Gilkerson Legal

CASE ALERT

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

"Timber Creek Case"

Justice Mansfield in the Federal Court of Australia delivered on 24 August 2016

> *"As a starting point, I refer to my earlier reference to the Preamble of the Native Title Act 1993 (Cth). 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".* [paragraph 94 at page 24].

Key Facts

1. The case concerned a native title compensation claim under the *Native Title Act 1993* (Cth) ("NTA"). It is the first judicial decision containing detailed guidance about the methodology for quantifying native title compensation.

2. Alan Griffiths and Lorraine Jones were the applicant. They brought the claim on behalf of the Ngaliwurru and Nungali Peoples - the common law native title holders for the land where the township of Timber Creek in the Northern Territory is located

3. Compensation was sought for acts attributed to the Commonwealth and the Northern Territory that had extinguished or impaired native title. They were the only respondents to the proceeding, but Queensland and South Australia were interveners.

4. The native title extinguishment and impairment involved acts that had been done within numerous lots together comprising about 23km^2. This is only a small part of the Ngaliwurru and Nungali traditional lands.

5. Various tenure grants and public works had been undertaken by government across many decades. In an earlier decision by Mansfield J they had been found to have caused native title to be impaired in some instances and extinguished in others. The hearing of the claim dealt with 63 separate acts of that kind. The claim was successful in having compensation awarded for all but 3 of them.

6. The area where the compensable acts were done involved the small township of Timber Creek (population 231).

7. The whole of the area had been proclaimed as town lands on 10 May 1975. This enabled the compensable acts (tenure grants and public works) to be subsequently undertaken. There is some analogy here between the dedication of the town and deeds of grant in trust ("DOGIT") in Indigenous communities. DOGIT's also allow tenures to be granted and public works to be constructed.

8. The compensation claim was first filed with the Federal Court in 2011 following a separate native title determination by the Court in 2006 that had formally recognised the native title. It is quite possible that Justice Mansfield's decision will be appealed. The extent of any appeals is not yet known.

Compensation Liability

9. Gilkerson Legal has developed preliminary tools and templates to help identify the various types of compensable acts under the NTA. For purposes of those tools and templates, the Timber Creek decision involves compensable acts of the following kinds:-

- Type 1 – "Past Acts" particularly Category D Past Acts - The past acts in this case involved tenure grants and dedications. Acts under that category impair native title but do not extinguish it. Because acts of this type are covered by the NTA, they are deemed to be done validly for native title purposes and give rise to a statutory entitlement to compensation.

- Type 2 – "Previous Exclusive Possession Acts" (PEPA) - The PEPAs in this case involved both exclusive possession tenure grants and the construction of public works. A PEPA is an act of that kind done before the commencement of key amendments to the NTA on 23 December 1996. PEPAs extinguish rather than impair native title. Because acts of this kind are also covered by the NTA, they are also deemed to be done validly for native title purposes and give rise to a statutory entitlement to compensation.

- Type 3 – "Intermediate Period Acts" – These acts involve non-exclusive possession tenure grants that impair rather than extinguish native title. They again are done between 1 January 1994 and 23 December 1996. Again they are covered by the NTA and deemed to be done validly for native title purposes and give rise to a statutory compensation entitlement.

- Type 5 – "Invalid Future Acts" – These were acts done by the Northern Territory that were not covered by the NTA. That is to say were done after the NTA commenced but were not covered by one of the provisions in Part 2 Division 3 of the legislation necessary for them to be valid. Because they are invalid for native title purposes they can not give rise to extinguishment. They do however impair native title. Invalid future acts are not covered by the statutory compensation scheme in the NTA. Mansfield J therefore awarded damages under the general law arising out of the tort of trespass.

10. The other type of compensable act in the Gilkerson Legal liability assessment tools and templates (Type 4 – "Valid Future Act"), was not the basis of any compensation award in the case. The quantification methodology decided by Mansfield J will however also be applicable to them.

11. The compensable acts of each type occurred after the commencement of the *Racial Discrimination Act 1975* ("RDA") on 31 October 1975.

12. The native title extinguished or impaired by the compensable acts comprised eight sets of rights derived from traditional laws and customs which together constituted a bundle of non-exclusive rights. The bundle of rights included accessing land, hunting and gathering, access to natural waters, living on the land, engaging in cultural activities, maintaining and protecting cultural sites and the sharing and exchange of traditional resources.

13. The native title determination for the area made in 2006 appointed a prescribed body corporate ("PBC") to hold and help manage the native title on behalf of the Ngaliwurru and Nungali Peoples.

14. The native title determination provided that the native title right to use resources was "not for any commercial purposes".

Compensation Methodology

15. The applicant made the claim for the compensable acts under three separate "heads of loss". Mansfield J found in favour of this. He ultimately made an award for economic loss assessed separately for each compensable act. The component of the award for non-economic loss was made on an in globo basis. Interest was applied on the economic loss component from the date each compensable act was done to the date of the judgment.

16. A summary of each head of loss is as follows:-

    (a) Economic Loss – The methodology for this loss is a percentage of the full freehold value of the relevant lot subject to extinguishment or impairment as at the date the compensable act was done.

    (b) Non-Economic Loss – In the language of compulsory acquisition law, this component can also be characterised as "solatium". It is also sometimes called "Special Indigenous Value". The methodology here involved a general compensation award commensurate with the cultural and spiritual harm suffered by Native Title Holders across all the land the subject of the compensation claim.

    (c) Interest – Interest was calculated on economic loss for each compensable act from the date each act was done to the day of the decision on a simple interest basis.

17. In analysing the history of each lot, Mansfield J found that in some cases there had been multiple compensable acts over time – initial acts of a non-extinguishing kind (such as intermediate period acts) and subsequent acts of an extinguishing kind (such as PEPAs). In these instances compensation is awarded only for the subsequent act of extinguishment.

18. Mansfield J's methodology for quantifying compensation began with s51 of the NTA. It requires that compensation be assessed on a "just terms" basis. Paragraph 51(xxxi) of the Commonwealth Constitution requires just terms compensation where property is acquired by government from others.

19. Mansfield J noted the interaction between s51A and s53(1) of the NTA. As an initial proposition s51A limits the amount of native title compensation to *"the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters",* but this is subject to s53(1).

20. s53(1) provides that where *"the application of any of the provisions of the Native Title Act 1993 in any particular case would result in any.....acquisition of property* (for purposes of paragraph 51xxxi of the constitution) .....(the native title holder) *is entitled to such compensation, or compensation in addition (*to the limit under s51A), *as is necessary to ensure the acquisition is made on paragraph 51(xxxi) just terms".*

21. s51(4) of the NTA specifically empowers the Court to *"have regard to any principles or criteria set out in a compulsory acquisition law for the Commonwealth, the State or Territory – depending on which the compensable act is attributable to".* Hence Mansfield J's more detailed findings about methodology drew on the *Lands Acquisition Act* (NT) ("LAA"). In Queensland the *Acquisition of Land Act 1967* (Qld) ("ALA") is equivalent legislation. Because the LAA and the ALA involve similar acquisition principles and criteria, all the main features of Mansfield J's decision are likely to apply in Queensland.

22. The LAA contains certain "rules for the assessment of compensation". Key features of the rules that informed Mansfield J's compensation determination are as follows:-

    (a) Fundamentally the monetary compensation must *fairly* compensate the claimant for the loss they have suffered or will suffer because of the acquisition.

    (b) To the extent possible, the rules with any necessary modifications are to be applied to native title.

    (c) The assessment of the extent of loss may take account of the following:-

        - Economic loss – In the context of land tenure acquisition this is described in the rules as the consideration (price) that would have been paid if the land had been sold on the open market on the date of acquisition by a willing but not anxious seller to a willing but not anxious buyer. That is to say, market value.

        - Non-economic loss – In the context of land tenure acquisition the rules describe this as the monetary value of any additional advantage to the person entitled to compensation incidental to his ownership, or occupation, of the acquired land.

        - Severance – Where the value of other land belonging to the claimant has been reduced because the acquisition has severed it from the acquired land, that loss of value must also be compensated.

        - Intangible disadvantages – Reasonable additional compensation may be paid for any intangible disadvantages resulting from the acquisition. Regard can be had to the nature of the claimant's interest in the land, the length of time the claimant resided on the land and would likely continued to have done so, the inconvenience caused to the claimant by their removal from the land and any other matter relevant to the circumstances of the claimant.

        - Costs – Costs and other losses sustained as a natural and reasonable consequences of the acquisition must generally also be compensated.

23. Mansfield J linked these principles and criteria to his task of determining a methodology for quantifying native title compensation this way:-

"In the NTA, the standard of just terms compensation does not prescribe any particular framework for the determination of the compensation payable, save that in the circumstances of this application by the operation of s 51(4) of the NTA, assistance may be derived from the framework under Sch 2 to the LAA".

24. Mansfield J considered the interaction between the NTA and the RDA in relation to methodology. He concluded that there is nothing in the RDA that requires native title to be valued at less than freehold title.

Economic Loss

25. The different types of compensable acts in the case either extinguished native title or impaired it. Impairment arises where the native title is not extinguished but is subject to, and detrimentally affected by, a tenure grant, physical works or other compensable act for as long as that act remains.

26. That is reflected in what the NTA calls the "non-extinguishment principle". This principle legally applies to the Category D past acts and intermediate period acts involved in the case. Invalid future acts can not extinguish, but do impair, native title. The type of compensable act called PEPAs completely extinguish native title.

27. The NTA, combined with native title validation legislation in each State and Territory, has the effect of validating for native title purposes all compensable acts done in the past, present or future. In return for the statutory validation, the NTA creates the statutory scheme for native title compensation. With validation comes a statutory entitlement to compensation.

28. Inevitably there is a difference in timing between the date on which a compensable act from the past was done and the date on which the statutory validation occurred. For example, the Northern Territory's validation legislation provides for the validation of past acts to occur when its legislation commenced on 10 March 1994 and on 1 October 1998 for intermediate period acts. However the compensable acts in the case were done before those dates.

29. There was disagreement between the parties whether the economic loss component should be assessed as at the date the compensable act was done or the date it was validated by the Territory legislation.

30. Mansfield J concluded that quantum of economic loss should be assessed at the date the act was done. He said that *"the entitlement to compensation is for "the act itself"* [paragraph 120 at page 30]. Hence for compensable acts involving tenure grants and the giving of permissions and authorities to others for the use of land or waters, the relevant date is the date the grant, permission, authority etc was made. For acts comprising public works, it is the date when construction commenced.

31. To ensure the practical outcome from that conclusion is fair, Mansfield J concluded that *"native title holders also receive compensation for the delay in payment by of interest"*. [paragraph 132 on page 32].

32. As to determining the amount as at the date of each act, the applicant argued for full freehold market.

33. The Territory argued that the nature of the usage of land under native title should first be assessed and the economic loss amount then assessed by reference to the closest conventional comparator (which might, for example, be a lease or licence rather than freehold). The Territory suggested an uplift factor to provide for any additional value accruing to Native Title Holders on account of the price that a freehold owner would be willing to pay to free the land from that usage right.

34. The Commonwealth argued for a different methodology again. It submitted that the compensation for economic loss should be to value the whole of the native title and then value those particular native title rights actually impaired by the act.

35. In coming to his conclusion, Mansfield J began by describing the nature of freehold:-

> *"A fee simple* (freehold) *is the most extensive in quantum of rights and the most absolute in respect to the right which it confers, of all estates known to the law. It confers the lawful right to exercise over, upon and in respect to, the land, every act of ownership subject to specific legislative constraints and exclusions".*

36. Mansfield J said that freehold value is an appropriate starting point because s51A of the NTA uses it as an upper limit unless constitutional just terms require otherwise. But he also said that in cases where the relevant native title is non-exclusive, freehold value is not the appropriate end point. Hence a percentage discount factor, likely to differ according to the nature of the native title and other factors in each case, is applied to the freehold value.

37. Mansfield J found that the non-exclusive native title rights in this case (the right to access the land, live, hunt etc), were in a practical sense exercisable in such a way as to prevent any other activity on the land (subject to any existing tenures). He then said as follows:-

> *"If the appropriate test were as to the price at which the claim group (native title holders) would have been prepared to surrender their non-exclusive native title rights, the answer would be not at all. If the appropriate test was to see what was the value to the Territory of acquiring those rights, as the Territory would not then be restricted by the nature of those rights which were surrendered, the answer would be closer to the freehold value. In my view, the appropriate valuation should be 80% of the freehold value".* [paragraph 232 on page 54].

38. The 80% figure (involving a discount of 20% of the full freehold value), was chosen by reference to the particular nature and extent of the non-exclusive native title in this case. In other cases where non-exclusive native title involves a different set of rights, a different figure would likely be chosen. In cases where there is exclusive native title, a figure of 100% of freehold value could be expected.

39. In selecting the percentage of freehold value, Mansfield J said that he had: *"been careful in reaching that intuitive figure, not to reflect in that percentage an allowance for the elements which are related to the cultural or ceremonial significance of the land, or of the very real attachment to the land which the claim group as an Indigenous community obviously has and which is acknowledged by, both the Territory and the Commonwealth".* [paragraph 233 on page 54]. That was to be the subject of the additional award for non-economic or intangible losses.

40. In determining the applicable economic loss methodology, the parties led expert evidence from anthropologists, economists and land valuers. He said that the case

did not however readily involve the routine application of their expertise. He did not accept an assumption by the Territory's valuer that it is appropriate to value the Native Title Holder's usage rights in conventional economic terms. He also found that other experts had not based their opinions on a sufficiently careful and full understanding of the nature of exclusive and non-exclusive native title according to the NTA and the case law.

Interest on Economic Loss

41. Because economic loss was assessed at 80% of the freehold value of the land at the date the compensable act was done, Mansfield J determined that interest should be paid on that component.

42. The Commonwealth and the Territory agreed that interest should be paid to compensate Native Title Holders for the loss involved in being deprived of the award from the time the economic loss was incurred.

43. However the parties were in dispute about whether interest should be calculated on a simple interest or compound basis and whether it was sufficient to cover the opportunity cost of being deprived of a significant capital sum for an extended period.

44. Mansfield J decided to apply simple interest in this case but the following indicates that compound interest might be appropriate in some cases:-

> *"On the other hand, I do not think that there are any authorities directly applicable and which would preclude the court, if it decided that the award of compound interest was an appropriate course to secure the claim group fair compensation or compensation on just terms, from granting compound interest. The NTA is silent on the topic...The absence of any prescription in the NTA as to the manner of calculating interest leaves that to the court. It does not preclude, where appropriate, the imposition of compound interest."* [paragraph 252 at page 59].

45. There were various options submitted by the parties as to the rate of simple interest. After a detailed analysis, Mansfield J decided on the rate that provided by the Federal Court's Practice Note CM16. This involves an amount of 4% above the Reserve Bank of Australia's cash rate.

Non-Economic Loss

46. The applicant sought an additional global award to account for the particular intangible losses of traditional attachment and hurt for cultural and spiritual impacts caused by the compensable acts.

47. Mansfield J summarised the position as follows:-

> *"It was not a matter of dispute that an award in the form of solatium was appropriate in the circumstances. The issue before the Court was how to quantify the essentially spiritual relationship which Aboriginal people, and particularly the Ngaliwurru-Nungali People, have with country and to translate the spiritual or religious hurt into compensation".* [paragraph 291 at page 68].

48. The Court's preferred description was one of "intangible disadvantage" (a phrase used in the LAA), rather than "special value". The Court, also preferred to determine this

component globally for all the land affected by the extinguishment or impairment (i.e. "in globo"), rather that determine separate amounts for each lot.

49. In this case, Mansfield J noted that non-economic loss needed to be assessed having regard to the non-exclusive nature of the native title involved. For exclusive native title the quantum might well be greater.

50. In assessing the quantum of this component Mansfield J said that he was not assisted by other cases where damages awards had been made for loss of Aboriginal culture under tort law. This is because those cases involved personal losses rather than the communal losses that a native title case involves.

51. Mansfield J was also reluctant to decide the quantum by reference to other cases involving wrongful death or defamation. He said that the law does however provide that there can be "*an entitlement to compensation in money value even where there is no market for what is lost and where the value of the dispossessed holder rests on non-financial considerations".* [paragraph 313 at page 73].

52. The relevant considerations for the Court to take into account in a native title case were summarised broadly as being the cause of the loss, the nature of the loss, the evidence before the Court including the greater spiritual significance of certain places within traditional country, the effects of the compensable acts and the nature and extent of traditional country affected.

53. These considerations will be different in each case. Mansfield J said that: "*An evaluation of what are the relevant compensable intangible disadvantages, with a view to assessing an amount that is fair and reasonable, requires an appreciation of the relevant affect on the native title holders concerned, which may include elements of "loss of amenities" or "pain and suffering" or "reputational damage". In that respect, evidence about the relationship with country and the affect of acts on that will be paramount".* [paragraph 318 at page 74].

54. A large part of the decision involves an analysis of the evidence of Native Title Holders and expert anthropological witnesses. Mansfield J found the evidence to reveal a duty under traditional laws and customs to look after country. He found there to be strong and compelling evidence from the Native Title Holders about the intangible affects on them.

55. The expert evidence was however impeded by indications of expert misunderstanding of the native title and because the experts did not know some details about the nature of the compensable acts, whey they occurred or the particular land affected. Nonetheless the evidence combined proved that the compensable acts had *"caused emotional, gut-wrenching pain and deep or primary emotions".* [paragraph 350 on page 83].

56. This arose from both the general intrusion of the development of the township over time and some specific compensable acts such as the construction of water tanks on the path of the dingo Dreaming. Additionally Mansfield J took into account "*the fact that each of the compensable acts to some degree have diminished the geographical area over which native title rights within the Township of Timber Creek more generally may be exercised, and each in an imprecise way has adversely affected the spiritual connection with the particular allotments and more generally, which the claim group have with their country".* [paragraph 38 at page 90].

57. In finally quantifying the non-economic loss, Mansfield J said as follows:-

> *"The selection of an appropriate level of compensation is not a matter of evidence or of mathematical calculation. Having regard to the matters to which I have referred in my view the appropriate award for the non-economic loss or solatium component of the compensation package should be assessed at $1.3M".* [paragraph 383 at page 91].

58. Like other aspects, the quantification outcome is fact specific and will differ according to the evidence in each case.

59. The in globo award only related to the relatively small area of compensable acts involving the township. The compensation claim did not cover any compensable acts in the much more extensive surrounding traditional lands of the Native Title Holders.

Impairment Acts and Extinguishment

60. For some lots one type of compensable act impairing native title was followed later in time by another type of compensable act that completely extinguished native title.

61. Mansfield J noted that in a practical sense many acts which have the impairment effect of supressing native title (through what is called the "non-extinguishment principle"), have the same practical effect as extinguishment, especially where the suppression lasts for a long time. As between impairment and extinguishment the relevant difference is that for non-extinguishing acts there is a future possibility of the impairment being wholly or partially removed.

62. Mansfield J said that it can be appropriate to make a "downward adjustment" in the compensation award where there has been such impairment only.

63. However where an extinguishment act follows an impairment act over the same area a reduction for the contingency is not necessary at all.

64. Where there is no subsequent extinguishment, the amount of the downward adjustment depends on the facts and circumstances of each matter. In this case Mansfield J said:-

> *"There is no real evidence upon which that contingency can be assessed. That is why I have referred to it as a conceptual contingency. I have endeavored to have it more than a nominal value or percentage. I do not think that it has real significance. I would not, therefore, reduce the freehold value in those circumstances at all. In making that conclusion, I considered that the removal either wholly or partially of the act or its affects is not likely ever to arise."* [paragraph 392 on page 93].

Other Conclusions

65. Important to the economic loss award were the freehold valuations from expert valuers. Each party had their own valuers and the various valuation figures differed significantly for some lots.

66. In deciding which valuation evidence to prefer, Mansfield J gave consideration to the following factors:-

- The expertise and experience of the competing valuers.
- The valuation assumptions used and the appropriateness and accuracy of the assumptions.

- The clarity and coherence with which valuation evidence was given.

- The comprehensiveness and rigor with which relevant data was collected, including detailed inspections of lots.

- The valuers experience in the local area and experience in valuing properties in other remote rural towns.

67. Section 94 of the NTA requires the Court when making a compensation determination to name the persons entitled to the compensation, the method for determining the amount of compensation for each person and a method for dispute resolution. Given that the previous native title determination already contained a description of the Native Title Holders and provided for a prescribed body corporate ("PBC"), the Court accepted that payment to the PBC would satisfy many of those requirements.

68. Despite a concern raised by the Commonwealth about whether an order providing for the PBC to deal with the compensation would be a constitutionally impermissible delegation of judicial decision-making, Mansfield J concluded that the PBC could be ordered to deal with those matters.

69. He did find it necessary to make orders about a dispute resolution process to apply given the possibility for disputes about how the compensation is allocated.