Case Note

Alan Griffiths (obo Ngaliwurru and Nungali Peoples) v Northern Territory of Australia (No. 3)

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Introduction

On 24 August 2016 Justice Mansfield handed down judgment in *Griffiths v Northern Territory of Australia* (No. 3) (Griffiths No.3),[1] the first decision to consider the compensation payable for the past extinguishment of native title rights and interests.

At common law, the extinguishment of native title by inconsistent legislative or executive act is not unlawful and does not give rise to a right to compensation. However, in Mabo No.2,[2] a majority of the High Court held that the *Racial Discrimination Act 1975* (Cth) (RDA) operated to invalidate certain acts affecting native title rights and interests. The *Native Title Act 1993* (Cth) (NTA) subsequently validated those acts, but created an entitlement to compensation for the effect of those acts on native title rights and interests.

In *Griffiths*, the Applicant claimed compensation under ss 20 and 23J of the NTA for acts attributable to the NT which occurred after the enactment of the RDA which extinguished or impaired native title.

Compensation was awarded under four heads:

1. Compensation for economic loss arising from the extinguishment or impairment of native title: $512 000;
2. Pre-judgment interest on economic loss: $1 488 261;
3. An *in globo* award for non-economic loss: $1 300 000; and
4. Damages for three invalid future acts: $48 975.

The trial raised the following four questions:

1. At what date should compensation for extinguishment be assessed, the date of the act or the date of validation?
2. How should native title rights and interests be valued?
3. How should the loss of traditional attachment to land be assessed?
4. Should pre-judgment interest be awarded on a compounding basis in native title contexts?

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Before discussing how those questions were resolved, it is necessary to set out the background and statutory context of the claim.

Background and liability

The claim was lodged as a compensation determination application over the town of Timber Creek, a small rural community on the NT/WA border. It followed a 2007 determination of native title which found that the claimants held exclusive native title rights and interests over much, but not all, of the town.[3]

The claim proceeded on the agreed basis that native title existed over the land as at the date of each compensable act. It was also agreed that native title had been partially extinguished over the compensation claim area by the historic grant of pastoral leases, such that compensation was only payable for the extinguishment of residual non-exclusive native title rights and interests.[4]

There was no dispute as to the occurrence of acts and there was large agreement as to the extinguishing or impairing effect of each act, though some preliminary issues of liability were resolved in two decisions handed down by Mansfield J in 2014 and 2015.[5]

Nature of the claim and statutory context

The claim concerned 53 acts, comprising acts which either extinguished native title rights and interests or supressed those rights for the duration of the act. It was not in dispute that ss 20 and 23J of the NTA created an entitlement to compensation for those acts. The Applicant also sought damages in respect of three invalid future acts.[6]

Section 51 of the NTA provides that an entitlement to compensation under the NTA is an entitlement "on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of an act on their native title rights and interests." Section 51A of the Act places a cap of freehold value on compensation for the extinguishment of native title. However, the *Historic Shipwrecks Clause* in s 53(1) provides for an additional entitlement, payable by the Commonwealth, whenever required to avoid invalidity by reason of s 51(xxxi) of the *Constitution*.

The first issue: The date for the assessment of compensation

The first issue in dispute was whether compensation should be assessed as at the date of each compensable act or at the date of validation, namely 10 March 1994.

The Applicant's primary contention was that compensation should be assessed at the date of the validation of acts. It also claimed supplementary damages in the form of *mesne profits* for the invalid occupation of the land between the date of each act and the date of validation.

The Applicant's submission was premised as follows. The NTA's retrospective validation of prior acts did not remove the historic fact of invalidity caused by the operation of the RDA. The validation of acts effected a divestiture or acquisition of native title, not the acts themselves, and "just terms" compensation required an assessment of compensation as at the time of the acquisition.

These submissions were not accepted for constructional reasons. Mansfield J determined that the intention of the NTA is to correspond the validation of an act and its effect on native title with the date of the act itself.[7] This was evidenced by the validation provisions of the NTA, which provide that past acts are and *are taken to have always been valid*.[8] Further, the entitlement to compensation is for "the act" itself.[9]

In so holding, his Honour rejected the Applicant's constitutional premise that the NTA and *Validation (Native Title) Act 1994* (NT) (VNTA) did not retrospectively remove

the historic invalidity created by the operation of the RDA.[10] His Honour referred to the following comments of the plurality in the *Native Title Act Case*:[11]

> The force and effect of a past act consisting of a State law which is "invalid" by force of s 109 of the Constitution because of inconsistency with the Racial Discrimination Act is recognised only from and by reason of the enactment of the future State law but, from that time onwards, the force and effect of the past act is determined by the terms of the State law enacted in conformity with s 19 [of the NTA].

Having regard to this, and to the language of the validating provisions of the NTA and VNTA, there was no scope to find the occupation of land pursuant to those validated acts invalid. Damages for unlawful occupation were therefore not payable.[12]

In practical terms, this means that land valuations must be made at, and pre-judgment interest will run from, the date on which an act is taken to have happened. For supressing acts that are followed by a subsequent extinguishing act, the date will be the date of the supressing act.

The second issue: The value of non-exclusive native title rights and interests

The second issue in dispute concerned the methodology for assessing economic loss arising from the extinguishment of native title.

To varying degrees, the parties agreed that the economic value of native title bore a relationship to the market value of a freehold estate in the land. However, the parties disagreed on the significance of differences between native title rights and the rights enjoyed by freeholders; principally, that native title cannot be alienated and that non-exclusive native title rights do not confer a right of exclusive possession. The parties therefore proposed three different valuation methodologies.

Although expert evidence was led from economists, valuers and one economist-anthropologist regarding these methodologies, those opinions were either not accepted or little weight was placed on them. In the course of the trial, Mansfield J queried whether any field of expert knowledge could adequately address the issue in total.

The Applicant submitted that non-exclusive native title should be valued at the same level as a freehold for four reasons. First, non-exclusive native title rights included substantial rights, such as the right to live on the land and gain sustenance from the land. Secondly, the assessment of lesser compensation than that which would be available for other types of title would be inconsistent with the RDA. Third, the holders of non-exclusive native title rights and interests could restrain future dealings with the land with the protections afforded by the NTA and RDA. Fourth, the benefit to the Crown of removing those rights was to receive a wholly unburdened radical title from which an estate in fee simple could be granted.

The Commonwealth submitted that the correct approach was to determine the individual rights in the bundle of non-exclusive native title rights and compare those with the rights enjoyed by a freeholder. Using this method, it proposed valuing non-exclusive native title at 50% of freehold value.

The Territory proposed a market-based model comprising a 'usage value' of non-exclusive native title rights and interests, supplemented by an 'uplift' of 50% of the difference between usage and freehold value. The 'usage value' derived from the essentially usufructuary nature of non-exclusive native title rights and was approximated from the value of large areas of land outside the town. The 'uplift' reflected the negotiated outcome the native title holders and a prospective purchaser of freehold would have reached.

Justice Mansfield adopted a qualified comparison methodology and valued the non-exclusive rights in question at 80% of freehold value.[13] His Honour started from the premise that the value of exclusive native title would approximate the freehold value of land.[14] Consistent with the Respondents' positions, non-exclusive native title would be valued less than freehold value to account for the loss of the right to exclusive possession.[15]

However, his Honour stressed that native title rights should not be valued as if those rights were held by non-Indigenous people.[16] Thus, the value of native title rights was not to be discounted because they are inalienable even though that would be a proper application of a market valuation test if those rights were held by non-Indigenous

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people. His Honour noted that the non-exclusive native title rights and interests considered were permanent and practically very substantial.[17] Therefore, the deduction to be made from freehold value was not large.

This reasoning relies on the *sui generis* nature of native title and differs from a simple application of the conventional valuation test contained in *Spencer's Case*.[18] The valuation outcome is also fact reliant and arguably leaves flexibility for different outcomes in other claims.

Issue three: The value of traditional attachment to land

The third issue was how to assess the non-economic effect of the compensable acts on native title. The Applicant characterised these effects as the loss of traditional attachment to land and the loss of traditional access to and use of land.

The parties agreed that it was appropriate to award compensation in respect of the diminution or loss of traditional attachment to land and that the award for non-economic loss could be made *in globo*, rather than lot by lot.

The parties' assessments of quantum were, however, markedly different. The Applicant claimed an award of not less than $2m and the Territory contended that an award of 10% of the overall compensation would be reasonable.

There was also differing emphasis on issues of causation. The Territory and Commonwealth supported a strict approach to causation in two senses. Firstly, it was argued that the award should not reflect any of the loss suffered as a result of acts of dispossession which occurred prior to the compensable acts. Timber Creek had been the subject of development since the 1930s and an entitlement to compensation only arose on the enactment of the RDA in 1975.

Secondly, reference was made to the geographical location of acts relative to sites of significance to the claimant group. The majority of acts, it was said, occurred away from those areas. Further, there was some evidence that where an act did impact upon the use of a particular site, the members of the claimant group were able to move their activities to another area. Emphasis was placed on the availability of other land for use. Finally, there was evidence that the claimant group had participated in selecting some sites as more appropriate for developments in and around the town.

The Applicant submitted that the claimant group had an obligation to care for all country and that damage to its connection with one part of the land was not inherently less significant than damage to another.

There were three elements of significance to his Honour's award of $1.3m.[19] Firstly, the construction of public works over an area of the *Dingo Dreaming* affected a larger line of spirituality and caused significant distress and concern. Secondly, acts on some lots had a clear effect on the enjoyment native title on adjoining lots, where, for example, private spiritual ceremonies were once held. Thirdly, the incremental extinguishment of native title reduced the area over which remaining native title rights could be enjoyed, reducing in an imprecise way the continuing connection with country. His Honour also held that it was open to infer that, notwithstanding the impact of prior acts, a further sense of loss was felt in consequence of the compensable acts.[20]

Issue four: Pre-judgment interest

The final issue in dispute was whether pre-judgment interest should be awarded on a compound or simple basis. Due to the length of time the acts and the date of judgment, pre-judgment interest was the most significant element in determining the final award and significant argument and expert economic evidence was led on the issue.

Section 51A(2)(a) of the *Federal Court Act 1976* (Cth) prohibits an award of prejudgment interest at compound

rates unless such an award is provided for by another law. The Applicant contended that an entitlement to compensation under the NTA permitted an award of compound interest, either through equity's auxiliary jurisdiction or as an aspect of "just terms" compensation. The Applicant specifically disavowed a claim to compound interest at common law.[21]

It was common ground between the parties that the function of the award was to compensate the claimant group for being kept out of the compensation funds from the date they were payable up to the date of judgment.

The Applicant's primary position was that equity, in its auxiliary jurisdiction, assumed that the claimant group would have made the most beneficial use of the money if paid to it at the time the entitlements arose, either by investing the funds or applying them in trade. Therefore, to compensate the claimant group from being kept out of money, it was necessary to award interest at a commercial rate, i.e. on a compounding basis.

To negative any rebuttal of that assumption, the Applicant also led evidence of the recent commercial activities of the claimant group, including business ventures, stock agistment and land agreements, and compensation negotiations.

The Applicant further argued that compensation on "just terms" necessarily required an award of compound interest, having regard to the length of delay, the diminishing time value of money and opportunity cost of capital. It was also claimed that the effect of the delay was to provide a de facto loan to the Territory Government, which would ordinarily be repaid with compound interest.

These arguments were not accepted. Mansfield J held that the presumption in equity was restricted to cases of money withheld or obtained by fraud or by defaulting fiduciaries.[22] However, this did not preclude the availability of an award of compound interest under the NTA's statutory right to just terms compensation. As the purpose of the award was to compensate the claimants from being kept of money, the appropriateness of the award was question of fact.

While there was some evidence of the recent commercial dealing of the claimants, his Honour did not infer that the funds would have been applied to similar commercial activities at the time of each act. In cross-examination, members of the claim group said that they had dissipated rather than invested previous compensation funds. Thus, the evidence pointed against the finding that the claimants would have made a commercial return on the compensation funds.

In the event that compound interest was not payable, the parties agreed that simple interest would be payable at the Federal Court CM 16 Practice Note rate, namely 4% above the Reserve Bank of Australia Cash Rate. Mansfield J held that this award was not inconsistent with an award of compensation on "just terms", noting that the rate reflects "the considered judgment of the Discount and Interest Rate Harmonisation Committee of the Council of Chief Justices of Australia and New Zealand" of what is fair and reasonable compensation for being deprived of the use of money.[23]

His Honour's ruling does not prohibit the award of compound interest in other compensation cases. It does however point to the need to establish a clear evidentiary basis for the claim.

1 [2016] FCA 900.
2 *Mabo v Queensland (No. 2) (1992)* 175 CLR 1.
3 *Griffiths v Northern Territory (2006)* 165 FCR 300, varied on appeal in *Griffiths v Northern Territory (2007)* 165 FCR 391.
4 Exclusive native title rights entitle the holders to possession of the land to the exclusion of all others. Non-exclusive rights include the right to hunt, erect shelters and conduct ceremonies on the land, but do not confer the right to exclude other persons.
5 *Griffiths v Northern Territory* [2014] FCA 256 and *Griffiths v Northern Territory (No. 2) [2015]* FCA 443.
6 An invalid future act is an act affecting native title which occurred after the enactment of the NTA, but which does not comply with the future acts regime of the NTA.
7 Griffiths No.3, [119] and [169].
8 See, for example, NTA, s 14.
9 Griffiths No.3, [120].
10 Ibid, [143].
11 *Western Australia v Commonwealth* 183 CLR 372, 454.
12 Griffiths No.3, [447].
13 Ibid, [232].
14 Ibid, [197] and [213].
15 Ibid, [197].
16 Ibid, [220].
17 Ibid, [231].
18 *Spencer v Commonwealth (1907)* 5 CLR 418, where it was held that value is determined as the price that a willing but not anxious buyer and seller would accept.
19 Griffiths (No. 3), [378] – [381].
20 Ibid, [326].
21 This would have required strict proof of the loss of the opportunity to earn a compounding gain: *Hungerford v Walker (1988)* 171 CLR 125.
22 Griffiths No.3, [250].
23 Ibid, [280].