

Background Paper

The High Court Decision on Compensation for the
Extinguishment of Native Title Rights
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ANTAR



The High Court decision on Compensation for the Extinguishment of Native Title Rights

(Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7)

Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7 ('Griffiths'), is the first High Court ruling regarding 'just' compensation for the extinguishment of native title rights.

In one of the most significant native title cases since *Mabo*, this was the first time that compensation for both economic and cultural loss had been measured and awarded under *the Native Title Act*. The case signals a huge development in native title law and sets an important legal precedent which may prove to have a profound impact on compensation claims and native title generally.

The claim was brought by the Nungali and Ngaliwurru peoples, whose Country encompasses Timber Creek in the Northern Territory, against the Northern Territory Government. Compensation was sought for the effect of acts by the government which 'extinguished' the group's native title rights, including the building of infrastructure and roads. The High Court awarded a total sum of \$2,530,350 in compensation.

The implications for groups who have seen their native rights 'extinguished' may be significant, and the case established a framework for assessing compensation that will be used and improved through further cases. The importance of the decision may also have implications for treaties, agreements

and settlements more generally, enabling negotiation of future claims “without the expense and delay of litigation”.¹



Fig 1. Alan Griffiths, 'Timber Creek', considered in evidence of connection to Country, and locations of sacred sites and Dreamings within the Timber Creek area.²

¹ [Northern Land Council, 'NLC Welcomes High Court Judgement of Native Title Compensation at Timber Creek'](#)

² [Published in Chris Griffiths, Dora Griffiths and Alana Hunt, 'Northern Territory of Australia v. Griffiths: The Landmark Native Title Compensation Case in the Tiny Town of Timber Creek' \(2019\) 18\(2\) Arts Backbone 4, 4 \('Backbone'\)](#)

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The context of Griffiths v Northern Territory



Fig. 1. A map showing the location of Timber Creek in the Northern Territory.³

Nungali and Ngaliwurru people's native rights over the Timber Creek area:

The claim in *Griffiths* surrounded the locality of Makalamayi,⁴ encompassing what is known today to the Crown as the township of 'Timber Creek'. Located 601km south of Darwin in the Northern Territory ('NT'), between Katherine and Kununurra, the area spans and is crossed by multiple sacred sites and travelling Dreamings.⁵

In a fight won in 2006 by the late senior lawman Alan Griffiths, "one of the great Kimberley First Nations leaders",⁶ the courts found that the Ngaliwurru and Nungali peoples held non-exclusive native title rights existed over the area.⁷ These included rights to travel over and to share and exchange subsistence and traditional resources obtained from the land.⁸

³ [Ashurst, 'Timber Creek Compensation – Native Title worth \\$3.3 million', Ashurst \(Alert, 24 August 2016\)](#)

⁴ [Remote Aboriginal Health Corps, 'Timber Creek – Katherine Region', \(Information Sheet\)](#)

⁵ [Northern Territory v Mr A. Griffiths \(deceased\) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples \[2019\] HCA 7, \[171\] \('Griffiths'\).](#)

⁶ [Senator Patrick Dodson, 'No One Can Ever Take Your Land Away', Indigenous X, \(Blog Post, 8 June 2018\)](#)

⁷ Griffiths (n5), [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), Griffiths v Northern Territory [2014] FCA 256 (Compensation Decision Part 1).

⁸ [See discussion regarding the Joint Statement of Factual Background \[s23\(3\)\] at Northern Territory v Griffiths \[2017\] FCAFC 106, \[33\].](#)

Once native title rights over the area were recognised, this opened the door for a compensation claim for the ‘extinguishment’ of those rights.

The compensation claims in this case:

Alan Griffiths passed away before the case reached the High Court, so the compensation claim was carried forward by Alan’s son Chris Griffiths and Lorraine Jones, both native title holders, representing five clan groups from the Nungali and Ngaliwurru peoples. The native title rights for which they were seeking compensation were considered as partially extinguished by the historic grant of a pastoral lease in 1882. However, compensation is only available for acts that took place after the implementation of the *Racial Discrimination Act 1975*.⁹ On this basis, 53 acts that gave rise to a compensation entitlement were identified. These were acts for which the NT Government was responsible, including public works and the granting of leases.¹⁰ To address the impact of these acts, the group were seeking compensation for ‘tangible’ loss of value, but also most importantly for interference with connection to land and the “intangible disadvantages” flowing from the loss of rights.¹¹

The claim sits against a backdrop of a native title system in which native title rights can be, and are, legally extinguished. Extinguishment in this context is the effect of a grant of land or act by the government that is ‘inconsistent’ with native title rights.¹² This ultimately means that the rights are destroyed and no longer exist under settler law. Acceptance within the law of extinguishment has led to “devastation” that traditional owner groups “have been trying to claw back from”.¹³ Addressing this, the claim sought monetary compensation as a way to partly address this loss. However, it is important to note that, as Chris Griffiths maintains, despite the finding of ‘extinguishment’ under settler law, culture has not been removed from the land:

⁹ Northern Territory v Griffiths [2017] FCAFC 106, [5], Griffiths (n5), [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), Griffiths v Northern Territory [2014] FCA 256 (Compensation Decision Part 1) [43], [46], [67].

¹⁰ Griffiths (n5), [6] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

¹¹ Native Title Act 1993 (Cth), s51(4), Griffiths (n5), [155] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

¹² [See The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors \[1996\] HCA 40](#)

¹³ [Nat Cromb, ‘Land Rights – Sand Castle in a Wind Storm’, IndigenousX, \(Blog Post, 8 May 2020\)](#)

"You can't remove the culture from the Country it belonged to... You can share it, but they don't own it".¹⁴

Brief case history

In *Griffiths*, compensation was considered for both economic and cultural loss. Under the terms of the *Native Title Act* ('NTA'), compensation is to be awarded 'on just terms', for any loss, reduction, damage "or other effect of the act on their native title rights".¹⁵ Until *Griffiths* these terms had never been fully tested or applied.

On the issue of economic loss, the trial judge used the value of full and unrestricted ownership under settler law (freehold) as a starting point.¹⁶ Then, a percentage calculation was used, comparing the non-exclusive native title rights to full freehold value. This method of calculation was endorsed by each court, but led to differing results:

1. Trial judge: awarded 80 percent of freehold value.¹⁷
2. Full Court: lowered the award to 65 percent of freehold value.¹⁸

In assessing cultural loss, the trial judge said the task was to "translate the spiritual hurt from the compensable acts into compensation".¹⁹ The judge used a two-step process:

1. Identify the nature and extent of the relationship with the land and waters; and
2. Consider the impact of the acts on that connection.²⁰

Extensive evidence from both traditional owners and anthropologists was considered and deep cultural knowledge of the area was shared. The trial judge

¹⁴ [Greg Roberts, 'High Court Cuts Native Title Payout', Port Lincoln Times, \(Web Page, 13 March 2019\)](#)

¹⁵ [Native Title Act 1993 \(Cth\), s51\(1\).](#)

¹⁶ [Native Title Act 1993 \(Cth\), s51A.](#)

¹⁷ [Griffiths v Northern Territory \[2014\] FCA 256 \(Compensation Decision Part 1\) \[232\].](#)

¹⁸ [Northern Territory v Griffiths \[2017\] FCAFC 106, \[139\].](#)

¹⁹ [Griffiths v Northern Territory \[2014\] FCA 256 \(Compensation Decision Part 1\) \[232\], Griffiths \(n5\), \[155\] \(Kiefel CJ, Bell, Keane, Nettle and Gordon JJ\).](#)

²⁰ [Griffiths \(n5\), \[159\] \(Kiefel CJ, Bell, Keane, Nettle and Gordon JJ\).](#)

listened to accounts of the deep and lasting pain caused by interference with Country, such as that relating to the “*puru maring*”, or “gut-wrenching”, feeling brought on by some of the acts.²¹ On this basis the judge used a “complex”, but “essentially intuitive” process to arrive at a compensation amount of \$1.3m for cultural and spiritual loss.²² This was upheld by the Full Court.²³

The Legal Issues

On appeal, the High Court sought to answer three questions:

1. How to objectively calculate the economic value of the native title rights and interests which have been extinguished;²⁴
2. Whether interest is available and, if so, how to calculate it
3. How the Claim Group's sense of loss is to be reflected in compensation,²⁵ and whether the compensation previously awarded was too high.²⁶

Findings

In a majority judgement, five of seven judges, (including Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), confirmed that it was appropriate to consider the economic loss and cultural loss separately,²⁷ and found that:

1. the economic value of native title rights is calculated in comparison with the value of freehold land calculated at the date of extinguishment, in this case 50 percent of freehold value or \$320,250;
2. Simple interest is payable on compensation, calculated from the time the act took place, to compensate for loss of use of the money, in this case \$910,000; and

²¹ Ibid [191].

²² Timber Creek (2016) 337 ALR 362, [302], See discussion at Griffiths (n5), [237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

²³ [Northern Territory v Griffiths \[2017\] FCAFC 106](#).

²⁴ Griffiths (n5), [2] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

²⁵ Ibid.

²⁶ Ibid [16]-[17].

²⁷ Ibid [84].

3. Cultural loss is to be reflected in compensation, considering the effect of the acts on factors such as connection to land, in this case \$1.3m.²⁸

The decision was welcomed by Chris Griffiths, as a step towards ‘recognition of the damage colonisation has done to our Country, law and ceremony... [of] our history and our pain’.²⁹

A. Economic Loss

The High Court confirmed that economic loss is to be measured using a comparison to freehold value, as the “most ample estate which can exist in land”.³⁰ The court said that the usual tools for valuing land should be used, but “adapted as necessary” in recognition of the unique character of native title rights.³¹ As in the lower courts, a percentage calculation was used.³² The court considered:

1. The nature and extent of the native title rights; and
2. How these rights compare to those enjoyed under full freehold title.³³

The rights in this case were “ceremonial” and allowed the holders ‘use’ of the property but did not extend to the right to prevent others from using or entering the land.³⁴ The court concluded that the economic value of these rights could not be more than 50 percent of freehold value, amounting to \$320,250.³⁵

B. Interest

The court awarded simple interest on the economic loss, to be calculated from the date of extinguishment to the date of judgement, to compensate for the

²⁸ Ibid [3].

²⁹ Backbone (n2).

³⁰ Griffiths, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, at [67], See *Amodu Tijani* [1921] 2 AC 399 at 403; *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 at 623; [1955] HCA 13; Megarry and Wade, *The Law of Real Property*, 8th ed (2012) at 52; Honoré, “Ownership” in Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107. See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 151-152 [107]; [1998] HCA 58.

³¹ Griffiths (n5), [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), *Spencer v Commonwealth* (1907) 5 CLR 418.

³² Griffiths (n5), [56] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

³³ Ibid.

³⁴ Ibid [69].

³⁵ Ibid [106].

group being “kept out” of the money for almost 40 years.³⁶The court left open the possibility of compound interest in future cases,³⁷ however it was denied in this case on the grounds that there was not enough evidence to show that the group would have invested the compensation at a profit.³⁸The award of simple interest means that the court did not award for ‘interest on interest’ or on investment, denying access to “decades of sustained economic growth”.³⁹Academic Eddie Cubillo, an Aboriginal man who has strong links throughout the Northern Territory,⁴⁰described the decision as “thinly veiled racism”.⁴¹

C. Cultural Loss

The High Court acknowledged the need to think outside of the terms familiar to the common lawyer when considering cultural loss.⁴²It is to be determined on a case by case basis, considering the effect of the acts of extinguishment on the group as a whole.⁴³ The court agreed the impacts and losses are intergenerational and can build and accumulate over time,⁴⁴ so consequences of each act should not be considered in isolation. Using the example of a large painting, the court compared the acts to a series of holes in the painting, where the resulting damage would be measured by reference to the entire work.⁴⁵

³⁶ Ibid [150], Simple interest refers to the calculation on interest based on the original amount which does not account for any ‘compounding’ and so is not affected by any interest accruing. Compound interest on the other hand allows for interest calculated on the interest already earned, therefore leading to a greater sum.

³⁷ Ibid [133], The court also concluded that there was nothing in this case that enlivened an award of compound interest in equity (such as unjust enrichment, breach of fiduciary duty), but the court left open the possibility that compound interest could be awarded on these grounds - See discussion at Griffiths, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, at [108]-[151]

³⁸ See discussion at Griffiths (n5), [133] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

³⁹ [Eddie Cubillo, ‘An Indigenous View on the Timber Creek Decision – The Trauma that is Native Title’ LinkedIn \(Blog Post, 24 March 2019\)](#)

⁴⁰ [University of Melbourne, ‘Academic Staff: Eddie Cubillo’ \(Web Page\)](#)

⁴¹ [Eddie Cubillo, ‘An Indigenous View on the Timber Creek Decision – The Trauma that is Native Title’ LinkedIn \(Blog Post, 24 March 2019\)](#)

⁴² Griffiths (n5), [153] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), also see *Ward v Western Australia* (2002) 213 CLR 1 at 64-65 [14].

⁴³ Griffiths (n5), [153], [157] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), also see *Ward v Western Australia* (2002) 213 CLR 1 at 64-65 [14].

⁴⁴ Griffiths (n5), [223] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

⁴⁵ Ibid [219].

Relying largely on evidence provided by native title holders regarding their relationship with Country and the impact of interference with it,⁴⁶ the task for the court is to:

1. Determine the “essentially spiritual relationship”; and
2. Translate the impact and “spiritual hurt” that followed from the acts into compensation.⁴⁷

Key considerations in this process include:

1. The effect on “the sense of a person’s engagement with the Dreamings”;
2. The feeling of failed responsibility when Country is damaged or impacted in “a way which cuts through the Dreamings”;⁴⁸
3. Physical damage to sacred sites, such as building concrete bridges;⁴⁹ and
4. The consequent and less tangible impacts that effect engagement with and perception of the Dreamings.⁵⁰

In this case the court acknowledged that the Ngaliwurru and Nungali people had a unique responsibility to protect Country, recognising what the late Alan Griffiths had explained at the time of trial:

“I got all those sites, all that Dreaming, I have to make sure people don’t make a mess of it”.⁵¹

The High Court confirmed the compensation award of \$1.3m for this particular cultural loss, noting that this would be regarded by ‘society’ as an “appropriate award”.⁵² The application of this approach could lead to varying amounts of compensation in different cases and contexts, depending on the particular facts in each case.⁵³

⁴⁶ Ibid [166], [154], [155].

⁴⁷ Ibid [216].

⁴⁸ Ibid [223].

⁴⁹ Ibid [223].

⁵⁰ Ibid [223].

⁵¹ [Quoted in Ben Winsor, ‘Here’s Exactly Why Millions were Awarded to NT Indigenous Custodians by the Federal Court’, NITV \(Online, 30th August 2016\)](#)

⁵² Griffiths (n5), [3] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

⁵³ Ibid [217], *Native Title Act, ss51(1)*.

D. Compensation not manifestly excessive

The High Court rejected the NT's argument that the amount awarded for cultural loss was too high.⁵⁴ The court acknowledged that as this was the first determination of compensation decided by the court, the figure was a "result of a social judgement".⁵⁵ However, as the trial judge had the 'substantial benefit' of being on Country and hearing and seeing first hand evidence on which to base his decision, the award of \$1.3m was appropriate.⁵⁶ This, the court noted, would fit with community expectations of what is 'fair or just'.⁵⁷

Minority Judgements

Although all judges ultimately reached the same outcome, the approaches of Edelman J and Gageler J in their individual judgments could lead to varied outcomes if applied in a different case.

A. Gageler J.

Whilst agreeing with the ultimate decision, Gageler J proposed an adapted test for calculating economic loss in which the native title holder can be "hypothesised" to be a willing but not anxious seller.⁵⁸

B. Edelman J.

Edelman J also acknowledged that there are limitations in the NTA framework in determining compensation for value that exists outside the Western conception of title.⁵⁹ Particularly, he disagreed with an approach that considers a

⁵⁴ Griffiths (n5), [235] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) citing *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13; [1940] HCA 27, quoting *Flint v Lovell* [1935] 1 KB 354 at 360.

⁵⁵ *Ibid* [237].

⁵⁶ *Ibid* [236].

⁵⁷ *Ibid* [237].

⁵⁸ *Ibid* [246], The proposed test to determine amount of compensation for economic loss was an adapted version of the test established in *Spencer v The Commonwealth* (1907) 5 CLR 418; [1907] HCA 82.

According to the Spencer test a fair market value can be calculated based on a hypothetical exercise in which the court considers what a 'willing but not anxious' seller would be prepared to accept, and what a 'willing but not anxious' purchaser would be prepared to pay for an interest in land.

⁵⁹ *Ibid* [251], citing W.E.H Stanner, *After the Dreaming* (Boyer Lectures, 1968) 44.

hypothetical ‘reasonable person prepared to sell’.⁶⁰ This approach fails, he argued, as considering the “immense” evidence it was clear that the Ngaliwurru and Nungali people were “not willing to surrender their native title rights”.⁶¹ Edelman J also emphasised that to prevent undervaluing of compensation, pain and suffering is to be measured at the time of judgement, recognising that it may occur slowly or gradually.⁶²

Implications

There are now over 500 recognised native title determinations,⁶³ and compensation claims for acts of extinguishment are increasing. These cases may be heard through the courts and under the NTA. Increasingly however, settlements will be resolved outside of these courts, as governments prepare to bring policies and agreements with traditional owners in to line with the principles established in the decision.

A. Compensation claims in the courts

A number of significant compensation claims have emerged since *Griffiths*, that seek to test, apply and extend the principles established in the decision. All are yet to be decided but contain immense potential.

Relying on the principles established in *Griffiths*, the Yindjibarndi people were able to achieve recognition of exclusive native title rights over an area of land in the NT.⁶⁴ Following this, the Yindjibarndi Aboriginal Corporation confirmed that they will bring a compensation case against Fortescue Metals Group (FMG), for both economic loss and spiritual harm.⁶⁵ FMG operate an iron ore mine in the area, so the claim will concern compensation for operation of the mine and use

⁶⁰ *Griffiths* (n5), [277] (Edelman J), *Spencer v The Commonwealth* (1907) 5 CLR 418, 432, *The Commonwealth v Arklay* (1952) 87 CLR 159, 170; [1952] HCA 76.

⁶¹ *Griffiths* (n5), [274]-[284], [311] (Edelman J).

⁶² *Griffiths* (n5), [254],[273] (Edelman J)

⁶³ [National Native Title Tribunal, ‘Statistics: Native Title Determinations \(as at 16/04/2021\)’, \(Web Page\)](#)

⁶⁴ [Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People \[2019\] FCAFC 177, Fortescue Metals Group Ltd & Ors v Warrie & Ors \[2020\] HCATrans 65.](#)

⁶⁵ [Isabella Higgins and Nick Sas, ‘Fortescue and Andrew Forrest Lose High Court Appeal Over Exclusive Native Title of WA’s Yindjibarndi People’, ABC News \(Web Page, 29 May 2020\)](#)

of the land without agreement. When decided, this claim may lead to an historic settlement, far greater than in *Griffiths*, and will test and expand the availability of compensation.

The Gumatj compensation claim, filed by Dr Gallarwuy Yunupingu, also relates to mining interests and mining companies “unmercifully” destroying Country and Dreaming sites without permission.⁶⁶ The Gumatj claim includes acts that took place before the introduction of the *Racial Discrimination Act*, so may extend the availability of compensation awarded in *Griffiths*.⁶⁷

Similarly, the Tjiwarl compensation claim will apply the principles developed in *Griffiths* to a larger range of activities and a larger land area, and may clarify some ‘unanswered questions’.⁶⁸ Tjiwarl Aboriginal Corporation chairman Brett Lewis says the claim is seeking to address impairment of rights and the “shame” caused by being unable to meet cultural responsibilities.⁶⁹

Although the process has been clarified by the court, access to compensation through the courts post-*Griffiths* is still strictly controlled. One significant compensation claim, brought by the Bigambul people in Queensland, was struck out by the Federal Court. The court cited *Griffiths* and said that the group had provided inadequate information about the claim area or the extinguishing acts.⁷⁰ Despite *Griffiths* broadening of availability of compensation, the onus sits squarely with the applicant to establish their claim, and vague or uncertain applications will not be accepted.⁷¹ In many claims, groups are unable to have their native title rights recognised, let alone access

⁶⁶ [Laura Garty and Steph Zilman, ‘Garma: Gove Peninsula Traditional Owners to Launch Compensation Case over Bauxite Mining’, ABC News \(Online, 3rd August 2019\)](#)

⁶⁷ [Ibid, see Gallarwuy Yunupingu \(On Behalf of the Gumatj Clan or Estate Group\) v Commonwealth of Australia & Anor \(Gove Compensation Claim\), currently in the Federal Court Registry as matter NTD43/2019, and discussion in William Isdale, ‘Dr Yunupingu’s Claim for Native Title Compensation – The Constitutional Path not Trodden’, AusPubLaw, \(Web Page, 18 March 2020\)](#)

⁶⁸ [Quoted in Rhiannon Stevens and Isabel Moussaili, ‘Tjiwarl Native Title Holders File Compensation Claim Against WA Government’, ABC News \(Web Page, 18 June 2020\)](#)

⁶⁹ *Ibid.*

⁷⁰ *Saunders on behalf of the Bigambul People v State of Queensland (No 2)* [2021] FCA 190, [99], Native Title Act s65(1)(c).

⁷¹ [Mark Geritz, Tosin Aro, Georgia Davis and Matthew Hales, ‘Billions to Bust: Deficiencies in Native Title Compensation Applications’, Clayton Utz \(Blog Post, 15 April 2021\)](#)

compensation, “because of the dispossession”,⁷² enacted and upheld by settler law.

B. Avoiding compensation litigation through settlement agreements

Governments around Australia ‘intervened’ or joined as interested parties in the case, including the Commonwealth, Queensland, South Australia and Western Australia and all governments watched the decision closely. Often, “negotiated settlement agreements are preferable to litigation outcomes”,⁷³ so governments will prepare to ensure they are not acting ‘inconsistently’ with High Court decisions.

As the use of settlement agreements increases, they may increasingly be structured to preclude future claims for compensation, to ensure that compensation for extinguishment is ‘full and final’.⁷⁴ The Noongar settlement is an example of this, and included a package of benefits that initiated financial payments, but limited further compensation claims.⁷⁵ However, the Single Noongar Land Claim has been lodged since and makes claim for a compensation amount of \$290b, the largest ever seen for a claim of this type. Some observers have noted that, following *Griffiths*, it would not be hard to prove spiritual damage.⁷⁶ The claim will likely be forcefully opposed by the WA Government as they seek to rely on the terms of the original Noongar settlement.

Similarly, in the Yamatji settlement, compensation is ‘full and final’, precluding further claims for compensation for any past actions, and any actions in the future done in accordance with the agreement.⁷⁷

⁷² [Professor Megan Davis, ‘2021 Mabo Oration’, \(Speech, IATSIS Summit, 3 June 2021\)](#)

⁷³ [National Native Title Council, ‘National Compensation Strategy’](#)

⁷⁴ [See generally for example, WA Government Department of Premier and Cabinet, ‘Gibson Desert Nature Reserve Compensation and Lurrtjurrulu and Palakitjalu Settlement Agreement’, \(Report, 29 October 2020\)](#)
⁷⁵ [South West Aboriginal Land and Sea Council, ‘Settlement Agreement’, \(Web Page\)](#)

⁷⁶ [Rangi Hirini, ‘Community Consulted Over Noongar Compensation Case’ \(Web Page, 5 February 2020\)](#)

⁷⁷ [Yamatji Nation ILUA Executed Agreement, 50](#)

C. Native title compensation frameworks in development

Since Griffiths, states and territories have addressed the need for a streamlined compensation process. Some emphasise the importance of moving beyond the framework of the NTA to reach better outcomes for Traditional Owners. There is, however, little evidence so far that the case has led to significant legislative amendments.⁷⁸

In 2019 the Queensland Government allocated responsibility for native title compensation to the Treasury, through the Native Title Compensation Project Management Office, to support consistency across claims, and “achieve settlement of compensation on ‘just terms’”.⁷⁹

The Northern Territory Government has committed to an Aboriginal Land and Sea Action Plan. The plan outlines an intention to create an overarching policy framework to streamline native title processes. Central to this will be a whole-of-government policy framework in the area of compensation, informed by the approach in *Griffiths*.⁸⁰

These streamlined frameworks demonstrate some willingness to build frameworks to support claimants.⁸¹ If governments commit to genuine engagement with traditional owners in this process, as claimed in proposals, this could enable greater opportunities for traditional owner control over the process. As Chris Griffiths says, the process should ensure that First Nations can “work things out the way we want to work it out.”⁸²

⁷⁸ [M.C Dillon, ‘Policy implications of the Timber Creek decision, Working Paper 128’, , Centre for Aboriginal Economic Policy Research - Australian National University \(Working Paper, 2019\), 8](#)

⁷⁹ [Queensland Government Treasury, ‘2018-2019 Annual Report: About Us’, \(Web Page, 27 September 2019\)](#)

⁸⁰ [Northern Territory Government, ‘Northern Territory Aboriginal Land and Sea Action Plan’, 11th April 2019, 11](#)

⁸¹ [See for example: Queensland Government, ‘Submission to the House of Representatives Standing Committee on Indigenous Affairs – Inquiry on Pathways and Participation Opportunities for Indigenous Australians in Employment and Business’, April 2020, 24](#)

⁸² [Indigenous Cultural Heritage Conference 2020, ‘Chris Griffiths’ \(YouTube, 25 June 2020\)](#)

D. Treaty

In Victoria, where treaty negotiations are continuing, the High Court's determination of compensation for non-economic loss has been 'embraced'.⁸³ Claims from the now former Attorney General Jill Hennessy indicated that negotiations should ensure the best outcomes for Traditional Owner groups, rather than limiting compensation available or imposing 'bureaucratic barriers'.⁸⁴ Victoria is aiming to create a framework that provides a "comprehensive alternative to the [NTA]", to "plug gaps" in the Federal act and increase the accessibility of compensation throughout court settlements.⁸⁵⁸⁶

The Northern Territory released a *Treaty Discussion Paper* in 2020 and is actively working towards developing a framework. Key to the discussion surrounding settlement for and calculation of compensation are some of the principles developed in *Griffith*. The paper notes:

'If a First Nation chose to negotiate, rather than litigate, for compensation... included in the negotiation of a treaty, *there would now be a benchmark* of 'market value' (Emphasis added).⁸⁷

This framework allows flexibility regarding the contents of treaty,⁸⁸ and may relieve some of the "onerous burden" on the claim group to comply with the strict requirements of native title determinations in court.⁸⁹ The paper also acknowledges that the litigation process requires reliving and recounting the trauma of cultural loss, as well as upholding the "artificial legal environment" of the NTA.⁹⁰ Using the principles established in *Griffiths*, compensation can be

⁸³ [Noel Towell, 'State flags new native title deal for 'spiritual and cultural loss', The Age \(Online Article, 14 February 2020\)](#)

⁸⁴ *Ibid.*

⁸⁵ [Traditional Owner Settlement Act 2010 \(Vic\)](#)

⁸⁶ [Noel Towell, 'State flags new native title deal for 'spiritual and cultural loss', The Age \(Online Article, 14 February 2020\)](#)

⁸⁷ [Northern Territory Treaty Commission, 'Treaty Discussion Paper', \(30 June 2020\) 45](#)

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 36.

⁹⁰ *Ibid.*, 40.

pursued outside of that environment to assess the value of reparations for “any such injury” to “Aboriginal spiritual connection to their traditional land”.⁹¹

The negotiation of compensation for native title within treaties is promising and those in development are “strong on rhetoric”. However, as Professor Megan Davis notes, State and Territory Treaties are not binding due to the ability and potential willingness of the Commonwealth to override State laws.⁹²

E. Cultural Heritage

There is potential for the decision in Griffiths to impact cultural heritage protections. Cultural heritage laws and policies could be amended to incorporate the High Court’s guidance on compensation to inform stronger remedies for breaches of heritage protections that cause cultural loss.⁹³ This could send a clear message to parties such as land owners and mining companies and provide greater bargaining power to traditional owner groups.

Conclusion

The High Court awarded a total of \$2,530,350 to the Ngaliwurru and Nungali peoples in a case that represents one of the most important native title decisions since *Mabo*. Despite a statutory right to ‘just terms’ compensation existing in the *NTA*, the decision was the first time that the court had interpreted and ruled on compensation for the extinguishment of native title. The case provides guidance on the interpretation and award of ‘just compensation’, as well as a framework to remedy some of the wrongs caused by tides of extinguishment. There now, at least, exists a confirmed right to compensation for cultural loss and greater certainty and bargaining power for

⁹¹ Ibid.

⁹² [Professor Megan Davis, ‘2021 Mabo Oration’, \(Speech, IATSIS Summit, 3 June 2021\)](#)

⁹³ [See recommendations in Dr Kate Galloway, ‘An inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia by The Joint Standing Committee on Northern Australia Parliament of Australia: Submission 27’, 3-4](#)

native title holders whose rights have already been extinguished. The decision potentially opens the door to more compensation awards, and the principles may be extended and developed through claims that are tested with a broader scope or against other bodies, such as mining companies. Although a monetary amount will never be adequate, the claimants in this case withstood the gruelling hearing process and felt that the message was “getting across”.⁹⁴ According to Chris Griffiths and Lorraine Jones, the decision showed the court was finally beginning to understand the importance of connection to Country and recognise and compensate for the feeling of being deeply “emotionally hurt inside” when seeing damage to their land.⁹⁵

It is important to note that as a test case the claimants in *Griffiths* had a ‘strong’ and ‘provable’ connection to land, law and custom in the eyes of the settler law. Potential challenges are still very present for many claim groups that may be unable to meet this threshold, particularly where the impacts of acts of ‘extinguishment’ have supposedly ‘severed’ connection to Country. Despite the gravity and importance of the decision in *Griffiths*, extinguishment, a “western legal concept”, remains a “deeply troubling issue for native title holders”.⁹⁶ Native title holders often have little power to prevent extinguishment, after which the native title is “eliminated” and “gone forever under the western law”, arguably reinstating *Terra Nullius*.⁹⁷ Promisingly however, the implications of the decision extend beyond the barriers of native title and shortfalls may be addressed through agreements such as settlements and treaty negotiations. As Chris Griffiths noted following the decision, it is only a part of recognising and compensating for the “loss and hurt caused by damage to Country... a small step in the long continuing journey to set things right”.⁹⁸

⁹⁴ [Felicity Jones, ‘Timber Creek Native Title Compensation Claim Brings High Court to NT for the First Time’, ABC News \(Online Article, 4 September 2018\)](#)

⁹⁵ *Ibid.*

⁹⁶ [Senator Patrick Dodson, ‘No One Can Ever Take Your Land Away’, Indigenous X, \(Blog Post, 8 June 2018\)](#)

⁹⁷ *Ibid.*

⁹⁸ Backbone (n2).

Bibliography

A. Articles/Books

Burke, Paul, 'How Can Judges Calculate Native Title Compensation?' (Discussion Paper, 2002) *Australian Institute for Aboriginal and Torres Strait Islander Studies*

Griffiths, Chris, Dora Griffiths and Alana Hunt, 'Northern Territory of Australia v. Griffiths: The Landmark Native Title Compensation Case in the Tiny Town of Timber Creek' (2019) 18(2) *Arts Backbone* 4

Harpum, Charles, Stuart Bridge and Martin Dixon, *Megarry and Wade, The Law of Real Property* (Sweet & Maxwell, 8th ed, 2012)

Honoré, A.M, "Ownership" in Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107

Stanner, W.E.H *After the Dreaming* (Boyer Lectures, 1968)

B. Cases

Amodu Tijani v The Secretary, Southern Nigeria [1921] 2 AC 399

Fejo v Northern Territory (1998) 195 CLR 96 [1998] HCA 58

Flint v Lovell [1935] 1 KB 354

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019]

FCAFC 177 Fortescue Metals Group Ltd & Ors v Warrie & Ors [2020] HCATrans 65

Gallarway Yunupingu (On Behalf of the Gumatj Clan or Estate Group) v Commonwealth of Australia & Anor (Gove Compensation Claim) (currently in the Federal Court Registry as matter NTD43/2019)

Griffiths v Northern Territory [2014] FCA 256 (*Compensation Decision Part 1*)
Lee Transport Co Ltd v Watson (1940) 64 CLR 1 [1940] HCA 27

Northern Territory v Griffiths [2017] FCAFC 106

Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7

Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610
[1955] HCA 13

Saunders on behalf of the Bigambul People v State of Queensland (No 2) [2021] FCA 190, *Spencer v The Commonwealth* (1907) 5 CLR 418; [1907] HCA 82.

The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors [1996] HCA 40

C. Legislation

Native Title Act 1993 (Cth)

http://www5.austlii.edu.au/au/legis/cth/consol_act/nta1993147/

Traditional Owner Settlement Act 2010 (Vic)

<https://www.legislation.vic.gov.au/in-force/acts/traditional-owner-settlement-act-2010/025>

Racial Discrimination Act 1975 (Cth)

http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/rda1975202/

D. Other

Ashurst, 'Timber Creek Compensation – Native Title worth \$3.3 million', published 24 August 2016, available at

<https://www.ashurst.com/en/news-and-insights/insights/timber-creek-compensation--native-title-worth-a33-million/>

Cromb, Nat, 'Land Rights – Sand Castle in a Wind Storm', *IndigenousX*, published 8 May 2020, available at <https://indigenousx.com.au/land-rights-sand-castle-in-a-wind-storm/>

Cubillo, Eddie, 'An Indigenous View on the Timber Creek Decision – The Trauma that is Native Title', *LinkedIn* published 24 March 2019, available at https://www.linkedin.com/pulse/indigenous-view-timber-creek-decision-trauma-native-cubillo-eddie?trk=portfolio_article-card_title

Davis, Megan (Professor), '2021 Mabo Oration', Speech, IATSIS Summit, delivered 3 June 2021, available at <https://www.indigenous.unsw.edu.au/2021-mabo-oration-professor-megan-davis>

Dillon, M.C, 'Policy implications of the Timber Creek decision, Working Paper 128', *Centre for Aboriginal Economic Policy Research - Australian National University*, 2019, available at <https://caepr.cass.anu.edu.au/research/publications/policy-implications-timber-creek-decision>

Dodson, Senator Patrick, 'No One Can Ever Take Your Land Away', *Indigenous X*, published 8 June 2020, available at <https://indigenousx.com.au/senator-patrick-dodson-no-one-can-ever-take-your-land-away/>

Galloway, Dr Kate, 'An inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia by The Joint Standing Committee on Northern Australia Parliament of Australia: Submission 27', accessed 15th May 2021, available at [https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/Caves at Juukan Gorge/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/Caves%20at%20JuukanGorge/Submissions)

Gartry, Laura and Steph Zilman, 'Garma: Gove Peninsula Traditional Owners to Launch Compensation Case over Bauxite Mining', *ABC News* published 3rd August 2019, available at

<https://www.abc.net.au/news/2019-08-03/gove-traditional-owner-to-launch-compensation-claim/11381034>

Geritz, Mark, Tosin Aro, Georgia Davis and Matthew Hales, 'Billions to Bust: Deficiencies in Native Title Compensation Applications', *Clayton Utz*, published 15 April 2021, available at <https://www.claytonutz.com/knowledge/2021/april/billions-to-bust-deficiencies-in-native-title-compensation-applications>

Higgins, Isabella and Nick Sas, 'Fortescue and Andrew Forrest Lose High Court Appeal Over Exclusive Native Title of WA's Yindjibarndi People', *ABC News*, published 29 May 2020 at <https://www.abc.net.au/news/2020-05-29/fortescue-andrew-forrest-native-title-yac-high-court-decision/12299700>

Hirini, Rangi, 'Community Consulted Over Noongar Compensation Case', *NITV News*, published 5 February 2020, available at <https://www.sbs.com.au/nitv/nitv-news/article/2020/02/05/community-consulted-over-noongar-compensation-case>

Indigenous Cultural Heritage Conference 2020, 'Chris Griffiths', published 25 June 2020, available at https://www.youtube.com/watch?v=-2yvXzwBaP8&ab_channel=IndigenousCulturalHeritageConference2020

Isdale, William, 'Dr Yunupingu's Claim for Native Title Compensation – The Constitutional Path not Trodden', *AusPubLaw*, published 18 March 2020, available at <https://auspublaw.org/2020/03/dr-yunupingu-claim-for-native-title-compensation/>

Jones, Felicity, 'Timber Creek Native Title Compensation Claim Brings High Court to NT for the First Time', *ABC News*, published 4 September 2018, available at

<https://www.abc.net.au/news/2018-09-04/timber-creek-native-title-compensation-high-court/10198442>

National Native Title Council, 'National Compensation Strategy', accessed 20th April 2021, available at <https://nntc.com.au/our-agenda/national-compensation-strategy/>

National Native Title Tribunal, 'Statistics: Native Title Determinations', accessed 16th April 2021, available at <http://www.nntt.gov.au/Pages/Statistics.aspx>

Northern Territory Government, 'Northern Territory Aboriginal Land and Sea Action Plan', published 11th April 2019, available at <https://cmc.nt.gov.au/news/2019/aboriginal-land-and-sea-action-plan>

Northern Territory Treaty Commission, 'Treaty Discussion Paper', published 30 June 2020, available at https://treatynt.com.au/__data/assets/pdf_file/0008/906398/treaty-discussion-paper.pdf

Queensland Government, 'Submission to the House of Representatives Standing Committee on Indigenous Affairs – Inquiry on Pathways and Participation Opportunities for Indigenous Australians in Employment and Business', published April 2020, available at <https://www.aph.gov.au/DocumentStore.ashx?id=67bba9ba-56d9-4ad1-b419-534e0947ac8a&subId=680130>

Queensland Government Treasury, '2018-2019 Annual Report: About Us', published 27th September 2019, available at <https://www.treasury.qld.gov.au/about-treasury/2018-2019-annual-report/about/>

Remote Aboriginal Health Corps, 'Timber Creek – Katherine Region', https://www.rahc.com.au/sites/default/files/pictures/Timber%20Creek_RAHC%20Community%20Profile_Katherine%20Region_web.pdf

Roberts, Greg, 'High Court Cuts Native Title Payout', *Port Lincoln Times*, published 13 March 2019, available at <https://www.portlincolntimes.com.au/story/5952845/high-court-cuts-nt-native-title-payout/>

South West Aboriginal Land and Sea Council, 'Settlement Agreement', accessed 5 June 2021, available at <https://www.noongar.org.au/about-settlement-agreement>

Stevens, Rhiannon and Isabel Moussaili, 'Tjiwarl Native Title Holders File Compensation Claim Against WA Government', *ABC News*, published 18 June 2020, available at <https://www.abc.net.au/news/2020-06-18/tjiwarl-native-title-holders-seek-damages-for-cultural-loss/12367796>

Towell, Noel, 'State flags new native title deal for 'spiritual and cultural loss'', *The Age*, published 14 February 2020, available at <https://www.theage.com.au/national/victoria/state-flags-new-native-title-deal-for-spiritual-and-cultural-loss-20200214-p540z0.html>

University of Melbourne, 'Academic Staff: Eddie Cubillo', available at <https://law.unimelb.edu.au/about/staff/eddie-cubillo>

WA Government Department of Premier and Cabinet, 'Gibson Desert Nature Reserve Compensation and Lurrtjurrululu and Palakitjalu Settlement Agreement', Report published 29 October 2020, available at <https://www.wa.gov.au/government/document-collections/gibson-desert-nature-reserve-compensation-and-lurrtjurrululu-palakitjalu-settlement-agreement>

Winsor, Ben, 'Here's Exactly Why Millions were Awarded to NT Indigenous Custodians by the Federal Court', *N/TV*, published 30th August 2016, available at <https://www.sbs.com.au/nitv/article/2016/08/25/heres-exactly-why-millions-were-awarded-nt-indigenous-custodians-federal-court>

Yamatji Nation ILUA Executed Agreement, accessed 25 May 2021, available at <https://www.wa.gov.au/sites/default/files/2020-03/Yamatji%20Nation%20ILUA%20%20Executed%20Agreement.pdf>

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