Compensation awarded in Australian first

Timber Creek by Mr A Griffiths, which was used as evidence in the case. Published courtesy of the Estate of Mr A Griffiths and Waringarri Aboriginal Arts.

By Cath McLeish*

Twenty years after the native title holders of Timber Creek – five estate groups of the Ngarliwurru and Nungali peoples – filed their original native title claim, the High Court of Australia has awarded them compensation for the loss of native title rights over parts of the land within the town area.

The High Court decision in *Northern Territory v Griffiths* [2019] HCA 7 of 13 March 2019 comes eight years after the compensation claim was made in the Federal Court, and treads a path for other groups around Australia to follow.

The *Native Title Act 1993* (Cth) provides a clear right to compensation for 'extinguishment' of native title. Extinguishment is the loss of native title rights due to government acts acquiring country or granting it to another party. Australians' right to compensation 'on just terms' for government acquisition of property has existed in the Australian Constitution since 1901. However, the law currently only provides for compensation where the extinguishment occurred after 1975, since the passage of the *Racial Discrimination Act 1975* (Cth) made it illegal to treat any racial group less favourably than others.

Until the *Griffiths* decision, it was not clear how native title holders could calculate the amount of compensation to which they are entitled. Now, the High Court has expressed some important principles, which other native title holder groups can interpret for their own unique circumstances.

The first of the three elements of the Timber Creek claim is economic loss. The High Court, disappointingly, ruled that the *non-exclusive* native title in Timber Creek is only relative to 50% of the value of freehold (or privately owned) land. This approach provides an award of $320,250 for Timber Creek, measured according to land values at the time of the extinguishment. Previously, the trial judge, Mansfield J, awarded 80% of the freehold value, and the Full Federal Court on appeal awarded 65%. The High Court held that the absence of rights to exclude others from the country or decide how the land may be used were important limitations on the native title and its economic value. The decision does suggest, however, that exclusive native title elsewhere could be valued equally to freehold.

The second element is the interest on the economic loss, from the dates of the extinguishing acts to the date of the court award. The claim was for 'compound' interest, that is, the higher interest rate that can be earned on investments, but this was unsuccessful in all three courts, with the High Court confirming that 'simple' interest applied. Due to the 25 to 39 years since each extinguishing act, the rate of interest is a valuable component of the award, at $910,000. It is rare to receive compound interest in the courts generally, but there could be other native title cases where it is achievable.

The third element is cultural loss – the effect on the claim group's spiritual connection with the country. It is this aspect of the decision that captures the unique strength of Ngarliwurru and Nungali culture, and guarantees that Australian law recognises the pain and suffering caused by extinguishing native title over parts of country. Although the claim group and the NT and Commonwealth governments had agreed, early on, that the claim should include these three elements, it is a fact of litigation that each side raises their strongest arguments against the other.

In the High Court appeal, around forty native title holders listened in court as the governments' lawyers argued that the extinguishment was not the direct cause of their sense of cultural loss and pain, analysing each town block separately. The Northern Territory government argued that the cultural loss should only be worth 10% of the economic value of the parcels of land in the claim. However, in maintaining Justice Mansfield's award of $1.3 million, the High Court looked at country more holistically, and awarded slightly more for cultural loss ($1.23 million including interest) than for economic loss.

The High Court's measure for compensation for cultural loss is a '*social judgement… of what, in the Australian community, at this time… is appropriate, fair or just*'. This loss of '*spiritual connection*' goes far beyond the concept of '*loss of enjoyment of life'* from personal injury law, because, as the High Court recognised, Aboriginal spiritual connection is '*a defining element in a view of life and living*'. The court recognised that the loss of native title rights is different from any European concept of a loss of land, as it arises '*under traditional laws and customs which owe their origins and nature to a different belief system*'.

The decision confirms that '*the people, the ancestral sprits, the land and everything on it are organic parts of one indissoluble whole*'. The Court adopted Mansfield J's description of the claim group's spiritual connection to country as '*A single large painting – a single and coherent pattern of belief in relation to a far wider area of land*'. The Ngarliwurru and Nungali peoples still possess native title or land rights over most of their country beyond the town, and, along with other peoples throughout the region, keep their culture strong. However, the High Court recognised that the extinguishment over blocks of land in Timber Creek has '*punched holes*' in that painting, damaging the integrity of the cultural landscape.

Thanks to masterful explanations of country and culture by many senior knowledge holders, particularly Mr A. Griffiths and Mr J. Jones who sadly passed on before this final outcome, the *Griffiths* decision recognises the interconnectedness of everything on country, rejecting a technical block-by-block interpretation. Recognising the strength of the Ngarliwurru and Nungali peoples' culture reflects the strength of Indigenous cultures across Australia. The court also confirmed that the loss of native title is '*permanent and intergenerational*', and that the loss of native title '*had ongoing present day repercussions*'.

Lorraine Jones, who has been an Applicant on the claim since it began, paid respects to her father and the other old people whose senior knowledge and leadership drove these claims throughout the last twenty years. "I really deeply wish that they were still around to see this outcome," Lorraine told the ABC. "I wish they were here with us today to celebrate, the good news or the bad news." Chris Griffiths, whose father gave his name to the case, said that although the reduction in the economic valuation is disappointing, recognition of their spiritual connection was "what our old people wanted". "Our culture is still alive, our law is still in the land, our blood is still running in the country, our tears will fall on the land."

It is possible that other native title holders can achieve higher compensation amounts where they have exclusive native title, or where the area of extinguishment is a larger portion of their country and cultural landscape, or perhaps where the economic value or use of the land is greater than that in the small town of Timber Creek. This area of law has a long way to develop, and will adapt to the range of unique cultures and circumstances around Australia.

For reasons of time, cost and fair process, focus is already turning to compensation negotiations, and to establishing a system that can support native title holders to access compensation without spending twenty years in the courts. In the new era of treaty talk, *Griffiths* also contributes to national considerations of non-discrimination, dispossession, and sovereignty. Traditional owners who cannot access post-1975 native title compensation will certainly lead discussions on redress outside of the present native title system.

To inform these developments, all around Australia, governments, native title holders and other land users such as mining companies are studying the *Griffiths* decision. What they will find is binding legal recognition of the real economic value of native title, as well as the unique cultural value of country.

The NLC congratulates all native title holders of Timber Creek, past, present and future for their achievement in paving a way forward for others to follow. They can be proud that, together, they have won compensation on just terms for the current and future generations.

*Cath McLeish is a Senior Legal Advisor with the NLC (Victoria River District) and has assisted in this case since 2017.