

IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY	IN THE HIGH COURT OF AUSTRALIA DARWIN REGISTRY
<b>No. D1 of 2018</b>	<b>No. D2 of 2018</b>	<b>No. D3 of 2018</b>
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
B E T W E E N	B E T W E E N	B E T W E E N
NORTHERN TERRITORY OF AUSTRALIA Appellant	COMMONWEALTH OF AUSTRALIA Appellant	MR A GRIFFITHS (DEC) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES Appellant
MR A GRIFFITHS (DEC) AND LORRAINE JONES ON BEHALF OF THE NGALIWURRU AND NUNGALI PEOPLES First Respondent	MR A GRIFFITHS (DEC) 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

**CENTRAL DESERT NATIVE TITLE SERVICES LTD AND YAMATJI MARLPA  
ABORIGINAL CORPORATION (FOURTH AND FIFTH INTERVENORS)  
OUTLINE OF ORAL PROPOSITIONS**

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## Part I: Certification

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

## Part II: Outline of propositions

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### The nature of native title compensation

1. Extinguishment of native title by inconsistent grant may:
  - (a) remove common law recognition of the native title holders' rights under traditional law and custom:
    - (i) of (utilitarian) occupation and use, which are valuable property rights; and
    - (ii) cause non-economic (non-pecuniary) loss associated with such dispossession, including depriving the native title holders of legal rights by which they maintain their spiritual connection to, and exercise responsibility for, the land, which are also valuable property rights;
  - (b) authorise use of the land by others which:
    - (i) actually prevents occupation and use and thereby has an effect on the native title holders e.g. through dislocation, lack of access to material resources;
    - (ii) interferes with the spiritual connection between the native title holders and their traditional country, including through damage to sites of significance, and an inability to exercise responsibilities to country.
      - NTRB Subs [13]-[19], [33]; *Alyawarr* [64] (JBA v 11 no 82 p 4576).
- 20 2. Section 51(1) of the *Native Title Act* should be construed broadly so as to provide substantive compensation for all of the above effects, having regard to the terms, object and context of the Act, the nature of native title, and by analogy with compensation principles in other areas of law. That is, all of the above effects are compensable, and the measure of compensation should be that which will so far as possible put the native title holders back in the position they would have been in but for the extinguishment. The section does not operate only by reference to land valuation principles.
  - NTRB Subs [8]-[10], [22] - [31], [43], [84]; *Native Title Act* Preamble, Pt 2 Div 5, s 223; *Mabo (No 2)* p 69 (JBA v9 no71 p 3482); *Leichardt* [35]-[39] (JBA v8 no69 p 3322); *Griffiths FC* [142] (CAB 314).
- 30 3. The Courts below correctly approached the matters in [1(a)(ii)] and [1(b)(ii)] above as a substantive head of loss for which compensation is to be assessed under s 51(1). Assessing such loss by reference to a percentage of freehold value or amount per hectare, or by application of a vague concept of 'fairness and moderation', would fail to accord with the proper basis for assessment of compensation and fail to have regard to the evidence.
  - NTRB Subs [32] - [34], [58] - [61], [74]; *Griffiths FC* [375]-[376] (CAB 374ff).

### Economic loss

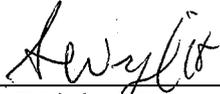
4. The Full Court erred in applying the *Spencer* test to value the effects in [1(a)(i)] and [1(b)(i)] above, in particular because native title is inherently incapable of being transferred and held by non-members of the indigenous society.
  - NTRB Subs [35] – [37].
5. Alternatively, the Full Court erred in discounting for inalienability. What a notional purchaser acquires is land free from native title, not the (inalienable) native title.
  - NTRB Subs [38] – [43]; *Leichardt* [23]-[24], [32], [43]-[44] (JBA v8 no69 p3320ff).
- 10 6. It may be appropriate to assess compensation for the effect in [1(a)(i)] and [1(b)(i)] above by equating non-exclusive native title to freehold where freehold is the closest analogue to what would put the native title holders back in the position they would have been in but for extinguishment.
  - NTRB Subs [44], [47]-[53]; *Griffiths TJ* [213]-[214], [221], [231]-[232] (CAB 154ff); *Native Title Act* Preamble, ss 51(6)-(8); *Kozaris* p 242 (JBA v8 no66 p3242).
7. In other cases, such as in remote areas where freehold value is negligible and where the native title holders lived on and obtained sustenance from the land, the cost of obtaining alternative accommodation, food and other resources may be a more appropriate methodology.
  - NTRB Subs [21], [29], [34], [54].
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### Non-economic loss

8. There was no error in the primary judge's approach to assessing the non-economic effects of the compensable acts by reference to the whole of the evidence and by reference to effects over a wider geographical area than each particular lot.
  - NTRB Subs [62]-[67]; *Griffiths TJ* [378]-[383] (CAB 194ff); *Griffiths FC* [312]-[319] (CAB 359ff).
9. A sense of failed responsibility can arise by reason of acts which extinguished the non-exclusive rights which existed in this case. Those are matters of the kind referred to in [1(a)(ii)] and [1(b)(ii)] above.
  - NTRB Subs [68] – [71].
- 30 10. Given the nature of native title as a communal entitlement which endures so long as the society remains, and is inalienable, compensation can be assessed by reference to impacts on the native title holders at the time of the compensable act and on persons (future generations) who would have enjoyed those rights but for extinguishment.
  - NTRB Subs [75] – [82]; *Griffiths TJ* [316], [382] (CAB 178, 195); *Griffiths FC* [333] (CAB 364), [415]-[419] (CAB 387-9).

11. The primary judge's assessment was not manifestly excessive. It reflected the evidence and accords with the Preamble to the *Native Title Act* and the purpose of compensation for non-economic (or non-pecuniary) loss being to recognise and recompense in accordance with community standards a loss which cannot be measured in money.

- NTRB Subs [83] – [86]; *Griffiths FC* [395]-[396] (CAB 381).



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