



# Native title compensation

## AWARDED TO TIMBER CREEK CLAIMANTS IN FIRST JUDGEMENT OF ITS KIND

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**I**N AUGUST, JUSTICE MANSFIELD OF the Federal Court ordered that the Northern Territory Government pay just over \$3.3 million in compensation to the Ngaliwurru and Nungali peoples for the extinguishment of their non-exclusive native title rights and interests in areas of the Timber Creek township. That figure includes \$512,400 for the economic value of the extinguished rights, \$1,488,261 in interest on that amount and \$1.3 million for the non-economic, or intangible, losses suffered by the group.

Timber Creek is located 600km south-west of Darwin, parts of which form part of the Ngaliwurru and Nungali peoples' native title determination area. The compensation application lodged in 2011 is the latest case in a long

history of native title litigation for the group, which formally commenced in 1999.

Justice Mansfield handed down a judgement in March 2014 that established the compensation liability of the Territory and identified the compensable acts, from those extinguishing acts that occurred after the commencement of the *Racial Discrimination Act 1975* (Cth). Those acts include the declaration of reserves, the construction of public works and Crown to Crown grants over approximately 23 square kilometres of land in Timber Creek and its surrounds.

The decision handed down in August sets out, for the first time in Australia, a methodology for calculating the quantum of native title compensation. The only other award

of native title compensation was made by consent to the Nguraritja people, who received payment from the South Australian Government for the extinguishment of their native title rights and interests over parts of the De Rose Hill pastoral station. The determination was confidential and left the sector none the wiser as to the quantum of compensation.

Section 51A of the *Native Title Act 1993* (Cth) limits the compensation amount to the equivalent that would be payable for a compulsory acquisition of freehold title (the equivalent of full ownership of the land), where that figure provides compensation on 'just terms' as required by s 53 of the *Native Title Act* and s 51(xxxi) of the Australian Constitution. In determining that exclusive possession native title rights are equal in value to freehold,

Justice Mansfield considered the appropriate legal test to be the value to the Territory of acquiring the native title rights in order to enjoy unrestricted title to the land.<sup>1</sup> His Honour equated non-exclusive native title rights to 80 per cent of the freehold value of the land at the time of the extinguishment,<sup>2</sup> noting that this figure was not arrived at 'as a matter of careful calculation,' but was instead an 'intuitive decision' with a focus on the 'entitlement to just compensation.'<sup>3</sup>

Justice Mansfield took the valuation of the land at the time the extinguishing acts occurred, due to their validation by the *Validation (Native Title) Act 1994* (NT), enacted to validate those acts that were invalid by virtue of native title. Justice Mansfield preferred the valuations of the Commonwealth's expert, which fell in between the valuations of the expert engaged by the Territory and those of the experts engaged on behalf of the claim group.

The parties agreed that interest should be paid 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. The issue of contention between the parties was whether the interest should be calculated at a simple or compounded rate. Justice Mansfield noted that there was nothing in the *Native Title Act* or case law that precluded an award of compound interest, and that the appropriate model will depend on the circumstances of each case.<sup>4</sup> His Honour considered that an award at a compounded rate would be appropriate where the Court is satisfied that the group would have applied the funds as capital in a business or trade that would have been successful to a significant degree.<sup>5</sup>

Despite common law and Federal Court practice favouring an award

on a simple interest basis, the argument was put on behalf of the claimants that the principles of equity law necessitated an award of compound interest. In coming to his decision on this point, Justice Mansfield considered contemporary evidence of the economic activities and decisions of the claim group to infer what actions it would have taken with the funds if they had been received at the time of extinguishment in the 1980s and 90s. His Honour concluded that the group's current commercial management revealed that funds are generally distributed to individuals and families upon receipt, with little suggestion that they invested those funds or that those funds were available or proposed to be used for such purposes.<sup>6</sup> Interest was awarded at a simple rate, as the Court was not of the mind that the claimants would have invested the funds to accumulate interest or undertaken profitable commercial activity.<sup>7</sup>

The parties accepted that the land acquisition legislation in the Northern Territory, supported by the *Native Title Act*, permits a further payment to compensate the claim group for the non-economic or intangible losses as a result of the disruption to their spiritual relationship to the land. The Court heard from the claimants that the loss and damage to country caused 'emotional, gut-wrenching pain'<sup>8</sup> and that there was a 'feeling of pain when sites were not protected'.<sup>9</sup> Chris Griffiths translated the feeling described by his father, Alan Griffiths, at one of the damaged sacred sites as 'a bad stomach feeling' and said that '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.'<sup>10</sup>

Justice Mansfield acknowledged that the relationship of the Ngaliwurru and Nungali peoples

to their country is a spiritual and metaphysical one which is not confined, and not capable of assessment, on an individual allotment basis.<sup>11</sup> His Honour agreed that the interconnectedness of the relationship with land meant that damage to sites had implications beyond the area immediately affected.<sup>12</sup> The group were also to be compensated for the effect of diminishing the area upon which native title rights and interests can be exercised, and the sense of responsibility felt for failing to fulfil their obligation to protect country.<sup>13</sup> His Honour also took account of evidence that the group's connection to country had 'not been wholly lost,'<sup>14</sup> though acknowledged that the effect of the acts had not dissipated over time and will continue into the future. Allowance was made in the assessment of compensation to account for this.<sup>15</sup>

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Justice Mansfield commented on the methodology he arrived at in making the decision, stating that 'the selection of an appropriate level of compensation is not a matter of science or of mathematical calculation,'<sup>16</sup> and requires consideration of the effects of the extinguishment on the particular claim group.<sup>17</sup>

The August *Griffiths* judgement is the first of its kind and has significant implications for the native title sector, including native title holders and claimants,



governments and resource proponents. The need for certainty around the principles meant that an appeal was anticipated. The Northern Territory Attorney General, Natasha Fyles, said it was important to get the decision right: 'This appeal was lodged so that there can be more certainty around valuing non-economic loss which will in turn provide guidance and assistance to those negotiating the settlement of other native title claims.'<sup>18</sup> CEO of the Northern Land Council, Joe Morrison responded to the appeal saying: 'We were always of the mind that the case was going to go to the High Court and we're not surprised by the appeal itself...I think it's in the benefit of Aboriginal people to have that aspect clarified going forward.'<sup>19</sup>

The full bench of the Federal Court will hear the appeal on the quantum methodology and the interest component of the award in February 2017. The final compensation figure will be paid to the Top End Default PBC on behalf of the claimants.



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- 1 *Griffiths v Northern Territory of Australia* [No 3] [2016] FCA 900, 232.
- 2 *Ibid* [233].
- 3 *Ibid*.
- 4 *Ibid* [252].
- 5 *Ibid* [253].
- 6 *Ibid* [275].
- 7 *Ibid* [277].
- 8 *Ibid* [375].
- 9 *Ibid* [353].
- 10 *Ibid* [350].
- 11 *Ibid* [375].
- 12 *Ibid* [379].
- 13 *Ibid* [381].
- 14 *Ibid* [364].
- 15 *Ibid*.
- 16 *Ibid* [383].
- 17 *Ibid* [318].
- 18 Helen Davidson, 'Northern Territory appeals \$3m Timber Creek native title payout', *ABC News* (online), 19 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/19/northern-territory-appeals-3m-timber-creek-native-title-payout>>.
- 19 Avani Dias, 'Historic \$3.3m native title compensation stalls as NT Government launches appeal', *ABC News* (online), 15 September 2016 <<http://www.abc.net.au/news/2016-09-15/native-title-compensation-stalls-as-nt-govt-appeals/7846678>>.