



| | IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D1 of 2018 | IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D2 of 2018 | IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY No. D3 of 2018 |
|----|---|---|--|
| 10 | BETWEEN: NORTHERN TERRITORY OF AUSTRALIA Appellant | BETWEEN: COMMONWEALTH OF AUSTRALIA Appellant | BETWEEN: ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant |
| | and | and | and |
| | ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent | ALAN GRIFFITHS AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent | NORTHERN TERRITORY OF AUSTRALIA First Respondent |
| | COMMONWEALTH OF AUSTRALIA Second Respondent | NORTHERN TERRITORY OF AUSTRALIA Second Respondent | COMMONWEALTH OF AUSTRALIA Second Respondent |
| 20 | ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervener | ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervener | ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervener |
| | ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervener | ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervener | ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervener |
| 30 | ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervener | ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervener | ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervener |
| | CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervener | CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervener | CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervener |
| | YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervener | YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervener | YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervener |

OUTLINE OF ORAL SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (SECOND INTERVENER)

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Outline of oral submissions
Filed on behalf of the Attorney-General for the State of Queensland (Second Intervener)
Form 27F; Rule 44.08.2

Mr GR Cooper
CROWN SOLICITOR
11th Floor, State Law Building
50 Ann Street, Brisbane 4000

Dated: 4 September 2018
Per Wendy Ussher
Ref PL8/ATT110/3374/UWE

Telephone: 07 3239 6328
Facsimile: 07 3239 6382
Email: wendy.ussner@crownlaw.qld.gov.au

PART I: Internet publication

1. This outline is in a form suitable for publication on the internet.

PART II: Outline of propositions

Disposal of the ‘just terms’ constitutional issue and application of ss 51A and 53

- 10 2. As the common stated position of the intervening States regarding the application of ss 51A and 53 of the *Native Title Act 1993 (Cth) (NT Act)* in relation to these proceedings (Queensland written submissions (*QS*) [17]-[24]) demonstrates :
 - (a) the only issue that was agitated in the courts below, and on which there was and is evidence apt to make a determination, was the entitlement to compensation under s 51; QS [18]-[19]
 - (b) the statutory schema of s 51 as creating an entitlement to compensation, s 51A as providing a cap on such compensation and s 53 as preserving a requirement of just terms where necessary to ensure constitutional validity, is uncontroversial; QS [20]
 - 20 (c) the circumstance for the engagement of the cap in s 51A is, relevantly, a question of fact. The protagonists have treated that circumstance for the engagement of the cap as having not been reached;
 - (d) consequently, no occasion arose below, or now, to consider the operation of ss 51A and 53. To do so would be to inquire into a hypothetical;
 - (e) the operation of ss 51A and 53 raise large and contestable issues. Such issues should be determined against a concrete set of facts upon which the competing arguments can be tested. QS [21]-[24]

Proper approach to addressing the question of interest under s 51

- 30 3. Whilst the issue of interest will always be significant due to the time that will necessarily have elapsed by the time compensation is paid, that should not obscure or complicate the statutory charge in s 51, being to provide compensation to native title holders for the interference with their native title rights.
- 4. The learning in relation to the payment of interest in other circumstances and other areas of law is relevant only to the extent it illuminates the answer that “the court, body or other person making the determination of compensation” must arrive at in discharging the statutory charge in s 51.

40 ***Do NT Act s 51 just terms require or permit compound interest?***

Simple interest is ordinarily sufficient

5. As the government parties have submitted, there is no case which establishes that s 51(xxxi) just terms (and by implication s 51(1) just terms) require anything other than simple interest (QS [41], [42]).

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6. Queensland's primary submission is that only simple interest is available, whether under s 51(1) or the *Federal Court of Australia Act 1976 (FCA Act)*, s 51A. By expressly providing only for simple interest, s 51A excludes compound interest (QS [69]-[71]). The context of s 51(1) is to an extent different because it does not expressly provide for simple interest. But even if it implicitly empowers an award of compound interest, such awards should be made by analogy with compound interest awards in other contexts.
7. The essence of an entitlement to compound interest is that "the defendant's wrong is something more than the late payment of damages"; *Hungerfords v Walker* (1998) 171 CLR 125 at 144 (Mason CJ and Wilson J); JBA vol 8, tab 61, p 3118 (pdf 275); QS [43]

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Analogy with compulsory acquisition compensation

8. Section 51(4) permits but does not require reference to the relevant compulsory acquisition law. Again as the government parties submit, there is no reported case in which compound interest has been awarded.
9. Section 51(1) may extend in an appropriate case to a compound interest award. But by reference to authority in analogous cases (such as vendor-purchaser and compulsory acquisition cases) nothing justifies or requires compound interest in this case. Again, delay in payment alone is adequately recompensed by simple interest.

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Compensation not restitution

10. The content of the entitlement to compensation depends on the true construction of the relevant provisions including s 51(1). The use of the word 'compensation' must be intended to invoke the accepted understanding that its purpose:

is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived.

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(*Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495, 571 (Dixon J); JBA vol 10, tab 80, p 4130 (pdf 361); QS [55])

11. There is nothing in the text, context or purpose of the NT Act that requires any departure from that general understanding of 'compensation' so as to require the payment of compound interest in a case like the present.

Does equity require or permit compound interest in restitution?

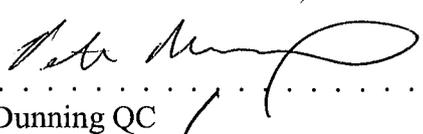
12. There are two distinct categories of case in which equity will award compound interest (money unjustly retained, and restitution for a wrong) (QS [66]). This case is in neither category (QS [78]-[79]).
13. The claim group does not press a claim based on a fiduciary relationship with the Crown (CGS [103]; QS [80]-[82]).
14. As the government parties have submitted, an award of compound interest on the basis of lost opportunity for reinvestment would be contrary to the evidence and the trial judge's findings (QS [84]-[86]).

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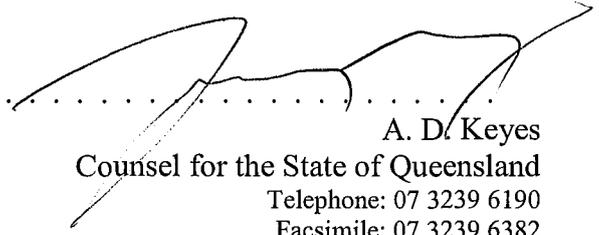
Interest as part of, or on, compensation award

- 15. An award to recognise the delay between the extinguishment and judgment made under s 51(1) of the NT Act is part of the compensation, as a matter of ordinary construction of the provision.
- 16. But whether that award is part of the s 51(1) compensation or is additional to it under s 51A of the FCA Act, the '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' would be satisfied.
- 17. It is therefore not necessary or desirable to decide whether the interest awarded in this case was *on* or *as* compensation (QS [88]-[92]).
- 18. But if that question is to be decided, necessitating construction of s 51A of the NT Act, it is submitted that s 51A must be understood as imposing a cap not of freehold market value, but of 'the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land ...'
- 19. In that notional case, something would be awarded not only for market value, but also for interest (*Lands Acquisition Act* (NT), s 64) among other elements.
- 20. Consequently, the NT Act s 51A cap is not freehold market value, but the total of the economic loss attributable to market value, the amount of interest (if any) awarded under s 51(1) plus any other component. The total compensation awarded under div 5 cannot exceed that total. (The amount of any FCA Act s 51A interest is not subject to the NT Act s 51A cap, but either way, interest is not capped by reference to freehold market value alone.)

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 Peter Dunning QC
 Solicitor-General
 Telephone: 07 3218 0630
 Facsimile: 07 3218 0632
 Email: solicitor.general@justice.qld.gov.au



 A. D. Keyes
 Counsel for the State of Queensland
 Telephone: 07 3239 6190
 Facsimile: 07 3239 6382
 Email: tony.keyes@crownlaw.qld.gov.au