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**JANGO: PAYMENT OF COMPENSATION FOR THE EXTINGUISHMENT OF NATIVE
TITLE**

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ABSTRACT

In Jango v Northern Territory of Australia the Federal Court was asked to determine the issue of compensation for the extinguishment of native title rights and interests. This paper examines the Court's treatment of Division 5 Part 2 of the Native Title Act 1993 (Cth) in relation to criteria for determining extinguishment. It focuses on whether any improvements

on the land which post-dated the extinguishing acts has a bearing on when the right to compensation arise; whether the quantum of compensation is assessed with reference to any improvements on the land; whether the person or groups entitled to compensation are those who held native title rights and interests at the date the past act occurred; the date from which interest should accrue; and whether a site of significance has a bearing on the quantum of the compensation payable once the claim group has established native title rights and interests that were extinguished as a result of compensation acts.

INTRODUCTION

In *Jango v Northern Territory of Australia*¹ the Federal Court, noted that the validation and extinguishment regime created within the *Native Title Act 1993* (Cth) (NTA), and of which the compensation provisions form but a part, is extraordinarily complex.² *Jango* is the first and only instance in which the Court has considered and dealt with, an application for a determination of compensation under that complex regime.³

This paper discusses the background to the *Jango* claim, the statutory regime under which compensation for the extinguishment of native title rights and interests is determined, the arguments of the parties in relation to the major issues relating to extinguishment and compensation and the findings of the Court on those issues. Finally, the paper discusses other potential issues that may arise in future native title compensation applications.

In relation to extinguishment and compensation the Court dealt with the following major issues:

- The statutory regime, in particular, the interrelationship between the *Validation (Native Title) Act 1994* (NT) (*Validation Act*) and the NTA;
- The identification of the relevant date or dates upon which any native title rights and interests were extinguished and the date or dates from which the entitlement to compensation would have arisen;
- The persons or groups who would be entitled to compensation;
- Whether the quantum of compensation is assessed with reference to the value of improvements on the land that were constructed subsequent to the date of the valid or validated act which extinguished the native title in question;
- Whether interest is payable from the date that act occurred; and
- Whether the existence of a site of significance on an area where native title has been extinguished, will have bearing on the quantum of the compensation payable.

BACKGROUND

The native title compensation application was brought under ss. 50(2) and 61(1) of the NTA, for a determination of compensation in respect of the Town of Yulara in the Northern Territory ('the Area'), which lies just north of the South Australian border and which is part

¹ [2006] FCA 318 (*Jango*).

² *Jango*, [39] (Sackville J).

³ The authors would like to thank the peer reviewers for their comments on an earlier draft.

of the much larger Western Desert region. The Area comprised 104 square kilometres.⁴ The members of the compensation claim group were almost exclusively *Yankunytjatjara* or *Pitjantjatjara* people, who claimed native title rights and interests in the Area that were extinguished by certain acts involving the development and construction of the Yulara Tourist Village that had occurred over the period between 1979 to 1992 ('compensation acts').

The NTA, makes provision in Division 5 of Part 2 for the determination of compensation on just terms, for any extinguishment or impairment of, native title rights and interests, brought about by the operation of Divisions 2, 2A, 2B, 3 or 4.

In compensation applications under the NTA, the Court is asked to make a determination of native title in hindsight at the date on which extinguishment occurred. The selection of the appropriate date was a matter of some controversy in *Jango* and was dependant upon identifying the acts which had extinguished the applicants native title rights and interests.

The Court held that the applicants had not shown, on the evidence, that the Aboriginal witnesses, or members of the compensation claim group, acknowledged and observed the laws and customs of the Western Desert bloc as pleaded in the applicants' Points of Claim. The Court found that the applicants had not made out the particular laws and customs that they had chosen to plead and to rely on when presenting their case.⁵ The Court made reference to the possibility that, had the case been pleaded differently, a different finding in relation to the existence of native title may have been made, but the Court also noted that there may have been sound reasons why the applicants had chosen to present their case in the way they had chosen.

COMPENSATION ACTS AND ARGUMENTS OF THE PARTIES

Notwithstanding the adverse findings in relation to the question of the former existence of native title, the Court addressed the issues relating to extinguishment and compensation that would have arisen, had the applicants succeeded in establishing that they had held native title rights and interests when the compensation acts occurred.⁶

The various potential compensation acts which had extinguished native title sometime between 1979 to 1992 were said to include grants of freehold and leasehold estates over some lots on the Area as well as the construction of public works, which included Connellan Airport, roads and a series of water bores. All of the potential compensation acts in *Jango* were acts attributable to the Northern Territory.⁷

The applicants claimed that their native title rights and interests were not extinguished until the commencement of the *Validation Act* on 10 March 1994. They argued, that the extinguishment came about as a result of the operation of the provisions of the NTA and corresponding provisions of the *Validation Act*.⁸ If the applicants' argument was successful

⁴ *Jango*, [2].

⁵ *Jango*, [440] – [451].

⁶ *Jango*, [572] – [573]; [603] – [782].

⁷ *Jango*, [6].

⁸ This Act was enacted by the Legislative Assembly of the Northern Territory to mirror the provisions of the NTA.

the compensation claim group may have been entitled to compensation for the value of improvements that were erected on the land before 1994.

The respondents submitted that all surviving native title rights and interests were validly extinguished before the commencement of the NTA.⁹ The Court was asked to determine whether the applicants had established that native title rights and interests subsisted over the Area in accordance with the traditional laws and customs of the Western Desert bloc, until extinguished by the compensation acts. The respondents argued that any native title rights and interests that may have existed were sequentially extinguished over various parts of the application area much earlier than that by the actual grants of freehold and leasehold interests and by the construction of the public works in the Yulara Tourist Village.

The Court held that the entitlement to compensation would have arisen in the case of acts other than the construction of public works, at the date the act was done and, in the case of public works, at the date on which the establishment or construction of the public work commenced¹⁰ (thereby accepting the respondents submissions, and rejecting the applicants argument that extinguishment occurred on commencement of the NTA and the complementary Territory legislation). It followed from this finding that compensation would not have included the value of any buildings or works subsequently constructed on the Area.

The Court also rejected the respondents argument that all surviving native title rights and interests were validly extinguished before the NTA came into force.¹¹

GENERAL PRINCIPLES IN RELATION TO EXTINGUISHMENT

To understand the law in relation to compensation in the native title context it is useful to examine the general principles in relation to the extinguishment of native title rights and interests. Native title rights and interests which are recognised and protected by the NTA, as defined in s. 223(1), are the same rights as those recognised at common law, namely, rights in relation to land or waters which existed under the laws and customs of Indigenous Australians when sovereignty was acquired.¹² The prior existence of those rights operated to prevent the Crown from obtaining an absolute beneficial ownership of land when it acquired sovereignty¹³ and continued as a burden on the Crown's radical title to land.¹⁴

Native title became vulnerable to extinguishment upon the acquisition of sovereignty by a valid exercise of sovereign power inconsistent with the continued right to enjoy the native title rights and interests.¹⁵ Such as the grant of an inconsistent interest in the land or a

⁹ *Jango*, [784].

¹⁰ *Jango*, [774].

¹¹ *Jango*, [784].

¹² *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta HC*), [45] (Gleeson CJ, Gummow and Hayne JJ), [134] (McHugh J) and [180] (Callinan J).

¹³ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (*Mabo (No 2)*), 45 (Brennan J with whose reasons Mason CJ and McHugh JJ agreed), 109 (Deane and Gaudron JJ), 182 (Toohey J).

¹⁴ *Mabo (No 2)*, 52 (Brennan J) and 88-87 (Deane and Gaudron JJ); see also *Wik Peoples v Queensland* (1996) 187 CLR 1, 127 (Toohey J); *Yorta Yorta HC* (Gleeson, Gummow and Hayne JJ).

¹⁵ *Mabo (No 2)*, 63 (Brennan J), 110 (Dean and Gaudron JJ); *Western Australia v Commonwealth (Native Title*

legislative act, such as the statutory vesting of mineral resources in the Crown,¹⁶ or the statutory vesting of an estate in fee simple.¹⁷

The majority of, the High Court in *Mabo v Queensland (No. 2)*¹⁸ held that at common law the Crown's extinguishment of native title by such acts was not wrongful and did not entitle the native title holders to compensation.¹⁹ Accordingly, any general entitlement to compensation for extinguishment must be created by statute. Extinguishment of native title is permanent.²⁰

The susceptibility of native title to extinguishment at common law was affected, first, by the enactment of the *Racial Discrimination Act 1975* (Cth) (RDA), which provided a measure of protection for native title still in existence at that time, and, later, by the NTA, which comprehensively deals with the circumstances in which native title can now be extinguished. Section 11 of the NTA provides that native title is not to be extinguished contrary to that Act.

It must be noted, however, that an act which occurred prior to the enactment of the NTA which was valid and which was effective then to extinguish native title, is unaffected by the NTA.²¹

It is important to note that compensation is not payable merely by reason of the fact that native title has been extinguished or rendered ineffective (permanently or otherwise). Rather, compensation is payable under the NTA only if:

- the act in question was valid, but a right to compensation exists by operation of s.10(1) of the RDA that operates in certain circumstances to confer a right to compensation upon the native title holders, so that they hold the same rights as the holders of other forms of title (s. 45, NTA);
- the act in question was invalid by reason of the existence of native title (being,

Act Case) (1985) 183 CLR 373 (*Native Title Act Case*), 422 and 452-453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J); *Wik Peoples v Queensland* (1996) 187 CLR 1, 84-85, (Brennan J); *Yanner v Eaton* (1999) 201 CLR 351, [35] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

¹⁶ *Ward HC*, [383]-[385] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [572] (Kirby J) and [640] (Callinan J) (with whose reasons McHugh J agreed at [472]).

¹⁷ *Ward HC*, [249]; *Lawson v Minister for Land and Water Conservation (NSW)* [2004] FCAFC 308.

¹⁸ (1992) 175 CLR 1.

¹⁹ *Mabo (No 2)*, 15 Mason CJ and McHugh stating, with the authority of the other members of the Court, that:

The main difference between those members of the Court who constitute the majority is that, subject to the operation of the *Racial Discrimination Act 1975* (Cth), neither of us nor Brennan J, agrees with the conclusion of Deane, Toohey and Gaudron JJ, that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown that inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note the judgment of Dawson J supports the conclusion of Brennan J and ourselves on that aspect of the case since his Honour considers that, native title, where it exists, is a form of permissive occupancy at the will of the Crown.

See also *Native Title Act Case*, 492, Dawson J accepting the reasons for judgment of Brennan J in *Mabo (No 2)* as containing the basic principles for which *Mabo (No 2)* now stands as authority'.

²⁰ *Fejo v Northern Territory* (1998) 195 CLR 96; and see too the definition of *extinguishment* in s. 237A of the NTA.

²¹ *Native Title Act Case*, 454 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

relevantly, a ‘past act’²²) but was validated by the NTA or by equivalent State or Territory legislation (s.20, NTA); or,

- the act was a ‘previous exclusive possession act’, and native title was extinguished, but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under the NTA (i.e. at common law) (s.23J, NTA).

THE COURT’S FINDINGS ON MAJOR ISSUES

Extinguishment by grants of inconsistent rights and interests

The overarching principle for determining whether native title has been extinguished is that identified by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Western Australia v Ward*,²³ namely:

whether by, the steps that were taken, the Crown created in others, or asserted, rights in relation to the land that were inconsistent with native title rights and interests over the land.²⁴

Since the 1998 Amendments to the NTA Part 2, Divisions 2, 2A, 2B, 4 and 4 have identified those *acts* that extinguish native title under the NTA. In *Jango* Sackville J stated that:

even if native title was extinguished under common law rules which are taken to have applied prior to the commencement of the NTA, it is still necessary to consider the application of the statute (and its State and Territory counterparts) to any act said to have extinguished native title: *Wilson v Anderson* (2002) 213 CLR 401, at [45]-[47], per Gaudron, Gummow and Hayne JJ.²⁵

Sackville J stated that s. 23J(1) of the NTA provides that the former native title holders will only be entitled to compensation for the extinguishment of their native title rights and interests under Part 2 Division 2B where they were not extinguished otherwise than under the NTA. An entitlement to compensation arises only where the statutory extinguishment exceeds the extinguishment that would have occurred at common law.²⁶ An example of statutory extinguishment exceeding the extinguishment that would have occurred at common law is the extinguishment brought about by the grant of a pastoral lease which is also a ‘category A past act’ under s. 229(3)(a) of the NTA, and will thus wholly extinguish native title.²⁷

²² Similar provision is made for compensation in relation to ‘intermediate period acts’ (see ss.22D and 22G, NTA); however, none of the alleged compensation acts in this case were intermediate period acts.

²³ (2002) CLR 1 (*Ward HC*).

²⁴ *Ward HC*, [214].

²⁵ *Jango*, [36].

²⁶ *Jango*, [53]. Sackville J referred to the statement of Gaudron, Gummow and Hayne JJ in *Wilson v Anderson* (2002) 213 CLR 401, [51].

²⁷ This will largely be confined to pastoral leases that were granted post the date of commencement of the RDA, which is 31 October 1975, and thus, would have been invalid by reason of the existence of native title.

Rights to compensation accrue at the date the compensation acts took place

Under the NTA, s. 17 creates an entitlement to compensation under Division 2 (that is, for ‘past acts’) and s. 23J creates an entitlement to compensation under Division 2B (ie for ‘previous exclusive possession acts’), but only to the extent that native title was not extinguished otherwise than under the Act. The Court noted, however, that the effect of s. 23C(3) of the NTA, which provides for the extinguishing effects of ‘past acts’ and hence, triggers an entitlement to compensation under s. 17, does not apply if an act is a ‘previous exclusive possession act’.²⁸

Division 2B of the NTA relates to the validation of ‘previous exclusive possession acts’. ‘Previous exclusive possession acts’ include grants of fee simple estates or leases and the construction of public works. Some of these ‘previous exclusive possession acts’ may have been invalid when done by reason of the RDA (and thus would have been ‘past acts’), but this would not have been known at the time the *acts* were carried out. The practical consequences of these acts usually included the *de facto* loss or impairment of native title rights and interests when the act occurred. Recognising this in *Jango*, Sackville J found that it made sense that any right to compensation in respect of the validation of those acts is to be determined as at the date the acts took place.²⁹

Section 23C(1) of the NTA provides that a ‘previous exclusive possession act’ under s. 23B(2), extinguishes native title in relation to the land concerned. Section 23C(2) provides that if an act is a ‘previous exclusive possession act’ under s. 23B(7) (which deals with public works), the *act* also extinguishes native title in relation to the land concerned. Section 23C(1)(b) expressly states that the extinguishment effected by a ‘previous exclusive possession act’ under s. 23B(2) of the NTA ‘is taken to have happened when the act was done’.³⁰

Similarly, s. 23C(2)(b) states that the extinguishment effected by a public work ‘is taken to have happened when the construction or establishment of the public work began’. Importantly, if s. 23C applies to an act (that is, if it is a ‘previous exclusive possession act’), then ss. 15 and 22B (which deal with the extinguishing effect of ‘category A past acts’ and ‘intermediate period acts’), do not apply (s. 23C(3)). Section 23C possibly renders ‘category A past acts’ and ‘immediate past acts’ inconsequential. It is hard to conceive of a ‘category A past act’ that is not a ‘previous exclusive possession act’ under s. 23C(3).

Sackville J found that the entitlement to compensation created by s. 17(1) assumes that a ‘past act’ has extinguished native title in accordance with s.15. Hence, his Honour found s.17 creates an entitlement to compensation because s.15 provides that the ‘past act’ extinguishes native title.³¹ Further, his Honour found:

that the extinguishment of native title by reason of a previous exclusive possession act takes place ‘under [Div 2B]’ for the purposes of s.23J of the NTA. Thus the entitlement to compensation for the extinguishment arises under s.23J and not s.17 of the NTA...

²⁸ *Jango*, [764].

²⁹ *Jango*, [771].

³⁰ A previous exclusive possession act attributable to the Northern Territory are validated by s. 9H(2) of the *Validation Act* which is an analogue to s. 23C(1)(b) of the *NTA*: see *Jango* at [773].

³¹ *Jango*, [765].

...For reasons I have given, s.23J of the NTA, in my view, creates an entitlement in native title holders to compensation for the extinguishment of native title affected by a previous exclusive possession act. This is so notwithstanding that the previous exclusive possession act is also a past act for the purposes of Div 2.³²

Sackville J found that ‘previous exclusive possession acts’ attributable to the Northern Territory are validated by s. 9H(2) of the *Validation Act*, which is an analogue to s. 23C(1)(b) of the NTA.³³

The Court found that the right to compensation arises, or is taken to arise, when the extinguishment is taken to have happened, the date the *act* was done, for *acts* other than public works. In the case of public works, the right to compensation arises on the date the construction or establishment commences.³⁴

Quantum of compensation assessed without reference to improvements

As discussed above Sackville J found that some ‘previous exclusive possession acts’, may have been invalid by reason of the RDA. Any right to compensation in respect of the validation of those acts was to be determined as at the date the acts took place, not when the validation occurred.³⁵ His Honour found that if this view was not taken it would lead to compensation for the added value of public works and other improvements to the land subsequent to the compensation acts. For example, it would include the added value of public works such as Connellan Airport constructed in 1981.³⁶

The persons or groups entitled to compensation are those who held native title rights and interests at the date of the compensation act

Sackville J found that it was only those persons or groups who held native title rights and interests at the date that the relevant ‘past act’ or ‘previous exclusive possession act’ occurred who would be entitled to compensation.

While the entitlement to compensation under s. 23J of the NTA accrues from when the relevant act was done, the applicants argued that if a child was born after a past act was done, but before 1994, when the NTA commenced, that child might be deprived of an accrued right to compensation.³⁷ In response to this argument his Honour found: ‘[t]his argument appears to assume that a person whose native title rights and interests came into existence after the past act took place has a right to compensation under s. 17 of the NTA.’ His Honour stated that he was doubtful this reasoning could be correct and held that, ‘the only persons or groups entitled to compensation are those who held native title rights and interests at the date the past act occurred’.³⁸

³² *Jango*, [766] - [768].

³³ *Jango*, [773].

³⁴ *Jango*, [774].

³⁵ *Jango*, [771].

³⁶ *Jango*, [772].

³⁷ *Jango*, [775].

³⁸ *Jango*, [776].

His Honour stated that if Division 2B of the NTA deprived some native title holders of compensation, then s. 53(1) provides that if the application of any of the provisions of the NTA would result in a 'paragraph 51(xxxi) acquisition of property' otherwise than on just terms, a person is entitled to such compensation as is necessary to ensure that 'just terms' are provided.³⁹

Interest to accrue from the date the native title was extinguished

Sackville J found that it may well be appropriate that native title holders should receive interest if compensation is assessed at the date of the statutory extinguishment of their legal rights and interests.⁴⁰ Interest over two or three decades could be, depending on the circumstances, considerable.

SITES OF SIGNIFICANCE MAY EFFECT THE QUANTUM OF THE COMPENSATION

An insight into the issue of quantum in future compensation matters may be gleaned from the obiter comments of Sackville J in *Jango* in relation to an Aboriginal women's site at Katartitja. His Honour stated that the claim that Katartitja has long been recognised by Aboriginal women as a site of significance 'bears on the quantum of compensation payable'.⁴¹

Sackville J's comments in *Jango* may indicate that where native title has been extinguished over land containing a significant site or sites, a greater amount of compensation may be payable than under land valuation principles for a freehold estate as capped in s. 51A of the NTA. It should be noted that in *Ward HC* the Court found that native title, as defined in s. 223(1), does not necessarily refer to 'a single set of rights relating to land that is analogous to a fee simple'.⁴² In discussing the worth of native title rights and interests it is important to remember the findings of Blackburn J in *Milirrpum v Nabalco*⁴³ where his Honour stated that the connection that Aboriginal peoples have with 'country' is essentially a spiritual one:

the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.

Brennan J stated in *R v Toohey; Ex parte Meneling Station Pty Ltd*⁴⁴ that, 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights'. When considering the value of land in the context of Aboriginal ownership, the purpose of the NTA must also be considered. In *Commonwealth v Yarmirr* McHugh J stated:

The [NTA] should therefore be read as having a legislative purpose of wiping away

³⁹ *Jango*, [777].

⁴⁰ *Jango*, [772].

⁴¹ *Jango*, [517].

⁴² *Ward HC*, [85] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴³ (1971) 17 FLR 141, [10] (Blackburn J).

⁴⁴ (1982) 158 CLR 327, p. 358.

or at all events ameliorating the ‘national legacy of unutterable shame’ that in the eyes of many has haunted the nation for decades. Where the Act is capable of construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.⁴⁵

Based on these considerations it is arguable that the value attributable to former native title rights and interests may well exceed the equivalent of a ‘just terms’ valuation under the freehold test in s. 51A. There is tension between the comments by Sackville J about *Katartitja* and s. 51A of the NTA. Section 51A provides that the total compensation payable under Part 2 Division 5 for a compensation act must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters in question. The freehold limit in s. 51A of the NTA is subject to s. 53.

Section 53 provides that where the doing of any future act would result in a para 51(xxxi) of the Australian Constitution, acquisition of property other than on para 51(xxxi) ‘just terms’, then an additional compensation payment may be necessary to ensure that the acquisition is made on ‘just terms’. Compensation payable in compulsory acquisition on ‘just terms’ principles is calculated based on the price that a willing purchaser would, at the date in question, have had to pay a vendor, not unwilling, but not anxious to sell.⁴⁶

An insight into awards of compensation to native title holders may be gleaned from future act determinations made by the National Native Title Tribunal (NNTT). The NNTT has held that it is not necessarily correct that any compensation would be ‘capped’ at the freehold value under s. 53. Section 53 ‘just terms’ principles may assist to set the maximum amount of compensation payable for a future act under s 51A(1) by reference to ‘just terms’ which may exceed the freehold value.⁴⁷

The NNTT has found that market value is an ‘uncertain guide to the true value of a loss of native title rights and interests in the land...[a]t best, the land value is a starting point, for want of a better yardstick’⁴⁸ In *Western Australia v Thomas*⁴⁹ the NNTT considered the application of the ‘similar compensable interest test’ in s. 240, under the old NTA and stated that it may lead to inequality as:

the rights and interests of native title holders are artificially converted to freehold rights and that the peculiar features of native title are to be ignored. To do so may impose a regime of formal legal equality which gives rise to actual inequality.⁵⁰

On the basis of Sackville J’s comments in *Jango* it may be the case that, when provided with evidence of the former native title holder’s spiritual or sacred connection with land, the Court may prefer to look to the subjective value of the land in the eyes of the former native title holders than it would to the objective value of the land under land valuation principles. What is clear from *Jango* is that the persons who are entitled to compensation are those that held native title at the date the compensation act was undertaken. In future proceedings, the

⁴⁵ (2001) 208 CLR 1, [124].

⁴⁶ *Spencer v Commonwealth* (1907) 5 CLR 418.

⁴⁷ *State of Western Australia v Leo Winston Thomas on behalf of the Waljan People* (1999) 164 FLR 12 (Honourable CJ Sumner).

⁴⁸ *Danggalaba Clan* [1998] NNTTA 11.

⁴⁹ (1996) 133 FLR 124 (*Thomas*), [192].

⁵⁰ *Thomas*, [192].

former holders of native title will have to provide evidence about their connection to land at that date. This evidentiary onus may become a burden for claimants when compensation acts occurred many years before and potential Aboriginal witnesses may not still be alive to give evidence needed.

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