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LAND, RIGHTS, LAWS: ISSUES OF NATIVE TITLE

Compensation Claims Post-*Griffiths*

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Aboriginal and Torres Strait Islander people are respectfully advised that this publication contains names and images of deceased persons and culturally sensitive information.

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Abstract

A new wave of compensation cases are consolidating and testing findings in the wake of the landmark High Court decision of *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples*.[1] A highly anticipated judgment which looked at native title compensation for the first time, *Griffiths* nevertheless arguably raised more questions than it answered. Among the compensation claims to follow are the Tjiwarl and Gibson Desert claims in Western Australia in which the Central Desert Native Title Services (CDNTS) representative body has been involved. As practitioners involved in the claims, this paper presents our reflections on the background to the claims, the process of bringing the claims, transitioning into alternative settlement agreements and lessons for other practitioners and native title holders involved in, or thinking of bringing, a native title compensation claim.

Pila Nature Reserve signing ceremony held at Mina Mina in October last year. Photo: Jason Thomas

[1] [2019] HCA 7 ('*Griffiths*').

The Tjiwarl Compensation Claims

Background

The Tjiwarl compensation claims cover an area of approximately 7, 700km^2 in the Goldfields region of Western Australia.[2] The Tjiwarl claimants had their native title determined in April 2017 as part of Western Desert society.[3] In 2018 and 2019, CDNTS received instructions to file two compensation claims on behalf of the Tjiwarl claim group and Tjiwarl (Aboriginal Corporation) RNTBC ('Tjiwarl AC'), respectively.[4] Both claims were filed in June 2020. A third compensation claim brought on behalf of the claim group was filed in November 2020.[5]

Brett Lewis & Ors on behalf of the Tjiwarl Compensation Claim Group v WA and Tjiwarl (Aboriginal Corporation) RNTBC v WA

The compensable acts claimed include the vesting of reserves and the creation of a special purpose lease in the Lewis claim and the building of roads and water bores and the granting of particular pastoral leases, mining leases, exploration licences and water licences in the PBC claim.

The research required to identify these compensable acts is a labour-intensive process which requires documenting and evaluating potentially compensable acts, particularly the activities undertaken on mining leases and other acts which impair, rather than extinguish native title. CDNTS has carried and is carrying out research to collate and summarise the damage done to Country. Ongoing research to date has indicated that many of the kinds of activities claimed to have a 'low-level' impact in fact can have serious and ongoing effect on native title rights and interests. For example, drilling programs pursuant to exploration licences can change the landscape and generate significant noise and chemical pollution, including over *tjukurrpa* (or dreaming sites). Together with other activities related to mining, including clearing of land and construction of infrastructure, native title rights and interests can be significantly impacted by mining activity, including prior to the establishment of the mine itself.

The claims raise a number of key issues not addressed in *Griffiths*, making the cases a priority and focus for practitioners in this emerging field. These include issues relating to who will ultimately be liable to pay any compensation awarded. In Western Australia, s 125A of the *Mining Act 1978* (WA) purports to provide that any liability to pay compensation under the NTA for the grant of a mining lease is 'passed on' to the applicant or holder of the lease at the time the compensation determination is made.

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[2] WAD141/2020; WAD142/2020; WAD269/2020.

[3] *Narrier v State of Western Australia* [2016] FCA 1519; *Narrier v State of Western Australia (No 2)* [2017] FCA 104.

[4] *Brett Lewis & Ors on behalf of the Tjiwarl Compensation Claim Group v WA* (WAD142/2020) ('Lewis claim'); *Tjiwarl (Aboriginal Corporation) RNTBC v WA* (WAD141/2020) ('PBC claim').

[5] *Wonyabong on behalf of Kapi Tjiwarl Claim v State of Western Australia* (WAD 269/2020).

A live issue in the claim brought by Tjiwarl AC is whether it is the State or tenement holders who are liable to pay compensation.[6]

The claim may also revisit the impact of s 47B of the NTA on compensation claims. When a determination of exclusive possession native title is made pursuant to s 47B of the NTA, does the determination operate retrospectively such that exclusive native title is deemed to have always existed over the area? Mansfield J at trial in *Griffiths v Northern Territory*[7] held that s 47B of the NTA was not relevant to native title compensation (as opposed to determination) and the correctness of this decision is at issue in the claim brought by Tjiwarl AC.

Wonyabong on behalf of Kapi Tjiwarl Claim v WA

This compensation claim concerns the creation and vesting of a water reserve under ss 39 and 42 of the *Land Act 1898* (WA). The area, called 'Logan Springs', is known to the applicants as 'Tjiwarl' (which means 'something shiny' in Western Desert language). The area is relatively small in size (covering just 6.47km^2)[8] but of great significance to the claimants who have named their claims and PBC 'Tjiwarl' after this place. At the 2015 hearing of the native title claim, the applicant attempted to establish native title over the area under the beneficial provisions of the NTA (s 47B) which allow extinguishment to be disregarded in certain circumstances. Mortimer J found that occupation had not been established,[9] and the cross-appeal to the Full Court of the Federal Court of Australia on behalf of the claimants was dismissed.

This compensation claim is potentially important because the creation and purported vesting of the water reserve occurred in 1921, many years before the passing of the *Racial Discrimination Act 1975* (Cth) (RDA) in 1975. Generally, it has been thought that compensation is only payable for acts which occurred after this date.[10] This claim puts in issue whether native title over the reserve has in fact been extinguished, and claims compensation for the effect of the vesting of the reserve on native title, based on the proper construction of the *Land Act 1898* (WA) and the characterisation of the vesting as a validated past act.

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[6] *Tjiwarl Aboriginal Corporation RNTBC v State of Western Australia* [2021] FCA 438 (at [4] - [6]).

[7] [2014] FCA 256, [43], [46], [67].

[8] *Wonyabong on behalf of Kapi Tjiwarl Claim v State of Western Australia* (WAD 269/2020).

[9] *Narrier v State of Western Australia* [2016] FCA 1519 at [1303].

[10] For example, see Kingsley Palmer, *Australian Native Title Anthropology: Strategic Practice, the Law and the State* (2018, ANU Press) 234.

Gibson Desert Claim

The Gibson Desert compensation claim has a long procedural history. The Ngaanyatjarra native title claim was determined by consent in 2005.[11] The determination area, however, excluded the Gibson Desert Nature Reserve, where native title was determined to be wholly extinguished. This was as a result of the High Court decision in *Western Australia v Ward*[12] which held that the vesting of reserves wholly extinguished native title rights and interests. Nevertheless, the Labor government at the time of the Ngaanyatjarra consent determination signed a Memorandum of Understanding with the claimants to work towards an alternative form of tenure to recognise the group as the traditional owners of the reserve area. Two years of negotiations culminated in the *Indigenous Conservation Title Bill 2007* (WA) (ICT Bill) which was to acknowledge the land aspirations of the Gibson Desert peoples, facilitate the transfer of title over the reserve and provide for the negotiation of a joint management agreement. During that time, however, a snap State election took place, and the incoming Liberal government withdrew from the ICT Bill negotiations.

Initial Compensation Claim

In 2011, the Gibson Desert claimants instructed CDNTS to lodge a compensation application under the NTA for the extinguishment of native title rights and interests over the reserve. The reserve was vested under s 33 of the *Land Act 1933* (WA) in 1977, two years after the enactment of the RDA. As a result, liability to pay compensation arose under s 45 of the NTA through s 10 of the RDA. The compensation claim was filed in 2012[13] and a significant amount of work and gathering evidence was undertaken between 2012 and 2014. In August 2014, evidence was discovered that oil prospecting areas covering a large part of the State (including the reserve) had been issued in 1921 and 1922. The State argued these tenures had the effect of extinguishing the right to control access, such that by the time the reserve was vested in 1977, only non-exclusive native title remained to be extinguished and therefore compensable. In *Ward v Western Australia (No 2)*[14] the Court held that the State was entitled to rely on the evidence of historical oil prospecting areas. In *Ward v Western Australia (No 3)*[15], it was found that the oil prospecting tenure was validly granted and had therefore extinguished the exclusive component of the native title rights and interests. Following this, in August 2016, the Gibson Desert claimants discontinued the application, and looked to alternative methods of achieving recognition of their Country.

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[11] *Stanley Mervyn, Adrian Young, and Livingston West and Ors, on behalf of the Peoples of the Ngaanyatjarra Lands v The State of Western Australia and Ors* [2005] FCA 831 (Ngaanyatjarra consent determination).

[12] (2002) 213 CLR 1.

[13] WAD 86/2012.

[14] [2014] FCA 825.

[15] [2015] FCA 658.

Settlement Negotiations

In October 2017, alternative settlement negotiations commenced after the Honourable Ministers Wyatt and Dawson visited the reserve at Mina Mina and met with traditional owners. A traditional owner negotiating team was established, along with the Warnpurru (Aboriginal Corporation). CDNTS was reengaged to assist with the alternative settlement negotiations. Negotiations didn't commence in earnest until 2019 following the High Court's decision in *Griffiths*.

Guided by the High Court's reasoning in *Griffiths*, the parties exchanged some information concerning their positions in relation to economic and cultural loss. Reaching agreement on the cultural loss component of the settlement was a difficult aspect of the negotiations, particularly as relatively little guidance was provided in *Griffiths* on this aspect of the award. In this case, as the compensable act was the vesting of a nature reserve, less damage had occurred to sites of cultural significance, when compared with the facts of *Griffiths*.

Nevertheless, while the traditional owners continued to practice cultural obligations on Country and maintain a strong connection to, and look after, Country, the existence of the reserve prevented the group as a matter of law from enjoying and exercising native title rights and interests in the same way that their native title holding neighbours were able to, especially the capacity to access Indigenous Protected Area funding to establish a ranger program. Amongst other matters, this caused considerable anxiety, hurt and shame.

Despite the complications arising as a result of the considerable factual differences between *Griffiths* and the Gibson Desert circumstances, and given the interest-based nature of the negotiations, the negotiations were able to proceed outside of a strictly *Griffiths*-based approach. The parties focus was instead on the group's aspirations for land management and a return of Country by way of joint vesting and restoration of native title.

The agreement was ultimately executed by all parties at a signing ceremony held on Country 28 October 2020.

The Agreement

The *Compensation and Lurrtjurrlulu Palakitjalu Settlement Agreement* (CLPSA)[16] outlines a 10-year partnership between traditional owners and the State government. The financial component of the compensation is directed largely towards funding Warnpurru (Aboriginal Corporation): $151,092 and $100,000 (indexed to inflation) each financial year for 10 years. A further $650,000 over 10 years (indexed to inflation) is attributed to the Ngurrarritjaku Kutju Fund – a discretionary fund for cultural matters such as funerals, law business and education.[17]

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[16] For more, see WA Government, 'Gibson Desert Nature Reserve Compensation and Lurrtjurrlulu Palakitjalu Settlement Agreement' (Web Page, 4 January 2021).

[17] CLPSA cls 13, 14.

The CLPSA also includes a number of non-monetary benefits. The main components of this includes a pathway to restore and recognise exclusive possession native title over the Nature Reserve, a joint management ranger program ($750,000 (indexed to inflation) each financial year for 10 years), and renaming the reserve as "Pila Nature Reserve". It also provides for joint vesting of the reserve in the Warnpurru (Aboriginal Corporation) and Parks and Wildlife Service of the Department of Biodiversity, Conservation and Attractions, with options for sole vesting in future. In addition, there are infrastructure upgrades for Patjarr community so that rangers can live and work on Country. The agreement also leaves open the door for future possibilities between the State and the traditional owners, stating '[t]he Parties acknowledge their intention that the State Parties and the Gibson Desert Parties continue to develop and maintain a sustainable, mutually beneficial relationship.'[18]

Consent Determination of Compensation

A compensation claim to accompany the agreement was filed with the Federal Court at the end of 2020. The agreed approach between the parties was that consent determination of compensation would be necessary to accompany the agreement in order to achieve a 'full and final' settlement of the State's past compensation liability. Since the passing of the *Native Title Legislation Amendment Act 2021* (Cth) in early 2021, the parties are now working towards the filing of a native title claim relying on the new s 47C NTA, followed by the native title and compensation applications being determined concurrently.

Conclusion

The Courts will surely have much more to say on the issue of native title compensation in the coming years. Claims such as the Tjiwarl and Gibson Desert claims are testing issues on which the Court was silent in *Griffiths*. This includes whether liability to pay may, at least in some cases, rest with parties other than State and Federal governments, the effect of s 47B of the NTA on compensation, and whether 1975 is in fact the 'starting point' it has long been assumed to be. As the Gibson Desert experience shows, however, it may be unnecessary and undesirable to rely on black letter law and the courts. Alternative and comprehensive settlement agreements may deliver benefits for both claimants and respondents, without the need for lengthy and costly court proceedings.

[18] Ibid cl 20.1(a).

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