



WHITE PAPER

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Native Title Compensation in Australia—Time to Pay

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The High Court has confirmed that just terms compensation payable under the Act for extinguishment of native title non-exclusive rights should be divided into three components—economic loss, simple interest, and cultural loss. The amount awarded in this instance was \$2.53 million. Cultural loss was \$1.3 million of this amount.

The cultural loss award and the other compensation amounts will involve substantial compensation being paid by governments that undertook past acts which extinguished native title rights. The Federal, State, and Territory governments will now be required to deal with the numerous native title compensation claims from Aboriginal groups who have established in the Federal Court that they hold native title rights. Whether this case provides sufficient guidance for the governments to streamline the compensation claim process remains to be seen.

In addition, the key compensation elements from the case may be sought to be applied by parties negotiating indigenous land-use agreements for new projects or following the right to negotiate procedure under the Act for the grant of mining and petroleum tenements.

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Introduction

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Implications

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In addition, the key compensation elements from the case may be sought to be applied by parties negotiating indigenous land-use agreements for new projects or following the right to negotiate procedure under the Act for the grant of mining and petroleum tenements.

Background

The Act effective from 1 January 1994 contains provisions (i) recognizing and protecting Aboriginal native title rights and interests (native title) following the landmark *Mabo* case in which the High Court first recognized native title in Australia in June 1992, (ii) validating certain past acts of government and providing for just terms compensation for extinguishment and other impacts of those past acts and (iii) establishing a system

for native title claims and a system for regulating future acts of government that impact native title.

Under this regime, before compensation could be calculated, an Aboriginal group had to establish that it held native title in the Federal Court of Australia and that the past acts of government at the Federal, State, or Territory level extinguished or otherwise impacted its native title.

The Ngaliwurrurru and Nungali Peoples (the Claim Group) made native title claims in 1999 and 2000 in respect of areas within the township of Timber Creek in the Northern Territory. The claims were heard in the Federal Court. It was determined or agreed that the Claim Group held exclusive rights to land in some areas and non-exclusive rights in an area of 127 hectares (1.27 square kilometres).

The native title non-exclusive rights were extinguished by various past acts of the Northern Territory. This extinguishment gave rise to a compensation entitlement under the Act.

The Compensation Claim

The Claim Group applied for compensation under the Act for loss, diminution, impairment or other effect of certain acts that extinguished the Claim Group’s native title over lands in the area of the township of Timber Creek in the Northern Territory.

The native title held by the Claim Group in this area were non-exclusive perpetual rights to travel over land, hunt, fish and forage on the land, gather and use natural resources, access and use natural water, live on the land, camp and erect shelters, engage in cultural activities, conduct ceremonies, participate in cultural practices related to birth and death, maintain and protect sites of significance, and share or exchange subsistence for non-commercial purposes.

The acts of extinguishment were Northern Territory government acts, which included the grant of freehold title for housing, the grant of leases for various private and public purposes, the construction of public works, and other grants relevant to the township. The grants and public works were progressively undertaken by the Northern Territory from 1980 to 1996.

The Decision in Numbers

The trial judge awarded total compensation of \$3,300,661. The full Federal Court on appeal reduced the total compensation to \$2,899,446. The High Court on appeal reduced the total compensation to \$2,530,350.

There were three components—economic loss, interest, and non-economic loss called cultural loss.

The economic loss was determined based on 50 percent of the freehold land value, which was determined based on expert valuer evidence. Each party put forward valuation evidence from valuers that differed and the trial judge adopted the valuations he considered appropriate. The Claim Group claimed 100 percent freehold value for the extinguishment of the non-exclusive rights. The trial judge determined 85 percent of freehold value. The full Federal Court on appeal determined 65 percent. The High Court on appeal determined 50 percent. The total freehold values of all the lots separately valued were \$640,500. The 50 percent award was \$320,250.

Pre-judgment interest was awarded at simple interest from the date of extinguishment to the date of judgment. The Claim Group claimed compound interest. Interest was \$910,100.

The cultural value was determined based on a first time social judgement of a fair amount by the court. The amount awarded by the trial judge was \$1.3 million. The Claim Group claimed at least \$2 million. The Northern Territory proposed \$93,848 (as 10 percent of freehold value) and the Commonwealth proposed \$215,000 (based on \$5,000 per lot). The Northern Territory and the Commonwealth claimed on appeal that the amount awarded was manifestly excessive. The High Court considered that awarded amount was within an appropriate range.

Key Compensation Elements for Total Extinguishment

There was a joint judgment of five judges out of the seven sitting judges. A summary of the key compensation elements for compensation for extinguishment of native title from the joint judgment are set out in the Schedule attached.

Other Situations

The key compensation elements will assist in determining compensation for total extinguishment of native title. The Act also provides compensation for non-extinguishment cases (where native title is suppressed for the period of the government act) and for partial effects by government acts. Those elements may also provide some assistance in determining compensation in those situations. Where the government act such as a freehold grant to a government authority is perpetual or a mining or petroleum lease with substantial reserves will be in force for a very long period, the act may be treated as equivalent to a freehold.

Conclusions

This case is very significant in the history of native title law in Australia but not all compensation issues have been resolved.

The case has implications for the Federal, State and Territory governments who have compensation liability in determining how they will deal with the numerous native title compensation claims to be made going forward.

One particular issue is whether the governments will have sufficient guidance from this case to streamline the native title compensation claims determination process or whether they consider that the many different factual circumstances of Aboriginal groups will prevent this course being followed.

Another open issue is whether parties will seek to use the case to negotiate indigenous land use agreements for new projects where the extinguishment of native title or its suppression for a long period is part of the agreed terms.

SCHEDULE

The following is a summary of the key compensation elements for extinguishment of native title as found by the High Court of Australia in March 2019.

Compensation Entitlement

1. Compensation is payable to a native title holder in relation to an act which extinguishes native title by the Commonwealth, State, or Territory that undertook that act (Part 2, the Act).
2. The compensation is just terms for loss, diminution, impairment or other effect of the act on the native title rights and interests (s51(1) Act). The compensation is to be assessed as at the date of the act (when extinguishment occurred). This section recognizes the existence of two aspects of native title — the physical or material aspect (the right to do something in relation to the land) and the cultural or spiritual aspect (the connection with the land) and that the manner in which each aspect may be affected by an act may be different. A bifurcated approach is required — determining the economic value of the native title rights extinguished and then estimating the additional cultural loss occasioned by the consequent diminution in the Claim Group's connection to country.
3. The total compensation payable for an act that extinguishes all native title in relation to any particular land or water 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 (s51A) Act), subject to this outcome achieving just terms compensation.
4. Where the act is not a compulsory acquisition, the court may have regard to any principles or criteria set out in the compulsory acquisition law of the Commonwealth, State, or Territory to which the act is attributable (s51(4) Act) — in this instance, the Lands Acquisition Act of the Northern Territory. The Lands Acquisition Act provides for compensation to be paid for economic and non-economic loss including special value to owner, disturbance, and solatium. In the case of native title, the non-economic loss is best described as cultural loss arising from the extinguishment of native title.
5. The effect of the above provisions is that the compensation is to be measured by reference to, and capped at, the freehold value of the land together with compensation for cultural loss.
6. Full exclusive native title rights in relation to land that include controlling access to the land is to be equated to freehold land.

Economic Value

7. The economic value of native title rights should be determined by application of conventional economic principles and tools of analysis and in particular by application of the test of value described in *Spencer v The Commonwealth* adapted as necessary to accommodate the unique character of native title rights and the statutory context. The *Spencer* test is the value that a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor. Also, the valuation of native title rights should be based on their highest and best use and the inalienability of native title is irrelevant to the assessment of value. Each lot of land is to be valued.
8. Where the native title rights involve non-exclusive rights, an evaluative judgment is required to be made of the percentage reduction from full exclusive native title rights that properly represent the comparative limitations of the Claim Group's rights relative to full exclusive native title. The economic value of the rights is then derived by the application of that percentage reduction to full freehold value as proxy for the economic value of full exclusive native title rights.

9. Where the native title rights are essentially usufructuary, ceremonial, and non-exclusive without power to prevent other persons entering or using the land or to confer permission on other persons to enter and use the land, without right to grant co-existing rights and interests in the land and without right to exploit the land for commercial purposes, the reduction from full exclusive native title and full freehold value should be 50 percent.

Pre-Judgment Interest on Economic Loss Compensation

10. The Act does not provide expressly for interest to be payable from the date of the act extinguishing native title but interest should be awarded on the economic value in order to reflect the time between the date when the entitlement to compensation arose and the date of judgment.
11. The interest should be simple interest at the Pre-Judgment Interest Rate fixed by the Federal Court of Australia Practice Note CM16 (except that it may be possible, without deciding, to award compound interest where evidence establishes that upon earlier payment of the compensation the Claim Group would have put the money to work at profit or the money would have been used to defray costs of doing business).
12. The interest is not part of the total compensation payable under the Act and therefore does not fall within the cap.

Value of Cultural Loss

13. The non-economic effect of the acts that extinguished native title is the loss of connection with the land based on the traditional laws and customs acknowledged and observed by the Claim Group. It should not be described as solatium.
14. The loss is to be quantified on an *in globo* basis to the Claim Group with the apportionment or distribution of the compensation as between members being an intramural matter. The number of native title holders is not relevant.
15. The compensation for cultural loss is assessed as at the date of the court judgment.
16. The assessment is a complex exercise and involves first identifying the nature and extent of the Claim Group's connection to the land by their laws and customs and second identifying the effect of the acts which extinguished native title on that connection and then translating the spiritual hurt and sense of loss caused by the acts into a compensation amount. A lot by lot approach is not appropriate with all land looked at as one indissoluble whole given the spiritual and metaphysical relationship to country and the pervasiveness of "Dreaming" across the entire area.
17. The loss is made out where there are trial judge findings that the connection to country of the Claim Group was unique, deep, and broad and that the loss of that connection and interference to the spiritual integrity of the landscape caused emotional, gut-wrenching pain and deep emotions and anxiety based on lay evidence and expert evidence.
18. Payments agreed by the Claim Group in commercial contracts for damage to, or destruction of, sacred sites and other matters were not considered to be material to the assessment.
19. The level of compensation is not a matter of science or of mathematical calculation. What is required is a monetary figure arrived at as the result of a social judgment made by the trial judge of what in the Australian community is an appropriate, fair or just award without restraint or limitation. Compensation will be determined on a case by case basis in view of the different factual circumstances applying to each Aboriginal group.
20. A compensation award of \$1.3 million for cultural loss as described above was consistent with acceptable community standards.

Lawyer Contacts

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