

COMPENSATION FACT SHEET

The High Court's recent judgment¹ in the Timber Creek native title compensation case looked at some of the legal issues regarding native title compensation where native title rights and interests have been extinguished or affected. Significantly, the Court explained how the value of compensation under the *Native Title Act 1993* (NTA) should be calculated.

The High Court explained that you need to consider the economic value of the land where native title rights have been extinguished or affected, and the cultural loss suffered by native title holders as a result of the extinguishment or interference with native title rights.

COMPENSATION FOR THE ECONOMIC VALUE OF THE NATIVE TITLE RIGHTS AFFECTED

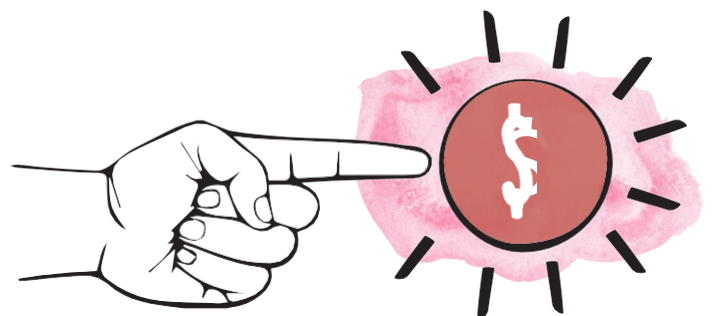
The High Court said that one part of the compensation is calculated by working out the economic value of the land on which native title has been extinguished or affected.

- The Court said that the starting point is that exclusive native title rights are comparable to the full freehold value of the land.
- In the Timber Creek case where the native title rights were non-exclusive the High Court said that based on the evidence about those native title rights, the claimants were entitled to compensation at 50 per cent of the freehold value of the land.
- The Claim Group was also entitled to be paid interest on the economic value they should have received at the date the native title rights were extinguished. The Court said that depending on the evidence, interest could be calculated on a simple interest basis (as was appropriate in this case) or on a compound interest basis.

COMPENSATION FOR CULTURAL LOSS

The High Court said that the other significant part of compensation under the NTA is compensation made on just terms for the cultural loss suffered by the claimants.

- This requires a Court to recognise the spiritual relationship claimants have with their country and the spiritual hurt caused to them when their native title rights and interests are extinguished or affected.
- The High Court said that the compensation provided to a Claim Group for the cultural loss they have suffered should be an amount that society would regard as appropriate, fair and just to compensate for the effect on their native title rights and interests.



¹ *Griffiths v Northern Territory* [2019] HCA 7

SOME ISSUES TO CONSIDER WHEN PREPARING A COMPENSATION CLAIM

There are many important issues to consider when preparing, and before lodging, a native title compensation claim. Some of these include:

- Can you prove that members of the Claim Group had native title rights in the relevant areas at the time native title would have been extinguished or affected?
- If the Federal Court has already made a determination that native title exists over adjacent areas this may provide a basis for reaching agreement with governments that members of the Claim Group had native title rights and interests in the areas where native title has been extinguished or affected.
- If there has not been a determination of native title you need to consider if you have good prospects of achieving a favourable determination that members of the Claim Group held native title in these areas at the time native title was extinguished or affected.
- Compensation is generally only payable under the NTA if native title rights were extinguished or affected after October 1975 when the Racial Discrimination Act commenced. Have you undertaken comprehensive historical tenure searches and expert analysis to confirm that native title was extinguished or affected after this time, and not before?
- Who should make the compensation claim and how will any compensation be dealt with? In most situations, a Claim Group will need to authorise and make a compensation claim and make decisions about related matters. There will also be circumstances where a PBC may be able to bring a claim for compensation over some areas of land within a determination area.
- Are suitable experts available to assess the economic value of the land where native title has been extinguished or affected?
- Are suitable legal, anthropological and other experts available to assist in preparing expert reports and other evidence required to show the extent of cultural loss that has been suffered?
- Have members of the claim group already entered into agreements to receive benefits or compensation for activities that affected or extinguished native title in the area, and would any of these agreements prevent a claim or reduce the amount of compensation payable?

CONSIDER ALTERNATIVE OPTIONS TO MAKING A COMPENSATION CLAIM IN THE FEDERAL COURT

It is apparent that preparing and successfully running a compensation claim in the Federal Court will take several years and require significant resources.

It is also likely that future compensation claims will raise legal issues that have not yet been decided by the High Court. Some of these issues will be appealed to the Full Federal Court, and possibly to the High Court, and this will add significantly to the cost and time required to resolve compensation claims.

For these reasons, and to ensure that most resources are used to compensate native title holders rather than pay for lengthy and costly court proceedings, it may be worth exploring other processes to resolve native title compensation matters. One option would be to consider negotiating comprehensive regional settlements with Commonwealth, State and Territory governments, as these settlements could:

- provide for the payment of compensation for government actions that have already extinguished or affected native title within a region.
- set up a process for compensation to be paid for future acts in the region.
- provide sufficient resources for PBCs so they can carry out their responsibilities and activities on behalf of native title holders.

For legal advice and more information about compensation applications and the implications of the High Court decision contact your Native Title Representative Body or Service Provider.



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The National Native Title Council (NNTC) is the peak body for the native title sector made up of regional Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs), and local Prescribed Bodies Corporate (PBCs) and Traditional Owner Corporations (TOCs). Our mission is to maximise the contribution of native title to achieving and improving the economic, social and cultural participation of indigenous people.