The *Timber Creek* Decision

> *Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title.*[1]

> *The earlier acts, which were not compensable, punched holes in what could be likened to a single large painting – a single and coherent pattern of belief in relation to a far wider area of land. The subsequent compensable acts punched further holes in separate parts of the one painting, and the damage done was not to be measured by reference to the holes created by the compensable acts alone, but by reference to the effect of those holes in the context of the wider area.*[2]

In 2019, the High Court of Australia handed down the landmark *Timber Creek* decision. The Court awarded a total of $2.5m in compensation for both economic and cultural loss, including interest. In 'the most significant [case]… since Mabo', the High Court ruled for the first time on compensation for the extinguishment of Native Title.

Background – The Mabo decision

Aboriginal and Torres Strait Islander peoples have occupied the Australian continent for at least 60,000 years. Organised in distinct political communities, First Nations peoples were bound together by a system of customary law that governed their relationships to each other and to Country. When the British arrived and colonised the continent, they ignored the pre-existing systems of law that had directed these societies for tens of thousands of years. In what became known as *terra nullius* (land belonging to no one), the British simply ignored the rights and interests of First Nations peoples.

In *Mabo v Queensland (No 2)*, the High Court was asked whether Australian law could recognise the land rights of the people of Mer (Murray Island) in the Torres Strait. The High Court said: yes. The Court rejected the idea that *terra nullius* 'was an appropriate legal foundation for Australia and renounced it as a legal fiction'.[3] It was out of step with both historical fact and basic principles of international law and justice.

The court said that the acquisition of sovereignty by the British did not displace First Nations peoples' land rights. Australian law could recognise native title. However, the Court also placed strict limits on native title. It held that Australian law can validly extinguish First Nations peoples land rights. Doing so did not even give rise to compensation at common law. In other words, unlike other property rights, Aboriginal and Torres Strait Islander peoples 'would not be compensated for the loss of their land'.[4] The decision in *Mabo* – its promises and its limits – formed the basis of the *Native Title Act 1993* (Cth).

Compensation

The decision in *Mabo* meant that First Nations peoples could not obtain compensation for the destruction of their native title rights if that destruction occurred prior to 1975. The importance of that date is that is when the *Racial Discrimination Act* was passed. Failure to pay compensation is racially discriminatory, as other land holders are able to obtain compensation.

The *Native Title Act* confirmed that compensation is available for the violation of native title rights. However, it was not until the *Timber Creek* decision in 2019, that the High Court had considered how

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[1] *Native Title Act 1993* (Cth), preamble.
[2] *Northern Territory v Griffiths* (2019) 69 CLR 1, [205].
[3] George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 209.
[4] George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 210.

compensation should be determined. It also marked the end of an 8-year long legal fight for compensation by the Ngaliwurru and Nungali peoples – but an even longer fight for recognition of the 'simple justice' *Mabo* and the *Native Title Act* were supposed to provide.

Despite the process of colonisation, the Ngaliwurru and Nungali peoples have maintained a strong connection to Timber Creek and the Makalamayi area, between Katherine and Kununnura in the Northern Territory. They successfully secured native title in 2006. Although Traditional Owners were not granted exclusive possession, senior lawman Alan Griffiths emphasised that the responsibility to Country remained, telling the court 'I got all those sites, all that Dreaming, I have to make sure people don't make a mess of it'.

Native title rights and interests can be 'extinguished' by acts of governments. In this case, the NT Government was responsible for 53 acts which had this effect, such as building roads and infrastructure over the area, including over sacred sites and Dreamings. Extinguishment has been described as reinstating Terra Nullius and almost 30 years on from Mabo has led to 'devastation'. Compensation claims are one way in which traditional owner groups 'have been trying to claw back' from the loss of their rights.

The compensation claim in this case was brought by Alan's son Chris Griffiths and Lorraine Jones, both native title holders, representing five clan groups from the Nungali and Ngaliwurru peoples. As Chris Griffiths explains, while Australian law might believe that his peoples native title rights have been 'extinguished', culture has not been removed from the land: 'You can't remove the culture from the country it belonged to… You can share it but they don't own it'.

The decision

This claim for compensation was the first time that the availability and measure of compensation under the *Native Title Act* had been fully considered by the High Court. The Court awarded compensation for both economic and cultural loss.

In a joint judgment, the majority found that:

1. the economic value of native title rights is calculated in comparison with the value of freehold land. In this case, because native title rights did not include exclusive possession, they were calculated at 50% of freehold value or $320,250;

2. Simple interest is payable on compensation, calculated from the time of extinguishment, in this case $910,000; and

3. Cultural loss is to be calculated on a case by case basis, to 'translate' the 'spiritual hurt' and assign an amount that would fit with community expectations. The Court set this at $1.3m.

Following the decision, Chris Griffiths said that it goes some way to recognise and compensate for the 'damage colonisation has done to our Country, law and ceremony… our history and our pain'.

What does this mean for native title and compensation claims?

The Court's decision will affect ongoing native title and broader settlement claims. There are now over 550 native title determinations that may be subject to compensation claims. Separate claims including those brought on behalf of the Yindjibarndi, Gumatj and Tjiwarl peoples, will likely rely on, develop and in some cases extend the decision in *Timber Creek*, with some taking on mining interests.

This potential also extends beyond the framework of Native Title. State and Territory governments are streamlining approaches to compensation now that there is guidance from the High Court, which will inform settlements outside the courts. A national compensation framework is yet to be implemented,

but strategy is being developed. This is being taken further in Treaty negotiations around the country, most notably in Victoria, where the *Timber Creek* decision has been 'embraced' and is guiding compensation discussions, particularly in terms of cultural loss.

Limitations of the decision

It is encouraging to see the greater certainty and clarity around the calculation and award of compensation since *Timber Creek*. Despite this, the decision was made according to the terms of the Native Title Act, 'a white fella legal construct' and so relies largely on western ideas of value and property ownership. This extends existing challenges with the *Native Title Act* – some of which were acknowledged but not addressed in the decision – including the burden on groups to prove continuous cultural connection. This impacts particularly on groups who may not have access to resources or have had cultural connection deliberately and systematically chipped away at by the settler state. As Larrakia lawyer Eddie Cubillo notes there is 'racism inherent in the judgement', as it has been decided within this limiting system which forces claimants to 'undergo a torturous regime' to so often see rights, interests and opportunity denied.

It is promising, however, that shortcomings in the decision may be addressed through direct negotiations and treaties, moving beyond the confines of native title. Genuine community consultation and control is key to ensuring the best outcomes for Traditional Owners in this context, rather than allowing native title barriers to limit compensation available.

Moving forward

The process for determining compensation claims is now clearer and more accessible following *Timber Creek*. Many compensation claims are progressing. For the Nungali and Ngaliwurru peoples, the award of compensation can go a little way to addressing the injustices suffered. As Chris Griffiths said following the decision, it provides some recognition of, and compensation for, the 'loss and hurt caused by damage to country'.

A finding of compensation for cultural loss particularly signals an important acknowledgement of the value of cultural connection to land and place. The native title framework remains limited by settler legal concepts of value, but it is promising that outside of the courts, and outside of the native title framework, changes are afoot. *Timber Creek* has been closely examined by governments, negotiators and traditional owners. Approaches to compensation are being streamlined and new agreements and settlements are emerging.

For Chris Griffiths the decision was 'a small step in the long continuing journey to set things right'. More work is to be done to ensure the best outcomes for traditional owner groups, but Griffiths and the developments following present an opportunity and immense potential for both Native Title and beyond.