

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY



No. D1 of 2018

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

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ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE
NGALIWURRU AND NUNGALI PEOPLES
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
The First Intervener

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ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
The Second Intervener

ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA
The Third Intervener

CENTRAL DESERT NATIVE TITLE SERVICES LIMITED
The Fourth Intervener

YAMATJI MARLPA ABORIGINAL CORPORATION
The Fifth Intervener

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D2 of 2018

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

AND:

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ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE
NGALIWURRU AND NUNGALI PEOPLES
First Respondent

NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

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ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
The First Intervener

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
The Second Intervener

ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA
The Third Intervener

10 CENTRAL DESERT NATIVE TITLE SERVICES LIMITED
The Fourth Intervener

YAMATJI MARLPA ABORIGINAL CORPORATION
The Fifth Intervener

IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

No. D3 of 2018

20 BETWEEN: ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE
NGALIWURRU AND NUNGALI PEOPLES

Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA

First Respondent

30 COMMONWEALTH OF AUSTRALIA
Second Respondent

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
The First Intervener

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
The Second Intervener

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The Third Intervener

CENTRAL DESERT NATIVE TITLE SERVICES LIMITED
The Fourth Intervener

YAMATJI MARLPA ABORIGINAL CORPORATION
The Fifth Intervener

FIRST INTERVENER'S ANNOTATED SUBMISSIONS

Part I:

1. These submissions are in a form suitable for publication on the internet.

Part II:

2. The first Intervener (**South Australia**) intervened at trial pursuant to s 78A of the *Judiciary Act 1903* (Cth). Pursuant to s 78A(3), South Australia is taken to be a party
10 to this appeal proceeding.

Part III:

3. South Australia does not require leave to appear or to be heard on any matter arising under the *Constitution* or involving its interpretation. For the reasons appearing below, it is not necessary for this Court to consider the issue raised on the Notice of a Constitutional Matter that was served on the Attorneys-General at trial, namely, whether the operation of any provision of the *Native Title Act 1993* (SA) (**NTA**) would result in an acquisition of property within the meaning of s 51(xxxi) of the *Constitution* (and if so whether the acquisition was other than on s 51(xxxi) just terms).
- 20 4. However, this matter raises a number of issues of significance to other current and future claims of compensation for the extinguishment of native title rights. Those issues are of significance to South Australia. South Australia made limited submissions at trial and on appeal to the Full Court of the Federal Court (**Full Court**) with respect to some of these issues. South Australia seeks leave to make limited submissions with respect to certain of those issues, identified below.

Part IV:

5. The relevant legislative provisions as they existed at the relevant time, and as amended, are set out in Annexure A.

Part V:

30 *It is not necessary to consider certain issues, including the Constitutional issue*

6. The submissions outlined below are common submissions as between the Attorneys-General for Queensland, South Australia and Western Australia.

7. The core provision of the NTA, Part 2, Division 5 upon which the parties conducted the proceedings below is s 51(1). It provides that the entitlement to compensation under Divisions 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'.
8. 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) (**LAA**)).
- 10 9. Section 51A(1) limits or caps the compensation otherwise payable by operation of s 51 by providing that the total compensation payable under Part 2, Division 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 section 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 (**Territory**) did not rely upon the limit in s 51A at trial or on appeal.
10. The Attorney-General for Western Australia applied for leave to intervene in the Full Court to make submissions that s 51A of the NTA applied to limit the compensation payable by the Territory to the amount that would have been payable for the compulsory acquisition of a freehold estate in the land. The Attorney-General for Western Australia also submitted that, if the entitlement under the NTA to pay compensation on just terms required the payment of any further amount above the statutory cap, that was payable by the Commonwealth of Australia (**Commonwealth**) under s 53 of the NTA. The submissions which the Attorney-General for Western Australia wished to make in the Full Court were not made by any party or intervener at first instance. As the Territory had not relied upon s 51A, the Full Court recorded that the Territory and the Commonwealth agreed that the Territory had agreed that it would pay whatever compensation was awarded. In those circumstances, the Full Court refused the Attorney-General for Western Australia's application for leave to intervene to advance those arguments.¹

¹ *Northern Territory v Griffiths* (2017) 346 ALR 247, 355 [463] [CAB.403].

11. 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 10 above.

12. Similarly, because it was not necessary for the Full Court to consider the constitutional issue of whether the operation of any provision of the NTA would result in a s 51(xxxi) acquisition of property (and if so whether the acquisition was other than on s 51(xxxi) just terms),² it is submitted that it is not necessary and would not be appropriate for this Court to consider or decide that issue.

10 13. 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 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.

Submissions for which leave is sought

A holistic approach to compensation for loss

14. The Claim Group's application for compensation was formulated under distinct heads of loss, namely economic loss, non-economic/intangible loss and pre-judgment interest.³ The trial was conducted according to that essential division of the claim, notably according to the bifurcation of economic loss and non-economic loss.

20 15. South Australia made submissions at trial against such a bifurcated approach being appropriate to the assessment of compensation for extinguishment of native title. On appeal before the Full Court, given that the grounds of appeal formulated by each party followed the bifurcated structure of the claim and the judgment, South Australia confined its submissions to a limited number of matters arising within those nominated heads of loss.

16. Accepting that this bifurcated approach was open in this case,⁴ where the parties are content to join issue by employing such an approach, it cannot be an error for the Court to proceed to adjudicate within that framework. There was, consequently, no challenge to that approach on appeal and, in any event, no basis upon which the Full Court could

² *Northern Territory v Griffiths* (2017) 346 ALR 247, 353 [458] [CAB.401].

³ *Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362, 371 [42] [CAB.112].

⁴ Submissions of the Commonwealth of Australia (**Commonwealth Consolidated Submissions**) [12].

have interfered with that essential premise of the adjudication of the claim.

Nevertheless the Full Court did express considerable reservation as to whether such an approach was that intended by Parliament.⁵

17. Equally, while the strict correctness of such a bifurcated approach does not arise for determination on this appeal, for the reasons expressed in the Submissions of the Commonwealth at [2], it would be desirable for this Court to express a view on the Full Court's observations as to the intention of s 51(1). To that end, South Australia submits as follows, in support of the "*alternative approach*" mooted by the Full Court, accepting that such an approach could not constitute a basis for determination of the present matter. The factors that may be considered under such an approach will nonetheless remain relevant where loss is considered under separate heads, as in the present matter.
18. The entitlement to compensation under s 51 of the NTA 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". The focus of compensation must therefore be on the loss occasioned by the compensable act.
19. The application of s 51 may direct the Court to legislation that provides applicable principles or criteria to be taken into account in the determination of compensation. Schedule 2 to the LAA provides such an example. Such laws now generally accommodate native title rights and interests.
20. While the text of s 51 may result in the Court being directed to different statutory regimes incorporating different principles underlying compensation, the existing principles applicable to compensation for non-native title interests may, in particular circumstances, have to be adapted to suit the *sui generis* nature of native title rights and interests.
21. South Australia submits that a better approach to assessing compensation, in light of the statutory scheme and the *sui generis* nature of the native title rights and interests, is an evaluative exercise requiring a multifactorial assessment, guided by some generic principles relevant to compensation.

⁵ *Northern Territory v Griffiths* (2017) 346 ALR 247, 287-288 [140]-[144] [CAB.314-315].

22. The evaluative exercise in determining an appropriate level of compensation must be multifactorial, in the sense that there are a broad and diverse range of factors that must be evaluated. The term, “evaluative”, is meant to indicate that the exercise is one that includes elements that defy quantification, such as loss of connection to land used for the conduct of spiritual ceremonies. There is an inherently qualitative aspect to the evaluative exercise.

23. These factors will differ in each case, but may include:

- 10 23.1. to the extent possible, relevant legislation identified in s 51 of the NTA where the nature of the relevant native title right and interest sufficiently resembles a right or interest compensable under the relevant legislation, including a consideration of the freehold value of the land at the time of the compensable act;
- 23.2. the effect of the relevant act considered in light of the particular incidents of the native title rights and interests in relation to the land and waters;⁶
- 23.3. the inalienability of the native title rights and interests;
- 23.4. the extent to which previous (non-compensable or compensable) acts had already extinguished or impaired the exercise of some or all of the native title rights (e.g., extinguishment of a right to exclude by the previous grant of a pastoral lease, or loss of enjoyment of native title rights by the grant of a non-extinguishing lease or license that grants rights in third parties to use the land for
20 a purpose which is inconsistent with the exercise of some or all of the native title rights);⁷
- 23.5. the extent of the extinguishment or impairment relative to other land and waters in which the native title holders hold native title rights and interests (i.e., do the native title holders possess rights and interests in other land or waters that permit them to engage in the same activities impacted by the extinguishing or impairing act?);

⁶ See, e.g., *De Rose v South Australia* [2013] FCA 988, which includes a summary of the claim group’s description of the connection to the land and the impacts of the extinguishing acts at [27]-[67].

⁷ Compare *Western Australia v Brown* (2014) 253 CLR 507, 527-528 [57] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

- 23.6. the extent to which the extinguishment or impairment precludes the conduct of ceremonial activities (i.e., precluding access to ceremonial grounds for men's or women's business);
- 23.7. whether the act involves destruction or disturbance of sites or areas of significance;
- 23.8. the size of the native title group at the time of the extinguishing act;
- 23.9. the location of the native title group at the time of the extinguishing act (e.g., were they largely dispersed to regional locations or capital cities as a result of other pressures?);
- 10 23.10. the number of native title holders exercising the rights and interests in the land and waters at the time of the act; and
- 23.11. the frequency with which the native title rights and interests were practised.
24. Each of the above factors may be relevant to an application for compensation under Part 2, Division 5 of the NTA. The relative weight to be accorded to any one of the factors must be determined on a case by case basis. The appropriate process to be adopted with regard to the above factors may usefully be described as one of "instinctive synthesis". That is to say, it is not useful to attempt to quantify each of the factors and then engage in a process of mathematical deductions or additions to arrive at a monetary amount. Rather, it is necessary to weigh *all* of the relevant factors, some of which will be in tension with one another, to arrive at a single fixed amount of compensation under s 51(5) of the NTA. The task is similar to that identified by this Court in *Markarian v The Queen*.⁸
- 20
25. South Australia does not suggest that the sentencing of offenders and the determination of monetary amounts of compensation for the extinguishment or impairment of native title rights and interests are analogous. Rather, it is instructive to consider other circumstances which call for an evaluative judgment based on a broad number of factors, some of which may be conflicting, to arrive at a single position that does individual justice to the application before the Court. An approach akin to an

⁸ (2005) 228 CLR 357, 373 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

“instinctive synthesis” approach is capable of achieving the sort of balancing that is required by the Court in determining compensation applications.

26. Such an approach is also likely to lead away from appealable error for attributing too much weight to some factors over others, by attributing too high a value to one factor without offsetting other contingencies, or by double-counting. It is not meant to “cloak the task of the [court] in some mystery”;⁹ it is meant to achieve the necessary weighing and balancing of factors for which the process calls.

27. By way of example, the Full Court in the present matter found error in the approach of the learned trial judge in the statement, when assessing the value of the economic loss:¹⁰

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If the appropriate test were as to the price at which the claim group would have been prepared to surrender their non-exclusive native title rights, the answer would be not at all.

28. The Full Court accepted a submission to the effect that the trial judge had, in approaching economic loss, included some allowance for the loss of deep spiritual attachment to the land, which was only to be included in the assessment of the non-economic component of the compensation.¹¹ That is, the reason why the claim group would have been so unprepared to surrender their rights lay in their deep spiritual attachment to the land, not economic factors. The Full Court concluded:¹²

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By including in the assessment of the economic value of the rights and interests a recognition of the non-economic element the primary judge overvalued the economic value of the rights and double counted the non-economic factors.

29. Many of the factors identified above that are relevant to the evaluative exercise are capable of informing both economic and non-economic aspects of the assessment of loss. Whatever the true nature of the yardstick that s 51A of the NTA provides in respect of an act that extinguishes all native title rights in relation to the particular land or waters in question, that multiplicity of factors favours a holistic assessment of loss.¹³

⁹ *Markarian v The Queen* (2005) 228 CLR 357, 374 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹⁰ *Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362, 404-405 [232] (Mansfield J) [CAB.158].

¹¹ *Northern Territory v Griffiths* (2017) 346 ALR 247, 280 [109] [CAB.305].

¹² *Northern Territory v Griffiths* (2017) 346 ALR 247, 281 [111] [CAB.305-306].

¹³ An instructive example is provided by the reference to maximum penalties in criminal law. See *Markarian v The Queen* (2005) 228 CLR 357, 372 [30]-[31], 373-374 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

30. The focus of compensation must be on the loss occasioned by the extinguishment; the extinguishment of all native title rights will not necessarily result in the same “effect” for every native title group. A number of factors are to be taken into account in assessing the effect of an extinguishment of native title rights and interests. The extinguishment may be for a fraction of the total land in which the rights and interests are held and have minimal effect on the exercise and enjoyment of the native title, or it may result in the destruction of sites of significance.

Addressing economic loss on the bifurcated approach

10 31. Each of the appellant parties has advocated a different approach to the assessment of economic loss in a bifurcated assessment (D1 grounds 1,2 and 3; D2 grounds 1 and 2; and D3 ground 1). South Australia’s primary concern is to submit, in support of the Full Court’s observations, that a more holistic approach is preferable and establishes a more meaningful framework for negotiations.

32. Nevertheless, in the circumstances of its intervention in this case, South Australia adopts the submissions of the Territory to the effect that native title does not have an equivalence with freehold title.¹⁴ The *Racial Discrimination Act 1975* (Cth) does not convert native title to such an equivalence.¹⁵

20 33. When a bifurcated approach is taken, as a matter of policy, freehold title might be a useful initial reference point when considering compensation for the extinguishment of all native title rights and interests, notwithstanding the inalienability of those rights and interests. However, any analogy remains highly contingent, and the impact of the various contributing factors may be made more complex by a discrete assessment of a single aspect of loss.

34. Further, in taking a bifurcated approach requiring a discrete assessment of economic loss, whether in negotiations or litigation, the paradox identified by the Territory must be squarely confronted. This paradox occurs where development drives up the market value of freehold land but reduces the ability of the native title holders to exercise the native title rights, contributing to a disconnect between freehold value on the one hand,

¹⁴ Northern Territory Consolidated Submissions [44].

¹⁵ Commonwealth Consolidated Submissions [38]-[43]

and the value to the holder of the native title rights and interests on the other.¹⁶ One need only consider the value of land in urban areas where enjoyment of native title rights has been significantly impaired compared to the value of land in remote areas where the exercise of native title rights is most fully enjoyed, to illustrate the paradox.

35. The Territory's approach to valuation within a bifurcated framework offers one possible answer to that paradox in a litigated context. The holistic approach also provides an avenue for avoiding the paradox.

Contributing factors to an assessment of economic loss

10 36. In circumstances where economic loss has been assessed separately, as in the present case, South Australia makes the following limited submissions as to matters of principle, which would be equally applicable on a holistic analysis as described above.

37. With respect to the impact of the inalienability of native title rights and interests, the Full Court was correct to hold that the trial judge was required to take into account the inalienability of the native title rights and interests as a discounting factor with respect to the economic value of those rights and interests.¹⁷ Contrary to the statement by the Full Court at [94],¹⁸ South Australia supported the position of the Northern Territory that *Geita Sebea v Territory of Papua*¹⁹ was not applicable to the question of the effect of the inalienability of non-exclusive title rights upon the value of those rights. The inalienability of non-exclusive and usufructuary rights may, on conventional analysis, affect their value. In the absence of evidence of special economic value, there is no principled reason to ignore the inalienability of the non-exclusive native title rights to the extent that it is accounted for in the expert valuation reports, simply on the basis that they were held by indigenous persons.

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38. South Australia adopts the Commonwealth's submissions to the effect that the Full Court was correct to hold that the trial judge erred by allowing the benefit of the

¹⁶ Northern Territory Consolidated Submissions [49]-[52].

¹⁷ *Northern Territory v Griffiths* (2017) 346 ALR 247, 281-284 [115]-[122] [CAB.306-310].

¹⁸ *Northern Territory v Griffiths* (2017) 346 ALR 247, 277 [94] [CAB.301].

¹⁹ (1941) 67 CLR 544.

acquisition to the Territory to influence his assessment of the compensation payable to the claim group.²⁰

39. The Full Court was correct to hold that the trial judge made a number of errors of principle which had the effect of overvaluing the economic loss of the claim group.²¹

40. The assessment of economic loss for the extinguished native title rights and interests must properly reflect the nature and incidents of those native title rights which go to the economic value of the land, including the significant limitations and restrictions identified by the Full Court.²² Also relevant to an assessment of economic loss is the significant area of land surrounding the township of Timber Creek which remains available to native title holders for the exercise of their native title rights. That land necessarily represents a considerable amelioration of the loss of rights in respect of discrete parcels of land within the township.

41. In the absence of evidence of any special economic value of the particular allotments in relation to which compensation is payable (for example as hunting grounds, or areas which are rich in natural food resources, medicinal plants, wild tobacco, timber, stone or resin) any diminution in the capacity to exercise a right in such a small fraction of land otherwise available for the exercise of the native title right must be considered in light of the native title parties' capacity to exercise the same rights in the remainder of their native title land.

42. As to the impact of the non-exclusivity of the rights and interests, South Australia adopts the submissions of the Commonwealth²³ and the Northern Territory.²⁴ The extinguishment²⁵ of the right to control and determine the use of the land and to exclude others from the land effected by grant of the pastoral lease in 1882 had more than an insubstantial impact on the rights and interests held and exercisable by the Claim Group. To find otherwise significantly diminishes the significance of exclusive

²⁰ Commonwealth Consolidated Submissions [44]-[47].

²¹ *Northern Territory v Griffiths* (2017) 346 ALR 247, 285-286 [129]-[132] [CAB.312].

²² *Northern Territory v Griffiths* (2017) 346 ALR 247, 286 [135] [CAB.312-313].

²³ Commonwealth Consolidated Submissions [25].

²⁴ Northern Territory Consolidated Submissions [64]-[67].

²⁵ Extinguishment being the state where the native title rights cease to be recognised by the common law and thereupon cease to be native title rights and interests within the meaning of s 223 of the NTA. See *Akiba v the Commonwealth* (2013) 250 CLR 209, 219-220 [10] (French CJ and Crennan J).

native title to the native title holders.²⁶ It also denies the history of the proclamation of the town of Timber Creek and the doing of the compensable acts by the Territory, which were valid and which were taken always to have been valid.²⁷

43. Thus, in *Western Australia v Ward*,²⁸ in circumstances where the grant of various pastoral leases had extinguished the native title right to control access to the land in question, the native title holders could not be described as having the “*lawful control and management*” of the land.²⁹

10 44. Extinguishment of the right to control access to the land or to be the gatekeeper for the country by the earlier grant of the pastoral lease is a significant impairment of the traditional native title rights and interests which had previously been held by the claim group. As such, it warranted being accorded considerable value in determining the entitlement to just compensation for the impairment of that which had remained.

45. That significance is underscored by the fact that even without reliance on the validation provisions of the NTA and the *Validation (Native Title) Act* (NT), the Territory government could, at the relevant dates, validly grant interests in the land that were not inconsistent with the non-exclusive rights.³⁰ The Full Court accepted that the “scope of the capacity to grant rights and interests consistent with the non-exclusive rights and interests held by the Claim Group was wide”.³¹ Whilst in the circumstances of this case the Territory had not in fact exercised its right to grant other interests in the land,
20 as recognised by the Full Court, it is the legal content of the right rather than the manner of its exercise that is relevant.³²

²⁶ See *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391, 414 [75]-[99], 428 [127] (French, Branson and Sundberg JJ).

²⁷ *Native Title Act 1993* (Cth) ss 19, 22F; *Validation (Native Title) Act* (NT) ss 4, 4A; *Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362, 386 [115]; [116] [CAB.133].

²⁸ (2002) 213 CLR 1.

²⁹ *Western Australia v Ward* (2002) 213 CLR 1, 167-169 [313]-[317] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). The statutory consequence in that case is that they were thereby not entitled to compensation as “owners” of the land within the meaning of the *Mining Act 1978* (WA) for the purpose of obtaining compensation on account of loss or damage arising on account of mining operations.

³⁰ See Commonwealth Consolidated Submissions [33]-[35].

³¹ *Northern Territory v Griffiths* (2017) 346 ALR 247, 275-276 [80]-[84] [CAB.298-299]; Northern Territory Consolidated Submissions [67]; Commonwealth Consolidated Submissions [25]-[37].

³² *Northern Territory v Griffiths* (2017) 346 ALR 247, 276 [84] [CAB.299].

46. The assessment of compensation for economic loss on a bifurcated approach was required to consider the content of the economic rights of the non-exclusive native title which were held in the particular allotments at the time of the compensable act, informed by the legal content of the radical interest of the Crown which had been enlarged by the earlier extinguishment of the right to exclude others and control access.³³

Non-economic loss

47. With respect to non-economic loss, South Australia supports the Northern Territory and the Commonwealth submissions that the primary judge's award of \$1.3 million was manifestly excessive.

Interest

48. South Australia supports the submissions of the Northern Territory in relation to interest.³⁴ South Australia supports the submissions of the Commonwealth on the topic of delay.³⁵

Part VI:

49. South Australia estimates that it will require 20 minutes for presentation of its oral argument.

Dated: 20 April 2018

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³³ Similarly, (although not arising directly in the present matter, the compensation provisions under the NTA having national application), an assessment of compensation under the NTA must accommodate as a fundamental premise that the particular native title rights which are impaired by a compensable act will vary between different native title holding groups depending on the nature of their traditional laws and customs, and may also vary within a compensation claim area depending upon the particular tenure history of the land across the claim area. See *Wik People v State of Queensland* (1996) 187 CLR 1, 169 (Gummow J); *Western Australia v Ward* (2002) 213 CLR 1, 91 [82] (Gleeson, CJ, Gaudron, Gummow and Hayne JJ). See also *Ah Chee v State of South Australia* (2014) 319 ALR 59, 70-71 [Orders 8-9].

³⁴ Northern Territory Consolidated Submissions [71]-[121].

³⁵ Commonwealth Consolidated Submissions [80]-[84].

ANNEXURE A

Relevant Constitutional Provisions and Legislation

THE CONSTITUTION

51 Legislative powers of the Parliament

10 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

...

NATIVE TITLE ACT 1993 (CTH)

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19 State/Territory acts may be validated

(1) If a law of a State or Territory contains provisions to the same effect as sections 15 and 16, the law of the State or Territory may provide that past acts attributable to the State or Territory are valid, and are taken always to have been valid.

Effect of validation of law

30 (2) To avoid any doubt, if a past act validated by subsection (1) is the making, amendment or repeal of legislation, subsection (1) does not validate:

(a) the grant or issue of any lease, licence, permit or authority; or

(b) the creation of any interest in relation to land or waters;

under any legislation concerned, unless the grant, issue or creation is itself a past act attributable to the State or Territory.

22F State/Territory acts may be validated

40 If a law of a State or Territory contains provisions to the same effect as sections 22B and 22C, the law of the State or Territory may provide that intermediate period acts attributable to the State or Territory are valid, and are taken always to have been valid.

51 Criteria for determining compensation

Just compensation

- (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

10 *Acquisition under compulsory acquisition law*

- (2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place.

Compensation where similar compensable interest test satisfied

- 20 (3) If:
- (a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and
 - (b) the similar compensable interest test is satisfied in relation to the act;
- the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines *similar compensable interest test*).

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

- 30 (4) If:
- (a) neither subsection (2) nor (3) applies; and
 - (b) there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth) or for the State or Territory to which the act is attributable;
- the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria set out in that law for determining compensation.

40 *Monetary compensation*

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

Requests for non-monetary compensation

- 10 (6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:
- (a) must consider the request; and
 - (b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a specified period, transfer property or provide goods or services in accordance with the recommendation.

Where recommendation not complied with

- 20 (7) If the person does not transfer the property or provide the goods or services in accordance with the recommendation, the person claiming to be entitled to the compensation may request the court, person or body to determine instead that the whole or the part of the compensation concerned is to consist of the payment of money.

Where recommendation complied with

- (8) If the person does transfer the property or provide the goods or services in accordance with the recommendation, the transfer of the property or provision of the goods or services constitutes full compensation for the act, and the entitlement to it is taken to have been determined in accordance with this Division.

30 **51A Limit on compensation**

Compensation limited by reference to freehold estate

- (1) The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.

This section is subject to section 53

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

53 Just terms compensation

(1) Where, apart from this section:

(a) the doing of any future act; or

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

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

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

(d) in any other case—the Commonwealth;

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

Federal Court's jurisdiction

(2) The Federal Court has jurisdiction with respect to matters arising under subsection (1) and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.

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223 Native title

Common law rights and interests

(1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

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(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), **rights and interests** in that subsection includes hunting, gathering, or fishing, rights and interests.

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Statutory rights and interests

- (3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression *native title* or *native title rights and interests*.

10 Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

Subsection (3) does not apply to statutory access rights

- (3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

Case not covered by subsection (3)

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- (4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):
- (a) in a pastoral lease granted before 1 January 1994; or
 - (b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

LANDS ACQUISITION ACT (NT)

30

Schedule 2 Rules for the assessment of compensation

Section 66

1. VALUE TO THE OWNER

Subject to this Schedule, the compensation payable to a claimant for compensation in respect of the acquisition of land under this Act is the amount that fairly compensates the claimant for the loss he has suffered, or will suffer, by reason of the acquisition of the land.

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

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

2. MARKET VALUE, SPECIAL VALUE, SEVERANCE, DISTURBANCE

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

- (a) the consideration that would have been paid for the land if it had been sold on the open market on the date of acquisition by a willing but not anxious seller to a willing but not anxious buyer;
- 10 (b) the value of any additional advantage to the claimant incidental to his ownership, or occupation of, the acquired land;
- (c) the amount of any reduction in the value of other land of the claimant caused by its severance from the acquired land by the acquisition; and
- (d) any loss sustained, or cost incurred, by the claimant as a natural and reasonable consequence of:
 - 20 (i) the acquisition of the land; or
 - (ii) the service on the claimant of the notice of proposal,

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

3. MARKET VALUE FOR USE OTHER THAN EXISTING USE

30 If the amount referred to in rule 2(a) is determined upon the basis of a use for a purpose which is not the purpose for which the land was used on the date of acquisition, no amount shall be allowed under rule 2(d) in respect of any:

- (a) loss that would have been sustained; or
- (b) costs that would have been incurred,

in adapting the land for use for that other purpose.

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4. CIRCUMSTANCE PECULIAR TO THE CLAIMANT

For the purposes of rule 2(d), in determining whether a particular loss sustained, or cost incurred, by a claimant is a natural and reasonable consequence of:

- (a) the acquisition of the land; or
- (b) the service on the claimant of the notice of proposal,

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the Tribunal shall take into account any circumstances peculiar to the claimant.

6. DETERMINABLE INTERESTS

If, at the date of acquisition, the interest of the claimant in the land was:

- (a) due to expire; or
- (b) liable to be determined,

10 the Tribunal shall take into account any reasonable prospect of renewal or continuation of the interest, and the likely terms and conditions of that renewal.

7. COST OF ACQUIRING OTHER LAND

(1) If:

- (a) the acquired land:
 - 20 (i) was, immediately before the date of acquisition, used for a purpose for which there is no general demand or market for land; and
 - (ii) but for the acquisition, would have continued to have been used for that purpose; and
- (b) the claimant has acquired, or genuinely intends to acquire, other land suitable for that purpose,

the Tribunal shall take into account, in place of the amount referred to in rule 2(a), an amount ascertained by adding:

- 30 (c) the cost of acquiring the other land; and
- (d) the cost and losses incurred or likely to be incurred by the claimant as a result of, or incidental to, relocation,

in each case calculated at the date when, in all the circumstances, it was or would be reasonably practical for the claimant to incur the cost or losses.

40 (2) In assessing the amount of compensation under subrule (1) the Tribunal shall have regard to the amount, if any, by which the claimant has improved, or is likely to improve, his financial position by the relocation.

8. MATTERS NOT TO BE TAKEN INTO ACCOUNT

The Tribunal shall not take into account:

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

- (i) in pursuance of a power conferred by law; or
- (ii) by the Commonwealth or the Territory, a statutory corporation to which the *Financial Management Act* applies, or a council constituted under the *Local Government Act*;
- (b) any increase in value of the acquired land resulting from its use or development contrary to law;
- 10 (c) any increase or decrease in the amount referred to in rule 2(a) arising from:
 - (i) the carrying out; or
 - (ii) the proposal to carry out,
the proposal; or
- 20 (d) any increase in the value of the land caused by construction, after the notice of proposal was served on the claimant, of any improvements on the land without the approval of the Minister.

9. INTANGIBLE DISADVANTAGES

- (1) If the claimant, during the period commencing on the date on which the notice of proposal was served and ending on the date of acquisition:
 - (a) occupied the acquired land as his principal place of residence; and
 - 30 (b) held an estate in fee simple, a life estate or a leasehold interest in the acquired land,

the amount of compensation otherwise payable under this Schedule may be increased by the amount which the Tribunal considers will reasonably compensate the claimant for intangible disadvantages resulting from the acquisition.
- (2) In assessing the amount payable under subrule (1), the Tribunal shall have regard to:
 - 40 (a) the interest of the claimant in the land;
 - (b) the length of time during which the claimant resided on the land;
 - (c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land;
 - (d) the period after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land;
 - 50 (e) the period during which the claimant would have been likely to continue to reside on the land; and

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

10. MORTGAGE DEBTS

10 The amount of compensation payable to a mortgagee in respect of a debt secured by a mortgage over acquired land shall not exceed the amount of compensation that would be payable for the acquisition of all interests in the land if there had been no mortgage secured over that land.

11. LOANS

(1) If the amount of compensation assessed in accordance with this Schedule is insufficient to enable a claimant who occupied the acquired land as his principal place of residence continuously between the date of service of the notice of intention and the date of acquisition and:

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- (a) who held an interest in fee simple in the acquired land;
- (b) in whom an equity of redemption in respect of that land was vested; or
- (c) who held a lease of that land granted under an Act:
 - (i) in perpetuity;
 - (ii) for a term of not less than 99 years;
 - (iii) with a right of purchase; or
 - (iv) which contained terms and conditions prohibiting the claimant from erecting or using any building on the land other than a dwelling-house,

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40 to purchase land to be used as a principal place of residence providing accommodation reasonably comparable with the accommodation on the acquired land, the Minister may offer to grant a loan to the claimant of an amount which, when added to the amount of compensation otherwise payable in respect of the acquired land, would be sufficient to enable the claimant to purchase land on which there is accommodation reasonably comparable with the accommodation on the acquired land.

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- (2) The Minister shall, when making an offer under subrule (1), specify the maximum amount of the loan he is prepared to grant.
- (3) Repayment of a loan granted in accordance with this rule shall be secured by a mortgage to the Territory of the land purchased to provide the comparable accommodation.

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(4) A mortgage under subrule (3):

(a) shall provide for the amount secured to be repayable forthwith if:

(i) the land the subject of the mortgage is sold;

(ii) the claimant and his spouse or de facto partner cease to use the land as a principal place of residence; or

10 (iii) if both the claimant and his spouse or de facto partner have died; and

(b) shall contain such other terms and conditions as the Minister thinks fit to secure the repayment of the loan.

12. INTERPRETATION

In rules 9 and 11, a reference to a claimant includes a reference to any spouse or de facto partner of the claimant.

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VALIDATION (NATIVE TITLE) ACT (NT)

4 Past acts

Every past act attributable to the Territory is valid and is taken always to have been valid.

30 **4A Intermediate period acts**

Every intermediate period act attributable to the Territory is valid and is taken always to have been valid.