

# UNDERSTANDING THE CALCULATION OF NATIVE TITLE COMPENSATION IN TIMBER CREEK

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Legal Briefings – By **William Oxby** and **Alice Hoban**

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## IN BRIEF

- The Federal Court of Australia has provided a framework for the calculation of compensation for the extinguishment or impairment of native title rights and interests. This is the first judgment to do so in the 22 year history of the *Native Title Act 1993* (Cth) (**Native Title Act**).
- The amount of compensation awarded was referable to the freehold value, calculated at the date of the relevant extinguishing or impairing act. Awards were also made for interest and non-economic loss.

## THE TIMBER CREEK DECISION

On 24 August 2016 the Federal Court of Australia handed down the first assessment of compensation for the extinguishment or impairment of native title rights and interests in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (**Timber Creek**).

The Court ordered the payment of approximately \$3.3 million to the native title holders, the Ngaliwurru and Nungali Peoples. \$512,000 was awarded for economic loss, \$1.488m in interest and \$1.3m for solatium, or non-economic loss. The compensation is payable in relation to land in and around Timber Creek, Northern Territory. The lots vary in size and include 1000sqm and 2 hectare lots.

This is an evolving area of law and Timber Creek is unlikely to be the final word on how to calculate native title compensation. Timber Creek may be appealed.

## STATUTORY FRAMEWORK

The Native Title Act provides a framework for the determination of native title and compensation for extinguishment or impairment of native title rights and interests.

While native title compensation is a well-known and established principle, until now there has been no case law on how to calculate native title compensation.

## WHAT IS NATIVE TITLE COMPENSATION PAYABLE FOR?

Under the Native Title Act, compensation is payable to native title holders where native title is extinguished or impaired. The most common acts that crystallise a native title compensation liability are the grant or renewal of tenures over Crown land where native title exists. Such acts can include the grant of freehold title, Crown leases and mining and petroleum tenure.

## HOW DO YOU CALCULATE NATIVE TITLE COMPENSATION?

The judgement makes it clear that the quantum of compensation payable will be determined on the evidence. This cautions against generalities and taking a 'one size fits all' approach.

With those qualifications in mind, the following table summarises the Timber Creek outcome:

	<b>Land where exclusive native title existed</b>	<b>Land where non-exclusive native title existed</b>
<b>Native title wholly extinguished</b> (e.g. previous exclusive possession acts)  OR <b>Native title suppressed</b> (e.g. category D past acts, non extinguishment principle)	100% of freehold value as at the date of the act that extinguishes native title rights and interests Plus: <ul style="list-style-type: none"><li>• interest (simple but may on evidence be compound); and</li><li>• solatium, or non-economic loss</li></ul>	80% of freehold value as at the date of the act that extinguishes native title rights and interests Plus: <ul style="list-style-type: none"><li>• interest (simple but may on evidence be compound); and</li><li>• solatium, or non-economic loss</li></ul>

Other key findings include:

- the date for the assessment of compensation is the date of the 'act' that extinguishes or impairs native title rights and interests;
- that on the facts, simple interest, not compound interest was appropriate (compound is possible);
- a component of solatium (non-economic loss) was awarded for loss of cultural and spiritual relationship with the land affected. No specific formula was developed for calculating this component; and
- that a finding of invalidity of tenure may be made in a compensation determination and compensation awarded at general law.

## **IMPLICATIONS**

The existence of native title compensation liabilities is not new. A decision of this kind has been expected since the commencement of the Native Title Act (22 years ago).

Native title compensation claims are rare. This is because they require a determination of the existence of native title.

Primary responsibility for the payment of native title compensation typically rests with the Commonwealth, State or Territory. However, the liability can be and is regularly passed on to proponents by law or by contract.

Until now many proponents have had to grapple with the concept of a potential native title compensation liability but have had no methodology to calculate it. This decision provides a methodology.

## **WHAT SHOULD YOU DO?**

Timber Creek provides some simple principles that could be applied to test the expected quantum of a native title compensation liability. This is subject to our cautionary note of taking a 'one size fits all' approach.

1. *Be mindful.* Be mindful that Timber Creek may be appealed. It is also the first decision in what will be an evolving area of law.
2. *Status quo.* The decision is unlikely to change whether or not proponents have a native title compensation liability. The crystallisation of such a liability will be site and tenure specific and will likely turn on issues such as any pass through or indemnity arrangements with the Crown.
3. *Guide to quantum.* If you have formed the view that you may have a native title compensation liability, Timber Creek provides guidance on how a Court might approach the calculation of what that liability may be.
4. *Future, organisational behaviour change.* In future dealings in relation to native title land (if not done already) proponents should have a renewed focus on understanding:
  - a. if a native title compensation liability may crystallise;
  - b. if there is a native title compensation liability, how much it may be;
  - c. who has to pay the native title compensation (and when); and

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