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
APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN	BETWEEN	BETWEEN
NORTHERN TERRITORY OF AUSTRALIA Appellant and ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent COMMONWEALTH OF AUSTRALIA Second Respondent	COMMONWEALTH OF AUSTRALIA Appellant and ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent NORTHERN TERRITORY OF AUSTRALIA Second Respondent	ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant and NORTHERN TERRITORY OF AUSTRALIA First Respondent COMMONWEALTH OF AUSTRALIA Second Respondent

SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

PART I: CERTIFICATION

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

PART II: ISSUES

2. Compensation on just terms is the price to be paid under the *Native Title Act 1993* (Cth) (**NTA**) for both the doing of future acts that affect native title as well as the validation of historically invalid acts. This is the first occasion for the compensation provisions to come before this Court. These provisions can be expected to be applied time and again, not only in relation to future acts, but in providing compensation for countless acts done in relation to land or waters between 1975 and late 1996 that have been validated. To the extent that
10 clear guidance as to methodologies and principles can be obtained from these appeals, the prospects for negotiated outcomes in future cases will be significantly advanced.

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3. This case concerns 53 acts that took place over a multitude of lots comprising a total area of about 1.27 km^2 in the town of Timber Creek, which is situated in a remote area in the Northern Territory. The land in question is land over which the Claim Group held only *non-exclusive* native title. However, that land comprises only a small proportion of the total land available to the Claim Group, which now holds *exclusive* native title over 86% of the town, in addition to freehold title over 1,461 km^2 of land adjoining the town under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**). While valuation questions will always depend upon the facts, on the facts just summarised the award of compensation of $2,899,446 (including interest) might be thought to set a very high benchmark, in circumstances where the approach to compensation adopted in this case can be expected to be applied to vastly larger and also less remote areas of land.

4. The appeals brought by the Commonwealth of Australia (**Commonwealth**), the Northern Territory (**Territory**) and the Ngaliwurru and Nungali Peoples (**Claim Group**) respectively, raise the following issues:

   (a) Economic loss:

      (i) Having regard to the limitations on the non-exclusive native title rights as found by the Full Court of the Federal Court (**Full Court**), did the Full Court err in determining that the economic value of the non-exclusive native title rights was 65% of the freehold value of the land? (Cth ground 1; Territory ground 1)

      (ii) Is a legally correct assessment of the economic value of the rights: no more than 50% of the freehold value? (Cth ground 2; Territory ground 3); or, alternatively, the value assessed by expert economist Wayne Lonergan? (Territory ground 2)

      (iii) Does the *Racial Discrimination Act 1975* (Cth) (**RDA**) operate in any respect to require that non-exclusive native title rights must be valued as exclusive native title rights or freehold? (Claim group ground 2(1))

   (b) Interest:

      (i) Having accepted that interest in this case should be awarded analogously to the equitable rule that provides interest on compensation for compulsory acquisition of property, was the Full Court required to hold that interest was payable *on* compensation, and not as *part of* compensation? (Cth ground 3)

      (ii) Was the Full Court correct to conclude that the Claim Group had not established a basis upon which equity would provide for interest to be calculated on a compound basis, rather than a simple interest basis? (Claim Group ground 2(2))

(c) Non-economic loss (solatium):

(i) Is the ongoing effect of an earlier non-compensable act capable of being characterised as the "effect of" a later compensable act, within the meaning of s 51(1) of the NTA? (Cth ground 4(a); Territory ground 4.2)

(ii) Did the Full Court err in upholding the primary judge's inclusion in the solatium award of a component for a "sense of failed responsibility for the obligation, under the traditional laws and customs, to have cared for and looked after" the land? (Cth ground 4(b))

(iii) Is the compensable "effect of" an act on native title capable of including a sense of loss that might be experienced by future descendants of the Claim Group? (Cth ground 4(c))

(iv) Did the Full Court erroneously hold that the primary judge had taken into account the extent of land that remained available to the Claim Group to exercise and enjoy their traditional rights, in comparison to the relatively small area of land that was subject to compensable acts? (Cth ground 5; Territory ground 4.3)

(v) Was the Full Court correct to conclude that commercial agreements entered into by the claimants (containing provisions for solatium-type payments for damage to or destruction of sacred sites) were irrelevant to the assessment of an appropriate award for solatium? (Cth ground 6)

(vi) Did the Full Court err in holding that the primary judge's award of $1.3 million for solatium was not manifestly excessive? (Cth ground 7; Territory grounds 4.1 and 4.4).

PART III: SECTION 78B NOTICE

5. The Commonwealth does not presently consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth). However, that may change if the Claim Group advances an argument along the lines described in paragraph 86 below, in which case the Claim Group will need to give the requisite notice.

PART IV: CITATION OF REASONS FOR JUDGMENT

6. The reasons for judgment of the Full Court of the Federal Court are found at *Northern Territory of Australia v Griffiths* [2017] FCAFC 106 (**FFC**) [CAB.257] (reported at (2017) 346 ALR 247). The reasons for judgment of the primary judge (Mansfield J) are found at *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (**FC**) [CAB.93] (reported at (2016) 337 ALR 362).

PART V: FACTUAL BACKGROUND

7. The background to the compensation claim is set out at FFC [1]-[33] (see also FC [1]-[53], [71], [73]-[80]). Where particular findings of fact or parts of the evidence are pertinent to a ground of appeal, they are expressly dealt with in the context of that ground. Otherwise, the Commonwealth highlights the following aspects of the background to the appeal.

8. The compensation claim was preceded by a contested determination of native title: *Griffiths v Northern Territory* (2006) 165 FCR 300. In that proceeding, Weinberg J found that the Claim Group held native title rights and interests over most of the land within the town of Timber Creek, but that the native title comprised only non-exclusive rights to access and use the area (FC at [10]-[11]). On appeal, the Full Court varied the determination of native title to provide that, in relation to those parts of the claim area to which s 47B of the NTA applied (requiring previous extinguishing acts to be disregarded), the native title comprised a right to exclusive possession, use and occupation of the subject land: *Griffiths v Northern Territory* (2007) 165 FCR 391. In upholding the appeal, the Full Court found (at [127]-[128]) that the Claim Group's traditional "gatekeeper" role involving protection of visitors to the land from spiritual sanctions and avoiding injury to the country was sufficient for a finding of exclusive possession (FC at [12], [332]; FFC at [29]).

9. The compensation claim itself was heard in two tranches, with questions of liability being determined in advance of quantum: *Griffiths v Northern Territory* [2014] FCA 256 (**Liability No 1**) [CAB.5]; *Griffiths v Northern Territory of Australia (No 2)* [2015] FCA 443 (**Liability No 2**) [CAB.71]. Most of the lots for which compensation was claimed were not included in the earlier native title determination because they had been excluded from the claim area by reason of s 61A(2) of the NTA. The trial on liability and quantum proceeded on the basis of agreed facts about the nature and extent of native title (depending upon questions of extinguishment) in terms that mirrored the earlier native title proceeding.

10. The primary judge found that a historical pastoral lease granted on 20 June 1882 was effective at common law to extinguish the native title right to control access to *inter alia* the whole of the area that would later be proclaimed as the town of Timber Creek. As a result, the native title holders had not enjoyed a right to exclusive possession since 1882. Accordingly, the compensable acts (being acts that occurred between 1980 and 1996) for which compensation was sought were acts that had extinguished or impaired "*non-exclusive* native title" (FFC at [31]-[33]; *Liability No 1* at [16], [41]-[43]; Order 1 of the orders made

by Mansfield J on 24 August 2016) [CAB.221].

11. The claim for compensation from the Territory was made pursuant to ss 50(2) and 61 of the NTA. The Claim Group also brought a claim for compensation from the Commonwealth pursuant to s 53. The claim against the Commonwealth depended upon the primary judge accepting the Claim Group's contention that compensation under the NTA is to be assessed at the date of validation. As the primary judge rejected that contention and found that compensation is to be assessed at the date of the act, his Honour held that there was no need to consider the claim under s 53 (FC at [44], [66], [172], [174], [435]). The Claim Group did not appeal that aspect of the primary judge's decision.

PART VI: ARGUMENT

10 ## ECONOMIC LOSS

The Full Court's assessment of market value was erroneous: Cth grounds 1 and 2

12. It was common ground in the courts below that just terms compensation could, consistently with s 51(1) of the NTA, be calculated by reference to a component representing the economic value of the native title rights and a component representing non-economic loss. It was also not disputed that there should be an award of interest calculated by reference to the economic value component.[1] Approaching the assessment of compensation in this way is envisaged by s 51(4) of the NTA, which authorises the Court to have regard to principles set out in laws determining compensation in compulsory acquisition cases. These principles concern the assessment of both economic loss and non-economic loss.[2] (They do not
20 concern interest, as legislation of this kind provides for interest *on* compensation, not as *part of* compensation).

13. Valuation cases employing these principles allow for the economic component of compensation (specifically, market value) to be determined by applying a discount to the normal freehold value by reference to the nature of the constraints on the use and alienability of the land. The courts below accepted that this approach could be used to assess the economic value component of an award of compensation under the NTA.

14. The primary judge assessed the market value of the non-exclusive native title rights at 80%

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1 Whether interest was payable on, or as part of, the compensation was (and still is) contentious: see paragraph 50 and following below.

2 The compulsory acquisition laws of the Commonwealth, the Territories, and every state except South Australia and Queensland provide compensation for non-economic loss in some form.

of the value of freehold. The Full Court accepted that his Honour had made errors of principle that affected this assessment because: (1) there were significant limits on the extent of the Claim Group's native title rights which were not reflected in the descriptions used by the primary judge (FFC at [78]-[84]); (2) the primary judge had wrongly allowed the benefit to the Territory of acquiring the Claim Group's native title rights to influence the assessment of the value of those rights (FFC at [89]-[92]); (3) the primary judge did not separate the economic and non-economic elements of the native title rights in assessing the solely economic value of those rights (FFC at [109]-[114]); and (4) the economic value of the native title rights should have been assessed by reference to the *Spencer* test even though the rights were inalienable, but it was necessary to discount the value of the rights because of their inalienability (FFC at [115]-[122]).[3]

15. In light of these errors, the Full Court decided to exercise the assessment power afresh having regard to the matters identified at FFC [135]-[136]. It concluded that the economic value of the non-exclusive native title rights was 65% of freehold value (FFC at [139]).

16. The Commonwealth's position in the courts below was that the inalienability of native title should not result in a downwards adjustment to the economic value of native title rights when assessing compensation for their loss or impairment. The Commonwealth considered that the decision of the High Court in *Geita Sebea v Territory of Papua* (***Geita Sebea***) supported that approach, even if it did not mandate it, when the interests acquired were indigenous rights in land.[4] The Full Court rejected those arguments and instead applied the "general principle" in *Corrie v McDermott* (FFC at [115]-[122]).[5]

17. In the absence of inalienability as a discounting factor, the Commonwealth had contended that it would be appropriate to value the non-exclusive native title rights at 50% of freehold value, on the basis that this would reflect the substantial limitations pertaining to non-exclusive native title rights in comparison to exclusive native title rights. If, however, inalienability must be taken into account (as the Full Court found), then that would affect the value of *both* exclusive and non-exclusive native title: that is, full freehold value would not be an appropriate proxy for the value of *exclusive* native title rights, with the

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3 This is a reference to the test in *Spencer v Commonwealth* (1907) 5 CLR 418.

4 (1941) 67 CLR 544 at 557.

5 [1914] AC 1056 at 1062, reproduced at FFC [117]. In that case, there was a restriction on sale (other than to a local authority) and use was restricted to trust purposes. The land was valued at 50% of freehold, but that value was assessed by an arbitrator and not contested by the parties.

consequence that even if the *relative* value as between exclusive and non-exclusive native title remains the same, the *absolute* value of each must be reduced by a further percentage to account for inalienability.

18. In those circumstances, if inalienability is taken into account, the Commonwealth submits that 50% of freehold value represents the **upper limit** of value for the non-exclusive native title rights that could be arrived at by the proper exercise of "judgment and sound discretion".[6] That follows because, whilst there are no judicial decisions involving the valuation of truly analogous rights, there is no cogent reason why valuation cases dealing with freehold land that is subject to restrictions on alienability cannot be used to provide guidance on the *relative* impact on value of restrictions of that kind.[7] Those cases reveal:

    (a) Discounted values range from 10% to 80% of freehold depending on the severity of the restrictions on alienability. The lowest assessed value involved land that was subject to a total and perpetual ban on sale or lease and for which there was very little use.[8] The highest involved land that had to be used for the purposes of a trust but which could be sold or leased with the permission of the Governor.[9]

    (b) There are a cluster of compulsory acquisition cases involving land that is classified as "*community land*" under NSW local government legislation. Community land cannot be sold or disposed of (except to the Crown), but it can be leased with the consent of the Minister. It tends to be zoned "open space" and is consequently subject to planning restrictions on use for public purposes. In these cases, the values have ranged from one-third of freehold[10] up to 72% of freehold,[11] with most assessments at 50%.[12] Notably, the 72% value was based on a reasonable chance of the land being rezoned and thus capable of development, so the case could be viewed as reflecting the restriction on alienability more than use. Conversely, after NSW acquisition legislation

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6 Cf. *Commonwealth v Reeve* (1949) 78 CLR 410 at 423 (Dixon J).

7 An analysis of such cases must take into account that the subject land is sometimes also affected by restrictions on use, and the courts do not necessarily identify what proportion of the reduction in value is attributable to each restriction.

8 *Liverpool City Council v Commonwealth* (1993) 46 FCR 67.

9 *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106.

10 *Hornsby Shire Council v Roads & Traffic Authority of NSW* (1998) 100 LGERA 105.

11 *Liverpool City Council v Roads & Traffic Authority of NSW* [2004] NSWLEC 543

12 *Canterbury City Council v Roads & Traffic Authority of NSW* [2002] NSWLEC 161; *Canterbury City Council v Roads & Traffic Authority of NSW* [2004] NSWLEC 172; *Blacktown City Council v Roads & Traffic Authority of NSW* [2004] NSWLEC 772; *Roads & Traffic Authority of NSW v Blacktown City Council* [2007] NSWCA 20.

was changed and inalienability was no longer taken into account as a discounting factor, community land zoned "open space" was valued at two-thirds of freehold.[13] These last two cases can be analysed as reflecting value where only one restriction is operative, with 50% being a better indication of value when land is subject to restrictions on alienability *and* use, but still has reasonable value to the owner (such as where open space land is well situated for public amenity).

19. It may be accepted that the freehold values that formed the basis of the assessment of market value of the native title rights in this case already factored in any restrictions on use that resulted from external factors (such as planning controls). They do not, however, factor in any restrictions that flow from *either* inalienability *or* the absence of a right to control access to the land. The Full Court identified those factors as follows (FFC at [135]):

> The Northern Territory had the right to grant co-existing rights and interests to others such as grant grazing licences, occupation licences, and miscellaneous licences. The Claim Group had limited ability to remove unlawful users from the land. The offences for unlawful use of the land under the Crown lands legislation did not prevent people accessing the land for purposes such as recreation. And finally, the Claim Group did not have the right to confer permission on non-native title holders to enter upon and use the land.

20. When regard is had to those restrictions, and to the level of discounting applied in valuation cases, the Commonwealth submits that the market value of the non-exclusive native title rights could not properly be discounted by a factor of less than 50% of the freehold value.

21. It follows that the Full Court's assessment of 65% of freehold was an erroneous assessment of the economic value of the non-exclusive native title rights, so as to warrant appellant intervention.[14] If that is accepted, a re-exercise of the assessment power would be called for. While the cases suggest that a value *lower* than 50% could be supported (having regard to the inalienability of the rights being valued), the Commonwealth does not contend for that result.

Non-exclusive native title should not be compensated as if it was exclusive native title or freehold: cf. Claim Group ground 2(1)

22. The Claim Group made a forensic decision at trial (and on appeal) not to advance any methodology for valuing the non-exclusive native title rights other than as full freehold value. Broadly speaking, the Claim Group argued that: the non-exclusive rights were in

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13 *Sutherland Shire Council v Sydney Water Corp* [2008] NSWLEC 303.

14 *Commonwealth v Reeve* (1949) 78 CLR 410 at 423 (Dixon J); *Federal Commissioner of Taxation v St Helen's Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 363-364 (Gibbs J), 381 (Mason J), 397 (Aickin J).

practical terms exclusive (FFC at [69]-[71]); the RDA operated in a way that made it impermissible to value any native title rights as anything less than freehold (FFC at [72]); and further, that it was appropriate to "adapt" the *Spencer* test in the context of native title so as to take into account the value to the Territory of obtaining a full beneficial estate in the land (FFC at [88]).

23. As a matter of logic, the Claim Group's equation of the value of exclusive and non-exclusive native title rights implicitly suggests that either:

    (a) no economic value is attributable to a native right to control access to and make decisions about the use of land, such that a right of this kind could be extinguished or impaired without payment of *any* compensation for economic loss; or alternatively

    (b) the extinguishment of native title by sequential compensable acts over time gives rise to a liability to pay compensation for economic loss in excess of freehold value (potentially amounting to multiple freehold values).

24. This tension in the Claim Group's approach has never been explained or resolved, and the Full Court was correct to reject the arguments that underpin it.

The non-exclusive rights were not in practical terms exclusive

25. The Full Court found that the consequence of the grant of the historical pastoral lease in 1882 was that a traditional right to control access to and make decisions about the subject land was lost to the Claim Group and did not revive (in the sense that the common law ceased to recognise the existence of such a right) (FFC at [80]). That is consistent with authority, including in this Court, regarding the extinguishing effect of a pastoral lease on native title,[15] and with authority to the effect that when a native title right to control access to land is extinguished, it is wholly extinguished and does not revive; the courts have rejected any notion of the survival of a "qualified" native title right to control access.[16]

26. The Full Court went on to find that, at the time of the compensable acts, it was open to the Territory validly to grant rights over the subject land that were no greater than the rights conferred by the historical pastoral lease. This meant that under the applicable Crown lands

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15 *Western Australia v Ward* (2002) 213 CLR 1 (***Ward HC***) at [192] (Western Australian pastoral leases), [417] (Northern Territory pastoral leases) (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

16 *Ward HC* at [52], [192], [219] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [98] (McHugh J); *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [147]-[148] (Wilcox, French and Weinberg JJ). See also *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1 at [1869]-[1872]; *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 at [787]-[788].

statute, the Territory had the power to grant licences to graze stock, licences to occupy the land for up to five years, and miscellaneous licences to take various things from the land (FFC at [80], [82]). Consistently with principles of acquisition law, the Full Court then held that the economic value to be ascribed to the native title rights would take account of the future potential for the Territory to grant co-existing rights in the land (FFC at [82], [135]).

27. Before the Full Court, the Claim Group accepted that the Territory could have granted *miscellaneous* licences over the land but contended that this should not lead to a reduction from full freehold value (FFC at [76]). In this Court, at the special leave stage, the Claim Group accepted that the Territory could also have granted *occupation* licences, yet still contended that this did not justify any reduction from freehold value.[17] The rationale for that position is not easy to discern because, on the Claim Group's own analysis, licences of this kind could be granted over leased land but *not* over freehold land.

28. The Claim Group apparently continues to maintain that the Territory could not have validly granted *grazing* licences over the subject land (despite a finding to the contrary effect having been made by the primary judge in the separate hearing on liability, which the Claim Group did not appeal).[18] However, the Full Court's holding that, at the time of the compensable acts, the Territory could validly have created rights in the land that were not inconsistent with the continued existence of the native title rights, represents an orthodox application of authority.

29. The argument that the Territory could not have validly granted *grazing* licences over the subject land attributes to s 10(1) of the RDA an operation it does not have. The plurality in *Ward HC* identified two kinds of case where s 10(1) of the RDA operates in relation to State (or Territory) laws. The first kind is when a State law provides for the extinguishment of land titles but provides for compensation only in respect of non-native title. In that scenario, the extinguishment remains valid but a right to compensation is provided to the native title holders by the federal law. The second kind is when a State law extinguishes only native title and leaves other titles intact. In this scenario, the discriminatory burden of extinguishment is removed because the operation of the State law is rendered invalid by s 109 of the Constitution (or by the overriding operation of s 10(1) of the RDA in relation

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17 Special Leave Application No. D6 of 2017: Claim Group's submissions dated 6 September 2017 at [22]; reply submission dated 9 October 2017 at [7].

18 *Liability No 1* [CAB.5] at [8], [21A(1)], [43], [46], [61]-[81]. See also *Liability No 2* [CAB.71] at [9].

to a Territory law).[19] Importantly, in both kinds of case it is the fact that native title will be *extinguished*, in whole or in part, that enlivens s 10(1) of the RDA. A grant of rights that has no extinguishing effect on native title does not engage s 10(1).[20]

30. No different result ensues even accepting, as a matter of principle, that the RDA operates in relation to native title in a manner similar to the principle of non-derogation from grant. That follows because non-derogation does not mean that the holder of a title from the Crown is protected from *any* subsequent grant of rights in every case. The protection is against a subsequent grant that would render the earlier grant of rights nugatory (in whole or in part) – that is, a grant "cannot be superseded by a subsequent *inconsistent* grant".[21] Where the grant is of an *exclusive* right, there will be derogation if the grantor purports to grant leave to anybody else to do the same thing.[22] In contrast, where the grant is of a *non-exclusive* right, the grantor cannot be prevented from granting the same right to others, provided that this does not defeat the objects of the first grant.[23] Analogising to the native title context, a grant of rights that is not inconsistent with the continued existence of the non-exclusive native title rights would not offend the principle of non-derogation.

31. The Claim Group contends that, because the RDA conferred upon native title holders "protection against later inconsistent derogating grants", this constrained the Territory from being able to grant any interest over land subject to native title unless the same interest could be granted over freehold or leasehold land under the Crown lands legislation.[24] Three observations can be made about that contention, each of which has the result that the Claim Group's argument should be rejected.

32. **First**, the Claim Group does not identify how a putative grant that would not extinguish

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19 *Ward HC* at [108], [129], [133] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

20 For example, in *Ward HC* at [309], post-RDA mining leases that would have extinguished a native title right to control access to land (and thus been invalid), were not invalid because the native title right to control access had already been extinguished – before the commencement of the RDA – by the grants of pastoral leases. See also *Western Australia v Commonwealth* (1995) 183 CLR 373 (***Native Title Act Case***) at 436-437 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), citing *Mabo v Queensland (No 1)* (1985) 159 CLR 70 at 217 (Brennan, Toohey and Gaudron JJ), 229-230 (Deane J); *Ward HC* at [116].

21 *Native Title Act Case* at 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (emphasis added). See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***) at 63-64 (Brennan J, with whom Mason CJ and McHugh J agreed), 110-111 (Deane and Gaudron JJ).

22 *O'Keefe v Williams* (1910) 11 CLR 171 at 191-2 (Griffith CJ), 211 (Isaacs J).

23 *Carr v Benson* (1868) L.R. 3 Ch. 524 at 532 (Lord Justice Page Wood), 535 (Lord Justice Selwyn). *Carr v Benson* was cited with approval in *O'Keefe v Williams* (1910) 11 CLR 171 at 212 (Isaacs J).

24 Special Leave Application No. D6 of 2017: Claim Group's submissions dated 6 September 2017 at [17], [22]; reply submission dated 9 October 2017 at [7].

native title is inconsistent with or derogates from the native title.

33. **Secondly**, the Claim Group bundles freehold and leasehold together but then elides the fact that, whereas some interests could be granted under Crown lands legislation over leasehold land, none could be granted over freehold land.[25] For that reason, the two components of the Claim Group's putative comparator are not even subject to the same treatment vis-à-vis each other. Further, the Claim Group likewise fails to distinguish between leases that confer a right of exclusive possession and those that do not (such as pastoral leases), and elides the fact that more interests could be granted over the latter than over the former.

34. **Thirdly**, and perhaps most significantly, the Claim Group's contention is utterly inconsistent with the way in which the courts have approached the validity of pastoral leases that were granted after the commencement of the RDA and which were still in force on 1 January 1994:

(a) When the NTA was originally enacted, the definition of a category A past act (which wholly extinguished native title if still in existence on 1 January 1994), included the grant of a pastoral lease: ss 15(1)(a), 229(3)(a) and (c). After a majority of the High Court in *Wik Peoples v Queensland* (***Wik***)[26] held that a pastoral lease was not necessarily inconsistent with all native title rights, the definition of "previous non-exclusive possession act" was inserted into the NTA (s 23F), as was s 23G (which prescribed the effect of such an act on native title). However, Parliament determined not to reverse the total extinguishment of native title that had already occurred upon the earlier enactment of the past act provisions of the NTA and satellite legislation. Of course, the past act provisions are only engaged if an act would otherwise have been invalid at common law.[27]

(b) The consequence is that, if a post-RDA pastoral lease still in force on 1 January 1994 was invalid by operation of s 10(1) of the RDA, it was a category A past act and native title was *wholly* extinguished: s 23G(2). In contrast, if the pastoral lease was valid at common law (because s 10(1) of the RDA was not engaged), it was not a "past act", and native title was only extinguished to the extent of any inconsistency: s 23G(1)(b).

(c) On the Claim Group's approach, *every* post-RDA pastoral lease that was still in force

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25 Cf. *Crown Lands Ordinance* (NT) ss 107-109; *Crown Lands Act 1992* (NT) ss 88, 90-91.

26 (1996) 187 CLR 1.

27 See the definition of "past act" in s 228 of the NTA. See also *Ward HC* at [114].

on 1 January 1994 would have been invalid and thus wholly extinguished native title by operation of the NTA, because a pastoral lease would necessarily be inconsistent with native title (if, as the Claim Group suggest, native title rights are simply equated with freehold land or land already subject to a lease).

(d) The courts have not taken the Claim Group's approach. On every occasion where the validity of a post-RDA (but pre-NTA) pastoral lease has arisen, the courts have indicated that the question of validity calls for a consideration of whether the grant of the pastoral lease would have had any further extinguishing effect on native title.[28]

35. The Full Court was likewise correct to conclude that, although the Claim Group could take legal action to enforce their non-exclusive native title rights, they had *no power to exclude others* from accessing the land (FFC at [82]). That is not to deny that native title may be protected by such legal or equitable remedies "as are appropriate to the particular rights and interests established by the evidence".[29] However, as the plurality in *Ward HC* observed (at [21]), the courts are yet to develop what is involved in the notion of "appropriate" remedies.

36. The "particular rights and interests" in this case, being non-exclusive rights, "did not confer rights on the native title holders to the exclusion of others, nor any right to control the conduct of others".[30] The Claim Group members could not have obtained an injunction to prevent the entry of others who were at liberty to be present on the land. In that respect, it is significant that a person is at liberty to do anything on Crown land that is not expressly prohibited. For that reason, it would not, for example, have been unlawful for anyone to go onto the land and play football or have a picnic or camp overnight. Under s 119(1) of the *Crown Lands Ordinance* (NT), unlawful occupation of Crown land was only constituted by "residing or by erecting any building thereon, or clearing, enclosing, or cultivating any part thereof". Further, even if persons were unlawfully on the land, the Claim Group could not have brought an action in trespass to remove those persons, because the native title rights in question lacked the element of control necessary to support an action of that kind.[31] These

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28 See: *De Rose v South Australia* (2003) 133 FCR 325 at [381], [387], [402], [405] (Wilcox, Sackville and Merkel JJ); *Moses v Western Australia* (2007) 160 FCR 148 at [113], also [53]-[56], [65], [74], [88(A)], [101], [110]-[112] (Moore, North and Mansfield JJ); *Neowarra v Western Australia* [2003] FCA 1402 at [526], [532] (Sundberg J). See also *Ward HC* at [418], [425] (Newry Lease), and earlier comments at [308] regarding the inability to ascertain whether mining leases had any further extinguishing effects on native title because there had been insufficient findings of fact at trial regarding the nature and extent of the subsisting native title rights.

29 *Mabo (No 2)* at 61 (Brennan J).

30 *Akiba v Commonwealth* (2013) 250 CLR 209 at [1] (French CJ and Kiefel J).

31 See for example the discussion in *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at [40]-[43], [91]-[106] (Barrett J).

are the points made by the Full Court at FFC [135]. They necessarily impacted on the extent to which the value of the Claim Group's interest in land could properly be equated with either exclusive native title rights, or with freehold.

37. In summary, the Full Court did not err in holding that the limits on the Claim Group's native title rights and interests meant that it was inaccurate to describe those rights in the way the primary judge did, as "a real impediment to the grant of any other grants of interests", or as "exercisable to prevent any further activity on the land" (FFC at [83]).

The RDA does not require non-exclusive native title to be valued as exclusive native title

38. A recurrent theme in the Claim Group's case is the proposition that s 10 of the RDA does not permit exclusive and non-exclusive native title to be accorded different value because the "different characteristics" of native title are irrelevant; and further, that s 10 does not permit native title to be valued as less than freehold title (FFC at [72]). Both propositions are incorrect.

39. As to the **first proposition**, the Claim Group relies upon statements in *Ward HC* (at [166]-[122]) that were made in an entirely different context. The plurality was there pointing out that s 10(1) of the RDA is expressed to operate where persons of a particular race, colour or origin do not enjoy a right that *is* enjoyed by persons of *another* race, colour or origin. Since native title "has different characteristics from other forms of title and derives from a different source", it is not a species of property that is enjoyed by other persons in the community. The plurality explained that s 10(1) is nonetheless engaged because: the relevant "rights" are human rights to own and inherit property; in this context, "property" extends to native title; no basis is suggested in either the *International Convention on the Elimination of All Forms of Racial Discrimination*, or in the RDA itself, for distinguishing between different types of property and inheritance rights; so that (at [121]):

> [T]he RDA must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by persons of another race.

40. Nothing in *Ward HC* can be understood as saying that it is irrelevant or impermissible to have regard to the particular content or incidents of native title rights when attributing *value* to those rights; or that the RDA does not allow the value of native title rights to be assessed by analogy with other forms of title.

41. As to the **second proposition**, the conclusion that full freehold value is not an appropriate

assessment of the economic value of *non-exclusive* native title rights does not depend upon any notion that native title may be expropriated "on less stringent conditions (including lesser compensation)" than is the case when other titles are brought to an end.[32] It is not discriminatory to assign *non-exclusive* native title rights a lesser value than freehold value, because *non-exclusive* rights of other kinds would likewise attract lesser compensation than freehold value.[33] That is illustrated by the consideration in *Ward HC* of the inability of the holders of non-exclusive native title rights to obtain compensation under the Western Australian mining statute as "owners" (as opposed to "occupiers"), because they could not be described as having the "lawful control and management" of the land. As the plurality observed (at [317]):

> This result is no different from that which would obtain in respect of any holder of rights and interests that did not amount to the "lawful control and management" of the land. The RDA is therefore not engaged on this basis.

42. In any event, the task engaged in by the Full Court was one of comparing exclusive native title (analogised to freehold) with non-exclusive native title (FFC at [134]). That plainly does not involve racial discrimination.

43. Nothing in the NTA requires, or even suggests, that native title need *ever* be attributed the value of freehold in any case, let alone that this must occur irrespective of the nature of the native title rights in issue. To the extent to which it is correct to say that the NTA uses freehold as a "benchmark" (for some future acts and for the similar compensable interest test),[34] that is at most in relation to the protection of native title from extinguishment. That is an altogether different matter to assessing the monetary amount of compensation to be paid where native title has been extinguished.

Value to the Territory is not an appropriate measure of economic loss

44. Economic loss represents the objective economic value of the rights lost. The Full Court, consistently with principles of acquisition law, held that it was not appropriate to fix this value by reference to the benefit of the "acquisition" to the Territory (as the notional acquirer) (FFC at [89]-[92]).[35]

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32 Cf. *Native Title Act Case* at 437 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

33 Cf. *Native Title Act Case* at 450 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

34 In any event, after the 1998 amendments to the NTA, it is not correct to say that the NTA uses freehold as the "benchmark" for the protection of native title.

35 *Commonwealth v Reeve* (1949) 78 CLR 410 at 418 (Latham CJ), extracted at FFC [91].

45. The fact that only the Territory could have acquired the native title rights (by voluntary surrender or compulsory acquisition) does not justify the introduction of subjective factors into the assessment of value under the NTA. Consistently with that submission, nothing said by the High Court in *Geita Sebea*[36] suggests that it is inappropriate to deploy the conventional approach to market value (by analogy) when assessing compensation for the loss of indigenous rights to land, despite the Crown being the only possible purchaser. In *Geita Sebea*, the High Court did not undertake the valuation exercise on the basis of the interest in land that the Crown would hold subsequent to acquisition. It was only once it had characterised the rights actually held by the people of Kila Kila as constituting "a communal usufructuary title equivalent to full ownership of the land" that the Court used the value of a notional freehold as a proxy for the value of that communal usufructuary title.[37] Unlike this case, *Geita Sebea* did not address a scenario where the rights that had been recognised at the time of assertion of sovereignty had been partially extinguished or diminished in the period since, such that it was necessary to value only the residual (non-exclusive) rights.

46. It may be accepted that some adaptation of the *Spencer* test is permitted by s 51(4) of the NTA and is appropriate when valuing native title rights. However, given that what is being ascertained is the objective value produced by a hypothetical bargain, whether the bargain is conceptualised as a sale to a third party or surrender to the Crown should make no difference. It is only if subjective factors referrable to a particular purchaser or acquirer are injected into the notional bargain that a different value could be produced. But to inject those factors would involve a rejection of the *Spencer* test, rather than an adaption of it. In any event, it was not possible to place weight on the value to the Territory, because there was no evidence of what the Territory would have paid for the voluntary surrender of non-exclusive native title rights (FFC at [87]).

47. For the above reasons, the Full Court was correct to find that the primary judge erred by allowing the benefit of the acquisition to the Territory to influence his assessment of the compensation payable to the Claim Group (FFC at [92]).

Inalienability: Claim Group ground 2(1)

48. The Commonwealth's position in the courts below with respect to inalienability is explained

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36 (1941) 67 CLR 544 at 551 (Starke J), 557 (Williams J, with whom Rich ACJ agreed).

37 *Geita Sebea* at 547, 551 (Starke J), 557 (Williams J, with whom Rich ACJ agreed).

in paragraph 16 above. The conceptual framework that underpins the reasoning in *Corrie v McDermott* is identical to that utilised in the Territory acquisition statute: i.e. that compensation is to be assessed on the basis of "value to the owner".[38] While the effect of s 51(4) of the NTA is that it was open to the Full Court to adapt that principle, it is a different matter to say that the Full Court was required to do so, or that its failure to do so constitutes appealable error.

49. Nevertheless, if this Court finds that the Full Court erred on this point, the assessment power will fall to be re-exercised. In that event, the Commonwealth contends, as it did in the courts below (see paragraph 17 above), that it would be appropriate to assess the value of the non-exclusive native title rights at no more than 50% of freehold (given the very substantial limitations on the rights listed by the Full Court at FFC [135], and that the primary judge's assessment wrongly included some allowance "for the loss of deep spiritual attachment to the land" (FFC at [109])).

INTEREST

Interest is not *part of* the compensation payable under the NTA: Cth ground 3

50. The NTA does not expressly provide for the payment of interest on compensation. However, the Commonwealth did not dispute, and both the primary judge and the Full Court found, that the Court had power to award interest. That power derived from equity, by analogy with the operation of equitable principles concerning the compulsory acquisition of property where no provision for interest was made by statute.[39] The primary judge determined that an award of simple interest was appropriate,[40] and the Full Court found no error in that determination.

51. The principles governing the award of interest in the context of the compulsory acquisition of property (the **equitable rule**) were recognised in *Commonwealth v Huon Transport Pty Ltd* (***Huon Transport***)[41] and *Marine Board of Launceston v Minister of State for the Navy* (***Marine Board***) (FC at [249]).[42] Those principles are discussed in the next section of these

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38 *Lands Acquisition Act* (NT) sch 2, item 1: "Value to the owner".

39 The Full Court accepted that the power to award interest derived from the equitable rule: FFC at [173], [226], [231].

40 The primary judge saw no need to resort to s 51A of the *Federal Court of Australia Act 1976* (Cth) as a source of power to award interest since he accepted that the equitable rule applied (FC at [254]).

41 (1945) 70 CLR 293.

42 (1945) 70 CLR 518.

submissions.

52. For present purposes, it is sufficient to note that in *Marine Board*, a majority of the Court held that it is necessary to distinguish between a sum awarded as compensation for an acquisition, and a sum awarded as interest. Justice Dixon thought the difference "quite clear".[43] He held that the entitlement to interest arose not from the statutory power to award *compensation*, but by reason of equitable principles. The Court had power "to order that interest shall be paid *on* the compensation assessed and awarded" only because, in circumstances where "interest is independently payable under the principles of equity", it was incidental to the grant of jurisdiction to determine a compensation claim also to award interest in accordance with equitable principles.[44] Justice McTiernan, having held "that interest on compensation is *not generally an element in the compensation*",[45] likewise thought it an incident of the jurisdiction to award compensation "to order payment of interest *on* the compensation".[46] Justice Williams, having discussed the authorities, expressed a preference for a formulation that referred to "interest on the compensation", as opposed to "interest in the compensation".[47] To the same effect, Latham CJ (dissenting as to the result) held that "a sum so awarded for interest is allowed, not as compensation for acquisition of property, but as compensation for delay in making payment for property".[48] The "delay in payment, though causing loss, is not something which is itself the subject matter of compensation for the taking".[49]

53. Notwithstanding the passages just cited, the primary judge accepted the Claim Group's submission that interest was to be awarded as *part of* the compensation, rather than as interest *on* the compensation (FC at [254]). His Honour's order was structured accordingly, paragraph 3(b) identifying "interest on" the identified economic loss under a chapeau that referred to the "compensation payable". On appeal, the Commonwealth contended that the primary judge erred in taking this approach, such that the form of order made does not accord with correct legal principle. The Full Court rejected that contention, holding that

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43 *Marine Board* at 532. See also *Hungerfords v Walker* (1988) 171 CLR 125 at 152 (Brennan and Deane JJ), referring to the "critical distinction" between interest "paid *upon* an award of damages" and "an actual award of damages which represents compensation for a *wrongfully caused* loss of the use of money and which is assessed wholly or partly by reference to the interest which would have been earned" (emphasis added).

44 *Marine Board* at 532-533 (emphasis added).

45 *Marine Board* at 534 (emphasis added).

46 *Marine Board* at 535 (emphasis added).

47 *Marine Board* at 537.

48 *Marine Board* at 527.

49 *Marine Board* at 526.

because the order made by the primary judge identified interest "as a separate element of the award" it did not offend the views expressed by the majority in *Marine Board* (FFC at [226]).

54. With respect, the Full Court's conclusion is difficult to understand. *Marine Board* was not concerned with how an order was expressed. It clearly holds that interest payable in accordance with the equitable rule is not properly characterised as *part of* the compensation *for the act that acquired property*.

55. The terms in which an entitlement to compensation is conferred by the NTA strongly support the analysis in *Marine Board*, because the NTA confers an entitlement to compensation for the effect of an *act* on native title rights and interests.[50] As *Marine Board* explains, in the compulsory acquisition context the award of interest compensates for loss caused by the *delay in payment*. Any such delay necessarily post-dates the "act" that enlivens an entitlement to compensation under the NTA. Compensation for delay therefore cannot be *part of* the compensation for which the NTA provides.

56. In short, while interest given pursuant to the equitable rule is compensatory (in the sense that it is recompense for being kept out of the funds ultimately awarded as compensation), it does not form *part of* the principal award of compensation, which is compensation only for the *act* that extinguishes native title. The Full Court should have found that the interest in this case was interest *on* the compensation and varied the orders in the manner sought by the Commonwealth.

57. While the issue does not affect quantum in this case, the proper characterisation of an award of interest in relation to a claim for compensation under the NTA is an important point of principle. The point has potentially very significant practical importance because of s 51A of the NTA. Depending upon how that provision is construed, s 51A may limit the amount of compensation that can be awarded (in which case it would be important to know whether interest is part of the compensation awarded under s 51(1), or instead payable *on* that compensation, and therefore outside any limit that might be imposed by s 51A).

No basis in principle or fact for compound interest: cf. Claim Group ground 2(2)

58. At no stage in this proceeding has the Commonwealth disputed that equitable principles entitled the Court to award simple interest on the compensation in this case, and to do so

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50 NTA ss 17, 20, 23J and 51(1).

independently of the power to award interest conferred by s 51A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). That is, the Commonwealth accepted that the Court should develop the equitable rule that allows for the award of interest in respect of compulsory acquisitions of property, so that it applies to compensation claims under the NTA.

59. Consistently with the Commonwealth's position, both the primary judge and the Full Court held that the Claim Group were entitled to simple interest in accordance with equitable principles. It was agreed between the parties that, if simple interest was appropriate, then the rate adopted should be that specified in the Federal Court Practice Note CM16, which reflects a considered compromise between borrower and lender rates (FC at [280]).

60. The Claim Group contends that it should have been awarded compound interest. While the basis for that claim has evolved over the course of the litigation, an initial claim that may have been based upon the common law principles in *Hungerfords v Walker* (***Hungerfords***)[51] was not ultimately pressed at the trial and related affidavits were not read. The Full Court was therefore correct in observing that the Claim Group did not argue for compound interest based on *Hungerfords* (FFC at [163]). For that reason, it is unnecessary to address whether compound interest *could* have been awarded in reliance on the principles identified in that case.[52]

61. Before the Full Court, the Claim Group's claim for compound interest was exclusively based on the *equitable* rule (FFC at [196]). It relied upon: (1) an asserted fiduciary relationship with the Territory (although that claim has now been abandoned[53]); (2) the proposition that the equitable rule has developed so as to allow compound interest to be

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51 (1988) 171 CLR 125 at 149 (Mason CJ and Wilson J), 152 (Brennan and Deane JJ). *Hungerfords* concerns an actual award of damages which represents compensation for the loss of the use of a specific sum of money which a defendant's breach of contract or negligence has caused to be paid away or withheld, and which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money or which was in fact paid upon borrowings which otherwise would have been unnecessary or retired. For a discussion of the limits of the principle in *Hungerfords*, see *Commonwealth v Chessell* (1991) 30 FCR 154 at 161-162 (Sheppard J), 163 (Wilcox J); *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 363-364 (Giles J); *William Felton and Co Pty Ltd v Phillips* [1994] FCA 1179 at [62]-[63] (Davies J).

52 Those principles could have applied only if the Claim Group proved actual loss on the balance of probabilities, and that the loss so proved was foreseeable at the time and not too remote from the compensable act or acts concerned: *Hungerfords* at 149 (Mason CJ and Wilson J), 152 (Brennan and Deane JJ); *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64 at [497]-[498] (Doyle CJ, Duggan and Bleby JJ); *Commonwealth v Chessell* (1991) 30 FCR 154 at 161-162 (Sheppard J), 162-163 (Wilcox J); *La Trobe Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299 at [81] (Finkelstein J); Edelman and Cassidy, *Interest Awards in Australia* (2003) at 35-36.

53 Special Leave Application No. D6 of 2017: Claim Group's submissions dated 6 September 2017 at [32] (fiduciary obligation).

awarded without proof of loss; and (3) the proposition that just terms or fair compensation required the Claim Group to be awarded the compound interest the Territory had saved on its borrowing costs by retaining the compensation money over a long period of time (FFC at [172]).

62. For the reasons that follow there is no principled basis for awarding compound interest in this case. The Full Court was therefore correct to dismiss the claim for compound interest (FFC at [213]).

The equitable rule and simple interest

63. The equitable rule concerning the award of interest with respect to compulsory acquisitions of property was itself developed by analogy with equitable principles in relation to specific performance of a contract to purchase land where a purchaser enters into possession of the property before payment of the purchase price in full.[54] In that context, the equitable principle is that the purchaser cannot retain the purchase money and at the same time be placed in occupation of the land or receipt of the rent and profits, unless he pays the vendor interest on the purchase money.[55] By analogy, in the case of a compulsory acquisition, the acquiring authority may assume possession of the property before compensation for the acquisition (akin to the purchase price) has been assessed and paid. In that event, the equitable rule provides for interest to be paid because the acquisition will have deprived the claimant (vendor) of the profitable occupation or use of the property without any immediate recoupment of capital in money.[56]

64. Underlying both the equitable rule and the statutory provisions concerning the payment of interest is a recognition of the time value of money. Where there has been a delay in the payment of a sum to which a claimant is entitled, it is often necessary to compensate not just for the *act* that warrants compensation (eg the compulsory acquisition), but also for the *delay* in paying that compensation. The award of interest is the mechanism used to provide

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54 *Marine Board* at 527 (Rich J), 530-533 (Dixon J), 534-535 (McTiernan J), 537-538 (Williams J); *Huon Transport* at 323-324 (Dixon J), 335 (Williams J); *Swift & Co v Board of Trade* [1925] AC 520 at 532; *Inglewood Pulp & Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492 at 498-499.

55 *Huon Transport* at 323-324 (Dixon J). His Honour referred to *In re Pigott and Great Western Railway* (1881) 18 Ch D 146, which in turn cites *Dart's Vendors and Purchasers* (5th ed, 1876) at 629-630. That text reveals that in some cases a purchaser did not need to pay interest on the purchase price until the vendor showed a good title. By analogy, that suggests that interest should not be payable by analogy with the equitable rule until the time when Claim Group's native title was established in 2007.

56 *Marine Board* at 529, 532 (Dixon J); *Inglewood Pulp & Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492.

compensation for the delay.[57]

65. Importantly, the award of interest to account for the time value of money is relevant whenever there is delay (in any context) in the payment by one person of a sum to which another person is entitled. In quantifying the compensation that is appropriate for such a delay, it is axiomatic that calculating interest on a compound basis will produce a greater sum than a calculation of simple interest. But notwithstanding that fact, and despite the ready availability of investments that attract compound interest, the law has long proceeded on the basis that *simple interest* provides adequate compensation for any delay in the payment of compensation. That finds statutory expression throughout Australia in statutes that provide for the payment of interest on damages, which invariably prescribe simple interest only.[58] But it is also reflected in the equitable rule, which ordinarily permits only simple interest.[59]

66. Simple interest is quite capable of accounting for things like inflationary factors, even over a lengthy period, provided that an appropriate rate is adopted.[60] Given the longstanding acceptance of simple interest as adequately compensating for a delay in the payment of funds, there is no basis for the Claim Group's assumption that the award of simple interest failed to provide due recompense.

The equitable rule and compound interest

67. The Federal Court correctly recognised that the authorities leave open the possibility that compound interest can be awarded by equity, whether under the equitable rule or some broader equitable principle, where the interests of justice so demand (FFC at [167], [199]). In practice, however, as the Federal Court also recognised, compound interest is awarded by equity only in limited circumstances (cf. FFC at [174]-[175], [180]-[205]), being where a defaulting fiduciary has (or is presumed to have) used money for his own commercial purposes, or where the fiduciary is guilty of fraud or serious misconduct.[61] The position was

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57 See the discussion of *Marine Board* in paragraph 52 above. See also *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 666; *Whitaker v Commissioner of Taxation* (1998) 82 FCR 261 at 263-264 (Black CJ), 274 (Lockhart J), 283 (Burchett J).

58 Edelman and Cassidy, *Interest Awards in Australia* (2003) at 11.

59 In addition to the authorities discussed below, see also JLR Davis, "Interest as Compensation" in PD Finn (ed.), *Essays on Damages* (1992) at 139.

60 *Fico v O'Leary* [2004] WASC 215 at [280] (Heenan J), cited with approval in *Talacko v Talacko* [2009] VSC 579 at [16], [29] (Kyrou J).

61 *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at [74] (McHugh and Gummow JJ); *President of India v La Pintada Compania Navigacion SA* [1985] AC 104 at 116, cited with approval in *Hungerfords* at 148 per Mason CJ and Wilson J (Brennan and Deane JJ generally agreeing).

succinctly stated in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (***Westdeutsche***),[62] where Lord Browne-Wilkinson (with whom Lord Slynn and Lord Lloyd agreed) said:

> In the absence of fraud courts of equity have *never* awarded compound interest *except* against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. Equity awarded simple interest at a time when courts of law had no right under common law or statute to award any interest. The award of compound interest was restricted to cases where the award was in lieu of an account of profits improperly made by the trustee. *We were not referred to any case where compound interest had been awarded in the absence of fiduciary accountability for a profit.*

68. *Westdeutsche* was referred to with approval by McHugh and Gummow JJ in *Commonwealth v SCI Operations Pty Ltd* (***SCI Operations***).[63] While the aspect of *Westdeutsche* that concerned the availability of interest at common law was subsequently overruled in *Sempra Metals Ltd v Inland Revenue Commissioners* (***Sempra***),[64] that substantially reflected the development of the common law in England in a manner that corresponded to the earlier decision of this Court in *Hungerfords*,[65] in that it recognised that it was open to a claimant to plead *and prove* his actual interest losses.[66] *Sempra* does not hold that compound interest is assumed to be payable whenever interest is awarded.

69. In responding to a separate argument, a majority in *Sempra* also extended the circumstances in which compound interest may be awarded to include common law claims for restitution, being actions where "it is the gain that needs to be measured, not the loss to the claimant".[67] However, only two members of the House of Lords (Lord Walker and Lord Mance) based that result on extending the equitable jurisdiction.[68] The decision in *Sempra* therefore did *not* expand the circumstances in which compound interest may be awarded pursuant to the equitable jurisdiction beyond the classes identified in *Westdeutsche* and *SCI Operations*.[69] Further, even if a majority had taken that approach, that would not have assisted the Claim

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62 [1996] AC 669 at 701-702 (emphasis added). See also 692, 718, 726 and 739.

63 (1998) 192 CLR 285 at [74].

64 [2008] 1 AC 561.

65 As was recognised in *Sempra* at [113] (Lord Nicholls). Prior to *Hungerfords*, the general rule under the common law was that a court had no power to award interest, simple or compound, for the late payment of damages.

66 [2008] 1 AC 561 at [94], [96], [100] (Lord Nicholls). See also [17] (Lord Hope), [132] (Lord Scott), [165] (Lord Walker).

67 [2008] 1 AC 561 at [28] (Lord Hope).

68 [2008] 1 AC 561 at [239]-[240] (Lord Mance) and [185] (Lord Walker).

69 The limits governing the award of compound interest in equity are acknowledged in Edelman, *McGregor on Damages* (20th edn, 2018) at 639.

Group, because their entitlement to compensation does not rest on restitutionary principles (FFC at [200]).

70. The Claim Group have been unable to identify a single Australian (or English) decision in which application of equitable principles has resulted in an award of compound interest other than in the limited categories identified above. That is not surprising, because an examination of the authorities reveals that when compound interest is awarded that is done not in order to *compensate* for a delay in payment, but for the quite different purpose of ensuring that fiduciaries do not profit from their wrongs.[70] Thus, "compound interest is awarded in order to ensure that no profit remains in the hands of the defaulting fiduciary".[71] When awarded, compound interest "is not punishment. It is not compensation. It is equity's way of ensuring, as far as possible, that no profit should remain in the hands of the trustee from so gross a breach of trust".[72]

71. In *Fico v O'Leary*,[73] Heenan J was therefore correct in stating that an award of compound interest should ordinarily be considered *only* in cases where the defaulting fiduciary is being compelled to disgorge a gain. Compound interest is not warranted where the purpose of the award of interest is to restore the plaintiff as far as possible to his original situation, because "this requires no more than an award of simple interest at or near market rates".[74] To similar effect, in *Talacko v Talacko*, after reviewing the history of the equitable rule, Kyrou J said:[75]

> Although the Court's equitable power to award compound interest is not confined to particular classes of case and may be exercised when appropriate in the interests of justice, the power is not

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70 Edelman and Cassidy, *Interest Awards in Australia* (2003) at 15, pointing out that it follows from the fact that interest awards can serve different purposes (to perfect an award of compensation, fully to reverse a transfer, or fully to strip profits) that "interest awards can have several different measures", being "compensatory, restitutionary, disgorging and punitive". See also at 21-22.

71 *Talacko v Talacko* [2009] VSC 579 at [15], citing *Hagan v Waterhouse (No 2)* (1991) 34 NSWLR 308 at 393 (Kearney J).

72 *South Cross Commodities Pty Ltd (in liq) v Ewing* (1987) 11 ACLR 818 at 843, which was applied in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [303] (Heydon JA, Spigelman CJ relevantly agreeing). An appeal was dismissed by the Full Court of the Supreme Court of South Australia: *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1988) 91 FLR 271. That approach was approved by Kearney J in *Hagan v Waterhouse (No 2)* (1991) 34 NSWLR 308 at 393, a case which was itself approved in *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45 at 47 (Handley JA, with whom Gleeson CJ and Sheller JA agreed). See also *Talacko v Talacko* [2009] VSC 579 at [15]; *Kirk v PBP Accounting Solutions Pty Ltd* [2015] VSC 173 at [39] (Macaulay J). That same rationale was identified in *Wallersteiner v Moir (No 2)* [1975] QB 373 at 398, where Buckley LJ stated that "[i]n cases of this kind interest is not ... given to compensate for loss of profit but in order to ensure as far as possible that the defendant retains no profit for which he ought to account"). See also at 388 (Lord Denning MR).

73 [2004] WASC 215.

74 *Fico v O'Leary* [2004] WASC 215 at [280].

75 [2009] VSC 579 at [25] (emphasis added). Justice Kyrou awarded simple interest, but at a higher rate to reflect the fact that the defendant was a defaulting fiduciary.

> at large. *There must be features in each case which justify a departure from the normal rule that simple interest is awarded.* All of the cases to which [counsel for the plaintiffs] referred have involved interest being awarded as part of a claim for restitution in respect of an actual or assumed gain made by a fiduciary at the expense of a beneficiary. Furthermore, where a gain has been assumed, there has been some evidentiary foundation for the assumption.

72. The conclusion that the Full Court was correct in rejecting the claim for compound interest is further supported by cases involving compulsory acquisition statutes in which claims have been made for compound interest.[76] For example, in *South Australian Land Commission v Perry*,[77] Jacobs J dealt with a "novel" argument involving a claim for compound interest under s 33 of the *Land Acquisition Act 1969-1972* (SA). The applicant argued that the acquisition of land was analogous to a commercial transaction of sale and purchase; that the court should therefore be guided by commercial principles in interpreting and applying the statutory right to interest; and that if the applicant had had the use of the money during the relevant period, it might reasonably be supposed that he would have invested it in interest-bearing securities. Justice Jacobs ultimately decided the case on the basis of statutory construction, finding that the acquisition statute permitted only simple interest. However, he also indicated that he considered it "an over-simplification to characterize every compulsory acquisition of land as 'commercial' in the relevant sense", and further that it was "impossible to regard the acquiring authority as a trustee or other fiduciary agent"[78] (thereby reflecting the limitations identified above on the availability of compound interest under equitable principles).

73. Subsequently, in *R v Compensation Court of Western Australia*,[79] the Full Court of the Supreme Court of Western Australia rejected a claim for compound interest under the *Public Works Act 1902* (WA). Justices Brinden and Walsh agreed with Jacob J's reasoning in *South Australian Land Commission v Perry*, describing it as "compelling", and similarly found that the acquisition statute in that case permitted only simple interest.

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76 The relationship between the equitable rule and statutory provisions of this kind was recognised in *Federal Wharf Co Ltd v Deputy Federal Commissioner of Taxation* (1930) 44 CLR 24 at 27-28, where Rich J described a statutory provision for simple interest in an acquisition statute as doing little more than expressing the equitable rule in precise legislative form. The authority cited by his Honour as articulating the equitable rule was *Re Pigott and Great Western Railway Co* [1881] 18 Ch D 146. *Re Pigott* was also relied upon by Dixon J in *Huon Transport* (at 323) and *Marine Board* (at 530). In addition to the cases discussed below, see also *FH Faulding & Co Ltd v Watson* [1969] WAR 63 at 66; *Hieber v Hieber* [1991] 1 NZLR 315 at 318.

77 (1977) 15 SASR 315.

78 (1977) 15 SASR 315 at 318.

79 [1990] 2 WAR 242 at 266-269.

The Claim Group's argument

74. There are no features in this case that justify departure from the normal rule. Indeed, nothing about this case supports a conclusion that the award of simple interest was anything other than fair, just and equitable (FFC at [212]).

75. At a factual level, it is significant that the primary judge found that, even if the compensation monies had been received earlier and invested, it was more likely that the Claim Group would have applied the interest received towards activities for their benefit: that is, they would have spent the interest as it was paid rather than re-invested it. That was supported by anterior findings, also unchallenged, that when substantial compensation and agreement monies were paid to the Claim Group in 2003 and 2009 respectively, the funds were distributed to individuals and families to use, and so far as could be ascertained, had been completely expended (FC at [275]-[278]; FFC at [169]-[170]). Those findings weigh heavily against the Claim Group's contention that they are entitled to an award of compound interest on the basis of a presumption (which would be contrary to the facts as found) as to how they would have invested any compensation had it been received earlier.

76. At a legal level, the Claim Group appear to advance (or propose to advance) three specific arguments in support of its claim for compound interest.

(i) Pre-validation unlawful acts

77. The Claim Group appear to argue that compound interest is required because validation of the compensable acts does not remove the historic fact that, pre-validation, the Claim Group "was dispossessed by acts that were unlawful".[80] That argument should be rejected for two reasons.

78. **First**, by asking the Court to determine the question of compound interest through the prism of how things stood prior to validation, the Claim Group seeks to imbue the compensable acts with shades of wrongfulness in order to co-opt principles applicable to restitutionary causes of action in equity (where the purpose of interest is to divest a respondent of monetary gain).[81] However, even if the acts that purported to extinguish native title were invalid, they would not have involved a breach of fiduciary duty, and therefore would not have warranted

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80 Special Leave Application No. D6 of 2017: Claim Group's reply submission dated 9 October 2017 at [13]; submissions dated 6 September 2017 at [33], [36].

81 See, eg, the discussion of *Sempra Metals* at FFC [190]-[194].

an award of compound interest so as to require a fiduciary to disgorge profits.

79. **Secondly**, the Claim Group's argument is inconsistent with the nature of validation of historically invalid acts under the NTA and satellite legislation. As the Full Court of the Federal Court explained in *Doyle (on behalf of the Iman People #2) v Queensland*,[82] the validation statute attaches a new legal significance to the acts and then provides that the new legal significance is to be taken to have attached to the acts at the time they occurred. The effect is that, since commencement of the validation provisions, the acts are to be treated as having *always been valid*. The primary judge and the Full Court were therefore correct to find that "at no time have the acts done by the Northern Territory been invalid", and on that basis to reject this aspect of the Claim Group's argument (FFC at [179]; FC at [259]).

(ii) Delay

80. On the authorities discussed above, the existence of a lengthy delay *per se* does not provide a basis for an award of compound interest. It would be anomalous if it did, because that would mean that the longer claimants delayed in bringing an application for compensation, the stronger their claim for a calculation using compounding interest. That would only exacerbate the point made by the NSW Court of Appeal in *Simonius Vischer & Co v Holt*, which noted that:[83]

> [T]o make an order for the payment of interest at commercial rates extending for long periods into the past is prima facie productive of unfairness to the defendant ... but possibly of a kind difficult precisely to pinpoint or demonstrate.

81. Echoing that observation, in *Kalls Enterprises Pty Ltd (in liq) v Baloglow (No 3)*, the NSW Court of Appeal said that:[84]

> [U]nreasonable delay and a high interest rate may mean that the defendant is unjustly left as the source of the plaintiff's investment income. The question is one of injustice to the defendant.

82. Notwithstanding the above, in *Ben v Suva City Council*,[85] it appears that the sole basis for the award of compound interest by the Fijian Supreme Court was the delay of some 35 years between acquisition and a determination of compensation. The principled basis upon which delay could result in the award of compound interest is not identified. Further, very few facts

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82 (2016) 249 FCR 519 at [50]-[52], [58] (North, Barker and White JJ). The decision deals with past acts under the Queensland validation statute, but the reasoning applies equally to the Territory Validation Act and to intermediate period acts.

83 [1979] 2 NSWLR 322 at 338-339 (Moffitt P, Reynolds JA agreeing).

84 [2007] NSWCA 298 at [11] (Giles JA, Ipp JA and Basten JA).

85 [2008] FJSC 17 at [3], [18], [24] (Mason, Handley and Sackville JJ). See FFC at [201]-[204].

are set out in the judgment other than that litigation was commenced in 1967 (the same year as acquisition), the primary judge had found that the Council "always had the power to settle the matter", and there appears to have been a finding at trial that the claimant bore no responsibility for the delay in payment. That factual scenario bears so little relationship to the present proceeding as to render the case of no assistance.

83. In particular, while it is true that in this case some 36 years elapsed between the date of the earliest compensable act and delivery of judgment:[86]

(a) for the first 13 years (pre-*Mabo (No 2)*), neither the Claim Group nor the Territory were able to do anything to address or improve their respective positions because "the existing state of the law was perceived to be the opposite of that which it since has been held then to have been";[87] and

(b) during the subsequent period of 23 years (following *Mabo (No 2)* and the enactment of the NTA), it has largely been a matter for the Claim Group whether and when a claim for compensation was pursued.[88] That, in turn, reflects the absence of any limitation periods in the NTA.

84. Given the above facts, an award of compound interest in this case would result in the imposition of a very large interest award against the Territory (being in the order of $4.49 million[89] on the argument finally advanced by the Claim Group on appeal) in circumstances where much of that award would relate to a period of time in which it could not reasonably have acted to protect itself against such an award. The injustice to the Territory would be manifest.

(iii) Just terms

85. At the special leave stage, the Claim Group seemed to suggest that it may seek to invoke the "just terms" requirement in s 51(1) of the NTA in support of its claim for compound interest.[90] That argument is premised upon the Court treating *Marine Board* as authority for the proposition that interest payable under the equitable rule forms *part of* compensation.[91]

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86 The date range for the compensable acts is 1980 – December 1996.

87 *Wik* at 184 (Gummow J).

88 The application for compensation was filed on 29 August 2011. The anterior determination of native title was made on 28 August 2006, and varied by the Full Court on 22 November 2007.

89 Commonwealth Further Materials (**CFM**).392.

90 Special Leave Application No. D6 of 2017: Claim Group's submissions dated 6 September 2017 at [36].

91 Special Leave Application No. D6 of 2017: Claim Group's submissions dated 6 September 2017 at [30]-[31] fn14.

The Commonwealth's primary answer to that argument is that the Claim Group misreads *Marine Board*, for the reasons set out at paragraphs 52-56 above. If that is accepted, then s 51(1) of the NTA (including the "just terms" requirement) says nothing about the interest that may be payable pursuant to equitable principles *on* any compensation awarded pursuant to that section.

86. In the event that the Commonwealth's primary answer is rejected, it will be necessary to address any reliance the Claim Group places on s 51(1) of the NTA (as opposed to equitable principles) as the source of an entitlement to interest. It may be that part of that argument will seek to invoke the provision of "just terms" compensation, presumably on the assumption that the meaning of the statutory expression in s 51(1) of the NTA is informed by the notion of "just terms" in s 51(xxxi) of the Constitution. However, an argument along those lines would attract s 78B of the *Judiciary Act 1903* (Cth) and the Claim Group has not given any indication that it proposes to serve a notice pursuant to s 78B. If the constitutional issue becomes properly raised, the Commonwealth will rely (in the alternative) upon the following submissions.

87. In so far as the Claim Group's argument seeks to draw upon the meaning of "just terms" in s 51(xxxi) of the Constitution, it encounters the obstacle that there has been a divergence of views expressed by Justices of this Court on whether the constitutional standard of "just terms" in s 51(xxxi) requires the payment of interest *at all* in cases where there is delay in payment of compensation following an acquisition of property.[92] There is therefore no concluded position with respect to s 51(xxxi) that could be imported into s 51(1) of the NTA (even assuming that such a translation of principles from the constitutional to the statutory contexts is otherwise permissible). Further, even when some Justices of the Court have allowed for the possibility that the provision of interest may be required by s 51(xxxi), there has never been *any* suggestion that an award of *compound* interest would be required in order to meet that standard. Indeed, the indications are that simple interest would be

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92 In *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 281-282, Latham CJ summarised the state of the law up to that point, concluding that there was not any decision by a majority of the Court that provision for payment of interest from the date of acquisition must be made in order to render the terms of acquisition of property just. See further *Huon Transport* at 311 (Rich J), 324-326 (Dixon J), 338 (Williams J); *Marine Board* at 520-527 (Latham CJ), 529 (Starke J); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 228 (Latham CJ), 277 (Rich and Williams JJ), 316-317 (Starke J), 343 (Dixon J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 291 (Deane J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at [195]-[196] (Kirby J).

sufficient.[93]

88. In fact, contrary to the Claim Group's argument, if (as they assert) interest is *part of* the compensation that is payable under s 51 of the NTA, then the reference to "just terms" in s 51(1) may in fact *confine* the entitlement to interest so as to render compound interest unavailable in this case. That follows because while "compensation" connotes full money equivalence, "just terms" are concerned with fairness (as Dixon J observed in *Nelungaloo Pty Ltd v Commonwealth*[94]). As Dixon J had earlier explained in *Grace Bros Pty Ltd v Commonwealth*,[95] it directs attention to what is "fair and just as between him [the property owner] and the government of the country". Chief Justice Latham expressed the same idea in observing that compensation on just terms "involves consideration of the interests of the community as well as of the person whose property is acquired".[96]

89. The need to strike a balance between fairness to the property owner and to the community points strongly against any entitlement to compound interest with respect to compensation that is payable under the NTA with respect to historical acts. That follows because in such cases (including the present matter) compensable acts will often have happened long before the decision in *Mabo (No 2)*, at a time when it could not have been known that those acts were invalid or would attract compensation. Moreover, even once the NTA was enacted, further delay between the occurrence of those acts and the determination of any claim for compensation with respect to those acts was inevitable because determinations first needed to be made under the NTA as to whether native title existed in the areas affected by the relevant acts. Given those inevitable and likely lengthy delays, and the fact that compound interest leads to exponential growth in the amount payable, it may be doubted that the concept of "just terms" will ordinarily support the payment of compound interest, for that often would not be "just" as between the native title holders and the relevant governments.

90. In addition, because s 51(xxxi) is a constraint on legislative power, the "just terms" standard

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93 In *Wurrijdal v Commonwealth* (2009) 237 CLR 309 at [331], Heydon J (with whose reasoning on validity French CJ agreed) expressed the view that the just terms standard would be met by an award of interest under s 51A of the FCA Act (i.e. an award of simple interest).

94 (1948) 75 CLR 495 at 569.

95 (1946) 72 CLR 269 at 290-291.

96 *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 280. See also *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 600 (Kitto J), stating that "The standard of justice postulated by the expression 'just terms' is one of fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence".

would require consideration of the Act as a whole and the range of benefits that it provides, not least of which is the very availability of a *statutory* remedy. Prior to the enactment of the NTA, if native title holders had tortious causes of action against the recipients of land grants (who thought they were lawful owners but were not), those causes of action would have been subject to time bars.[97] The remedy created by the NTA is not subject to any limitation periods and is (compared to the common law alternative) a simplified procedure allowing claims to be brought on behalf of many members of a group against one or more governments rather than an array of third party grantees.

91. Moreover, the work of the NTA in seeking to address historic injustices to Aboriginal people and Torres Strait Islanders is not done by the compensation provisions alone.[98] The "package" enacted by the NTA (in 1994 following *Mabo (No 2)*, and in 1998 following *Wik*) includes that: many validated interests do not extinguish native title (because the NTA created the notion of the non-extinguishment principle); even where they have done so, native title is able to revive (which was not possible at common law) in the circumstances specified in ss 47, 47A and 47B of the NTA; the future acts regime confers statutory rights on native title holders (such as the right to negotiate) which they did not have under the common law; and Part 10 of the NTA created a National Aboriginal and Torres Strait Islander Land Fund for the purpose, inter alia, of acquiring land to assist Aboriginal peoples. This is the statutory context in which any proposition that "just terms" would require payment of compound interest would fall to be assessed.

92. Consideration would also need to be given to the question of taxation. Before the primary judge, the Commonwealth raised the application of the principle in *British Transport Commission v Gourley*,[99] namely that, where an award of compensation is not itself taxable but includes a component that represents an amount that would have been taxable, it can be appropriate to apply a discount to that component so as not to overcompensate the recipient of the award (the ***Gourley* principle**). The preconditions for the application of the *Gourley* principle are present in this case: a tax-free award that includes a substantial component

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97 Cf. the observations regarding the impact of statutes of limitation in *Mabo (No 2)* at 109, 112 (Deane and Gaudron JJ), 196 (Toohey J).

98 Cf. Special Leave Application No. D6 of 2017; Claim Group's reply submission at [13].

99 [1956] AC 185. In an appropriate case, the principle can apply where interest is paid in a case involving the compulsory acquisition of interests in land: *Federal Wharf Co Ltd v Deputy Federal Commissioner of Taxation* (1930) 44 CLR 24.

representing a sum that would have been taxable (interest) in the hands of the native title holders if compensation had been paid earlier. The Commonwealth did not press for a strict application of the *Gourley* principle *unless* interest was to be awarded on a compound basis, as in that circumstance the scope for over-compensation is greatest.[100] For that reason, if the Court were to determine that interest is to be calculated on a compound basis, it would be necessary for the Court to decide whether it accepts that the *Gourley* principle applies and, if so, to remit the matter so that the parties are given the opportunity to advance evidence establishing the appropriate discount (that being the approach that was advanced at first instance, with the result that such evidence was never required to be led because only simple interest was awarded).

93. In any event, this aspect of the Claim Group's argument should fail because it focuses upon the asserted benefit gained by the Territory from the delay in paying compensation. That focus is not justified, because the statutory entitlement under s 51(1) to *compensate* native title holders for loss, diminution, impairment or other effect of the act on their native title, cannot be treated as if it were an entitlement to restitutionary damages. The Full Court was correct to hold that the scheme under the NTA requires an examination of the *loss* incurred by the Claim Group, not the gain made by the Territory (FFC at [200], [205], [208]). If it were otherwise, the NTA would not provide for compensation for loss of spiritual attachment to land. The primary judge and the Full Court, focusing on that loss, correctly found no basis to award compound interest.

Conclusion as to interest

94. The case for compound interest advanced by the Claim Group does not establish (and no longer even attempts to establish) that this case falls within any of the circumstances in which compound interest has previously been awarded by equity. Nor does it rely on any circumstances peculiar to the Claim Group. Instead, the factors relied upon will apply to every compensation claim made under the NTA for validated historical acts, meaning that if compound interest is appropriate in this case, it could reasonably be expected to be appropriate in all compensation cases under the NTA. In the circumstances, there is no proper basis to depart from the ordinary approach for compensating for a delay in the payment of compensation, which involves the award of simple interest only. The Full Court

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100 Indeed, *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 666 (the Court) suggests that the pre-judgment interest rate and similar standard rates may already have some form of tax discount "built in".

was correct to so hold.

NON-ECONOMIC LOSS

95. The primary judge identified "three particular considerations of significance" to the assessment of an appropriate amount for non-economic loss (solatium) (FC [378]; FFC [287]). The Commonwealth has never disputed that the first consideration (the construction of the town water tanks on the path of the Dingo Dreaming) caused considerable distress and concern to the Claim Group and was properly given weight in determining an appropriate lump sum award. However, the Commonwealth contends that the primary judge erred with respect to the second and third considerations identified, and with respect to temporal considerations of loss, and that the Full Court erred in dismissing the Commonwealth's challenges in respect of those considerations and in failing to find that the award of $1.3 million as compensation for non-economic loss was manifestly excessive. In advancing those arguments, the Commonwealth does not dispute that the assessment of a sum for solatium involved an exercise of discretion,[101] and thus attracted the principles for appellate review derived from *House v The King*.[102]

Ongoing effect of prior act has no causal nexus to compensable acts: Cth ground 4(a)

96. There was uncontested evidence about a site where, up to 1975 but not since, certain important rituals were held. The reason rituals ceased to be held at the site (and were relocated to another place) was because of the development of a highway near the site in around 1974. The construction of the highway is not a compensable act. Further, the site itself is not located on any of the land that was subject to a compensable act, and there was no suggestion that the Claim Group's native title rights over the site had been extinguished (FC at [361], [379]; FFC at [300]).[103]

97. At trial, the Commonwealth contended that the compensable acts had no effect on the native title rights in relation to the site and did not impact upon the enjoyment of those rights because the highway (which continues to exist) had already resulted in rituals not being carried out at the site. There was simply no causal relationship between any compensable acts and the cessation of use of the site as a place to carry out rituals. Contrary to those

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101 By analogy with an award of general damages, which has been held to involve the exercise of a form of judicial discretion: *Miller v Jennings* (1954) 92 CLR 190 at 195-196 (Dixon CJ and Kitto J); *Wilson v Peisley* (1975) 50 ALJR 207 at 241.

102 (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTiernan JJ), cited at FFC [380]. Cf. FFC at [357].

103 Restricted CFM.619 [25]; Restricted CFM.634(1-20), 644(41)-645(30), 657(10)-658(30).

submissions, the primary judge took into account the purported effect of the compensable acts "upon the capacity to conduct ceremonial and spiritual activities" on the site and adjacent areas. Indeed, that effect was said to be one of the three "particular considerations of significance" in assessing non-economic loss (FC at [379]). His Honour's analysis (at [380]) was that it would be "inappropriate" for the Territory, if acquiring the parcel of land on which the site was situated (which it did not do), to deny an obligation to pay compensation for non-economic loss pertaining to the site *both* for the compensable act comprised by the acquisition, and for the earlier construction of the highway which had led to the rituals no longer being performed at the site.

10 98. Before the Full Court, the Commonwealth contended that the primary judge had necessarily (and impermissibly) reasoned that, if rituals had not ceased to be conducted at the site at the earlier point in time, then they *would* have been affected by the compensable acts (on adjacent sites) and, on that basis, the Claim Group was entitled to compensation for the *continuing* inability to conduct rituals at the site. Further, it submitted that the primary judge supported that reasoning with a putative anomaly that simply does not arise: the reason why the earlier construction of the highway "should not lead to compensation" is because it was an act that was validly done at common law that does not attract the compensation provisions of the NTA.

99. The Full Court found that the Commonwealth had misconstrued the reasons of the primary
20 judge and upheld his Honour's inclusion of this consideration in the assessment of non-economic loss (FFC at [300]). The Full Court said that "the effect" relied on by the primary judge was not related to the discontinuance of use as a ritual ground in 1975. Rather, the reason the primary judge took into account "the effect" on the site was because claimant Chris Griffiths gave evidence "as to why the place **remains** important" (emphasis in original). The Full Court found that (FFC at [300]):

> It was the character of the location of the ritual ground at the time of the compensable act and the effect of that act on the then current status of the ritual ground as a site of importance that caused the primary judge to take the effect into account.

100. Exactly what effect the compensable act purportedly had on "the then current status of the
30 ritual ground" is not articulated. The Full Court's unexplained reference to "the then current status" of the site is similarly unilluminating if, by that choice of words, their Honours were referring to the status of the site as a *former* ritual ground. In short, despite rejecting the Commonwealth's characterisation of "the effect" relied upon by the primary judge, the Full

Court never identified the true nature of "the effect" that the primary judge should be understood as having found, and for which his Honour awarded a significant component of compensation.

101. That question is not answered by a finding that the site "remains important". The site might be important because the Claim Group would ideally like to conduct rituals there, but they cannot be compensated for loss of a right to hold them there because *they still possess that right* (native title not having been extinguished over the site). Nor should the Claim Group be compensated for loss of their preparedness to conduct rituals at the site, because they were already not prepared to hold them there on account of the earlier construction of the highway. As there was no suggestion in the evidence that the circumstances that led to the relocation of the ritual activity in 1975 had ceased to operate, the compensable act must have been analysed as either a new (and superseding) cause, or an additional cause in an apparent continuum of accumulating causes, that prevented rituals being conducted on the site.

102. That reasoning reveals legal error. If a non-compensable act impacted on the exercise of native title in some way, a later compensable act that does not *further* affect the exercise of native title is not capable of satisfying the causal relationship prescribed by s 51(1) of the NTA, because that provision requires the claimed loss to be an "effect of" a compensable act.[104] The nature of the requisite causal relationship is illuminated when s 51(1) is read with s 23J(1), being the provision that creates the primary entitlement to compensation that is now in issue. This Court has held that the consequence of the words of limitation in s 23J(1) ("but only to the extent...") is to make clear that Parliament did not intend for compensation to be payable for any extinguishment of native title that took place at common law.[105] The compensation scheme under the NTA is not, and was never intended to be, a general compensation scheme for the effects of European settlement on native title.

103. Causation in a legal context is always purposive.[106] The text, context and purpose of s 51(1) point to the closeness of the causal relationship that must be demonstrated between a compensable act and the claimed loss: the loss must be able to be characterised as the effect *of* the act. The courts below erred in construing s 51(1) in a manner that permitted the

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104 Whether a causal relationship exists in the relevant legal sense required by a statutory provision has been described as a question of principle: *Comcare v Martin* (2016) 258 CLR 467 at [41]-[42].

105 *Wilson v Anderson* (2002) 213 CLR 401 at [51] (Gaudron, Gummow and Hayne JJ).

106 *Comcare v Martin* (2016) 258 CLR 467 at [42] (French CJ, Bell, Gageler, Keane and Nettle JJ).

ongoing effect of a separate act, being an act that *preceded* a compensable act, to be characterised as an effect *of* the compensable act. The wider impact of that error can be seen in the way the Full Court approached consideration of manifest excess: see paragraphs 142-143 below in relation to ground 7(d).

Sense of failed responsibility: Cth ground 4(b)

104. The third particular consideration of significance identified by the primary judge was the extent to which the compensable acts had adversely affected the spiritual connection that the Claim Group had with the particular parcels of land covered by the compensable acts, and more generally, with their country (FC at [381]). The Commonwealth did not dispute that the primary judge could include a component for loss or diminution of spiritual connection with the subject land, but contended that his Honour wrongly inflated the sum by awarding compensation in part for "the sense of failed responsibility for the obligation, under the traditional laws and customs, to have cared for and looked after that land". The Commonwealth contended that the primary judge erred because: (1) except for the land affected by the town water tanks, that finding was against the evidence (FFC at [306]); and (2) to the extent that the Claim Group experienced such feelings, they were attributable to loss of recognition by the common law of a right to control access to the land, and were not an "effect of" the compensable acts (FFC at [307]).

105. As to the **first proposition**, the primary judge considered that the evidence of "failed responsibility" was focused on certain sites of importance (only one of which was affected by a compensable act, being the town water tanks). However, his Honour was prepared to extrapolate from this specific evidence to infer that the Claim Group experienced a sense of failed responsibility for looking after the country more generally. Before the Full Court, the Commonwealth argued that it was not open to the primary judge to draw that inference because it was contradicted by other specific findings in relation to the Wilson Street development (which accounted for 26 of the 39 parcels of land the subject of the compensation claim), including findings that the development "was acceptable under Indigenous law" and "did not create a sense of grievance" (FC at [365]; FFC at [306]).

106. The Full Court rejected that argument. Its reasons for doing so are divided between two sections of the judgment, respectively titled "Considerations of the overall erosion of the Claim Group's connection to the land" (FFC at [304]-[328]) and "The Claim Group's approval of acts on the land" (FFC at [337]-[346]). It is necessary to read those sections together.

107. In the first mentioned section, the Full Court considered the nature of the task of the primary judge in assessing non-economic loss where the land in question comprised a small part of a larger area of country in which the Claim Group had interests, and where there had been historical interference with native title rights in and around Timber Creek (FFC at [312]). The Full Court referred to "numerous examples" of the insight of the primary judge into the claimants' way of viewing country, and that it was not possible "to deconstruct the Aboriginal belief system so as to fit into distinct title boundaries of each separate lot" (FFC at [314]-[317]). Their Honours concluded that the primary judge had to determine the nature and extent of the impact of the compensable acts from "the evidence about the Claim Group connection to country generally" and the evidence concerning "the general effect on the Claim Group of interference with country"; the evidence did not allow for analysis "whereby reactions were specific to particular lots" (FFC at [319]).

108. When undertaking the above analysis, the Full Court did not refer to the evidence about the Wilson Street development (which, it is submitted, was evidence "specific to particular lots"). This was addressed only in the second mentioned section of the judgment, where the Full Court:

(a) noted the relevant passages from the primary judge's reasons in relation to the Wilson Street development but said that his Honour considered the evidence "as a whole" and that it disclosed that the Claim Group's acceptance of certain acts on certain lots "did not diminish the general sense of loss" (FFC at [343]-[344]);

(b) expressed the view that the government parties did not explore the evidence about acceptance of the Wilson Street development "in a way which established that the approval by the Claim Group signified a reduced feeling of loss" (FFC at [345]) — an approach which either overlooks the primary judge's specific finding that the development did *not* create a sense of grievance, or impermissibly goes behind that finding when it was not the subject of a ground of appeal; and

(c) concluded that the primary judge gave proper and balanced consideration to the evidence that the Claim Group had accepted certain actions which interfered with their rights and interests in the subject lots "in the context of the evidence as a whole" (FFC at [346]).

109. It was not open to the Full Court to reason in the way that it did. Where specific evidence of the effect of compensable acts in relation to particular parcels of land has been adduced

and accepted, an *in globo* approach to assessing compensation does not permit the court to disregard that evidence and instead to extrapolate from more general evidence about *other* acts.

110. As to the **second proposition**, the Full Court appears to have accepted, with respect correctly, that the primary judge would have erred if he had included a component of compensation based on loss of a traditional right to control access to the land, since that right had been extinguished by the historical pastoral lease in 1882 (FFC at [323], [327]). However, the Full Court held that the primary judge did not err in this way because the "failed sense of responsibility to protect the land" was "not directed to the control of access to it" (FFC at [325]).

111. The distinction made by the Full Court is not maintainable given that the claimants' responsibility to protect the land was the very foundation upon which they were determined to have a right to control access (before it was extinguished).[107] Nor did the Full Court elucidate the basis for the primary judge's inclusion of this factor if it was not to be understood as flowing from a right to control access. In the Commonwealth's submission, the relevant passages of the primary judge's reasons cannot reasonably be understood as anything other than a reference to the claimants' role as "gatekeepers" for their country, and a sense of having failed in discharging the obligations of that role because they could not prevent things happening on the land (FC at [330], [332], [334], [337], [345]-[347], [356]). Indeed, part of the Commonwealth's case before the primary judge and the Full Court was that the expert anthropologist called by the Claim Group characterised the evidence exactly in this way.[108]

112. The Full Court's finding that the primary judge did not err by including a component of compensation for the failed sense of responsibility to protect the land, was consequential to, and dependent upon, the (erroneous) finding that this was "not directed to the control of access to it".

Compensable loss is not experienced in perpetuity: Cth ground 4(c)

113. The question of principle raised by this ground is whether, properly construed, the quantum

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107 At FC [332] (referred to at FFC [256]), the primary judge adopted the findings on the appeal from the native title determination proceedings: see *Griffiths v Northern Territory* (2007) 165 FCR 391 at [127], where the Full Federal Court held that the claimants' role as "gatekeepers" for the purposes of preventing spiritual harm and injury to the country could be recognised as an exclusive right of possession, use and occupation.

108 CFM.535(1-37).

of compensation under the NTA is assessed on the premise that compensable loss is suffered by a *finite* group of persons, for a period of time that has an *end point*. The Commonwealth contends that it is; that the persons who are conceived of by the NTA as having suffered loss from the extinguishment of native title are the persons who held the native title at the time it was extinguished; that the NTA nonetheless provides for a compensation claim to be brought by present day members of a claim group so as to prevent the entitlement to compensation from abating upon death; and that the measure of compensation may be assessed at the time of judgment by reference to the members of the claim group at that time. What is not permitted under the NTA is for the assessment of compensation under s 51(1) of the NTA to take into account the putative loss that may be felt by future descendants of the claimants, not born at the time of judgment.[109]

114. The Commonwealth does not suggest that the primary judge was required to make findings about the composition of the Claim Group at a specific point in time. The description of "the native title holders" who were entitled to the compensation was an agreed fact at trial (FC at [71], cl (4)), and mirrored the description of the persons who were determined to be "the native title holders" in the earlier Timber Creek native title proceeding.[110] It is a description that enables the composition of the group to be determined from time to time, because the composition of the group changes as senior members pass away and new members are born. This reflects the nature of native title as, generally, a communal or collective title that subsists for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community's lands.[111]

115. A determination of native title, being an order of the Court that operates *in rem* and continues to speak into the future, necessarily describes the native title holders in terms that accommodate the ever-changing composition of the group. In some cases, it will be sufficient to describe the native title holders by reference to a group name, "The X

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109 The Commonwealth contended at trial that the situation differs for a claim for compensation brought under s 53 of the NTA (if the section is, in fact, engaged), as the entitlement in that provision is not conferred on "the native title holders" but rather on "a person" from whom there has been "a paragraph 51(xxxi) acquisition of property". That would exclude persons who had not accrued native title rights at the time of the "acquisition": *Victoria v Commonwealth* (1996) 187 CLR 416 at 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). It was unnecessary for that point to be determined because the claim under s 53 was otherwise dismissed.

110 *Griffiths v Northern Territory* (2006) 165 FCR 300, as varied on appeal in *Griffiths v Northern Territory* (2007) 165 FCR 391.

111 See the definition of "native title" in s 223(1) of the NTA.

People".[112] Nevertheless, a native title holding group is not a corporate entity, or quasi-corporate entity, with separate perpetual legal existence, capable of suffering from perpetual loss that never diminishes. It is a community ("society") of individuals from time to time, each of whom is capable of experiencing loss in their own lifetime. Further, when native title is extinguished, it is permanently extinguished.[113]

116. The Commonwealth contends that, when native title has been extinguished, the compensation awarded under s 51(1) of the NTA is intended to compensate persons who suffered the loss, and not generations into the future.[114]

117. The Federal Court did not take that approach. The primary judge assessed compensation on the basis that the loss of cultural and spiritual relationship with the land in question would be experienced "for an *extensive* time into the future" (FC at [382]). That his Honour intended that descriptor to encompass future descendants of the current claimants can be gleaned from a subsequent discussion, where the primary judge expressly linked the concept of native title as a communal entitlement of persons "from time to time", to "assessing the solatium component" of the judgment (FC at [442]).

118. The Full Court found no error on the part of the primary judge, holding that the "duration of the effect" of the compensable acts was a proper factor for his Honour to take into account (FFC at [333]). While that statement on its own may be uncontroversial, read in the context of the passage as a whole, the Full Court accepted an approach by which the "effects" of a compensable act were not confined to the hurt and distress experienced by a group of people at any particular point in time (FFC [329], [331], [336]). That the Full Court considered it permissible to compensate for "effects" on future generations is reinforced by their Honours' later statements with respect to the inalienable character of native title, which was said to inform "the nature and extent of the loss suffered as a result of the compensable acts", being loss that is "permanent, and *intergenerational*"; and further that the primary judge's approach to non-economic loss generally indicated that his Honour "properly recognised that *inalienability* formed part of the assessment of non-economic loss" (FFC at [414]-[419]) (emphasis added).

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112 *Moses v Western Australia* (2007) 160 FCR 148 at [362], [373] (Moore, North and Mansfield JJ).

113 NTA s 237A (subject only to application of ss 47, 47A or 47B, which enable past extinguishment to be disregarded).

114 All except three of the compensable acts in this case extinguished native title. The three exceptions were category D past acts where the non-extinguishment principle would operate in perpetuity, and thus was treated as equivalent to extinguishment: FC at [392].

119. The Commonwealth submits that the primary judge and the Full Court each proceeded upon the same erroneous footing, which was to treat future descendants of the Claim Group as suffering from *compensable* loss. The fact that future descendants of the claimants may feel a sense of loss due to the historical effect of a compensable act does not mean that they are to be treated in law as suffering from the "effect of" a compensable act within the meaning of s 51(1). The NTA cannot be construed as conferring an entitlement to compensation on persons who would only have become members of the native title holding group *after* native title had been extinguished.[115] The assessment of the primary judge, upheld by the Full Court, was attended by error because it ostensibly made allowance for the putative future loss to be experienced by successive generations for some undefined and potentially indefinite period into the future.

Loss is to be assessed in the context of the totality of the land that remains available for the exercise of traditional rights: Cth ground 5

120. The uncontroversial facts upon which this ground is based are:
    (a) the total area of the town of Timber Creek is 23.62 km^2;
    (b) the compensable acts covered 1.27 km^2 of that area;
    (c) the amount of extinguishment that pre-existed the compensable acts was 1.82 km^2; and
    (d) the amount of *exclusive* native title determined to exist in the town is 20.53 km^2 (approximately 86% of the town);
    (e) in addition, members of the Claim Group had freehold title granted under the ALRA over 1,461 km^2 of land adjoining the town.[116]

121. The primary judge assessed compensation for the adverse effect on the Claim Group's spiritual connection with land, using a conceptual framework in which each compensable act effectively diminished the global spiritual estate of the Claim Group's country (FC at [381]). The Commonwealth (and the Territory) contended that this analysis required the primary judge to have regard to the overall extent of the estate and to the proportion of it affected by the compensable acts. The Full Court appeared to acknowledge the importance

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115 A separate procedural issue arises because the NTA does not, in terms, make express provision for the survival of the entitlement to compensation on the death of the person so entitled. The Commonwealth accepted in the courts below that "the native title holders" who can bring a claim for compensation under the NTA should be construed as the persons who held or would have held the native title rights in question up to the time of judgment, so as to allow for the survival of the statutory cause of action. In that way, the NTA provides for continuity of the entitlement to compensation according to traditional law and custom, rather than the general law of succession. Cf. FC at [438].

116 FFC at [370]; FC at [33]. For visual representation of the areas, see CFM.360, 368, 398.

of the issue, but then dismissed the criticisms of the primary judge as not being established (FCC at [355], [370], [373]). The Full Court's reasons reveal error in the following respects.

122. **First**, while the Full Court correctly pointed out that the primary judge accepted in principle the approach contended for by the government parties, the Full Court did not observe that his Honour also said that this would depend on the evidence (FFC at [372], referring to FC [319]). In subsequent sections of the primary judge's reasons, his Honour makes no reference to any of the evidence or facts regarding the extent of the Claim Group's interests in surrounding lands.

123. **Secondly**, the Full Court reasoned that, although the primary judge did not set out the relative sizes of the subject land and the other land in which the claimants held rights, "from what was recorded in the reasons for judgment he was obviously aware of the facts" (FFC at [371], [372]). With respect, the passages relied upon by Full Court (FC [29]-[31]) rise no higher than a cursory recitation of general background to the compensation proceeding (and were drawn from the Claim Group's submissions in chief at trial). Moreover, the Full Court does not address the Commonwealth's submission that the primary judge never referred to the fact or evidence that, while the Claim Group consisted of five estate groups, the compensable acts affected land falling within only one estate (FFC at [355]).[117]

124. **Thirdly**, the Full Court relied on the primary judge having been aware of and "dealt with" a contention by the Territory that the impact of the extinguishment on such a small area "would be slight" (FFC at [372]). However, that contention was directed to whether the relatively small area covered by the compensable acts would have given rise to any appreciable incremental erosion of cultural and spiritual connection at all, when viewed in the context of the historical development of Timber Creek (FFC at [305], [321]-[322]). That is a fundamentally different question to determining the actual order of magnitude of the "erosion" that did occur, when viewed in the context of the wider area over which the claimants are able to continue to exercise their traditional rights in land, so as to assess an appropriate amount of compensation. In any event, the passages where the primary judge "set out" the Territory's contention are immediately followed by the statement that it will be necessary "to address the evidence on the topic" — which his Honour never did (FFC at [371], referring to FC at [302]-[304]; see also FC at [305]).

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117 That factor was the subject of specific submissions by the Commonwealth at trial and on appeal, in terms that, on the uncontested evidence, out of 364 members of the Claim Group, only 37 belonged to the estate group that had the town of Timber Creek as its primary territory: CFM.65 [6]-[8]; CFM.69-77.

125. The Full Court was wrong not to uphold this ground. The importance of the extent of the land affected by compensable acts to the proper assessment of non-economic loss can be seen at paragraphs 142-143 below in relation to ground 7(d).

Contractual sums for solatium: Cth ground 6

126. There was evidence before the primary judge, tendered by the Claim Group, of commercial contracts entered into by members of the Claim Group containing provisions for solatium-type payments of either $5,000 or $10,000 in the case of damage to, or destruction of, a sacred site.[118] The Commonwealth contended that the primary judge had erred by failing to give any consideration at all to those provisions in assessing damages for non-economic loss. The Full Court held that his Honour was not required to have regard to these agreements (FFC at [347]-[351]).

127. The Full Court's primary basis for rejecting the relevance of the agreements was that they did not provide compensation "for the permanent loss of rights" (FFC at [350]). Nonetheless, the agreements contemplated a scenario where a sacred site was *destroyed*, and provided at least an indicative amount of compensation for that. Whilst two of the agreements only provided for initial predeterminations, that could not be said of the third, and in any event, the whole point of the predetermined amounts is that they represented a figure the claimants were prepared to accept if they did not wish to pursue the matter further. The Full Court's speculation about the possible use of "template" agreements, even if accepted, would only strengthen the inference that the contractual amounts represented a settled and considered position adopted by the claimants (FFC at [351]).

128. The Full Court's emphasis on the brevity of oral submissions on this issue at trial (FFC at [347]) disregards the fact that the primary judge's attention was drawn to places in the written submissions where the agreements were addressed.[119] Where a party expressly adopts written submissions on a point, it should not be treated as akin to an abandonment of the point.

129. In the Commonwealth's submission, the amounts in the agreements reflect a monetary sum that the claimants judged acceptable in the event of a worst case scenario: destruction of a spiritually significant place. It has never been suggested that the sums are determinative, but they are at least relevant to have regard to as a check measure, or useful touchstone, when

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118 CFM.50-51 [cl 25]; CFM.152-153 [cl 15.7]; CFM.234-235 [cl 16]; CFM.264-265 [cl 7].

119 CFM.604(10-30), 605(42-46).

assessing whether an award of solatium is appropriate having regard to "community" standards. The Full Court erred in holding to the contrary.

The approach to manifest excess: Cth grounds 7(a) and (b)

130. The Commonwealth submitted below that, if the Full Court found that the primary judge had committed one or more of the specific errors the subject of Cth grounds 4-6, the assessment of non-economic loss should be vitiated and the discretion re-exercised. The Full Court rejected each of the errors contended for by the Commonwealth (and the Territory), and went on to consider whether the assessment was "manifestly excessive" within the residuary category of error articulated in *House v The King* (FFC at [381]). In the Commonwealth's submission, that task miscarried.

131. **First**, the Full Court asked itself whether the sum awarded was "substantially beyond the highest figure which could reasonably have been awarded" (FFC at [395], [411]). That is the test applicable to appeals from a jury verdict of damages.[120] The Full Court should have applied the test for appellate review of an award of damages made by a judge, which is less stringent,[121] and asked whether the amount awarded was a wholly erroneous estimate of the damages suffered; the ultimate question being whether the total award is outside the limits of a sound discretionary judgment.[122] Whilst it may be accepted that to show inferred error the award must be substantially outside the available range,[123] that concept should not be understood as prescribing any particular order of magnitude of disparity as a minimum standard. In *Sharman v Evans*, for example, the High Court set aside an award of damages for personal injuries in the sum of $300,547 and substituted it with an award of $270,500, having found that the component for pain and suffering exceeded what could properly be awarded.[124]

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120 The Full Court cited *R v Williscroft* [1975] VR 292, having earlier reproduced a passage from that decision (FFC at [384]), which in turn cited *Australian Iron & Steel Ltd v Greenwood* (1962) 107 CLR 308 (***Australian Iron***). Both of those cases involved appeals from jury verdicts. See the test stated in *Australian Iron* at 313; *Papanayiotou v Heath* (1969) 43 ALJR 433 at 434.

121 *Miller v Jennings* (1954) 92 CLR 190 at 196 (Dixon CJ and Kitto J); *Australian Iron* at 321-322, 324 (Windeyer J); *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 364 (Barwick CJ), 369 (Gibbs J); *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 463 (Gibbs CJ, with whom Wilson J agreed).

122 A useful compilation of relevant High Court authority is found in *Calder v Boyne Smelters Ltd* [1991] 1 Qd R 325 at 347-349 (Cooper J, with whom Kneipp J agreed).

123 *Calder v Boyne Smelters Ltd* [1991] 1 Qd R 325 at 346, and the authorities there cited.

124 (1977) 138 CLR 563 at 589 (Gibbs and Stephen JJ).

132. **Secondly**, the Full Court did not test the award by determining for itself the permissible range of a sound discretionary judgment so as to ascertain whether the sum awarded by the primary judge was outside the limit of the range.[125] The most that can be discerned is that their Honours considered a sum of $1,000 would be too low and $5.2 million may be too high (FFC at [396], [408]). The Full Court's conclusion that the figure selected by the primary judge was within the permissible range was based on little more than the proposition that another judge "on the same evidence and acting rationally and reasonably, could have selected a figure less than $1 million, or more than $1.3 million" (FFC at [411]-[412]).

133. **Thirdly**, and in any event, the Full Court impermissibly had recourse to material that was not provided to the parties. This is the subject of grounds 7(c)-(e) below.

Use of decisions by the Inter-American Court of Human Rights: Cth grounds 7(c)-(d)

Breach of procedural fairness

134. The Full Court had regard to three decisions of the Inter-American Court of Human Rights (**IACHR**) without giving the parties any opportunity to controvert or comment upon the decisions (FFC at [397]-[405]).[126] The parties could not reasonably have been expected to discover those decisions in the ordinary course, nor were the decisions of any obvious probative value as comparators. Moreover, the Full Court's purpose in having regard to the decisions was to obtain guidance on monetary amounts for compensation for non-economic loss. Hence, their Honours engaged in a *factual* comparison between the IACHR decisions and the present case to determine whether the former provided "validation of the appropriateness of the solatium award" in the latter (FFC at [402]). In short, the Full Court used the decisions to assist it to determine a central issue of controversy: whether the sum awarded for non-economic loss was manifestly excessive. By doing so without first providing the parties with an opportunity to be heard, the Full Court failed to accord procedural fairness.[127]

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125 *Sharman v Evans* (1977) 138 CLR 563 at 589-590 (Gibbs and Stephen JJ, whose analysis of the approach to review by an appellate court was agreed by Jacobs J); *Dessent v Commonwealth* (1977) 13 ALR 437 at 447 (Mason and Aickin JJ).

126 *Yakye Axa Indigenous Community v Paraguay* (IACHR, 17 June 2005) (***Yakye Axa***); *Sawhoyamaxa Indigenous Community v Paraguay* (IACHR, 29 March 2006) (***Sawhoyamaxa***); *Saramaka People v Suriname* (AICHR, 28 November 2007) (***Saramaka***).

127 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [146] (Heydon J).

135. The denial of procedural fairness was particularly acute because the Full Court should have appreciated that the Commonwealth would wish to make submissions as to the significance of those cases, the Court having been informed that the Commonwealth's submissions at trial included a review of overseas cases involving compensation for the acquisition of indigenous rights in land, and that that review had not revealed any case in which an indigenous group had sought or been awarded a sum for spiritual connection with the land (as opposed to the economic value of the land).[128] That gave added significance to the IACHR decisions, as they were perceived by the Full Court as the "only assistance" available from cases outside Australia (FFC at [397]).

The decisions do not "validate" an award of $1.3 million

136. Independently of the denial of procedural fairness, the Full Court erred in concluding that those decisions provided "some, albeit limited, validation" of the primary judge's assessment (cf. FFC at [402]). That is so for three reasons.

137. **First**, the IACHR decisions operate in an entirely different paradigm and are not appropriate comparators for native title compensation claims in Australia. The Court applies the provisions of a particular international treaty (the American Convention on Human Rights) in a different domestic law framework, and in circumstances where the indigenous people who come before the Court require access to their traditional lands for subsistence.

138. **Secondly**, the factual circumstances pertaining to the IACHR decisions bear little relationship to this proceeding:

(a) In the *Yakye Axa* case, a Paraguayan indigenous community of about 319 people had experienced complete dispossession from the whole of their traditional lands (18,189 hectares) for a compensable period of over a decade, during which time they lived in "destitute" conditions in roadside settlements without access to clean water, sanitary facilities of any kind, or their lands for subsistence purposes, resulting in malnutrition, anaemia, parasitism and some deaths.[129]

(b) The *Sawhoyamaxa* case involved nearly identical circumstances, right down to the fact that the community of about 407 people had also been living in a roadside settlement across from their traditional lands (14,404 hectares). Seventeen members of the

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128 CFM.606(2-11), 607(10-13).

129 *Yakye Axa* at [50.92]-[50.97], [50.108]-[50.111], [156], [167]-[168], [176], [208], [215], [221].

community had died as a result of "the precarious living and health conditions" in the settlement.[130]

(c) The *Saramaka* case involved persons whose ancestors were African slaves brought to Suriname in the 17th century, and who escaped to the interior regions of the country where they established autonomous communities. Although not a traditional indigenous community (cf. FFC at [404]), the Saramaka people asserted their claim as tribal peoples and were held to enjoy the same rights. The claim was made on behalf of some 30,000 Saramaka people spread over 63 communities (the area of land was unspecified), in circumstances where there had been large-scale environmental destruction and damage to a substantial part of their lands from logging.[131]

139. By way of a purely numerical comparison, the Claim Group in this case was comprised of some 336 members (FC at [32]), and the area covered by the compensable acts was 1.27 km^2 (which equates to 127 hectares).

140. **Thirdly**, the *Yakye Axa* and *Sawhoyamaxa* cases each concerned violations of the Right to Life (Art 4(1)), not just the Right to Property (Art 21) (cf. FFC at [398]-[399]). Compensation awarded for "non-pecuniary damages" related to both of these violations (cf. FFC at [400]-[401]).[132] As such, even if the dollar value of the award in *Yakye Axa* and this case could be described as "generally similar" (USD 950,000; cf. AUD 1.3 million), the basis for the awards was entirely different. On no view could the compensation in *Yakye Axa* be characterised as wholly, or even mostly, for loss of spiritual attachment to land (cf. FFC at [402]).

141. The Full Court reasoned that the compensation in *Yakye Axa* was, in fact, "significantly higher" than in the present case, because the Yakye Axa were also to have their traditional lands returned to them. Even putting to one side the different basis for the compensation, that analysis is inherently flawed because, unlike the Yakye Axa, the Claim Group are not being compensated for loss in relation to *all* of their traditional lands. To the contrary, exclusive native title was restored to the Claim Group over the vast bulk of the land in the town of Timber Creek by the determination of native title in 2006, and the claimants have traditional rights in large areas of ALRA freehold land adjoining the township.[133] Further,

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130 *Sawhoyamaxa* at [73(74)], [144], [156], [159], [166], [178], [219]-[224], [230].

131 *Saramaka* at [80], [150]-[152], [200]-[201].

132 *Yakye Axa* at [50.108]-[50.111], [156], [168], [176]; *Sawhoyamaxa* at [144], [156], [178], [220]-[224].

133 See paragraph 120 above.

the Full Court completely disregarded the fact that, in relation to the small area of land over which native title has been extinguished, the Claim Group is also to receive a *separate* component of compensation for economic loss (with interest).

142. Even more surprising is the way in which the Full Court dealt with the disparity between the 18,000 hectares of land in the *Yakye Axa* case and the 127 hectares in the present case. The rationale given by their Honours for why that factor may not have as much significance as appears was that:

> On the approach taken by the primary judge, the impact of compensable acts on a larger number of lots may not have added significantly to the award, because of the *collateral detriment* of the compensable acts which the primary judge took into account when fixing the amount of the award for solatium. (emphasis added)

143. "Collateral detriment" is the term used by the Full Court to describe the purported effect of a compensable act on the former ritual ground (see the heading above FFC at [293]). The Full Court appears to say that the "effect" of the compensable acts should be understood as having a (much) larger geographical footprint than the lots covered by the acts, such that the disparity between the areas of land in the two cases is more apparent than real. This begs the question: what area of land did the Full Court regard as being affected by "collateral detriment"? The whole of the town of Timber Creek? Or something in the order of 18,000 hectares (which is around 7 times the size of the whole township)?

144. The IACHR decisions did not support the appropriateness of the primary judge's assessment of non-economic loss. The opposite is the case. That is, if, contrary to what has been submitted, it was proper for the Full Court to have regard to the decisions, they would indicate that the sum awarded by the primary judge was a wholly erroneous estimate of the damages suffered.

Use of opinion not in evidence: Cth ground 7(e)

145. The Full Court found "another broad validation" of the compensation awarded by the primary judge by having regard to an opinion, not in evidence, contained in an academic paper authored by Paul Burke, titled "How can judges calculate native title compensation?" (FFC at [406]). The report set out a methodology for calculating non-economic loss not relied upon by any party to this proceeding (FFC at [407]).

146. The Full Court used the Burke report for the purpose of comparing factual results. Their Honours took one of the "hypothetical claims", apparently making adjustments to more closely reflect the factors present in this case, so as to compare the figure yielded with the

primary judge's award (FFC at [408]). The Full Court did this without affording the parties any opportunity to controvert or comment upon the report. In relation to a hypothetical example that yielded a figure of just under $5.2 million for non-economic loss, the Full Court said:

> The obvious differences between the hypothetical case and the present were that the group affected in the hypothetical case was larger and the loss was of exclusive native title rights rather than non-exclusive native title rights. Nevertheless, those factors *would not have produced a reduction to less than the award in the present case.* (emphasis added)

147. The Full Court does not even permit the reader to interrogate that result: What were the similarities with the chosen hypothetical claim and this case? How much larger was the hypothetical group? How did the Court deduce that a smaller group and non-exclusive native title rights would not have produced a figure of less than $1.3 million? What figure did it produce? Further, having resolved to take into account the methodology in the Burke report, it was incumbent upon the Full Court to consider and compare the methodology contended for by the Commonwealth, but it did not (FFC at [358]).

148. In any event, the Commonwealth submits that the Full Court erred because the Burke report was not capable of being the subject of judicial notice. Without the consent of the parties, the Full Court should not have had regard to it at all.[134]

Re-exercise of the discretion: Cth ground 8

149. If it is accepted that the Full Court wrongly failed to set aside the primary judge's assessment of compensation for non-economic loss, the Commonwealth respectfully submits that this Court is in as good a position as the primary judge to determine an appropriate award for solatium. The evidence of the effects of the compensable acts (as opposed to non-compensable acts) was limited.[135] In particular, only four Aboriginal witnesses gave oral evidence over a period of less than two days, and there was no challenge to the credibility of any of them.[136] This Court is not under any disadvantage in relation to documentary material.

150. The Commonwealth's proposed methodology for calculating compensation for non-

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134 *Gordon M Jenkins & Associates Pty Ltd v Coleman* (1989) 23 FCR 38 at 47-48, cited with approval in *Kuhl v Zurich Financial Services* (2011) 243 CLR 361 at [69] (Heydon, Crennan and Bell JJ).

135 **Water tanks:** CFM.339-340 [146]-[148]; 414(1-29); 417(26)-421(2), 423(7-16), 424(6-10). **Wilson Street:** CFM.10-11 [14]; 16 [6]; 412(4)-413(25); 443(17-29); 453(24)-454(24). **Lot 47:** CFM.285 [34]; 436(20)-437(13).

136 The transcript of Aboriginal evidence given in open session is 87 pages. There was also a short session of restricted evidence.

economic loss is set out at FFC [358]. In all the circumstances of this case, the Commonwealth contends that a sum of $230,000 would be a fair and just amount of compensation for non-economic loss.

PART VII: ORDERS SOUGHT

151. The Commonwealth seeks orders in accordance with paragraphs 9 and 10 of its Notice of Appeal [CAB.506], and also an order that the Claim Group's appeal be dismissed.

PART VIII: ORAL ADDRESS

152. The Commonwealth estimates that it will require 3.5 hours for oral argument in chief.

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