

**Blackburn’s “error”: The *Ngaliwurru Nungali (Timber Creek) Case*
and the future of compensation in native title.**

Tammy Wong

“I must inevitably therefore come to the conclusion that the doctrine [of communal native title] does not form, and never has formed, part of the law of any part of Australia” – Blackburn J¹

“...the conclusion is inevitable that... in 1788, there existed, under the traditional law or customs of the Aboriginal peoples in the kaleidoscope of relevant local areas, widespread special entitlements to the use and occupation of defined lands of a kind which founded a presumptive common law native title” – Mason C.J, Brennan, Deane, Toohey, Gaudron and McHugh JJ²

“...[W]here native title rights and interests are extinguished, compensation on just terms is to be provided.” – Kiefel CJ, Bell, Keane, Nettle and Gordon JJ³

Introduction

In 1963, the Yolngu peoples of North East Arnhem Land presented the famous bark petitions to the Commonwealth Parliament.

These petitions protested the Commonwealth’s apparent intention to grant mineral leases over certain land upon which the Yolngu peoples resided to Nabalco Pty Ltd (“Nabalco”) for the purposes of bauxite mining. Notwithstanding these, in 1968 the Commonwealth granted a special mineral lease to Nabalco over that land for a period of 42 years.

In 1971, the Yolngu peoples sought to challenge the validity of that special mineral lease and the lawfulness of Nabalco’s subsequent activities in the first native title case ever to be heard in an Australian court: *Milirrpum v Nabalco*.

In *Milirrpum*, Justice Blackburn rejected the Yolgnu people’s claims and ruled that the doctrine of communal native title “does not form, and never has formed, part of the law of any part of Australia”.

In 1992, the High Court overturned Justice Blackburn’s reasoning in *Mabo No. 2*.

Now, almost 50 years on from *Milirrpum*, the legal value of native title has finally been quantified in the *Ngaliwurru Nungali (Timber Creek) Case*.

This paper gives a brief overview of native title law followed by an analysis of the principles set out in *Ngaliwurru Nungali* for the assessment for compensation where native title rights and interests have been extinguished.

¹ *Milirrpum and Others v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141 at 245 (“*Milirrpum*”).

² *Mabo and Others v The State of Queensland (No. 2)* (1992) 175 CLR 1 at 100 (“*Mabo No. 2*”).

³ *Northern Territory v Mr A Griffiths (decd) and Lorraine Jones obh of Ngaliwurru and Nungali Peoples* (2019) 364 ALR 208; [2019] HCA 7 (“*Ngaliwurru Nungali*”).

Milirrpum to Mabo (No. 2) – Terra Nullius

In *Milirrpum*, the plaintiffs' central contentions were that⁴:

1. Their rights to the land under native law or custom existed prior to colonisation in 1788.
2. Those rights were intelligible and capable of recognition by the common law
3. Those rights were proprietary rights and included rights of the native people to use and enjoy the land, in the manner which their own law or custom entitled them to do
4. Those rights survived the Crown's act of acquisition of land and had to be respected by the Crown unless and until they were validly terminated either by consent or perhaps explicit legislation.
5. By reason of points 1 to 4, the Commonwealth and Nabalco had unlawfully infringed upon the plaintiffs' proprietary rights as native people of Australia.

Having received extensive evidence from several Yolngu witnesses, Blackburn J found:

“The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provide a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men” it is that shown in the evidence before me.⁵”

Despite this finding, his Honour denied the claim because while he accepted that the Yolngu peoples had a system of law that conferred rights to them within that system, he did not find that those rights were capable of recognition by the common law.

His Honour considered himself bound by authority such as *Cooper v Stuart*⁶ which stood for the proposition that Australia came into the category of a settled or occupied colony as opposed to a conquered or ceded colony. This is significant because, as at 1788, the English legal position on the status and survival of local laws and rights in the context of Crown acquisitions was already well established.

A conquered or ceded colony was a territory in which there were original inhabitants living pursuant to a local system of law that was recognisable by the English common law. In those cases, the law of the original inhabitants was permitted to remain in force until altered by the Crown. By contrast settled or occupied colonies referred to land that was “desert and uncultivated” and in which, even if native peoples were present, there was no system of law that was recognisable by the common law. As a result, the Crown took absolute title of all such lands and English law became applicable in those colonies immediately upon their foundation.

The plaintiffs pleaded their argument in the former and argued that their native title proprietary rights and customs persisted notwithstanding the act of colonisation. His Honour rejected the plaintiffs contention that their native title rights were proprietary in nature because “there is so little resemblance”⁷ between property as understood in Australian law and that presented by the plaintiffs. Amongst other things, his Honour found that the plaintiffs did not have a right

⁴ *Milirrpum* at 149 – 150.

⁵ *Milirrpum* at 267 -268.

⁶ (1889) 14 App Cas 286.

⁷ *Milirrpum* at 273.

exclude others from land or to alienate their native title rights and interests – both of which he considered to be a central to the substance of any proprietary interest.

His Honour also did not consider that the Yolngu claimants shared the exact same links to the same areas of land as their ancestors at the time of colonisation in 1788 because the evidence of the Yolngu witnesses showed that it was possible for clans to become extinct and their lands to be subsumed or cared for by other clans.

In *Mabo No. 2*, amongst other things, the High Court overruled the existing theories and authorities that Blackburn J had relied upon in *Milirrpum* on the basis that such theories “depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs...[were] false in fact and unacceptable in our society”⁸. The High Court expressly discarded the distinction between inhabited colonies that were *terra nullius* and those that were not.

The High Court found that the common law was capable of keeping in step with international law which had progressed to a point where the notion of *terra nullius* no longer commanded general support⁹. That being the case, the doctrines of the common law which depended upon *terra nullius* could “hardly be retained”¹⁰ because they were founded on unjust discrimination in the enjoyment of civil and political rights.

The High Court also found that the common law recognition of native title rights and interests was compatible with the recognition of radical title to the Crown and no inconsistency arose from the simultaneous recognition of both forms of proprietary right¹¹.

This meant that the considerations that occupied Blackburn J’s reasoning as to the law of settled or occupied colonies and the ramifications flowing therefrom no longer fell to be considered in the contemporary law of native title.

Further, the High Court held that native title will be recognised by the common law where a traditional connection with the land has been substantially maintained by the claimants and where the acts of the Crown have not extinguished native title:

*“Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.”*¹²

⁸ *Mabo No.2* at 40.

⁹ *Mabo No.2* at 41.

¹⁰ *Mabo No.2* at 41.

¹¹ *Mabo No.2* at 43.

¹² Per Brennan J in *Mabo No. 2* at 59–60.

Coupled with the High Court decision in *Mabo No. 1*¹³, the effect of these decisions was to:

- Recognise that native title rights and interests were proprietary rights
- Recognise that Aboriginal people were entitled to enjoy their proprietary rights free from discrimination pursuant to s.10 of the *Racial Discrimination Act 1975* (Cth) (“RDA”)
- Recognise that state or territory laws which purported to remove or impinge upon native title rights and interests were invalid to the extent that they contravened the RDA by reason of the operation of s.109 of the Constitution of Australia.

It should be noted, however, that the majority in *Mabo No. 2* did not find that compensation was owed to native title holders whose rights had been extinguished or otherwise impinged upon.

Native Title Act 1993 (Cth)

Against the backdrop of *Mabo No. 2*, the *Native Title Act 1993* (“Act”) was enacted with a commencement date of 1 January 1994 with significant amendments added in 1998.

The interlocking provisions of the Act are complex but may be understood generally as creating a statutory regime that:

- provides a process by which native rights may be recognised
- provides the ways in which native title may be extinguished
- provides for the validation of “past acts” occurring between 1975 and 1994 and “intermediate acts” occurring between 1994 and 1996 which may be invalid because of the existence of native title
- provides for compensation where native title has been extinguished
- provides for a future regime for the protection of native title rights.

The provision for the validation of past acts is a crucial element of the legislation because the enactment of the RDA in 1975 had the potential effect of invalidating several pieces of state and territory legislation that sought to deal with lands between 1975 and 1992 when the decision in *Mabo No. 2* was handed down and such lands were recognised as being burdened by native title. Thus by the operation of the Act, state and territory parliaments were able to

¹³ This case was a demurrer that was determined in advance of the substantive case in *Mabo No. 2*. It arose because midway through the proceedings, the Queensland Government enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld) (“Queensland Act”) “for the purpose of removing any doubt that may exist as to the application to the islands of certain legislation”. Section 3 of the Queensland Act declared that, upon annexation, the land which was subject of the substantive claim were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever whereas s.5 declared that no compensation was payable in respect of any right that existed prior to annexation. The intent of the Queensland Parliament in enacting this legislation was to extinguish native title upon annexation and so amend its defence to defeat the claim brought by the claimants. The claimants submitted that the Act did not extinguish native title because of the operation of ss. 9 and 10 of the *Racial Discrimination Act 1975* (Cth) (“RDA”) which identified the right to own property and the right to inherit as rights protected from discrimination on the basis of race under the International Convention on the Elimination of All Forms of Racial Discrimination. The claimants were successful and the High Court held that if native title was found in the Mer Islands, such native title was a “right to own property” protected by the RDA and therefore the Queensland Act was inoperative by reason of s.109 of the Commonwealth Constitution.

pass legislation that retrospectively validated past acts from 1975 onwards that would have been invalid because they were carried out in contravention of s.10 of the RDA.

The validation regime prescribes four categories of ‘past acts’ and provides for the legal effect of validation of past acts in each category. Depending on the category of past act, the effect upon native title may be complete extinguishment, partial extinguishment or non-extinguishment (but may result in the prolonged suspension of native title right). This is significant because s.51 of the Act provides that there is an “entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests”. It was this entitlement that the *Ngaliwurru Nungali* case concerned.

Selected Cases

Since the commencement of the Act on 1 January 1994, the content of native title and the ways by which it may be extinguished has become clearer as a result of litigation. In particular, it has become generally accepted that “native title” takes its meaning from the Act rather than from the common law.

Some of the key principles established in various litigation include:

1. Native title may only be extinguished where the legislation evinces a clear and plain intention to do so.¹⁴
2. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.¹⁵
3. Native title rights can exist in relation to the sea and seabed but such rights are non-exclusive in nature.¹⁶
4. The underlying existence of the traditional laws and customs is a necessary prerequisite for native title but their existence is not a sufficient basis for recognising native title.¹⁷
5. Native title comprises a bundle of rights which are themselves referred to as native title rights and interests. Each right in this bundle can be subject to extinguishment and should be considered separately and independently to other rights.¹⁸
6. Native title rights and interests must derive from laws and customs acknowledged and observed and possessed by a society under a normative system of law. If the laws and customs and society existed at the time sovereignty was acquired and substantially the same laws and customs have been continuously acknowledged and observed by the society, the rights and interests will be recognised and protected.¹⁹

¹⁴ *Yanner v Eaton* (1999) 201 CLR 351.

¹⁵ *Fejo v Northern Territory* (1998) 195 CLR 96.

¹⁶ *Commonwealth v Yarmirr* (2001) 208 CLR 1.

¹⁷ *Fejo v Northern Territory* (1998) 195 CLR 96.

¹⁸ *Western Australia v Ward* (2002) 213 CLR 1.

¹⁹ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

Most native title cases have been concerned with the determination and native title with scarce examples of attempt to claim compensation for the loss, diminution or impairment or other effect of acts upon native title rights and interests.

However in 2006, members of the Yankunytjatjara and Pitjantjatjara brought a claim for compensation for extinguishment of native title over the town of Yulara in the Northern Territory²⁰. The claimants were not previously recognised as native title holders of the relevant land and therefore it was a prerequisite for the compensation case that the court also find that the claimants were native title holders of the relevant area. The court ultimately did not so find. As a result, the claim failed at the first hurdle and no consideration was given to the question of compensation as a result.

In 2013, the first determination of native title compensation was made in the case of *De Rose v State of South Australia*²¹ where the Federal Court ordered that the State of South Australia make payment to a group of claimants asserting a claim over De Rose Hill Station located in north-west South Australia. However, this determination was made by consent. The terms of settlement were confidential and so could provide no guidance on the question of compensation.

The Ngaliwurru Nungali Case

In the context set out above, the significance of the *Ngaliwurru Nungali* case cannot be overstated. This case represents the first and only expression of judicial guidance on the topic of compensation pursuant to the Act.

It sets the principles by which compensation may be assessed for both economic and non-economic loss and finally, sets a legal value on native title.

In the town of Timber Creek, there were 53 grants of freehold or leases by the Northern Territory Government that extinguished native title.

At first instance, the claimants sought, *inter alia*, compensation for each of those acts pursuant to s.51 of the Act in the following elements²²:

1. Compensation for economic loss of both exclusive and non-exclusive native title rights and interests extinguished or otherwise impaired or suspended by past acts of the Northern Territory Government;
2. Compound interest on the amount of compensation awarded for economic loss; and
3. Compensation in the sum of not less than \$2 million “for non-economic loss to give effect to the diminution or disruption in traditional attachment to country and the loss of rights to live on and gain spiritual and material sustenance from the land”.

²⁰ *Jango v Northern Territory* [2006] FCA 318.

²¹ [2013] FCA 988.

²² *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at 9 and 10.

In 2016, at first instance, the Federal Court (Mansfield J) awarded compensation of \$3,300,661 to the claimants, including \$1.3 million for cultural loss.²³

In 2017 the Full Federal Court (French, Branson and Sundberg JJ) upheld an appeal from the Commonwealth and the Northern Territory and reduced the compensation to \$2,899,446 but maintaining the figure of \$1.3 million for cultural loss.²⁴

In 2019, the High Court unanimously upheld an appeal from the Commonwealth and the Northern Territory, and reduced the overall award to \$2,530,350, but again allowed the figure of \$1.3 million within that sum to stand for compensation for cultural loss.

In relation to economic loss, Justice Mansfield at first instance assessed compensation at 80 per cent of the unencumbered freehold value of the affected land as at the date at which native title was taken to have been extinguished under the Act.

The Full Federal Court varied the percentage to 65 per cent but otherwise did not disturb Justice Mansfield's judgment in respect of the question of economic loss.

Ultimately, on the question of economic loss, the High Court held that "in these appeals, the objective economic value of the non-exclusive native title rights and interests of the Claim Group is 50 per cent of the freehold value of the land".²⁵

The central principles that fell from these cases as to the assessment of compensation were as follows:

Economic Loss

1. Simple interest was payable on pre-judgment compensation but not to be included as part of the total compensation to be paid.²⁶
2. The objective economic value of *exclusive* native title rights to and interests in land, in general, equates to the objective economic value of an unencumbered freehold estate in that land.²⁷
3. Interest is payable on the compensation for economic loss, and in the circumstances of this case, on a simple interest basis, at a rate sufficient to compensate the Claim Group for being deprived of the use of the amount of compensation between the date at which compensation was assessed and the date of judgment.²⁸

²³ Note, the claim was pleaded in first instance as "non-economic loss" or "solatium" but the High Court has held that a better expression is "cultural loss", see footnote 3 of the *Ngaliwurru Nungali* case at [4].

²⁴ *Griffiths and Another v Northern Territory and Another* (2017) 256 FCR 478.

²⁵ *Ngaliwurru Nungali* case at [3]; but the High Court found that the Full Court's assessment of 65% was "manifestly excessive" but did not itself engage in an assessment of what the percentage ought to be. The Court would otherwise have remitted the matter to the Full Court for redetermination, "but since no party suggested that the percentage should be set at below 50 per cent, it can be accepted for the purposes of the disposition of these appeals that 50 per cent is the figure". Therefore the question of the appropriate percentage remains open.

²⁶ *Ngaliwurru Nungali* case at [151].

²⁷ *Ngaliwurru Nungali* case at [3].

²⁸ *Ngaliwurru Nungali* case at [3].

4. The compensation for loss or diminution of traditional attachment to the land or connection to country and for loss of rights to gain spiritual sustenance from the land is the amount which society would rightly regard as an appropriate award for the loss.²⁹
5. The date for the assessment of the compensation is the date of the act because the validation provisions deem the extinguishing act to be valid and always to have been valid from the time of the act.³⁰
6. It is necessary to identify the native title rights and interests in question as a first step in their valuation.³¹
7. The proper comparison is between the native title rights and interests and the rights and interests of a full exclusive native title; and therefore the economic value of the property that was lost must be assessed according to the rights and interests that were held.³²
8. That the inalienability of native title rights and interests did not have the effect of diminishing their value and were not a relevant discounting factor in the assessment of their economic value.³³
9. That the nature of the native title rights, including whether they were usufructuary, ceremonial, non-exclusive, or included the power to grant co-existing rights and interests in the land, the right to control access to the land and to decide how the land should be used, or the right to exploit the land for commercial purposes were relevant considerations in assessing their economic value.³⁴
10. The economic value of the Claim Group's native rights should be assessed using an “adapted *Spencer* test”³⁵, which asks what price a willing but not anxious purchaser would pay to a willing but not anxious vendor in a hypothetical transaction³⁶ and therefore “the economic value of native title rights and interests in developed areas should, in many cases, prove to be greater than the economic value of comparable native title rights and interests in a remote location”.³⁷
11. The valuation of native title rights and interests in land is not ordinarily to be confined to the benefit of their past uses but should also extended to their highest and best use.³⁸

²⁹ *Ngaliwurru Nungali* case at [3].

³⁰ *Ngaliwurru Nungali* case at [43].

³¹ *Ngaliwurru Nungali* case at [68].

³² *Ngaliwurru Nungali* case at [76] and [87].

³³ *Ngaliwurru Nungali* case at [99] to [101].

³⁴ *Ngaliwurru Nungali* case at [107].

³⁵ *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440-441; [1907] HCA 82.

³⁶ *Ngaliwurru Nungali* case at [84] and [85].

³⁷ *Ngaliwurru Nungali* case at [96].

³⁸ *Ngaliwurru Nungali* case at [97].

12. That courts should take a bifurcated approach³⁹ to valuation of first determining the economic value of the native title rights and interests that had been extinguished and then estimating the additional non economic or cultural loss occasioned by the consequent diminution of the Claim Group's connection to country.⁴⁰

Cultural Loss

13. An award for cultural loss is to be made on an *in globo* basis to the Claim Group with the apportionment or distribution of the award being an intramural matter.⁴¹
14. In assessing the entitlement of the native title holders under s 51(1) of the *Act* to compensation on just terms for any loss, diminution, impairment or other *effect of the act* on their *native title rights and interests*, the Act requires compensable acts to be identified but then the task then is to determine the essentially spiritual relationship which the Claim Group had with their country and to translate the spiritual hurt caused by the compensable acts into compensation.⁴²
15. The task required by s 51(1) of the *Act* requires a number of separate but inter-related steps: identification of the compensable acts; identification of the native title holders' connection with the land or waters by their laws and customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection.⁴³
16. That each act of extinguishment should not be considered in isolation but the consequences of acts can be incremental and cumulative and should be assessed in the context of their wider effect on native title.⁴⁴
17. That the task of assessing such compensation was to be arrived at as the result of a social judgment, made by the trial judge and monitored by the appellate courts, for what, in the Australian community, at the time of hearing, was an appropriate award for what had been done; "what is appropriate, fair or just".⁴⁵

³⁹ The High Court expressly rejected the Full Court's *obiter* that it might have been preferable to approach the assessment task on a "holistic" basis without the division in economic and non-economic loss; see *Ngaliwurru Nungali* case at [86].

⁴⁰ *Ngaliwurru Nungali* case at [84].

⁴¹ *Ngaliwurru Nungali* case at [214].

⁴² *Ngaliwurru Nungali* case at [216].

⁴³ *Ngaliwurru Nungali* case at [217].

⁴⁴ The High Court affirmed Justice Mansfield's analogy that, "each [compensable] 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." (see *Ngaliwurru Nungali* case at [219].

⁴⁵ *Ngaliwurru Nungali* case at [237], see also [59] and [163] in which Mansfield J describes the task as essentially "intuitive".

Conclusion

Almost fifty years after *Milirrpum v Nabalco*, by its award of \$1.3 million for cultural loss upheld by all High Court and Federal Court Judges, the *Ngaliwurru Nungali* case not only confirms the existence of native title, it also quantifies the value of native title rights and interests held by Aboriginal people. Importantly, it confirms that the spiritual connection of Aboriginal people to their country is of paramount importance and should be valued in view of this.