves to highlight the difference between two concepts. The first concept is the value that is lost at the moment of the personal injury. That is called loss of

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392 *Griffiths* (2016) 337 ALR 362 at 421 [323].

393 Stanner, *After the Dreaming* (1968) at 44, in part of a passage to which reference was made in the primary judgment: *Griffiths* (2016) 337 ALR 362 at 416 [294].

amenity. The second is the additional pain and suffering that is later felt as a consequence of the tort.

315 The concepts of loss of amenity and pain and suffering, like the allied concepts of loss of cultural value and solatium, are closely related but distinct. They are closely related because the value of an amenity is derived, by experience, from the pleasure and fulfilment that it generally brings. Loss of amenity encompasses the lost ability to lead the life that the injured person could have chosen. Its value is thus based upon the lost pleasures of life, and will reflect the sense of injustice in the deprivation. That value is lost immediately upon loss of the amenity. An award for pain and suffering should, therefore, only be the additional, consequential pain and suffering later arising from the manner of the injury.

316 The distinct nature of the awards can be clearly seen when compensation for loss of amenity is awarded even where there is no subsequent pain and suffering. In *Skelton v Collins*[394], an award of damages for loss of amenity was upheld despite the appellant being permanently unconscious and without any present or future capacity to experience pain or suffering. As Kitto J said[395], quoting *H West & Son Ltd v Shephard*[396], the "fact of unconsciousness does not, however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life". Or, as Lord Pearce said in the latter case[397], "[i]f a plaintiff has lost a leg, the court approaches the matter on the basis that he has suffered a serious physical deprivation no matter what his condition or temperament or state of mind may be". Nevertheless, although the deprivation represents a loss to any ordinary person, the inability to experience the deprivation meant that the award was necessarily "moderate"[398].

317 The same distinction exists in the law relating to valuation of losses from compulsory acquisition. Putting to one side losses arising from severance or injurious affection, the relevant distinction is between (i) a loss of the value of the land, being exchange value and any special value, and (ii) solatium, being the subsequent mental distress that arises from the compulsory nature of the acquisition. Even where the special value incorporates a loss of culture, and the valuation reflects the sense of injustice in the deprivation, the award for special

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394 (1966) 115 CLR 94; [1966] HCA 14.

395 (1966) 115 CLR 94 at 103.

396 [1964] AC 326 at 349.

397 [1964] AC 326 at 365.

398 *Skelton v Collins* (1966) 115 CLR 94 at 101-102, 110, 132, 137.

value is distinct from an award for any further, particular distress caused by the compulsory manner of the extinguishment.

The erroneous assumption in this litigation

318 The trial and the appeals in this litigation were all conducted on the assumption that the proper method of valuing the native title rights involved assessing: (i) the "economic", "exchange", or "surrender" value of the rights to the Claim Group, equal to the price that would reasonably be paid by a person in the position of the Northern Territory to extinguish the rights; (ii) interest on that amount; and (iii) the additional special value, beyond the exchange value, of the extinguished rights to the Claim Group. Although these appeals fall to be resolved by reference to that methodology, and although there is no single correct method of valuation, there is a basic flaw with it. That flaw is the assessment of cultural value at the date of judgment.

319 Senior counsel for the Commonwealth accepted that the exercise of valuation could have been done by assessing both the exchange value and the cultural value at the date of extinguishment. Interest on both amounts would be added to solatium, with interest and solatium calculated at the date of judgment. No submissions were made as to why, as a matter of principle, the cultural value of the land should not be calculated at the date at which that cultural value was extinguished.

320 Senior counsel for the Commonwealth, without demur from any other party, submitted that there would be no difference in result "in the end" because the assessment of cultural value at the date of judgment was measured in present day dollars, whilst the assessment of cultural value at the date of extinguishment or impairment would be in past money with the addition of simple interest. In the absence of submissions to the contrary, or any appropriate alternative valuation evidence in this proceeding, I proceed on this same assumption. However, the assumption is wrong in principle. As a matter of elementary economics it would be remarkable if inflation or a risk free rate as an estimate of the time value of money between 1994 and 2016 happened to coincide precisely with the rate of simple interest under the Federal Court Practice Note[399]. Even without the distortion of the compounding effect of the time value of money, the Practice Note rate over that period, as tables annexed to Mr Houston's report show, sometimes differed from the risk free rate by up to 8 per cent. Further, even if the two measures are seen as a rough approximation of each other, the

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399 Federal Court of Australia, *Pre-Judgment Interest*, Practice Note CM 16 (2011), since revoked and superseded by Federal Court of Australia, *Interest on Judgments*, Practice Note GPN-INT (2017).

assumption could lead to an erroneous compensation award in other cases for at least three reasons.

321 First, when there is a significant delay between the act that causes the extinguishment and the award of compensation, the expression of compensation for cultural loss at the date of judgment can give rise to an appearance of manifest excess, especially when compared with the freehold value. At the very least, the comparison can invite undue moderation. For instance, an award of $1,300,000 in this case for the cultural value of 1.27 square kilometres of land that has a freehold value of $640,500 might appear to be excessive. Indeed, this difference encouraged a strongly expressed submission by the Northern Territory and the Commonwealth, adopted by the Attorneys-General for South Australia and Queensland, that the cultural value was manifestly excessive.

322 But the comparison invited in submissions is inapt. If cultural value is not expressed as a value at the date of the act of extinguishment then it should not be compared with the value of freehold at that time. If cultural value had properly been expressed as at the date of extinguishment, namely 10 March 1994, then it is unlikely that such a submission would have been made. The equivalent cultural value, using only simple interest to discount, and assuming no separate solatium, would be only $338,381[400] on 10 March 1994, a little more than half of the freehold value. In other words, at the time of extinguishment, the combined exchange value and cultural value of the native title rights was approximately the same as the mere exchange value of the freehold title.

323 Secondly, if the award of cultural value were truly a solatium for the pain and suffering of the members of the Claim Group after the compensable acts, and measured at the date of judgment, then the award ought to differ according to the particular pain, suffering and distress endured by the individual group members. It also ought to increase with an increase in the number of persons in the Claim Group. However, it was correctly assumed by the parties that the loss of culture would be unaffected by the size of the Claim Group and would be assessed "on an in globo basis", which did not require a focus on the pain and suffering of particular members[401]. Perhaps most fundamentally, the *Native Title Act*[402] defines native title rights in terms that include communal rights. As the joint judgment observes[403], the "native title holders" to be compensated were a

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400 Extrapolating back from an award of $1,300,000 measured at the date of judgment and adopting the interest rate used by the Full Court.

401 *Griffiths* (2016) 337 ALR 362 at 419 [316].

402 Section 223(1).

403 At [229].

group whose membership would change from time to time as new members are born and others die.

324 Thirdly, by describing the cultural value of the land as solatium, the Claim Group conflated the different concepts of (i) loss of cultural value, and (ii) loss arising from the compulsory manner of the extinguishment. This meant that no separate award of solatium, properly so called, was sought for the additional distress caused by the compulsory manner of the acquisition. For reasons explained below, it might be doubted whether the award for loss of cultural value incorporated any such amount.

325 Despite the erroneous nature of the parties' assumption, in circumstances where it was not challenged by any party, I proceed on the basis that in this case there would be no substantive difference between an award of $338,381 as at 10 March 1994, to which simple interest is added at the Practice Note rate, and an award of $1,300,000 as at the date of judgment.

Application: the measure of the cultural value in this case

326 The basis upon which the primary judge made the award for cultural loss and the nature of that award are described in detail in the joint judgment[404]. I agree with those reasons. I would add only the following.

327 On the assumption of the parties that an award for cultural value of $1,300,000 at the date of judgment was not any different from the cultural value at the date of extinguishment plus simple interest, the latter amount, when added to the exchange value determined by this Court, gives a total value ($658,631) of the native title which is roughly approximate to the freehold value of the land ($640,500). Indeed, the amount in this case would be less than an award of compensation for a compulsory acquisition of freehold, because the freehold value would usually have added to it a component of solatium of up to 10 per cent to reflect the compulsory nature of the acquisition. Solatium, properly so called, was not separately sought in this case.

328 In this case, the combined award of exchange value and cultural value as at the date of extinguishment therefore amounts to less than the award of compensation that would be made for the compulsory acquisition of the freehold over the same land with no special value. In comparison, the special, cultural value to the Claim Group included the spiritual sustenance derived from the land, "the product of the Dreaming ... considered to be inviolable"[405]. The value to the

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404 At [152]-[237].

405 Palmer and Asche, *Timber Creek Native Title Application: Anthropologists' Report* (2004) at 89 [9.2].

Claim Group of the native title rights was immense. The total award is plainly not excessive. With all the latitude afforded to the primary judge it is a reasonable, indeed a conservative, award.

The operation of s 51A of the *Native Title Act*

329 Section 51A provides relevantly as follows:

"**51A Limit on compensation**

Compensation limited by reference to freehold estate

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

330 Section 51A(2) provides that the section is subject to s 53. Section 53 provides a "safety net"[406] entitlement to constitutional just terms compensation if the limit in s 51A would result in payment of compensation on other than the just terms required by s 51(xxxi) of the *Constitution*.

331 On one view, the limit in s 51A would be engaged in this case. On the assumptions discussed above, the total amount of compensation, comprised of exchange value and cultural value, at the date of extinguishment without interest is marginally more than the freehold value. Of course, that assessment uses only simple interest as a discounting factor. The total compensation would be significantly less if cultural value were discounted by the compounding effect of the time value of money.

332 However, the comparison invited by s 51A is not between the combined cultural and exchange value of native title and the exchange value only of freehold. The proper comparison is between the exchange value of the native title rights ($320,250) and the exchange value of the freehold ($640,500). Consistently with the parity principle underlying the *Native Title Act*, the goal of s 51A is to treat native title, where the native title rights are exclusive and extensive, in the same way as freehold title. In the Explanatory Memorandum to the Bill that introduced s 51A[407], it was explained that the section was intended to

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406 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 224 [24.10].

407 Australia, House of Representatives, *Native Title Amendment Bill 1997*, Explanatory Memorandum at 224 [24.8].

"clarify the amount of compensation that native title holders can get" and that it "equates native title with freehold title for the purposes of the compensation provisions but it does not mean that native title will be regarded in all circumstances as equivalent to freehold".

333 Although the members of the Parliamentary Joint Committee who considered the Bill expressed concern that it was "not clear to the Committee exactly how the capping provision will accommodate the special Indigenous attachment to land"[408], the answer to this concern must be that to treat native title as equivalent to freehold title requires only that the exchange value of native title cannot be more than the exchange value of freehold. A person holding freehold title with some special value would not have the special value ignored for the purpose of compensation any more than a person holding native title should have the special value ignored for the purpose of compensation.

334 This conclusion is reinforced by the comparison invited in s 51(2) to the terms of laws concerning compulsory acquisition. Those statutes[409] are based upon the principle of assessing compensation according to the value to the owner[410]. It would violate the parity principle if compensation for the extinguishment of native title were required to ignore special value to the native title holder, despite it being permitted to the freeholder in many of the statutes.

Interest

335 The remaining issue is whether interest upon the value of the extinguished native title rights should be simple or compound. Both the primary judge and the Full Court held that the interest should be simple interest.

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408 Australia, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *The Native Title Amendment Bill 1997 – Tenth Report* (1997) at [7.29].

409 *Lands Acquisition Act 1989* (Cth), s 55; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 55; *Land Acquisition and Compensation Act 1986* (Vic), s 41; *Land Acquisition Act 1969* (SA), s 25; *Acquisition of Land Act 1967* (Qld), s 20; *Land Administration Act 1997* (WA), s 241; *Land Acquisition Act 1993* (Tas), s 27; *Lands Acquisition Act* (NT), s 66, Sch 2; *Lands Acquisition Act 1994* (ACT), s 45.

410 *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 571; *The Moreton Club v The Commonwealth* (1948) 77 CLR 253 at 257; [1948] HCA 21; *The Commonwealth v Arklay* (1952) 87 CLR 159 at 169; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 212 [11], 279 [354]; 167 ALR 575 at 579, 668-669.

Interest as part of compensation

336 One route to the award of compound interest is for the interest to form part of the obligation in s 51 to "compensate the native title holders for any loss ... or other effect of the act on their native title rights and interests".

337 It is immediately necessary to identify what is meant by "compensation". The term is used in s 51 in its nearly universally accepted sense, which focuses upon the claimant. It is consistent with the longstanding approach to compensation for compulsory acquisition, which focuses upon the effect on the owner[411], replicated in the focus of the compensation provisions in the *Native Title Act* upon compensation to the "native title holders"[412]. This accords with the widely prevailing meaning of compensation adopted for decades in this Court. There are many authorities affirming that the role of compensation is to "put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed"[413]. As Mason CJ, Dawson, Toohey and Gaudron JJ said in *Haines v Bendall*[414], the concept of compensation was cognate with "the rule, described by Lord Reid in *Parry v Cleaver*[415], as universal, that a plaintiff cannot recover more than he or she has lost".

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411 *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 571; *The Moreton Club v The Commonwealth* (1948) 77 CLR 253 at 257; *The Commonwealth v Arklay* (1952) 87 CLR 159 at 169; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 212 [11], 279 [354]; 167 ALR 575 at 579, 668-669.

412 See Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum: Part A at 3; Australia, House of Representatives, *Native Title Bill 1993*, Explanatory Memorandum: Part B at 29; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2882.

413 *Haines v Bendall* (1991) 172 CLR 60 at 63; [1991] HCA 15. See *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *British Transport Commission v Gourley* [1956] AC 185 at 197, 212; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191; [1966] HCA 38; *Todorovic v Waller* (1981) 150 CLR 402 at 412, 463; [1981] HCA 72; *Redding v Lee* (1983) 151 CLR 117 at 133; [1983] HCA 16; *Johnson v Perez* (1988) 166 CLR 351 at 355, 367, 371, 386; [1988] HCA 64; *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 664; [1991] HCA 3.

414 (1991) 172 CLR 60 at 63.

415 [1970] AC 1 at 13.

338 Compensation, understood in this manner, contrasts sharply with awards in cases, including a decision relied upon by the Claim Group[416], based upon a gain to the defendant, of either restitution or disgorgement. Restitution of a gain reverses the value of an enrichment received at the plaintiff's expense. Restitution "does not seek to provide compensation for loss"[417]. As for an account and disgorgement of profits, this is a "prophylactic"[418] principle. This prophylactic or deterrent purpose is a foundation for stripping profits from a wrongdoer[419]. It is also well established that disgorgement of profits is not concerned with compensating for loss[420].

339 Since s 51 is concerned only with awards of compensation it is unnecessary on these appeals to consider whether there exists any generalised principle, whether or not it could be described as "free standing"[421], permitting compound interest as part of an award of restitution. Compound interest as a restitutionary award would not be concerned with loss and would not be compensatory[422]. Further, difficult issues, not addressed in submissions in this

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416 *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] AC 561.

417 *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75; [1994] HCA 61; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 529 [26]; [2001] HCA 68. See also Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) at 26, s 1(2).

418 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 92 ALJR 918 at 923 [9]; 360 ALR 1 at 6; [2018] HCA 43; Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010) at 80-84.

419 *Keech v Sandford* (1726) Sel Cas t King 61 at 62 [25 ER 223 at 223-224]; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557; [1995] HCA 18, quoting *Meinhard v Salmon* (1928) 164 NE 545 at 546. See also Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 *Law Quarterly Review* 472 at 474.

420 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408-409; [1929] HCA 24; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 394; [1975] HCA 8; *Chan v Zacharia* (1984) 154 CLR 178 at 199; [1984] HCA 36.

421 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316-317 [72]-[75]; [1998] HCA 20.

422 *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] AC 561 at 585 [28], 585-586 [30]-[31], 606 [116], [119], 615 [144], 618 [154], 649-650 [231]; Burrows, *The Law of Restitution*, 3rd ed (2011) at 64-65.

case, would need to be considered before that possibility is entertained. One issue is whether a claim for restitution of unjust enrichment should rationally be confined to the value immediately transferred to the defendant[423]. A second, related, issue is the value of analogies between, on the one hand, the benefit of an opportunity to use money and, on the other hand, the benefit of an opportunity to use other property[424] or the benefit of the opportunity to use money unlawfully obtained[425]. A third issue is any incongruity that would arise by, on the one hand, not subjecting the defendant to a prima facie obligation to restore the value of the opportunity to profit from the use of money received by unjust enrichment yet, on the other hand, recognising a defence to the extent that the money is used unprofitably[426]. A fourth issue is the status and nature of authorities, discussed below, awarding interest at common law where a judgment is set aside.

340 It is equally unnecessary to consider whether there should be a generalised principle permitting compound interest as part of an award of disgorgement of profits, beyond cases of breach of fiduciary duty and, despite some doubts[427], fraud[428]. Even if such a generalised principle were recognised to require

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423 *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] 3 WLR 652 at 678-680 [68]-[75]. Compare *Menelaou v Bank of Cyprus plc* [2016] AC 176 at 188 [24]; *Moore v Sweet* 2018 SCC 52 at [43]-[44]; Mitchell, Mitchell and Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 156-160 [6-17]-[6-29]; Burrows, *The Law of Restitution*, 3rd ed (2011) at 66-69.

424 See Clode, *The Law and Practice of Petition of Right* (1887) at 96, cited in *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365 at 369; *Heydon v NRMA Ltd [No 2]* (2001) 53 NSWLR 600 at 605 [15]. See also *Dimond v Lovell* [2002] 1 AC 384 at 397.

425 *Nelson v Nelson* (1995) 184 CLR 538 at 571-572, 617-618; [1995] HCA 25.

426 Bant, *The Change of Position Defence* (2009) at 129-130.

427 *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488 at 505, considering *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 700-701; which I discuss and criticise in *McGregor on Damages*, 20th ed (2018) at 492-494 [15-039]-[15-044], 639 [19-068].

428 *President of India v La Pintada Compania Navigacion SA* [1985] AC 104 at 116; *Hungerfords v Walker* (1989) 171 CLR 125 at 148; [1989] HCA 8; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316 [74].

disgorgement of compound interest for wrongdoing beyond these categories[429], and generalised to include investment profits made by the wilful wrongdoing of a defendant who is liable to account[430], the principle would not be relevant to s 51 of the *Native Title Act* because disgorgement of compound interest profits made by a defendant is not "compensation"[431].

341 In order for an award of interest, including compound interest, to be made as part of a compensation award, the Claim Group would need to prove that they suffered a loss. That loss could be proved by showing that if the value of the native title rights had been paid to the Claim Group at the date of extinguishment, then they would have invested that money and would have earned interest on it[432]. The further question would then arise as to whether that loss from the failure to invest was an "effect of the act on their native title rights and interests"[433].

342 These issues do not arise. The primary judge was not satisfied that the Claim Group would have invested any payment made at the time of extinguishment to earn interest. As he explained, "on previous occasions where the Claim Group had collectively considered how funds should be applied, they had elected to distribute the funds for individuals or families to use"[434].

The power to award interest on compensation

343 Whatever may be the position in the interpretation of different legislative provisions[435], interest that arises only because of a delay in paying the

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429 See, eg, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 692-693, 696-697, 735; *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] AC 561 at 586 [32].

430 American Law Institute, *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (1937), §149 at 595-596; American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (2011), §49 at 184.

431 Elliott, "Rethinking interest on withheld and misapplied trust money" [2001] *The Conveyancer and Property Lawyer* 313 at 321.

432 *Hungerfords v Walker* (1989) 171 CLR 125 at 143, 149-150, 152.

433 *Native Title Act*, s 51(1).

434 *Griffiths* (2016) 337 ALR 362 at 413 [275].

435 See *Swift & Co v Board of Trade* [1925] AC 520; *The Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293; [1945] HCA 5; *Marine Board of*

(Footnote continues on next page)

compensation assessed under s 51 of the *Native Title Act* cannot be *part* of the award of compensation. It is not part of the compensation because it is not "for" an effect of the acts in extinguishing native title. Instead, interest for delay in the payment of compensation can only be interest *on* the compensation.

344 Although interest for a delay in paying compensation is *on* compensation, the better view is that it is still within the terms of s 51 of the *Native Title Act*, which requires the compensation to be paid on "just terms". Again, this is a question of interpretation of the particular statute. The context of s 51(1) illustrates that the "just terms" of the obligation to compensate includes the power to order interest on that compensation.

345 As Dixon J said in *Marine Board of Launceston v Minister of State for the Navy*[436], the jurisdiction of a court to award compensation "may be readily interpreted as extending to what is consequential upon or incidental to the award". The reference in s 51 to the "just terms" upon which the obligation to compensate must be fulfilled reiterates the reach of the obligation to matters, such as interest, that are incidental to the award of compensation. Even assuming that s 51(xxxi) of the *Constitution* does not necessarily require the payment of interest for a delay in paying compensation for a compulsory acquisition[437], the justice of the terms of payment of compensation must be understood against the background of the equitable rule that required the payment of interest upon unpaid purchase money and the analogy with that rule that had been drawn in cases of compulsory purchase of property. The principles and concerns revealed by that history demonstrate that the obligation to compensate on "just terms" will generally require interest on compensation but will not require compound interest.

The history of an award of interest on compensation

1. Common law

346 Prior to 1829, there had been some argument at common law that the "constant practice"[438] of ordering payment of interest where it had been agreed should, in justice, apply also to cases where there had been no agreement to pay

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Launceston v Minister of State for the Navy (1945) 70 CLR 518; [1945] HCA 42; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; [1948] HCA 7.

436 (1945) 70 CLR 518 at 533.

437 *The Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 at 326; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 300-301.

438 *Craven v Tickell* (1789) 1 Ves Jun 60 at 63 [30 ER 230 at 231].

interest[439]. However, long-established practice was to the contrary. In *Calton v Bragg*[440], Lord Ellenborough CJ, Grose and Bayley JJ had said that interest on a "mere simple contract of lending" was never awarded without agreement.

347 The restrictive rule was settled at common law in 1829 in *Page v Newman*[441]. Lord Tenterden CJ put the rule upon a curious premise. He said that to adopt a rule that allowed interest without agreement would require proof of a proper attempt by the plaintiff to obtain payment and that insistence upon such proof would be "productive of great inconvenience" in jury trials[442]. Nevertheless, the general rule at common law was adopted in Australia with the effect that, in the absence of agreement, interest was not payable for a delay in payment of money that was due[443].

348 The general rule at common law was not absolute. One exception was in cases of money obtained and retained by fraud[444]. Another, and perhaps the best known common law exception, involved interest on an award of restitution rather than compensation. In *Rodger v The Comptoir d'Escompte de Paris*[445], in an approach adopted in Australia[446], the Privy Council held that interest was payable upon an order for restitution of money paid under a judgment that was set aside. The interest was ordered because "the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the

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439 *Arnott v Redfern* (1826) 3 Bing 353 at 360 [130 ER 549 at 552].

440 (1812) 15 East 223 at 226-227 [104 ER 828 at 830].

441 (1829) 9 B & C 378 [109 ER 140].

442 (1829) 9 B & C 378 at 380-381 [109 ER 140 at 141].

443 *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518 at 525; *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149 at 162; [1984] HCA 59.

444 *Johnson v The King* [1904] AC 817 at 822.

445 (1871) LR 3 PC 465.

446 *Heavener v Loomes* (1924) 34 CLR 306 at 323-324; [1924] HCA 10; *The Commonwealth v McCormack* (1984) 155 CLR 273 at 276-277; [1984] HCA 57.

money restored to them, with interest, during the time that the money has been withheld"[447].

2. Equity

349 In contrast with the restrictive approach at common law, in cases involving a sale of land equity recognised that a purchaser in possession must pay interest to the unpaid vendor from the date of taking possession, or the date when the purchaser might reasonably have taken possession, until the date of the decree[448]. An early, but fictitious, rationale given by Sir William Grant was that the act of taking possession was "an implied agreement to pay interest"[449]. A more sophisticated rationale that emerged was that the defaulting purchaser in possession who retained the purchase money was the "trustee" of it for the vendor, at least to the extent that equity would decree specific performance, and must therefore account for the purchase money and interest[450]. Although the trustee analogy might now be doubted[451], the obligation to pay interest was extended in equity by analogy from cases of sale of land to cases of compulsory acquisition of property under the *Land Clauses Consolidation Act 1845* (UK)[452]. This extension was justified in that case because the "notice to treat under the statute [was] treated in equity as creating the relation of vendor and purchaser" of land[453].

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447 *Rodger v The Comptoir d'Escompte de Paris* (1871) LR 3 PC 465 at 475-476.

448 *Esdaile v Stephenson* (1822) 1 Sim & St 122 at 123 [57 ER 49 at 50].

449 *Fludyer v Cocker* (1805) 12 Ves Jun 25 at 27-28 [33 ER 10 at 11]. See also *Swift & Co v Board of Trade* [1925] AC 520 at 532; *Lawrence v Broderick* (1974) 1 BPR [97004] at 9117.

450 *Birch v Joy* (1852) 3 HLC 565 at 590-591 [10 ER 222 at 233]; *International Railway Co v Niagara Parks Commission* [1941] AC 328 at 345; *In re Priestley's Contract* [1947] Ch 469 at 479-480; Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates*, 3rd ed (1808) at 353-356.

451 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 332-333 [53]; [2003] HCA 57; Swadling, "The Fiction of the Constructive Trust" (2011) 64 *Current Legal Problems* 399.

452 *In re Pigott and the Great Western Railway Co* (1881) 18 Ch D 146 at 150. See also *Fletcher v Lancashire and Yorkshire Railway Co* [1902] 1 Ch 901 at 909.

453 *Swift & Co v Board of Trade* [1925] AC 520 at 532.

350 The need for a relationship of vendor and purchaser was eventually abandoned by equity and the power to award interest was recognised by the Privy Council in all cases of compulsory "acquisition" of land[454]. Although the earlier rationale based upon the trust that arose in a sale of land was a reason why the courts did not further extend the equitable rule to the compulsory acquisition of goods[455], in 1945 the equitable rule was used in Australia to justify the award of interest on statutory compensation for the compulsory acquisition of a ship where a contract for its sale could have been the subject of specific performance[456]. However, Dixon J decided the case on the broader footing of the power being a matter of statutory construction without necessarily confining the power to the availability of specific performance of a contract for the sale of the subject matter[457].

3. Admiralty

351 Admiralty took the same approach as equity, at about the same time, but without the need for a rationale based upon a trust. In *Shaw Savill and Albion Co Ltd v The Commonwealth*[458], Dixon CJ quoted from Dr Lushington[459], saying:

> "Upon what grounds, then, was interest given? Interest was not given by reason of indemnification for the loss, for the loss was the damage which had accrued; but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money, it is a loss in the common sense of the word, but a loss of a totally different description, and clearly to be distinguished from a loss which has occurred by damage done at the moment of collision".

352 With the exception of limited circumstances, such as delay by the plaintiff, an award of pre-judgment interest in Admiralty became "well-nigh

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454 *Inglewood Pulp and Paper Co v New Brunswick Electric Power Commission* [1928] AC 492 at 498-499.

455 *Swift & Co v Board of Trade* [1925] AC 520 at 532.

456 *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518 at 527, 534-535, 537-538; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 278-279.

457 *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518 at 532-533.

458 (1953) 88 CLR 164 at 166-167; [1953] HCA 24.

459 *The Amalia* (1864) 5 New Rep 164n.

automatic"[460]. In *President of India v La Pintada Compania Navigacion SA*[461] Lord Brandon of Oakbrook said that the interest awarded in damage actions should be extended to salvage actions but emphasised that the award of interest "does not involve, and never has involved, the award of compound interest, and again there is no authority in any reported Admiralty case for the award of interest of that kind". Such an award would never have occurred to any experienced Admiralty lawyer[462].

4. Statute

353 At the same time as equity and Admiralty were developing awards of interest on compensation, the same approach was being taken in legislation. The first law was a limited power in s 28 of the *Civil Procedure Act 1833* (UK)[463] to award interest on judgment debts or awards of damages. Statutory interest was generalised on a wide scale in England with the enactment of the *Law Reform (Miscellaneous Provisions) Act 1934* (UK) following the report of the Law Revision Committee presented to Parliament in that year. In the published report, the Committee observed[464]:

> "In practically every case a judgment against the defendant means that he should have admitted the claim when it was made and have paid the appropriate sum for damages. There are of course some cases where it is reasonable that he should have had a certain time for investigation, and in those cases the Court might well award interest only from the date when such reasonable time had expired. This is often done at present in claims under insurance policies. There is no doubt that the present state of the law provides a direct financial motive to defendants to delay proceedings."

354 In Australia, general statutory interest provisions now exist in State, Territory and federal courts legislation which generally provide for the award of

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460 *Masters v Transworld Drilling Co* (1982) 688 F 2d 1013 at 1014.

461 [1985] AC 104 at 120. See also *Polish Steam Ship Co v Atlantic Maritime Co* [1985] QB 41 at 50-51.

462 [1985] AC 104 at 121.

463 3 & 4 Will 4 c 42.

464 Great Britain, Law Revision Committee, *Second Interim Report* (1936) Cmd 4546 at 5.

interest upon judgment debts and damages[465]. The rationale for the statutory interest was explained by Lord Wright, a member of the Law Revision Committee that had generalised the provision for statutory interest, in *Riches v Westminster Bank Ltd*[466]:

> "The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or in other words was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute, as for instance under s 57 of the Bills of Exchange Act, 1882, or was unliquidated and claimable under the Act as in the present case."

The rationale in equity, in Admiralty, and under statute

355 In all of the instances discussed above involving interest on compensation at common law, in equity, in Admiralty, and under statute, the interest was not awarded for a proved loss. A claim for interest based upon proved losses from the failure to obtain money would be interest as part of the compensation award[467]. This type of claim for interest is "a loss like any other"[468] and could attract compound interest if that is what was lost. In contrast, the award of interest on compensation or interest on a debt "is no part of the debt or damages claimed, but something apart on its own"[469].

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465 *Federal Court of Australia Act 1976* (Cth), s 51A; *Civil Procedure Act 2005* (NSW), s 100; *Supreme Court Act 1986* (Vic), ss 58-60; *Supreme Court Act 1935* (SA), s 30C; *Civil Proceedings Act 2011* (Qld), s 58; *Supreme Court Act 1935* (WA), s 32; *Supreme Court Act* (NT), s 84; *Court Procedures Act 2004* (ACT), s 7, Sch 1, item 20; *Court Procedures Rules 2006* (ACT), r 1619. Compare *Supreme Court Civil Procedure Act 1932* (Tas), ss 34-35.

466 [1947] AC 390 at 400. See also *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] 3 WLR 652 at 680 [76]; [2019] 1 All ER 308 at 335.

467 *Hungerfords v Walker* (1989) 171 CLR 125.

468 *BritNed Development Ltd v ABB AB* [2018] 5 CMLR 37 at 1693 [545].

469 *Jefford v Gee* [1970] 2 QB 130 at 149.

356 The reason why interest is awarded, as "something apart", on the amount that would otherwise be due as compensation is that the plaintiff has been kept out of the money for a period of time. The cases, and the rationale of the legislation, emphasise the concern that the plaintiff be compensated for being deprived for a period of time of the payment that should have been received. However, the period is only a single period. The plaintiff has not been kept out of money for a period of time, then kept out of the money and interest for a further period, then the money and the interest and interest on the interest for a further period, and so on. This is why the interest awarded in Admiralty, or on default of payment by a purchaser of land, or under the various statutes, was never compound interest.

357 There may, however, be some tension between, on the one hand, recognising that there is only one period of deprivation and, on the other hand, recognising that simple interest over that period does not fully reflect the extent of the deprivation as measured in commercial terms. That conflict was generally resolved by generous assumptions made by legislatures and the common law in the rate of interest. Those assumptions often used a single rate for clarity.

358 In *Calton v Bragg*[470], Lord Ellenborough CJ said that "[i]t is not only from decided cases, where the point has been raised upon argument, but also from the long continued practice of the Courts, without objection made, that we collect rules of law". The long-established conservatism was not limited to an insistence that the interest be for a single period. It also extended to a strong reluctance to depart from the rate of interest. For instance, the interest awarded by the Admiralty courts in England and Australia in limited liability actions[471] was set at 4 per cent for more than a century[472]. More recently, in England the rate has generally been set at a market borrowing rate of base rate plus 1 per cent following the practice, under statute[473], of the Commercial Court[474]. In *Asiatic Steam Navigation Co Ltd v The Commonwealth*[475], this Court refused to depart

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470 (1812) 15 East 223 at 226 [104 ER 828 at 830].

471 Compare *The Mecca* [1968] P 665 at 673; Roscoe and Hutchinson, *The Admiralty Jurisdiction and Practice of the High Court of Justice*, 5th ed (1931) at 364-365.

472 *The Theems* [1938] P 197 at 201; *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397 at 421; [1956] HCA 82; *The Abadesa [No 2]* [1968] P 656 at 664.

473 *Law Reform (Miscellaneous Provisions) Act 1934* (UK), s 3.

474 *Cremer v General Carriers SA* [1974] 1 WLR 341 at 355-356; [1974] 1 All ER 1 at 14-15; *Polish Steam Ship Co v Atlantic Maritime Co* [1985] QB 41 at 67.

475 (1956) 96 CLR 397 at 420-421.

from a rate of 4 per cent, although acknowledging that the rate of interest upon a judgment was 5 per cent, and that the 4 per cent rate was low according to the economic conditions. The Court referred to the lack of change in the rate for more than a century and reiterated the reason given by Dixon J for refusing to change the 4 per cent rate when awarding interest in equity for the purpose of adjusting rights on legacies[476]. That reason was stability: marked fluctuations in interest rates over time have "rather confirmed the policy of the court in fixing for its purposes a rate which over a long period represents a fair or mean rate of return for money"[477].

359 Stability can be achieved now, without the sacrifice of a fair rate, by adopting the rate, as was common ground, from the Federal Court Practice Note. To depart now from the practice of equity, Admiralty, or statute established for centuries would be a significant sacrifice of the stability of the law in circumstances where the underlying principle for the award of interest in all of these areas, over the entire course of their development, has been that the claimant is deprived of money for a single period. Although the "just terms" that are required for the award of compensation in s 51 import a power to award interest, that power cannot be extended to compound interest "on" an award of compensation.

Conclusion

360 I agree with the orders proposed in the joint judgment. In particular, I agree that the award of interest upon the "economic loss" of $320,250, as rounded, should be $910,100. This award of interest employs an *rt* (rate multiplied by time) multiplier of 2.84182, which is the multiplier used by the Full Court. Although different *rt* multipliers were adopted by the parties in spreadsheets handed up during these appeals, there was no challenge in this Court to the *rt* multiplier used by the Full Court, which, as explained earlier in these reasons, varied the *rt* multiplier used by the primary judge consequent upon allowing the Commonwealth's appeal ground concerning lot 47.

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476 (1956) 96 CLR 397 at 421.

477 *In re Tennant; Mortlock v Hawker* (1942) 65 CLR 473 at 507-508; [1942] HCA 3, cited in *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397 at 421.