Native Title: compensation has now arrived

February 2020

A recent High Court decision raises significant issues for many local governments throughout Western Australia regarding native title issues in their district.

Northern Territory v Griffiths[i] **is known in native title circles as the 'Timber Creek decision' as that is the name of the township in the Northern Territory which is the subject of the case. In this case, the High Court granted financial compensation for the extinguishment of native title rights for the first time in Australian history.**

In what appears to be the most significant native title decision since the landmark Mabo case,[ii] the Timber Creek decision will have major repercussions throughout Australia. For local governments, it is not so much a question of if, but when a compensation claim will be lodged over any land it may have acquired.

This article highlights the key points from the Timber Creek case, explains the compensatory implications and provides suggestions to all local governments in anticipation of future extinguishment claims.

'The Timber Creek decision will have major repercussions throughout Australia'

The Timber Creek case

The Ngaliwurru and Nungali peoples sought financial compensation for the extinguishment of their native title rights which had previously been established to exist over 127 hectares of land around Timber Creek.

The losses in issue occurred during infrastructural developments undertaken by the Northern Territory government in the 1980s-90s.

The case, which was heard before the High Court on appeal from the Full Federal Court, dealt with three key issues:

- the objective economic value of affected native title rights;
- whether interest was payable on or as part of the financial compensation, and;
- assigning monetary value to non-economic, cultural loss.

Ultimately, $2.5 million was awarded. The economic loss was calculated as being $320,250. This was done by assigning the objective value of the non-exclusive rights as 50% of the value of the freehold land. Interest was found to be payable and was granted in the sum of $910,100. The amount awarded for cultural loss was determined to be the most subjective, and fixed at $1.3 million.

Approach to determining compensation

The High Court endorsed the following approach in determining compensation amounts for claims of native title extinguishment:

Determinations of economic loss must consider the nature and content of the rights at the relevant date. Where native title rights are exclusive, their objective economic value will generally equate to the objective economic value of an unencumbered freehold estate in that land. Where native title rights are non-exclusive, it is expected that their objective economic value will be significantly less than the freehold value.

Interest is applicable to compensation for economic loss. It will ordinarily be calculated on a simple interest basis at a rate sufficient to compensate the claimants for the deprivation of land usage between the date at which compensation was assessed as being payable and the date of judgment.

The quantum of compensation for cultural loss will be the most variable factor. Cultural loss, according to the High Court, is about the diminution of the connection to country and the spiritual damage caused by the compensable acts.[iii] The High Court states it should be measured against what society would rightly regard an appropriate award for the loss to be,[iv] with regard to the significance of the affected land to the claimants, the degree of physical effect on the land and the duration of the effect of the loss.

Legal significance

Indigenous claimant groups

The Timber Creek decision confirms that a substantial financial amount may be awarded to claimant groups for past interferences with their native title rights. It is significant because it recognises the cultural losses resulting from the acquisition and use of land by non-Indigenous bodies.

Over the years, a significant number of Indigenous claimant groups have had their native title rights established. Many have resulted in consent determinations and Indigenous Land Use Agreements.

Complacency may therefore have set in with regard to native title matters. However, the Timber Creek decision is likely to motivate such native title holders to now seek compensation for infringement of these rights.

Local governments

Currently, a local government will only be held liable for compensation if it has compulsorily acquired native title land. In all other instances, a local government's liability will be attributed and transferred to the State or Commonwealth under s 239 of the *Native Title Act 1993* (Cth).[v]

Given the vast number of potential claims and the generous compensation precedent set by the Timber Creek decision, it would not be unreasonable to expect that the State government will seek to recover some costs from local governments where they can be said to have done some act that caused the loss to the native title holders.

In that scenario, one could anticipate legislation being enacted or else claims from the State on a case-by-case basis.

The Timber Creek decision is also important as it creates a framework for ensuring that compensation granted to Indigenous groups is not arbitrarily determined but is arithmetically calculated (to a certain degree), accountable and based on High Court precedent. This will help far-sighted local governments begin to estimate their potential financial exposure to native title compensation claims.

Suggestions for local governments

1. Be informed
Local governments should inform themselves about the native title implications of developments they propose within their district. Reviewing legislation and understanding the local government's overall legal position will be the most prudent way forward in this significantly changed native title environment.

2. Review records of all land acquisitions, projects and developments conducted within their district since 1 January 1994[vi] and check their adherence to the conditions of *the Native Title Act 1993* (Cth)
Where those conditions have not been adhered to, exposure to compensation may well have arisen. However, the review need not go further than about 1975. The reason is that there is no statutory right to compensation for acts affecting native title that occurred **before** 31 October 1975.[vii]

3. Add native title issues to reviews of agreements with the State and with private parties
Local governments should check that they have not assumed liability for compensation under any existing (or proposed) agreements with the State, or with any private parties. Conversely, local governments should satisfy themselves of their legal position where liability has been transferred to private third parties.[viii]

4. Create a plan of action with regard to past developments that have created exposure to compensation
Prioritise consultation, negotiation or mediation with relevant native title holders over litigation.

5. Consider financial reporting and disclosure obligations for potential liability in relation to native title claims
Where Indigenous Land Use Agreements (**ILUAs**) have been made with native title holders, rigorously check the conditions of the agreement and note any exclusions. Local governments should satisfy themselves as to their overall liability position because where ILUAs have been entered into, liability is dictated by those agreements rather than the *Native Title Act 1993* (Cth).

6. Create a plan for future projects.
Incorporating native title and Aboriginal cultural heritage assessments into the early stages of planning will help to minimise exposure to compensation claims. Further, it is wise to keep good records and properly document reasons for planning decisions.

7. Stay up to date
This is a largely novel area of law which will evolve as further determinations are made. Local governments should stay updated on native title compensation decisions made by the Native Title Tribunal and the Federal Court, as well as any new legislation that may be enacted as more compensation claims are determined.

Contact

Andrew Read
Special Counsel
T 9200 4900
E aread@civiclegal.com.au

[i] (2019) 93 ALJR 327.
[ii] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1
[iii] Ibid [154].
[iv] Ibid [3].
[v] Section 239 of the *Native Title Act 1993* (Cth) states that any act attributable to the Commonwealth, State or Territory will be payable by the Commonwealth, State or Territory. Attributable acts include any act done by any person under a law of the Commonwealth, State or Territory. As local government powers are created by State law, any action validly done by a local government would constitute an attributable act of the State.
[vi] When the *Native Title Act 1993* (Cth) was commenced.
[vii] When the *Racial Discrimination Act 1975* (Cth) was commenced.
[viii] Note that s 125A of the *Mining Act 1978 (WA*) transfers liability to the holders of mining tenements where appropriate.