

IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY
<i>No. D1 of 2018</i>	<i>No. D2 of 2018</i>	<i>No. D3 of 2018</i>
APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA	APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN	BETWEEN	BETWEEN
NORTHERN TERRITORY OF AUSTRALIA Appellant	COMMONWEALTH OF AUSTRALIA Appellant	MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant
and	and	and
MR A. GRIFFITHS (DECEASED) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	MR A. GRIFFITHS (DECEASED) 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
ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor	ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor	ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA First Intervenor
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor	ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor	ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND Second Intervenor
ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor	ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor	ATTORNEY-GENERAL FOR THE STATE OF WESTERN AUSTRALIA Third Intervenor
CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor	CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor	CENTRAL DESERT NATIVE TITLE SERVICES LIMITED Fourth Intervenor
YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor	YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor	YAMATJI MARLPA ABORIGINAL CORPORATION Fifth Intervenor

**FIRST INTERVENOR'S OUTLINE OF ORAL SUBMISSIONS**

Filed on behalf of the First Intervenor by:  
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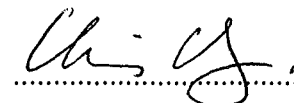
**Part I: Certification:** This outline is in a form suitable for publication on the internet.

**Part II – Outline of Propositions:**

1. In response to the oral submissions made in relation to the construction of s 51A South Australia submits as follows:
  - 1.1. s 51A imposes a cap on compensation, and represents the outer extremity of the spectrum of compensation capable of being awarded for a claim in relation to native title rights extinguished in the hypothetical case, where those rights include the maximum loss that might be sustained, including a loss of exclusive possession and loss consequent upon great spiritual attachment. It serves as a “yardstick” against which other claims involving a lesser loss, diminution, impairment or other effect are to be assessed.
  - 1.2. The hypothetical worst case scenario is not simply synonymous with an act that extinguishes all native title rights. The focus of compensation must be on the loss occasioned by the extinguishment. Extinguishment of all native title rights will not necessarily have the same “effect” for every native title group. Conversely, extinguishment of a limited bundle of rights may be very significant for the purposes of the cap if, for example, it were to relate to a site of overwhelming spiritual, but not economic, significance. The cap operates nonetheless.
  - 1.3. The construction of s 51A preferred by the Commonwealth, to the effect that the cap could never have any work to do in respect of a single group, is not supported by either the text or purpose of the section.
  - 1.4. This practical operation of the cap recommends a holistic approach to compensation.
2. South Australia supports the observations of the Full Court to the effect that “*properly construed, s 51(1) contemplates compensation to native title holders of a more holistic nature*” (*Northern Territory v Griffiths* (2017) 346 ALR 247 at [142] (CAB 314)) (WS [16]-[17]).
3. Nothing in the Act mandates or even recommends a bifurcated approach. When a multifactorial approach is taken, it may well be that actual economic loss is subordinated in significance to matters deriving from considerations of spiritual attachment to the land. The cap in s 51A operates on the entirety of those factors; an attempt to apportion the capped amount as between economic and non-economic factors risks trivialising the actual nature of the native title rights and interests in circumstances where Parliament has legislated an overall cap.

4. A multifactorial evaluative exercise, guided by some generic principles relevant to compensation, will generally reflect better the holistic, *sui generis* nature of native title rights and interests (*Western Australia v Ward* (2002) 213 CLR 1 at [14]; [94]-[95]). It carries the benefit of tending to lead away from appealable error by risking double-counting, attributing too much weight to a factor without offsetting other contingencies or omitting consideration of factors (WS [21]-[22]; [26]). Numerous factors are relevant to the evaluative exercise (WS [23]); it is necessary to take due account of all of them to reach a single, fixed amount of compensation under s 51(1), rather than to engage in a process of mathematical deductions and additions (WS [24]).
5. The cap itself is not to be equated with mere freehold value of the land, but represents that which would be payable if the act were the compulsory acquisition of a freehold estate from any person. That may, in a given case, exceed strict freehold value, especially if considerations of interest are of moment. On this approach, however, the prospect of an award of compensation many multiples of the freehold value is unlikely.
6. When a bifurcated approach is taken, the analysis becomes more complex (WS [33]). Many of the relevant factors are capable of informing questions of both economic and non-economic loss. (WS [29]).
7. When a bifurcated approach is taken, the characteristics of a holistic, multifactorial process may nonetheless be deployed to operate as a check on double-counting or inappropriate omissions. The Full Court was correct to hold that the trial judge, in answering a bifurcated claim, made a number of errors that had the effect of overvaluing the economic loss of the claim group (WS [39]).

Dated: 5 September 2018



CD Bleby SC