

The decision in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 has created a slight headache for the Northern Territory and Commonwealth Government for their future infrastructure plans.

Not because the entitlement to compensation for the extinguishment and impairment of native title is something that no one was aware of. That is not the case. The right of native title claimants to compensation for extinguishment of native title has always existed in the *Native Title Act 1993* (Cth).

The reason is because it finally provides some clarity around the methodology of calculating compensation. This is the first time this has occurred. The award of AU\$3.3 million is some way off what was being sought by the native title holders – up to AU\$22 million – but it is still a not insubstantial sum of money.

The methodology adopted involves three limbs:

1. The first limb is the Economic Loss Calculation: this calculation is undertaken by making a valuation of the land subject to the extinguishing acts, at the time of the extinguishment, and applying a percentage factor, in this case 80%. This percentage factor is the court's assessment of the extent to which the extinguished or impaired native title rights equate to freehold title.
2. The second limb is the Interest Calculation: given that the Economic Loss compensation entitlement arose at the time of the extinguishment, the Court applied interest, on a simple interest basis.
3. The third limb is the Solatium Calculation: this is a valuation of the non-economic loss or intangible loss suffered by the native title holders as a result of the loss of connection to their land as a result of the extinguishment of their native title rights.

While a methodology has been set out for the calculation of compensation, there is still considerable variability in how the methodology is applied in each case. It is also uncertain whether the method will remain as adopted.

By media release on 14 September 2016, the Territory flagged that it will be filing an appeal to seek clarity in relation to the decision.

Given that there are considerable areas of variability, many of which relate to subjective elements, it is a possibility that any appeal will throw up a different interpretation and delay the achievement of certainty in this area.

What Are the Main Issues for Understanding the Possible Compensation Payable?

There are a number of issues that will be relevant and important to parties affected by a native title claim for compensation.

Calculating Economic Loss

The court determined that the correct date for calculating the value of the native title extinguished or impaired is the date of the extinguishing acts – when the acts were done which impaired or extinguished the native title rights. This would appear logical but practically there are issues with assessing the value of land at a point in time that could be decades ago.

Another implication of this calculation method is that the economic value of the land is assessed at what would most likely be its lowest point. The land, and therefore the compensation to native title holders, does not benefit from the compounding effect over time of increased economic value of the land caused by general development and wealth creation.

Furthermore, this economic value is not uplifted through the application of compounding interest, as the decision regarding the Interest Calculation was to apply simple interest to the Economic Loss Calculation.

It is essential that all interested parties have certainty of the method adopted for calculating the economic loss component and that any decision on appeal provides clarity on this element of compensation.

Calculating the Solatium

The Solatium Calculation looks at factors to determine the loss or diminution of traditional attachment to land arising from the extinguishment or impairment; however, there is no valuation principle applied. The valuation is an intuitive process. It will depend on an assessment of the particular spiritual significance of certain impacted areas, the nature and extent of the intangible loss and the extent of traditional country affected.

This calculation will be different for each native title claim group and has the potential to be the most variable element of the compensation equation due to the subjective nature of the calculation.

Applying the Interest Component

What is also unclear is why the Interest Calculation was only applied to the Economic Loss Calculation. The parties agreed that interest was payable “on the value of extinguished native title rights and interests to reflect the time between when the entitlement to compensation arose and the date of the judgment”. The parties also agreed that the assessment of the Solatium Calculation is a lump sum amount that “will fairly compensate the native title holders for the intangible disadvantages resulting from the extinguishment or impairment of native title”.

If the Solatium Calculation is properly to be considered as an amount of compensation, it is unclear why it was considered a different category of compensation which did not attract interest.

Who Bears the Risk?

While liability for compensation prima facie sits with the Crown, an ongoing and important consideration will be the extent to which commercial arrangements have or will deal with the financial responsibility for native title claimants.

It will be particularly important to ensure that the terms of any indemnity or other clauses dealing with the risks associated with the use of land – which caused the extinguishment of native title – are well understood by the parties and their implications are clear.

Due Diligence and Expert Advice are Essential

With these various considerations still unclear and subject to assessment on a case-by-case basis, it is important to ensure that any transactions are assessed by relevant experts with on the ground knowledge and experience in transactions in the Territory.

As the only global law firm with a presence on the ground in the Territory, we are able to provide clients with direct advice that takes account the actual requirements and circumstances as they are here. We can provide practical and effective guidance on the probable risks and assist to navigate through complex contractual requirements to ensure risks are understood and appropriately addressed.

Contacts



Fabio Fior

Partner, Darwin
T +61 8 9429 7537
E fabior.fior@squirepb.com



Margie Tannock

Partner, Perth
T +61 8 9429 7456
E margie.tannock@squirepb.com



Carla Mazibuko

Associate, Darwin
T +61 8 9429 7552
E carla.mazibuko@squirepb.com

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