

**CALCULATING CULTURAL LOSS AND  
COMPENSATION IN NATIVE TITLE:  
*NORTHERN TERRITORY V GRIFFITHS*  
(2019) 364 ALR 208**

Decision-making in native title decisions has been described as a ‘question of how much chaos a judge is willing to tolerate’.<sup>1</sup> This ‘chaos’ stems from the irreconcilable nature of applying Western concepts of land ownership to the metaphysical, non-economic relationship with land that sustains many Indigenous Australians. It is a difficult task for any court to consider the two together. This observation rings true when considering the High Court’s decision in *Northern Territory v Griffiths*,<sup>2</sup> regarding the ongoing question of the nature and amount of compensation payable for the loss and impairment of native title rights. When decided at first instance, Mansfield J’s award of compensation was the first such award to be judicially determined under the *Native Title Act 1993* (Cth) (‘the Act’). The High Court’s judgment on appeal is therefore the most authoritative statement to date as to how native title compensation is to be quantified.

Three elements to compensation were identified: economic loss, interest, and non-economic, or ‘cultural’ loss. How to determine an award for each was considered at length in the plurality judgment (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). In separate minority judgments, Gageler J and Edelman J agreed with the plurality as to the orders that should be made, but with divergent reasoning. The entire Court therefore agreed that the compensation should include an award for economic loss valued at 50% of the freehold value of the land, with simple interest applied, as well as an award of \$1.3 million for the cultural loss suffered by the Ngaliwurru and Nungali Peoples (the ‘Claim Group’).

The decision establishes a precedent for the use of a bifurcated approach to native title compensation, incorporating consideration of both economic and, for the first time, cultural loss. The introduction of this additional head of compensation reflects

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\* BA (Adel), LLB Candidate (Adel); Student Editor of the *Adelaide Law Review* (2019).

\*\* BA (Adel), Hons LLB Candidate (Adel); Student Editor of the *Adelaide Law Review* (2019).

<sup>1</sup> Kinglsey Palmer, ‘Societies, Communities and Native Title’ (2009) 4(1) *Land, Rights, Laws: Native Title Research Unit* 1, 2.

<sup>2</sup> (2019) 364 ALR 208 (‘*Griffiths*’).

the important and unique relationship between many Indigenous Australians and the land on which they have historically resided for up to 60,000 years.<sup>3</sup>

However, underpinning all three aspects of the *Griffiths* decision is the significant tension that has existed in native title law since *Mabo* was decided.<sup>4</sup> Despite rejecting terra nullius as a legal fiction, the High Court in 1992 validated Australian sovereignty as having been legally established through British colonisation. Some have said that this was done out of fear that to do otherwise would ‘fracture the Australian legal system’.<sup>5</sup> The two concepts of native title and Australian sovereignty were held to ‘co-exist’ through the Crown’s all-encompassing radical title, subject only to claims of un-extinguished native title.<sup>6</sup> However, the recognition of Indigenous connections to land that was accepted in *Mabo* requires validation through Western property law concepts such as ‘continuity’ and ‘exclusivity’ of occupation, effectively perpetuating the assumptions underlying terra nullius.<sup>7</sup> The High Court thus limited future native title determinations to the application of potentially inappropriate Western property law concepts to assess native title claims. Therefore, while the recent *Griffiths* judgment *ex facie* appears progressive, by deciding to remain within the boundaries of native title established by *Mabo*, it remains constrained from considering a more holistic and truthful valuation of the relationship between first Australians and their country — raising the question of whether the decision in *Griffiths* merely represents a more favourable, but ongoing, legal fiction.

## I BACKGROUND AND APPEAL HISTORY

### A *The Ngaliwurru and Nungali Peoples*

The Ngaliwurru and Nungali Peoples have lived in and around Timber Creek for ‘as long, probably, as Aboriginal people have occupied the continent’.<sup>8</sup> Timber Creek is a region of gorges and escarpments, rivers and creeks, red rocks and plains, styled centuries ago by volcanic activity and erosion.<sup>9</sup> The Dreaming of the Ngaliwurru and Nungali Peoples is present throughout the area; the *Wirip*, a dingo who travelled the

<sup>3</sup> Referendum Council, *Uluru Statement From the Heart* (26 May 2017) <<https://www.referendumcouncil.org.au/final-report.html#toc-anchor-ulurustatement-fromthe-heart>> (‘Uluru Statement’).

<sup>4</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo*’).

<sup>5</sup> Irene Watson, ‘Buried Alive’ (2002) 13(1) *Law and Critique* 253, 259.

<sup>6</sup> *Mabo* (n 4) 48–51.

<sup>7</sup> *Ibid* 51, 59–60. See Watson (n 5).

<sup>8</sup> Jacob Saulwick, ‘The High Court Has Listened to Aboriginals, so too Must Politicians’, *Sydney Morning Herald* (online, 16 March 2019) <<https://www.smh.com.au/national/the-high-court-has-listened-to-aboriginal-people-so-must-politicians-20190314-p514bg.html>>.

<sup>9</sup> *Ibid*.

Timber Creek area, remains under the rocks of a creek running through the valley.<sup>10</sup> The Peoples have hunted, fished and foraged in the region for years, using the land's natural resources for physical and spiritual sustenance.<sup>11</sup> They have an extensive system of rights and obligations to country, which pass through descent, and which require non-Indigenous persons to seek permission for entry.<sup>12</sup>

In 1825, the British Crown claimed sovereignty over the entire Northern Territory, but it was not until the mid-1800s that they explored Timber Creek. By the end of the 19<sup>th</sup> century, a number of pastoral leases were granted in the district. In 1975 the township of Timber Creek was proclaimed under the *Crown Lands Act 1931* (NT).<sup>13</sup> Between 1980 and 1996, the Northern Territory was responsible for 53 grants of tenure and public works which impaired or extinguished the Claim Group's native title,<sup>14</sup> and some of which threatened harm to Dreaming sites.<sup>15</sup>

### B *The Initial Decision and Appeals*

Following proceedings begun in 1999, the Claim Group were found to have eight non-exclusive native title rights and interests over a large area of land in Timber Creek.<sup>16</sup> In 2011, they made a claim for compensation under s 61(1) of the Act for the impairment of these rights.<sup>17</sup> The 53 compensable acts affecting the Claim Group's native title consisted of both grants of tenure and public works, such as the building of roads.<sup>18</sup> The native title rights and interests these acts affected included the right to move about the relevant area, the right to hunt, fish and forage, and the right to conduct cultural ceremonies, including burial rights, on the land.<sup>19</sup>

Having identified the specific native title rights that had been affected by the compensable acts, Mansfield J in the Federal Court initially awarded economic compensation of an amount worth 80% of the freehold value of the land.<sup>20</sup> His Honour then ruled that simple interest was payable on this amount, to be calculated from the time of extinguishment until the time of judgment.<sup>21</sup> Finally, his Honour awarded \$1.3 million in compensation for non-economic loss, an award that was described

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<sup>10</sup> *Griffiths* (n 2) 260–1. The importance of this ‘Dingo Dreaming’ to the Claim Group was emphasised in the reasons of Mansfield J at first instance, emphasis with which the plurality judgment agreed: see below (n 78).

<sup>11</sup> *Ibid* 214–15 [10].

<sup>12</sup> *Ibid* 258 [168].

<sup>13</sup> *Ibid* 213 [5].

<sup>14</sup> *Ibid* [6].

<sup>15</sup> *Ibid* 260 [178].

<sup>16</sup> *Ibid* 214 [7]; *Griffiths v Northern Territory* (2007) 165 FCR 391.

<sup>17</sup> *Griffiths* (n 2) 214 [8].

<sup>18</sup> *Ibid* 213 [6].

<sup>19</sup> *Ibid* 214–15 [10].

<sup>20</sup> *Ibid* 215 [12].

<sup>21</sup> *Ibid* 215 [12], 280 [269].

as a ‘solatium’.<sup>22</sup> On appeal to the Full Court of the Federal Court, the quantum of compensation for economic loss was reduced to 65% of the freehold value.<sup>23</sup> Specifically, the Full Court considered that the economic value of the native title rights and interests should be further discounted to reflect the fact that they were (nominally) inalienable, which would reduce their value to a hypothetical ‘willing but not anxious’ purchaser.<sup>24</sup>

The appeal to the High Court was made on various grounds by each of the parties. All parties accepted that the ‘bifurcated approach’ of economic and non-economic loss should be maintained.<sup>25</sup> The Claim Group submitted that the compensation for economic loss awarded should have been the full value of freehold title, without reduction,<sup>26</sup> and that compound interest should have been awarded.<sup>27</sup> Both the Northern Territory and the Commonwealth appealed on the basis that economic loss compensation should have been calculated as 50% of the freehold value,<sup>28</sup> and that the award of compensation for non-economic loss should have been reduced by the Full Court as it was ‘manifestly excessive’.<sup>29</sup> Given the extensive grounds of appeal, it was essentially open to the High Court to reconsider each element of the compensation award. Their Honours’ decision, and a critique thereof, is the focus of this case note.

## II DETERMINING ECONOMIC LOSS

The Act entitles claimants who hold native title rights and interests to compensation for any ‘loss, diminution, impairment or other effect’ of a compensable act affecting those rights and interests.<sup>30</sup> The relevant section provides that such compensation is to be on ‘just terms’.<sup>31</sup> This is supplemented by s 51A, which provides that the total compensation payable for an act extinguishing all native title is not to exceed the freehold value of the relevant land.<sup>32</sup> However, this section is subject to the s 53 requirement of ‘just terms’ — meaning that where the operation of s 51A would

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<sup>22</sup> A typical additional award of non-economic compensation in compulsory acquisitions: *ibid* 216 [12]; *Griffiths v Northern Territory (No 3)* 337 ALR 362, 417 [300].

<sup>23</sup> *Griffiths* (n 2) 216 [13].

<sup>24</sup> *Ibid* 227 [64]; *Northern Territory v Griffiths* (2017) 256 FCR 478, 520 [135]–[139].

<sup>25</sup> *Griffiths* (n 2) 233 [84].

<sup>26</sup> *Ibid* 216 [15].

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid* 216–17 [16]–[17].

<sup>29</sup> *Ibid*.

<sup>30</sup> *Native Title Act 1993* (Cth) s 51(1).

<sup>31</sup> *Ibid* ss 51(1), 53.

<sup>32</sup> *Ibid* s 51A.

result in the acquisition of property being other than on ‘just terms’, the Act works to prevent this occurring, to ensure the constitutional validity of the section.<sup>33</sup>

Based on this legislative framework, the High Court proceeded from the basis that the value of compensation is to be determined as a reduction of freehold value, based on the value of the specific native title rights and interests lost or impaired.<sup>34</sup> It was also an agreed fact in the proceedings that the compensation would be determined based on the date at which the native title was found to have been extinguished by the compensable acts.<sup>35</sup> The plurality considered that, while ‘exclusive’ native title rights could not be directly compared to freehold title, they similarly could be understood through the ‘bundle of rights’ conception.<sup>36</sup> The Claim Group argued that scaling compensation in this way was contrary to s 10(1) of the *Racial Discrimination Act 1975* (Cth).<sup>37</sup> The plurality rejected this argument on the basis that to equate exclusive native title rights with full freehold title was to treat ‘like as like’.<sup>38</sup>

The plurality found that the 80% and 65% awards of the trial and appeal judges were manifestly excessive, over-valuing the nature of the specific native title rights and interests the Claim Group held.<sup>39</sup> Crucially, their Honours noted that the native title that was held was essentially ‘usufructuary, ceremonial and non-exclusive’.<sup>40</sup> It did not include formal rights to admission, exclusion or commercial exploitation and thus, could not be worth more than 50% of the freehold value.<sup>41</sup> For applicants in future native title compensation matters, then, it can be assumed that economic compensation will be determined by the nature of the rights and interests they have lost, and how proximate they are to full, exclusive, native title rights.

The idea that compensation should be based on the freehold value of the land is controversial. Lavarch and Riding criticise the freehold approach as wrongly assuming that a market value can be determined for native title.<sup>42</sup> Indeed, the High Court’s unquestioned adoption of the equivalency between full freehold title and exclusive native title rights demonstrates the ongoing conflict within native title since *Mabo*. The plurality’s use of exclusivity of possession as a tool in determining compensation

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<sup>33</sup> Ibid s 53; *Griffiths* (n 2) 224 [49]. Section 53 of the *Native Title Act* ensures that any acquisition of land under the Act does not offend the ‘just terms’ principle found in s 51(xxxi) of the *Constitution*.

<sup>34</sup> *Griffiths* (n 2) 229 [70].

<sup>35</sup> Ibid 225 [56].

<sup>36</sup> Ibid 228–9 [68].

<sup>37</sup> Ibid 229–30 [71].

<sup>38</sup> Ibid 230 [74].

<sup>39</sup> Ibid 240 [106].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Michael Lavarch and Allison Riding, ‘A New Way of Compensating: Maintenance of Culture Through Agreement’ (Issues Paper No 21, Native Title Research Unit, April 1998) 4.

was justified as a ‘consistent’, and ‘conventional’ approach, one which avoided the adversarial use of valuation reports.<sup>43</sup> However, the use of this Western test of valuation ignores the different relationship that Indigenous peoples may have with land, one in which ‘exclusivity’ of occupation is less relevant:

There exists different ways of knowing what is law, for example Nunga [Aboriginal] relationships to ruwi [land] are more complex than owning and controlling a piece of property ... [under the law of the coloniser] the land becomes enslaved and a consumable which is traded or sold in and out of existence. We are the natural world; it is a mirror of our self, our Nunganness, so how can we sell our self ... We nurture ruwi as we do our self, for we are one.<sup>44</sup>

This results in lower assessments of value for persons such as the Claim Group, whose land use was found to be ‘usufructuary, ceremonial and non-exclusive’,<sup>45</sup> thus reducing the percentage of full freehold value they were entitled to. Claim groups are constrained from obtaining an appropriate assessment of economic value by the very system that purports to realise that value. In Irene Watson’s words:

Native title is extinguishment. Extinguishment is genocide.<sup>46</sup>

Others have taken the view that this inequity created through the freehold approach is to be remedied through the award of compensation for non-economic loss<sup>47</sup> — which may be more significant for Indigenous nations whose native title rights are in rural areas where land value is lower.<sup>48</sup> The plurality accepted that compensation for economic loss would be higher in ‘developed’ areas of Australia,<sup>49</sup> however they failed to note that in these more ‘developed’ areas, potential claim groups will likely be unable to prove exclusivity of possession. The plurality judgment can be problematised as Eurocentric, forcing Western economic concepts onto native title rights and interests that cannot properly be understood in this way.<sup>50</sup>

The plurality found that such criticism was ‘misplaced’ because the value of extinguished native title rights and interests must be determined through an ‘objective’

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<sup>43</sup> *Griffiths* (n 2) 236 [92].

<sup>44</sup> Watson (n 5) 256.

<sup>45</sup> *Griffiths* (n 2) 240 [106].

<sup>46</sup> Watson (n 5) 256.

<sup>47</sup> Paul Burke, ‘How Can Judges Calculate Native Title Compensation?’ (Discussion Paper, Native Title Research Unit, 2002) 4.

<sup>48</sup> *Ibid* 1; Wanjie Song, ‘What’s Next for Native Title Compensation: The De Rose Decision and the Assessment of Native Title Rights and Interest’ (2014) 8(10) *Indigenous Law Bulletin* 11, 12; *Griffiths* (n 2) 238 [98].

<sup>49</sup> *Griffiths* (n 2) 236–7 [95].

<sup>50</sup> See, eg, Watson’s criticisms of native title as a furthering of the colonial project: Watson (n 5).

inquiry.<sup>51</sup> However the concept of ‘objectivity’ is inherently a matter of context: ‘for the people in the Tanami region in the western Northern Territory, “Canberra is a very remote place indeed”’.<sup>52</sup> By using the *Spencer* test of the ‘willing but not anxious’ purchaser and vendor,<sup>53</sup> the Court applied a concept removed from a conception of property law that cannot necessarily be imported into Indigenous understandings of land.

The plurality judgment acknowledged that a market for native title rights and interests cannot actually exist,<sup>54</sup> conceding that there was a ‘degree of artificiality’<sup>55</sup> in determining economic loss through the lens of the *Spencer* test. This view was not shared by Gageler J in his Honour’s minority opinion, who felt that the value of the native title rights could accurately be determined in this way.<sup>56</sup> Based on this, his Honour agreed that the proper value of the native title rights and interests lost was 50% of the freehold value.<sup>57</sup> Given s 51A of the Act directly pins the economic value of native title to its freehold, the approach of all Justices of the Court is not surprising. It therefore falls to the question of non-economic loss to ensure compensation is actually awarded on just terms.

### III THE MATTER OF INTEREST

Because compensation for economic loss was valued at the date of extinguishment, the Claim Group sought an award of interest on top of this amount. They argued that the ‘just terms’ requirement allows for the importation of equitable concepts into how such an award should be calculated, and that it was ‘inequitable for the Northern Territory’ to profit from the compensable acts.<sup>58</sup> This formed the basis of their claim for compound interest, both at first instance and on appeal. However, this argument was rejected for a number of reasons. The Court instead agreed with an award of simple interest.

The plurality noted that, by virtue of the Act’s retrospective validation of extinguishing acts, the Northern Territory’s profits from the land could not be said to have been obtained by fraud or any similar equitable basis for compound interest.<sup>59</sup> They also found that it was unlikely the Claim Group would have invested the money had they

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<sup>51</sup> *Griffiths* (n 2) 237 [96].

<sup>52</sup> Michael Dodson, ‘Indigenous Culture and Native Title’ (1996) 21(1) *Alternative Law Journal* 2, 5.

<sup>53</sup> *Griffiths* (n 2) 234 [85]. See generally, *Spencer v The Commonwealth* (1907) 5 CLR 418.

<sup>54</sup> *Griffiths* (n 2) 234 [85].

<sup>55</sup> *Ibid* 234 [85].

<sup>56</sup> *Ibid* 275 [246].

<sup>57</sup> *Ibid* 276 [250].

<sup>58</sup> *Ibid* 241 [112].

<sup>59</sup> *Ibid* 248 [132].

been compensated at the time of extinguishment — which would also have been grounds for an award of compound interest.<sup>60</sup> The latter point is once again representative of the issues facing applicants in translating their Indigenous practices into the Western economic system. Following the initial decision of Mansfield J in the Federal Court, it was noted that the Claim Group were ‘significantly disadvantaged ... for their commitment to cultural traditions of sharing native title’ rather than demonstrating a ‘more European’ willingness to invest their compensation.<sup>61</sup> This is yet another example of detriment being caused to the Claim Group through the courts’ attempt to translate foreign legal concepts into native title law.

It was explained that the purpose of compensation was to ‘put the Claim Group, so far as money can do, in the position in which they would have been if the native title had not been extinguished’.<sup>62</sup> This did not allow an award for restitution of any profit or benefit accrued by the Northern Territory in extinguishing and impairing native title.<sup>63</sup> It also assumes that monetary compensation can go at least some way towards addressing the losses suffered by the Claim Group. However, for applicant groups, what may actually be desired is an ability to continue important cultural practices, maintain a relationship with country, and promote cultural education and language revival.<sup>64</sup> Once again, the tensions that arise from attempting to translate native title rights and interests into the existing Western legal system are apparent.

#### IV VALUING CULTURAL LOSS

The decision then turned to the issue of compensation for non-economic loss. Until the High Court decision in *Griffiths*, this component had been described as a ‘solatium’.<sup>65</sup> Indeed, such an award had long been considered a potential means for compensation to more accurately reflect the significant non-economic loss suffered by native title holders.<sup>66</sup> However, difficulties have been noted with this approach given the likelihood (as occurred in *Griffiths*) that non-economic loss compensation would exceed that awarded for economic loss.<sup>67</sup> The plurality held that a more appropriate term was ‘cultural loss’;<sup>68</sup> as to consider the case in the terms of compulsory

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<sup>60</sup> Ibid 248–9 [133].

<sup>61</sup> Fiona Martin, ‘Compensation for Extinguishment of Native Title: *Griffiths v Northern Territory* Represents a Major Step Forward for Native Title Holders’ (2016) 8(27) *Indigenous Law Bulletin* 8, 10.

<sup>62</sup> *Griffiths* (n 2) 249–50 [136].

<sup>63</sup> Ibid.

<sup>64</sup> Tracy Nau, ‘Looking Abroad: Models of Just Compensation Under the *Native Title Act*’ [2009] 93 *Reform Native Title* 55, 56, Lavarch and Riding (n 43) 7.

<sup>65</sup> Ibid 280 [269] (Edelman J).

<sup>66</sup> Lavarch and Riding (n 42) 4; Burke (n 47) 6.

<sup>67</sup> Burke (n 47) 8.

<sup>68</sup> *Griffiths* (n 2) 224–5 [52]–[54].



acquisitions would ‘deflect attention’ from the fact that native title rights and interests arise under a ‘different belief system’.<sup>69</sup>

The High Court proceeded on three agreed bases for this award in the appeal: that such an award was appropriate, and should be awarded *in globo*, with the distribution of the award to be decided by the group;<sup>70</sup> that it would consider the Claim Group as a whole because of the complex inter-relationships between group members, rather than being based on the number of native title holders who existed at the time of extinguishment;<sup>71</sup> and that it was to be based on the specific laws and customs observed by the Claim Group.<sup>72</sup>

In reaching a figure of \$1.3 million, the trial judge had first considered the nature and extent of the Claim Group’s relationship with the land, their relevant laws and customs, and the effect of the compensable acts on this connection.<sup>73</sup> His Honour chose not to approach the question of cultural loss through a ‘lot by lot’ approach, because ‘the consequences were necessarily incremental and cumulative’.<sup>74</sup> Four key examples were provided of events that caused significant cultural loss to the Claim Group, including the building of a causeway across the Timber Creek which was said to ‘cut the life out of the Dreaming’.<sup>75</sup> While these acts were non-compensable, they were used as a demonstration of the significant losses the Claim Group had already suffered.<sup>76</sup> The harm to significant sites, the dispossession of the Claim Group’s land, their ongoing emotional pain, restricted access to hunting grounds, and impeded ability to practise traditions and customs, culminated in not only damage to their ability to fulfil their duties to country, but a strong sense of failure to do so.<sup>77</sup>

Justice Mansfield then went on to detail ‘three particular considerations’ he considered significant in determining the award of compensation. First, there had been construction on the path of the Dingo Dreaming, which had caused significant distress.<sup>78</sup> Second, the acts affected the Claim Group’s enjoyment of their rights across a number of related areas, not just the specific location of the acts.<sup>79</sup> Third, each act (including non-compensable acts) was said to have ‘chipped away’ at the area, causing lower enjoyment of the Claim Group’s native title rights as a whole.<sup>80</sup>

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<sup>69</sup> Ibid 225 [53].

<sup>70</sup> Ibid 255 [156].

<sup>71</sup> Ibid 255–6 [157].

<sup>72</sup> Ibid 256 [158].

<sup>73</sup> Ibid 256 [159].

<sup>74</sup> Ibid 257 [165].

<sup>75</sup> Ibid 261 [180].

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 264–5 [194], 266 [200]–[202].

<sup>78</sup> Ibid 266 [200].

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

He then went on to consider that, given that these specific considerations had been experienced by the Claim Group for some time, the award should be made for an assessment of loss likely to be felt into the future.<sup>81</sup> The plurality of the High Court agreed that it was appropriate to consider the ‘overall picture’ of loss suffered by the Claim Group.<sup>82</sup> The plurality explained this method at length:

Each act affected native title rights and interests with respect to a particular piece of land. But each act was also to be understood by reference to the whole of the area ... each act put a hole in what could be likened to a single large painting — a single and coherent pattern of belief in relation to a far wider area of land. It was as if a series of holes was punched in separate parts of the one painting. The damage done was not to be measured by reference to the hole, or any one hole, but by reference to the entire work.<sup>83</sup>

The plurality agreed that loss should be measured into the future, because the cultural loss would be ‘permanent and intergenerational’.<sup>84</sup> They also rejected the argument that the figure of \$1.3 million was manifestly excessive, suggesting that it was within what the Australian community would deem as acceptable.<sup>85</sup> Indeed, in his Honour’s separate judgment, Edelman J considered the figure to be conservative, given the significant value of the native title rights and interests to the Claim Group.<sup>86</sup>

It is clear from this reasoning that cultural loss is likely to make up the bulk of any award of compensation for loss of native title. Given the difficulties in determining the economic value of non-exclusive native title rights and interests, this is significant, and potentially lucrative, for future applicants. However, considering economic and cultural loss separately is likely to remain contentious. Throughout the course of the matter, it was made plain that for the Claim Group the ‘ancestral spirits, the people, the country, and everything that exists on it are ... viewed as one indissoluble whole’.<sup>87</sup> Yet Mansfield J’s consideration of the spiritual importance of the rights as adding to their economic value was considered by the plurality judges to be erroneous.<sup>88</sup>

All the Justices of the High Court were keenly aware of the significance of the cultural losses that have been, and continue to be, suffered by the Claim Group, and this element of the judgment is significant. However, the fact that cultural and

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<sup>81</sup> Ibid 268 [207].

<sup>82</sup> Ibid 271 [226].

<sup>83</sup> Ibid 270 [219].

<sup>84</sup> Ibid 272 [230].

<sup>85</sup> Ibid 273–4 [237].

<sup>86</sup> Ibid 294 [328].

<sup>87</sup> Ibid 265–6 [198].

<sup>88</sup> Leonie Flynn, ‘Landmark Timber Creek Native Title Compensation Case’ (2017) 36(2) *Australian Resources and Energy Law Journal* 1, 2; *Northern Territory v Griffiths* (n 24) 514 [111].

economic losses were treated separately at all stages of the matter is representative of the difficulty in apportioning compensation for the extinguishment of native title using legal concepts drawn from a system that, for so long, failed to even recognise the existence of such rights.

## V CONCLUSION

The High Court's decision in *Griffiths* is the clearest guide to date as to how native title compensation claims should be assessed. The Court confirmed that economic and non-economic losses are to be assessed separately. Economic loss is to be assessed 'objectively', requiring the native title rights and interests of the applicants to be a proportion of the value of the land's freehold title, relative to the group's exclusivity of occupation. In *Griffiths*, this was to the detriment of the Claim Group, whose native title rights were considered to be worth at most 50% of freehold value. The Court then confirmed that interest is payable on top of this award, to be restricted to simple interest unless it can be shown there are special circumstances mandating a payment of compound interest. These findings demonstrate the tensions that occur in translating Indigenous legal systems into Western property law concepts. It is these same tensions with which courts making native title determinations have had to grapple since the decision in *Mabo*. While in *Griffiths* the plurality judgment at least seemed aware of the issues caused by applying concepts such as the *Spencer* test in this context, they still maintained this as the correct approach. This was inevitably to the detriment of the Claim Group.

For the Claim Group, it was the award for cultural loss that provided the bulk of their compensation. The separate award of compensation for cultural loss appears to be the preferred solution to the difficulties posed by giving native title rights and interests an 'objective' economic value. Yet assessing the nature and extent of cultural loss is an unenviable task, and the Court did not touch on the question of whether monetary compensation is even appropriate for a loss of this kind. Looking to the future, it will be interesting to see whether courts continue to follow the bifurcated approach, and with it, apply ill-fitting and culturally inappropriate methods of ascertaining economic loss. If this is the case, their ability to attach a monetary sum to something as intangible as cultural loss in future compensation claims will continue to be of vital importance.