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## Native Title Anthropology after the Timber Creek Decision

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For over two decades, anthropologists have played a crucial role assisting the court to determine Aboriginal and Torres Strait Islander peoples' traditional property rights under the *Native Title Act 1993* (Cth). Until now, these efforts have been directed almost exclusively at evidencing survival: the survival of families and societies, traditional laws and customs, and their connections to country. Consequently, anthropological research for native title claims for the most part tends to be a very positive enterprise, involving the discovery, organisation and analysis of facts and relationships that demonstrate how Aboriginal and Torres Strait Islanders peoples have responded to and endured the colonisation of their traditional territories.

The recent native title compensation decision, *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (**Timber Creek**), marks the beginning of a significant discursive shift for native title anthropology. For in order to pursue compensation for the extinguishment of their rights, traditional owners and anthropologists alike must now turn their minds to the shadow side of survival: loss. And if the Timber Creek case is anything to go by, it seems likely that compensation claims are going to be just as intellectually and emotionally demanding for everyone involved as the native title claims that preceded them.

Timber Creek is the court's first litigated award of compensation for the loss or impairment of native title rights. The decision awarded Ngaliwurru and Nungali native title holders over \$3.3 million compensation for the extinguishment of their non-exclusive rights and interests over an area of approximately 79 hectares<sup>1</sup> in and around the town of Timber Creek, some 600 kilometres south of Darwin. Just over one-third of this amount (\$1.3 million) took the form of a solatium payment, that is, compensation for hurt arising from damage caused.

Valuing the solatium — in other words, attaching a price to the pain and anxiety caused by the extinguishment of native title rights — proved a difficult task for Justice Mansfield, who was frank about the extent to which he relied on intuition to work through the complexity [233]. The decision is under appeal,<sup>2</sup> which may well result in greater clarity about the method for determining the solatium and the evidence required to support it.

The Timber Creek decision is worth reviewing for the guidance it provides on evidentiary requirements of native title compensation claims and the value of engaging anthropologists to assist. The testimony of anthropological experts was persuasive in this case, and it is clear from the decision that their value lies in their ability to articulate not only connections to country, but also the qualities and consequences of the social impacts that accompany the *loss* of connections to country [291].

When determining the solatium, His Honour gave especial regard to the 'spiritual cultural and material significance of traditional country' to native title holders as it was substantiated by the evidence [368], taking the following factors into account:

- the nature of the native title interest affected, including the spiritual component
- the length of time of native title holder's connection to country
- the distress and anxiety caused by the loss of part of country 'manifested by deep or primary emotions of hurt, shame and worry'

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<sup>1</sup> Estimated area based on an assessment undertaken by the National Native Title Tribunal's Geospatial Unit over the lots listed in Annexure B of the judgement over which compensation is payable covers.

<sup>2</sup> On 15 September 2016 the Northern Territory lodged an appeal of *Griffiths SJ*. They are seeking clarity in relation to aspects of the decision, including the valuation of non-economic loss.

- the period of time people had been dispossessed of their country
- the period of time people would have maintained their connection, had they not been dispossessed, that is, in perpetuity
- the special value of the land to the community, above and beyond its market value.

Justice Mansfield makes it clear that the task required of him was not attaching a price to the 'special' spiritual value of the land, but compensating native title holders for the pain and suffering caused by the loss of that value [292]. Moreover, the question of *how much* compensation should be paid requires consideration of different dimensions of social effect, namely 'loss of amenities', 'pain and suffering' and 'reputational damage'. When considering these facts, His Honour determined, 'evidence about the relationship with country and the effects of acts on that will be paramount' [318].

The anthropological evidence tendered for the Timber Creek case was relatively extensive. An Expert Anthropologists Report co-authored by Dr Kingsley Palmer and Ms Wendy Asche (who also both prepared the expert report for the Ngaliwurru and Nungali peoples' native title proceedings, *Griffiths v Northern Territory of Australia* (2006) 165 FCR 300) was tendered by the Applicants. Palmer and Asche documented many of the sites around Timber Creek, and their evidence focussed on establishing the interconnectedness of multiple sites to each other as well as to the Ngaliwurru and Nungali peoples themselves. 'Sites should be understood', they argued, 'as "meta-place"...a reference to a place that is also a reference to a whole range of spirituality and associated imperatives that inform social exchanges, cultural activities and determined priorities' [336]. Most significantly, their analysis went beyond the usual articulation of the cultural obligations to protect country, to consider in detail the profound and sometimes fatal consequences that are considered to accompany a failure to meet these responsibilities.

Anthropologist Professor Basil Sansom also gave evidence, appearing on behalf of the Northern Territory government. Sansom's research and analysis of the emotional impacts of dispossession through extinguishments was relied upon by Justice Mansfield, together with the evidence of Palmer and Asche, to help interpret the testimony of the Ngaliwurru and Nungali witnesses. The testimony of the native title holders, which His Honour found to be 'strong and compelling'<sup>3</sup> [348], was appropriately privileged above the testimony of expert anthropologists. Nevertheless, Justice Mansfield found 'the depth of the relationship between self and country is supported and informed by the anthropological evidence' [355].

The Timber Creek decision provides guidance on approaching the task of conceptualising and describing the social impacts associated with the diminution or extinguishment of rights in country. It clarifies that the impacts of loss are to be understood as cumulative and incremental [324], intergenerational, and extending to the cultural landscape in its entirety [319]. As such, the time-frame for assessing the consequences of multiple extinguishing acts should be, from the time of the first act until the time of the last, with consideration given to how impacts accrue and ultimately affect the ability of native title holders to reproduce their cultural practices and identities through time and across space.

Justice Mansfield recognises that physical impacts on precise areas resonate across the landscape to impair native title rights and interest more generally [378]. 'Those impacts', says His Honour, 'don't exist in a vacuum' [319]. Drawing on the work of Palmer and Asche, His Honour emphasised that 'one cannot understand hurt feelings in relation to a boxed quarter acre block...the effects of acts have to be understood in terms of the pervasiveness of the Dreaming' [325]. Rather, His Honour's decision upholds the need to recognise the inherent interrelatedness of multiple sites in a single cultural landscape, and the extent to which feelings of hurt and anxiety are not constrained by legal tenure.

The Timber Creek decision also signposts that expert anthropologists working on native title

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<sup>3</sup> Gender-restricted evidence was also tendered during the proceedings.

compensation cases would do well to focus more on individuals rather than societies, and specifically the impact of loss of a relationship with country on a person's sense of self in relation to others. Testimony about embodied emotions such as anxiety, grief, hurt and 'gut wrenching pain' [350] was given weight and was influential in Justice Mansfield's consideration of the solatium. There is a substantial body of ethnographic literature that anthropologists might draw on to help articulate the embodied nature of the relationship between Aboriginal people and country.<sup>4</sup> In addition, the emerging international literature on indigenous health and wellbeing and intergenerational trauma may also yield concepts, language and other research that will aid in the task of assessing some of the deeper cumulative consequences of loss of connection to country.<sup>5</sup>

The hurt caused by the loss of cultural reputation among members of the surrounding jural public of traditional owners, 'the sense of failed responsibility for the obligation...to have cared for... that land' [381], is an element of loss that the Timber Creek case suggests is compensable. As such, the consequences of damage to cultural reputation and social identity will be an important and relevant focus for future anthropological research. Arguably the loss of reputation among the broader Australian public should also be considered, given that maintaining a connection to country is essential to claims of Indigeneity and that losing the ability to call oneself a traditional owner may be a profound blow to an Indigenous person's sense of self in relation to the rest of the world. Timber Creek opens the door to consideration of the need for 'just terms' for native title compensation to include how much it will cost a group to maintain their reputation and identity in the face of loss.<sup>6</sup>

Finally, it is worth noting Justice Mansfield's consideration of the Expert Economist's Report by economic anthropologist, Professor Jon Altman. Altman's evidence was deemed by His Honour to be important and consistent with other anthropological evidence, but he chose not to rely on it in relation to determining the appropriate amount to be awarded as solatium [366]. As His Honour explained,

As both an economist and an anthropologist, [Professor Altman] 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...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 [367].

The future work of native title anthropologists in the compensation space is unlikely to be limited to the task of evidencing the social impacts of loss. With the decision about the distribution of compensation payments being left in the hands of Registered Native Title Bodies Corporate, and with the capacity

<sup>4</sup> The anthropological literature alone is extensive. The following offer a useful introduction: LR Hiatt (ed), *Aboriginal Landowners: Contemporary issues in the determination of traditional Aboriginal land ownership*, University of Sydney, Sydney, 1984; I Keen, 'Ancestors, Magic, and Exchange in Yolngu Doctrines: Extensions of the Person in Time and Space', *The Journal of the Royal Anthropological Institute*, vol. 12, no. 3, pp. 515–30, 2006; F Merlan, *Caging the Rainbow: Places, Politics, and Aborigines in a North Australian Town*, University of Hawai'i, Honolulu, 1998; F Myers, *Pintupi Country, Pintupi Self: Sentiment, Place and Politics among Western Desert Aborigines*, University of California Press, Berkeley, 1986; B Sansom, 'A Frightened Hunting Ground: Epic Emotions and Landholding in the Western Reaches of Australia's Top End', *Oceania* vol. 72, no. 3, pp.156–94, 2002.

<sup>5</sup> For example: J Atkinson, *Trauma trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia*, Spinifex Press, North Melbourne, 2002; Jonathan Kingsley et al, 'Developing an Exploratory Framework Linking Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing', *Int. J. Environ. Res. Public Health*, vol. 10, no. (2), pp. 678–98, 2013; N Argenti & K Schramm (eds), *Remembering Violence: Anthropological Perspectives on Intergenerational Transmission*, Berghahn Books, New York, 2010. See also: L Connor et al, 'Environmental Change and Human Health in Upper Hunter Communities of New South Wales, Australia', *EcoHealth*, vol. 1, su. 2, pp. 47–8, 2004, and other related publications for a useful discussion of theory and method informing an ongoing anthropological study of environmental change and human distress.

<sup>6</sup> D Smith, *Valuing native title: Aboriginal, statutory and policy discourses about compensation*, Centre for Aboriginal Economic Policy Research (CAEPR), Canberra, 2001, p. 38.

of many of these organisations to manage disputes already strained as a result of lack of capacity and under-resourcing, it is possible that anthropologists will also be called upon to assist with the difficult task of determining the distribution of compensation monies. Such 'post-compensation' issues may prove to be among the most difficult and conflicted that anthropologists and traditional owners have had to face.

Many of the conceptual challenges of native title compensation claims alluded to above were foreshadowed by anthropologist Diane Smith some 15 years ago, and Smith's work on Aboriginal regimes of compensation is worth revisiting in light of the Timber Creek decision.<sup>7</sup> Smith draws our attention to the fact that Aboriginal and Torres Strait Islander people have their *own* compensation regimes for managing instances of trespass, intrusion and cultural transgression on country. Smith's work brings to the fore that in Aboriginal world views, compensation is a *process* not a payment, thus emphasising the need to heal the underlying relationships between the perpetrators of acts of extinguishment (as understood in terms of trespass, intrusion and transgression), and those who have suffered the consequences. The *form* that compensation takes and its ability to heal and conciliate, therefore, are aspects of native title compensation worthy of further consideration. Money alone may not be what native title holders want or need to achieve a sense of redress for the loss of their rights.<sup>8</sup>

The process of pursuing a native title compensation claim itself may have unforeseen consequences for native title holders, and not all of them positive. Although the social impacts of compensation litigation are not something that the Court is in a position to consider, the experience will not be a neutral one for those involved. A senior solicitor who prepared evidence for the Gibson Desert compensation case described the experience as, 'very tough...I would not wish a fully blown compensation case on any group'.<sup>9</sup> Part of the difficulty, she suggested, was that in the process of proofing witnesses, many traditional owners realised for the first time the true extent of their legal dispossession over areas they still very much considered their own. It was as if the country was disappearing before their very eyes.

This viewpoint helps underscore the extent to which the anxiety and pain caused by ongoing loss of country is not a historical or legal abstraction for traditional owners, but a never-ending, cumulative experience that undermines their ability to reproduce their traditions and therefore themselves in very fundamental ways.<sup>10</sup> Traditional owners already weary from the drawn out process of getting their rights recognised in the first place may well find this next phase of their native title journey just as demanding on themselves and their communities.

One way to avoid the risk of further trauma may be to brief expert anthropologists to pre-emptively address issues of loss as well as continuity in connection reports for native title claims. This would remove or at least reduce the need for further evidence to be taken for compensation claims at a later date, but would require careful attention to how narratives of loss potentially influence perceptions of survival. It would also require analysis of underlying tenure to have been conducted so that the research efforts are targeted at only those areas where compensation for extinguishment is claimable.

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<sup>7</sup> D Smith, *Valuing native title: Aboriginal, statutory and policy discourses about compensation*, CAEPR, Canberra, 2001. See pages 9–15 for a discussion of issues such as the need to identify the social boundaries of impacts, the intergenerational nature of impacts and the idea of impacts on country as moments of transformation, loss and sometimes death.

<sup>8</sup> D Smith, *Valuing native title: Aboriginal, statutory and policy discourses about compensation*, CAEPR, Canberra, 2001, p. 9, 32.

<sup>9</sup> This compensation claim over areas of the Gibson Desert Nature Reserve was discontinued by the compensation claim group following the discovery of a number of historical petroleum exploration licences that extinguish native title access rights in some areas, significantly changing the nature of the State's compensation liability. On-country evidence from Aboriginal witnesses and expert anthropologists had already been heard. See: Central Desert Native Title Services, 'Gibson Desert', webpage, viewed 19 January 2017, <<http://www.centraldesert.org.au/native-title-item/gibson-desert/>>.

<sup>10</sup> B Scambray & G Lewis, 'Sacred bodies and ore bodies: conflicting commodification of landscape by Indigenous peoples and miners in Australia's Northern Territory', in PF McGrath (ed), *The right to protect sites: Indigenous heritage management in the era of native title*, AIATSIS Research Publications, Canberra, 2016, p. 224.

There is a very real risk that revisiting the trauma associated with loss of country in order to produce the evidence necessary to compensate it may lead to further trauma. This risk is something everyone involved in native title compensation claims should be attentive to as they pursue their various agendas in what will no doubt prove to be a highly contentious arena of social action. Anthropologists have a crucial role to play in native title compensation matters, not only providing advice to the court in relation to evidence, but also just as importantly assisting Aboriginal and Torres Strait Islander peoples in the difficult task of navigating this new and highly complex legal terrain.

## Abstract

In August 2016, the traditional owners of Timber Creek in the Northern Territory, the Ngaliwurru and Nungali peoples, were awarded over \$3.3 million for the loss of their native title rights. \$1.3 million of this award was a solatium payment, that is, compensation for hurt arising from damage caused by the loss of connection to the land. *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (**Timber Creek**), which was heard by Justice John Mansfield, is the courts first litigated award of compensation for the loss or impairment of native title rights. In making his decision, Justice Mansfield relied on the evidence of anthropologists when assessing not only connections to country, but also the qualities and consequences of the social impacts that accompany the loss of connections to country. This paper considers the implications of the Timber Creek decision for the work of native title anthropologists and highlights some of the conceptual and methodological shifts required for research on native title compensation claims. The author draws attention to the demanding nature of native title compensation cases and the potential for research to aggravate existing trauma associated with loss of country, arguing for the need for all involved to be attentive to this risk when pursuing future claims.

## About the author

Dr Pamela McGrath is a Research Director at the National Native Title Tribunal and Emeritus President of the Australian Anthropological Society. Pamela has been involved with native title research and policy analysis for over fifteen years. Her most recent research projects have focused on the social impacts of native title, Indigenous cultural heritage regulation, and the management and return of native title information.

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