
COMPENSATION FOR EXTINGUISHMENT OF NATIVE TITLE: GRIFFITHS V NORTHERN TERRITORY REPRESENTS A MAJOR STEP FORWARD FOR NATIVE TITLE HOLDERS

by Dr Fiona Martin

INTRODUCTION

The history of compensation determinations under the *Native Title Act 1993* (Cth) (NTA) is not a positive one for native title claimants. In the 19 years from the enactment of the NTA until the 2013 decision *De Rose v State of South Australia*¹ there had been 37 compensation applications filed under the NTA.² The *De Rose* decision was the first successful compensation determination, with all others except this one having been withdrawn, discontinued or dismissed. The *De Rose Case* was the first decision to order the payment of compensation for the extinguishment of native title rights and interests, however as the financial terms of the settlement were agreed by the parties in mediation, and were kept confidential by the Court, the public does not know how much the amount of compensation awarded was. Nor were any significant details of the process of coming to this agreed amount revealed. The Court in this case provided a vague description of the negotiation process, with the parties proposing detailed calculations and formulae to one another, with 'vastly varying results';³ until ultimately a mutually agreeable amount was reached. The Court also mentioned that the State of South Australia was not prepared to accept that the freehold value of the extinguished area was necessarily relevant to the value of the native title rights and interests lost.⁴

This has now changed with the landmark 2016 decision of *Griffiths v Northern Territory*⁵ which does shed light on the ability of the Federal Court to award compensation under the NTA and also how this compensation might be calculated.

BACKGROUND TO GRIFFITHS V NORTHERN TERRITORY

The background to this case is that in 2006 and 2007 the Ngaliwurru and Nungali people were recognised as holding non-exclusive native title rights over particular lots in Timber Creek, Northern Territory.⁶ In 2007, on appeal, they were found to hold exclusive native title in certain lots in accordance with s 47B of the NTA.⁷ Following this, the Ngaliwurru and Nungali people lodged a claim for compensation under ss 50(2) and 61 of the NTA. The decision

as to whether or not compensation was payable was not handed down until 2014 when Mansfield J held that there was a liability for compensation and that the amount would be determined at a later date.⁸ It was not until 2016 that the compensation award was made.⁹ It therefore took from before 2006 until 2014 for the Ngaliwurru and Nungali people to be awarded compensation for acts which took place many years earlier. Compensation was claimed for acts attributable to the Northern Territory which wholly or partially extinguished or impaired or suspended native title, since the commencement of the *Racial Discrimination Act 1975* (Cth) (RDA) on 31 October 1975. This is because prior to the enactment of the RDA, Commonwealth and State governments were free to make grants or do acts that extinguished native title, without requiring these acts to be 'validated' by the NTA.

As a result of the compensation claim Mansfield J ordered that the Northern Territory Government pay the Ngaliwurru and Nungali people \$3,300,661 in compensation. This amount was made up of \$512,400 to account for the economic value of the extinguished native title rights, \$1,488,261 interest on the sum of \$512,400, and \$1,300,000 for 'solatium', a form of compensation for emotional rather than physical or financial harm.¹⁰

The applicants had sought compensation on 'just terms' under s 51(1) of the NTA for economic loss, non-economic/intangible loss and pre-judgement interest. His Honour noted that under the NTA there is no particular framework or guidance for the determination of the compensation payable on just terms. He was also cognizant of the fact that the NTA recognised Indigenous Australians dispossession from their traditional lands. His Honour stated:

As a starting point, I refer to my earlier reference to the Preamble of the NTA. It recognises that the dispossession of Aboriginal people and Torres Strait Islanders from their lands occurred largely without compensation, and that successive governments have failed to reach a lasting and equitable agreement with Aboriginal people and Torres Strait Islanders concerning the use of their lands. It is also unexceptional to observe that, if acts have extinguished native title and are to be

validated or allowed, justice requires that compensation on just terms be provided to the holders of native title whose rights have been extinguished.¹¹

In coming to his decision he divided the compensation determination into four issues. These were first, the time at which the valuation of the extinguishment of native title rights and interest should be assessed; second, the value which should be ascribed to the extinguished native title rights and interests; third the assessment of pre-judgment interest; and finally, the manner and extent to which traditional attachment to the land should be reflected in the compensation award.¹²

THE DATE OF ASSESSMENT

In order to consider the amount of compensation to be awarded it was necessary for Mansfield J to consider whether or not compensation should be assessed at the date of each of the acts effecting the extinguishment of native title or at the date of the validation of that act of extinguishment.¹³ His Honour concluded that validation of the past acts occurred on 10 March 1994 when the *Validation (Native Title) Act (NT) (Validation Act)* commenced operation. However, as the *Validation Act* expressly provides that each act to which it applies is taken always to have been valid,¹⁴ his Honour concluded that it is the date of the act itself at which compensation is to be assessed.¹⁵ In arriving at this decision he did comment that this 'does not preclude the desirability of stepping back at the end of the process...to determine whether, in the circumstances, and having regard to the interest awarded the 'just terms' requirement of s 51(1) of the NTA has been satisfied.'¹⁶

THE VALUE OF NATIVE TITLE RIGHTS AND INTERESTS

Section 51(1) of the NTA outlines the entitlement to compensation on just terms for 'any loss, diminution, impairment or other effect of the act on their native title rights and interests'. His Honour commenced his determination of the compensation for the lost native title rights with a consideration of s 51A of the NTA as the appropriate starting point.¹⁷ Section 51A of the NTA sets the upper limit on the amount of compensation payable at the value of a freehold estate. Justice Mansfield found that exclusive native title should be valued at the same as freehold title, and considered that the inalienable and non-transferable character of exclusive native title does not necessarily mean its value is less than freehold.¹⁸ However, he also found that if exclusive native title was equivalent to the value of freehold title, non-exclusive native title rights must be less than the market value of that freehold title.¹⁹ His Honour also decided that it is not appropriate to treat non-exclusive native title rights as valued in the same way as if those rights were held by a non-indigenous person and in doing this he expressly rejected the

Territory's approach of valuing the native title rights in conventional economic terms.²⁰ Justice Mansfield valued non-exclusive native rights at 80 per cent of the freehold value and commented that this was an intuitive decision which reflects a 'focus on the entitlement to just compensation for the impairment of those particular native title rights and interests which existed immediately prior to the determination acts'²¹ and does not include an allowance for cultural or ceremonial significance of the land.

This case is a landmark decision as it is the first case under the *Native Title Act 1993* where compensation has been awarded and the details of how this amount has been determined have been judicially decided and made public.

THE INTEREST COMPONENT

All parties agreed that interest was payable on the value of extinguished native title rights and interests in order to reflect the time between when the entitlement to compensation arose and the date of judgment. Justice Mansfield considered whether or not, in the absence of any guidance in the NTA, that interest should be calculated on a simple basis, a compound basis at superannuation rates, or a compound basis at the risk free rate. His Honour held that interest should be assessed at the simple rate. In coming to this conclusion he considered what actions the native title holders would have taken with the funds if they had been compensated at the date of the act. He pointed out that the simple interest basis was the one routinely awarded and that compound interest could not simply be awarded because a lengthy time period was involved. His Honour reasoned that the Court could award compound interest to give adequate compensation if satisfied that the applicants would have applied the funds received for compensation, if they had been received at the time of the compensable acts, as capital in a business or trade and that it would have been successful to a significant degree.²²

However, his Honour was not convinced this was so. In arriving at this conclusion his Honour relied upon contemporary evidence of the applicant's commercial management which revealed that funds were generally distributed to individuals and families, and held little suggestion that they invested those funds or that those funds were available or proposed to be used for such purposes.²³ His Honour was therefore not convinced that had the applicants received compensation at the time of the compensable acts, they

would have used that money to invest and accumulate interest, or that they would have undertaken a commercial activity which would have been profitable to the same degree. The applicants were significantly disadvantaged under this reasoning for their commitment to cultural traditions of sharing native title and not engaging in a more European style of investment in businesses and commercial activities.

Justice Mansfield considered whether or not, in the absence of any guidance in the *Native Title Act 1993*, that interest should be calculated on a simple basis, a compound basis at superannuation rates, or a compound basis at the risk free rate.

REFLECTION OF TRADITIONAL ATTACHMENT TO LAND IN THE COMPENSATION AWARD

\$1.3 million was awarded under the heading of traditional attachment to the land. In arriving at his conclusion, Mansfield J considered that an important aspect of native title rights and interests was the spiritual, cultural and social connection with the land.²⁴ Justice Mansfield looked at the non-economic effect the compensable acts had upon pre-existing native title and held that it was relevant to consider the adverse effects the compensable acts had both generally in the area and specifically in the lots under consideration. In the end he restricted the assessment to compensation for the 'hurt feeling' caused and not a general sense of loss from a loss of access to country and the inability to exercise native title rights on country. His Honour also noted that the compensation should also be assessed for an extensive time into the future. This was due to his finding that the impact of the compensable acts had not dissipated over time.²⁵

Although Mansfield J accepted that there is no mathematical calculation to arrive at an appropriate sum of compensation he focused on what had caused particular distress to the applicants as a result of the compensable acts. In this regard, he concluded that the construction along the path of the dingo Dreaming, the general way compensable acts affected native title rights and interests, and the general way in which the geographic diminution of native title rights had affected the spiritual and cultural connection to land (and from this the sense of failed responsibility to look after that land), were the most important areas of impact to the applicants.²⁶

INCOME TAX

It is important to note that the application of the relatively recent provisions of s 59-50 of the *Income Tax Assessment Act 1997* (Cth) mean that the compensation is not assessable or exempt income for income tax purposes.

CONCLUSION

This case is a landmark decision as it is the first case under the NTA where compensation has been awarded and the details of how this amount has been determined have been judicially decided and made public.²⁷ The amount of compensation however is not a large one by the standards of compensation for loss or injuries under other legislation.²⁸ The main reason for this is that compensation under the NTA is only payable for extinguishing acts that occurred after 1975, the date of the introduction of the RDA. Prior to the enactment of the RDA, Commonwealth and State governments could make grants or do acts that extinguished native title, without requiring these acts to be 'validated' by the NTA. As such, it is only the 'validation' of acts after 1975 by the NTA that provides any entitlement to compensation. As the majority of acts extinguishing native title are likely to have been committed prior to 1975, this means that there is no compensation payable. Furthermore, there is no common law right to compensation for the extinguishment of native title rights and interests.²⁹

A further consideration in the calculation of the award of damages is that in order to determine the rate of pre-judgement interest the judge only awarded this at the simple interest rate rather than a compound rate. He based this on the use to which the money would have been put if paid earlier. The communal attitude and ties of the Ngaliwurru and Nungali people, which translated into their use of funds, was a determining factor that weighed against a more lucrative form of interest calculation.

The Northern Territory is appealing the decision on the basis that the court's methodology in calculating the compensation is unclear.³⁰

Dr Fiona Martin is an Associate Professor at the UNSW School of Taxation & Business Law and Solicitor of the Supreme Court of New South Wales (non-practising), Federal Court and High Court of Australia. She is an internationally recognised expert on taxation issues relating to charities and not-for-profits.

1 [2013] FCA 988.

2 Wanjie Song, 'What's next for native title compensation: The *De Rose* decision and the Assessment of Native Title Rights and Interests' (2014) 8(10) *Indigenous Law Bulletin* 11; James Whittaker and Timothy Bunker, *De Rose v State of South Australia—the First Approved*

Native Title Compensation Determination (15 November 2013)
Corrs Chambers Westgarth <<http://www.corrs.com.au/publications/corrs-in-brief/de-rose-v-south-australia-the-first-approved-native-title-compensation-determination/>>.

3 [2013] FCA 988 [69].

4 *Ibid.*

5 [2016] FCA 900.

6 *Griffiths v Northern Territory of Australia* [2006] FCA 903.

7 *Griffiths v Northern Territory of Australia* [2007] FCAFC 178.

8 *Griffiths v Northern Territory of Australia* [2014] FCA 256.

9 *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 ('*Griffiths v NTA*').

10 *Ibid.*, Court Order [3].

11 *Ibid.* [94].

12 *Ibid.* [54]-[60].

13 *Ibid.* [55].

14 *Validation (Native Title) Act 1994* (NT) s 4.

15 *Griffiths v NTA* [2016] FCA 900 [172].

16 *Ibid.* [173].

17 *Ibid.* [225].

18 *Ibid.*

19 *Ibid.* [227].

20 *Ibid.* [220].

21 *Ibid.* [233].

22 *Ibid.* [253].

23 *Ibid.* [264]-[267].

24 *Ibid.* [326].

25 *Ibid.* [301] and [382].

26 *Ibid.*

27 Gilbert and Tobin, 'National Native Title Workshops' (Delivered at the National Native Title Workshops, Gilbert and Tobin, 15 September 2016).

28 For example, the average compensation payment for critical injuries for a single person for a motor vehicle accident in Queensland was \$1,583,200 for the period 1 July 2014 to 30 June 2015. See: The Personal Injury Lawyers, *How much compensation will I receive for my injuries?* (February 2016) <<http://www.thepersonalinjurylawyers.com.au/How-much-compensation-will-I-receive-for-my-injuries>>.

29 Heather McRae, Garth Nettheim, Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 7-490.

30 MacDonnells Law, *Update on Native Title Compensation Decision* (26 September 2016) <<https://macdonnells.com.au/update-native-title-compensation-decision>>.

Weres 2 (detail)

Gail Mabo

Acrylic on canvas

1400mm x 1220mm

