

# Native title compensation claims

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## Introduction

In the 24 years since the enactment of the *Native Title Act 1993* (Cth) (NTA), there has been just one fully litigated and successful native title compensation claim: *Griffiths v Northern Territory (No.3)* [2016] FCA 900; (2016) 337 ALR 362 (Mansfield J) (*Griffiths No.3*) and, on appeal, *Northern Territory v Griffiths* [2017] FCAFC 106 (*Griffiths FFC*). On 18 February 2018 the High Court granted leave to the Northern Territory and Commonwealth to appeal *Griffiths FFC*. In this article we discuss the approach that the Federal Court took at first instance and on appeal to this truly novel area of Australian law.

## Background and the Native Title Act

The enactment of the NTA was the Commonwealth's response to the High Court's landmark recognition of native title in Australia in *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

The main objects of the NTA are set out in s 3 of the NTA and they are:

to provide for the recognition and protection of native title; and

to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and

to establish a mechanism for determining claims to native title; and

to provide for, or permit, the validation of past acts invalidated because of the existence of native title.

## Claims for the recognition of native title

As part of the statutory recognition and protection of native title, the NTA made provision for Aboriginal people and Torres Strait Islanders to apply to the Federal Court to obtain a determination that would recognise their native title rights and interests. There have been many such applications determined by the Federal Court since the commencement of the NTA on 1 January 1994. Most contested native title claims have gone on appeal to the Full Federal Court and a significant number to the High Court. As a result, a considerable body of jurisprudence has developed relative to the making and the determination of claims for the recognition of native title.

Native title rights and interests are not common law rights and interests; they are rights and interests possessed under traditional laws and customs and are 'recognised' by the common law. Those rights and interests may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer. Native title rights and interests will often reflect a different conception of 'property' or 'belonging': *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) at [40]. In *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*Yarmirr*) at [12], the High Court cautioned that neither the use of the word 'title' nor the fact that the rights and interests be 'in relation to' land and waters should be seen as requiring identification of the rights and interests as items of 'real property'.

The following passage from the majority judgment in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*) at [14] aptly describes

both the nature of native title and the difficulty of translating what is essentially a spiritual or religious connection with land into what the law will recognise as rights and interests:

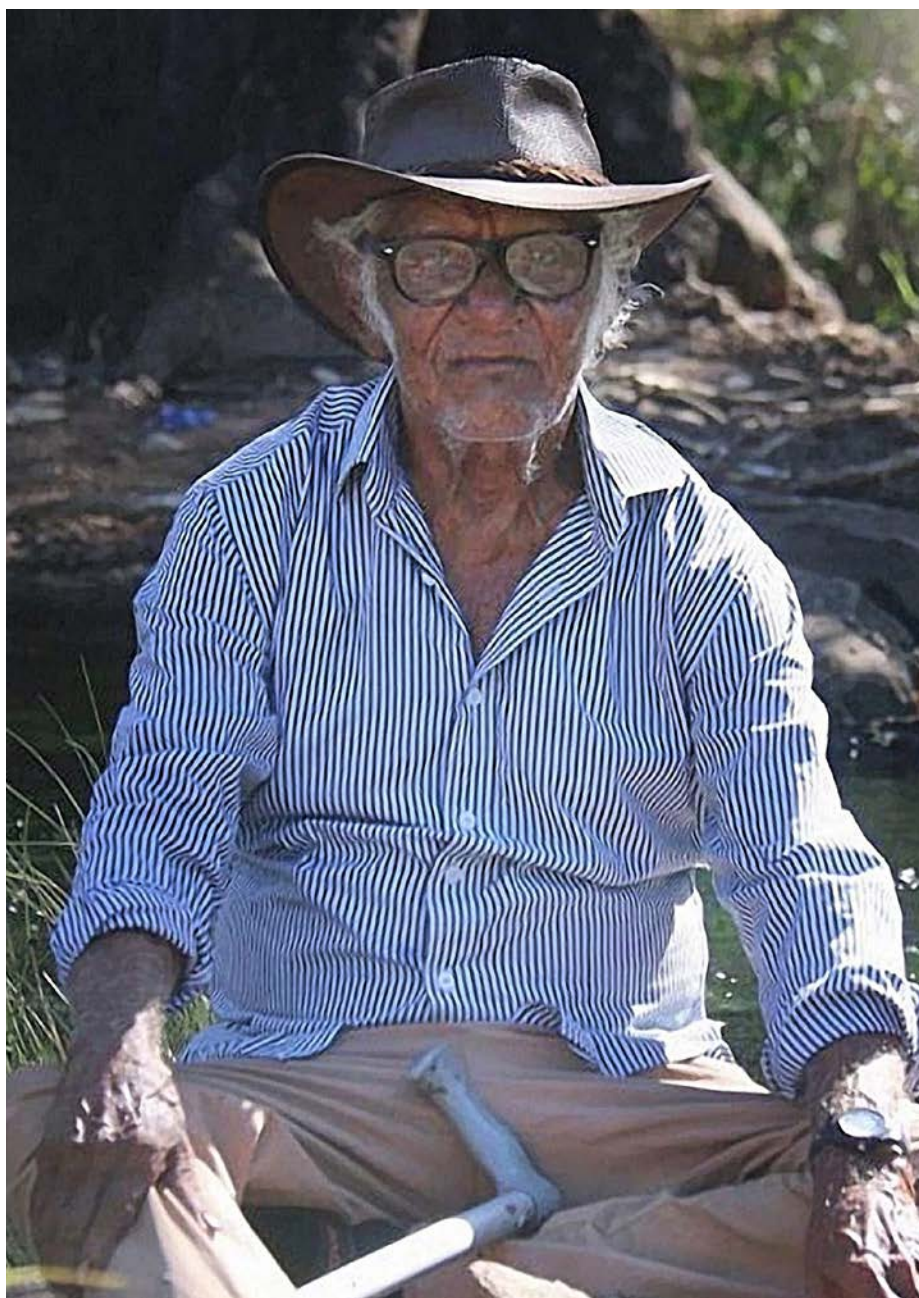
As is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J said that:<sup>1</sup>

'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 NTA. 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. Nor are they reduced by the requirement of the NTA, now found in par (e) of s 225, for a determination by the Federal Court to state, with respect to land or waters in the determination area not covered by a 'non-exclusive agricultural lease' or a 'non-exclusive pastoral lease', whether the native title rights and interests 'confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.'

## Native title compensation claims

The NTA's *quid pro quo* for enabling the Commonwealth, state and territory governments to validate past acts which may have



Alan Griffiths. Photo: ABC

been invalidated by reason of the existence of native title and to engage in future dealings that may affect native title was to make provision for the native title holders to receive compensation on just terms for the effect that such acts would have upon their native title rights and interests. In relation to some state regimes liability for compensation is transferred. For example, the State of Western Australia is liable under the NTA to compensate native title holders for the grant of mining tenements over native title land, yet under s 125A of its *Mining Act 1978* (WA), the state has transferred that liability to the holder of mining tenements.

The pivotal section of the NTA when it comes to determining the quantum of compensation payable is s 51(1) which relevantly provides that the entitlement to compensation for past or future acts: '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'.

### *Griffiths v Northern Territory* (No.3) (2016) 337 ALR 362

#### Background

The Ngaliwurry and Nungali People (Griffiths Applicants) filed applications for a native title determination in 1999 and 2000 over areas of vacant Crown land within the small township of Timber Creek in the Northern Territory.<sup>2</sup> At first instance, Weinberg J determined that the Griffiths Applicants held only non-exclusive native title rights and interests. His Honour ruled that, with a few exceptions, any prior extinguishment as a result of the grant of pastoral leases must be

disregarded under s 47B of the NTA.<sup>3</sup> The Griffiths Applicants successfully appealed that decision. The Full Court determined that the Griffiths Applicants held native title rights to exclusive possession, use and occupation in relation to those parts of the claim area to which s 47B applied.<sup>4</sup>

The Griffiths Applicants commenced a claim for compensation under s 61 of the NTA for the past extinguishment of their native title rights and interests in respect of various lots of land within Timber Creek. Because s 47B had no application to a claim for compensation, the court could not disregard the prior extinguishment of the right to control access and use brought about by the earlier grant of historic pastoral leases.

#### *Issues in Griffiths (No.3)*

It was common ground that most of the Griffiths Applicants' entitlement to compensation arose under s 23J of the NTA for the extinguishment of their native title rights and interests by various previous exclusive possession acts attributable to the Northern Territory and validated by operation of the NTA.<sup>5</sup> It was also common ground that the rights and interests which were extinguished by those previous exclusive possession acts were non-exclusive rights and interests by virtue of the fact that earlier pastoral leases had already extinguished the Griffiths Applicants' exclusive native title rights.<sup>6</sup>

The compensation application claimed compensation under two heads. One head of claim was the economic loss caused by the acts that extinguished the native title rights and interests. The other head of claim was the non-economic effect of those acts on the Griffiths Applicants. The Northern Territory and the Commonwealth did not take issue with that general framework and accordingly Mansfield J adopted that framework for his assessment of the amount of compensation.

The primary judge awarded \$512,400 compensation for the economic value of the extinguished native title rights (80% of the freehold value) and simple interest on that sum of \$1,488,261. He also awarded \$1,300,000 for solatium for the loss or impairment of those rights and interests.

#### **Mansfield J's approach to the calculation of compensation queried in the Full Court**

In *Griffiths* FFC, the Full Court referred to the passage in the majority judgment in *Ward* (at [14]), set out earlier above at [5], in which their Honours adopted the observation of Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, that the relationship of Aboriginal people to land is, whatever else, a spiritual relationship in which ancestors, the people and all else are organic parts of one indissoluble whole (at [140]). The Full Court said that s 51(1) of the NTA should



be construed in a manner which reflects the (special) nature of the subject matter with which it deals and when that is done, 'it is by no means clear that Parliament intended there to be the kind of binary approach to compensation adopted by the parties in this proceeding' (at [142]).

The Full Court said that the use of the phrase, 'loss, diminution, impairment or other effect', in s 51(1) suggests that Parliament contemplates that there may be more than one effect, and that the effects may

be economic components. It might rather be more appropriate to seek to place a money value as best as can be done on the one indissoluble whole.' (at [144]).

### The Full Court's decision

Despite those criticisms, the Full Court went on to determine the appeal in the way that it had been argued before it and in the way that the case had been conducted before the primary judge. That is, the Full Court con-

sidered whether the primary judge had erred in his calculation of either or both, economic loss and non-economic loss.

of compensation was an 'intuitive' decision but said that the primary judge had erred in not giving a sufficient discount to reflect the fact that the native title holders' rights and interests were non-exclusive, that is, they did not have a right to control access onto their land and the inalienable nature of native title. The Full Court said that the discount factor should have been 65%, rather than 80% of the freehold value of the land.

Justice Mansfield calculated the interest on the economic loss using the simple interest method. His Honour noted that the NTA does not prescribe a particular method and held that the appropriate method will depend on the evidence in a particular case.<sup>10</sup> In the case before him, Mansfield J considered it probable that the funds would have been distributed to individuals rather than invested commercially, and this justified the payment of simple, rather than compound, interest by the Northern Territory.<sup>11</sup>

Before the Full Court, the Commonwealth's contention was that the economic value of the non-exclusive native title should be assessed at 50% of the freehold value. The Northern Territory's contention was that the economic value should be assessed as the aggregate of a 'usage value' of the parcels of land (derived from the market value of undeveloped range land) and a 'negotiation value' equal to the excess of 50% of the freehold value over the 'usage value'. In its cross-appeal, the native title holders' contention was that the economic value should be assessed at 100% of the freehold value.

### Non-economic loss

Compensation for non-economic loss was the largest component of the damages awarded to the Griffiths Applicants.<sup>12</sup> As noted by Mansfield J, the issue confronting the court was 'how to quantify the essentially spiritual relationship which Aboriginal people, and particularly the Ngarliwurrurru-Nungali People, have with country and to translate the spiritual or religious hurt into compensation'.<sup>13</sup>

His Honour held that non-economic loss or solatium, is to be calculated with reference to the collective and communal nature of native title, and the extent to which rights and interests are non-exclusive.<sup>14</sup> It was particularly emphasised that not all claim groups will have an identical relationship to country, and so the court must undertake an evaluation of the relevant compensable intangible disadvantages, which in turn requires an appreciation of the effects of that loss on the specific native title holders.<sup>15</sup> As in his consideration of economic loss, Mansfield J suggested the process of calculating non-economic loss is an intuitive one.<sup>16</sup>

Justice Mansfield identified three particular considerations that were significant to his assessment of non-economic loss. First, the construction of a water tank on a site of



Timber Creek, NT. Photo: ABC

vary in nature, quality and significance (at [142]). They said that native title rights have a unique indissoluble character and it is in relation to those rights and interests that the terms of the compensation must, as s 51(1) states, be 'just' (ibid):

The statute does not ask in terms what is the 'effect' on the land in relation to which rights and interests are held; nor on its value. Nor does the statute confine the effect to the use or exercise in any particular way of the bundle of rights constituting native title. Properly construed, s 51(1) contemplates compensation to native title holders of a more holistic nature. (at [142])

Their Honours went on to say that once it is seen that Aboriginal rights and interests in land had dimensions remote from the notions enshrined in Australian land law, the question arises as to whether any real assistance can be found in applying the principles to be found in state or territory land compensation statutes to the task of assessing compensation for the loss of native title rights and interests (at [144]). Their Honours said that it may well be appropriate to 'loose the assessment from the shackles of Australia land law and approach the compensation exercise without dividing value into economic and non-economic components. It might rather be more appropriate to seek to place a money value as best as can be done on the one indissoluble whole.' (at [144]).

considered whether the primary judge had erred in his calculation of either or both, economic loss and non-economic loss.

### Economic loss

The starting point of Mansfield J's analysis of the Griffiths Applicants' economic loss was that exclusive native title is equivalent in value to freehold title.<sup>7</sup> It was reasoned that a discount must be applied to the Griffiths Applicants' rights and interests on the basis that there is a difference in value between exclusive and non-exclusive native title rights.<sup>8</sup> Justice Mansfield ultimately held that the Griffiths Applicants' non-exclusive rights and interests were worth 80% of the freehold value. His Honour noted that this was not 'a matter of careful calculation' and that, rather:

It is an intuitive decision, focussing on the nature of the rights held by the claim group which had been either extinguished or impaired by reason of the determination acts in the particular circumstances. It reflects a focus on the entitlement to just compensation for the impairment of those particular native title rights and interests which existed immediately prior to the determination acts.<sup>9</sup>

The Full Court agreed that the calculation

spiritual significance, which caused readily identifiable distress. Second, the impact of certain acts on the capacity of the native title holders to conduct ceremonial and spiritual activities on that area and adjacent areas. Third, the reduction of the geographical area over which native title is held, which has affected the spiritual connection of the claim group to their country.<sup>17</sup>

At [382]-[384], his Honour concluded:

Those three elements have now been



experienced by the Claim Group for some three decades. The evidence given by the members of the Claim Group shows that the effect of the acts has not dissipated over time. I have referred to that evidence above. The compensation, therefore, should be assessed on the basis of the past three decades or so of the loss of cultural and spiritual relationship with the lots affected by the compensable acts in the manner I have identified, and for an extensive time into the future.

...

As that compensation is made as at the date of this judgment, there is no question of interest to be calculated in relation to it.

By taking into account the intangible disadvantages principle in the Land Acquisition Act (NT), (see NTA s 51(4)), Mansfield J assessed compensation for non-economic loss in an amount of \$1,300,000, which was more than twice the aggregate freehold value of the land. Before the Full Court, the Commonwealth maintained that the non-economic value should be assessed at \$5,000 per parcel of land whilst the territory's position was that the non-economic value should be assessed at 10% of the economic loss based on the 'usage value' and 'negotiation value' as

discussed earlier above at [21].

The Full Court declined to interfere with the non-economic loss component of the compensation. In this respect, the Full Court said that the non-economic loss claim was to compensate for the effects of the loss or diminution in the claim group's native title rights and interests in land and as such it was for the anguish and distress caused by the extinguishment of those rights (at [375]). Their Honours said that losses of that nature cannot be measured in terms of money and

## Conclusion

Justice Mansfield's reasoning at first instance and that of the Full Court on appeal points, firstly, to the added significance that will attach to the extinguishment of exclusive, as opposed to non-exclusive, native title rights and interests. Secondly, although each case will depend upon its own facts and on the degree of traditional connection to the land, compensation for the native title holding community must include compensation for such intangibles as loss of amenities, pain and suffering and reputational damage.

Claims for compensation for the loss of native title have potential to become bitterly fought disputes. For example, in *Warrie (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803 (*Warrie*) the Fortescue Metals Group's (FMG) predominant concern during the trial of the Yindjibarndi People's application for a determination of native title was to avoid a finding that the native title rights and interests which the Yindjibarndi admittedly possessed did not confer on them a right of exclusive possession. In *Warrie*, Rares J rejected FMG's arguments to the contrary and found that the Yindjibarndi People did possess exclusive possession native title. Any future compensation application by the Yindjibarndi People will result in a liability for FMG, which is as yet unquantified, to compensate the Yindjibarndi People for the affect that the grant of FMG's Solomon Hub mining tenements have had and will continue to have, on the Yindjibarndi People's native title rights and interests.

In February 2018 the applicant, the Northern Territory and the Commonwealth sought, and were granted, special leave to appeal to the High Court. It is hoped that the High Court will provide a much greater degree of certainty in what is currently a very uncertain area of the law.

## END NOTES

- (1971) 17 FLR 141 at 167.
- Griffiths v Northern Territory of Australia* [2006] FCA 903; (2006) 165 FCR 300 (*Griffiths*) at [8]-[10].
- Griffiths* at [705].
- Griffiths v Northern Territory of Australia* [2006] FCAFC 178; (2007) 165 FCR 391 (*Griffiths FFC*).
- Griffiths* (No.3) at [73]-[81]. Compensation under the general law was also claimed in respect of three invalid 'future acts' consisting of freehold grants, each of which were invalid under s 24OA of the NTA.
- Griffiths* (No.3) at [71].
- Griffiths* (No.3) at [213].
- Griffiths* (No.3) at [227].
- Griffiths* (No.3) at [233].
- Griffiths* (No.3) at [252].
- Griffiths* (No.3) at [277]-[279].
- Griffiths* (No.3) at [466].
- Griffiths* (No.3) at [291].
- Griffiths* (No.3) at [301].
- Griffiths* (No.3) at [318].
- Griffiths* (No.3) at [302].
- Griffiths* (No.3) at [378]-[381].