Valuing native title compensation after *De Rose* and *Griffiths (No.3)*

Introduction

1. *Griffiths v Northern Territory (No.3)* [2016] FCA 900; (2016) 337 ALR 362 ***(Griffiths (No.3))*** was a watershed case in native title. Justice Mansfield's decision was the first litigated determination of compensation under the *Native Title Act 1993* (Cth) **(NTA)**, and therefore the first statement of judicial authority as to how native title rights and interests are likely to be valued. The case has been appealed to the Full Federal Court and it is likely that it, or another case relating to native title compensation, will be heard by the High Court before too long.

2. This paper will first set out details of the very complex scheme for compensating native title holders for the effect of valid or validated acts on their native title rights and interests and in that context will examine Mansfield J's decision in *Griffiths (No.3)*. Secondly it will analyse the approach which Mansfield J took to the assessment of compensation in *Griffiths (No.3)* and will look at possible alternative approaches to valuing native title.

3. I did intend to make some passing references to his Honour's earlier decision on native title compensation in *De Rose v South Australia* [2013] FCA 988 which can be seen as somewhat of a pre-cursor to the decision in *Griffiths (No.3)*. Time, however, has prevented me from dealing with that topic here.

The legislative scheme of compensation for the validation of past and future acts

"Past acts": Part 2 Division 2

4. Division 2 of Part 2 of the NTA validates or allows the States and Territories to validate certain acts (known as *"past acts"*) that took place before 1 January 1994 and that otherwise would be invalid because of native title: NTA, ss.13A(1), (2), 228. Division 2 also sets out the effect of such validation on native title: s.13A(3). The past act regime is based on the assumption, which the authorities have established is correct, that some past acts were invalid when done because they were inconsistent with native title rights and interests and thus would have extinguished native title in a discriminatory fashion in contravention of s.10(1) of the *Racial Discrimination Act 1975 (Cth)* **(the RDA)**.

5. Division 2 provides that if a "*past act*" is an act *"attributable to the Commonwealth"*, the act is valid and is taken always to have been valid: s.14(1). Division 2 also provides that certain past acts attributable to the Commonwealth extinguish native title: s.15(1)(a), (b), (c). Generally speaking, *"past acts"* include (see ss.13A(2), 228(2)):

   (a) acts that took place before 1 January 1994, when native title existed in relation to particular land or waters; and

   (b) apart from the NTA, the acts were invalid to some extent, but would have been valid to that extent if the native title did not exist.

   An example of a "*past act*" is a lease by a State or Territory of land in respect of which native title existed, where the lease was invalid because it extinguished native title rights and interests in contravention of s.10(1) of the RDA.

6. Section 17(1) of the NTA provides, *inter alia*, that if the past act attributable to the Commonwealth is a *"category A past act"* (such as the grant of certain freehold estates or pastoral leases and the construction of a public work), native title holders are entitled to compensation for the act. In the case of other past acts, s.17(2) of the NTA provides for compensation if certain conditions are satisfied. The compensation is payable by the Commonwealth: s.17(4).

7. Section 19(1) of the NTA permits a law of a State or Territory, if it contains provisions corresponding to ss.15 and 16 of the NTA, to provide that *"past acts"* attributable to the State or Territory are valid and are taken always to have been valid. In effect, s.19 of the NTA carves out an exception to the blanket protection accorded to native title by s.11(1) of the NTA (which provides that native title cannot be extinguished contrary to the NTA): *Native Title Act Case*,[1] at 456, 469.

8. Section 20(1) of the NTA provides that if a law of a State or Territory validates a past act attributable to that State or Territory:

   > *"the native title holders are entitled to compensation if they would be so entitled under subsection 17(1) or (2) on the assumption that section 17 applied to acts attributable to the State or Territory."*

[1] *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

The native title holders may recover the compensation from the State or Territory concerned: s.20(3).

9. Section 20(4) of the NTA provides that a State or Territory may create additional rights to compensation for a past act or the validation of a past act.

10. All States and Territories have enacted legislation of the kind permitted by s.19(1) of the NTA. New South Wales, for example, has enacted the *Native Title (New South Wales) Act 1994* which is authorised by s.19 of the *NTA*, but is an exercise of the legislative power of the State. Section 8 of the New South Wales Act provides that every past act attributable to the State is valid, and is taken always to have been valid.

"Intermediate period acts": Part 2, Division 2A

11. Division 2A of Part 2 of the NTA validates or allows the States and Territories to validate "*intermediate period acts*" that took place on or after 1 January 1994 but on or before 23 December 1996[2] and that would otherwise be invalid to any extent because they fail to pass any of the future act tests in Division 3 of Part 2 or for any other reason because of native title: NTA ss.21(1), (2), 232A. The structure of this Division is very similar to that of Division 2 (which deals with validation of past acts): NTA s.21(5). It deals in the same way with the extinguishment of native title through the validation of *"intermediate period acts"* and for consequential compensation to be paid to the (former) native title holders.

"Previous possession acts": Part 2, Division 2B

12. Division 2B of Part 2 of the NTA was inserted by the *Native Title Amendment Act, 1998* (Cth) and came into force on 30 September 1998. Division 2B is intended to confirm past extinguishment of native title by certain acts which were valid and which were not struck at by the RDA: *Western Australia v Ward* (2002) 213 CLR 1 **(*Ward* HC)** at [8]. Such acts include those which predated the RDA, and those which post-dated the RDA but which have been validated by the NTA (including by the operation of Div 2 or 2A of Part 2 and its State and Territory counterparts). Division 2B confirms that certain acts attributable to the Commonwealth that were done before 23 December 1996 completely or partially extinguished native title: s.23A(1). The acts having that effect may be:

[2] The latter date was the date of the High Court's decision in *Wik Peoples v Queensland* (1996) 187 CLR 1.

(a) *"previous exclusive possession acts"* (involving, for example, the grant of freehold estates or leases conferring exclusive possession or the construction of public works); or

(b) *"previous non-exclusive possession acts"* (involving, for example, grants of non-exclusive pastoral leases): s.23A(2), (3).

13. Division 2B allows the States and Territories to legislate, in respect of *"previous exclusive possession acts"* and *"previous non-exclusive possession acts"* attributable to them, for the extinguishment of native title in the same way as is done under Div 2B for acts attributable to the Commonwealth: s.23A(4). Again, the States and Territories have enacted such legislation. *Jango v Northern Territory* (2006) 152 FCR 150 **(*Jango*)** decided at [763]-[766] that where a category A past act is also a previous exclusive possession act, the extinguishing effects of the act occurred under 23C in Div 2B and not under s.15 of Div 2 as had previously been the case. The entitlement to compensation arises under s.23J and not s.17. In those circumstances, the extinguishment is taken to have occurred when the act was done and not when the act may have been validated: at [770]-[774], [785]. See s.23C(1)(b) & (2)(b): *"extinguishment is taken to have happened when the act occurred"* and see too ss14(1) & 19(1) "[the past act] *is valid and is taken **always** to have been valid"*.

14. Section 23J of the NTA (within Div 2B) provides as follows:

> ***"Entitlement***
>
> *(1) The native title holders are entitled to compensation in accordance with Division 5 for any extinguishment under this Division of their native title rights and interests by an act, **but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under this Act.***
>
> ***Commonwealth acts***
>
> *(2) If the act is attributable to the Commonwealth, the compensation is payable by the Commonwealth.*
>
> ***State and Territory acts***
>
> *(3) If the act is attributable to a State or Territory, the compensation is payable by the State or Territory."*
>
> (emphasis added)

15. In *Wilson v Anderson* (2002) 213 CLR 401, Gaudron, Gummow and Hayne JJ observed (at [51]) that s.23J(1) of the NTA:

> *"has the effect of conferring upon native title holders an entitlement to compensation* ***only where the statutory extinguishment exceeds the extinguishment that would have occurred at common law.*** *The evident purpose of s.23J is to limit, so far as possible, the entitlement to compensation under s.23J, to cases where the 'Act' is invalid by reason of the* Racial Discrimination Act *1975 (Cth) ... and is subsequently validated by s.14 of the NTA or s.8 of the State Act* [equivalent to s.4 of the *Validation Act*]. *However, s.23J also may be attracted in respect of a valid 'Act' which, although satisfying the definition of 'previous exclusive possession Act', would not completely extinguish native title at common law. That a different result may be reached under Div 2B of Pt 2 of the NTA or Pt 4 of the State Act* [equivalent to Parts 3B and 3C of the *Validation Act*] *emphasises the point that it is the statutory criteria provided for by those provisions which are to be applied when determining issues of extinguishment."*
>
> (emphasis added)

"Future acts": Part 2, Division 3

16. Division 3 of Part 2 of the NTA deals mainly with "*future acts*" which are defined in s.233. Acts which do not affect native title are not *future acts* and therefore this Division does not deal with them: s.24AA(1) (and see s.227 for the meaning of acts that "*affect*" native title). Basically this Division provides that, to the extent that a future act affects native title, it will be valid if covered by the provisions of this Division and invalid if not: ss.24AA(2), 24OA.

17. Division 3 provides that, in general, valid future acts will be subject to the non-extinguishment principle: s.24AA(6) (the "*non-extinguishment principle*" is defined in s.238).

18. The Division does, however, make some provision for the extinguishment of native title, eg s.24MD provides that the compulsory acquisition of native title extinguishes the whole or the part of the native title rights and interests acquired: s.24MD(2)(c). In those circumstances, the (former) native title holders are entitled to compensation for the act: see eg ss.24AA(6), 24MD(3), 24NA(6).

RDA Compensation: Part 2, Division 4

19. Section 10(1) of the RDA may operate to confer a right to compensation upon native title holders where a State or Territory law has failed to make the right universal by denying it to the native title holders. For example in *Ward (HC)*, the High Court held

(at [253]) that s.10(1) of the RDA conferred a right to compensation on native title holders for the loss of their rights by the creation of a reserve pursuant to a State statute. The RDA conferred a right to compensation because under State law the only interests that were destroyed without compensation by the creation of the reserve were those of the native title holders. In such circumstances, the creation of the reserve was valid and could not be a 'past act' validated by legislation corresponding to Div 2 of Part 2 of the NTA. The effect of s.10(1) of the RDA, however, was that the native title holders were entitled to compensation.

20. Section 45 of the NTA is concerned with a right to compensation which arises in such circumstances. It provides as follows:

> *"(1) If the* Racial Discrimination Act 1975 *has the effect that compensation is payable to native title holders in respect of an act that validly affects native title to any extent, the compensation, in so far as it relates to the effect on native title, is to be determined in accordance with section 50 as if the entitlement arose under this Act.*
>
> ***Recovery of compensation***
>
> *(2) If the act took place before 1 January 1994 and is attributable to the Commonwealth, a State or a Territory, the native title holders may recover the compensation from the Commonwealth, the State or the Territory, as the case requires."*

Determination of compensation: Part 2, Division 5

21. Division 5 of Part 2 of the NTA (ss.48-54) deals with compensation for acts affecting native title. Section 48 provides that compensation payable under Div 2, 2A, 2B, 3 or 4 in relation to an *"Act"* is only payable in accordance with Div 5. Section 50(1) reiterates that a determination of compensation may only be made in accordance with Div 5. Section 49 provides that compensation under the NTA is only payable once for acts that are essentially the same.

22. An application for compensation may be made to the Federal Court under Part 3 (which includes s.61) for a determination of compensation: s/50(2); see, too, ss.81 and 213(2) of the NTA, each of which confers jurisdiction on the Federal Court to hear and determine matters relating to native title.

23. Section 51 of the NTA specifies the criteria for determining compensation. Section 51 relevantly provides as follows:

*"**Just compensation***

(1) Subject to subsection (3), the entitlement to compensation under Divisions 2, 2A, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

Acquisition under compulsory acquisition law

(2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place.

Compensation where similar compensable interest test satisfied

(3) If:

(a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and

(b) the similar compensable interest test is satisfied in relation to the act;

*the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in s.240 (which defines **similar compensable interest test**).'*

Compensation not covered by subsection (2) or (3)

(4) If:

(a) neither subsection (2) nor (3) applies; and

(b) there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth, or for the State or Territory to which the act is attributable);

the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8) in doing so have regard to any principles or criteria set out in that law for determining compensation.

Monetary compensation

(5) Subject to subsection (6), the compensation may only consist of the payment of money.

Requests for non-monetary compensation

(6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:

(a) must consider the request; and

(b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a special period, transfer property or provide goods or services in accordance with the recommendation.

..."

24. Section 240 provides that the *"similar compensable interest test"* is satisfied in relation to a past act, an intermediate period act or a future act if:

> *"(a) the native title concerned relates to an onshore place; and*
>
> *(b) the compensation would, apart from this Act, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned."*

25. Section 226(2) provides that an *"act"* includes the following:

> *"(a) the making, amendment or repeal of any legislation;*
>
> *(b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;*
>
> *(c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;*
>
> *(d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;*
>
> *(e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;*
>
> *(f) an act having any effect at common law or in equity."*

An *"act"* may be done by the Crown in any of its capacities, or by any other person: s.226(3).

26. Section 51A purports to limit the compensation payable for an act that extinguishes all native title in relation to particular land or waters to an amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters: s.51A(1). The effect of that limitation is, however, greatly water down by s.51A(2) which provides that s.51A has effect *"subject to section 53 (which deals with the requirement to provide* 'just terms' *compensation)"*.

27. Section 53 of the NTA, deals with *"just terms compensation"* as follows:

> **"Entitlement to *just terms* compensation**
>
> *(1) Where, apart from this section:*
>
> *(a) the doing of any future act; or*
>
> *(b) the application of any of the provisions of this Act in any particular case;*
>
> *would result in a paragraph 51(xxxi) acquisition of property of a person*

other than on paragraph 51(xxxi) just terms, the person is entitled to such compensation, or compensation in addition to any otherwise provided by this Act, from:

(c) if the compensation is in respect of a future act attributable to a State or Territory – the State or Territory; or

(d) in any other case – the Commonwealth;

as is necessary to ensure that the acquisition is made on paragraph 51(xxxi) just terms.

Federal Court's jurisdiction

(2) The Federal Court has jurisdiction with respect to matters arising under subsection (1) and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court."

The expression *"paragraph 51(xxxi) acquisition of property"* is defined by s.253 to mean *"an acquisition of property within the meaning of paragraph 51(xxxi) of the Constitution"*. Similarly, s.253 defines *"paragraph 51(xxxi) just terms"* to mean *"just terms within the meaning of paragraph 51(xxxi) of the Constitution"*.

Determinations of the Court: Part 4, Division 3

28. Section 94 of the NTA, provides as follows:

"If the Federal Court makes an order that compensation is payable, the order must set out:

(a) the name of the person or persons entitled to the compensation or the method for determining the person or persons; and

(b) the method (if any) for determining the amount or kind of compensation to be given to each person; and

(c) the method for determining any dispute regarding the entitlement of a person to an amount of the compensation."

29. In *Jango*, the Commonwealth and the Territory argued that if an award of compensation is ultimately made, s.94 requires the Court to identify each individual who is a member of the group entitled to compensation, or at least a means of identifying those individuals. In response, the applicants came up with increasingly expansive lists of named individuals. Ultimately, in view of the findings which the Court made, the Court did not need to rule on this argument. Nonetheless, you should be aware of it and you should compare the very different wording of ss.94 and 225(a).

30. Note also that s94A states that an order in which the Federal Court makes a determination of native title must set out the details of the matters mentioned in s.225.

Section 13(2) states that if the Federal Court is making a determination of compensation in accordance with Division 5 the Court must also make a current determination of native title in relation to the whole or part of the area, that is to say, a determination of native title as at the time at which the determination of compensation is being made.

***Griffiths v Northern Territory (No.3)* (2016) 337 ALR 362**

Background

31. The Ngaliwurry and Nungali People **(Griffiths Applicants)** filed applications for a native title determination in 1999 and 2000.[3] At first instance, Weinberg J determined that the Griffiths Applicants held non-exclusive native title rights and interests. His Honour ruled that, with a few exceptions, any prior extinguishment as a result of the grant of pastoral leases must be disregarded under s.47B of the NTA.[4]

32. The Griffiths Applicants successfully appealed Weinberg J's decision. The Full Court determined that the Griffiths Applicants held native title rights to exclusive possession, use and occupation in relation to those parts of the claim area to which s.47B applied.[5]

33. The Griffiths Applicants commenced a claim for compensation under s.61 of the NTA relating to those parts of the claim area in which they were not found to hold exclusive native title rights. In *Griffiths v Northern Territory of Australia* [2014] FCA 256, Mansfield J ruled that the Northern Territory was liable for compensation but reserved a decision on the issue of quantum. That issue was the subject of Mansfield J's subsequent decision in *Griffiths (No.3)*.

Issues in Griffiths (No.3)

34. It was common ground that most of the Griffiths Applicants' entitlement to compensation arose under s.23J of the NTA for the extinguishment of their native title rights and interests by various previous exclusive possession acts attributable to the Northern Territory and validated by operation of the NTA.[6] It was also common

[3] *Griffiths v Northern Territory of Australia* [2006] FCA 903]; (2006) 165 FCR 300 (***Griffiths***) at [8]-[10].
[4] *Griffiths* at [705].
[5] *Griffiths v Northern Territory of Australia* [2006] FCAFC 178; (2007) 165 FCR 391 (***Griffiths* FC**).
[6] *Griffiths (No.3)* at [73]-[81]. Compensation under the general law was also claimed in respect of three invalid *"future acts"* consisting of freehold grants, each of which were invalid under s.24OA of the NTA.

ground that the rights and interests which were extinguished by those previous exclusive possession acts were non-exclusive rights and interests by virtue of the fact that earlier pastoral leases had already extinguished the Griffiths Applicants' exclusive native title rights.[7]

35. In determining the quantum of compensation, Mansfield J considered the Griffiths Applicants' economic loss and non-economic loss ("solatium"), the relevant date on, or from, which to determine compensation and the applicable rate of interest.

Economic loss

36. The starting point of Mansfield J's analysis of the Griffiths Applicants' economic loss was that exclusive native title is equivalent in value to freehold title.[8] It was reasoned that a discount must be applied to the Griffiths Applicants' rights and interests on the basis that there is a difference in value between exclusive and non-exclusive native title rights.[9] Justice Mansfield ultimately held that the Griffiths Applicants' non-exclusive rights and interests were worth 80% of the freehold value. His Honour noted that this was not *"a matter of careful calculation"* and that, rather, it is:

> *"It is an* intuitive *decision, focusing on the nature of the rights held by the claim group which had been either extinguished or impaired by reason of the determination acts in the particular circumstances. It reflects a focus on the entitlement to just compensation for the impairment of those particular native title rights and interests which existed immediately prior to the determination acts."* [10]

37. Justice Mansfield calculated the interest on the economic loss using the simple interest method. His Honour noted that the NTA does not prescribe a particular method and held that the appropriate method will depend on the evidence in a particular case.[11] In the case before him, Mansfield J considered it probable that the funds would have been distributed to individuals rather than invested commercially, and this justified the payment of simple, rather than compound, interest by the Northern Territory.[12]

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[7] *Griffiths (No.3)* at [71].
[8] *Griffiths (No.3)* at [213].
[9] *Griffiths (No.3)* at [227].
[10] *Griffiths (No.3)* at [233].
[11] *Griffiths (No.3)* at [252].
[12] *Griffiths (No.3)* at [277]-[279].

38. Before the Full Court, the Commonwealth's contention is that the economic value should be assessed at 50% of the freehold value. The Northern Territory's contention is that the economic value should be assessed as the aggregate of a *"usage value"* of the parcels of land (derived from the market value of undeveloped range land) and a *"negotiation value"* equal to the excess of 50% of the freehold value over the *"usage value"*. In its Cross-Appeal, the native title holders' contention is that the economic value should be assessed at 100% of the freehold value.

Non-economic loss

39. Compensation for non-economic loss was the largest component of the damages awarded to the Griffiths Applicants.[13] As noted by Mansfield J, the issue confronting the Court was *"how to quantify the essentially spiritual relationship which Aboriginal people, and particularly the* Ngarliwurru-Nungali *People, have with country and to translate the spiritual or religious hurt into compensation"*.[14]

40. His Honour held that solatium is to be calculated with reference to the collective and communal nature of native title, and the extent to which rights and interests are non-exclusive.[15] It was particularly emphasised that not all claim groups will have identical relationship to country, and so the Court must undertake an evaluation of the relevant compensable intangible disadvantages, which in turn requires an appreciation of the effects of that loss on the specific native title holders.[16] As in his consideration of economic loss, Mansfield J suggested the process of calculating solatium is an *intuitive* one.[17]

41. Justice Mansfield identified three particular considerations that were significant to his assessment of solatium. First, the construction of a water tank on a site of spiritual significance, which caused readily identifiable distress. Second, the impact of certain acts on the capacity of the native title holders to conduct ceremonial and spiritual activities on that area and adjacent areas. Third, the reduction of the geographical area over which native title is held, which has affected the spiritual connection of the claim

[13] *Griffiths (No.3)* at [466].
[14] *Griffiths (No.3)* at [291].
[15] *Griffiths (No.3)* at [301].
[16] *Griffiths (No.3)* at [318].
[17] *Griffiths (No.3)* at [302].

group to their country.[18]

42. At [382]-[384], his Honour concluded:

> *"Those three elements have now been experienced by the Claim Group for some three decades. The evidence given by the members of the Claim Group shows that the effect of the acts has not dissipated over time. I have referred to that evidence above. The compensation, therefore, should be assessed on the basis of the past three decades or so of the loss of cultural and spiritual relationship with the lots affected by the compensable acts in the manner I have identified, and for an extensive time into the future.*
>
> ...
>
> *As that compensation is made as at the date of this judgment, there is no question of interest to be calculated in relation to it."*

43. By taking into account the intangible disadvantages principle in the LAA, Mansfield J assessed compensation for non-economic loss in an amount of $1,300,000 approximately twice the aggregate freehold value of the land. Before the Full Court, the Commonwealth has maintained that the non-economic value should be assessed at $5,000 per parcel of land whilst the Territory's position is that the non-economic value should be assessed at 10% of the economic loss based on the *"usage value"* and *"negotiation value"* described above.

Criticism of *Griffiths (No.3)*

44. Under s.51(1) of the NTA, native title holders are entitled to compensation on just terms to compensate them for any loss, diminution, impairment or other effect of the relevant act on their native title rights and interests. As such, it is clearly arguable that compensation should not be determined by reference to the value of the land as such. That is, the entitlement to compensation should focus on the effect which the relevant act has had upon the native title holders' community in the same way that general damages are awarded in common law tort cases.

45. Nonetheless, if as the parties in *Griffith (No.3)* agreed, compensation should be separately calculated for economic and for non-economic loss, it is at arguable that there is another method of valuing the economic loss that is preferable to the *"intuitive"* approach employed by Mansfield J in *Griffiths (No.3)*. An approach that may provide more certainty is one that calculates the difference between:

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[18] *Griffiths (No.3)* at [378]-[381].

(a) the market value of the relevant land to the Crown at the date of the compensable acts on the assumption that those native title rights and interests had been surrendered; and

(b) the market value of the relevant land to the Crown at the date of the compensable acts on the assumption that the relevant land remained subject to those native title rights and interests.

46. This method more accurately reflects the hypothetical *"sale"* upon which the market value principle is based, as it considers the only way in which native title can be converted into money. It is likely that this method would result in at least a similar or a higher determination of economic value than the *"80% of freehold value"* standard adopted by Mansfield J. This is because although the native title rights were non-exclusive, the effect of the *Racial Discrimination Act 1975* **(RDA)** would have been to prevent the Crown from validly granting rights of exclusive possession over the relevant land. Although the RDA may not have prevented the Territory from granting other kinds of interests such as grazing licences and hence the land would have had some value to the Crown, that value is likely to be very small compared to the market value of the land to the Crown if it was not subject to native title and the Crown was able to grant freehold or other rights of exclusive possession.

47. Justice Mansfield's calculation of non-economic loss as accruing continuously since the commission of the compensable acts may also be criticised. As noted above, s.51(1) entitles the native title holders to be compensated *"for any loss, diminution, impairment or other effect of the act on their native title rights and interests"*.[19] It is arguable that the *"loss"* of native title rights in *Griffiths (No.3)* occurred only at the time the compensable acts were committed and cannot be ongoing given those acts completely extinguished the relevant native title rights.

48. It follows that the non-economic value of the native title rights and interests should have been assessed at the date on which they were extinguished by the compensable acts. It is worth noting that, if such an approach were to have been followed, the Griffiths Applicants would have been entitled to interest on the non-economic value for approximately 30 years. In all likelihood, this would have amounted to a greater sum of compensation being awarded to the Griffiths Applicants.

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[19] NTA s 51(1).

Compensation for invalid future acts

49. As noted above, the *"effect of the act(s)"* on the native title in *Griffiths (No.3)* was, for the most part, its *"extinguishment"* by *"past acts"* that were validated and for which the native title holders were entitled to compensation under the NTA. Accordingly, most of the judgment in *Griffiths (No.3)* is concerned with the determination of the amount of compensation for this extinguishment under the statutory regime in the NTA.

50. However, the Griffiths Applicant also claimed compensation under the general law in respect of three *"future acts"* consisting of grants in 1998 of freehold interests over vacant land on which dwelling houses were subsequently built. It was agreed by the parties that each of these grants were invalid future acts under s.24OA of the NTA (see *Griffiths (No.3)*).

51. The claim was put on the following alternative bases:

    (a) damages for wrongful occupation and use of land in the nature of trespass;

    (b) damages in lieu of an injunction that could have been sought to prohibit action in reliance on the invalid grants in aid of the statutory right to negotiate in sub-division P of Part 2 Division 3 of the NTA (see *Griffiths (No.3)*).

52. The amount of the damages sought was:

    (a) mesne profits evidenced by market rental for the use of the land or the value of the land;

    (b) compensation for non-economic loss (see *Griffiths (No.3)*).

53. Whilst the Territory and the Commonwealth accepted that the freehold grants were invalid future acts under s.24OA, they contested the claim for damages both in terms of liability and quantum. The Territory also contended that the Court did not have jurisdiction to determine the issue as, *inter alia*, there were no provisions of the NTA that expressly provided for compensation in respect of invalid future acts.

54. Most of the judgment on this point concerns the issue of jurisdiction (see *Griffiths (No.3)* at [452]-[460]). There is no explanation or analysis of the correct legal basis

for liability or the proper measure of damages. However, in the result, the Court awarded compensation for the invalid future acts in an amount of 80% of the freehold value of the relevant parcels. This was the same basis on which the Court determined compensation under the regime in the NTA for economic loss for the extinguishment of native title by the past acts.

55. Both the Territory and the Commonwealth have appealed this aspect of the judgment (including by the Territory on the basis of a failure to provide reasons). In my opinion, the arguments raised in the Commonwealth's and Territory's submissions have merit and may be accepted by the Full Court. For example, in relation to liability, as the Territory submitted, an action in trespass usually only lies where the claimant is in possession of the land in question. However, an action in nuisance is potentially available for unreasonable interference with other interests in land (such as easements or profits a *prendre*).

56. Further, in relation to quantum, Mansfield J appears to have assessed damages on the basis that the native title rights had been permanently extinguished which is contrary to the fundamental premises of the NTA reflected in s.24OA that these invalid future acts (ie the grants) were of no force and effect in relation to the native title rights (which remained legally extant). As the Territory pointed out if the Territory now ought to compulsorily acquire those extant native title right it would be required to pay compensation for their extinguishment in a similar amount to that awarded as compensation for the invalid future acts.

57. I expect that the judgment of the Full Court will provide some answers to these difficult issues.

Vance Hughston SC

2 June 2017