FEDERAL COURT OF AUSTRALIA

Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900

File number: NTD 18 of 2011

Judge: **MANSFIELD J**

Date of judgment: 24 August 2016

Catchwords: **NATIVE TITLE** – claim for compensation for loss or impairment of traditional rights and interests – "just terms" compensation under s 51 of the Native Title Act 1993 (Cth) – "just terms" compensation under s 51(xxxi) of the Constitution - claim for economic loss – claim for non-economic/intangible loss – claim for pre-judgment interest

NATIVE TITLE - acts giving rise to compensation – grants established as previous exclusive possession acts – public works established as previous exclusive possession acts – category D past acts subject to the non-extinguishment principle – multiple acts affecting the same area of land – category D past acts followed by previous exclusive possession acts in respect of the same area of land - availability of compensation under the general law for invalid future acts

NATIVE TITLE – date at which compensation is to be assessed - whether compensation is assessed as at the date of the act or at the date of validation of the act – where improvements to the land were made between the date of the act and the date of validation of the act - if compensation is assessed as at the date of validation of the act, whether compensation for impairment as between the date of the act and the date of validation of the act is available

NATIVE TITLE – economic valuation of native title rights and interests – construction, prioritisation and application of legal norms governing the value of economic loss for the purposes of determining compensation under the NTA - where native title rights and interests are non-exclusive – where native title rights and interests include rights to access, live on, erect shelters, gather, use and exchange the natural resources of, and protect the land – application of economic principle to the valuation of non-exclusive native title rights and interests – application of anthropological fact and opinion to the valuation of non-exclusive native title rights and interests - whether freehold

value is an appropriate proxy for native title rights and interests – whether 'usage value' is an appropriate proxy for native title rights and interests

NATIVE TITLE – claim for non-economic/intangible loss – solatium for loss or diminution of connection or traditional attachment to land – assessment in globo – consideration and application of relevant principles – evidence of causation – direct and general evidence of effect of acts – whether comparison of usufructory and spiritual significance of different parcels of land is appropriate – consideration of spiritual relationship between the claimant group and their traditional country – consideration of the consequences that flow from the transgression of traditional laws and customs – consideration of length of time through which the claimants and their ancestors have maintained their connection to land - consideration of loss of access to and use of parts of traditional country

NATIVE TITLE – claim for pre-judgment interest – power of the Court to award interest on or as part of compensation for loss or impairment of native title rights and interests – whether compound or simple interest is appropriate in the circumstances – consideration and application of relevant principles

Legislation:

Native Title Act 1993 (Cth)

Lands Acquisition Act (NT)

Racial Discrimination Act 1975

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Crown Lands Ordinance 1931 (NT)

Northern Territory National Emergency Response Act 2007 (Cth)

Validation of Titles and Actions Amendment Act 1998 (NT)

Northern Territory (Self-Government) Act 1978 (Cth)

Real Property Act (NT)

Anti-Discrimination Act 1977 (NSW)

Native Title (Queensland) Act 1993 (Qld)

Federal Court of Australia Act 1976 (Cth)

Copyright Act 1968 (Cth)

Judiciary Act 1903 (Cth)

Native Title Amendment Act 1998 (Cth)

Cases cited:

Mabo v Queensland (No 2) (1992) 175 CLR 1 *Judiciary Act 1903* (Cth)

Griffiths v Northern Territory of Australia (2006) 165 FCR 300

Griffiths v Northern Territory of Australia (2007) 165 FCR 391

Griffiths v Northern Territory of Australia [2014] FCA 256

Nelungaoo Pty Ltd v Commonwealth (1952) 85 CLR 545

Wurridjal v The Commonwealth (2009) 237 CLR 309

Goodwin v Phillips (1908) 7 CLR 1

Western Australia v Commonwealth (1995) 183 CLR 372

Jango v Northern Territory (2006) 152 FCA 150

Jango v Northern Territory (2007) 159 FCR 531

University of Wollongong v Metwally (1984) 158 CLR 447

Shoshone Tribe of Indians v United States 299 US 476 (1937)

Doyle on behalf of the Iman People (No 2) v State of Queensland [2016] FCA 13

PJ Magennis Pty Ltd v The Commonwealth (1949) 80 CLR 382

Birmingham Corporation v West Midland Baptist (Trust) Association (Inc.) [1970] AC 874

Blue Mountains City Council v Mulcahy (1998) 45 NSWLR 577

Collins v Council of the Shire of Livingstone (1972) 127 CLR 477

Registrar of Titles v Crowle (1947) 75 CLR 191

Grace Brothers Pty Ltd v Commonwealth (1946) 72 CLR 629

Geita Sebea v Territory of Papua (1941) 67 CLR 544

Amodu Tijani v Secretary, Southern Nigeria [1921] 2AC 399

Tee-hit-Ton Indians v United States (1955) 348 US 272

Shoshone Tribe of Indians v United States 299 US 476 (1937)

United States v Shoshone Tribe of Indians 304 US 111 (1938)

Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v United States 85 Ct.Cl. 331 (1937)

Spencer v Commonwealth (1907) 5 CLR 418

The Commonwealth v Reeve (1949) 78 CLR 410

Hungerfords v Walker (1988) 171 CLR 125

The Commonwealth v Huon Transport Pty Ltd (1945) 70 CLR 293

Marine Board of Launceston v Minister for the Navy (1945) 70 CLR 518

Commonwealth v SCI Operations Pty Ltd (1998) 192 CLR 285

West Deutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669

Federal Commissioner of Taxation v Interhealth Energies Pty Ltd (No 2) (2012) 204 FCR 423

Wallersteiner v Moir (No 2) [1975] 1 QB 3

Talacko v Talacko [2009] VSC 579

Fico v O'Leary [2004] WASC 215

Roads Corporation v Melbourne Estates and Finance Co Pty Ltd [1993] 1 VR 602

MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657

Batchelor v. Burke (1981) 148 CLR 448

British Transport Commission v Gourlay [1956] AC 185

Federal Wharf Company Ltd v Deputy Federal Commissioner of Taxation (1930) 44 CLR 24

Management 3 Group Pty Ltd (in Liq) v Lenny's Commercial Kitchens Pty Ltd (No 2) (2012) 203 FCR 283

Western Australia v Ward (2002) CLR 1

Yanner v Eaton (1999) 201 CLR 351

Yorta Yorta v Victoria (2002) 214 CLR 422

Dangerfield v Town of St Peters (1972) 129 CLR 586

Milpurrurru v Indofurm Pty Ltd (1994) 54 FCR 240

Cubillo v Commonwealth (2000) 103 FCR 1

Trevorrow v South Australia (No 5) (2007) 98 SASR 136

Cattanach v Melchior (2003) 215 CLR 1

Rogers v Nationwide News Ltd (2003) 216 CLR 327

Crampton v Nugawela (1996) 41 NSWLR 176

March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506

Milirrpum v Nabalco Ltd (1971) 17 FLR 141

Sydney Water Corporation v Caruso [2009] NSWCA 391

Western Australia v Ward (2000) 99 FCR 316

Moses v Western Australia (2007) 160 FCR 48

Gumana v Northern Territory (2005) 141 FCFR 457

Far West Coast Native Title Claim v South Australia (No 6) [2013] FCA 1270

Taylor on behalf of the Kalkadoon People v North Queensland Electricity Commission (unreported, 18 October 1996)

Edwards v Santos Ltd (2011) 242 CLR 421 *LNC Industries Ltd v BMW (Australia Ltd)* (1983) 151 CLR 575

Felton v Mulligan (1971) 124 CLR 382

LNC Industries Ltd v BMW (Aust) Ltd (1983) 151 CLR 575

Felton v Mulligan (1971) 124 CLR 367

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Table of Corrections

12 September 2016	In Order 3(a) and (b), the amount "$512,000" is replaced with "$512,400".
12 September 2016	In Order 3, the Totalling amount "$3,300,261" is replaced with "$3,300,661".
12 September 2016	In paragraph 466(a) and (b), the amount "$512,000" is replaced with $512,400".
12 September 2016	In paragraph 466, the Totalling amount "$3,300,261" is replaced with "$3,300,661".
13 September 2016	The appearance for Counsel for the Second Respondent "S Lloyd SC and N Kitson" be replaced with "S Lloyd SC and N Kidson".
13 September 2016	The appearance for Counsel for the Intervener: Attorney-General for the State of Queensland "P Dunning SC" be replaced with "P Dunning QC and AD Keyes.

ORDERS

NTD 18 of 2011

BETWEEN:	**ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES** Applicant
AND:	**NORTHERN TERRITORY OF AUSTRALIA** First Respondent
	COMMONWEALTH OF AUSTRALIA Second Respondent
JUDGE:	**MANSFIELD J**
DATE OF ORDER:	**24 AUGUST 2016**

THE COURT NOTES THAT:

In this Order:

A. "past act", "previous exclusive possession act" and "non-extinguishment principle" have the meaning given by the *Native Title Act 1993* (Cth) (the Act);

B. "exclusive native title", "non-exclusive native title" and "native title holders" have the meaning given by the Interim Statement of Agreed Facts dated 2 May 2012 at [2], [3] and [4];

C. the numbered acts referred to in these orders are the subject of the compensation claims in the Applicant's Amended Particulars dated 17 October 2012;

D. the Applicant has withdrawn the claims for compensation made for acts 35, 42, 49A and 55.

THE COURT ORDERS THAT:

1. The native title holders are entitled to compensation, to be assessed, in relation to acts 1 to 34, 36, 40 to 41, 43 to 50, 51 to 54 and 56 to 59; and:

   Grants that are category D past acts that impair native title

   (1) each of acts 1, 3, 15, 17, 19, 21, 23, 25, 27, 29, 36 and 41 is a category D past act attributable to the Respondent to which the non-extinguishment principle

applies that impaired non-exclusive native title at the time of the grant (or dedication in the case of act 41) the subject of the act, and for the duration of the granted (or dedicated) interest (subject to (2) below), and compensation is payable by the Respondent under s 20 of the Act:

(2) in the case of acts 3, 15, 17, 19, 21, 23, 25, 27 and 29, the non-exclusive native title in the land concerned that was impaired by those acts was later extinguished by acts 4, 16, 18, 20, 22, 24, 26, 28 and 30 respectively referred to at (3) and (4) below;

Grants that are previous exclusive possession acts that extinguish native title

(3) each of acts 2, 4 to 13, 31 to 33, 40, 45, 48, 49, 50 and 51 to 54 is a previous exclusive possession act attributable to the Respondent that extinguished non-exclusive native title at the time of the grant the subject of the act and compensation is payable by the Respondent under s 23J of the Act;

Works that are previous exclusive possession acts that extinguish native title

(4) each of acts 14, 16, 18, 20, 22, 24, 26, 28, 30, 43, 44, 46, 47, 56, 57 and 59 is a previous exclusive possession act attributable to the Respondent that extinguished non-exclusive native title at the time when establishment of the works the subject of the act began and compensation is payable by the Respondent under s 23J of the Act;

Works (act 58) that are a previous exclusive possession act that extinguishes native title if no earlier works

(5) subject to whether or not the land concerned (or any part) was covered by a previously established public work, act 58 is a previous exclusive possession act attributable to the Respondent that extinguished non-exclusive native title at the time when establishment of the works the subject of the act began and compensation is payable by the Respondent under s 23J of the Act;

Grants in Part A.1 area (act 34) that are a previous exclusive possession act and extinguishment not to be disregarded in compensation application

(6) notwithstanding the approved determination of native title made on 28 August 2006, as varied on 22 November 2007 and 21 December 2007, that exclusive native title exists in relation to the land affected by act 34 (Lot 47) by virtue of the application of s 47B of the Act, for the purposes of the Compensation

Application, act 34 is to be treated as a previous exclusive possession act attributable to the Respondent and as extinguishing non-exclusive native title at the time of the grant the subject of the act and compensation is payable by the Respondent under s 23J of the Act.

2. The Compensation Application is dismissed in relation to acts 37, 38 and 39.

3. 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 said act is:

   (a) Economic value of the extinguished native title rights: $512,400;

   (b) Interest on the said sum of $512,400 assessed in accordance with the reasons for judgment: $1,488,261;

   (c) Allowance for solatium of $1,300,000;

   Totalling $3,300,661.

THE COURT FURTHER NOTES:

A. Section 94 of the the Act provides that when the Court makes an order that compensation is payable, the order must set out the things in paragraphs (a), (b) and (c).

B. The Court has determined that the groups and persons comprising the native title holders (as set out in order [5] below) are entitled to the compensation that is payable.

C. Pursuant to s 58(c) of the Act and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (the Regulations) the agent prescribed body corporate for the native title holders (the PBC), Top End (Default PBC/DLA) Aboriginal Corporation, has certain functions to hold and invest the compensation that is payable.

D. Pursuant to s 60 of the Act and the Regulations an agent prescribed body corporate may be replaced in certain circumstances, in which event the functions referred to at C devolve to the replacement PBC.

THE COURT FURTHER ORDERS

4. Payment of the compensation to the PBC on behalf of the native title holders shall be taken as full discharge of the liability to pay compensation.

5. The persons entitled to the compensation are the native title holders, being:

(1) the Ngaliwurru and Nungali persons who are members of the estate groups Makalamayi, Wunjaiyi, Yanturi, Wantawul and Maiyalaniwung by reason of:

(a) descent through his or her:

(i) father's father;

(ii) mother's father;

(iii) father's mother;

(iv) mother's mother; or

(b) having been adopted or incorporated into the descent relationships referred to in (a);

(2) other Aboriginal persons who in accordance with traditional laws and customs, have rights in respect of land and waters of the relevant estate group, being:

(a) members of estate groups from neighbouring estates;

(b) spouses of estate group members;

(c) members of other estate groups with ritual authority.

6. The amount or kind of compensation to be given to each person, and any dispute regarding the entitlement of a person to an amount of the compensation, shall be determined in accordance with the decision making processes of the PBC.

AND THE COURT DETERMINES

7. Pursuant to ss 13(2) and 225(1) of the Act, the Court determines that, at the time at which the determination of compensation is made:

(1) native title does not exist in the compensation claim area (as defined in the further amended compensation application dated 17 August 2015), other than as identified below;

(2) in relation to Lots 52 and 60 (subject to acts 36 and 41):

(a) there exists native title comprising the rights referred to in par [3] of the statement of agreed facts dated May 2012;

(b) there are other interests in that land comprising:

(i) a freehold estate granted to the Commonwealth over Lot 52; and

(ii) the reservation of use as a cemetery over Lot 60,

to which the non-extinguishment principle applies.

AND THE COURT FURTHER DECLARES

8. Pursuant to s 213(2) of the Act, the Court declares in relation to Lots 82 to 84 (subject to acts 50A to 50C), acts 50A to 50C are invalid future acts within ss 24AA(2) and 233 of the NTA.

9. The damages payable by the Northern Territory to the PBC on behalf of the native title holders for the invalid future acts (calculated in accordance with the reasons for judgment) is $48,597 comprising the value of the native title rights imposed by those acts of $19,200 and pre-judgment interest thereon of $29,397 and totalling $48,597.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MANSFIELD J:

INTRODUCTION

1 This is a claim for compensation, principally under the *Native Title Act 1993* (Cth) (the NTA), involving important issues of principle, and about the application of well-established rules about the valuation of compulsorily acquired land under legislation such as the *Lands Acquisition Act* (NT) (LAA) to the loss or impairment of the traditional rights and interests of Aboriginals in this country.

2 The NTA is seminal legislation addressing the progressive dispossession of Aboriginal peoples from their land by European and related settlement. It followed the decision of the High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*) that the common law of Australia recognises the native title of Aboriginal people in their traditional country in accordance with their traditional laws and customs.

3 The NTA, by its Preamble, is to ensure that Aboriginal people "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".

4 To that end, it provides for the recognition of ongoing native title rights and interests in land in the prescribed circumstances, and where acts have extinguished or partially extinguished native title and are validated or allowed, it provides for compensation for that extinguishment on just terms.

5 This claim is for compensation for the partial extinguishment of native title rights and interests. It concerns land within the Township of Timber Creek.

6 It is necessary to refer to the particular claim and its background to identify the issues which arise.

The Claim

7 By a Further Amended Compensation Application dated 17 August 2015 (the Amended Application), the Applicants apply for a determination of compensation under s 61(1) of the NTA. They also claim compensation under the general law for three invalid future acts. I am satisfied that the Court has jurisdiction to deal with those three claims, on the basis that each

involves a matter arising under the NTA: see s 213(2) of the NTA and s 39B(1A)(c) of the *Judiciary Act 1903* (Cth). The application was first made on 2 August 2011.

8 In broad terms, compensation is claimed over the land and waters in Timber Creek for acts attributable to the Territory which occurred after the commencement of the *Racial Discrimination Act 1975* (RDA) on 31 October 1975 which have extinguished native title in whole or in part, or have impaired or suspended native title where it still exists.

9 The application follows from an earlier proceeding.

10 The earlier native title proceeding concerned three applications for a determination of native title to vacant Crown land within the boundaries of the proclaimed town of Timber Creek. The native title claims were made by Narpijawuk/Yitipiari (Alan Griffiths) and Kalwaying (William Gulwin now deceased) as representatives of the Ngaliwurru and Nungali Peoples: *Griffiths v Northern Territory of Australia* (2006) 165 FCR 300 (*Griffiths SJ*).

11 The trial judge determined that native title existed and held that s 47B of the NTA applied to the claimed land, with the result that any prior extinguishment by the grant of pastoral leases over the land must be disregarded. He then determined that the native title comprised non-exclusive rights to access and use the area: *Griffiths SJ* at [705].

12 The Full Court varied the determination of native title to provide that, in relation to those parts of the claim area to which s 47B applied, the native title comprised a right, on the part of the native title holders, to exclusive possession, use and occupation of that part of the claim area: *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391 (*Griffiths FC*).

13 The native title holding group is a set of five descent based *Yakpali* (country or estate) groups, being *Makalamayi, Wunjaiyi, Yanturi, Wantawul* and *Maiyalaniwung*. The native title holding group is now the compensation claim group (the Claim Group).

14 It was found that at the time each of the compensable acts occurred, native title existed in relation to the relevant parcel affected by the act and involved the following rights in accordance with traditional laws and customs of the claim group:

(1) to travel over, move about and have access to the land;

(2) to hunt, fish and forage on the land;

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

(4) to have access to and use the natural water of the land;

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

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

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

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

15 By an earlier decision in this matter: *Griffiths v Northern Territory of Australia* [2014] FCA 256 (*Compensation Decision Part 1*), I decided a number of issues requiring to be addressed in this claim.

16 The current claim is conveniently addressed at this point as covering three categories of area:

(1) areas where native title had been found to exist and was exclusive of other interests because s 47B of the NTA applies to those areas;

(2) areas where native title had been found to exist and was non-exclusive because s 47B did not apply to those areas; and

(3) areas where there had been no determination of native title in the *Griffiths SJ* and *Griffiths FC* decisions as they had not been addressed: Lots 16, 22 and 49 were expressly excluded from that earlier claim, and all other land and waters within Timber Creek simply not included in that earlier claim.

17 Compensation is, of course, not sought in relation to those areas where exclusive native title has been found to exist. The compensation claim is confined to the areas (2) and (3) referred to in the preceding paragraph. It is not now necessary to refer in detail to the *Compensation Decision Part 1*. There were a number of issues required to be addressed, focusing on whether (in respect of the land in (3) of the preceding paragraph) native title had been extinguished or partly extinguished, either by historic tenure grants and reservations, or by public works, and whether that extinguishment had occurred prior to the RDA coming into effect. There were other subsidiary issues addressed.

18 The *Compensation Decision Part 1* proceeded on agreed facts about the existence of native title (apart from extinguishment issues), and on the occurrence of acts said by one or both of

the Applicant and the Northern Territory (the Territory) to affect native title. The disagreement as to the effect of certain acts on native title was resolved by that decision, and the parties agreed that the native title rights and interests were in terms that mirror the earlier determination of native title in *Griffiths SJ* as altered by *Griffiths FC*.

19 The effect of the *Compensation Decision Part 1* and certain ancillary matters was reflected in a Draft Order (not formally made) which set out those parts of the land and waters in Timber Creek to which an entitlement to compensation was found to exist, in addition to those areas in Timber Creek to which an entitlement to compensation exists by reason of *Griffiths SJ* and *Griffiths FC*.

20 The Draft Order is attached to these reasons at Annexure A.

21 The provisions of the NTA, read with the provisions of the *Validation (Native Title) Act* (NT) (VNTA), govern both the entitlement to compensation and the quantum of that entitlement.

22 There is of course a significant background to the present application. It can largely be drawn from the judgment of Weinberg J in *Griffiths SJ*. The Applicant applied to the Court to adopt and receive under s 86 of the NTA in this proceeding those findings. Their adoption and receipt initially was disputed by the Territory and by the Commonwealth. In the result, there was little dispute about them. I see no reason why I should not accede to the application to receive them as evidence capable of being adopted. The findings which follow broadly reflect that decision. It was only in a very limited respect that the Commonwealth in its submissions specifically disagreed with the Applicant's use or understanding of those findings, and the Territory in its submissions did not point to any particular finding which it disputed. Where there is a dispute, I have not acted on the finding relied on by the Applicant without specifically addressing the dispute.

BACKGROUND

European contact in Ngaliwurru-Nungali country

23 Timber Creek is a tributary of the Victoria River in the north-western corner of the Northern Territory. Augustus Gregory explored the Victoria River district in the mid-19th Century and established a camp in the area of Timber Creek. He published an account of his expedition, which described Indigenous people visiting his camp, and on one occasion as having displayed hostility, where shots were fired.

24 Gregory's exploration made known the potential extent of grazing land in the region, and at the end of the 19th Century a number of pastoral leases were granted in the Victoria River district. Stocking of the various holdings did not commence until several years later. After the arrival of the first permanent European settlers, Timber Creek became a focus for the supply of cattle stations. Indigenous inhabitants of the area found themselves being excluded from their traditional lands by cattle station owners, and as recorded in *Griffiths SJ* at [50]:

> During these early years of settlement, relations between the local indigenous groups and the European settlers ranged from open warfare, and massacres, to what was at times friendly co-operation.

25 In the early 1900s, some station managers began to encourage Aboriginal people to settle at the various homesteads and outstations, but while the open conflict may have ended, cattle spearing and theft from station stores and unoccupied camps continued, and again as recorded in *Griffiths SJ* at [51]:

> This situation quickly degenerated into a kind of guerrilla warfare, with Aborigines striking opportunistically and then retreating into rough range country.

26 Indigenous people in the region became increasingly involved in station work, and the period roughly 1920 to 1960 saw little change in their conditions where, at the beginning of the wet season, stock camps closed down and most Aboriginal workers returned to the bush, walking across country to visit relatives and engage in traditional ceremonies. One effect of World War II was that many white station employees enlisted in the armed forces and Indigenous persons began to play a greater role in the cattle station economy. Victoria River district Aborigines became aware that improved work conditions were possible, but when the war ended, station life for Aborigines reverted, more or less, to what it had been in earlier times.

27 In 1966, local dissatisfaction on the part of Aboriginal persons finally came to a head at Wave Hill where Aboriginal employees walked off the job, and camped in the Victoria River bed. Their initial demands for full wages and improved conditions were soon overtaken by others, including a demand for land rights, and by 1972 Aborigines from other stations had joined the strike. The Wave Hill strike contributed to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the *Land Rights Act*), which ultimately resulted in Indigenous groups gaining grants of land in the northern Victoria River region, including the areas surrounding Timber Creek in the Territory.

Makalamayi – Timber Creek

28 The township of Timber Creek was proclaimed on 10 May 1975. It is within *Yakpali* (country) known as *Makalamayi,* named after a focal site of significance to the *Ngaliwurru-Nungali* Peoples at the junction of Timber Creek and Victoria River. It is also known as *Lamaparangana's* country, an apical ancestor of the Ngaliwurru and Nungali Peoples.

29 The township is bounded to the north by Victoria River and to the west, south and east by Aboriginal land granted under the *Land Rights Act*. Land within the boundaries of the proclaimed township was unavailable for claim under the *Land Rights Act*, but the area surrounding the proclaimed boundaries was claimable, and was granted on the findings of the Aboriginal Land Commissioner (Justice Maurice) that six descent based country or estate groups of the Ngaliwurru and Nungali Peoples were traditional Aboriginal owners of the area, that is (using the definition in s 3(1) of the *Land Rights Act*):

> … a local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land.

30 Each of the groups was associated with a separate tract of land in the region of which the claim area formed part, those groups being *Makalamayi, Wunjayi, Yanturi, Wantawul, Maiyalaniwung* and *Kuwang,* who are the native title holding subgroups constituting the Claim Group.

31 Further areas in the vicinity of Timber Creek available for claim under the *Land Rights Act* have also been granted as a result of findings by successive Aboriginal Land Commissioners that the *Ngaliwurru-Nungali* are the traditional Aboriginal owners of the claimed land: they are the former Fitzroy Pastoral Lease, Stokes Range Pastoral Lease, and Kidman Springs and Jasper Gorge Pastoral Leases.

Development of the Town and the compensable acts

32 The Town of Timber Creek has a population of about 231. Aboriginal people make up about two thirds of the Town population, drawn principally from the native title holders, who are about 336 in number. The economy of the Town relies on tourism and associated services, and regional service delivery. The principal buildings are a road house and general store, a

hotel and caravan park, local council offices, a police station, primary school and health clinic.

33 The Town is an area of about 2362 hectares. As noted, that area was declared as a Town and set the area apart as Town lands under s 111 of the *Crown Lands Ordinance 1931* (NT) by Proclamation made on 10 May 1975.

34 A consequence of that Proclamation was that land set apart as Town lands could then be leased for various purposes by public auction or offered for sale upon payment of a reserve price, and leases of Town lands could be granted for particular purposes. Many of the compensable acts involve grants of that kind (development leases: see below).

35 Another consequence of setting apart the area as a Town was that, on the later enactment of the *Land Rights Act*, the area of the Town could not be the subject of a claim under that Act, which provides for the grant of unalienated Crown land in the Territory as traditional Aboriginal land. Where Crown land becomes Aboriginal freehold land under that Act, interests in the land cannot be granted without the consent of the traditional Aboriginal owners of the land. As noted, largely the area surrounding the Town including south of Victoria River was the subject of a claim and report under that Act, and was granted as Aboriginal freehold land.

36 Compensation is claimed for acts attributable to the Territory occurring after the commencement of the RDA that have extinguished native title in the area where native title no longer exists and for acts that have impaired or suspended native title in the areas where native title still exists.

37 Inevitably, because the application for compensation was brought in respect of 63 acts numbered 1-59 (including 49A, 50A, 50B and 50C) and because the claim as presented concerns those acts, by reference to identified lot numbers within the Town of Timber Creek, the factual circumstances are somewhat complex. The difficulty of refining and confining the issues is, it is fair to say, compounded by the complexity of the legislation itself. The Court has been greatly assisted in identifying the appropriate focuses for its consideration, and to address the issues, by the exchange of points of claim and points of defence between the Applicants, the Territory and the Commonwealth, and by the very helpful and thorough written submissions of the parties, together with the oral submissions made on their behalf by counsel.

38 In the course of the exchange of the pleadings, the claims for acts numbered 35 (Lot 48), 42 (Lot 61), 49A (Lot 79), and 55 (Victoria Highway Public Works) have been withdrawn. Consequently, the application now concerns 56 acts, which were validated under the terms of the NTA and the VNTA (the compensable acts), and three acts which were invalid (the invalid acts). The invalid acts are those numbered 50A, 50B and 50C.

39 To understand the context for the detailed statutory analysis which is required to address the principal issues, it is probably convenient to provide an introductory summary to how those issues arise beyond the recognition of the native title rights and interests of the claim group.

OVERVIEW

40 In short, the claim for compensation is said to be payable in respect of:

(1) 53 compensable acts, being acts numbered 1-34, 36, 40-41, 43-50, 51-54 and 56-59;

(2) 3 acts in relation to which the application for compensation was dismissed by the *Compensation Decision Part 1*, being acts 37, 38 and 39 (in respect of Lots 56-57, 73 and 109) (dismissed acts); and

(3) 3 invalid future acts, being acts 50A, 50B and 50C (in respect of Lots 82-84) (invalid acts).

As the Territory in its submissions suggested, I shall adopt the collective description of those acts as the "determination acts".

41 Each of the determination acts is accepted as being attributable to the Territory within the meaning of s 239 of the NTA.

42 In respect of each of the determination acts, the Applicant on behalf of the Claim Group claims compensation under the following heads of loss:

1. economic loss;
2. non-economic/intangible loss; and
3. pre-judgment interest.

43 Given the complexity of the legislation, the Applicant's quantification of those losses depended to a degree on a series of contingencies and alternatives.

44 On its primary case, sometimes called its "just terms case", the economic loss is said to constitute:

(a) for all the determination acts (except those to which the non-extinguishment principle applies and which were followed by later extinguishing acts, and acts in respect of infrastructure lots) the value of the extinguished native title rights and interests assessed as at 10 March 1994 for which the improved freehold land value at that date is an appropriate proxy; and

(b) for all the determination acts (except extinguishing acts following an earlier act to which the non-extinguishment principle applies, and acts in respect of infrastructure lots) the value of the impaired enjoyment of the native title rights and interests between the date of the acts and 10 March 1994 for which market rental value is an appropriate proxy.

45 Secondly, as part of the primary claim, interest is sought to be awarded on the economic loss determined by reference to the freehold value at 10 March 1994 calculated on a compound basis at superannuation rates, or alternatively on a compound risk free rate, or alternatively on a simple interest rate in accordance with Practice Note CM 16 of the *Federal Court Practice Notes*.

46 Thirdly, there is claimed an in globo award of not less than $2m for non-economic loss to give effect to the diminution or disruption in traditional attachment to country and the loss of rights to live on, and gain spiritual and material sustenance from, the land.

47 That case is opposed by both the Territory and the Commonwealth, starting from the first proposition that the valuation of the extinguishment of native title rights and interest should be assessed at 10 March 1994, rather than the date of the act which constituted the extinguishing act.

48 The date 10 March 1994 is selected as it is said to be the date of the validation of the determination acts, previously invalid by removing native title rights unlawfully having regard to the RDA. The validation was effected by the NTA and the VNTA. I note that the Applicant says certain validated acts were validated only at a later point in time, but adopts a consistent (and the earliest) date of validation in the submissions. That step was uncontroversial in the sense that the Territory and the Commonwealth agree that is a sensible starting date for the assessment, if the primary contention of the Applicant is correct. That is a contention they firmly dispute.

49 The Applicant's alternative case (sometimes called its "statutory claim") is for economic loss:

(a) for all determination acts (except those to which the non-extinguishment principle applies which were followed by a later extinguishing act and acts in respect of infrastructure lots), the value of the extinguished native title rights and interests assessed as at the date of the act for which the unimproved/improved freehold land value is an appropriate proxy; and

(b) for acts 3, 15, 17, 19, 21, 23, 25, 27 and 29 (to which the non-extinguishment principle applies and which were followed by later previous exclusive possession acts), the value of the impaired enjoyment of the native title rights and interests between the date of the act and the later extinguishing act for which market rental value is an appropriate proxy.

50 Interest is claimed on the starting valuation of economic loss calculated on the three descending options referred to in [45], and again an in globo award of not less than $2m for non-economic loss is also sought.

51 The Territory's case is that the Claim Group is entitled to the economic value of the native title rights and interests which were either actually or effectively extinguished by the determination acts, for which an appropriate proxy of value is a usage value (according to its expert Wayne Lonergan) plus 50% of the excess of freehold value over usage land value. It says that any interest should be calculated in accordance with Practice Note CM 16 on economic loss. It accepts that there should be a modest in globo award in the nature of solatium for the loss of the native title rights and interests. It also says that any compensation in respect of the dismissed acts should be determined on the same basis. Finally, it contends that there is no entitlement under s 51 of the NTA to compensation in respect of the invalid acts.

52 The Commonwealth's position is a little different.

53 It ultimately submitted that the value of the non-exclusive rights should be valued at 50% of the freehold value of the allotments, having regard to a comparison between the full range or bundle of rights which constitutes freehold title, the bundle of rights which comprises exclusive native title, and the bundle of rights which the non-exclusive native title of the Claim Group in fact enjoyed at the time of the determination acts.

Primary areas of dispute

54 There are four principal, but somewhat related, areas of dispute.

55 The first is in respect of the "timing" issue under the NTA. As noted, the disagreement is as to whether the valuation date is that on which the native title rights and interests were extinguished (as the Territory says, in the sense of a divestiture of property) or whether it is the date at which the Claim Group's native title as extinguished was validated. The Territory contends that the proper focus and identification on the timing issues and their resolution are inseparable from resolution of the question whether the formulation of the Applicants' primary case involves a double counting of loss.

56 On the first area of dispute, the Commonwealth has adopted the same position as the Territory.

57 The second area of dispute is in respect of the value which should be ascribed to the native title rights and interests which have been extinguished, whatever the timing. That is, the Applicants' claim that the value of the extinguished rights should be determined by reference to valuation of freehold title as an appropriate proxy for the valuation, whereas the Territory and the Commonwealth do not accept that. Within that dispute, the following issues have been identified:

(a) the application of economic principle to the valuation of non-exclusive native title rights and interests;

(b) the application of anthropological fact and opinion to the valuation of non-exclusive native title rights and interests; and

(c) the construction, prioritisation and application of legal norms governing the value of economic loss for the purposes of determining compensation under the NTA.

It is fair to say the third of those points is of major significance.

58 The Commonwealth has propounded a somewhat different method of the valuation of non-exclusive native title rights which have been extinguished, but in the end result it does not appear that its method, as distinct from that of the Territory produces a significantly different outcome.

59 The third area of dispute concerns the manner and extent to which traditional attachment to the land should be reflected in the award of compensation. That concerns the "solatium" calculation, using the term used by the Territory. Although both the Territory and the Commonwealth adopt a somewhat different position on this issue, again, the outcome of applying their respective positions is not significantly different.

60 The fourth main area of dispute concerns the manner and extent to which the effluxion of time between the various dates in which the entitlement to compensation arose and the date of judgment should be reflected in the award of compensation. The major dispute concerns the issue of pre-judgment interest. The Commonwealth agrees with the Territory in its approach to this issue, as noted above.

61 The Territory has pointed out, and I accept, that the differences on those issues principally concern the proper understanding and construction and application of the NTA and related legislation. I therefore adopt the approach which it has suggested, namely to address the construction issues by reference to the evidence in the hearing, and separately then to address the application of the outcome of those considerations to the quantification process including evidentiary matters, some interpretative differences, and the calculations which will result in the final orders.

62 I note also that the Commonwealth has raised an issue under s 94 of the NTA as to the terms of the appropriate order which should be made, bearing in mind the status and character of the Claim Group. That is addressed as a fifth and separate issue at the conclusion of these reasons for judgment.

63 I also note that in the Applicants' opening submissions, there were six issues addressed, or identified. The additional issues to which I have not referred concern the quantification of compensation for occupation and use of land (impairment), dependent upon the rejection or acceptance of its primary contention as to the date at which the primary quantification should take place. In the course of submissions, that element of its contentions was absorbed into, and for the purposes of this decision conveniently it is absorbed into, the first issue.

64 The Applicants also raised the issue of compensation for economic loss under s 51(xxxi) of the Constitution, raising concern that the Territory or the Commonwealth might argue that s 51A of the NTA (to be referred to shortly) imposed a restriction on the upper level of compensation inconsistent with the statutory or constitutional provisions. That submission

was ultimately not put by either the Territory or the Commonwealth and does not require separate consideration. Nevertheless, s 51(xxxi) of the Constitution is an important element in the Applicant's claims for economic loss on either its primary case or its alternative case. It is considered in that context.

65 It is worth noting, at this point, that the Applicant's statutory claim for economic loss for impairment of native title, that is its alternative claim if the loss is not to be assessed at the date of the validation of the determination acts, is as follows:

(1) Where native title has been impaired before it is extinguished by a later act, the applicant's claimed economic loss for the impairment of native title is reasonable remuneration for occupation or use of land for the period of impairment, measured by reference to reasonable market rental, or receipts.

(2) Where native title is impaired by an act of indefinite and perpetual duration, the applicant's claimed economic loss for this impairment is assessed by reference to the freehold value of the land at the date of the act. The same measure is claimed in relation to the three invalid future acts.

(3) The Applicant claims non-economic loss to be assessed on an *in globo* basis in reference to all of the lots and road areas as a whole, having regard to the factors listed in the Points of Claim at [11].

66 The primary claim is made in reliance on the provision in s 53 of the NTA, which appears to provide for "just terms" to the extent required to avoid invalidity under s 51(xxxi) of the Constitution. These claims are referred to as "constitutional compensation" in the Applicant's submission. These claims only arise if, and to the extent that, the compensation assessed in accordance with ss 51 and 51A of the NTA (statutory compensation) does not provide "just terms" within the meaning of s 51(xxxi) of the Constitution for the acquisition of any property. As noted, that constitutional issue depends on the constructional premise that the validation and confirmation provisions fix the date for assessing compensation at a time earlier than the legal divestiture of the native title.

Applicant's evidence

Economic loss

67 The Applicants rely on the following evidence in support of the claims for economic loss:

(1) "Expert valuation report – Timber Creek Township" by Glenn Miller dated 15 May 2015 (Miller Report);

(2) "Expert Valuation Report – Timber Creek Compensation Claim" by Brian Dudakov and Les Brown dated 12 August 2015 (Dudakov and Brown First Report), and "Supplementary Expert Valuation Report – Timber Creek Compensation Claim" by Brian Dudakov and Les Brown dated 2 September 2015 (Dudakov and Brown Second Report);

(3) Expert Economists' Report by Barry Lewin and Kuo Ning Ho dated 27 July 2015 (SLM First Report), and Expert Economists' Supplementary Report by Kuo Ning Ho dated 25 August 2015 (SLM Second Report);

(4) Affidavit of John Hofmeyer sworn on 23 July 2015;

(5) Affidavit of Rebecca Hughes sworn on 23 July 2015;

(6) Affidavit of Mark Lewis sworn on 17 August 2915;

(7) Affidavit of Lorraine Jones sworn on 14 October 2015;

(8) The documents referred to in the Particulars of Receipts.

Non-economic loss

68 The Applicants rely on the following evidence in support of the claims for non-economic loss, as outlined in the Notice on Non-Economic Loss:

(1) Affidavit of Alan Griffiths sworn on 7 July 2015;

(2) Affidavit of Jerry Jones sworn on 7 July 2015;

(3) Affidavit of Lorraine Jones sworn on 7 July 2015;

(4) Witness statement of Josie Jones dated 17 August 2015;

(5) Witness statement of Roy Harrington dated 17 August 2015;

(6) Expert Anthropologists' Report – Timber Creek Native title Compensation Application, by Kingsley Palmer and Wendy Asche November 2012 (Palmer and Asche 2012 Report);

(7) Expert Economists' Report – by John Altman dated 17 August 2015 (Altman Report); and

(8) The s 86(1) evidence and findings referred to in the s 86 Notice, and the Notice on Non-economic Loss.

Pre-judgment interest

69 The applicant relies on the following evidence in support of the claims for pre-judgment interest:

(1) SLM First Report and SLM Second Report;

(2) Dudakov and Brown First Report, and Dudakov and Brown Second Report.

70 The Applicants also rely generally on the lay evidence given on-country in and around Timber Creek by Alan Griffiths, Jerry Jones, Josie Jones and Lorraine Jones, Roy Harrington, and Chris Griffiths (listed in the sequence they gave evidence on country.

Continuing Agreed Starting Point

71 For the purposes of the current reasons, it is convenient to record that the parties agree that, at the time of an act for which compensation is claimed:

(1) Native title (within the meaning of s 223 of the NTA) existed in relation to the land and waters comprising Timber Creek.

(2) Where the native title had not been wholly or partially extinguished by an earlier act, the native title rights and interests that existed were rights and interests in accordance with traditional laws and customs to the possession, occupation, use and enjoyment of the Timber Creek area to the exclusion of all others.

(3) Where the native title had not been wholly extinguished, but had been partially extinguished by an earlier act, the native title rights and interests 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;
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;
5. the right to live on the land, to camp, to erect shelters and other structures;
6. the right to:
    (a) engage in cultural activities;
    (b) conduct ceremonies;
    (c) hold meetings;

(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).

(4) The persons who held the native title were:

1. the *Ngaliwurru-Nungali* persons who are members of the estate groups *Makalamayi*, *Wunjaiyi*, *Yanturi*, *Wantawul* and *Maiyalaniwung* by reason of:

(a) descent through his or her:

(i) father's father;

(ii) mother's father;

(iii) father's mother;

(iv) mother's mother; or

(b) having been adopted or incorporated into the descent relationships referred to in (a);

2. other Aboriginal persons who in accordance with traditional laws and customs, have rights in respect of land and waters of the relevant estate group, being:

(a) members of estate groups from neighbouring estates;

(b) spouses of estate group members;

(c) members of other estate groups with ritual authority.

(5) The native title rights and interest were subject to and exercisable in accordance with the valid laws of South Australia, the Northern Territory of Australia and the Commonwealth of Australia.

72 That agreement on the facts is subject to the contentions which the parties make at the hearing as to:

(1) the nature and extent of any other interests in relation to the application area, including in respect of the waters and the beds and banks of Timber Creek and the Victoria River;

(2) the relationship between the native title rights and the other interests (taking into account the effect of the NTA), and any contention by the Territory as to the nature and effect of the other rights; and

(3) the existence of any native title rights and interests in:

(a) minerals (as defined in s 2 of the *Minerals (Acquisition) Act 1953* (NT));

(b) petroleum (as defined in s 5 of the *Petroleum Act 1984* (NT)); and

(c) prescribed substances (as defined in s 3 of the *Atomic Energy (Control of Materials) Act 1946* (Cth) and s 5(1) of the *Atomic Energy Act 1953* (Cth)).

Matters not in contest

73 It is common ground that:

(1) the application was brought in respect of 63 acts numbered 1 to 59 (including 49A, 50A, 50B and 50C);

(2) the claims for Act 35 (Lot 48), Act 42 (Lot 61), Act 49A (Lot 79) and Act 55 (Victoria Highway public works) have been withdrawn;

(3) the application now concerns 56 acts which were validated under the terms of the NTA (the compensable acts), and three acts which were invalid (the invalid acts);

(4) the compensable acts were attributable to the Northern Territory within the meaning of s 239 of the NTA;

(5) the compensable acts were pasts acts within the meaning of s 228 of the NTA, except for Acts 50, 51, 52, 53 and 54;

(6) the past acts were validated on 10 March 1994;

(7) Acts 50, 51, 52, 53 and 54 were intermediate period acts within the meaning of s 232A of the NTA;

(8) the intermediate period acts were validated on 1 October 1998;

(9) the compensable acts were previous exclusive possession acts within the meaning of s 23B of the NTA, except for Acts 1, 3, 15, 17, 19, 21, 23, 25, 27, 29, 36 and 41;

(10) native title was extinguished by each of the previous exclusive possession acts;

(11) Acts 1, 3, 15, 17, 19, 21, 23, 25, 27, 29, 36 and 41 were category D past acts within the meaning of s 232 of the NTA;

(12) the non-extinguishment principle applies to the category D past acts;

(13) Acts 3, 15, 17, 19, 21, 23, 25, 27 and 29 were followed by subsequent previous exclusive possession acts affecting the same Lots which extinguished native title over the relevant Lots;

(14) Acts 1, 36 and 41, affecting Lots 16, 52 and 60 respectively, were not followed by any subsequent act affecting native title and the non-extinguishment principle continues to apply in respect of those Acts;

(15) the native title holders are entitled to compensation pursuant to s 23J of the NTA in respect of the compensable acts which are previous exclusive possession acts;

(16) the native title holders are entitled to compensation pursuant to s 20 of the NTA in respect of the compensable acts which are category D past acts;

(17) the Applicants seek damages under the general law in respect of the invalid acts.

74 In relation to category (5) above, s 228 relevantly means that a past act is an act which was done before 1 July 1993 (for legislative acts) or 1 January 1994 (for non-legislative acts) and was, apart from the NTA, invalid to any extent but would have been valid to that extent if the native title did not exist. The validation of past acts took place by operation by s 19 of the NTA and s 4 of the VNTA.

75 The reference to "intermediate period acts" in (7) above refers to the definition which generally, and relevantly, means an act which took place between 1 January 1994 and 23 December 1996, and which was invalid to any extent but would have been valid to that extent if native title did not exist, and which was not a past act. The validation of those acts took place by operation of s 22F of the NTA and s 4A of the VNTA.

76 For the purposes of the previous exclusive possession acts referred to in (9) above, they are defined by s 23B of the NTA relevantly as comprising a certain type of act which took place before 23 December 1996 which is valid (because it was validated by s 14(1) of the NTA or s 4 of the VNTA or by s 22A of the NTA and s 4A of the VNTA). The extinguishment of native title by each of the previous exclusive possession acts was effected by s 23E of the NTA and ss 9H and 9J of the VNTA. Section 23C(3) of the NTA and s 9G of the VNTA mean that where a particular act is either a past act or an intermediate period act, and also a

previous exclusive possession act, the extinguishment of native title is effected by the previous exclusive possession act provisions.

77 To this point, therefore, the prescriptive legislative provisions mean that the compensable acts which were past acts and previous exclusive possession acts (that is those listed in category (9) above) extinguished native title because they were previous exclusive possession acts, and the remainder of the compensable acts (other than acts 50, 51, 52, 53 and 54) were past acts which were validated on 10 March 1994, and acts 50, 51, 52, 53 and 54 were intermediate period acts which were validated on 1 October 1998. As noted, the Applicant is prepared to treat the date of validation of all determination acts as 10 March 1994.

78 To revert to the list above, the past acts which were also previous exclusive possession acts, were also category D past acts within the meaning of s 232 of the NTA. That categorisation arises because, by definition, category D past acts are past acts that are not category A past acts (generally, certain freehold grants, certain types of leases, and certain public works as defined by s 229 of the NTA), and are not category B past acts (generally, certain leases as defined by s 230 of the NTA), and are not category C past acts (comprising mining leases as defined by s 231 of the NTA). They fall within the default category. As a consequence, the non-extinguishment principle as defined in s 238 of the NTA applies to them.

79 However, all but acts 1, 36 and 41 of those category D past acts were followed by subsequent previous exclusive possession acts affecting the same lots, and which extinguish native title over those lots: that occurs by operation of s 23E of the NTA and ss 9H and 9J of the VNTA. For the purposes of later cross-referencing, and the application of the compensation principles as subsequently determined by reference to the principal issues, I note that acts 3 and 4 affect Lot 21, acts 15, 16, 17 and 18 affect Lot 34, acts 19 and 20 affect Lot 36, acts 21 and 22 affect Lot 38, acts 23 and 24 affect Lot 39, acts 25 and 26 affect Lot 40, acts 26 and 28 affect Lot 41, and acts 29 and 30 affect Lot 42.

80 The remaining category D past acts, that is acts 1, 36 and 41, affecting Lots 16, 52 and 60 respectively, were not followed by any subsequent act affecting native title so that the non-extinguishment principle continues to apply to them.

81 The grouping in (15), (16) and (17) above therefore identifies the compensable acts, and the invalid acts to which the entitlement to compensation is said to arise.

THE LEGISLATION

82 Section 23J of the NTA (appearing in Div 2B) provides:

> **23J Compensation**
>
> *Entitlement*
>
> (1) The native title holders are entitled to compensation in accordance with Division 5 for any extinguishment under this Division of their native title rights and interests by an act, but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under this Act.
>
> *Commonwealth acts*
>
> (2) If the act is attributable to the Commonwealth, the compensation is payable by the Commonwealth.
>
> *State and Territory acts*
>
> (3) If the act is attributable to a State or Territory, the compensation is payable by the State or Territory.

83 Section 20 of the NTA (appearing in Div 2) provides, so far as is relevant to the application:

> **20 Entitlement to compensation**
>
> *Compensation where validation*
>
> (4) If a law of a State or Territory validates a past act attributable to the State or Territory in accordance with s 19, the native title holders are entitled to compensation if they would be so entitled under subsection 17(1) or (2) on the assumption that section 17 applied to acts attributable to the State or Territory.
>
> …
>
> *Recovery of compensation*
>
> (3) The native title holders may recover the compensation from the State or Territory.
>
> …

84 Section 17 of the NTA provides relevantly in relation to category D past acts that the native title holders are entitled to compensation for the act if the native title affected by the act is in relation to an onshore place (and the application area in this case is entirely 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 any land concerned and the land adjoining or surrounding any waters concerned (s 17(2)(a), NTA).

85 Section 51 of the NTA provides, so far as is relevant to the application:

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 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.

…

Compensation not covered by subsection (2) or (3)

(4) If:

(a) neither subsection (2) nor (3) applies; and

(b) 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 making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria set out in that law for determining compensation.

Monetary compensation

(5) Subject to subsection (6), the compensation may only consist of the payment of money.

…

86 Section 51A or the NTA imposes a limit on compensation in the following terms:

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.

This section is subject to section 53

(2) This section has effect subject to section 53 (which deals with the requirement to provide "just terms" compensation).

87 Section 53(1) provides for an additional entitlement to compensation whenever that is required to avoid invalidity by reason of s 51(xxxi) of the Constitution. It is as follows:

Entitlement to just terms compensation

(1) Where, apart from this section:

(a) the doing of any future act; or

(b) the application of any of the provisions of this Act in any particular

case;

would result in a paragraph 51(xxxi) acquisition of property of a person other than on paragraph 51(xxxi) just terms, the person is entitled to such compensation, or compensation in addition to any otherwise provided by this Act, from:

(c) if the compensation is in respect of a future act attributable to a State or a Territory – the State or Territory; or

(d) in any other case – the Commonwealth;

as is necessary to ensure that the acquisition is made on paragraph 51(xxxi) just terms.

88 The term "paragraph 51(xxxi) acquisition of property" is defined in s 253 of the NTA as an acquisition of property within the meaning of s 51(xxxi) of the Constitution, and "paragraph 51(xxxi) just terms" is defined as just terms within the meaning of s 51(xxxi) of the Constitution. Section 51(xxxi) of the Constitution provides for the power to acquire property on just terms.

89 There is a compulsory acquisition law for the Northern Territory in the form of the LAA. Section 5 requires the LAA to be read so as to provide for the acquisition of land on just terms.

90 The expression "the date of acquisition" used in the LAA, including in the Compensation Assessment Rules in Sch 2 means, when land is compulsorily acquired, the date on which a notice of acquisition of land is published in the Gazette: s 4(1).

91 Compensation bears interest from the date of acquisition to the date on which payment is made to the claimant: s 64(1)(a). The rate of interest is the rate from time to time fixed by the Minister after consultation with the Treasurer: s 65. The Territory has advised in correspondence that no rate of interest has been set under the LAA. That is accepted by the Applicants and by the Commonwealth.

92 Section 66 of the LAA provides relevantly that in assessing compensation the relevant Tribunal must have regard to, but is not bound by, the Rules set out in Schedule 2 (as modified in respect of the acquisition of native title rights and interests).

93 Schedule 2 provides relevantly:

Schedule 2 Rules for the assessment of compensation

1. VALUE TO THE OWNER

Subject to this Schedule, the compensation payable to a claimant for compensation in

respect of the acquisition of land under this Act is the amount that fairly compensates the claimant for the loss he has suffered, or will suffer, by reason of the acquisition of the land.

1A. RULES TO EXTEND TO NATIVE TITLE RIGHTS AND INTERESTS

To the extent possible, these rules, with the necessary modifications, are to be read so as to extend to and in relation to native title rights and interests.

2. MARKET VALUE, SPECIAL VALUE, SEVERANCE DISTURBANCE

Subject to this Schedule, in assessing the compensation payable to a claimant in respect of acquired land the Tribunal may take into account:

(a) the consideration that would have been paid for the land if it had been sold on the open market on the date of acquisition by a willing but not anxious seller to a willing but not anxious buyer;

(b) the value of any additional advantage to the claimant incidental to his ownership, or occupation of, the acquired land;

(c) the amount of any reduction in the value of other land of the claimant caused by its severance from the acquired land by the acquisition; and

(d) any loss sustained, or cost incurred, by the claimant as a natural and reasonable consequence of:

(i) the acquisition of the land; or

(ii) the service on the claimant of the notice of proposal,

for which provision is not otherwise made under this Act, other than costs incurred as a result of attending, participating in or being represented at consultations for the purposes of section 37(1) or mediation under section 37(4).

…

8. MATTERS NOT TO BE TAKEN INTO ACCOUNT

The Tribunal shall not take into account:

(a) any special suitability or adaptability of the acquired land for a purpose for which it could only be used:

(i) in pursuance of a power conferred by law; or

(ii) by the Commonwealth or the Territory, a statutory corporation to which the *Financial Management Act* applies, or a council constituted under the *Local Government Act*;

(b) any increase in value of the acquired land resulting from its use or development contrary to law;

(c) any increase or decrease in the amount referred to in rule 2(a) arising from:

(i) the carrying out; or

(ii) the proposal to carry out,

the proposal; or

(d) any increase in the value of the land caused by construction, after the notice of proposal was served on the applicant, of any improvements on the land without the approval of the Minister.

9. INTANGIBLE DISADVANTAGES

(1) If the claimant, during the period commencing on the date on which the notice of proposal was served and ending on the date of acquisition:

(a) occupied the acquired land as his principal place of residence; and

(b) held an estate in fee simple, a life estate or a leasehold interest in the acquired land,

the amount of compensation otherwise payable under this Schedule may be increased by the amount which the Tribunal considers will reasonably compensate the claimant for intangible disadvantages resulting from the acquisition.

(2) In assessing the amount payable under subrule (1), the Tribunal shall have regard to:

(a) the interest of the claimant in the land;

(b) the length of time during which the claimant resided on the land;

(c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land;

(d) the period after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land;

(e) the period during which the claimant would have been likely to continue to reside on the land; and

(f) any other matter which is, in the Tribunal's opinion, relevant to the circumstances of the claimant.

CONSIDERATION: CONSTRUCTIONAL CONTENTIONS

Preliminary

94 As a starting point, I refer to my earlier reference to the Preamble of the NTA. It recognises that the dispossession of Aboriginal people and Torres Strait Islanders from their lands occurred largely without compensation, and that successive governments have failed to reach a lasting and equitable agreement with Aboriginal people and Torres Strait Islanders concerning the use of their lands. It is also unexceptional to observe that, if acts have extinguished native title and are to be validated or allowed, justice requires that compensation on just terms be provided to the holders of native title whose rights have been extinguished.

95 Hence it is that s 10 provides that native title is recognised and protected in accordance with the NTA, and s 11 says that native title is not able to be extinguished contrary to the NTA. The circumstances in which legislation of the Commonwealth, or of a State or Territory, may

extinguish native title is circumscribed by the requirements of s 11(2). After 1 July 1993, such legislation may only extinguish native title in accordance with Div 2B (which deals with the confirmation of past extinguishment of native title), or Div 3 (which deals with future acts and native title) of Pt II, or by validating past acts and intermediate period acts in relation to native title in accordance with Div 2 and 2A of Pt II of the NTA.

96 It is in that context that the NTA provides for compensation in respect of native title rights and interests which have been extinguished, at least since acts undertaken after the commencement of the RDA.

97 It is, therefore, not surprising that the criterion for determining compensation in s 51 of the NTA described a standard of entitlement by reference to "just terms". Nor is it surprising that the parties accept that "just terms" as there expressed is coterminous with the meaning of "just terms" in s 51(xxxi) of the Constitution.

98 The standard is one of fair dealing: *Nelungaoo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 600 per Kitto J. In the context of a challenge to the validity of a lease of Aboriginal land granted under the *Land Rights Act*, pursuant to the *Northern Territory National Emergency Response Act 2007* (Cth), in *Wurridjal v The Commonwealth* (2009) 237 CLR 309 the High Court used a like expression at [190] per Gummow and Hayne JJ (*Wurridjal*).

99 In the NTA, the standard of just terms compensation does not prescribe any particular framework for the determination of the compensation payable, save that in the circumstances of this application by the operation of s 51(4) of the NTA, assistance may be derived from the framework under Sch 2 to the LAA.

100 In *Wurridjal* a statutory right to "reasonable compensation" was interpreted as conferring whatever compensation was necessary to provide "just terms" within s 51(xxxi) of the Constitution.

101 The Applicant submits that the "just terms" requirement necessarily means that the compensation be assessed at the time of validation in 1994, rather than at the time of the act which has been validated. That is a matter which is addressed in considering the "timing issue" below. However, I did not discern from the submissions of the Territory or of the Commonwealth that it was contended (or accepted) that, to assess the compensation at the time of the compensable act itself rather than of its validation, would or could routinely or

necessarily lead to the compensation being other than on "just terms". The contrary was the case.

102 As to the RDA itself, s 7(1) of the NTA provides that it is intended to be read and construed subject to the provisions of the RDA. However, it goes on to explain that that expression means only that the provisions of the RDA apply to the performance of functions and the exercise of powers conferred by or authorised by the NTA, and so that any ambiguous terms in the NTA should be construed consistently with the RDA if that would remove the ambiguity. Section 7(3) specifically said that those explanations do not affect the validation of past acts or intermediate period acts in accordance with the NTA.

103 In my view, neither the RDA itself, nor the RDA taken in light of s 7 of the NTA, necessarily prescribes that native title rights generally cannot be valued at less than freehold title, or that the native title rights and interests which were extinguished or impaired by one or more of the determination acts the subject of the present proceedings, necessarily must be treated as "relevantly exclusive". Nor does it mean that the divestiture of the native title rights and interests, or their extinguishment, occurred at the time of the validation rather than at the time of the act itself.

104 So long as the provisions of the NTA or of the VNTA in relation to validation of past acts or intermediate period acts are valid, the general principle should apply that as a later enactment contemplated and made by the Parliament, they would prevail: *Goodwin v Phillips* (1908) 7 CLR 1 at 7 per Griffiths CJ. Indeed, in my view that was made explicit in *Western Australia v Commonwealth* (1995) 183 CLR 372 at eg 484 in the joint judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (*Native Title Act case*). There is no basis for qualifying their proper construction or application by reason of any primacy of the RDA or its terms.

105 Section 7(3) in any event makes that clear.

106 There is no dispute that there are four categories of acts which attract, or are said to attract, the entitlement to compensation. There is an overlap in the first three, because previous exclusive possession acts are or may be also past acts and/or intermediate period acts.

107 The break-up of those categories is set out in more detail earlier in these reasons, but because it requires specific consideration in this context, it is convenient to repeat them. They are:

(1) past acts under s 20 of the NTA which, read with ss 5-8 of the VNTA, entitle the Applicants to compensation under s 17(1) including where the non-extinguishment principle applies under s 17(2);

(2) intermediate period acts: the entitlement to compensation arises under s 22G of the NTA, read with s 22B of the NTA and ss 9B-9E of the VNTA, and for other intermediate period acts to which the non-extinguishment principle applies;

(3) previous exclusive possession acts: the entitlement to compensation arises under s 23 of the NTA, read with ss 23E and 23I of the NTA and ss 9H-9JB of the VNTA, as they apply to previous exclusive possession acts and previous non-exclusive possession acts and, as noted, where a previous exclusive possession act is also a past act or an intermediate period act, the entitlement to compensation is in respect of its status as a previous exclusive possession act, as s 23J then confers the entitlement to compensation for extinguishment; and

(4) invalid future acts: generally, a future act will be valid if it is covered by a provision in Div 2 of the NTA and it is invalid if it is not: s 24AA(2), as the VNTA does not deal with future acts.

108 The VNTA commenced on 10 March 1994, and validated past acts attributable to the Territory. It was amended on 1 October 1998 to provide for the validation of intermediate period acts, and the confirmation of extinguishment of native title by previous exclusive possession acts: *Validation of Titles and Actions Amendment Act 1998* (NT).

109 The Applicant's primary case is that the assessment of just terms compensation must be by reference to the date of validation of past acts: 10 March 1994, but on its alternative or statutory contention on the dates when the acts occurred. However, as noted, although the intermediate period acts were validated later, on 1 October 1998, for the purposes of assessing compensation for those acts, the Applicants are content to adopt the 10 March 1994 date. It is accepted that any further and more precise breakdown, by reference to the operative dates of extinguishment and impairment in relation to individual lots, is not likely to affect the overall assessment of loss.

110 The non-extinguishment principle in s 238 of the NTA provides for the suspension of what otherwise would be native title rights and interests, so that whilst they continue to exist, to the extent of any inconsistency they have no effect in relation to the act in question. The

inconsistency precluding the exercise or enjoyment of native title rights may itself be entire or partial and will last until the act or its effects are later removed or cease to operate.

111 As also noted, the Territory accepts that it is liable for the acts about which compensation is sought. Section 239 of the NTA provides that an act is attributable to the Territory if it is done by the Crown in light of the Territory or by any other person under a law of the Territory. This captures acts done by the Territory after its establishment as a body politic on 1 July 1978 by the *Northern Territory (Self-Government) Act* 1978 (Cth).

The Claim for Economic Loss

112 The Applicants claim economic loss under the following heads:

(1) for previous exclusive possession acts – the freehold value of the land at the time of the compensable act, including any improvements;

(2) for category D past acts – reasonable remuneration for the occupation or use of the land in the nature of mesne profits evidenced by market rental or receipts for use of the land from the time of the compensable act until native title was extinguished by a later act, or for an indefinite period where there was no later extinguishing act;

(3) for all the compensable acts – reasonable remuneration for the wrongful occupation or use of the land in the nature of mesne profits evidenced by market rental receipts for use of the land from the time of the compensable act until the act was validated on 10 March 1994;

(4) for compensable acts where native title was extinguished – the freehold value of the land at the date of validation on 10 March 1994, including any improvements; and

(5) for compensable acts to which the non-extinguishment principle continues to apply – reasonable remuneration for the occupation or use of the land in the nature of mesne profits evidenced by market rental or receipts from 10 March 1994 for an indefinite period.

113 The claims described in subparagraphs (3), (4) and (5) immediately above are said to be brought on the concession or contingency first that the entitlement to compensation under ss 20, 23J and 51 of the NTA is to be assessed at the date the compensable act happened rather than at the date of validation; second that the limitation imposed by s 51A(1) the NTA operates on the entitlement to compensation under ss 20, 23J and 51 of the NTA; and third on the basis that if the Claim Group are not entitled to those species of compensation under ss

20, 23J and 51 of the NTA, they are entitled to that additional compensation from the Commonwealth by operation of s 53 of the NTA.

114 The Applicant through counsel put its proposition at the commencement of closing submissions on this topic which is repeated as follows:

> 1. Compensation for economic loss is to be assessed by reference to the market value of the affected native title rights and land at the time of validation of the past acts (10 March 1994), and include compensation for the invalid occupation and use of the land by others in the intervening period between date of act and validation.
>
> (a) Validation for the purposes of the *Native Title Act 1993* (Cth) (as a permitted exception to the protection of native title) does not remove the historical fact that the acts were invalid by the overriding operation of the *Racial Discrimination Act 1975* (Cth) at the time of grant and in the intervening period until validation.
>
> (b) Validation effected a divesture (acquisition) of the native title rights in relation to the land that were recognised by the common law and protected by the NTA or the RDA, and resulted in the Northern Territory gaining a benefit in having its underlying radical title to the land cleared of the burden or qualification of the native title rights and in its invalid dealings in the land validated, and in grantees acquiring valid titles.
>
> (c) The lead compensation provision is s 51(1) of the NTA by which the native title holders are entitled to be compensated on just terms. This involves assessment or compensation by reference to the value of the affected rights and land at the time of the acquisition, or at least at a time that is not remote from the time of acquisition, irrespective of retrospective validation of acts that occurs for the purposes of the NTA.

CONSIDERATION: DATE FOR THE ASSESSMENT OF COMPENSATION

115 The validation of the past acts occurred on 10 March 1994 when s 4 of the VNTA commenced operation, but it provides expressly that each act to which it applies is taken always to have been valid.

116 The validation of the intermediate period acts occurred on 1 October 1998 when s 4A of the VNTA commenced operation, but again it provides that each act to which it applies is taken always to have been valid.

117 It is common ground that the NTA does not expressly provide for the date upon which the entitlement to compensation arises, or the date at which the value of the interest being acquired or extinguished is to be determined.

118 The critical question is whether compensation is to be assessed as at the date of each of the acts effecting the extinguishment or divestiture of the relevant native title rights and interests, or at the date of the validation of that act of extinguishment or divestiture.

119 Both the NTA at ss 14 and 22B provides respectively that a past act and an intermediate period act by the Commonwealth are, by the operation of those sections, valid and are taken always to have been valid. The same expression applies to past acts of the Territory: ss 19 and 22F of the NTA and s 4 of the VNTA. The entitlement to compensation arises by ss 20 or 23J (in respect of previous exclusive possession acts).

120 The entitlement to compensation is for "the act" itself. As s 8 of the VNTA provides for the non-extinguishment principle to apply to the act, the entitlement to compensation under s 20 arises for a past act that extinguishes or suppresses native title. In the case of a previous exclusive possession act, s 23J gives rise to the entitlement to compensation for the act which extinguishes the native title and ss 9H and 9J of the VNTA provide that the Act is "taken to have happened when the act was done". In the case of a public work, it is taken to have happened when the construction or establishment of the public work began.

121 As a matter of construction, in my view, because the relevant provisions deemed the extinguishing act to have been valid from the time of the act, or to have been done at the time of the act, it is the date of the act which fixes the date at which compensation is to be assessed.

122 That conclusion is consistent with the views of Sackville J in *Jango v Northern Territory* (2006) 152 FCA 150 (*Jango SJ*). That case concerned a claim for compensation under Div 2 and Div 2B of the NTA and the corresponding provisions of the VNTA. The issue of liability (that is, the establishment of native title held by the claimants upon which the extinguishing acts were said to have effected an extinguishment of native title) was first heard and determined.

123 As that issue was decided adversely to the claimants, it was not strictly necessary for Sackville J to address the issues concerning the claim for compensation, including the issue as to the date upon which the compensation was to be assessed. However, his Honour made some carefully considered observations on the topic.

124 The claimed compensable acts consisted of public works (including Connellan Airport), fee simple grants and a Crown Lease, each of which was attributable to the Territory and found by his Honour to have been previous exclusive possession acts within Pt 3B of the VNTA.

125 Sackville J specifically considered the question as to when the extinguishment should be taken to have occurred: at [742]. I shall not repeat his Honour's careful review of the legislative history of the 1998 amendments to the NTA, including his references to the Explanatory Memorandum. Having regard to the clear language of s 23C, noted above, Sackville J found that the effect of the deemed date of extinguishment when read with s 23J of the NTA is that the right to compensation under s 23J: "arises (or is taken to arise) when the extinguishment is taken to have happened": at [774].

126 I respectfully agree with his Honour's reasoning leading to that conclusion. If a compensable act covered by Div 2B may have been invalid when done by reason of the RDA, that would not have been known at that time. However, as his Honour said, the practical consequences of such an act usually would have included the de facto loss or impairment of native title rights and interests, so that it makes sense that any right to compensation in respect of the validation of those acts should be determined at the date at which they took place. The alternative construction could lead (and in this instance does lead on the Applicant's contentions) to the entitlement to compensation which would include compensation assessed having regard to the added value of the acquired area by public works and other improvements after the extinguishing acts took place: see generally at [778]-[785].

127 Sackville J said at [771]:

> Presumably, this would be in addition to other heads of compensation for the loss of native title rights and interests over the land on which the Airport was constructed. While it may well be appropriate (as the Commonwealth appears to accept) that native title holders should receive interest if compensation is assessed at the date of statutory extinguishment of their rights and interests, it is difficult to imagine that the compensation regime in the NTA is intended to provide the windfall benefits to claimants that are implicit in the applicants' arguments.

128 The same reasoning applies in relation to compensation for past acts that were not previous exclusive possession acts and in relation to the parallel provisions of the VNTA.

129 On appeal in *Jango v Northern Territory* (2007) 159 FCR 531 (*Jango FC*), the Full Court (French, Finn and Mansfield JJ) reached the same conclusion on those topics. The appeal itself was unsuccessful so that the primary findings of Sackville J were upheld. As to this topic, the Full Court said at [109]:

> The entitlement to compensation under s 23J 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." : S 51(1). That compensation is to be assessed at the date at which the various invalid grants were made, as his Honour found and the Commonwealth here accepts.

It appears that that comment was made on the same reasoning as the conclusions of Sackville J: see at [107].

130 It should be noted that those views were reached in the context of a Commonwealth submission that native title had been wholly extinguished, at least in the case of the fee simple grants, by registration of the grants under the *Real Property Act* (NT) after the extinguishing act itself. The consequence of the Commonwealth's argument was that no entitlement to compensation could arise because, at the time the VNTA was enacted, there would have been no native title left to extinguish by reason of the registration of the grant of fee simple. The Full Court rejected that argument by adopting the analysis of Sackville J. It said at [114] as follows:

> Whatever may have been the consequences of registration on native title rights and interests at the time of registration by virtue of the indefeasibility provisions, on and from the enactment of the Validation Act, those rights and interests were taken for the purposes of the NTA to have already been extinguished completely: see s 23A(2); by the anterior previous exclusive possession acts of the Northern Territory, ie by the making of the grants … What registration did not do is affect in any way an entitlement to compensation under the NTA given by s 23J. For its purposes, notwithstanding the later registration of the grants, the native title rights and interests in the lands granted would not have been extinguished "otherwise than under this Act".

131 The approach adopted in *Jango SJ* and in *Jango FC* appears directed to interpreting and applying the NTA in a manner consistent with the practical effects of the compensable acts on native title as they operated at the time of those acts.

132 It is of course necessary, as the Applicant strongly submitted, that ultimately that approach should reach a level of compensation which is fair and just. To achieve that end, as I have indicated, the native title holders also receive compensation for the delay in payment by way of interest. The characterization of and the quantification of that interest is itself a matter of considerable debate in this matter.

133 Some support for that approach is also derived from the *Native Title Act case*. The High Court was there considering a challenge to the validity of the NTA directly. The plurality judgment (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) at 454 addressed the way in which the NTA dealt with past acts, and described the definition of "past act" as

the "lynch pin" for the provisions of the NTA that permit State or Territory laws enacted in the future to give full force and effect to earlier acts which otherwise purported to extinguish or impair native title but were ineffective at the time when those acts were done. The plurality then said:

> The provision authorizing the future validation of past acts attributable to a State is not affected by the principle that a law of the Commonwealth cannot retrospectively avoid the operation of s 109 of the Constitution on a State law that was inconsistent with a law of the Commonwealth. Section 19 of the Native Title Act does not purport to deny the overriding effect of the Racial Discrimination Act upon any inconsistent law of a State in the past. Section 19 removes any invalidating inconsistency between, on the one hand, a State law enacted in the future that purports to validate past acts attributable to a State and, on the other, the Racial Discrimination Act or any other law of the Commonwealth (including the Native Title Act itself). The validation of past acts attributable to a State is effected by a State law which, at the time of its enactment, is not subject to an overriding law of the Commonwealth. The force and effect of a past act consisting of a State law which was "invalid" by force of s 109 of the Constitution because of inconsistency with the Racial Discrimination Act is recognised only from and by reason of the enactment of the future State law but, from that time onwards, the force and effect of the past act is determined by the terms of the State law enacted in conformity with s 19.

That passage was relied upon expressly by the Full Court in *Jango FC* at [106].

134 I note that the Applicant sought also to derive support for its contentions from the *Native Title Act case* at 475. I do not think that the passage relied upon, in its context, represents a different view of the plurality on the particular issue or support for the Applicants' contention. At that point in the plurality reasons, the Court is responding to a submission by Western Australia that a provision like s 20 of the NTA was beyond Commonwealth legislative power because it imposed a compensation liability on the State when the State exercised its legislative power to extinguish or impair native title. The State argued in that case that such legislation imposed a financial burden upon the exercise of the legislative power of the State, and that it could not do so. The particular passage in the plurality reasons at 475 is:

> The submission overlooks, with respect, the legal effect of a validation of a past or permissible future act by a State law which is enacted in conformity with s 11(2) of the Native Title Act. Such an act divests from the Aboriginal native title holders the proprietary or usufructuary rights which they possessed by virtue of the common law and which were protected by s 11(1) of the Native Title Act or by the Racial Discrimination Act.

135 In its context, I consider that the "act" there referred to as divesting the native title holders of native title rights is not the enactment of the validation statute, but the past act itself.

136 That understanding of the *Native Title Act case* is also, in my view, consistent with the High Court decision in *University of Wollongong v Metwally* (1984) 158 CLR 447 (*Metwally*).

137 The Applicant sought to argue in closing submissions that *Metwally* dictated that, or pointed to, the alternative conclusion because the deeming provisions in the NTA and the VNTA could only be valid if they accommodated the intervening period between the doing of the invalid act (later deemed to be valid so that there was at first a de facto and then subsequently a de jure extinguishment of native title) and the validating enactment. Otherwise, it was argued, the intervening period resulted in a period of non-use of the native title rights and interests which was otherwise not compensated for.

138 In my view, *Metwally* decided that s 109 of the Constitution operated to allow a State law or Territory law have retrospective operation, but did not dictate the consequences for which the Applicant contends in the present circumstances.

139 Mr Metwally was a student at the University of Wollongong who successfully sued the university under the *Anti-Discrimination Act 1977* (NSW) (NSW ADA) for unlawful acts of discrimination that had taken place between 1978 and 1981, and for which he obtained an award of damages in 1983. The University appealed from that decision. Whilst the appeal was in progress, the High Court in a separate case had ruled that the NSW ADA was inconsistent with the RDA, and to that extent invalid. Consequently, that meant that, during the years when the acts of discrimination had occurred, the NSW ADA was invalid so that the acts of discrimination of which Mr Metwally complained had not been unlawful at the time and the award of damages to him should not have been made.

140 To re-dress that obvious unfairness, the Commonwealth then amended the RDA so as to remove any inconsistency with the NSW ADA for the future. It also sought to remove legislatively the past period of inconsistency by deeming the amendments to the RDA to have effect retrospectively. It is the latter step which was directed to maintaining or enabling Mr Metwally to maintain his claim. The NSW ADA had not been amended so as to operate retrospectively.

141 Clearly, the prospectively operating amendments to the RDA were effective to remove any future inconsistency with the NSW ADA. The NSW ADA was therefore revived and operative by reason of the amendments to the RDA. However, it was held that the historical period of invalidity could not be overcome, because the Commonwealth did not have the

power to restore the validity of the NSW ADA, by its previous inconsistency, during the period of the acts of discrimination. The majority of the High Court held that, because the invalidity of the NSW ADA Act had been brought about by the operation of s 109 of the Constitution, and not directly by the RDA, and because the Commonwealth could not enact the law to unilaterally override the prior operation of the Constitution, it could not retrospectively restore the status of the NSW ADA. Deane J observed at 479 that such an outcome, if it were to be done, would have to be done retrospectively by the relevant State or Territory. His Honour then said at 480:

> Such a situation would be quite different in nature to that for which the respondents have contended in the present case in that it would be the Parliament of New South Wales which would have legislated to give retrospective operation to provisions of its own law and in that, while the citizen would have been subjected to the operation of retrospective legislation, the provisions of s 109 would nonetheless have operated to ensure that there was, in fact, no time at which he was accountable to both a law of the Commonwealth and an inconsistent law of a State.

See also Murphy J at 469.

142 The majority in *Metwally* comprised Gibbs CJ, Murphy, Brennan and Deane J in separate judgments. Mason, Wilson and Dawson JJ dissented as their Honours would have held that the amendment to the RDA was effective retrospectively to remove the inconsistency produced by s 109 of the Constitution.

143 The approach of Deane J, and supported by Murphy J, is that which seems to support the structure of the past act provisions of the NTA. That is, the provisions provide for retrospective operation in respect of Commonwealth acts, and for the enactment of complementary validating provisions of the relevant State or Territory if that State or Territory chose to adopt that course. The VNTA is such an enactment.

144 Before explaining why, in my view, that conclusion does not result in an entitlement to compensation which is of itself not fair or just, it is also useful to refer to the approach which, the Commonwealth said, flowed from the Supreme Court of the United States when addressing not dissimilar issues in *Shoshone Tribe of Indians v United States* 299 US 476 (1937) (*Shoshone*). I accept the Commonwealth submission concerning what that case decided, and why it is, in broad terms, consistent with the views which I have taken. Of course, the task of the Court in this matter is the proper understanding and application of the NTA and the VNTA, so that the decision in *Shoshone* provides but an indicative support for a similar line of reasoning in relation to a different legislative and factual history.

145 The issue in that case was the date at which compensation should be assessed for the loss of half of the Shoshone Tribe's reserved land.

146 In 1986, the Shoshone Tribe by Treaty relinquished to the United States a reservation of over 44m acres in exchange for a reservation of just over 3m acres in Wyoming. This "Wind River Reservation" was to be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians". However, in March 1878, the Commissioner of Indian Affairs brought a band of Northern Arapahoes to the Wind River Reservation, at least for what the Shoshone Tribe then believed to be a temporary stay. The Shoshone Tribe protested repeatedly to the Commissioner about that. In August 1891, the Commissioner issued a public notification that "the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones".

147 In the following decades, parts of that Wind River Reservation area were ceded to the United States for payments made to both tribes equally, still against the protestations of the Shoshone. Eventually, a special law was enacted in March 1927 enabling the Shoshone Tribe to pursue a cause of action against the United States for violation of the Treaty.

148 The question that came before the Supreme Court was whether it was appropriate to assess the damages as at August 1891 (the date of the Commissioner's declaration), or at March 1878 (the date of occupation unlawfully by the Arapahoes), or at March 1927 (the date of the jurisdictional enactment). The Shoshones had argued for the value of the land at March 1927, together with compensation for the value of the intermediate use and occupation between 1878 when the unlawful occupation began and 1927.

149 Justice Cardozo delivered the judgment of the Court. It found that the enactment of the jurisdictional enactment in March 1927 was not the appropriate date to fix the value of the land, as that enactment merely provided a forum for the adjudication of the claim according to legal principle. Its intention was to give reparation for an alleged unlawful appropriation of the past, rather than to make a new and lawful appropriation by the exercise of sovereign power. The Court also said that the damages should not be measured at August 1891 but at March 1878, the date of the unlawful entry by the Arapahoes. The Court said at 496:

> Looking at events in retrospect through the long vista of the years, we can see that from the outset the occupancy of the reservation was intended to be permanent; that, however, tortious in its origin, it has been permanent in fact; and that the government of the United States, through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the de facto

> appropriation by relation as of the date of its beginnings.

150 That was the occasion of the appropriation of property within the meaning of the Fifth Amendment, "the right to interest or a fair equivalent" attaching itself automatically to the right to an award of damages.

151 Perhaps anticipating the Applicants contention here, or more accurately and realistically, perhaps founding the approach of the Applicants here, it was said that the damages were to include such amount beyond the value of the property rights as taken as would be necessary to secure an award of just compensation, and the increment was "to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances". At 498 it was also said:

> The right of the Indians to the occupancy of the lands pledged to them may be one of occupancy only, but it is "as sacred as that of the United States to the fee".

That is an observation, the echoes of which are also found in the Applicant's submissions on its second main point.

152 Consequently, compensation was calculated as at March 1978 as the value of the taking of the rights at that time, being one half of the undivided share in the reservation as at that date, and in that case an amount for simple interest calculated at 5% per annum was applied to constitute just compensation.

153 As I have indicated, I agree with the observation of the Commonwealth that within its historical and legal context, that case provides a useful analogy in re-affirming the decision reached on the first point.

154 As foreshadowed, it is necessary to address in more detail the Applicant's contention that such a course will not, or cannot, result in "just terms" compensation. If that proposition is made out, it is said to follow that the valuation of the rights extinguished must be made at the date of the validating act rather than at the date of the act which first had the de facto effect of extinguishing or impairing native title rights.

155 The Applicant sought to establish that the approach of Reeves J in *Doyle on behalf of the Iman People (No 2) v State of Queensland* [2016] FCA 13 (*Doyle*) provided support for the primary argument that was adduced. I do not think that decision, properly understood, advances the Applicant's case. That matter concerned a series of questions whether certain acts which were said to have had an extinguishing effect upon native title were previous

exclusion possession acts within s 23B of the NTA. Certain of those acts concerned the dedication and establishment of public roads, and certain concerned the effect of certain Grazing Homestead Leases. It was on that issue, and how it was addressed by Reeves J in *Doyle*, that the Applicant sought support.

156 It is plain from the reasons that what are there called the "Metwally principles" was critical to the resolution of that issue or those questions. As to that, in my view and with respect, Reeves J adopted an appropriate and careful analysis consistent with the conclusion which I have reached. The summing up of how those issues were resolved, and should be applied to the deemed validating provisions of the NTA as set out in [71] of *Doyle*.

157 The question really resolved, in that case, on the consideration of the *Native Title (Queensland) Act 1993 (Qld)* (*QNTA*) in circumstances where the past invalid act "no longer existed" at the time of the enactment of the *QNTA*: see at [72]. It is not doubted, as [71] summarises, that retrospectively a combination of State and Commonwealth (or as here Territory and Commonwealth) legislation could be effective. So much was acknowledged at [74]. Indeed, in the particular circumstances, the conclusion at [76] was that the validation of past acts by the combination of provisions in the NTA and the *QNTA* operated to make valid the past acts. As the Solicitor-General for Queensland submitted as intervener in this hearing, that case reflects what he called an "orthodox analysis" and application of the Metwally principles. It is an application and understanding of them consistent with the approach I have adopted.

158 To revert to the "just terms" component of the Applicants' contentions, which is at 1(3) of its outline of propositions as presented at the commencement of the closing oral submissions, and as set out above, I have in large measure already rejected the proposition that s 51(1) of the NTA necessarily prescribes that the value of the extinguished rights be measured at the time of legislation rather than the time at which, according to the validating legislation, the extinguishing act is deemed to have validly occurred or deemed to have taken effect.

159 I do not consider that the cases referred to by counsel for the Applicants in this context necessarily require an alternative conclusion. In *PJ Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 (*Magennis*), an example is provided of where the statutory prescription for the date of acquisition did not coincide with the date of dispossession. It therefore has some parallels to the present circumstances, where it appears that the validation provisions of

the NTA and the VNTA are intended to align the dates of the de facto loss or impairment of native title to the date of the de jure loss or impairment of native title.

160 In *Magennis*, the Commonwealth and States had each legislated to approve an inter-governmental agreement that authorised the States to acquire certain property for defence purposes at a value not exceeding the value prevailing on 10 February 1942. The acquisition then in question was to take place in late 1945, and between February 1942 and August 1945 the plaintiff had spent considerable sums of money improving the land proposed to be acquired, and it had significantly increased in value. The High Court found, in favour of the plaintiff, that the Commonwealth legislation therefore authorised the acquisition of land upon terms which required the payment of compensation at a value less than the present value of the land, and so for the acquisition of property on terms that were not just.

161 To describe the facts of that case is to indicate why it does not directly support the Applicant's contentions. Indeed, the scheme for compensation in respect of validated acts under the NTA seeks to align the date of actual or de facto dispossession or impairment of those rights with the date at which those rights are to be valued. I do not think that the passages in the judgments of Latham CJ in that case at 403, or of Williams J (with whom Rich J agreed at 418-419, or of Rich J at 428) directly inform the proper construction and application of the NTA and the VNTA in this matter.

162 Similarly, *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc.)* [1970] AC 874 (*Birmingham Corporation*) and, in particular at 910 in the speech of Lord Donovan, simply reflects the application of the relevant legislation to the particular circumstances then under consideration.

163 *Blue Mountains City Council v Mulcahy* (1998) 45 NSWLR 577 similarly turned upon the application of the relevant legislation, in particular the definition of "market value" to the valuation of land compulsorily acquired. The issue was whether improvement works carried out unlawfully should be excluded from determining the valuation of the compensation for the compulsorily acquired land. Those unlawful improvements were carried out before the resumption.

164 *Collins v Council of the Shire of Livingstone* (1972) 127 CLR 477 similarly concerned the straightforward application of the legislative provisions in the particular circumstances of the case. In that case, the value of the land at the time it had been acquired may have been

increased by the value of certain fixtures (a dam) built on the land unlawfully by the acquiring authority before the time of acquisition. It did not address the sort of issue presently now under consideration.

165 Nor do I think that the decision in *Registrar of Titles v Crowle* (1947) 75 CLR 191 is of assistance in addressing the present issue. It was a claim for damages arising out of the mistaken registration of an interest in fee simple, which should have been a life interest, in two parcels of land in 1883, and involving subsequently a number of other complex transactions.

166 Finally, it is necessary to refer to *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 629 (*Grace Bros*). In that case, the High Court held that a compulsory acquisition statute which prescribed the quantification of the compensation payable for the compulsory acquisition to be the value of the land on 1 January of the year preceding the acquisition was not unjust: see eg per Latham CJ at 279-280. The Chief Justice there pointed to two situations in which compensation assessed at the acquisition date may not truly reflect "just terms": where the dispossessed owner was disadvantaged because some pre-acquisition governmental action had depressed the value of the property; and, alternatively, where some pre-acquisition governmental action had increased the value of the property before the date of acquisition in circumstances where it was not fair for the dispossessed owner to benefit from that increase. Sackville J in *Jango SJ* adverted to a similar concern, where the compensation if assessed at the date of the validating enactment, may result in a substantial and inappropriate benefit to the native title holder where, between the past invalid (now validated) act and the date of the validation enactment there had been a significantly increased value to the land by the construction of public works or other improvements after the extinguishing act itself took place: see at 772. In that case, as in *Birmingham Corporation*, there was a statutory prescription directing the assessment of value of the compulsorily acquired land at a date other than the date of the acquisition.

167 That is not directly analogous to the present circumstances. There is no specific legislative prescription directing that the valuation of the rights extinguished or impaired should be made at a particular date, but the background to the NTA itself indicates the attempt to correspond the date of the validation of the act which otherwise invalidly impaired or extinguished native title rights with the occasion or the act which was, at the time, treated as having impaired or extinguished native title rights.

168 I note that Starke J in *Grace Bros* at 286 made the following observation:

> It by no means follows from anything I have said that Parliament has authority to fix any date it thinks proper for the assessment of compensation. But it is for those attacking legislation to establish its invalidity. However, if the Parliament were to fix a date for the assessment of compensation so remote from the date of acquisition of land that it afforded no reasonable or substantial basis for ascertaining the value of the land to the owner at and about that time, then the Court's might well conclude that the enactment was beyond power and invalid.

That was the effect of the decision in *Birmingham Corporation*.

169 The legislation presently under consideration, I have found by clear intention, seeks to align the date of the act which was treated as having extinguished or impaired native title with the date by which that impairment or extinguishment is treated as having been validated (and as having always been validated). On that basis, it does not follow from what was said in *Grace Bros* that selecting the date of the act as the date at which the valuation of the extinguished or impaired rights are to be assessed is irrational or unreasonable. That is so, even though it may have been a good many years prior to the validating enactment itself. The NTA, in effect, seeks to provide just terms to native title holders as well as to those who innocently but (with the wisdom of the hindsight exposed by the NTA) acquired or granted thought they were acquiring or granting those titles. The price of doing so was the payment of compensation on the basis that the acts by being validated are treated as having affected adversely native title, and that compensation would be payable by the liable governments for the act or acts which enabled the extinguishment or impairment of those rights.

170 Section 53 of the NTA then imposes the override of the entitlement to just terms compensation. As the Territory pointed out, Starke J in *Grace Bros* at 285 also said:

> It does not follow that terms are unjust merely because "the ordinary established principles of the law of compensation for the compulsory taking of property" have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not to be there. The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men.

171 The question of whether the statutory prescription for determining the time at which the loss of or impairment of native title rights is to be valued, as discussed in *Jango SJ* and *Jango FC*, is not of itself of that character. The application of interest to compensation as assessed at the time of extinguishment is also capable of, and appropriately should be, taken into account in

determining whether the compensation is on just terms. The rationale for selecting the date at which the valuation is to be made is also obviously relevant.

172 For those reasons, in my view, the appropriate starting point is to determine the value of the native title extinguished or impaired at the date of the act which, at the time, was understood to have extinguished or impaired it, and which by virtue of the validating provisions is taken to have been valid, and always to have been valid from that date. In other words, the starting point is to align the date of the statutorily validated act extinguishing or impairing native title as the date on which the value of the extinguished or impaired native title is to be valued, rather than the date of the validating enactment itself.

173 That does not preclude the desirability of stepping back at the end of the process, particularly if there are particular circumstances which have not otherwise been taken into account relevant to the amount of compensation to be paid, to determine whether, in the circumstances, and having regard to the interest awarded the "just terms" requirement of s 51(1) of the NTA has been satisfied.

174 In my view, that approach has the consequence that the particular and additional implications urged by the Applicant to be drawn from s 51(xxxi) of the Constitution, or from s 53 of the NTA, or from the RDA itself do not need to be further considered. The provisions of the NTA collectively in any event provide for just terms compensation.

THE SECOND MAIN ISSUE

175 The Applicant in the course of final submissions encapsulated the proposition contended for in the following way:

> Compensation for economic loss by the extinguishment of the native title rights is to be assessed by reference to the market value of a freehold estate in the land …
>
> (a) The native title involved rights to live on the land and to gain material, cultural and religious sustenance from the land and its resources that were perpetual and held communally. The rights were recognised and enforceable by the common law, including on terms that on surrender (or acquisition) the radical title of the Crown would be freed of that burden or qualification, and enlarged as an absolute or beneficial fee simple estate. On validation, the Territory acquired that interest (not the native title), and those claiming through the Territory acquired valid freeholds (or leaseholds convertible to freehold).
>
> (b) The land affected by the native title was unalienated Crown land set aside as town lands (enabling the grant of leases convertible to freehold) under the *Crown Lands Act 1931* (NT). The powers under that Act to grant rights and interests in relation to the land (including the invalid freehold and leasehold grants comprising the compensable acts) could not be exercised if the land were held

under other titles (relevantly, freehold or leasehold).

(c) The incidents of the native title rights affected included their protection by the RDA by which the native title holders had security in the possession and enjoyment of their native title rights to the same extent as the holders of other titles. The native title holders were protected from the exercise of powers by the Crown (including by grants to others) that would be inconsistent with the continued existence or enjoyment of the native title rights, unless the powers could be so exercised in relation to other titles. The native title holders could restrain invalid dealings in and uses of the land. At the time of the grant, the acts (grants and rights) were invalid by the overriding operation of the RDA. There were no other valid co-existing non-native title interests in the land (save for the radical title of the Territory, constrained by the *Crown Lands Act* and RDA).

(d) Any assessment of compensation for loss or diminution of native title on terms involving lesser compensation than that assessable for other titles is inconsistent with the RDA. The NTA sets ordinary (freehold) title as the benchmark for the treatment of native title and the assessment of compensation for acts that affect native title for the purposes of the NTA.

(e) The practical effect of (1) to (4) is that the market value of the native title rights reflects the consideration that the native title holders and the Territory (and those claiming through the Territory) would agree upon the surrender of the native title as a condition to the freeholds and leaseholds convertible to freehold to enable the valid grant of those titles, and in circumstances where there was a scarcity of tradable valid pre-RDA titles in the Town.

176 In support of those propositions, but fundamentally the proposition that the value of the diminution or impairment of the native title rights is the freehold value of the land affected by the invalid (but validated) act, reference was made to several decisions.

177 It is appropriate first to consider the High Court decision in *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 (*Geita Sebea*).

178 In that case, the High Court considered the compulsory acquisition of Indigenous traditional rights to land in the then Australian Territory of Papua. The Indigenous rights possessed by the people of Kila Kila were accepted by the High Court as "a communal or usufructuary occupation with a permanent right of possession in the community" per Starke J at 551, and as "a communal usufructuary title equivalent to full ownership of the land" per Williams J at 557. No individual community member could alienate that land.

179 In 1937, the subject land had been leased by the Indigenous community to the Crown for a 10 year term at an annual rental. The Crown as lessee then developed the land by constructing an aerodrome and supporting buildings and facilities on the land. In 1939, an Ordinance was passed authorising the compulsory acquisition of the land by a gazetted notice. That notice was then gazetted in February 1940.

180 The Ordinance required the payment of compensation in an amount determined "as nearly as possible" in the manner prescribed by the general Ordinance authorising the compulsory acquisition of land, and requiring payment by the Territory of Papua of the value of the land.

181 One issue before the Court arose from the fact that the primary judge had valued the acquired land on the basis that he should exclude the value of the improvements and structures on the land at the date of valuation, because they were not fixtures but chattels: see per Starke J at 552. The High Court indicated that that was incorrect, because the proper inquiry was not the value of the improvements to the Indigenous owners or whether they might be removed from the land, but the degree of attachment or annexation of the improvements to the land and the object of those attachments or annexures: see per Starke J at 553.

182 The High Court also addressed the question of how the valuation was to be made where there was no other market for the land. Starke J at 544 said that it should be the value of the land and improvements, with some deduction for the existing leasehold interest. That part of the decision is not contentious.

183 Importantly, however, his Honour said at 555 that, notwithstanding the inability of the Kila Kila People to alienate the land, their interest in the land "should be valued on the footing that an estate in fee simple freed and discharged from all trusts and encumbrances whatsoever was acquired" by Papua. Williams J (with whom Rich ACJ agreed) said at 557 that:

> … the restriction would have no detrimental effect upon the determination of the value of the land when compulsorily acquired, because in the hands of the Crown it would be freed therefrom.

His Honour added that the compensation should be assessed upon as ample a basis as though it had been acquired from a European.

184 In the course of that decision, reference was made to *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2AC 399 (*Amodu Tijani*). In that case, the Privy Council overturned a decision of the Supreme Court of Nigeria, and declared that the entitlement to compensation for the compulsory acquisition of land held by a White Cap Chief (but belonging to the community as a whole) was on the footing that the Chief was transferring the land in full ownership, and not merely a right of control and management: see at 408 and 411. Viscount Haldane, delivering the advice of the Privy Council, described the:

> … real character of the title to the land occupied by a native community [as] a communal usufructuary occupation, which may be so complete as to reduce any radical title in the Sovereign to one which only extends to comparatively limited

rights of administrative interference: [at 409-410]

185 As the Commonwealth pointed out in its helpful submissions, American Indians are not recognised as having general property rights in lands, the extinguishment of which is compensable as an acquisition under the Fifth Amendment: *Tee-hit-Ton Indians v United States* (1955) 348 US 272. The only particular decision in the United States which might be of assistance arises from the particular scheme or the terms of the treaty addressed in *Shoshone Tribe of Indians v United States* 299 US 476 (1937) referred to above. Because there had been an appropriation of property granted under a treaty by reason of the co-settling of another tribe without consent, the right to damages was established. It was said at 497 that the damages were to include such additional amounts beyond the value of the tribe's property rights, when taken by the government, as may be necessary to ensure an award of just compensation, and the increment was "to be measured" either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.

186 The assessment of damages was then determined by the Court of Claims, and again reviewed in the US Supreme Court: *United States v Shoshone Tribe of Indians* 304 US 111 (1938). The Supreme Court upheld the decision of the Court of Claims that the right of the Shoshone Tribe included the timber and mineral resources within the reservation, for the purposes of assessing those damages.

187 Subject to that correction, the process of the Court of Claims did not attract adverse comment from the Supreme Court. It determined the value of the tribe's right at the time of taking, and added an additional amount for interest to produce the present worth of the money equivalent of the property value, as if paid contemporaneously with the taking. Its starting point was, therefore, the "fair and reasonable value" of a one-half undivided share in the reservation as at 19 March 1878. Simple interest was then added at a rate of 5% per annum on that value from the date of taking to the date of judgment: see *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v United States* 85 Ct.Cl. 331 (1937) at 379381.

188 The Supreme Court at 117 said:

> For all practical purposes, the tribe owned the land … The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee.

At 118, it said:

> Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and securely safeguarded as is fee simple absolute title.

189 The Commonwealth pointed out that in neither of *Geita Sebea* or *Amodu Tijani* was there any additional claim made for, nor consideration given, to compensation for loss of the spiritual or religious attachment to the land.

190 The Applicant draws from those two authorities that the proper focus should be on what the Territory acquired by reason of the relevant determination acts, in essence restoring its radical title to the full fee simple entitlement or its equivalent. And, it is said, the analysis of the nature of the right held by the Claim Group should not be measured in the conventional way of assessing the bundle of rights which were possessed against the totality of rights which represent a fee simple title, so as to arrive, as the Commonwealth (and to a lesser extent the Territory) asserted is appropriate at a particular percentage which reflects that measuring).

191 As noted above, the Commonwealth says that that is an appropriate process, and would result in an assessment that the value of the native title at the time of the determination acts should be assessed at 50% of the rights of a fee simple holder of those lots, so that the proper valuation is 50% of the freehold value.

192 The Territory has a more nuanced position, but broadly agrees as a starting point with the comparative analysis of the rights held by the native title holders at the time of the determination acts, with the extent of rights which would be represented by a full freehold title.

193 The Territory made a comparison between the rights attaching to freehold title and the non-exclusive native title rights and interests of the Claim Group.

194 It emphasised the certain differences said to be material to the question of market value.

195 Firstly, it said that native title rights and interests cannot be "sold" but can only be surrendered to or acquired by the Territory for a price, so they have no value on the open market. As a further feature, it is said that native title rights and interests cannot be mortgaged, or leased to a third party as that term is understood in Australian property law. Native title holders who hold exclusive native title rights and interests over land could license a third party to occupy that land for a limited duration (ie something like a lease) but, it is pointed out, non-exclusive native title rights and interests cannot in any practical sense be dealt with in that manner, as they do not carry the right of exclusive possession. As noted above, the non-exclusive native title rights and interests presently under consideration do not permit the subject land to be utilised commercially. The Claim Group holding the non-

exclusive native title rights and interests also cannot exclude others from the land, or otherwise control the use to which the land may be put. An additional feature is that the native title right "to live on the land, to camp, to erect shelters and other structures" is said not to permit native title holders to construct a permanent residence, or at least to discourage the construction of a permanent residence. Finally, it is pointed out that the land cannot be subdivided in the exercise of non-exclusive native title rights and interests.

196 The Territory moved from that analysis to the submission that the Court's first task is to determine the market value of the interest in the land, the several lots affected by the determination acts, by reference to the conventional test expressed in *Spencer v Commonwealth* (1907) 5 CLR 418 at 432 per Griffith CJ (*Spencer*). That is to determine the value which would be paid by a willing but not anxious purchaser from a willing but not anxious vendor. That is the orthodox measure of value.

197 If it is assumed that exclusive native title may or should be valued at about the same as freehold title, a conclusion which in my view can properly be drawn from *Geita Sebea*, it follows that the market value of non-exclusive native title rights and interests over a particular lot or lots must be less than the market value of that freehold title.

198 The Territory then contended that the selection of a notional percentage of freehold title to represent the extent to which non-exclusive native title rights and interests relate to freehold title, or to exclusive native title rights and interests, is artificial in the case of small urban lots. That is because it may mean that native title rights and interests over small urban lots may be more valuable than native title rights and interests over larger remote lots, in circumstances where the general nature of native title rights and interests – focusing upon their ceremonial and usufructuary purposes – would suggest the contrary.

199 Consequently, the Territory contended that the appropriate starting point for the measurement of value is to assess the usage available to the holder of non-exclusive native title rights and interests and identify the closest conventional comparator in terms of usage value, and to adopt the market value of the comparator. That is the methodology adopted by Wayne Lonergan in his Report of 20 November 2015 (Lonergan First Report).

200 To determine usage value, it is then said that the appropriate comparators are the large parcels of undeveloped and unserviced range lands, as that is the nature or type of area in which the relevant native title rights and interests have their greater usage value. The next step in the

process, as submitted, is to adjust the usage value to add the value of potential uplift from future negotiated exit value above future usage value (the negotiation value). That is said to be the proportion of the additional value of land in an alternative use, not available due to the existence of native title, that a freehold owner would be willing to pay to make that use available. Lonergan says that that uplift or negotiation value is reasonably assessed at 50% of the excess of market (freehold) value over usage value.

201 The Territory submitted that that assessment reflects the fact that the owner of a freehold (or lesser) interest in land would not rationally pay the full freehold value in order to acquire or buy out native title over the land, and similarly that a prospective purchaser would not rationally pay the full freehold value to acquire or buy out native title over the land.

202 As noted, the Commonwealth's contention is different. In effect, its contention is that it is appropriate and necessary to value the native title rights and interests which have been adversely impaired by the determination acts, and then to value the bundle of those rights so affected. As it is closely analogous to a comparable bundle of non-native title rights, to undertake that exercise (it is said) it is necessary to strip the native title rights of any spiritual or cultural dimension, which are separately accounted for through other components of the compensation package.

203 The analogy called for, then, is the value of common law rights to the possession, use and occupation and enjoyment of an area by analogy with a fee simple estate. No particular analogy has been suggested.

204 The question of what a purchaser wishing to obtain a freehold interest in land the subject to those non-exclusive native title rights would pay to get the surrender of their native title is, it is said, an inappropriate question because that would be valuing the price of the purchaser was prepared to pay for the freehold title, rather than valuing what the Claim Group has lost by the determination acts. Nor, it is said, is it appropriate to ask what price the Claim Group would be prepared to accept for the surrender of their native title, taking account of their special attachment to the land, in order to obtain a grant of freehold. That is incorrect, it was argued, because it reflects a special value not related to some special economic suitability of the land to the Claim Group, which is a value which should be separately accounted for as solatium or some similar label.

205 Alternatively, it was argued that that would reflect a peculiar bargaining or leveraging position of the Claim Group over the holder of other interests, when that should not be permitted. That, it was said, is contrary to the concept of market value as explained by Latham CJ in *The Commonwealth v Reeve* (1949) 78 CLR 410 at 418 in the following terms:

> It is often said in compensation proceedings that that which is to be assessed is the value of the land to the owner, and this expression is sometimes understood and applied as if the proposition meant that the owner is entitled to recover whatever loss he may suffer from losing his land. But the point of the phrase "value to the owner" is not that the owner is entitled to damages for all his loss consequent upon acquisition of his land, but that the value to the acquiring authority is not the measure of compensation. The principle excludes any increase in value due to the necessities of the authority which acquires the land. Where, for example, a large enterprise is in contemplation on a block of land and a single allotment in the middle of the block is required and accordingly is acquired, it may well be that the value of that allotment to the acquiring authority is tremendously greater than the value which it would possess if it were not included within the area which the acquiring authority was about to use. Such a circumstance, however, is excluded in computation of value.

206 The Commonwealth supports the Court having regard to the principles or criteria for assessing compensation set out in the LAA, as it is a "just terms statute", although the Court is not bound to do so.

207 Schedule 2 of the LAA provides for relevant heads of compensation, including market value. The Commonwealth contention was that, if the view of Mr Lonergan as to the value of the non-exclusive native title rights is not accepted, that it would be open to, and appropriate for, the Court to determine the value of non-exclusive rights as a proportion of the value of fee simple, and that a 50% apportionment would be justifiable in the circumstances.

208 The Commonwealth then accommodates "special value" incidental to the Claim Group's ownership or occupation of the acquired land only if it is shown that there is some special quality of the land of particular economic value to the Claim Group. Ultimately it contended that there is no such entitlement. Nor is there any basis for an allowance for the natural and reasonable consequences of the acquisition for which provision is not otherwise made (disturbance).

209 However, it accepts that r 9(1) of the LAA Rules permits an additional sum to reasonably compensate the Claim Group for the intangible disadvantages resulting from the acquisition (solatium) and that that provision – supported or required by s 51(4) of the NTA – accommodates the Court compensating for the loss of the use of the land itself, derived from the breaking of the spiritual relationship and disruption to that relationship with the land.

210 In my view, the starting point is s 51(1) of the NTA. It provides for the compensation entitlement 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.

It is for the effect of the determination acts on the native title rights and interests of the Claim Group for which compensation is to be assessed. It is for that purpose that reference may, but not must, be made under s 51(2) to the principles or criteria for determining compensation set out in the LAA.

211 It is obviously artificial to focus upon the amount which a willing but not anxious purchaser might have been prepared to pay for the non-exclusive native title rights which were affected adversely by each of the determination acts. That is because, apart from the Territory and arguably the Commonwealth, those rights and interests cannot be sold, or transferred to a third party. It is also artificial, because the rights are not capable of alienation, to inquire as to the price at which the Claim Group might have been prepared to sell those rights. The conventional valuation approach expressed in *Spencer* therefore seems inappropriate.

212 I also do not think it is appropriate simply to proceed on the basis of a comparison of the bundle of rights held by the native title holders, 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.

213 While s 51(A) sets an upper limit for the economic compensation representing the direct value of the estate or interest in land or waters which has been acquired by the Territory, it does not follow that the value of exclusive native title is necessarily less than that freehold value because it is not inalienable, and is not transferrable. Such an assumption would fail to have regard to the real character of native title held by Indigenous Australians. Indeed, in the case of exclusive native title rights, where they are lost, I see no reason why their value should not be taken as the equivalent of freehold value. That appears to have been the undebated premise in *Geita Sebea* and in *Amodu Tijani*.

214 Indeed, having regard to the express purposes of the NTA, and the recognition of the Aboriginal peoples as the original inhabitants of Australia, it would be erroneous to treat the nature of their original interests in land as other than the equivalent of freehold and the economic value of those interests as other than the equivalent of freehold interests.

215 In *Geita Sebea*, the focus was on the benefit to the Crown of the acquisition, rather than on the extent of the detriment to the holders of the Indigenous rights, where the existing native title rights are inalienable, save to the Crown. Where those rights are removed or diminished by an act of the Crown (here, the Territory), there is a sensible reason to focus on what has been obtained by the (presumed) willing but not anxious buyer even though there is not, and by definition of the rights held cannot be a willing but not anxious seller.

216 The value of the native title rights was not regarded as less in value because they were inalienable. To have taken that step is to recognise that, for the purposes of determining the economic value of native title rights, it is not appropriate to treat them as if they were rights conventionally held by a land holder. Otherwise, necessarily, the starting point would have been different.

217 It is necessary to start with a fuller understanding of the nature of native title rights and interests in land. As was pointed out in *Geita Sebea*, the perspective of the willing but not anxious seller and the perspective of the willing but not anxious buyer is a contrived analysis where there is no willing but not anxious seller, and the only willing but not anxious buyer (in that case the Crown) was acquiring rights which the indigenous people (because their inherent rule in alienability) did not themselves have. The individual bundle of rights which the Territory received by the determination acts was different in character from the bundle of rights which the holders of native title enjoyed and exercised up to the time of the determination, but it was capable of indicating the economic value of the exclusive native title rights.

218 Native title is a *sui generis* right or interest. To describe native title as a proprietary right (or as equating with a proprietary right) is "artificial and capable of misleading": *Mabo* at 178 per Toohey J.

219 Native title, as the jurisprudence now clearly accepts, is a communal bundle of rights, and not an individual proprietary right. It depends for its existence on the continuing acknowledgment and observance of the relevant traditions, customs and practices of the community. Its content is principally usufructuary in nature. It is inalienable, except by surrender to or acquisition by the Crown, and in respect of a particular community's estate, has boundaries which may not be precisely defined (except by a determination by the Court under the NTA). It is not necessary to go beyond the *Native Title Act* case (1995) 183 CLR 373 at 437, and *Ward HC* to support that step.

220 Non-exclusive native title confers on the holder a bundle of rights in relation to the area. The nature of the interest in land denoted by the term non-exclusive native title is both defined and limited by this collection of rights. But just as it is not appropriate to treat exclusive native title as valued at less than freehold, so it is not routinely appropriate to treat non-exclusive native title rights as valued in the same way as if those rights were held by a non-indigenous person, or to reduce the value of those rights because they are inalienable even though that may be the proper analysis if the rights were held by a non-indigenous person.

221 The non-exclusive native title rights and interests presently under consideration are the matters described at para 3 of the Interim Statement of Agreed Facts dated 30 April 2012 and set out above in detail. They include the right to travel over, move about and have access to the area; to hunt, fish and forage on the area; to gather and to use the natural resources of the area; to have access to and use the natural water of the area; to live on the land, to camp, to erect shelters and other structures; the right to engage in cultural activities; to maintain and protect sites of significance on the area; and 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).

222 At a general level, it is clear that the grant of freehold title in land conveys the fullest interest in land recognised by law. It is the equivalent of full ownership of the land.

223 A fee simple is the most extensive in quantum of rights, and the most absolute in respect to the right which it confers, of all estates known to the law. It confers the lawful right to exercise over, upon, and in respect to, the land, every act of ownership subject to specific legislative constraints or exclusions.

224 I accept that compensation on just terms for the extinguishment of non-exclusive native title rights and interests is not properly assessed simply on the basis that, upon the extinguishment of such native title, the Crown acquired radical or freehold title unencumbered by native title so that freehold value is the appropriate measure of compensation. For reasons which are apparent, *Geita Sebea* does not lead to that conclusion simply because in that case the indigenous rights acquired were equivalent to "full ownership of the land", including the right of perpetual and exclusive occupation. Nevertheless, I consider that *Geita Sebea* recognises that inalienability is not necessarily a factor which means the exclusive or non-exclusive native title rights would have a value less than freehold value.

225 In my view, the freehold value is an appropriate starting point because s 51A puts it as the upper limit. However, where the native title holders did not have, at the relevant time, the right to exclusive possession the freehold value is not the appropriate end point. Nevertheless, I consider that the decision in *Geita Sebea* does support the proposition that the applicants' inability to dispose of the subject native title rights and interests on the open market is not necessarily a significant discounting factor. I have reached that view independently of that decision, but it provides affirming reasons.

226 Under the statutory regime presently in consideration, compensation is to be paid for the loss, diminution or impairment or other effect of the determination acts on the particular native title rights and interests in question.

227 Consequently, whilst I do not accept the contention of the Claim Group that their non-exclusive native title rights should be valued as if they were the equivalent of exclusive native title rights, it is necessary to arrive at a value which is less than the freehold value and which nevertheless recognises and gives effect to the nature of those rights.

228 That is reflected in the contention of the Claim Group that their native title rights, even as the non-exclusive rights existed as a real impediment to any other grants of interest in the subject allotments, or more generally. The Territory, in this case, needed to acquire those rights before it could proceed to treat the land or the allotments as part of its radical title to enable it to grant freehold or leasehold interests over those lots. I note the contention on behalf of the Claim Group that, apart from the previous acts which in *Griffiths SJ and in Griffiths FC* were held partially to extinguish native title rights, there were no meaningful restrictions on their use and enjoyment of the relevant allotments. The only valid extinguishing acts prior to the determination acts were, it is said, the grants of pastoral leases which removed the right to exclusive possession, but in reality in relation to Timber Creek Township itself, that restriction or limitation was not a major restricting factor.

229 In the light of those conclusions, it is of course necessary to determine the freehold value of the various lots. That is simply because that sets the upper limit, subject to the question of interest, of the economic component of the entitlement so as to ensure that the just terms requirement is met.

230 I have addressed separately, and later in these reasons, the freehold value of the various lots.

231 But for the invalid determination acts, the native title rights which were held which were permanent, and in a practical sense very substantial. To accommodate the fact that they were non-exclusive, clearly some reduction from the freehold value is necessary. If that were not so, they would have the same value as exclusive native title rights when plainly they do not. However, in my view, the deduction should not be great in the present circumstances.

232 The rights the Claim Group in fact enjoyed were in a practical sense exercisable in such a way as to prevent any further activity on the land, subject to the existing tenures. If the appropriate test were as to the price at which the claim group would have been prepared to surrender their non-exclusive native title rights, the answer would be not at all. If the appropriate test was to see what was the value to the Territory of acquiring those rights, as the Territory would not then be restricted by the nature of those rights which were surrendered, the answer is that that would be a figure close to the freehold value. In my view, the appropriate valuation should be 80% of the freehold value.

233 As each of the submissions recognised, that is not a decision as a matter of careful calculation. It is an intuitive decision, focusing 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.

234 I have been careful, in reaching that intuitive figure, not to reflect in that percentage an allowance for the elements which are related to 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, and which is acknowledged by both the Territory and the Commonwealth. That is a separate and significant element of the entitlement to compensation. It is separately discussed later in these reasons. However, it is necessary to note it at this point to avoid any suggestion that the percentage arrived at represents a form of double compensation, by putting a particular value on the rights by reason of the cultural and spiritual significance of the land to the Claim Group.

235 It follows that I did not regard the evidence of Mr Lonergan as of no particular significance to that determination. I have already indicated that the freehold value of the various allotments is the defined starting point. I have had regard to the land valuers' expert evidence of course in reaching that starting point.

236 This is a convenient point to address, to a degree, the respective objections to the various expert evidence and to make some general observations about it.

237 It is not at all surprising that such objections arose in this matter, where the issues have previously not been substantively addressed. Although the parties were agreed about the nature of the issues to be addressed, it was entirely appropriate for them to consider ways in which evidence might be procured to assist the Court in determining how those issues might properly be determined so far as they concern land valuation or economic or commercial considerations, and to present evidence in support of it. Having regard to the nature of this application, and in particular in the light of the especial nature of native title rights and interests in land which the common law recognises, it was inevitable that issues would give rise to debate about the applicability or otherwise of the expertise of anthropologists, economists, and land valuers not specifically in their particular fields of endeavor but insofar as their fields of endeavor might usefully inform the Court about how to properly resolve the issues in the proceeding.

238 I have taken the view, in those circumstances, that I should receive each of the expert reports, and have regard to the oral evidence of the experts who gave evidence, as admissible and potentially relevant material to the determination of the issues in this proceeding. I have no doubt that each recognised the complexity of the task confronting the Court, and had considered the extent to which their respective areas of expertise might usefully assist in that process. I have no doubt that each of the experts accepted that the issues confronting the Court did not readily involve the routine application of their expertise, in all respects, to the issues which they were asked to comment on. I have no doubt that each genuinely sought to apply their acknowledged expertise to address the resolution of each of those issues, insofar as each considered that their expertise might be useful in doing so.

239 Each of the experts provided reports which represented an endeavor, within the complexities of this case, to comply with the Practice Note relating to the giving of expert evidence. Each, either in a report or as elicited in the course of oral evidence, clearly identified the nature of their respective instructions, the material upon which they had relied, and so far as then considered appropriate, the assumptions which underlay the application of their expertise to that material and to the questions before the Court. In the course of oral evidence, it emerged that certain additional assumptions had been made relevant to the weight which I have placed

on their respective evidence. I shall refer to that, to the extent necessary, in dealing with the separate issues.

240 It is convenient, therefore, at this point to indicate that I have received each of the expert reports tendered by each of the parties as representing expert evidence of the respective persons who presented those reports, and as material potentially relevant to the resolution of the issue which arise. I have explained in the course of the reasons, progressively, the extent to which I have taken or placed weight upon the respected views which are expressed.

241 The immediate issue concerns the weight to be given to the views of Mr Lonergan in his oral evidence and in his reports of 20 November 2015 (Lonergan First Report) and 19 February 2016 (Lonergan Second Report). His reports provided a substantial part of the foundation of the contentions of the Territory with respect to valuation on a usage value plus the uplift referred to.

242 There is no dispute that Mr Lonergan has an extensive and broad range of valuation experience and expertise. In the course of his exercising that expertise, he has had to address issues identifying the appropriate conceptual framework for a wide variety of commercial and other interests in a large number of commercial or social contexts. He has explained his methodology in detail. It is rational, carefully thought out, and thorough. His conclusion is that the usage value in economic terms of the bundle of rights represented by the non-exclusive native title rights of the claim group is “relatively low”.

243 The reason why I have not accepted the Territory’s case on this issue is because it is, in essence, based upon Mr Lonergan’s assumption that it is appropriate simply to value the usage rights of the Claim Group in conventional economic terms. That is, he has assumed it is appropriate to express the context of each of the native title rights in terms which would be used if that right came to exist in an entirely different context (eg under a lease or other contract) and then to value them as a bundle with the practical and legal constraints they would carry with them. For the reasons I have given, I do not consider that that is an appropriate starting assumption. Once that assumption is not accepted, the analysis of the usage value by Mr Lonergan becomes an inappropriate foundation for the valuation exercise as proposed by the Territory.

244 Although Mr Dudakov and Mr Brown in their joint opinion sought also to give expert evidence concerning the value of non-exclusive native title rights and interests compared to

freehold value, I did not form the view that that opinion was based upon a careful and full understanding of the nature of exclusive or non-exclusive native title rights and interests as explained in the *Native Title Act case* and in *Ward HC*. It was an opinion expressed without those witnesses demonstrating in a persuasive way their reasoning process or their conceptual understanding of the nature of the native title rights and interests.

245 In the result, I have reached the conclusion referred to above for the reasons given. To a degree, it reflects part of the evidence of Mr Houston, also an expert economist, who in the course of his evidence acknowledged the particular and especial character of native title rights and interests, without professing the expertise properly to evaluate or assess it in economic terms. He did not assume or profess that such an evaluation is within the scope of the expertise of an expert economist, or at least of himself as an expert economist who did seek to undertake that comparison. In respect of the evidence of the experts who did seek to undertake that comparison to which I have referred, I do not consider their evidence persuasive.

CONSIDERATION: INTEREST COMPONENT

246 As noted, both the Territory and the Commonwealth accept that interest is payable on the value of extinguished native title rights and interests to reflect the time between when the entitlement to compensation arose and the date of judgment. It is also common ground that the function of interest is to compensate a party for the loss suffered by being kept out of his or her money during the relevant period. The issue is whether the interest should be calculated on a simple basis or a compounded basis, and if on a compounded basis, the rate at which it should be calculated.

247 The Applicant identifies three principal factors to be taken into account in determining the applicable rate of interest, at least at a theoretical level. The first is the risk of not being paid. That has not been the subject of particular focus, for obvious reasons. The second is to guard against the decline in real value over time. That is a commonly accepted need, but it does not directly inform the dispute as to whether the interest allowed should be on a simple interest basis or a compounded interest basis. The third is identified as the opportunity cost of capital.

248 At common law, interest on a judgment between the time of the event creating the liability to pay damages, and the judgment, is routinely allowed on a simple interest basis. More recently, that has been in accordance with Practice Note CM 16. Compound interest is only

allowed based upon the principles in *Hungerfords v Walker* (1988) 171 CLR 125. It is not the Applicant's case that the evidence supports an award of interest on that basis. Indeed, to the contrary, the argument is that equity presumes what the common law requires proof of, so that in the present circumstances, equity dictates an award of compound interest.

249 In my view, the authorities relied upon to support that proposition do not do so. Reference was made to *The Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293, particularly per Dixon J at 323-324, and to *Marine Board of Launceston v Minister for the Navy* (1945) 70 CLR 518 per Dixon J at 531-533. It is clear enough that each of those authorities support the proposition that interest may be awarded in moneys payable as compensation for land compulsorily acquired, by an equitable presumption that the right to receive interest on the compensation entitlement takes the place of the right to retain possession. That is, the right to interest as recompense for the delay in payment of compensation is an equitable right, developed by analogy to the entitlement which would arise in relation to a specific performance of a contract to sell and buy land, where there is no statutory provision providing for that entitlement to interest. I do not regard those decisions as providing authority to support the proposition that the entitlement to interest must be interest at a compounded rate.

250 Nor do I consider that the cases to which I was referred in which, in equity, compound interest has been awarded on a delayed judgment are supportive of the applicant's proposition. In broad terms, equity has intervened to award compound interest in cases of money obtained or withheld by fraud or defaulting fiduciaries: eg *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285, or to oblige a trustee or defaulting beneficiary to account for the profit wrongfully made by the misuse of funds: *West Deutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. As was there said at 701-702, the award of compound interest is restricted to cases where the award was in lieu of an account of profits improperly made by the trustee, and only where there had been fiduciary accountability for a profit.

251 In my view, the authorities do not support the more general proposition put by the applicant that equity will assume, as the basis for awarding compound interest, that in circumstances such as the present the fact of the claim group having not received their entitlement to compensation for a considerable period means that the entitlement should be assessed on a compound basis.

252 On the other hand, I do not think that there are any authorities directly applicable and which would preclude the Court, if it decided that the award of compound interest was an appropriate course to adopt to secure for the Claim Group fair compensation or compensation on just terms, from granting compound interest. The NTA is silent on the topic. That does not foreclose the conclusion for which the Applicant contends: cf *Federal Commissioner of Taxation v Interhealth Energies Pty Ltd (No 2)* (2012) 204 FCR 423 at [13]. The absence of any prescription in the NTA as to the manner of calculating interest leaves that to the Court. It does not preclude, where appropriate, the imposition of compound interest.

253 Accordingly, were the circumstances such as to have demonstrated that the Claim Group would have applied the funds received by way of compensation, if received at or about the time of the compensable acts, as working capital in a business or trade and that business or trade would have been successful to a significant degree, in my view, the Court could award compound interest on the market value of the acquired property. For the reasons discussed shortly, I am not satisfied that that is the case, and I do not propose to proceed on the basis that the Claim Group would have made the most beneficial use of the money available to it, and without detriment to that form of investment in the longer term, from the time of the compensable acts to the present time: cf *Wallersteiner v Moir (No 2)* [1975] 1 QB 3; *Talacko v Talacko* [2009] VSC 579.

254 To that extent, I have accepted the Applicant's contention that the interest to be awarded is awarded as part of the compensation, rather than interest on the compensation. That is, the entitlement to interest in circumstances where the market value is to be determined at the date of the compensable acts necessarily includes interest on that market value to provide for compensation on fair terms, or compensation which is in a just amount. I do not think it is either necessary or appropriate to resort to s 51A of the *Federal Court of Australia Act 1976* (Cth) dealing with interest up to judgment as the source of that entitlement. At common law, by comparison, interest may be awarded, on a compound basis, where the interest is awarded as and by way of damages, rather than on the damages to be awarded.

255 Nor is it demonstrable that an award of simple interest at an appropriate interest rate, as opposed to compound interest, will necessarily operate unfairly and so result in an acquisition which is not on just terms. There are many instances where precisely that outcome has been determined: see eg *Fico v O'Leary* [2004] WASC 215 at [280] per Heenan J and *Wallersteiner v Talacko* referred to above. In the context of compulsory acquisition of land

under statute, the same outcome is reflected in *Roads Corporation v Melbourne Estates and Finance Co Pty Ltd* [1993] 1 VR 602.

256 The Applicant's propositions with respect to interest or the market value of the land the subject of the determination acts are that:

> (1) Interest is part of an entitlement to compensation on just terms under s 51(1) of the NTA that is necessary to compensate for the loss of value in money over time, as distinct from interest on compensation, and is allowed by analogy to equitable principles that inform an entitlement to compensation on just terms.
>
> (2) Interest is allowed as part of the compensation for the compulsory acquisition of land on the equitable principle that it is inequitable for the acquiring authority (the Territory) to acquire or have possession of the land (which is presumed to be an income producing asset) in place of the former owner or occupier of the land (the native title holders) and retain the compensation money without paying interest from the time of acquisition.
>
> (3) Allowance of interest at market rates, and compounded (including at risk free rates), gives effect to the entitlement to compensation on just terms under s 51(1), which involve fairness as between the native title holders and the Territory in view of (1) and the following circumstances:
>
> > (a) In the case of a compulsory acquisition of non-native title interests, the existence of the affected interest and of a liability to compensate are taken as givens, and there are processes for pre-assessment offers and payments. The delay between acquisition and (full) payment is relatively short, and fluctuation in money and land values will not be marked. Interest is needed only to cover the period of assessment (say two or three years where contested) and for where the assessed amount exceeds the amount offered and pre-paid.
> >
> > (b) By contrast, in the case of native title interests, delay is systematic as native title holders must first establish that they had native title prior to extinguishment or impairment, and establish a liability on the part of government to pay compensation for those effects because of invalidity of the acts (as occurred here), and the processes for pre-assessment offers needs to address far greater fluctuations in money and land values that occur over a much longer period of time, and adjustment for the loss of time value should thus be compounded.
> >
> > (c) During that period of delay (20 years since validation and up to 35 since date of act), the Territory has not paid compensation but HAS received payments (sale and rent) for the (invalid) use of the land, and has obtained a benefit or saving in its borrowing or revenue costs that are computed on market (risk free) rates and compounded.

257 The principal dispute is whether the interest should be awarded on the market values (now, as a result of my decision on the time at which that is assessed, the date of the determination act):

(1) compounded, at superannuation rates; or

(2) compounded, at the risk free rate; or

(3) simple, allowed at the Pre-Judgment Interest rate fixed by the Federal Court Practice Note CM 16, effectively 4% above the cash rate of the Reserve Bank of Australia as published from time to time (with a proxy for the period prior to the RBA cash rate being published).

258 The circumstances (a)-(c) in proposition (3) of the Applicant's propositions are not all immediately attractive. If the point is that, until the NTA in 1993 there was no basis for securing the formal recognition of native title, and so no statutory entitlement to compensation until that date, leading to lengthy periods of apparent unlawful extinguishment or impairment of native title without recourse, so much is obvious. It is also obvious that, in those circumstances, there was no statutory structure for exchanges of offers and prompt determination of compensation entitlements, such as existed under the LAA. It is not clear why those matters are directly relevant to the determination of the appropriate basis for assessing interest payable as, or on, compensation so as to give effect to ss 51 and 53 of the NTA.

259 The separate point that the Territory has received payments for the use of the affected land, and has had the benefit of borrowing at revenue costs computed on market (risk free) rates and compounded over the period since the determination acts (assuming that to be accurate) to the extent that it has not yet paid compensation to the Claim Group, does not seem to be directly relevant to the assessment required by ss 51 and 53 of the NTA, especially where by statutory prescription the acts are validated form their date so the use of the acquired land over the full period has been deemed to be lawful. That would have significance only if it were the case that the awarding of compound interest was necessary to comply with ss 51 and 53.

260 The next step is to address the proper rate and calculation of interest under s 51 of the NTA.

261 It is common ground that the function of an award of interest is to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period*: MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 663 (*Gogic*) citing *Batchelor v. Burke* (1981) 148 CLR 448 at 455 per Gibbs C.l.

262 On the Applicant's case that loss is assessed by presuming that either the claimant or the acquiring authority would have made beneficial use of the money, in reliance on equitable

compensation principles. Compound interest is said to be appropriate because simple interest would unfairly favour the acquiring authority as the authority gains by saving on its borrowing costs which are computed at a compound rate. In reliance on the equitable presumption that beneficial use of the money would have been made, they say that it is not necessary for the Applicants to prove actual loss of use of money, but only the yield the claimants could have received from the time of extinguishment. I have not accepted those contentions.

263 Whether the appropriate interest should be simple interest or compound interest will depend on the evidence.

264 The Court's attention was drawn to the following dealings in native title in the general area:

(1) The Bradshaw Partnering Indigenous Land Use Agreement (July 2003) (Bradshaw ILUA) provided for payments and other benefits, including the payment of at least $370,000 in compensation for the construction and use of the Army Bridge and access road over Victoria River by the Commonwealth Department of Defence. The initial payment was distributed by the NLC in accordance with cl 6.1.4 of the ILUA, which provided that the NLC must ensure that the payment is distributed to, or at the direction of the traditional owners. The evidence of Alan Griffiths and Josie Jones was that, once distributed, the funds had been completely expended by allocation with the Claim Group. The Bradshaw ILUA also makes provision for ongoing benefits by employment, training business opportunities for the traditional owners and Aboriginal businesses, and makes provision for a Bradshaw Liaison Officer.

(2) The traditional owners have taken up those opportunities through Bradshaw & Timber Creek Contracting & Resource Co Ltd (Bradshaw Contracting), which was established in 2008 to be an Aboriginal-run company that would provide services to the Bradshaw Field Training Area.

1. Any profit goes back into the business of the corporation and there has never been distribution to individuals or communities.

2. Bradshaw Contracting has built up into a successful business. In the 2013-2014 financial year, Bradshaw Contracting turned over $1 million.

(3) In 2009 the Northern Territory made a substantial payment to the Gunmaru Aboriginal Corporation under an agreement to acquire native title in respect of the house blocks on Wilson Street. The funds were paid to the Corporation for

distribution to the *Nungali- Ngaliwurru* people. Josie Jones gave evidence that, once distributed, the funds she received were expended.

(4) Rebecca Hughes summarised the effect of commercial dealings in native title and Aboriginal land in Timber Creek town, and the Timber Creek environs. To take just some examples:

1. In the Timber Creek town, Gunarmu Aboriginal Corporation has entered into a stock agistment agreement with Warren Pty Ltd. for 2011-2013 for Lot 47 (annual rent $2,000 indexed); a native title lease agreement with Bradshaw Contracting for 2013-2053 (annual rent $7,200 indexed); and a powerline infrastructure agreement with the Department of Defence (annual rent $3,000 indexed). The rules of Gunmaru Aboriginal Corporation require that the money and property of the corporation be used to carry out its business. The Ngaliwurru/Nungali Aboriginal Land Trust entered into a gravel extraction agreement with Bradshaw Contracting.
2. In the Timber Creek environs, Mayat Aboriginal Land Trust entered into a pastoral land use agreement between 1990 and 2000 (annual rental beginning $1,500 scaling to $1,900 in the final year), and there is a proposal for the Ngaliwurru/Nungali Aboriginal Land Trust to enter into a 25-year lease for a municipal waste dump.

265 In the Applicants' submission, the need for interest to be calculated on a compound basis is then underscored by the substantial period of time between the acts being done and the award of compensation due to the 'time value of money'. That is, compound interest is required to reflect the real commercial value of the money over time, including the opportunity for funds to be used to generate income over time as well as inflation considerations.

266 On this basis, the Applicants say that interest should be calculated:

(1) on a compound basis at a "superannuation" rate (that is, the rate which they say could have been obtained if the money had been invested in a conservative fashion by the Applicants over the relevant period); or

(2) alternatively, on a compound basis at a "risk free" rate (that is, the rate which reflects the cost of borrowing by the Northern Territory); or

(3) in the further alternative, interest calculated on a simple basis under Practice Note CM 16.

267 For reasons already given, I do not presume that the Claim Group would have made the most beneficial use of the money open to it so that compounded interest is necessary to give adequate compensation.

268 The decision to be made depends on the evidence.

269 As observed by the Commonwealth, it is a truism that compound interest will necessarily lead to a sum larger than an equivalent calculation of simple interest and that the difference will be more substantial over a greater period of time. However, having taken the step of finding that at no time have the acts done by the Territory been invalid, there is no justification for compound interest simply given the longer time period involved and as there has been no period, extended or otherwise, of unlawful use of the land.

270 As I have found that the acts done by the Territory are taken to have been valid from the date of the act, the appropriate starting point for the assessment of interest is not by reference to the potential or actual gain from acquiring rights in the land by the Northern Territory. It is by reference to the properly valued native title rights lost or suppressed by reason of those acts. For that reason, the assessment of the loss caused by the delay in compensation is necessarily a question of the use which would have been made by the native title holders if they had been compensated as at the date of the act and whether there is a sufficient evidentiary foundation for the award of interest other than on a simple interest basis in accordance with the Practice Note.

271 The evidence in the present matter which supported the potential investment or commercial application by the Applicants of the compensation, had it been received at the date of the compensable acts is not extensive.

272 That is not surprising. All of the praties acknowledged that, at the time of the compensable acts (almost all prior to the enactment of the NTA), there was no common understanding that they were compensable, or indeed but for the VNTA that they were not lawful. The nature of Australian law in relation to Indigenous traditional rights and interests was only in the process of being exposed, and then more formally accepted by the NTA. Hence, the Claim Group should not be disadvantaged by the lack of any significant evidence of their investment and commercial capacities during much of that period.

273 I draw no adverse inference on that topic from the only relatively recent commercial and related activities they have undertaken. I would be prepared to infer that, if the relatively

contemporary evidence supported it, their commercial management of substantial funds would have been taken at a much earlier time. The substantial delay before they commenced any form of commercial activity is readily explained.

274 So my focus is on what the relatively contemporary evidence shows.

275 I am not persuaded, to the extent that it was advanced by counsel for the Applicant, that the evidence before the Court of native title holders and traditional Aboriginal owners engaging in commercial activity, referenced to their interests in land, is sufficient to support a finding that the native title holders would either have invested the money on a compound basis at either "superannuation" or "risk-free" rates or in any enterprise or enterprises which would have longer term been productive of economic earnings at such levels. In my view, the lay evidence was to the effect that 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. There was little, if any, evidence to suggest that once distributed, those individuals had sought to invest or otherwise use those funds to generate income for commercial or investment purposes or that those funds were otherwise currently available or proposed to be used for such purposes.

276 I accept that there was some evidence of commercial activity which supported the use of the land for commercial purposes. That is no doubt an evolving skill. But there is no evidence that those activities have been profitable, at least not yet, in a way that generates profits at levels equivalent to the sorts of outcomes which would justify the imposition of compound interest, even for a period of the time between the compensable acts and this judgment.

277 In short, I am not persuaded that the Claim Group, if they had received the market value of the lots where their native title rights were affected by the compensable acts, would have used those monies by investing them without any expenditure, accumulating the interest year by year, to the present time. I am also not satisfied that they would, alternatively, have used the monies so received to undertake a commercial activity which would have been profitable to the same or a greater degree.

278 It is more likely that, even if the monies received were invested, the Claim Group would have applied the interest received toward activities for their benefit. That would have been appropriate, provided the application of those monies was properly for the benefit of their community, whether for educational or social benefits or whether for short term or longer

term commitments. It involves no criticism of the Claim Group that I have reached the conclusion I have reached. Indeed, there would have been (and there is still) no reason why the monies if received progressively from about 1980 or to be received by this judgment must all be invested and the capital sum not diminished. Obviously, there are constraints upon the application of capital (or interest), but that is a matter for future consideration.

279 It follows that I consider the appropriate interest calculation is simple interest at the rate specified in the Practice Note CM 16, as noted above. The parties agreed that an appropriate proxy for any period prior to the RBA publishing its cash rate can readily be identified.

280 The economic rationale for the allowance of 4% above the Reserve Bank cash rate is, on the evidence given by Lonergan, a figure that reflects a synthesis of the host of considerations which affect the value of money over time. Those considerations include variation in rates of interest, investment costs and loses, as well as taxation considerations. It reflects a considered judgment of the Discount and Interest Rate Harmonisation Committee of the Council of Chief Justices of Australia and New Zealand, and what is described in *Gogic* at 666 as a fair and reasonable compensation for being deprived of that use of money. I note that, if this option were adopted, there was no submission that it should be refined in any way in the particular circumstances to provide for an increased rate above the cash rate.

281 It is appropriate to briefly deal with two separate matters raised by the Commonwealth in respect of the calculation of interest.

282 The first of those issues concerns the period for which interest is payable in respect of Act 34/Lot 47. In respect of that act, as a result of the application of s 47B of the NTA, the claimants have been able to enjoy their native title rights and interests from 28 August 2006. Consequently, in the Commonwealth submission, the claimants ceased to suffer any loss in relation to that parcel of land and should not receive interest from that time onward on the proportion of the compensation that is referrable to that parcel of land. For the reasons given in *Griffiths (No 2),* s 47B of the NTA does not apply in relation to a compensation application. Consistent with those reasons, act 34 is treated as a previous exclusive possession act attributable to the Territory for which compensation is payable.

283 During the hearing, the Commonwealth made submissions to the effect that it may be appropriate to reduce the amount of interest awarded on the basis that a component of the award comprising interest would have been taxable in the hands of the native title holders if it

had been paid on the capital sum representing the value of the native title rights over the period covered by the interest component, so as not to overcompensate the native title holders: see *British Transport Commission v Gourlay* [1956] AC 185 and its application in *Federal Wharf Company Ltd v Deputy Federal Commissioner of Taxation* (1930) 44 CLR 24.

284 Having regard to my conclusion about the appropriate method of calculating interest on the economic value of the lots affected by the compensable acts, and that the interest component is part of the compensation ordered, rather than being interest on the compensation ordered, that is not a matter which now arises. That is the view taken by the Commonwealth in its opening submissions at [275].

285 Finally, it is appropriate to note that the conclusions I have reached have not required extensive consideration of the expert evidence on this topic. That is simply because the assumptions made which have supported one or other of the expert views are not assumptions I have been prepared to make on the evidence.

286 The SLM Corporate (Mr Lewin and Mr Ho) Reports assume the full investment of the capital sums received in a superannuation fund or equivalent investment, and the continued re-investment of all interest or income earned on capital. There is no evidence, ultimately, which supports that assumption. Indeed, I have not accepted it. It is not necessary to refer in detail to the evidence, including in cross-examination, which in my view exposed in some detail the more detailed steps involved on that more general assumption and why those steps were not appropriate to be taken.

287 The alternative provided by Mr Houston of compounded interest at the risk free rate again assumes the progressive deposit of all capital sums received by way of the market value of the lots acquired over time, and the interest payments similarly being re-invested year by year. I have not been prepared to make that assumption for the reasons given.

288 As noted, it is uncontentious that, if the Court finds that simple interest should be the basis of the interest calculation for that component of the compensation, the rate in Practice Note CM 16 should be adopted. See also *Management 3 Group Pty Ltd (in Liq) v Lenny's Commercial Kitchens Pty Ltd (No 2)* (2012) 203 FCR 283 at [25].

289 It is uncontentious that, if the Court finds that simple interest should be accorded, the application of Practice Note propounded by Mr Houston should be preferred.

CONSIDERATION: NON-ECONOMIC LOSS

290 As part of the claim for compensation, the Applicant seeks an award, in globo, which takes into account the loss sustained and the disadvantages experienced by the native title holders because of the extinguishment and impairment of their native title. The propositions asserted by the Applicant in closing submissions were that:

> Compensation is payable for the effects of the extinguishment and impairment of native title in relation to the impairment of the traditional attachment (connection) of the claimant community to the land and their loss of traditional access and use of the land, assessed as a lump sum and in today's money values.
>
> (1) This element may be approached by reference to consideration of the additional advantage (special value) of the land represented by that connection, or by reference to the intangible disadvantages in loss of that special value;
>
> (2) The amount assessed should reflect community standards of fairness that inform the award of compensation for other non-pecuniary losses where there is no market for what is lost, and the assessment of what is fair is determined by transactions of the law in making those awards;
>
> (3) The steps at (1) and (2) should be considered with a view to arriving at an assessment that best gives effect to the entitlement to compensation on just terms under s 51(1) of the NTA.

291 It was not a matter of dispute that an award in the form of solatium was appropriate in the circumstances. The issue before the Court was how to quantify the essentially spiritual relationship which Aboriginal people, and particularly the *Ngaliwurru-Nungali* People, have with country and to translate the spiritual or religious hurt into compensation.

292 In starting from that point, I acknowledge that the submissions on this topic referred to both "special value" of the land under Sch 2 r 2 of the Schedule to the LAA, and to "intangible disadvantages" under Sch 2 r 9. I have decided to focus only on the "intangible disadvantages" element. The first reason for that is to avoid any potential overlap (or double dipping) with the economic loss component of the compensation to be awarded. That is a point made by both the Territory and the Commonwealth. The second reason is that I am satisfied, buoyed by the submissions of the Applicant and the Commonwealth (and not opposed by the Territory) that it is an appropriate descriptor for the valuation of non-economic losses, not constrained by the need to be persuaded of the type of disadvantage for which, in land valuation cases, such compensation has been awarded. The third reason is that, again with the support of the Applicant and the Commonwealth (and in accordance also with the Territory's position) the award can be made on an in globo basis, without separate allocation to particular compensable acts in respect of particular lots.

293 The High Court observed in *Western Australia v Ward* (2002) CLR 1 at [14] (*Ward HC*):

> …the connection which Aboriginal peoples have with "country" is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, 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 NTA. The spiritual or religious is translated into the legal.

294 Native title rights and interests are understood as involving a perception of socially constituted fact, an important aspect of which is the spiritual, cultural and social connection with the land under laws and customs that define the Aboriginal community concerned and their relationship with country: *Yanner v Eaton* (1999) 201 CLR 351 at [38]; *Yorta Yorta v Victoria* (2002) 214 CLR 422 at [49]. Reference was made to the remark of Professor Stanner in his 1968 Boyer Lectures that a non-Aboriginal way of thinking can leave us "tongueless and earless towards this other world of meaning and significance".

Principles

295 The Applicant submits that there are two overlapping elements to non-economic or intangible losses:

(1) the diminution or disruption in traditional attachment to country; and

(2) the loss of rights to live on, and gain spiritual and material sustenance from the land.

296 There is a need to comment upon those matters.

297 An award of non-economic loss is said by the Applicant to be informed by the relevant compensation criteria in the LAA, having regard to provisions for the assessment of the additional "special value" of the land (Sch 2 rule 2) and the assessment of compensation for "intangible disadvantages" (Sch 2 rule 9). The Applicant also submitted that the Court may have regard to or adapt relevant principles from the award of compensation for non-pecuniary losses in other settings, including where general damages for cultural loss has been awarded in contexts outside of land acquisition, and by awards of general damages for injury to feelings and reputation. In contrast, the Northern Territory and the Commonwealth said that

traditional attachment should only properly be recognised as non-economic loss, as opposed to special economic value. I have explained why I am not proposing to use the descriptor of "special value". I do not think it is necessary to do so, and in the present context potentially at the risk of allowing double compensation.

298 Ultimately, I did not perceive there to be a substantial divergence between the parties as to the relevant considerations about the unique spiritual cultural and material value of land for the holders of native title which should be considered by the Court as part its assessment of non-economic loss, under either a 'special value' or 'intangible disadvantage' approach. The Applicant acknowledged the difference between the two approaches as being mainly one of methodology – in the application of additional value (rule 2) or additional compensation (rule 9). Further, while the Applicant submitted that while the two methods of assessment are not mutually exclusive, to the extent that they were different, the parties said that the preferable approach is to assess a lump sum amount that the Court considers will fairly compensate the native title holders for the intangible disadvantages resulting from the extinguishment or impairment of native title.

299 I accept the submissions of the Territory and the Commonwealth that the principles which arise in an assessment of "intangible disadvantages" are more appropriate to a native title context. In particular, in my view an award for "special value" is unsuited to adaptation in the context of native title as the principle has been developed as a means of, and is said to be confined to, assessing particular economic value to the owner. The difficulty with adaptation of special value to account for traditional attachment to country is that it is not the case that any special knowledge or use to which the Claim Group would have put the land consistent with the determination rights and interests could be of greater economic value than use of the land for commercial or residential purposes: see eg *Dangerfield v Town of St Peters* (1972) 129 CLR 586 at 590 per Barwick CJ.

300 It is also appropriate to adopt the description "solatium" to describe the compensation component which represents the loss or diminution of connection or traditional attachment to the land. To the extent to which the LAA principles apply, both the Territory and the Commonwealth accepted that adaptation of that principle would accommodate an appropriate allowance for solatium. The Applicant was also content with using that expression. In my view, it provides a suitable focus for ensuring also that there is no overlap of the

compensation awarded for the economic loss discussed above, and for this element of the compensation to which the Claim Group is entitled.

301 I accept that the component awarded for solatium should be assessed having regard to the communal native and collective ownership of the native title rights and interests. It must reflect the loss or diminution of traditional attachment to land arising from the extinguishment or impairment in question (rather than from earlier or subsequent events or effects); and it must be assessed having regard to the non-exclusive nature of the native title rights and interests in question. So much is not contentious.

302 The process required is a complex, but essentially an intuitive, one. As the Territory pointed out, the compensation must be assessed having regard to the spiritual and usufructuary significance and area of the land affected, but relative to other land that remained available to the Claim Group for the exercise of the native title rights and interests.

303 It is therefore necessary to bear in mind that, prior to the Town of Timber Creek being proclaimed on 10 June 1975, European settlement of the area occurred with the establishment of cattle stations in the late 1980s and that progressively the Township of Timber Creek became an important centre including, from the 1930s, when roads were constructed in the region. Inevitably, that would have led to the Claim Group being partly impaired from enjoying their traditional lands by various cattle station owners during the early years of European settlement and through the grants of other tenures in the vicinity of Timber Creek.

304 Those factors lead the Territory to say that, prior to the determination acts, the development of the area which is now Timber Creek had resulted in a significant loss of access of the Claim Group to their customary country and its resources, and that any loss or impairment of the spiritual/traditional attachment consequent upon the determination acts separated from the more general and earlier detachment or separation due to the general settlement and development of the Town would be quite slight.

305 It will therefore, shortly, be necessary to address the evidence on the topic in more detail.

306 Before doing so, it is appropriate to note the decisions to which the Court was referred dealing with damages to give effect to the intangible losses from the rupture of traditional relationships of Aboriginal people and their land.

307 In *Milpurrurru v Indofurm Pty Ltd* (1994) 54 FCR 240 (*Milpurrurru*), damages were awarded under s 116 of the *Copyright Act 1968* (Cth) of almost $91,000 for “conversion damages” and

additional damages of $70,000, partly in the nature of exemplary or punitive damages to mark the seriousness of the infringement of copyright (apportioned equally between the owners of the copyright) and partly to reflect the harm suffered by the three living Aboriginal artists whose copyright had been infringed, to reflect the harm suffered by them in their cultural environment by the fact of the infringement of the copyright having occurred when it was within their custody. Apart from an example where loss of harm to cultural rights and status has been recognised as a head of general damages, I do not think that the reasons provide any clear guidance or compensation to be made for solatium in this matter. It is difficult to take much guidance from *Milpurrurru* where the damages awarded to the three living Aboriginal artists were directed to their subjective or personal loss, rather than the collective loss of a claim group which is the present focus of attention.

308 In *Cubillo v Commonwealth* (2000) 103 FCR 1 at [1499], it was held that a claim for loss of Aboriginal culture was maintainable in tort. Subsequently, in the Supreme Court of South Australia in *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, such a claim succeeded, and a significant allowance was provided for the suffering brought about by the plaintiff's effective total loss of his Aboriginal identity and culture. As a personal loss, again I do not consider it provides much guidance.

309 I do not consider that much assistance is to be derived from other cases involving cultural loss as an aspect of damages, again because they are focusing on the personal rather than the communal losses. Such cases were listed helpfully in Appendix A to the written opening submission of the Commonwealth. I do not think it is necessary to refer to each of them individually, other than *Millpurruru* (just discussed) because that case was a matter of focus on the part of the Applicant.

310 In the Commonwealth opening submission, reference was also made to the practise of awarding a "conventional sum" for loss of expectation of life in wrongful death cases because, it is said, "life is invaluable in the sense that it is beyond monetary value or monetary valuation": *Cattanach v Melchior* (2003) 215 CLR 1 at [361] per Heydon J. For the same reason, I do not think much can be taken from that case in terms of the appropriate method of assessing the amount of compensation allowed for solatium, or loss of solatium, under the NTA.

311 I note also the contention of the Applicant that damages in awards in defamation cases also provide some indication or some analogy for compensation for intangible losses of the present character under consideration.

312 For the same reason, I am cautious about using awards made in defamation cases as a useful analogy. I note the submissions based particularly upon the decision in *Rogers v Nationwide News Ltd* (2003) 216 CLR 327 and the very significant awards of damages for reputational loss to which reference was there made and in other cases referred to in the written closing submissions of the Applicant, particularly at [187]-[190]. As the Commonwealth pointed out, such damages represent an assessment for personal distress and hurt caused by the publication, reparation for harm done to the individual's personal reputation or professional reputation, and on occasions the vindication of the reputation by the size of the award of damages.

313 Nevertheless, it is important to recognise, as the parties accept, that the law provides an entitlement to compensation in money value even where there is no market for what is lost and where the value to the dispossessed holder rests on non-financial considerations: see eg *Wurridjal* at [337] per Heydon J. In *Crampton v Nugawela* (1996) 41 NSWLR 176, Mahoney A-CJ observed that:

> There is no yardstick for measuring these matters. Value may be determined by a market: there is no market for this. There is no generally accepted or perceptible level of awards, made by juries or by judges, which can be isolated and which can indicate the "ongoing rate" or judicial consensus on these matters. And there is, of course, no statutory or other basis. In the end, damages for distress and anguish are the result of a social judgment, made by the jury and monitored by appellate courts, of what, in the given community at the given time, is an appropriate award or, perhaps, solatium for what has been done.

314 Albeit in the context of an appeal from a significant award of damages in a defamation claim, those observations are nevertheless apt to the present circumstances.

315 It is then a matter for the Court to consider questions of causation, the nature of the claimed loss, the evidence before the Court, including the greater spiritual significance of certain places within traditional country, and the effects of the compensable acts, the nature and extent of intangible loss and the extent of traditional country affected.

316 Subject to the matter raised by the Commonwealth concerning the requirements of s 94 of the NTA, it was accepted by all parties that non-economic loss should be compensated on an in globo basis to the Claim Group (with the apportionment or distribution as between members

being an intramural matter). It was accepted that it would not be appropriate for an award to reflect the size of the native title holding group at the time native title was determined to have existed. That was supported in the present circumstances in particular by the evidence that loss or diminution of the compensable acts would be, in effect, suffered by the native title holders as a whole, and the inter-relationships between the members of the related country groups, and their relationships to the countries of those groups. In my view, there is no reason to depart from that approach.

317 Similarly, it was not in dispute that an assessment of the effects on native title rights cannot be divorced from the content of the traditional laws and customs acknowledged and observed by the Claim Group, that is under the laws and customs that sustain rights and duties in relation to land held under the relevant Claim Group's normative system, and the customary practices and beliefs of the Aboriginal peoples concerned.

318 Not all groups will be the same; hence it is not enough to make the inquiry about effects by reference only to a statement of what would be the determined native title rights were it not for extinguishment. An evaluation of what are the relevant compensable intangible disadvantages, with a view to assessing an amount that is fair and reasonable, requires an appreciation of the relevant effects on the native title holders concerned, which, may include elements of 'loss of amenities' or 'pain and suffering' or reputational damage. In that respect, evidence about the relationship with country and the effect of acts on that will be paramount.

319 The extent to which the spiritual and usufructuary significance of an area of the land affected relative to other land that remained available to the Claim Group for the exercise of the native title rights and interests, may inform an award for non-economic loss is a matter of dispute. In the Applicants' submission, there is no basis for reducing the compensable non-economic loss because there is other land over which the Claim Group may have native title rights and interests. That is strictly speaking correct. On the other hand, depending on the evidence, it is the consequences of the collective compensable acts on their native title rights (putting aside economic consequences or losses) which is to be compensated for. Those consequences do not exist in a vacuum, uninformed by the Claim Group's wider areas in which they hold and enjoy native title rights.

320 The necessary evidence to establish causation between the acts and the claimant's loss was also a matter of dispute. That is largely because of the tumultuous history of Australia in the

claim region and the progressive legal recognition of Indigenous rights and interests in land (of which the presently considered compensable acts are a relatively small part) and the nature of the spiritual or religious and other intangible losses which have been occasioned.

321 As to causation, I note the Territory's submission that the entitlement to solatium is only for detrimental non-economic consequences which "directly" arise from the compensable acts. I do not consider that it is useful or appropriate to incorporate into a statutory formula, such as s 51(1) of the NTA, such an element, particularly as it may carry some overtones of causative requirements beyond the statutory prescription. Whilst *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 may have been decided in the context of apportionment legislation, I see no reason why the practical test for causation there approved is not appropriate to s 51(1) of the NTA. It does not support the ignoring of an appropriate relationship between the compensable act and its consequences. Indeed, it is the effect of the particular compensable act or acts which is to be measured or assessed, upon the whole of the evidence and in the context of the historical and geographical background referred to.

322 In my view, the proper question is simply to consider what, if any, non-economic effect there was upon the pre-existing native title by the compensable acts, that is the effect within the content of solatium only. Part of the effect, or the consequences of the effect, is the non-economic detriment to the Claim Group of the character under consideration. In making that assessment, as noted, the previous acts adversely affecting the native title rights both generally in the area and specifically in the lots under consideration will be relevant.

323 Consequently, as the Territory said, the claimants are only entitled to compensation for the "hurt feeling" evoked or caused by the determination acts. Any sense of loss generally derived from a loss of access to country in the town of Timber Creek and the inability to exercise native title rights on that country lies outside the parameters of s 51(1) of the NTA. I accept that proposition to confine the compensation under this heading to solatium, and to avoid the consequence of double compensation.

324 I agree that a parcel-by-parcel approach to the assessment of those consequences is not appropriate, having regard to the fact that many of the acts in issue occurred some 30 or so years ago. They were incremental and cumulative.

325 It is not possible to establish the comparative significance of one act over another. That is simply not how things are viewed according to the traditional laws and customs, in particular

by the *Ngaliwurru-Nungali* people. As the evidence of Palmer and Asche shows, one cannot understand hurt feelings in relation to a boxed quarter acre block. Rather, the effects of acts have to be understood in terms of the pervasiveness of Dreaming.

326 I have earlier noted that the loss or impairment of significant sacred places nearby to land affected by the compensable acts must necessarily have caused a loss or impairment of spiritual/traditional attachment in respect of that land and in Timber Creek generally at the time of that loss or impairment. Any award of compensation for loss or spiritual attachment in respect of land affected by the compensable acts must properly take into account the extent to which the spiritual attachment to that land has already been impaired or affected by the loss or destruction of significant places on nearby land or in Timber Creek. In my view, it is open to the Court to infer from the evidence which does not specifically relate to an act or parcel of land, that a further sense of loss is felt in consequence of the determination acts. The inferences to be drawn in the circumstances will necessarily depend on the direct and indirect evidence before the Court.

327 In *Milirrpum v Nabalco Ltd* (1971) 17 FLR 141 at 167, Blackburn J said:

> … the fundamental truth about Aboriginal's 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 else that exists on it and in it, are organic parts of one indissoluble hole.

That passage was quoted with approval in *Ward HC* at [14].

Findings and evidence

328 The Applicant sought the adoption of findings and of evidence in the hearing of *Timber Creek SJ* to be received under s 86(1) of the NTA, noting that the compensation application area is within the native title determination application, as are the subject of the findings and evidence in the earlier proceedings. The evidence and findings were adopted and received on an uncontested basis.

329 As I have said, I adopt the findings of the trial Judge in *Timber Creek SJ* under s 86(1)(c) of the NTA that the native title holders are linked to the claim area through ancestral ties that go back to *Lamparangana*, and well before his time; that they observe essentially the same rituals and ceremonies as were practiced by their ancestors more than a century ago; and that those ritual and ceremonial practises are largely and inextricable bound up with the land and waters in and around Timber Creek: see *Griffiths SJ* at [470]-[471], [566] and [584].

Examples include 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*): at [567].

330 I also adopt the findings of the trial Judge that the *Ngaliwurru-Nungali* 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: at [587] and that those who were *Yakpalmululu* (senior owners of country) could deny access to certain foraging areas, and that if a white person wished to go on to *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-Nungali*: at [615].

331 I further adopt the trial Judge's finding at [497] that:

> …the restricted evidence, in particular, points to a link between the symbols of the higher order ritual, and proprietary interests in land. The rituals and ceremonies signal a right to a country which stems from the Dreamings. There is in place, in Timber Creek, a system of normative rules that governs a continuing ritual tradition which articulates and "owner's" right to country. In essence, these rights pass through descent. The laws and customs upon which this normative system rests are part of ta conservative oral tradition that would be unlikely to be amenable to significant change

332 In addition I adopt the observations of the Full Court in *Timber Creek FC* at [127]-[128] that according to the traditional laws and customs of the native title holders spiritual sanctions are visited upon unauthorised entry. Their Honours said that the native title holders are the gatekeepers for the purpose of preventing harm to others and avoiding injury to country.

333 The evidence about the Claim Group's relationship with Timber Creek and their wider country is not really disputed.

334 In the 2004 Palmer and Asche Report in the hearing of *Timber Creek SJ* and there received into evidence, Palmer and Asche explained that:

> Country is understood to comprise a spirituality with which people are believed to be intimately connected. This we have explained in the foregoing by reference to the ways in which the applicants' beliefs and dependant practices develop from the land and its Dreaming spirituality. Protection of the land is concomitant of this relationship. Protecting the land is a way of protecting yourself. Protection of the land and particularly of those places within it which are regarded as being potent sources of spirituality is a duty of a Yakpalimululu, while other consociates are required to work with him (or her) in this endeavour.

335 In reference to his review of the anthropological literature, in his oral evidence Dr Palmer stated:

> … people identify in relation to a particular country, and in this sense, a particular Dreaming that is within the country, and that is a fundamental proposition of their sense of identity and who they are.

336 Drawing upon their own fieldwork, and the earlier field work of others (including that in the traditional land claim to land adjacent to the Town done by Palmer), Palmer and Asche reported upon sites of significance in and around the claim area and the travels of major Dreamings through the claim area. Noting the relationship between the spirituality of the Dreaming and sites, they said that:

> 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. …the power…underpins the system whereby the applicants' consider their willing to be ordered. …Sites are then far more than places or lists of names or locations. They should also be understood as meta-place, that is a reference to a place and is also a reference to a whole range of spirituality and associated imperatives that inform social exchanges, cultural activity and determine priorities.

The major travelling Dreamings through Timber Creek reported on by Palmer and Asche include *Wirup* (dog), *Marna* (barramundi), and *Wuguru* (hunchback). The sites they visited in the Town (and imbued with spirituality), and the tracks they took through the Town, were documented in the Palmer and Asche 2004 Report.

337 The expert opinion evidence of Palmer and Asche on the rights and duties under *Ngaliwurru-Nungali* law and custom to look after and speak for country was supported by the primary evidence of the claimants. Hence, Alan Griffiths gave evidence that:

> I got all those sites, all that Dreaming, I have to make sure people don't make a mess of it. I ask Jerry if anything is happening on the country. That's how I look after country. My grandpa, Lamparangana taught me to look after country and now I teach my kids. My kids follow me for country.

Lamparangana had told Alan Griffiths:

> … to look after the place and any Kamili [Kamiliyuru] people [strangers] come, you got to water their heads so that people can't feel sick.

Manjiari (Jerry Jones) explained why head wetting (*Mulyarp*) has to be done for strangers:

> JERRY JONES: Well, from that Dreaming, like, that Dingo Dreaming, because you're not supposed to be walking in there and because you - if you're not a TO [traditional owner] or you're not a - you're not a people that belong to this country and you're a stranger, you walk in there and - you'll find out you'll be in - you know, you get sick. You'll be in very - or sick. Just like that fella we talking there is - like,

> young Maxie Duncan.
>
> … He went out and built that bridge…. Without asking us and - - -
>
> MR PARSONS: He didn't ask?
>
> JERRY JONES: Well, he didn't ask because he done it. He got a big mob of rocks from down the gap - - -
>
> ...He going towards VRD turnoff, all that rock still there piled up, and he build a bridge. And what he done is, when he build the bridge up, he went down the - down the racetrack. I think he was down there playing cricket, and when they finished cricket playing he come along there and, oh, went to sleep, finish.

338 The nature of *Ngaliwurru-Nungali* traditional law and custom in relation to duties to look after country, and the effects, under their laws and customs, when country is harmed, was illustrated by the Applicant by reference to four events that occurred in Timber Creek that were the subject of evidence at the earlier trial.

339 The first event concerned a white man who built a causeway across Timber Creek (to the rear of Lot 20) without asking permission, which Jerry Jones mentioned in the passage set out immediately above. That interfered with a *Wirip* (Dingo Dreaming) site, *Wirip ngalur katpan* and, in the belief of the native title holders, caused the subsequent death of that man in a car accident. As Jerry Jones said:

> Well, that's what you get punish. It's from doing the wrong thing, because you should ask Aboriginal people. You know, Aboriginal people, they been here long long time. Long long time before Gregory came up. And I mean, they should - and from the Dreamtime, you want to think what Dreamtime leave it, because, like the Dingo Dreaming, they were the - they were the human.

340 Alan Griffiths said that if that white man had not died, he would have to pay "us mob" a "lot of money" because that "bridge go right on the Dream", and:

> ALAN GRIFFITHS: He'd have to pay or otherwise he'd be a dead man. He's damage from that Dreaming.
>
> COUNSEL: He'd have to pay or be a dead man. What would he have to pay?
>
> ALAN GRIFFITHS: Well, he'd have to pay his money, him.
>
> COUNSEL: He'd have to pay money?
>
> ALAN GRIFFITHS: Lots of money.
>
> COUNSEL: But what about before there was money? What would happen?
>
> ALAN GRIFFITHS: We'll spear that bloke up, put a spear on him, kill him.
>
> COUNSEL: And why was that? Why would you have to kill someone who damaged someone's Dreaming site?

> ALAN GRIFFITHS: Well, he's damaging of the Dreaming. The body of Dreaming's been walking around that place. He's cutting his body.
>
> COUNSEL: Does that – spearing that man, or killing him, does that fix that Dreaming up or not?
>
> ALAN GRIFFITHS: No. The Dreaming would be still there, but the Dreaming might kill him himself. Damage he done to that young bloke had an accident here. When he finished that, he went out, come back and had an accident.

341 The second event concerns the construction of a bridge over Victoria River by the Army (the Army Bridge) just outside the Town and payment of compensation to the native title holders. Originally the Army wanted to build the bridge near a *Wirip* Dreaming site, *Palawa*, but as Alan Griffiths explained that:

> First up the army wanted to build a bridge over the Victoria River in a way that would be bad for the dreaming. Originally it was northwest, opposite the dingo dreaming (site 1) [Palawa] but I said you have to change it to go the direction it is now. The Army mob said alright then and they built it away a bit from the dreaming, a little bit on the side. I also said that you can't take any of the top of the hill when they were building the road to go through to the bridge because dingo went through there too and they said alright then. Everyone asks me because they know I'm the traditional owner (yakpalimululu) for this country. The Army did the right thing by asking me.

342 While he remained worried that the bridge might still interfere with *Marna* (barramundi) Dreaming by "cutting the bodies for Barramundi walking across", he agreed that the bridge could be built at the second location away from the *Wirip* Dreaming because:

> Well, all – all my mob, see? Well, you know, if we let the bridge goes, then we'll get the money and I said, "Well, we'll do that."

343 The third event concerns someone scrapping gravel from a site on *Wirip* Dreaming. Alan Griffiths explained what happened:

> COUNSEL: Alright. Alright. Now, what about - what happened here, then, with this - with this big scrape here, this - all this gravel that's been - can you tell the judge anything about that?
>
> [ALAN GRIFFITHS]: Well, I - I didn't know nothing about it, because I didn't want people to go and dig - dig that out, because they digging out Wirip.
>
> COUNSEL: Right. So did you do anything about it when you found out about it?
>
> ALAN GRIFFITHS: Well, I told my - whatever you call it - whatever you call manager or - - -
>
> COUNSEL: You're indicating Jerry.
>
> ALAN GRIFFITHS: - - - managing Timber Creek for me. He ring me up when he seen this gravel been take away from here, and I told him to stop it.
>
> COUNSEL: Right.

> ALAN GRIFFITHS: Stop that bloke, don't let him take any more gravel.… Because he's in the sites… They cutting our Dingo's body … for Aborigines.
>
> COUNSEL: And so can you tell the judge a little bit about why did you ring Jerry up? What reason - - -
>
> ALAN GRIFFITHS: Well, Jerry ring me up….He told me that "gravel going out from your Wirip site" and call this place name…. And I said, "Well" - I tell him, "Yes, well, just tell that bloke to stop".
>
> COUNSEL: Right.
>
> ALAN GRIFFITHS: No more gravel taken.

344 The fourth event concerns a mining company wanting to explore for diamonds on a hill on the edge of the Town known as *Japajani*, a site considered dangerous where a snake *Yalamburra* took all the poison teeth from the water snake. Alan Griffiths told "everyone not to touch the hill as they can die, no doctor, medicine can fix it", and recounted a public meeting between his people and the mining company:

> ALAN GRIFFITHS: And I told them all that - all these - all these people what you see now.
>
> COUNSEL: This is sitting in the court here.
>
> ALAN GRIFFITHS: Sitting up in the court. And they asked me they going to find stuff, find a little bit of diamond. So "What are you going to do about it, old man?" Oh well, you know, I been thinking that ways about white people get - digging all the diamond out because he's a bad - bad - bad country, you know, that Japajani, and Two Snake been fighting over that poison with - out of their teeth.
>
> COUNSEL: Yes. That story you told the Judge.
>
> ALAN GRIFFITHS: Yes. And I said not worth - you know, not worth digging this country. Oh well, how about we let them go, you know, so we can get a bit of money. I said alright. And so I said not going touch that hill. If - if digging out on one side, you'll be right."
>
> COUNSEL: Alright.
>
> ALAN GRIFFITHS: I don't want to see nobody digging up hill because my grandfather told me not to - you know, you're not going to touch it there when he took me hunting. We never get near there. We only been going halfway, Kuminyiyung way.

345 The evidence on these events reveals a duty and concern to look after country. Jerry Jones gave evidence that white people fishing Timber Creek should stay away from special sacred sites, and do the right thing, and went on to explain:

> That okay but they got to listen, you know. You know, if someone he not looking, they'll make…
>
> … I'm like a manager, and I don't want anyone go. Just like what I said at the top of the hill, you know, couple of days ago - three weeks ago I think - weeks ago.

> COUNSEL: Feels like weeks ago. I think it was just a few days ago.
>
> JERRY JONES: A few days ago, whatever it is now, yes, but that's - it's - it's not - it's not on. See, what they dragging for gravel, we was there, instead of going asking them people in here, because I'm here all the time –
>
> COUNSEL: Jerry, just asking about that fishing at the moment, those people fishing in Timber Creek, yes.
>
> JERRY JONES: Well, same thing as the fishing or getting the gravel out of the country.
>
> …
>
> JERRY JONES: But it's not - just to us, I reckon we-they shouldn't go and fish and do what they like and throwing fish away, grabbing and just throwing away. It's not on, you know, because we need a lot of time in these place and we trying to pull him up and we still own it.

346 Jerry Jones explained that every person has a jamaran way to speak, which in white-fella way was like swearing on a bible in court to speak the language of the country, and that he has to call out the names and open the place up, and with strangers:

> We water everyones in the head…Because when you get a change of people that's not belong to this country, he's destroy the water or he destroy a lot of country, he's not-he's not right people and you got to have a people that belong to this-and Ngaliwurru people.

347 After Jerry Jones had said that he did not want white people going to the waterhole known as *Tilwarni*, a site of *Wuguru* (the humpyback spirit monster) Dreaming, to get bait and that he had "seen a few trap there to get cherrapin but I pull it down and I threw one part of it down", he tried to explain, in European terms, why he had done that:

> Well, because look, you can't just walk into any European's 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?

348 The Applicant also led evidence in the present hearing about the effects of loss of country and the effects of acts on the exercise of rights to country in these proceedings. The evidence given by the traditional owners was strong and compelling. The beliefs expressed were genuinely held and demonstrated a deep connection to country. Expert anthropological evidence was given by Palmer and Asche (for the Applicants) and Professor Sansom (for the Territory).

349 During the hearing Palmer and Asche conceded that they were not briefed with and did not know the nature of the determination acts or the dates at which they occurred, or the particular land the subject of the compensation claim, but was generally of the effects of alienation and loss of attachment to land in the Timber Creek region. They also understood

that the native title holders held exclusive native title rights. I have considered their evidence in that context and in particular as a means of interpreting the evidence given by the lay witnesses. Those matters do inform the general understanding of the nature of the Claim Group's traditional and special relationship to their country, but they must be viewed with caution when transposing or applying that understanding to the consequences of the compensable acts.

350 The evidence from the Claim Group, supported by Palmer and Asche, was that loss of and damage to country caused emotional, gut-wrenching pain and deep or primary emotions. In translating an Aboriginal word used by Alan Griffiths for such feeling when giving evidence at *wirip ngalur katpan* (the rear of Lot 20), his son Chris Griffiths explained that it was "a bad stomach feeling" and:

> … your stomach turns around and around inside when you know and feel that something bad has happened to you, and you can feel it in your stomach that…you don't feel right..

351 Alan said that "other Aboriginal people don't like it, …they get angry". This was because, as Chris Griffiths explained, elders had told his father to look after the country, and to keep it as a place to teach his children.

352 This gut wrenching feeling was accompanied by anxiety. As Alan Griffiths later said when giving evidence at *kulungra* (which includes the water tanks on Lot 70):

> Well, everything happening here on Timber Creek on my site, I always feel real bad. You know I had a big operation for my heart just over the country worrying too much. The (mulkimundy) [sic] didn't let anybody doing those things. They told me to look after them. And I too looking after them. But somebody's doing something behind that's hurting me.

353 At the same place, Jerry Jones noted the relationship of the *kulungra* area to *winan*, that it was very important for old people. He referred to the work he had done with the Aboriginal Areas Protection Authority (APA) to protect sites, and to a similar feeling of pain when sites were not protected, as in the case of the water tanks:

> Well, I think it's really bad for me because I'm really sorry… The grandkids have to go through ceremonies. I went through with my mob. I'm really feeling hard for it because this site is very important to us, and all these sites got rid of it.

354 Alan Griffiths added "the whole lot." Jerry Jones said how they have to carry on from the old people. He and Alan Griffiths then referred to how they were getting infirm (Jerry) and old

(Alan), and that younger members of the group will take over. The fact that the Dreaming may still be known, does not mean its ok for these things to happen, as Alan said:

> Not in black fella way…right in a gardia [white man] way but not - not in our tribal law way.

355 The depth of the relationship between self and country is supported and informed by the anthropological evidence. In the Palmer and Asche 2004 Report explained the relationship of person and Dreaming in his way:

> Dreaming beings (sometimes called 'Dreamings' or puwaraj) are essentially and powerfully spiritual. While they often metamorphosed and became places or sites, they may also be understood to have continued their travels. Their spirituality remains potent to this day and the areas with which they are directly associated are considered inviolable. The concept of puwaraj is therefore not limited to past events but it a continuing presence in the landscape.
>
> The relationship between an individual and the Dreaming is characterised as a personal one. Alan Griffiths told one of us (KP) that you can say, 'puwaraj ngarkina'. This means literally, 'Dreaming talk to me'. He went on to explain that the idea of 'talk to me' means that it is your own, that it is in sympathy with you and in accord with you, perhaps even a part of you and your own property…The Dreamings that talk to you are then those within your country of which you are a part. This exegesis neatly sums up both the immediacy and the intense personal relationship that is believe to exist between a person and the Dreaming, in its many manifestations.

356 One consequence is that unauthorised use of country by others imposes upon the native title holders responsibility for loss and damage. As Jerry Jones says:

> Each group has to look after its bit of the Dreaming. If something goes wrong of 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 will complain about it and say that we are letting them down.

357 Similarly, Professor Sansom, having read the transcript of evidence by the claimants, was of the view that the general theory in his 2002 paper on the emotional effects of dispossession was in operation in this case. Those emotions, which Sansom described as "primary feelings socially recognised" (and in his paper as "epic") were a "feeling…about a person and a numinous, the holy". This is because the notion of injury to Aboriginal self is connected with the oneness between people and Dreamings, and the "feeling" is about an Aboriginal person's experience of engaging with the Dreaming.

358 The anthropological opinion evidence of Professor Sansom is that unless dispossession ends, and land is restored and things are put back in order, these hurt feelings continue and are persistently aggravated. In his 2002 paper, Professor Sansom writes that the business of "feeling" is a code word that:

> …stands for moments of active participation in which the person as totemite is engaged with Dreamings or is spiritual communion with another human being (also a totemite)

This emotion is something that Professor Sansom describes as:

> The experience of ripping that goes "right through" the traditional owners (as totemites who experience sympathetic shock when their land is wounded).

359 I have considered the lay evidence, including the evidence of Allan Griffiths that when someone builds a building, if the Dreaming is still there:

> What they been do there, they been cutting all those thing out. The been cut the body out of it.

360 The claimants also gave evidence about the effect of acts on the exercise of their native title rights and interests.

- Alan Griffiths says that when *gardia* (white people) put up fences and build things without asking, his group can't get to their hunting grounds where they get bush tucker.
- Jerry Jones gave instances of site damage, such as the water tanks built across the *winan* track.
- Lorraine Jones gave evidence of reduced bush tucker around Wilson Street.

361 The evidence about the effect of the acts also concerned effects on the use of certain areas as ritual grounds. That was the subject of male gender restricted evidence, both in these proceedings and in the earlier *Timber Creek SJ* proceeding which has been tendered in this matter. The restricted nature of that evidence means that it is not appropriate to describe it in detail in these reasons. However, I accept the submission by counsel for the Applicant that, without going into the evidence, the ritual described, and the need for its secrecy, are very valuable to the native title holding community. There was evidence in this proceeding of a place that is no longer a secure ritual ground, and evidence in the earlier proceeding of another place that is no longer secure for ritual. Jerry Jones gave evidence as to why the area could no longer be used. Chris Griffiths gave evidence as to why the place remains important.

362 Also, even when an act has not destroyed the claimants' ability to practice their traditions entirely, it will still impede that ability and cause loss.

- Alan Griffiths said that if you cannot see a Dreaming site, they will have trouble telling the young children (eg, the rock has gone at the site of the concrete bridge);

- Alan Griffiths said further that, even if a Dreaming is largely there when someone builds a building, that does not make things okay;
- Professor Sansom stated that the full experience is to conduct ritual on country;
- Palmer noted, in reference to the bridge behind Way Side Inn, that "it's not the same" and there is a palpable sense of loss as a consequence among the native title holders;
- Asche stated that an example like relocating the Army Bridge involved Alan Griffiths accepting a European imposition on him and making the least damage possible.

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

364 While the loss of *Ngaliwurru-Nungali* People was evident, there was also significant evidence that the attachment of the claimants to country has not been wholly lost. Consistently the findings of Weinberg J that the claimants "occupied" the claimed land in the Town by using the land for traditional purposes were sufficient to support a finding that s 47B of the NTA applied: *Griffiths SJ* at [685], [703] and [782]. The evidence heard in this proceeding shows that the Claim Group continues to exercise native title rights and interests following the determination acts and development of the Town of Timber Creek. In particular I note that Alan Griffiths said that he retained a connection to, and responsibility for, country despite development of the Town and the fencing of some lots, and that there were still places to go hunting and fishing and that stories about country were still passed down to younger generations. Josie Jones also gave evidence about hunting and fishing as well as the capacity to obtain white ochre used in ritual near the cemetery

365 There was also evidence which suggested that some developments in the Town of Timber Creek were acceptable under Indigenous law. That included the evidence of Josie Jones that certain developments did not create a sense of grievance, including the purchase of land in 2009 by Lorraine Jones and the construction of the houses on Wilson Street. Alan Griffiths said in relation to the construction of the Army Bridge in 2003 that the construction was okay under Indigenous law, and Jerry Jones gave evidence that approval was given to erect the Ngaringman Resource Centre where indigenous law and custom recognised the helmet or headdress of the *Wirip* was located.

366 In my consideration of the appropriate amount to be awarded under this heading, I have not had regard to the evidence of Professor Altman. That is not because I doubt his expertise, or the importance of his evidence generally. Insofar as it relates to and describes the nature of the Claim Group's traditional spiritual connection with their country, including Timber Creek, it is consistent with the other anthropological evidence, and accords with the direct personal evidence.

367 As both an economist and an anthropologist, he has interwoven his views as to the tangible economic losses and less tangible cultural losses suffered by the Claim Group by reason of the compensable acts. At this point, I do not need to record in detail his evidence addressing those issues. However, because of the interaction of those two categories of loss, and my intention to exclude from this category of damages any element of economic loss, I have preferred to place no particular weight on his evidence for this purpose.

Consideration

368 Having regard to the evidence adduced relating to the spiritual, cultural and material significance of traditional country to the native title holding community, the Applicant says that a substantial award of solatium should be awarded in view of:

(1) the nature of the interest affected, including its spiritual component which is a deeply religious connection to country of which the claim area is an integral and inseparable part of an indissoluble whole (LAA, r 9(2)(a));

(2) the length of time through which the claimants and their ancestors have maintained their connection to the land, by legal definition at least since sovereignty, but long before that (rule 9(2)(b));

(3) the distress and anxiety caused by reason of loss of part of their country, which is manifested by deep or primary emotions of hurt, shame and worry (rule 9(2)(c));

(4) the period during which the claimants were unlawfully dispossessed up until validation, and for which they are entitled to have their rights of property vindicated (rule 9(2)(d));

(5) the period during which the claimants and their descendants would have continued their connection to the land, that is, in perpetuity and for the benefit of the native title holding community (rule 9(2)(e)); and

(6) the special value of the land to the native title holding community, above market value, and the need for an award to have a correlation with other awards for non-pecuniary losses where substantial amounts are awarded for injury to the feelings and reputation experienced of an individual (rule 9(2)(f)).

369 For the reasons above, it is appropriate to have regard to the considerations set out in Sch 2 rule 9 of the NT Acquisition Act. To the extent that the Applicant seeks to rely on a period of unlawful dispossession prior to validation: see (4) in the preceding paragraph, I do not place any weight on that. As I have found, the compensable acts are deemed always to have been valid.

370 The direct evidence of Alan Griffiths, and the anthropological opinion evidence, does not depend on any proposition that some parts of Aboriginal landscape are more important than others. As Dr Palmer observed, the 2002 paper of Professor Sansom is in relation to the damage of loss, and "the hurt feelings of a hunting ground, of a generalised area, a resource lost." The broad expanse of the *kulungra* area is a similar example in this case. As Professor Sansom accepted, the kind of contention advanced by the Territory and the Commonwealth that there can be a significant area of landscape that is unimportant to Aboriginal people, or that there could be an area that is devoid of spirituality, defies logic in the Aboriginal tradition.

371 The dispossession (and consequential injury to feeling) of the native title holders from part of their country has occurred after generations of ongoing traditional but impaired connection. It has an immediate effect to the native title holders. To take an example, Josie Jones learned about country and traditional law and custom at the old pensioner camp in the Town. Her grandfather is buried nearby. She lived out the back of Fogarty's and the police station. In her time, things changed. Her daughter Lorraine remembers hunting with her grandmother (Josie's mother) and:

> She would say in her language about how change was happening with all the buildings that were going up in town. Around 1985 Wilson Street was opened and a road was put through. Her and the old people all said how they felt sorry – Yapali – for that place. They would say yakara yakpali mairing burangum meaning 'they are damaging our place'.

372 These effects are not simply about access and use of land. As Palmer and Asche explain, those with whom they worked in the field expressed a variety of emotions regarding damage and loss of their cultural places. This is to be understood, in their expert opinion, in terms of

the spiritual integrity of the landscape as being fundamental to the native title holders. The response of the native title holders to any interference or damage to that spirituality must therefore be understood in view of the bond understood to exist between a person and the spirituality of country.

373 It is that dimension that signifies the nature of connection to country that needs to be appreciated, whether approached as reflecting a special value of the land to the native title holders, or viewed when considering the intangible effects that result from their dispossession.

374 The assessment of the appropriate compensation is a most complex one.

375 It is clear that the Aboriginal spiritual relationship to land encompasses all of the country of a particular group, and not just particular "sacred sites". It is also clear that 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. It is also clear that 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. Nevertheless, it is also clear that there are areas of country which are of particular significance, and areas of country of Aboriginal people (including the Claim Group) where their traditional rights and interests and the spiritual connection to the country is less significant. Some of the evidence addressed the process leading to the Wilson Street development, for example.

376 I have referred above to the general picture as to the intrusion, at least de facto, upon the traditional rights and interests of the Claim Group in the wider area than the Township itself prior to the compensable acts. Clearly, that was a significant intrusion, and causing significant cultural and spiritual pain and anxiety to the Claim Group. Much of the evidence of Palmer and Asche concerned significant Dreaming lines or sacred sites, outside Timber Creek itself, which had been destroyed or impaired in previous times. The appropriate level of compensation must take account of that pre-existing state of affairs.

377 As has also been pointed out, the compensable acts did not remove all of the native title within the Township of Timber Creek, but it is correct to say the significant series of compensable acts, some relating to larger areas of country and some smaller areas of country,

that the extent of native title rights and interests in the Township itself were progressively further impaired in the period extending from about the early-1980s. In terms of the area affected, it is a not insignificant area. As I have noted in the immediately preceding paragraph, and in my reference to the evidence, it is also clear that not all of those acquired areas had the same significance as others.

378 With those general observations, in my view, there are three particular considerations of significance to the assessment of the appropriate amount of compensation. The first is the construction of the water tanks on the path of the dingo Dreaming. That is along a line of particular spirituality, and has caused clearly identified distress and concern.

379 The second is the extent to which certain of the compensable acts effected not simply the precise geographical area of the lot over which that act specifically related, but in a more general way to related area so as to have impaired the native title rights and interests more generally; in particular, I refer to certain of the evidence briefly referred to above concerning the effect of a particular act upon the capacity to conduct ceremonial and spiritual activities on that area and on adjacent areas.

380 I have considered whether that is a legitimate factor to take into account. If the immediately adjacent area were now to be compulsorily acquired by the Territory, it would be inappropriate for the Territory to be able to say that the Claim Group could not recover non-economic compensation for that acquisition because the capacity to carry out that activity on that allotment had already been significantly impaired by its earlier act, and at the same time to say that the earlier act should not lead to compensation for its effect upon the enjoyment of native title rights and interests on that adjoining area. Such an approach would also be inconsistent with the generally accepted proposition that native title is a feature of a wider area of country than any of the particular and individual acts now under consideration.

381 Thirdly, and more generally, is the fact that each of the compensable acts to some degree have diminished the geographical area over which native title rights within the Township of Timber Creek, and more generally, may be exercised, and each in an imprecise way has adversely affected the spiritual connection with the particular allotments, and more generally, which the Claim Group have with their country. Again, the point should be made that that connection is not divisible geographically, but each chipping away of the geographical area necessarily must have some incremental detriment to the enjoyment of the native title rights over the entire area. Associated with that collective diminution of the cultural and spiritual

connection with land, is the sense of failed responsibility for the obligation, under the traditional laws and customs, to have cared for and looked after that land. Again, that is not geographic specific, save for the more important sites, but it is a sentiment which was quite obvious from the evidence led from the members of the Claim Group. That evidence, understandably, was more focused on the area of the town water tanks, as that is clearly a more significant area, and in other areas in the vicinity of Timber Creek which were also of significant importance. That does not enable the Court simply to ignore the sense of responsibility for looking after country which, in relation to the compensable acts were regarded as a failure properly to look after the country and to preserve it for future generations. Those matters of cultural sensitivity should be compensable.

382 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.

383 The selection of an appropriate level of compensation is not a matter of science or of mathematical calculation. Having regard to the matters to which I have referred, in my view, the appropriate award for the non-economic or solatium component of the compensation package should be assessed at $1.3m. I have not broken up that assessment by reference to the three elements to which I have referred above. I have listed the three elements in what I regard at descending order of spiritual significance. That does not mean that the first act should account for more than one third of the total sum awarded, as the cumulative effect of all the acts (putting aside the first two elements) is in my view a significant matter.

384 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.

CONSIDERATION: THE FREEHOLD LAND VALUES

385 It is now necessary to descend from the consideration of the four principal topics to matters in issue requiring determination before those principles can be applied.

386 One topic concerns the freehold land values of the relevant lots the subject of the compensable acts.

387 In view of the decision made on the timing issue, it is not necessary to determine the freehold values of those lots at the validation date or, associated with that, the status of the improvements on those lots at that time. Nor is it necessary to determine, from the Applicant's claim as expressed the value of the usage of those lots between the period of the acts themselves and the validation date.

Freehold market value

388 The Applicant claimed compensation for grants (which were previous exclusive possession acts, see Draft Order [1](3) or were to be treated as previous exclusive possession acts, see Draft Order [1](6)) and for public works (which were previous exclusive possession acts, see Draft Order [1](4) or were public works which were previous exclusive possession subject to whether any part of the land was covered by a previously established public work, see Draft Order [1](5)). The Applicant also claimed compensation for category D past acts where there was no subsequent extinguishing act (see Draft Order [1](2)). No separate claim for economic loss was made in respect of the infrastructure parcels, lots 70 and 72.

389 In the case of each of these acts, it is appropriate firstly to consider the market value of the lots at the date of the act or public work before making any adjustment based on the comparison between the relevant native title rights and freehold property rights (already addressed), and any further adjustment which may need to be made in respect of category D past acts subject to the non-extinguishment principle in s 238.

390 As indicated, I have found that the entitlement to compensation (in respect of the effect of acts upon the native title rights and interests) is assessed at the date on which the relevant act was done or the date when the construction or establishment of the relevant public work began.

391 There remain certain issues concerning values to be determined for permanent, or potentially permanent impairment of native title by the compensable acts, both where there is a subsequent compensable act totally extinguishing native title in any event, and where there is not. It is convenient to address the last alternative at this point.

392 In a practical sense, where a Category D past act suppresses native title rights and interests in whole, for the period while those acts are suppressed, they have the same effect as a previous exclusive possession act. For the purposes of compensation, the difference between such acts is the existence of the contingency of the act or its effects being wholly or partially removed

or otherwise ceasing to operate so that the native title rights and interests again have full, or partial, effect. In my view it is conceptually appropriate to make a downward adjustment for this contingency. There is no real evidence upon which that contingency can be assessed. That is why I have referred to it as a conceptual contingency. I have endeavoured to give it more than a nominal value or percentage. I do not think that it has any real significance. I would not, therefore, reduce the freehold value in those circumstances at all. In making that conclusion I considered that the removal either wholly or partially of the act or its affects is not likely ever to arise. A reduction for that contingency is, of course, not necessary where there has been a subsequent extinguishing act over the same area of land, but that is merely again a theoretical prospect. Where there is a category D past act in respect of an area followed by an extinguishing act concerning the same area, I have therefore used the freehold market value at the date of the category D past act as an appropriate starting point. It is not necessary for the subsequent extinguishing act to then be separately considered.

The valuers

393 Each of the Applicant, the Territory and the Commonwealth relied on expert valuation evidence to assess market value at the date of the act. As indicated, the Applicant primarily relied on evidence given by Dudakov and Brown, the Territory relied on evidence given by Wotton and the Commonwealth relied on evidence given by Copland. Each valuer derived values for land types as at certain dates and then made adjustments either side of those dates to arrive at a value for each lot affected by a determination act at the date of the act and a value for the date of validation. For the reasons above it is not necessary to consider the values as at the date of validation, except in so far as it informs more generally an assessment of the evidence given by the expert valuation witnesses.

394 Each of the valuers had extensive experience in the valuation of land. Dudakov had nearly 40 years' experience in the valuation of real estate throughout Victoria with a particular emphasis on compulsory acquisition. Brown also had almost 30 years' experience valuing properties primarily in Victoria, including rural communities. Wotton primarily had experience in New South Wales, Queensland and Western Australia, again including rural areas. Copland primarily had experience in remote Australia in the Northern Territory. That experience and personal knowledge of sale properties inside and outside of Timber Creek clearly informed his evidence.

395 Unsurprisingly, each of the Applicant, the Territory and the Commonwealth made submissions in respect of the valuation evidence primarily to the effect that the evidence given by the expert witness or witnesses each presented should be adopted by the Court. In the case of the Applicant, that was ultimately qualified in respect of valuations for certain lots as at the date of validation and for future invalid acts in respect of certain lots, where it was conceded that either:

(1) Copland's evidence should be preferred because he had particular information about when improvements were made (e.g. Act 7/Lot 26 and Act 8/Lot 27); or

(2) the "(slightly) higher" amount should be chosen to give effect to the "more liberal estimate" where there is scope for legitimate variations in approach and method and where two or more views are reasonably open: see *Sydney Water Corporation v Caruso* [2009] NSWCA 391 at [3] (Allsop P, with Sackville AJA agreeing) (e.g. Dudakov and Brown's valuation of Act 12/Lot 31); or

(3) the "middle figure" (that is, when comparing the values assigned by each of Dudakov and Brown, Wotton and Copland in respect of a specific lot) should be chosen when there is a divergence among the valuers which cannot be explained by difference in information (e.g. Wotton's assessment of Act 9/Lot 28).

396 Those submissions were refined following cross-examination of the valuation witnesses including in relation to the relative lack of rigour in the application of the sales evidence and in the assessment of the properties under consideration by the witnesses.

397 It is appropriate firstly to make some general observations about the valuation evidence before considering evidence given in respect of specific lots.

398 One matter which arose during cross-examination was the assumptions relied upon by the valuation witnesses in respect of the improvements which were on the various lots as at the date of validation. That was particularly a matter which arose in respect of the Dudakov and Brown Reports, and which was the basis of criticism by both the Territory and the Commonwealth. During the hearing, Dudakov confirmed that he and Brown were unable conclusively to ascertain which, if any, improvements were on the various lots as at the date of validation and that their Reports relied on the assumed scope and nature of the improvements on each of the subject lots. They had made "guestimates" based on a "common sense test" of what was existing at the time by viewing the improvements which exist on the land today, and assuming that they were on the land at the date of validation

"unless it was something obvious…like it was well and truly after the date of validation". While they sought to cross-check those assumptions with building records, they were unable to do so. There was some evidence to suggest that building records in the Northern Territory are kept by the Territory government rather than by the local government authority, and that the enquiries by Dudakov and Brown were misdirected.

399 The Territory submitted that the assumptions as to improvements relied on by Dudakov and Brown led to allowances being made for improvements on a number of the Lots (in the Territory submissions, lots 20, 21, 23, 26, 44, 46, 52, 75, 79, 81, 82, 83, 84, 85, 86) in circumstances where there was no or insufficient evidence to substantiate the existence or nature of those improvements. A similar position was taken by the Commonwealth.

400 Each of Wotton and Copland gave evidence that sales and other evidence relied on by them in their reports indicated that certain allotments were not as developed as assumed by Dudakov and Brown.

401 Clearly the existence of improvements on the land had significant implications for the valuation figures derived. By way of example, in respect of Act 2/Lot 20, it was Copland's evidence that aerial photographs taken around March 1994 indicated that there were no improvements on Lot 20 at that time and that the value of that lot at the date of valuation was $55,000. In contract, Dudakov and Brown, at least initially, made an allowance for the vacant lot of $49,000, an allowance for improvements of $100,000, and a total value for the lot in the amount of $149,000.

402 I note the related criticisms made by Territory of the Dudakov and Brown figures in respect of the following lots:

(1) In respect of Lot 26, Dudakov and Brown value the property as at the date of validation on the assumption that there were 11 buildings on the land at that time. That assumption was made without any attempt to assess the relevant building information. The Record of Administrative Interests and Information discloses that the only permit to occupy issued prior to March 1994 was in respect of a shed 144 sq m. Moreover, the property was sold in January 1994 for a price of $80,000, which was entirely inconsistent with the presence of 11 buildings on the Lot as valued by Dudakov and Brown. Nor was that sale unknown to Dudakov and Brown. It was actually listed in their Sales Schedule at Section 4.1 of the first evaluation report, but

selectively disregarded for the purpose of assessing the value of the Lot at a point in time approximately six or seven weeks after that sale.

(2) In respect of Lot 27, the valuations as at the date of validation adopted by Dudakov and Brown (and Copland) are unrealistic and excessive. It is not possible to say there was anything other than an office on Lot 27 as at March 1994. The lot is approximately 2 ha in size. Ranged against that, Lots 13 and 20 were sold as a compendium in March 1994 for $495,000, That property was approximately 5 ha in size and consisted of a service station, a general store and tourist cabins. Lot 23 sold in January 1996 for $42,500. That property was approximately 2 ha in size and consisted of a three-bedroom two bathroom dwelling and agricultural shed in the same subdivisional location as Lot 27. In light of those comparable sales, the valuations adopted by Dudakov and Brown ($385,000) and Copland ($450,000) in respect of Lot 27 are entirely unrealistic, particularly in circumstances where neither is able to point to any particular comparable sales evidence in support of those valuations.

(3) Dudakov and Brown adopt land values for the 1000 sq m lots as at March 1994 in the order of $12,000. The valuation is anomalous in circumstances where the comparable sales for 1000 sq m lots in or about 1993 were in the order of $6,000 (Lot 43), or in or about 1998-2000 were in the order of $8,000 (lots 35, 37 and 85), and in or about 2000 were in the order of $10,000-$20,000. Mr Brown's refusal to accept that anomaly is telling.

(4) In respect of Lot 21, Dudakov and Brown assess a value as at March 1994 of $35,000. That assessment is made notwithstanding the fact that the Lot had sold for $25,000 in January 1993.

403 I also note the related criticism by the Commonwealth of the approach adopted by Dudakov and Brown in their consideration of sales evidence *in toto* to ascertain a 1994 base rate, without cross-referencing sales data for specific lots. That had the consequence, by way of example, that values for improvements were assigned where there were later day land sales for the same lot at prices indicative of vacant land sales, as in Act 6/Lot 23. Indeed, in respect of Act 6/Lot 23, appropriate concessions were made by Dudakov and Brown when those when sales figures were brought to their attention during cross-examination.

404 It is not necessary to address each of those lots specifically. While the evidence in respect of the improvements was directed towards the Applicant's primary case that compensation should be assessed from the date of validation, and not the date of the act (as it was agreed that as at the date of the act there were no improvements), the accepted errancy (in part) in the Dudakov and Brown approach to valuation at the validation date causes me to be cautious about accepting their evidence more generally about the valuations at the date of the determination acts. I also think that the reliance by Dudakov and Brown on those assumptions, in circumstances where those assumptions were not immediately evident on the face of their reports, and in circumstances where those assumptions were shown not to be consistently reliable, causes concern about the rigour of their implementation of the valuation methodology more generally

405 I note that the Applicant also made submissions as to necessary 'adjustments' to be made to the freehold values contained in the Dudakov and Brown report, including to reflect changes which they accepted it was necessary to make to the dates when Dudakov and Brown in fact valued various allotments, including where Dudakov and Brown had selected a date the midpoint between two acts where they affected the same allotment. Similarly, it is not necessary to address whether those adjustments may properly be made in detail.

406 Consequently, I have treated the Dudakov and Brown figures with caution and have preferred the valuation evidence given by the other valuers.

407 I found both Copland and Wotton to be impressive witnesses. The Applicant noted in its submissions that both Wotton and Copland were given Dudakov and Brown's figures in advance of the valuation. Wotton accepted that it was preferred practice to reach valuations without knowing another valuer's figures. In my view, the decades of valuation experience of both Wotton and Copland amply qualify them to independently arrive at valuation figures. Nor did I perceive the evidence given by either Wotton or Copland to have been significantly influenced by or reliant upon the Dudakov and Brown valuation figures. Indeed, in respect of the 1,000 sq m lots there were significant differences between the Dudakov and Brown figures on the one hand and the valuations by Wotton and Copland. There were also some significant differences between the Dudakov and Brown, and the Wotton and Copland valuations for the large rural lots.

408 I am satisfied that each of Wotton and Copland independently applied their respective valuation expertise to the valuation task.

409 While Copland had less experience with compulsory acquisition valuations than Dudakov and Brown, I did not perceive this to have impacted in any meaningful way his valuations of the areas in and around Timber Creek. In my view, his lengthy valuation experience amply qualified him to value the various allotments under consideration. I did not perceive his evidence to be other than persuasive.

410 I did not discern from the submissions any other particular submissions going to the preference of one valuer's evidence over that of the others.

411 Where the valuation of particular lots is in issue, I have generally preferred the evidence given by Copland to that given by Wotton. His evidence was given in a clear and coherent manner and I found his evidence of the method and cross checks he had undertaken to be comprehensive and rigorous. He was able to rely on data he had collected from detailed inspection of allotments and inquiries which he made in Timber Creek and search certificates for the lots obtained from the Northern Territory. He also had the benefit of particular experience in the Northern Territory which enabled him to draw on his experience valuing properties in other remote rural towns with similar economies.

412 Whilst I have no particular adverse reason to not act on the evidence of Wotton, I have preferred the evidence of Copland because I was impressed with his thoroughness, and by his more detailed knowledge of Timber Creek and related or potentially comparative areas in the Northern Territory and the common sense way in which he made use of that knowledge as he considered appropriate.

413 Each of the valuers, as one would expect, applied the same fundamental stepping stones. The differences derive from the interpretation of the significance of comparative sales and its use. They each agreed that it was not appropriate to add or assess a separate value for the acts done by the establishment of "infrastructure land" as they commonly understood that expression (and as recorded in the Table of Issues raised by expert valuation reports). They each proceeded on the basis that, in respect of the lots where there is now (and was at 1994) some improvements on the lots, the land was unimproved at the time of the compensable acts.

414 Having taken the step of preferring the evidence of Copland, in my view, it is also appropriate to adopt his valuations of the relevant allotments, even though in respect of some allotments they are significantly higher than those of Wotton (in particular the larger

allotments) and in at least one instance a little lower. There was no particular reason demonstrated why his valuation of any particular allotment or allotments should not be accepted. To the extent that the Territory has contended that I should, in a few instances, accept the lower Wotton valuation, I do not accept that it is appropriate to do so. Nor, even if I were to have done so, would it routinely follow that, upon an individual allotment analysis, the Wotton valuation (which is in most instances significantly lower than the Dudakov and Brown valuations) would routinely become the preferred valuation of that allotment. I note that, in respect of the smaller allotments, the Dudakov and Brown valuation is generally quite significantly higher than both the Copland valuation and the Wotton valuation.

The 1000 sq m allotments

415 Dudakov and Brown adopted land values for the 1000 sq m lots as at 1987 in the order of $8000, compared to Wotton at $4,000 and Copland at $4,500 (see Lots 36, 38-43).

416 In arriving at valuations for the 1,000 m sq allotments, the parties particularly referred to the following transactions in 1,000 sq m lots:

(1) the purchase of Lots 43 for $6,000 in March 1993;

(2) the sale of Lot 35 for $8,000 in September 1998;

(3) a sale of Lot 37 for $8,000 in September 1998; and

(4) the grant of three development leases for $5,000 in between 1987 and 1992 (acts 31-33), and three other development leases for $8,000 in 1995 and 1996 (acts 50, 51-52).

417 The sale of Lot 43 was not made until 1993, six years after the relevant date and then in the amount of $6,000. The sale of a 1,000 sq m block for $8,000 does not occur until 1998 (Lots 35 and 37), more than 10 years after the time at which a value of $8,000 is attributed to the lots by Dudakov and Brown.

418 I accept the submissions of the Applicant that it is appropriate to look at sales over the entire period to determine the value at the time of the act and at 1994 and not to place undue reliance on single sales figures and, to some extent, that it may be appropriate to be cautious about the reserve price for development leases set by government (as in the case of the sales of the 1000 sq m lots in 2009 based on valuations from the Australian Valuation Office). However, in my view that does not adequately explain the selection of a valuation figure significantly in excess of the subsequent sale value of $6,000. In particular, I note the evidence of Wotton that vendors who have several parcels of land to sell usually inform

themselves as to what is a fair market price and that the market will then either accept that price or offer, usually, less.

419 It was also suggested that one reason for the discrepancy between the Dudakov and Brown figures and the Wotton and Copland figures was the weight which may properly be attributed to the relativity between the 1,000 sq m lots and the 2 ha lots, as at least in some circumstances they were used for the same purpose – that is, as residential dwellings. The evidence of each of the valuers was that in 2011, the price of a 1,000 sq m block was approximately 40-50% the cost of a 2 ha block. The Dudakov and Brown valuations as at the date of the act endeavoured to maintain this relativity, whereas the Wotton and Copland figures indicated that since the date of the acts the price of the 1,000 sq m lots had increased significantly relative to the increased cost of the 2 ha blocks.

420 While I accept at a general level that it may, in some circumstances, be appropriate to consider sales evidence of lots with significantly different dimensions where they are used for the same purpose, I do not take the step of finding that the evidence of Wotton or Copland is necessarily flawed because they did not do so or because they did not seek to explain why the markets for 1,000 sq m and 2 ha blocks moved differently between the date of the act and the date of validation.

421 I accept the evidence given by Wotton and Copland in respect of the 1,000 sq m allotments, and for the reasons given above, adopt the Copland figures for market value in respect of each of those lots.

The 2 ha allotments

422 There was relatively little discrepancy as between the valuers in respect of the 2 ha allotments, although the exercise of judgment produced variances. Dudakov and Brown and Wotton generally adopted figures between $20,000 to $25,000, and Copland generally adopted figures between $24,000 to $28,000, although there lots 20 and 21 were values slightly higher by Copland, Dudakov and Brown, and lower by Wotton.

423 For the reasons above, I adopt the Copland figures as I found his evidence to be particularly impressive.

The large rural allotments

424 Mr Copland's values for these lots was significantly higher than the valuations by Dudakov and Brown, and by Wotton. That was largely due to the lack of data in respect of the larger rural lots, the fact that they were, as Brown said, 'reasonably unique parcels in the township' and the different approaches of the valuers to accommodating that.

425 Dudakov and Brown used an analysed value as at March 1994 of $1,000 per ha. Copland considered large, rural lots from other jurisdictions within the Northern Territory, a schedule of which was annexed to his report. He explained that he considered that larger lot size alone would have to attract a significantly higher price than a 2 ha block. Wotton stated that he adopted prices for the parcels of land containing areas greater than 20,000 sq m at rates lower than the rates which were paid for parcels containing area around 20,000 sq m, to reflect the fact that the larger parcels of land, particularly to the north of the airstrip and to the north east of Timber Creek, lack direct access and provision to services. It was his evidence that he did not consider the market would pay double the value of a rural residential lot even where the land size was double, because they would get additional area not no real advantage in terms of use.

426 As I have indicated, I prefer the Copland valuations.

427 It is convenient to note the specific parcels of land by their size and specification under the NTA, as they were addressed by the valuers and the parties, that is:

(1) small lots (mostly approximately 1,000 sq m)

1. grants

(a) Act 31/Lot 43

(b) Act 32/Lot 44

(c) Act 33/Lot 46

(d) Act 45/Lot 64

(e) Act 50/Lot 81

(f) Act 51/Lot 85

(g) Act 52/Lot 86

2. public works

(a) Act 20/Lot 36

(b) Act 22/Lot 38

(c) Act 24/Lot 39

(d) Act 26/Lot 40

(e) Act 28/Lot 41

(f) Act 30/Lot 42

(g) Act 43/Lot 62

(h) Act 44/Lot 63

(2) grants of lots which were approximately 2 ha

1. Act 2/Lot 20
2. Act 4/Lot 21
3. Act 5/Lot 22
4. Act 6/Lot 23
5. Act 7/Lot 26
6. Act 8/Lot 27
7. Act 9/Lot 28
8. Act 10/Lot 29
9. Act 11/Lot 30
10. Act 12/Lot 31
11. Act 13/Lot 32

(3) grants of large rural lots that were over 4 ha

1. Act 34/Lot 75
2. Act 48/Lot 75
3. Act 49/Lot 79

428 The lots affected by category D past acts were considered separately, as on the Applicants' primary case compensation was claimed for market rental. For the reasons given above. I have not accepted that that is an appropriate measure of loss. Relevantly, the lots affected by category D past acts are:

(a) where there is no subsequent extinguishing act

(i) Act 1/Part 16;

(ii) Act 36/Lot 52; and

(iii) Act 41/Lot 60; or

(b) where there was a subsequent extinguishing act, that is:

(i) Act 3/Lot 21;

(ii) Act 15/Part 34;

(iii) Act 17/Part 34;

(iv) Act 19, Lot 36;

(v) Act 21/Lot 38;

(vi) Act 23/ Lot 39;

(vii) Act 25/Lot 40;

(viii) Act 27/ Lot 41; and

(ix) Act 29/Lot 42.

429 In my view, the market value of the relevant lots affected by the compensable acts is therefore $640,500, taken from Commonwealth Table of Comparative Interest Calculations, so that 80% thereof, representing the economic value of the non-exclusive native title rights is $512,400.

430 It is accepted that the Copland valuation does not address the value of:

(i) the claimed acts 50A-50C (the invalid future acts); or

(ii) the claimed acts 37-39 (the grazing licences.

431 The Applicant also seeks that compensation for acts 37-39, if payable, be assessed having regard to an entitlement on the part of the native title holders to reasonable remuneration for the occupation or use of the land in respect of:

(1) compensation for economic loss under the Act for impairment of the relevant (exclusive) native title during the currency of the acts; and

(2) any necessary additional compensation for economic loss under para (xxxi) for occupation or use up to 10 March 1994;

in the nature of mesne profits evidenced by market rental or receipts for use of the land together with compensation for non-economic loss (in globo) and pre-judgment interest.

432 The Court's findings in the *Compensation Decision Part 1*, as recorded in the Draft Order and attached to these reasons state that the application for compensation in relation to acts 37, 38 and 39 is to be dismissed (Draft Order [2]). Nonetheless, the Applicant seeks findings on quantum in relation to those acts in case the proposed dismissal of those acts under the order is later reversed or varied.

433 If it were necessary and appropriate to do so, I would adopt the Wotton valuation for Acts 37--39 affecting Lots 56, 57, 73 and 109, so that their collective freehold value would be $64,000 in preference to the much higher value given by Dudakov and Brown.

434 If there were power to value the lots affected by Acts 50A, 50B and 50C, as I have found below, again I would adopt the values of Wotton in relation to Lots 82, 83 and 84 of $8000 each. Apart from my earlier comments about the witnesses, that would seem to be more in line with the Copland value of similar lots. The economic value of the non-exclusive native title rights is 80% of those values, namely in total $19,200.

CONSIDERATION: OTHER ISSUES

The "Just Terms" Constitutional Issues

435 I have addressed this issue above. In my view, the Applicant has not shown that the outcome of the proper application of the relevant provisions of the NTA involves an outcome inconsistent with s 51(xxxi) of the Constitution, assuming that all or any of the determination acts constituted an acquisition of proper within that constitutional provision.

Section 94 of the NTA

436 The Commonwealth raised the question of whether s 94 of the NTA, authorising the Court to make an order of the kind proposed by the Applicant.

437 It requires the Court to name each of the persons entitled under the NTA to the compensation to be awarded, or a method for determining the person or persons, and the method (if any) for determining the amount or kind of compensation to be given to each person, and a method for dispute resolution.

438 The Commonwealth accepts that the persons as defined in the proposed determination (Annexure A to these reasons) are those entitled to the compensation at the date of judgment, or that they are thereby capable of identification. It notes that a payment of the compensation to a prescribed body corporate (PBC) then would not require separate expression of the other

requirements, but that that could only be done with the consent of all those otherwise entitled to the compensation.

439 The Commonwealth has also given notice of a Constitutional Matter that the proposed compensation order (as presented by the Applicant) which provides for the s 94 elements (other than identifying the persons entitled to compensation) to be determined in accordance with the decision-making process of the proposed PBC may involve a Chapter III court delegating its judicial functions when it cannot do so.

440 The Territory made no submission on the topic. Neither the intervening States, Queensland or South Australia, sought to make submissions on the topic.

441 The present PBC for the Claim Group is Top End (Default PBC/CLA) Aboriginal Corporation for the purposes of s 57(2) of the NTA. The Applicant, by its proposed orders, intends that that PBC should receive the compensation and manage its application. It is a PBC under the management of nominees of the NLC.

442 In my view, the proposed order of the Applicant, in this regard, is an appropriate one and accords with s 94 of the NTA and is not unconstitutional.

443 Despite the terms of s 94(a) and (b), the entitlement to compensation is a communal or group entitlement: see eg s 223(1) and s 225(a). It is for the benefit of the native title holders, determined under s 51(1). Necessarily that is a communal or group entitlement of persons from time to time: see *Western Australia v Ward* (2000) 99 FCR 316 at [189]. That is reflected in decisions of this Court in *Moses v Western Australia* (2007) 160 FCR 48; *Northern Territory v Alyawarr* (2005) 145 FCR 442 and other decisions. It is also reflected in this judgment, particularly assessing the solatium component.

444 Section 94 must be construed in the context of the NFA as a whole. The view I have taken is also consistent with the way the NTA deals with PBCs more generally: see the discussion of that role in *Gumana v Northern Territory* (2005) 141 FCFR 457; *Far West Coast Native Title Claim v South Australia (No 6)* [2013] FCA 1270 at [80].

445 In any event, the prescription in s 94 does not, in my view, involve any delegation of the judicial power of the Commonwealth. It is an appropriate procedural requirement that the dispute resolution process be specified. It does not preclude the Court from exercising its oversight jurisdiction, to the extent it lies with this Court, or the High Court from exercising

its oversight jurisdiction in the event that administrative adjudicative procedures are not accepted.

The claim for mesne profits

446 This claim was based upon the proposition that the period between the several determination acts and the date of their validation, the Applicant is entitled to mesne profits by a form of analogy with the law of trespass.

447 I do not accept the premise. The VNTA deemed the acts to have always been valid. It is not shown that, by that process, the compensation provided for by the NTA is not on just terms, or that the just terms requirement in s 83 of the NTA are, in substance, different from the prescription in s 51(xxxi) of the Constitution.

448 I do not regard the observations of Drummond J in *Taylor on behalf of the Kalkadoon People v North Queensland Electricity Commission* (unreported, 18 October 1996) on an interlocutory injunction application as directing any alternative conclusion.

Invalid Future Acts

449 The Applicant claims compensation under the general law in respect of acts 50A, 50B and 50C, in respect of three 1,000 sq m residential lots on Fitzer road – lots 82, 83 and 84 respectively. Acts 50A-50C consist of various grants of freehold interest by the Territory in 1998 (or in the case of Act 50A, the initial grant of a Crown lease in 1998 and a later conversion to freehold in 2001). Lots 82, 83 and 84 were unimproved at the dates of the acts. However, in reliance on these acts, each of the lots had a residential dwelling built on it after grant.

450 It is agreed by the parties that each of these are invalid future acts under s 223 and s 24OA of the NTA. That is, each act purported to effectively extinguish native title from 1998 but did not have that effect. While Pt 2 Div 3 of the NTA provides specific rights to compensation for valid future acts, there are no provisions which expressly provide for compensation in respect of invalid acts. The Applicants say that the entitlement to compensation is governed by the general law and seek damages in lieu of an injunction on the basis that in principle, the Applicants could have sought an injunction to prohibit persons from taking action in reliance on the invalid future acts 50A-50C, in aid of the statutory right to negotiate in Pt 2, Div 3, subdiv P of the NTA or, in the alternative, damages for wrongful occupation and use of land. They submit that damages should be in the nature of mesne profits evidenced by market

rental or receipts for use of the land; or the value of the land (including improvements at the date of the relevant act); together with compensation for non-economic loss (*in globo*) and pre-judgment interest.

451 That is disputed by the Territory and the Commonwealth on the basis that the invalid acts were of no force and effect in relation to native title, and had no effect on the Applicants' native title. In any event, it is the position of the Territory that this Court does not have jurisdiction to determine that matter as the claim does not arise under the NTA pursuant to s 213(2) of the NTA and s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), contrary to submission of the Applicant. The proper assessment of any damages to be awarded for acts 50A-50C is also a matter of dispute.

452 The issue of jurisdiction of the Federal Court to determine whether compensation is payable under the NT Act for invalid future acts was first raised by the Territory in the *Compensation Judgment Part 1* in relation to the application by the Applicants, subsequently granted, for leave to amend the application to incorporate the claim for compensation over the invalid future acts.

453 As is recorded in the *Compensation Judgment Part 1* at [122]-[124], I was not persuaded that the Court has no jurisdiction to determine whether compensation is payable under the NTA for invalid future acts. However, a final ruling on jurisdiction was not then made, on the basis that the parties be given an opportunity to refine the factual context and then to make submissions on that point, noting that such a ruling may be informed by further facts material to this question. I have now had the benefit of further submissions.

454 This claim as now amended involves an action in the nature of damages for trespass for grants made and actions taken by the respondent over Lots 82, 83 and 84 that are invalid to the extent that they affect native title by virtue of ss 24AA(2) and 24OA of the NT Act. I am satisfied that the Court has jurisdiction to entertain that claim: s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), s 213(2) of the NT Act and see *Edwards v Santos Ltd* (2011) 242 CLR 421 at [41] and [45], and *LNC Industries Ltd v BMW (Australia Ltd)* (1983) 151 CLR 575 at 582-583.

455 Section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) gives this Court jurisdiction in any matter arising under any laws made by the Parliament, other than a matter in respect of which a

criminal prosecution is instituted or any other criminal matter. It is accepted that a matter arising under the NTA is a matter arising under a law made by the Parliament.

456 The principles governing the application of s 39B(1A)(c) are well established. A matter arises under a law made by Parliament if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement: see e.g. *Felton v Mulligan* (1971) 124 CLR 382 at 374, 388; and *LNC Industries Ltd v BMW (Aust) Ltd* (1983) 151 CLR 575 at 581.

457 Section 213(2) provides that the Federal Court has jurisdiction in relation to matters arising under the NTA. The Territory disputes that a claim for compensation under the general law in the nature of a claim for the tort of trespass to land, or for Lord Cairns' Act compensation in lieu of injunctive relief, is a matter "arising under" the NTA, noting that there are no provisions which expressly provide for compensation in respect of invalid acts. In support of that proposition, the following submissions are made.

458 Two contentions are put forward in support of that position. Firstly, the Territory submits that the issue in controversy is not whether the grants were invalid, and that it is not enough that the NTA must be construed in the course of the determination of the controversy for the purpose of determining whether the grants were invalid: see *Felton v Mulligan* (1971) 124 CLR 367 (*Felton*) at 391 per Windeyer J and at 374 per Barwick CJ. Secondly, it is submitted that the question of whether the grants were invalid is not a "matter" giving rise to some immediate right, duty or liability to be established by the determination of the court in pursuance of the NTA as the claim does not invoke any right conferred by the NTA or any law made by the Parliament nor does the Territory raise any defence to the claim that is either wholly or partly a matter arising under the NTA or any other law made by the Parliament: *Felton* per Menzies J and at 374 per Barwick CJ.

459 I do not accept the construction put forward by the Territory. A claim under the general law for damages in respect of an invalid future act necessarily requires as a starting point the establishment that the act is invalid. The validity or invalidity of the act, to the extent that it affects native title, is governed by the provisions of the NTA, most notably s 24OA which provides that 'Unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title' that is, 'if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.' That is consistent with s 10 of the RDA. The determination of such issues is a

question for this Court. That invalidity is agreed in the present circumstances that each of acts 50A-50C are invalid future acts is of no significance to the jurisdiction of the Court.

460 That is supported by the reference to s 213(2), which provides that the Federal Court has jurisdiction in relation to matters arising under the NTA, in the note to s 50(1) of the NTA added by the *Native Title Amendment Act* 1998 (Cth) which provides:

> (1) A determination of the compensation may only be made in accordance with this Division.
>
> Note: Such compensation is generally for acts that are validated or valid. Native title holders would ordinarily be entitled to compensation or damages for invalid acts under the general law. The Federal Court may be able to award such compensation or damages in proceedings in relation to the invalidity of the act: see subsection 231(2).

461 The Territory further contends that the valid acts were of no force and effect in relation to native title, and had no effect on the Applicants' native title under ss 24AA(2) and 24OA. I do not need to address that issue.

462 I have separately indicated the market value of the lots affected by acts 50A, 50B and 50C above.

ORDERS

463 In addition to the Draft Order (Annexure A to these reasons), which I will now make, on the basis of the findings there should be an order in terms of the Applicant's proposed order with the compensation assessed as follows:

(1) 80% of the freehold values of the relevant allotments based on the Copland valuations, namely 80% of $640,500.

(2) Simple interest on that market value from the date of respective acts to the date of this judgment calculated in accordance with Practice Note C16, with an agreed proxy to the extent required.

(3) Non-economic loss (solatium) of $1,300.00.

464 As I indicated earlier in these reasons, I am very grateful for the extensive, careful and helpful submissions of counsel and the support provided through their solicitors, and of course to the parties for the focus of the submissions. That has extended to the provision of a detailed table of calculations for the judgment, which were apparently prepared by SLM Corporate Pty Ltd, and which I annex to these reasons for judgment as Annexure B. They

show the interest calculation on the compensable acts to be $1,488,261, and on the invalid future acts to be $29,397.

465 Accordingly, the orders will be in the terms of the Draft Order.

466 In addition, the orders will direct the payment of compensation. 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 said act is:

(a) Economic value of the extinguished native title rights: $512,400;

(b) Interest on the said sum of $512,400 assessed in accordance with the reasons for judgment: $1,488,261;

(c) Allowance for solatium of $1,300,000;

Totalling $3,300,661.

467 It is necessary to address the requirements of s 94 of the NTA. For that purpose, there will be further orders made in the form proposed by the Applicant, directing payment to the Top End (Default PBC/CLA) Aboriginal Corporation.

468 There will be further declaratory orders addressing the invalid future acts.

I certify that the preceding four hundred and sixty-eight (468) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 24 August 2016

ANNEXURE A - DRAFT ORDER

No: NTD 18/2011

FEDERAL COURT OF AUSTRALIA
District Registry: Northern Territory
Division: General

ALLAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES
Applicant

NORTHERN TERRITORY OF AUSTRALIA
Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
Intervenor

DRAFT ORDER

JUDGE: Justice Mansfield

DATE OF ORDER: -

WHERE MADE: -

Note: In this Draft Order:

(1) "past act", "previous exclusive possession act" and "non-extinguishment principle" have the meaning given by the *Native Title Act 1993* (Cth) (the Act);

(2) "exclusive native title", "non-exclusive native title" and "native title holders" have the meaning given by the Interim Statement of Agreed Facts dated 2 May 2012 at [2], [3] and [4];

(3) the numbered acts referred to in these orders are the subject of the compensation claims in the Applicant's Amended Particulars dated 17 October 2012;

(4) the Applicant has withdrawn the claims for compensation made for acts 35, 42, 49A and 55.

THE COURT ORDERS THAT:

1. The native title holders are entitled to compensation, to be assessed, in relation to acts 1 to 34, 36, 40 to 41, 43 to 50, 51 to 54 and 56 to 59; and:

Grants that are category D past acts that impair native title

(1) each of acts 1, 3, 15, 17, 19, 21, 23, 25, 27, 29, 36 and 41 is a category D past act attributable to the Respondent to which the non-extinguishment principle applies that impaired non-exclusive native title at the time of the grant (or dedication in the case of act 41) the subject of the act, and for the duration of the granted (or dedicated) interest (subject to (2) below), and compensation is payable by the Respondent under s 20 of the Act:

(2) in the case of acts 3, 15, 17, 19, 21, 23, 25, 27 and 29, the non-exclusive native title in the land concerned that was impaired by those acts was later extinguished by acts 4, 16, 18, 20, 22, 24, 26, 28 and 30 respectively referred to at (3) and (4) below;

Grants that are previous exclusive possession acts that extinguish native title

(3) each of acts 2, 4 to 13, 31 to 33, 40, 45, 48, 49, 50 and 51 to 54 is a previous exclusive possession act attributable to the Respondent that extinguished non-exclusive native title at the time of the grant the subject of the act and compensation is payable by the Respondent under s 23J of the Act;

Works that are previous exclusive possession acts that extinguish native title

(4) each of acts 14, 16, 18, 20, 22, 24, 26, 28, 30, 43, 44, 46, 47, 56, 57 and 59 is a previous exclusive possession act attributable to the Respondent that extinguished non-exclusive native title at the time when establishment of the works the subject of the act began and compensation is payable by the Respondent under s 23J of the Act;

Works (act 58) that are a previous exclusive possession act that extinguishes native title if no earlier works

(5) subject to whether or not the land concerned (or any part) was covered by a previously established public work, act 58 is a previous exclusive possession act attributable to the Respondent that extinguished non-exclusive native title

at the time when establishment of the works the subject of the act began and compensation is payable by the Respondent under s 23J of the Act;

Grants in Part A.1 area (act 34) that are a previous exclusive possession act and extinguishment not to be disregarded in compensation application

(6) notwithstanding the approved determination of native title made on 28 August 2006, as varied on 22 November 2007 and 21 December 2007, that exclusive native title exists in relation to the land affected by act 34 (Lot 47) by virtue of the application of s 47B of the Act, for the purposes of the Compensation Application, act 34 is to be treated as a previous exclusive possession act attributable to the Respondent and as extinguishing non-exclusive native title at the time of the grant the subject of the act and compensation is payable by the Respondent under s 23J of the Act.

2. The Compensation Application is dismissed in relation to acts 37, 38 and 39.

Date that entry is stamped:

Deputy District Registrar

ANNEXURE B

Timber Creek Compensation Claim: Calculations for Judgement

Practice Note Interest Calculations on 80% of Mr Copland's unimproved land values (24/8/2016)

Act	Lot	Date of Act	Value	Practice Note Interest
1	16	29/07/1980	$56,000	$238,826
2	20	13/07/1983	$28,000	$104,609
3	21	16/04/1987	$22,400	$68,698
5	22	1/09/1992	$22,400	$47,930
6	23	13/12/1990	$21,600	$51,464
7	26	19/05/1986	$22,400	$72,929
8	27	30/07/1987	$20,800	$62,593
9	28	30/01/1989	$20,800	$57,361
10	29	12/05/1987	$19,200	$58,606
11	30	2/03/1989	$20,800	$57,053
12	31	22/05/1989	$20,800	$56,248
13	32	12/05/1987	$19,200	$58,606
19	36	24/03/1987	$3,600	$11,087
21	38	24/03/1987	$3,600	$11,087
23	39	24/03/1987	$3,600	$11,087
25	40	24/03/1987	$3,600	$11,087
27	41	24/03/1987	$3,600	$11,087
29	42	24/03/1987	$4,400	$13,551
31	43	18/05/1987	$3,600	$10,977
32	44	20/02/1992	$4,400	$9,692
33	46	20/02/1992	$4,400	$9,692
34	47	21/11/1986	$40,000	$125,962
36	52	6/11/1987	$6,800	$20,110
43	62	2/07/1980	$4,000	$17,104
44	63	2/07/1980	$8,000	$34,208
45	64	3/07/1992	$8,800	$18,981
48	75	8/04/1992	$42,400	$92,699
49	79	30/09/1993	$56,000	$113,864
50	81	26/03/1996	$6,000	$10,684
51	85	23/11/1995	$5,600	$10,190
52	86	23/11/1995	$5,600	$10,190
First Calculation			**$512,400**	**$1,488,261**
50A	82	17/09/1998	$6,400	$9,798
50B	83	16/09/1998	$6,400	$9,799
50C	84	16/09/1998	$6,400	$9,799
Second Calculation			**$19,200**	**$29,397**
Total			**$531,600**	**$1,517,658**