

COMPENSATION FOR EXTINGUISHMENT OR IMPAIRMENT OF NATIVE TITLE: THE LEGAL FRAMEWORK

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Introduction

- Why is the High Court's decision in *Griffiths* important to anthropologists?
 - No common law right to compensation for extinguishment or impairment of native title (*Mabo No 2* p 15). It is all about construing the NTA.
 - Anthropological opinion will not assist if it does not address the legal basis for compensation.
- 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.

The decision in *Northern Territory v Griffiths* [2019] HCA 7

- Joint judgment of Kiefel CJ and Bell, Keane, Nettle and Gordon JJ.
- Separate judgments of Gageler J and Edelman J reach the same conclusion.
- Economic loss 80% \implies 65% \implies 50% (of freehold value).
- Total compensation
\$3,300,661 \implies \$2,899,446 \implies \$2,530,350

The bifurcated approach upheld

- See [84], [86], [94]. Holistic approach rejected.
- Why?
 - 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).
- Non-economic loss (or solatium) is better expressed as cultural loss.

In summary

- 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
- 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.
- 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 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.

Joint reasons [3]

Each case will be fact specific

- The consequences of a compensable act are not and cannot be uniform. The act and the effect of the act must be considered. Section 51(1) 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.

Economic loss

- 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
 - essentially usufructuary, ceremonial and non-exclusive.
- 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.
- *Spencer* test applies - what the Claim Group could fairly and justly have demanded for their assent to the infringement.

Economic loss

- RDA not engaged.
- Practical exercise of the native title rights is not relevant.
- Inalienability not relevant.
- Surrounding land values will be relevant (higher in developed areas, lower in remote areas).

Cultural loss

- 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.
- Three 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.
- 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.

Cultural loss

- Indirect effects are to be taken into account.
- E.g. compensable acts had an effect on the ritual ground as an adjacent area by diminishing the cultural and spiritual connection of the Claim Group to those grounds when the acts did not directly affect those grounds and the use of the grounds had already been significantly impaired by an earlier, non-compensable act.
- Rejected Cth and NT argument that s 51(1) imposes specific temporal and physical limits which do not extend to collateral detrimental effects.
- Metaphor of a painting (joint reasons [205] and [219]).

Cultural loss

- The entitlement to compensation is a communal or group entitlement.
- Accordingly can take into account that the loss is permanent and inter-generational.

Section 51A

- Equates exclusive native title with freehold.
- Economic loss is capped at ordinary freehold value.
- Cultural loss is not (by analogy with special value and solatium).

Some issues arising

Economic loss

- Why isn't the highest and best use of non-exclusive native title (right to live etc) worth more than 50%?
- What is in the bundle of rights is important, especially commercial.
- Is the Right to Negotiate relevant (at least for post 1994 extinguishment)?
- Scope to argue for different valuation methodology for freehold value where no market e.g. desert?

Cultural loss

- Does extinguishment cause cultural loss per se, or is it what is done on the land (or both)?
- Is evidence of trauma, social disadvantage relevant?
- Whole of country claims v individual extinguishing acts.

The end – Questions / discussion