IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D1 of 2018	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D2 of 2018	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D3 of 2018
BETWEEN: NORTHERN TERRITORY OF AUSTRALIA Appellant	BETWEEN: COMMONWEALTH OF AUSTRALIA Appellant	BETWEEN: ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant
and	and	and
ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	NORTHERN TERRITORY OF AUSTRALIA First Respondent
COMMONWEALTH OF AUSTRALIA Second Respondent	NORTHERN TERRITORY OF AUSTRALIA Second Respondent	COMMONWEALTH OF AUSTRALIA Second Respondent
ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervener	ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervener	ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervener
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervener	ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervener	ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervener
ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervener	ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervener	ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervener
CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervener	CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervener	CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervener
YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervener	YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervener	YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervener

ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (SECOND INTERVENER)

Second Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland
Form 27c

Dated: 20 April 2018
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ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (SECOND INTERVENER)

PART I: Internet publication

1. This submission is in a form suitable for publication on the internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('**Queensland**') intervened in the proceeding at first instance in relation to a matter arising under the Constitution or involving its interpretation pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth). While that matter is no longer live between the principal parties, Queensland is a party to these appeals pursuant to s 78A(3).

3. Whether an intervener who becomes a party pursuant to s 78A(3) is entitled to make submissions on issues other than the constitutional matter which founded its intervention is unclear.[1] To avoid any controversy on that question, Queensland applies on the grounds set out in part III below for leave to make the submissions on non-constitutional issues set out in paragraphs 25-93 below.

4. It is submitted that leave is not required in respect of the submissions made in paragraphs 17-24 below because an intervener who is a party pursuant to s 78A(3) would still be entitled to make submissions such as those, even in the absence of a fresh s 78B notice. But if that is not accepted, leave is also sought in respect of those submissions.

PART III: Reasons why leave to intervene should be granted

5. The Court's power to permit interveners and amici curiae to be heard is a wide one.[2]

6. The issues in these appeals are being considered and determined for the first time in Australia's legal history. Large issues of law, principle and policy are at stake and the Court's judgment and reasons will to a large degree affect all future native title compensation applications,[3] and thus will have significant effects on all Australian bodies politic.

7. The *Native Title Act 1993* (Cth) (***NT Act***) was enacted in 1993. It has taken until 2018 for the issues in these appeals to reach this Court. It may be another lengthy period before the Court has occasion to consider them again. As thorough a resolution as possible of the issues that are properly raised in the appeals will best aid the expeditious

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1 *Cheesman v Waters* (1997) 148 ALR 21, 26-27 (Hill, Heerey and Sundberg JJ); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 557-559 [28]-[33] (Kirby J), 567-568 [63]-[68] (Hayne JJ, Gleeson CJ agreeing).

2 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 557-8 [29] (Kirby J).

3 *Levy v Victoria* (1997) 189 CLR 579, 603 (Brennan CJ), 651-2 (Kirby J in dissent).

and effective settlement and, where necessary, litigation of compensation claims. It is submitted that those circumstances also favour a grant of leave.

8. The State of Queensland has a significant interest in the outcome of these appeals. Existing native title determinations and pending determination applications in the State are summarised as follows:

	Number	Area	Proportion of total State area
Determinations	134	486,250 km^2	27.4 percent
Pending applications	60	569,570 km^2	32.1 percent
Total	194	1,055,820 km^2	59.5 percent

9. Three native title compensation applications are pending in relation to acts attributable to the State and more are foreshadowed. It is not possible reliably to estimate the State's ultimate financial liability for compensation for the extinguishment or impairment of native title, but in light of the compensation ordered in the proceedings below, it is likely to be significant.

10. The submissions which Queensland seeks leave to make would concentrate on the issue raised in ground 2 of the claim group's notice of appeal, namely the applicable compensatory interest payable from the time of the loss or impairment of their native title rights and interests to the date of the eventual award of compensation (***pre-judgment interest***).

11. Substantial periods of time will have passed between (a) the doing of extinguishing or impairing acts between 31 October 1975 and 1 January 1994 (in relation to past acts) or 23 December 1996 (in relation to intermediate period acts), and (b) future dates on which compensation applications are being decided. In those circumstances, whether pre-judgment interest is payable on a simple or compound basis will have very large financial implications for the State.

12. Queensland seeks to supplement the submissions of the Northern Territory and Commonwealth on the pre-judgment interest point, and to adopt their submissions in other respects.

13. Queensland supports the applications for leave similarly made by the Attorneys-General for the States of South Australia and Western Australia.

PART IV: Statutory provisions

14. The statutory provisions are set out in the reasons of the Court below.[4]

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4 *Northern Territory v Griffiths* (2017) 346 ALR 247, 258-9 [26]-[27], 261-3 [34]-[39]; [2017] FCAFC 106, [26]-[27], [34]-[39]; Core Appeal Book (***CAB***) 177-8 and 280-2.

PART V: Submissions

Summary

15. Queensland submits that questions about the interaction between ss 51A and 53 of the NT Act need not and ought not to be decided in these appeals (paragraphs 17-22 below).

16. Subject to leave being granted, Queensland's submissions on the three main issues in the appeals are as follows:

    a. Economic loss: Queensland supports the submissions of the Northern Territory and (to the extent of their consistency with the Territory's submissions) of the Commonwealth;

    b. Interest:

        i. while the Federal Court had power under s 51(1) of the NT Act to award interest on a simple or compound basis, on a proper construction of s 51, there was no feature of the present case which permitted or required interest to be awarded on a compound basis; and

        ii. (if this Court decides the issue raised by the Commonwealth as to whether interest should be awarded *on* compensation, not as *part of* it) Queensland supports the submissions of the Northern Territory that interest is awarded as part of compensation; and

    c. Non-economic loss (solatium): Queensland supports the Northern Territory and the Commonwealth submissions that the primary judge's award of $1.3 million was manifestly excessive.

Disposal of the 'just terms' constitutional issue and application of ss 51A and 53

17. The submissions below (paragraphs 18-22) are common submissions as between the Attorneys-General for Queensland, South Australia, and Western Australia.

18. The core provision of the NT Act, pt 2, div 5 is s 51(1), upon which the parties conducted the proceedings below. It provides that the entitlement to compensation under divs 2-4 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'.

19. The relevant ancillary provision of s 51 is subsection (4) which permits (but does not require) the court which is determining compensation on just terms to have regard to any principles or criteria set out in the relevant compulsory acquisition law (here the *Lands Acquisition Act* (NT) (***LA Act***).

20. Section 51A(1) limits or caps the compensation otherwise payable by operation of s 51 by providing that the total compensation payable under pt 2, div 5 for an act that extinguishes all native title must not exceed the amount that would be payable if the extinguishing act were instead a compulsory acquisition of a freehold estate. By

s 51A(2), the limit imposed by s 51A(1) is subject to s 53 which preserves an entitlement to compensation on just terms where necessary to ensure constitutional validity. The Northern Territory did not rely upon the limit in s 51A at trial or on appeal.

21. The Attorney-General for Western Australia (***Western Australia***) applied for leave to intervene in the Full Court to make submissions that s 51A of the NT Act applied to limit the compensation payable by the Northern Territory to the amount that would have been payable for the compulsory acquisition of a freehold estate in the land. Western Australia also submitted that, if the entitlement under the NT Act to pay compensation on just terms required the payment of any further amount above the statutory cap, that was payable by the Commonwealth under s 53. The submissions which Western Australia wished to make in the Full Court were not made by any party or intervener at first instance. As the Northern Territory had not relied upon s 51A, the Full Court recorded that the Territory and the Commonwealth agreed that the Territory would pay whatever compensation is awarded. In those circumstances, the Full Court refused Western Australia's application for leave to intervene.[5]

22. In those circumstances, it is submitted that it is not necessary and would not be appropriate for this Court to consider or decide the issues identified in paragraph 21 above.

23. Similarly, because it was not necessary for the Full Court to consider the constitutional issue whether the operation of any provision of the NT Act would result in a para 51(xxxi) acquisition of property (and if so whether the acquisition was other than on para 51(xxxi) just terms),[6] it is submitted that it is not necessary and would not be appropriate for this Court to consider or decide that issue.

24. The operation of s 51A, and therefore s 53, raises an interest on the part of the States which was not dealt with in the proceedings below as a consequence of the Northern Territory not having relied upon s 51A. Accordingly it is submitted that the determination of those issues should await a case in which they are squarely and properly raised.

Pre-judgment interest

Trial

25. At first instance, the claim group sought an award of compound interest on the basis that it should be presumed that either the claimant or the acquiring authority would have made beneficial use of the compensation money, in reliance on equitable compensation principles. Compound interest was said to be appropriate because simple interest would unfairly favour the acquiring authority because the authority saves on its borrowing costs which are computed at a compound rate. In was submitted that it was not necessary that the claimant prove actual loss of use of the money.

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5 *Northern Territory v Griffiths* (2017) 346 ALR 247, 355 [463]; [2017] FCAFC 106, [463]; CAB 403.

6 *Northern Territory v Griffiths* (2017) 346 ALR 247, 353 [458]; [2017] FCAFC 106, [458]; CAB 401.

26. The primary judge, with respect correctly, did not accept those contentions and held that whether the appropriate interest should be simple interest or compound interest depends on the evidence.[7]

27. The claim group submitted that interest should be calculated:[8]

    a. on a compound basis at a 'superannuation' rate (that is, the rate which could have been obtained if the money had been invested in a conservative fashion by them over the relevant period); or

    b. on a compound basis sat a 'risk-free' rate (that is, the rate which reflects the cost of borrowing by the Northern Territory); or

    c. on a simple basis under Practice Note CM 16.

28. In the result, the primary judge held that the claim group was entitled to interest on the amount awarded for economic loss from the time when the entitlement to compensation arose to judgment (a period of over three decades). His Honour held that the evidence showed that the appropriate award was simple interest at the rate specified in the practice note, which provides about 4 percent above the Reserve Bank of Australia cash rate (with a proxy for the period prior to the RBA cash rate being published).[9]

Appeal to Full Court

29. In the Full Court, the claim group again sought compound interest on alternative bases:[10]

    a. that the entitlement to compound interest on economic loss did not require proof that the money would have been used for profitable means if paid earlier;

    b. that a fiduciary (the Northern Territory) is not permitted to profit from improper withholding of trust funds; or

    c. that the only way to arrive at just terms or fair compensation was by awarding the interest which the Northern Territory saved on its borrowings by retaining the compensation money.

30. The Full Court rejected all of those submissions and held that the claim group had failed to establish that the primary judge erred in awarding simple, rather than compound, interest.[11]

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7 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 410 [262]-[263]; [2016] FCA 900, [262]-[263]; CAB at 165-6.

8 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 412 [266]; [2016] FCA 900, [266]; CAB at 167.

9 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 413 [279]; [2016] FCA 900, [279], CAB at 170.

10 *Northern Territory v Griffiths* (2017) 346 ALR 247, 294 [172]; [2017] FCAFC 106, [172]; CAB 322-3.

11 *Northern Territory v Griffiths* (2017) 346 ALR 247, 303 [212]-[213]; [2017] FCAFC 106, [212]-[213]; CAB 334.

These appeals

31. The claim group now claims that the rate of interest should be calculated by reference to the 'risk-free rate' of yields on long term (10-year) government bonds, compounding at appropriate rests.

The NT Act scheme

32. Section 51 of the NT Act does not expressly require, or preclude, an award of compensation attributable to any particular type of loss in relation to native title rights and interests.

33. Section 51(4) permits the court to have regard to any principles or criteria set out in the relevant compulsory acquisition law (here, the LA Act).

Federal Court of Australia Act

34. Section 51A(1)(a) of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***) provides for orders to include interest in judgment sums. Whilst the FCA Act does not itself authorise compound interest (s 51A(2)(a)) it does not limit the operation of any enactment or rule of law which provides for the award of interest (s 51A(2)(d)).

35. In *Hungerfords v Walker*,[12] this Court rejected an argument that a similar statutory scheme acted as a code to limit claims in equity. The comparable South Australian provision expressly did not limit any other enactment or rule of law providing for the award of interest. It was held that:[13]

> Where a legislative provision is designed to repair the failings of the common law and is not intended to be a comprehensive code, the existence of that provision is not a reason for this Court refusing to give effect to the logical development of common law principle.

36. The primary judge in the present matter found that interest was payable under the NT Act and that it was not necessary or appropriate to resort to the FCA Act provision.[14] Queensland makes no submission about the primary judge's findings about the source of the Court's power to award interest.

Do NT Act s 51 just terms require or permit an award for or in the nature of interest

37. In *Marine Board of Launceston v Minister of State for the Navy*,[15] Dixon J, referring to a statutory provision empowering the awarding of compensation in respect of compulsory acquisitions, stated as follows about the award of interest:[16]

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12 (1989) 171 CLR 125.
13 (1989) 171 CLR 125, 148 (Mason CJ and Wilson J, Brennan and Deane JJ agreeing).
14 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 408 [254]; [2016] FCA 900, [254]; CAB at 163.
15 (1945) 70 CLR 518 (***Launceston Marine Board case***).
16 *Launceston Marine Board case,* 532-533 (emphasis added).

> The difference, I think, is quite clear between the sum awarded or assessed as compensation as at the date of acquisition for loss of property and a sum awarded for interest or compensation because the acquisition deprived the claimant of the profitable occupation or use of the property without any immediate recoupment of capital in money. But, where a legislative instrument empowers a court or tribunal to deal with the question of compensation, it is a question of interpretation whether its jurisdiction is extensive enough to cover incidental matters and so to enable the court or tribunal to order that interest shall be paid on the compensation assessed and awarded, where according to legal or equitable principles it is payable. Though in America the reparation expressed by the word compensation is considered incomplete unless pending payment it includes interest on the capital sum arrived at, in English law I should not think that without context the primary meaning of the word would go so far. But the jurisdiction to determine compensation may be readily interpreted as extending to what is *consequential upon or incidental to the award.* Where the sum awarded carries interest according to the substantive law, including in that expression the doctrines of equity, it is no great step to say that the tribunal dealing with the matter may so declare.

38. On that approach, s 51(1) is broad enough to include an award for interest if necessary to provide compensation on just terms.

39. An award for compensation will generally not be 'just' unless an allowance is made for the time during which the claim group has been kept out of their money.[17] So much is accepted by the Territory and the Commonwealth,[18] and Queensland does not submit otherwise. Further, it is settled that a court has authority and jurisdiction to determine and order that such interest be paid.[19]

Do NT Act s 51 just terms require or permit compound interest?

40. Consistently with the submissions of the Northern Territory[20] and the Commonwealth,[21] Queensland submits that interest should be awarded on a simple, not compound, basis.

Simple interest is ordinarily sufficient

41. It is common ground that an award of compensation under s 51(1) of the NT Act may include interest to account for the lapse of time between the extinguishment or impairment of native title rights and interests and the determination of compensation. It is submitted that in the ordinary course, simple interest is sufficient to compensate on just terms for the lapse of time.

42. An award of simple interest for pre-judgment interest will ensure that the value of the money awarded for economic loss is maintained. That and nothing more is what is required to perfect the compensation due to the claim group for the value of native title

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17 *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 663 citing *Batchelor v Burke* (1981) 148 CLR 448, 455 (Gibbs CJ); *Haines v Bendall* (1991) 172 CLR 60, 66-7 (Mason CJ, Dawson, Toohey and Gaudron JJ).

18 Northern Territory submissions [71]; Commonwealth submissions [58].

19 *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518.

20 Northern Territory submissions [71]-[114].

21 Commonwealth submissions [58]-[94].

rights and interest lost. An award of compound interest is justified in the case of *additional loss* of which there is no evidence in this case.[22]

43. In *Hungerfords v Walker*, Mason CJ and Wilson J held: [23]

> Incurred expense and opportunity cost arising from paying money away or the withholding of moneys due to the defendant's wrong are something more than the late payment of damages. They are pecuniary losses suffered by the plaintiff as a result of the defendant's wrong and therefore constitute an integral element of the loss for which he is entitled to be compensated by an award of damages.

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44. Generally stated, the rule in *Hungerford v Walker* is that 'loss of use' compensation may be awarded where the plaintiff shows expenses incurred and opportunity costs arising from 'money being paid away or withheld' as a result of a breach of contract or negligence suffered by the plaintiff as a result of the defendant's wrong.[24]

45. In the present case, there is no evidence that the claim group paid money away[25] as a result of the extinguishment or impairment of their native title rights and interests or that the money was withheld due to the Northern Territory's wrong.

20 46. The Full Court of the Federal Court was correct to hold that simple interest on the economic loss award satisfies the just terms requirement under s 51 of the NT Act and compensates the claim group for being kept out of their compensation money.

Analogy with compulsory acquisition compensation

47. It is submitted that that conclusion is not affected by the reference permitted by s 51(4) of the NT Act to the principles or criteria set out in the LA Act.

48. Section 59(1) of the LA Act provides that the interest of a person in land acquired under pt V, div 1 is, at the date of acquisition, converted into a claim for compensation against
30 the Territory. In assessing compensation, the Civil and Administrative Tribunal may have regard to, but is not bound by, the rules set out in sch 2: s 66(1). Schedule 2 is silent as to interest. Section 64(1) provides that compensation bears interest from the day of acquisition to the date on which payment is made to the claimant or another date specified by the Tribunal. The rate of interest payable under s 64(1) is fixed by the Minister under s 65 after consultation with the Treasurer. No such rate has been fixed. Consequently, the rate of interest may be determined by the court or tribunal at its discretion.[26]

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22 *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 666; also see *Grincelis v House* (2000) 201 CLR 321, 329 [17].

23 (1998) 171 CLR 125, 144.

24 See also *Balanced Securities Ltd v Bianco (No 2)* [2010] VSC 201, (2010) 27 VR 599 [16]; *Whitehaven Coal Mining Ltd v Tomaska* [2012] NSWSC 1445 [76].

25 Such as for example, where the plaintiff borrowed money as a consequence of the defendant's wrong: *General Securities Ltd v Don Ingram Ltd* [1940] SCR 670.

26 *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518, 532-533 (Dixon J).

49. It is submitted that 'interest' payable under the LA Act prima facie refers to simple interest and not compound interest.[27] The overriding principles in resumption cases include that compensation is payable for the purpose of compensating the resumee for their loss, not for the purpose of punishing the relevant acquiring authority. In *Albany v Commonwealth*,[28] the statutory rate of interest under the former *Lands Acquisition Act 1955* (Cth), being simple interest, was held to satisfy the requirements of 'just terms' under s 51(xxxi) of the *Constitution*.[29]

50. In a practical sense, interest on compensation for delay in payment in the circumstances of compulsory land acquisition would often involve a landowner resumee having commercial-rate borrowing in the form of a mortgage over the relevant land, thus paying interest out on the land. Additionally, where the resumed land is occupied as the residence of the owner or a tenant, the owner would, before compensation was paid, have to find alternative accommodation at his or her own expense (if not granted an advance payment) or evict the tenant, with obvious consequential costs. Although such scenarios are readily conceivable, the default interest entitlement under compulsory acquisition laws is simple interest only, albeit that the entitlement to interest and the rate are in the court or tribunal's discretion. An entitlement to compound interest would only arise if the acquiring authority had committed some compensable wrong.

51. When landowner rights in compulsory acquisition cases are compared with inalienable non-exclusive native title rights and interests, it is difficult to identify a basis on which compound interest would be required in the latter case (again, in the absence of some compensable wrong).

52. In *Wm Collin & Sons Pty Ltd v Coordinator-General of Public Works* the claimant sought interest in respect of a resumption of land. However, because the claimant had full use of the resumed land free of all liability during the whole of the statutory period during which interest might have been payable, the Land Appeal Court made no award of interest.[30]

Compensation, not restitution

53. Section 51 of the NT Act offers no express guidance on whether and if so when interest should be calculated on a compound basis.

54. Section 51 converts native title interests that are extinguished or impaired into a claim for compensation.[31] It is not an action based on restitution. Restitutionary damages seek to reverse the value of the benefit, so as to deprive the defendant of an unjustly acquired

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27 *South Australia Land Commission v Perry* (1977) 15 SASR 315; *Shepherds Properties (NQ) Pty Ltd v Cairns Port Authority* (1991) 13 QLCR 234.

28 (1976) 12 ALR 201.

29 Applying *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269.

30 *Wm Collin & Sons Pty Ltd v Co-ordinator General of Public Works* (1974) 1 QLCR 1, 35 [71].

31 Compare LA Act, s 59(1). See also discussion about the analogous Wheat Acquisition Regulations in *Nelungaloo v Commonwealth* (1948) 75 CLR 495, 505 (Williams J).

gain.[32] In contrast, compensation remedies a loss incurred,[33] in this case as a result of the compensable acts.

55. In *Nelungaloo Pty Ltd v Commonwealth*, Dixon J held:[34]

> Now "compensation" is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived. Compensation prima facie means recompense for loss ... pecuniary loss must be ascertained by determining the value to him of the property taken ... the object is to find the money equivalent for the loss ...

56. Justice Dixon's statement was repeated and applied in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*.[35]

57. Those characteristics of compensation are demonstrated by the following two cases. In *McCrohon v Harith*, the New South Wales Court of Appeal held that an award of compensation must not place the plaintiff in a better position than if the compensable acts had not occurred.[36] The Court's reasons refer to tort and contract, but the NT Act compensation scheme is functionally identical.

58. In *Haines v Bendall*,[37] the issue was whether an amount of workers' compensation should be taken into account in calculating interest damages. The majority held that the wide discretion to award pre-judgment interest must nevertheless be exercised in conformity with legal principle so as to do no more than restore the plaintiff to the position he would have been in but for the defendant's negligence.[38]

59. Unjust enrichment stands in contrast with compensation. In *Pavey & Matthews Pty Ltd v Paul*, Deane J explained that unjust enrichment:[39]

> ... constitutes a unifying legal concept which explains why the law recognizes, *in a variety of distinct categories of case*, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case. In a category of case where the law recognizes an obligation to pay a reasonable remuneration or compensation for a benefit actually or constructively accepted, the general concept of restitution or

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32 *Attorney-General v Blake* [2000] 3 WLR 625 (HL); *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 (CA 1369).

33 *Tito v Waddell [No 2]* [1977] Ch 106, 335 (Sir Robert Megarry V-C); *Jaggard v Sawyer* [1995] 1 WLR 269.

34 (1947) 75 CLR 495, 571.

35 (2008) 233 CLR 259, 271 [34] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

36 *McCrohon v Harith* [2010] NSWCA 67, [53].

37 *Haines v Bendall* (1991) 172 CLR 60.

38 *Haines v Bendall* (1991) 172 CLR 60, 66-67 (Mason CJ, Dawson, Toohey and Gaudron JJ).

39 (1987) 162 CLR 221, 256-7 (references omitted; emphasis added).

> unjust enrichment is ... also relevant, in a more direct sense, to the identification of the proper basis upon which the quantum of remuneration or compensation should be ascertained in that particular category of case.

60. The body of law that constitutes the criteria for determining damages in unjust enrichment does not logically support a new category of statutory compensation for the loss, diminution, impairment or other effect of an act on native title rights and interests. This is because acts extinguishing or impairing native title and their consequences are not analogous to the wrongs concerned in an action founded in unjust enrichment and do not result in any unjust enrichment of the Crown.

61. The focus of the inquiry under s 51(1) of the NT Act must be on compensating the claim group for their loss, not on reversing any gain by the Northern Territory. An award for compounding pre-judgment interest outside the established objectives of ensuring a restitutionary or disgorging remedy would be inconsistent with equitable principle and would exceed that statutory mandate to provide compensation on just terms.[40]

62. It follows in Queensland's submission that while just terms compensation under s 51(1) of the NT Act will ordinarily include interest, having regard to the nature and purpose of compensation, interest is calculated on a simple, not a compound, basis.

63. If that submission is not accepted, it is submitted that interest under s 51(1) should be ascertained in conformity with equitable principles.

Does equity require or permit compound interest in restitution?

64. The primary judge observed that the right to interest as recompense for the delay in payment of compensation is an equitable right.[41]

65. Equity awarded *simple* interest at a time when courts of law had no right under common law or statute to award any interest.[42] Now, the FCA Act provides a statutory entitlement to simple interest.

66. Historically, equity has intervened to award *compound* interest in restitution cases where justice so demanded, in two distinct categories of case:[43]

- where money was unjustly retained, as in the case of mistake, duress, unconscionability or undue influence;[44] and
- where interest is restitution for a wrong, such as fraud or improper profit made by a trustee or person otherwise in a fiduciary position.[45]

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40 James Edelman and Derek Cassidy, *Interest Awards in Australia* (LexisNexis Butterworths, 2003), 21-2.

41 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 407-408 [249]; [2016] FCA 900, [249]; CAB at 162.

42 *West Deutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 701C-702D (Lord Browne-Wilkinson).

43 James Edelman and Derek Cassidy, *Interest Awards in Australia* (LexisNexis Butterworths, 2003) 148 [7.11]; *Blackshaw Services Pty Ltd v Cureton* [2001] NSWSC 548.

44 *David Securities Pty Ltd v Commonwealth Bank of Australia Ltd* (1992) 175 CLR 353.

67. In the first category:[46]

> Compound interest is sought in these cases to make the award of restitution complete. The defendant has had the *use* of the money which the law recognises must be returned; the defendant should pay for the value of that use. That value, commercially, is compound interest. Here the defendant is *giving back* value taken from the plaintiff ...

68. As to the second category:[47]

> An award of compound interest here operates to disgorge profits made by a defendant. It operates to force a defendant to *give up* profits made by a wrong.

69. In *Commonwealth v SCI Operations Pty Ltd*, McHugh and Gummow JJ appeared to discourage (in obiter dicta) recognition of a general right to compound interest in restitution in the context of statutory provision for simple interest only. Their Honours held:[48]

> It is true that in the administration of its remedies, equity followed a different path to the common law with respect to the award of interest. In cases of money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary, the decree might require payment of compound interest.[49] However, in *Westdeutsche Landesbank Girocentrale v Islington London Borough Council*,[50] the House of Lords answered in the negative the question whether, where statutes, of which s 51A(2)(a) is a local example, provide for orders for payment of simple but not compound interest upon common law claims, equity, in its auxiliary jurisdiction, will supplement the statute by providing for an award of compound interest.

70. Their Honours went on to hold that because of the applicable statutory scheme compound interest was not payable, and in any event no equitable relief was sought.[51]

71. Queensland's primary submission is that by conferring an entitlement to compensation, s 51 excludes the possibility of compound interest. That is, in terms of *Westdeutsche* and *SCI Operations*, the statutory scheme excludes equity, in its auxiliary jurisdiction, from supplementing the statutory entitlement to simple interest (whether the latter arises under the NT Act, s 51(1) or the FCA Act, s 51A).

72. However, if s 51(1) admits the possibility of compound interest, whether it should be awarded to ensure just terms compensation loss must depend on the evidence in the particular case.[52]

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45 *Hungerfords v Walker* (1989) 171 CLR 125, 148.
46 James Edelman, 'Claims to Compound Interest in Restitution: Awakening the Sleeping Giant' (1999) 27 *Australian Business Law Review* 211, 212 (original emphasis).
47 *ibid* (original emphasis).
48 (1998) 192 CLR 285, 316 [74].
49 See *Hungerfords v Walker* (1989) 171 CLR 125, 148.
50 [1996] 1 AC 669.
51 (1998) 192 CLR 285, 317 [75]-[76].

73. Thus, in equity, the plaintiff must prove that the defendant either retained the money unjustly or committed the relevant wrong and that the defendant made an actual gain (or establish a foundation upon which a gain may be assumed).[53] An award of compensation would also be subject to the rules on causation, remoteness and mitigation, defences and bars to relief, such as lack of clean hands, delay and acquiescence. The plaintiff would need to prove that the harm is legally attributable to the defendant's wrongful conduct[54] and that the type of damages were foreseeable.[55]

74. Additionally, where the requirements of the rule in *Hungerfords v Walker* are satisfied (money paid away or withheld), the plaintiff's entitlement to compound interest is also subject to proving the loss of use of money.[56]

75. This case lacks an evidentiary basis on which an award of compound interest should or could be made. The primary judge, after hearing the evidence, determined that just terms did not require the court award pre-judgment interest on a compounding basis.[57] No error has been demonstrated in that finding.

76. Specifically, there is no evidence of any unjust enrichment, commission of a wrong, existence or breach of fiduciary duty, or any other basis on which equity would award compound interest. As for the rule in *Hungerfords v Walker*, there is no evidence of the claim group having incurred financial costs arising from money being paid away or withheld as a result of the a wrong commissioned by the Northern Territory.

77. Without in any way trivialising the loss and impairment of native title rights and interests, there was as the Territory submits a barely perceptible degree of incremental erosion of the claim group's connection to country caused by the compensable acts.[58] Whilst not decisive, that circumstance fortifies the view that this case does not fall in either of the equitable categories that would justify an award of compound interest.

No unjust enrichment

78. To secure an award of compound interest, a plaintiff must prove that the defendant has been unjustly enriched at the plaintiff's expense as a result of the compensable acts. The claim group appear to simply allege some wrongdoing at large.[59] But at the time of

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52 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 412 [268], [270]; [2016] FCA 900, [268], [270]; CAB at 168 and 170; James Edelman and Derek Cassidy, *Interest Awards in Australia*, (LexisNexis Australia, 2003), 35-6 citing *Commonwealth v Chessel* (1991) 30 FCR 154; *Shaw v Commonwealth* (1993) 116 FLR 376.

53 *Kirk v PBP Accounting Solutions Pty Ltd* [2015] VSC 173, [39].

54 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 509 (Mason CJ).

55 For example, *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145 (breach of contract; *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (tort). However, liability for wrongs in particular intentional torts extend to unforeseeable loss: *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388.

56 *Duke Group v Pilmer* (1999) 73 SASR 64, 173 (overruled by this Court as to quantum of damages, but not on this point: *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

57 *Griffith v Northern Territory [No 3]* (2016) 337 ALR 362, 407-415 [246]-[289], 408-409 [252]-[255], 410 [263], 413 [277]-[279]; [2016] FCA 900 [246]-[289], [252]-[255], [263], [277]-[279]; CAB 161-171.

58 Northern Territory's submission [155].

59 E.g. *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 408 [251]; [2016] FCA 900, [251]; CAB at 162.

the compensable acts taking place there was no legal acknowledgement or other appreciation of the existence of native title. Consequently, the Northern Territory was passive in any enrichment derived from the compensable acts.[60]

No commission of a wrong

79. Notwithstanding that the claim group's legal rights were infringed, the Northern Territory did not commit any wrong in the relevant sense so as to justify or require an award of compound interest. There is no cause of action for the late payment of damages and the Northern Territory commits no wrong by contesting the claim group's claim for compensation.[61] Further, the primary judge observed that "at no time have the acts done by the Territory been invalid ... as I have found that the acts done by the Territory are taken to have been valid from the date of the act ..."[62]

No fiduciary duty

80. The claim group argued below that the Territory owed a fiduciary duty in respect of their native title. However, that contention does not find support in the authorities.

81. In *Mabo [No 2]*, Toohey J considered that the relationship between the Crown and the Meriam people was sufficient to give rise to a fiduciary obligation with respect to the traditional lands. The Crown owed a fiduciary duty because of its power to alienate land the subject of the Meriam people's traditional rights and interests, the result of which was the loss of traditional title.[63] His Honour considered that a breach of the duty would give rise to compensation or damages.[64] However, the other Justices did not support that view.[65]

82. In any event, in *Mabo* the claimants had exclusive native title rights prior to the occurrence of the compensable acts. In the present appeals, the native title rights and interests are non-exclusive. It is submitted that if the majority in *Mabo [No 2]* did not find a fiduciary duty existed in the relevant sense in relation to exclusive native title rights, it is difficult to see how a fiduciary duty could exist in relation to non-exclusive rights.[66]

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60 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 412 [269]-[272]; [2016] FCA 900, [269]-[272], CAB at 168.

61 *Hungerfords v Walker* (1989) 171 CLR 125, 144 (Mason CJ and Wilson J).

62 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 412 [269]-[270] [2016] FCA 900, [269]-[270]; CAB at 168.

63 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 203 (Toohey J).

64 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 205.

65 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60 (Brennan J, Mason CJ and McHugh J agreeing), 164-170 (Dawson J). Deane and Gaudron JJ's reasons did not address the issue.

66 See also *Wik Peoples v Queensland* (1996) 187 CLR 1, 96-7 (Brennan CJ), 100 (Dawson J), 167 (McHugh J); *Northern Territory v Griffiths* (2017) 346 ALR 247, 295-6 [169]; [2017] FCAFC 106, [176]-[177]; CAB 324.

Delay

83. Queensland adopts the Commonwealth's submissions that the existence of a lengthy delay between the date of an extinguishing act and the compensation determination does not provide a basis for awarding compound interest.[67]

Other bases

84. The claim group's claim for compound interest at the risk-free government bonds rate is premised on a lost opportunity to invest the money and further that such investment would generate a further increase to the value of the money, without risk.

85. The claim postulates hypotheticals that are not consistent with the evidence established at trial. To put it another way, the claim group seeks compensation for the relevant loss and the value of use of the money that may be payable in a case where the cause of action was restitutionary (where as a result of a wrong or unjust enrichment, the award is both of the money and the use of the money).[68] However, as explained earlier, s 51(1) confers an entitlement to compensation, not restitution.

86. In the proceedings below, the claim group asserted that they could have invested the compensation money and profited from it.[69] But that circumstance does not of itself enliven any equitable jurisdiction to award compound interest. In any event, the trial judge was unable to find that the money would have been invested without expenditure so as to accumulate interest year by year to the present.[70]

Interest as part of, or on, compensation award

87. The Commonwealth raises the issue of whether interest should be awarded *on* compensation or *as* (part of) compensation (the ***on/as issue***), and submits that interest should be awarded *on* compensation.[71] The Northern Territory takes the opposite view, submitting (as the Federal Court held) that interest should be awarded *as* compensation.[72]

88. Queensland submits that it is not necessary for this Court to decide the *on/as* issue in the present case for several reasons.

89. First, it makes no difference to the result in this case.[73]

90. Second, while the *on/as* issue may be an important point of principle, its resolution depends on how s 51A of the NT Act is construed.[74] But as submitted earlier (paras 18-

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67 Commonwealth's submissions [80]-[84]; see also the Northern Territory's submissions [96].
68 James Edelman and Derek Cassidy, *Interest Awards in Australia* (LexisNexis Butterworths, 2003), 17.
69 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362, 412-3 [269]-[270] [2016] FCA 900, [271]-[278]; CAB at 168-9.
70 *Northern Territory v Griffiths* (2017) 346 ALR 247, 295-6 [169]; [2017] FCAFC 106, [169]; CAB 322.
71 Commonwealth submissions [50]-[57].
72 Northern Territory submissions [115]-[121].
73 Commonwealth submissions [57].
74 Commonwealth submissions [57].

23 above), the Territory did not rely on s 51A and its construction is therefore not in issue in these appeals. It follows that the *on/as* issue is hypothetical.

91. Third, the *on/as* issue may have implications in terms of ss 51A and 53 of the kind with which Western Australia was concerned in the Full Court (para 21 above). The possible implications are only vaguely hinted at in the Commonwealth's submissions, and have not been explored in sufficient depth to enable a proper resolution in these appeals.

92. For those reasons, Queensland submits that it is neither necessary nor appropriate to resolve the *on/as* issue in these appeals.

93. If that submission is not accepted, Queensland adopts the Territory's submissions on the *on/as* issue.[75]

PART VI: Length of Oral Argument

94. It is estimated that 20 minutes will be sufficient for Queensland's oral argument.

Dated 20 April 2018

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[75] Northern Territory submissions [115]-[121].