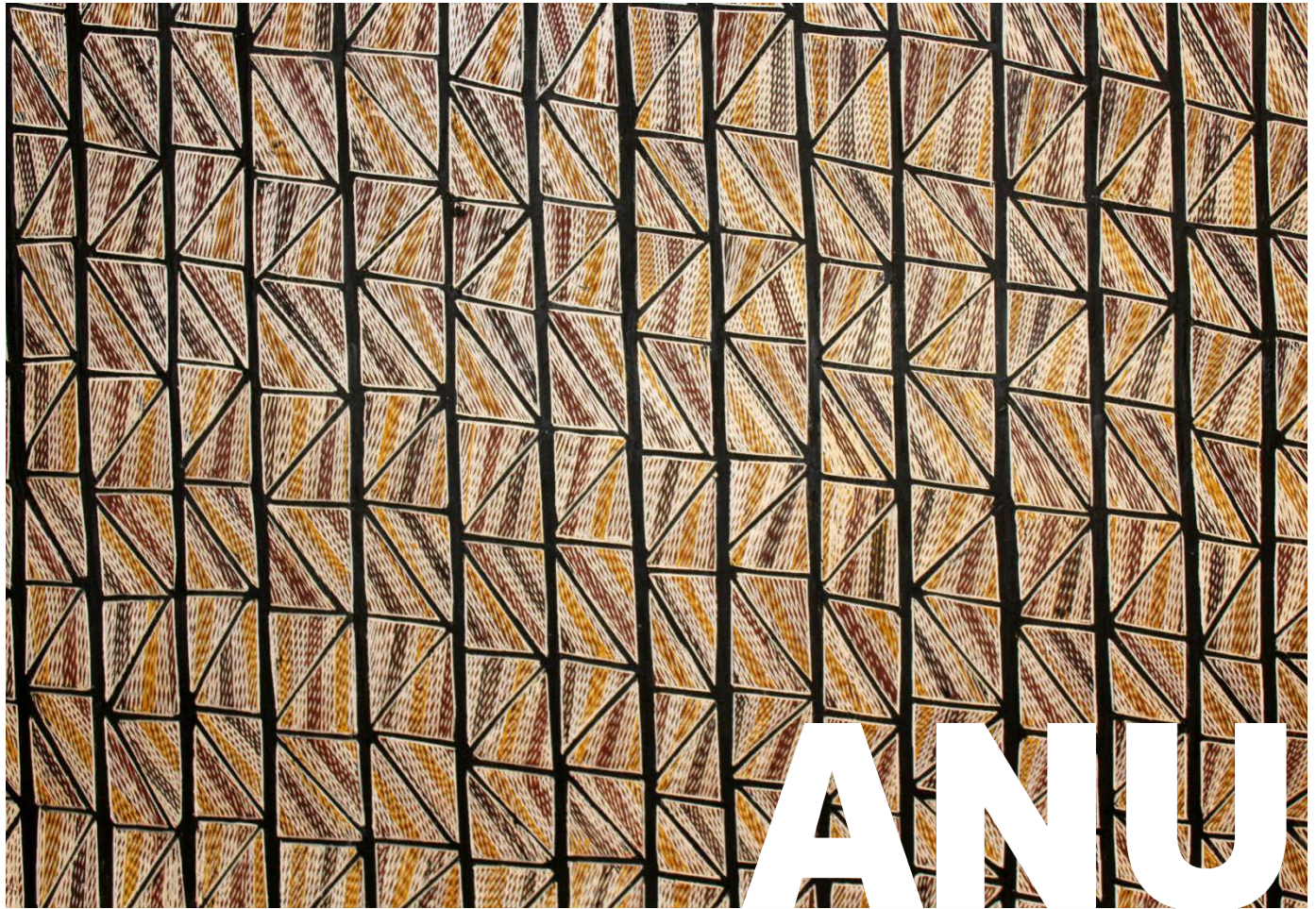




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POLICY IMPLICATIONS OF THE TIMBER CREEK DECISION

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Policy implications of the Timber Creek decision

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Abstract

The High Court decision in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 provides authoritative determination in relation to the approach to be adopted in valuing native title. In particular, it deals with how to value the compensation required to compensate native title holders when their title has been extinguished or impaired. This paper briefly summarises the core elements of the Court's decision, and then focuses on the policy implications arising from the decision. The likely response of governments to the High Court decision is assessed, before progressing to a consideration of issues which deserve further consideration by governments into the future.

Keywords: native title, compensation, Timber Creek

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Acronyms

ALRC	Australian Law Reform Commission
ANU	Australian National University
CAEPR	Centre for Aboriginal Economic Policy Research
ILUA	Indigenous Land Use Agreements
NTA	<i>Native Title Act 1993</i>
NNTT	National Native Title Tribunal
PBC	Prescribed Bodies Corporate
RDA	<i>Racial Discrimination Act 1975</i>

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Introduction

The High Court decision in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* is a 'landmark' decision in native title law¹. It answers three legal questions with significant implications for the future of native title law in Australia. These are:

- how the objective economic value of affected native title rights and interests is to be ascertained
- the form and basis of interest payments in relation to determined compensation for economic loss, and
- how the claim group's sense of loss of traditional attachment to the land is to be incorporated into the award of compensation.²

The short answers to these questions are set out in paragraph 3 of the joint judgment³ and are thus worth quoting in full:

For the reasons which follow, those questions should be answered thus:

1. 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. In these appeals, the objective economic value of the non-exclusive⁴ native title rights and interests of the Claim Group is 50% of the freehold value of the land
2. 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, and
3. 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. The appropriate award for the cultural loss in these appeals is \$1.3 million.

The Court's reasons are set out over 147 pages. While at times complex, the language is accessible and logic compelling, at least to this non-lawyer.

Of course, a further reason the High Court has delivered a landmark decision is that it relates to both the physical and cosmological presence and imprint on the land of the Ngaliwurru and Nungali peoples, and in particular to the relationship between that imprint and the Australian state. The decision provides further judicial confirmation that the Australian nation recognises and acknowledges not only the existence of the link and impact of infrastructure and other development on Indigenous cosmologies and cultures, but finally incorporates (however inadequately) that cultural reality for native title holders (and Indigenous peoples more generally) into the conceptual framework of mainstream property and compensation law. It is for this reason that the (former) native title holders of the extinguished interests and the Northern Land Council welcomed the decision.

¹ *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA7. For ease of reference, the High Court decision is referred to in this paper as 'the Timber Creek decision'. References to the 'joint judgement' are to the majority judgment in the High Court decision.

² See paragraph 2 of the judgment.

³ Chief Justice Kiefel, and Justices Bell, Keane, Nettle and Gordon authored the joint judgment. Justices Gageler and Edelman both endorsed the determinations of the joint judgment, but wrote separate judgments to elaborate on disagreements as to valuation methodology and timing of assessment of compensation respectively.

⁴ The claim group held non-exclusive native title rights as the prior grant of a pastoral lease had extinguished their exclusive possession rights and interests. This footnote was not part of the joint judgment.

While this decision is a further step along the judicial pathway to fuller recognition of previously ignored Indigenous property rights laid down in the *Mabo* and *Wik* decisions⁵, it is also a legal framework for incorporating the reality of Indigenous cultural loss into mainstream jurisprudence. This is a positive development, delivering as it does both acknowledgment of loss and financial recompense. However, it is also the case that the decision embodies the shortcomings that were built into the *Mabo* decision, and the subsequent *Native Title Act 1993* (NTA)⁶ (see below). In turn, the policy implications that flow from the decision will exemplify both the positive and negative attributes of the underlying legal framework.

It is not proposed to undertake a close legal analysis of the High Court decision in this paper, but rather the aims are to identify and draw out some of the broader policy implications related to native title compensation going forward.

The High Court decision

The first step is to define what is meant by compensation, at least in the context of the Timber Creek High Court decision. It relates to compensation for the loss of native title rights (and the concomitant cultural loss) arising from past extinguishment of native title by government action. In the language of the NTA, the Timber Creek case is about compensation for ‘past acts’, albeit only those since 1975. Extinguishment of native title rights prior to 1975 are not addressed.

The Timber Creek case also has implications for the assessment of compensation for ‘future acts’ under the NTA. These include compulsory acquisition acts by governments (which are relatively rare) and the grant of exploration permits and other interests that do not extinguish native title, but can impair it. The NTA stipulates various administrative and consultative processes and ultimately provides for the payment of compensation, but this framework involves significant transaction costs for proponents (including time and expenditure). Consequently the formal processes are generally replaced by commercial negotiations, and often involve the negotiation of Indigenous Land Use Agreements (ILUAs) particularly in relation to areas on yet to be determined claims⁷. While these outcomes are sometimes referred to as compensation for the use of native title (Altman & Pollock 1998, Neate 1999, Smith 2001), the future act framework and associated payments are not a focus of the present analysis. It is likely however that the decision in the Timber Creek case will strengthen the bargaining position of native titleholders (and claimants) involved in negotiations with land development proponents. Nevertheless, it is just one element in many considered in such negotiations, and in my view is unlikely to have a major effect on the outcomes of future commercial negotiations. While the court has distinguished economic and cultural (or spiritual) loss, parties involved in commercial negotiations related to the future use of native title are likely to rely on both rationales, without necessarily specifying their respective weights, to reach a commercial outcome.

A second issue not covered by the High Court case (except by exclusion) is the very extensive extinguishment of native title prior to 1975 when the *Racial Discrimination Act 1975* (RDA) was enacted. The *Mabo* decision determined that native title was an inherently weak form of title, and would be extinguished by any inconsistent Crown actions. This principle was moderated by the existence of the RDA from 1975, which required any inconsistent actions to be non-discriminatory to be valid. So in the case of the Timber Creek claim group, the granting of a pastoral lease over their lands prior to 1975 meant that they lost their rights to exclusive possession without any compensation, and retained only non-exclusive native title rights. It was these non-exclusive rights that the Northern Territory Government had extinguished and which were at issue in the present

⁵ *Mabo v Queensland (No.2)* [1992] HCA 23; *Wik Peoples v Queensland* [1996] HCA 40.

⁶ See Palmer (2018:239–40) for a succinct list of the major shortcomings.

⁷ See Smith (1998) for a discussion of the potential applications of ILUAs under the NTA.

case. The economic and cultural losses imposed on Indigenous peoples related to this prior extinguishment, which extends across most of settled Australia, is not compensable under Australian law.

A third issue not addressed by the Timber Creek decision is compensation for the loss of political sovereignty by First Nations. The High Court has previously determined that the assertion of sovereignty by the British Crown extinguished pre-existing Indigenous sovereignty.⁸ It is increasingly clear however that both developments in Canada⁹, and the development in Australia of a First Nations' political agenda around shared sovereignty associated with the *Uluru Statement from the Heart* (2017) are creating the opportunity for a new debate on the place of shared sovereignty in public policy. This opportunity derives from the existence and indeed ubiquity of multiple (non-Indigenous) sovereignties in the global economy including modern Australia (Berman 2007' Coombs 1994:207) and the normative disjunction between strengthening national values around recognising Indigenous contributions and the legal reasoning¹⁰ that underpins the current rationale for the doctrine of the unitary sovereign status of the Crown in Australia. If policymakers do not treat this opportunity seriously, the uncompensated loss will feed greater disenchantment and distress amongst the growing cohort of Indigenous citizens, and potentially undermine social harmony and stability into the future.

A fourth issue not addressed by the Timber Creek decision, and arguably an issue with strong links to both historical dispossession and loss of political sovereignty by First Nations (i.e. the second and third issues noted above) is the intergenerational impact of colonisation and settlement. Thus Darryl Kickett (1999:139–40), when asked to provide a commentary on the issue of native title compensation at a workshop convened by the NNTT in 1999, focused not on the legislation, but on the history of overt racism experienced by his family, and went on to note in relation to his extended family:

I do not know what compensation would make up for past injustices. I really cannot say what compensation would help them to cope with their life or create opportunities for their people. This is something that you will have to ask them. Only they can tell you what the dollar worth is of the pain they have experienced...

You see my view of the compensation is that it must be treated as process-oriented not solution based. When people come together to talk, reflect on their issues and plan for action, they then begin to see the way forward – how things need to be done and what resources are required. They can also work out where those resources will be found.

Kickett's focus on process over outcomes aligns with anthropologist Diane Smith's observation (2001:47) that 'In accordance with their own social preferences and conceptualisations of cultural property, the process of negotiating compensation may itself be part of compensation for many native title groups'. Smith's paper is an extremely valuable and perceptive insight into the cross-cultural issues that infuse native title and native title compensation. In retrospect, Kickett's comment reads as a prescient evocation of the case for the *Makarrata* proposed by the Referendum Council and the authors of the *Uluru Statement from the Heart* (2017).

A fifth issue absent from the Court's approach is a conceptually robust account of economic rights. In particular, the NTA (by virtue of section 51A) equates the economic value of native title with market-based valuations (i.e. based on a freehold valuation benchmark). However, one of the elements of native title (which the High Court in *Mabo* confirmed was *sui generis*) is that it can involve non-market economic elements such as subsistence and

⁸ See *Mabo v Queensland (No.2)* [1992] HCA 23; also *Coe v Commonwealth* [1979] HCA 68. Nettheim (1994) discusses this issue in detail; see also Reynolds (1994).

⁹ See Hoehn (2016), which discusses the 2014 Canadian Supreme Court decision in *Tsilqhot'In*. See also Nadasdy (2017).

¹⁰ See the comments of Gibbs J in *Coe* [1979] ALJR 50 at p.409, and quoted by Nettheim (1994:50).

foraging rights.¹¹ The result is that the assessment of economic loss is potentially narrowed by the NTA's focus on market based freehold valuation methodologies.

In terms of substantive implications, the Timber Creek case deals primarily with the assessment and calculation of compensation for the extinguishment of native title interests by governments (i.e. the Crown) between 1975 and 1996.¹² These dates are set by the enactment of the RDA in 1975 and the terms of the 1998 *Wik* amendments which extended the term of the validation provisions included in the NTA in 1993. Because the High Court determined in *Mabo* that native title was part of the common law, once native title was determined to exist by a court, it was deemed to have always existed. The policy purpose of the validation provisions was to provide certainty to governments and existing (non-native title) landowners in relation to all land dealings by governments which may have adversely affected or extinguished native title interests and which by virtue of the RDA would be at risk of invalidity. The *quid pro quo* for native title holders was the provision of 'just terms' compensation, as laid out in the Australian Constitution.

Once the NTA came into operation, there was no longer a justifiable policy rationale for further validation, as governments were now aware of the potential existence of native title, and were able to ensure title validity through compliance with the so-called 'future act' provisions of the legislation and/or the normal compulsory acquisition processes in place in each jurisdiction. The decision of the Howard Government in its *Wik* amendments to extend the validation provisions beyond 1993 to 1996¹³ was thus highly contentious, and in my view not good policy. At their core, the validation provisions operate to validate actions that would otherwise breach the RDA and thus be discriminatory. Those actions generally occurred without consultation or natural justice for native title holders, and compensation was inevitably delayed while affected native title holders went through the process of establishing their title.

The economic value to governments and existing non-native title holders of the certainty provided by validation has never been calculated, but it will have been financially significant, since that certainty underpinned the valuations applicable to virtually every property title in Australia. While the benefits of title validation were intangible, they were widely shared whereas the costs fell on a comparatively much smaller number of native title holders insofar as validation effectively legitimated ongoing dispossession.¹⁴ As Justice Brennan observed in 1992 in *Mabo*:

Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.¹⁵

While true, the statement ought to have been written in the present tense. The 1998 validation provisions had the effect of facilitating, parcel by parcel, ongoing dispossession up to the end of 1996.

The 1998 *Wik* amendments also included a new provision, section 51A of the NTA, which sought to cap the compensation for economic loss in relation to the extinguishment or compulsory acquisition of native title at the value of the compensation to be paid for a freehold estate over the same land. Importantly however, this is not the same value as the freehold value of the land.¹⁶ Notwithstanding this provision, the Court held that the NTA

¹¹ This issue was raised in expert evidence to the court by Professor Altman in the first trial, but was not taken up by the trial judge (pers. com. Jon Altman).

¹² See paragraphs 6 and 34–36 of the joint judgment for more details on the relevant acts that were validated.

¹³ See the more technical discussion in paragraphs 32 and 33 of the joint judgment in the Timber Creek case for more details on these provisions.

¹⁴ One of the issues facing Indigenous landowning groups was that they were often unaware that their native title had been extinguished or impaired by prior Crown grants, and this information asymmetry potentially operated both before 1975 and from 1975 through to 1998.

¹⁵ [1992] 175 CLR 68; quoted by Nettheim (1994:29).

¹⁶ See paragraphs 44–54 of the joint judgment for the analysis that underpins this conclusion. Notwithstanding the Court's broader approach, as discussed earlier, the Court was still constrained by section 51A's overly narrow focus on market based economic factors.

provisions themselves require an assessment which amounts to 'just terms' and which extends beyond economic loss (which is to be capped at the freehold value of the land) to an assessment of any 'other effect' on native title rights, which can include 'cultural loss'.¹⁷

The Timber Creek case also dealt with a number of other issues: whether compensation payments include any interest amounts determined (they don't) and whether interest to be paid on delayed compensation payments should be simple or compound (it depends, but in this case, the court determined that it should be simple interest).

Perhaps of most significance is the discussion around the assessment of cultural loss¹⁸. It is beyond the scope of this paper to seek to summarise the detailed reasoning by the judge at first instance, the Full Court and finally the High Court which led to the assessment of \$1.3m in compensation for cultural loss. The quantum was determined by the judge at first instance, Justice Mansfield, and was not varied as a result of the subsequent appeals. It is however worth focussing on a number of observations made by the High Court that are relevant to the policy issues that flow from the case.

After quoting from the High Court's earlier decision in *Ward*¹⁹ to emphasise that the relationship of Aboriginal people to the land has a religious or spiritual dimension, the joint judgment stated:

Compensation for the non-economic effect of compensable acts is compensation for that aspect of the value of land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts. It is not just about hurt feelings, although the extent of it may have evidentiary value in determining the extent of it. It is compensation for a particular effect of a compensable act – what is better described as 'cultural loss'.²⁰

In other words, the court acknowledges that compensation for loss of native title is potentially equivalent to more than a mere freehold interest.

Second, the joint judgment noted that the effect of an act or acts on native title interests can vary dependent upon the identity of the native title holders, the connection of the native title holders with their land, and the effect of the compensable acts upon that connection, and thus, so too will the appropriate award of compensation vary. The Court went on to note²¹:

So, for example,...a sense of loss of connection to country resulting from...the effect of an act on native title rights and interests in areas where land has been developed may prove less than the sense of loss of connection to country in relation to native title rights and interests in remote, less developed, areas...

A third important element in the judgment on cultural loss was its confirmation of the trial judge's finding that section 51(1) of the NTA does not require that the detrimental consequence directly arise from the compensable

¹⁷ Importantly for the future, the High Court's analysis, combined with general law principles and the normal principles of non-discrimination, allows the possibility of the inclusion of further compensation based on severance, injurious affection, disturbance, special value, solatium or other non-economic loss. See paragraph 51 of the joint judgment.

¹⁸ Refer to paragraphs 152–237 in the joint judgment. See Palmer (2018: chapter 10) for a discussion of the anthropological issues involved in this case.

¹⁹ *Western Australia v Ward* [2002] 213 CLR 1

²⁰ Paragraph 154 of the joint judgment.

²¹ Paragraph 217 of the joint judgment.

act. Instead, it requires consideration of the particular and inter-related effects of the compensable acts on the native title holders connection with their land or waters.²² The Court went on to note²³:

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 a whole of the areas over which the relevant rights and interests had been claimed...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.

Finally, the joint judgment turns to the issue of whether the award for cultural loss was manifestly excessive. The Court found that it was not. Importantly however, it relied on legal precedent that noted that²⁴:

What, in the end, is required is a monetary figure arrived at as the result of a social judgment, made by the trial judge, and monitored by appellate courts, of what, in the Australian community, at this time, is an appropriate award for what has been done, what is appropriate, fair or just.

In other words, the state of community attitudes in relation to Indigenous peoples, and in particular to their native title rights will potentially impact, for better or worse, on the quantum of compensation the courts will be prepared to allow.

Media coverage of the High Court decision

Apart from the High Court judgment itself, a good place to start the assessment of the policy implications is in the media coverage that followed the publication of the High Court decision on 13 March 2019. That coverage has ranged from the factual to the overstated.

Key issues and concerns raised in the media coverage have included the inclusion of compensation for 'spiritual harm' (James 2019); the prospect of 'claims worth billions of dollars' (Davidson 2019, Roberts 2019); and the potential for the ruling 'to affect the mining, resources and pastoral sectors...' (Davidson 2019, Ludlow 2019a). In the *Australian Financial Review*, a series of articles (Ludlow 2019a, 2019b, 2019c, Pelly 2019) focused on the potential future costs of compensation claims. In particular, Mark Ludlow (2019b) noted that the infrastructure was largely for the benefit of the Timber Creek community (where many of the claimants reside) with the inference being that compensation may not be warranted, and reported claims from the Institute of Public Affairs that 'taxpayer funded compensation...would discourage investment throughout regional Australia' (Ludlow 2019c). These articles also discussed the reaction of State and Territory governments to the outcome. Ludlow (2019b) noted:

Queensland Treasurer Jackie Trad called for a coordinated federal response to deal with the new methodology for determining native title compensation into the future.

'A comprehensive federal approach must prioritise ways to settle native title compensation through negotiation rather than through expensive or protracted litigation in the courts', she said.

The *Australian Financial Review* also questioned the courts finding that the compensation awarded accorded with community standards:

²² Paragraph 218 of the joint judgment.

²³ Paragraph 219 of the joint judgment.

²⁴ Paragraph 237 of the joint judgment. Footnotes have not been included.

There are some nervous state governments and miners – calculators in hand – that might disagree (Pelly 2019).

The Fairfax media provided a more contextual analysis (Saulwick 2019) arguing that, as in relation to the sexual abuse matters facing the Australian churches, the case demonstrated the value of the judicial system ‘in providing a place for people to tell their stories, and find redress’.

A number of ‘expert’ native title lawyers have also provided commentary, often blending factual analysis with more speculative assessments. Thus Tony Denholder, a partner in law firm Ashurst, was cited in a number of media reports as stating that ‘It is likely that nationally, the liability for native title compensation will run into the billions of dollars’ (Roberts 2019; see also Davidson 2019). Richard Abraham from law firm MinterEllison was quoted as saying the decision would be a ‘game changer’ for Indigenous communities, and the total compensation figure could take decades to resolve, but would be a:

...‘very large number’ based on some conservative assumptions about the 2.8 million square hectares of native title land and waters. ‘While only some of those areas have been affected by acts attracting compensation, applying the Timber Creek award of \$20,000 per hectare to one percent of Australia’s total determined native title area, yields an overall compensation figure of \$56 billion,’ Mr Abraham said (Begley & Perkins 2019).²⁵

Lawyers associated with the University of Queensland (Isdale & Fulcher 2019) raised the more general issue of the application of the Constitution’s ‘just terms’ requirement, speculating that:

It may be possible for compensation claims to be successfully made outside the Native Title Act and for losses that occurred before October 31, 1975 [when the RDA came into force]. If that were the case, for example, actions by the Commonwealth in the Northern Territory (which achieved self-government only in 1978) that extinguished or affected native title, all the way back to Federation in 1901, could be compensable.

In contrast, former Commonwealth Attorney-General Michael Lavarch (2019) published a much more grounded, and politically realistic assessment of the implications of the decision. He emphasised the parameters and limitations around the decision, emphasising its application to validated titles rather than future acts. Lavarch ended his opinion piece by pointing to the fact that we are entering ‘a time of a potential significant recalibration in Indigenous affairs’, and went on to argue that:

This provides a real opportunity to holistically re-examine relationships with Indigenous peoples. As it did with the Mabo decision, the federal government should assume a leadership role. Other governments...should use the Timber Creek decision to engage with native title holders to explore compensation opportunities which maximise self-determination and economic opportunity.

In relation to the issue of inter-governmental cost sharing, *The Australian* reported (Aikman 2019) that:

Canberra is negotiating with the states and territories over who should foot the bill and how to handle future claims.

²⁵ The reference to 2.8m square hectares is incorrect, and probably should refer to 2.8m square kilometres.

The Australian can also reveal that in an exchange of letters in 2017 after the Federal court first granted the Ngaliwurru and Nungali about \$3.3 million, the NT Government sought support from Canberra but was rebuffed.

Then federal attorney general George Brandis wrote that while previous federal governments had 'made offers of financial assistance', none was accepted and so 'do not bind the current government'.

Queensland, Western Australia and the NT all want a new framework for dealing with native title claims and more federal financial support. Canberra has said that it prefers the status quo.

Assessing the media coverage overall, it is clear that the major issues of interest and/or concern are the potential cost implications of the decision, and the associated issue of who will end up paying. A related issue, more implicit than explicit, is the uncertainty regarding how compensation issues will be resolved. Perhaps unsurprisingly, there is little recognition in many of the media reports that the law of compensation is based in the common law. The 'cost' to governments will in all cases have been or will be offset by a benefit to government in terms of access to and use of land which was previously owned by Indigenous interests, and the compensation beneficiaries will in all cases have suffered a loss which is incommensurable and potentially intergenerational in its impact. Tellingly, the speculation regarding the potential size of the cost to taxpayers of the compensation bill displays very little appreciation that the obverse conclusion is that the quantum of the losses suffered by Indigenous interests will be at least of a similar magnitude. More positively, a second issue to emerge is an acknowledgement that there is an opportunity embedded in the Court's decision to put Indigenous/non-Indigenous relations on a sounder footing.

Policy implications

If policy is what governments do²⁶, then the policy implications of the Timber Creek decision can be ascertained by answering the question: what will governments do as a result of the Timber Creek High Court decision?

The short and perhaps depressing answer to this question, in my view, is 'not much'.

In terms of legal policy, the High Court has laid down clearly how the law is to be interpreted, and given clear indications to claimants, governments and the lower courts as to how cultural loss is to be assessed and ascertained. There seems little impediment now to constructive engagement between the relevant parties in relation to the particular circumstances of each claim which comes forward. The framework laid down by the High Court will facilitate negotiated outcomes in many cases. No obvious requirement for legislative amendment has emerged from the Court's decision.

Notwithstanding the speculation about billions of dollars in compensation liabilities, the short and medium term financial impost arising from the High Court decision will be limited. Moreover, any financial liabilities on governments will take decades to crystallise, and will be spread over eight jurisdictions. Importantly, the most significant potential liability for governments will relate (almost by definition) to areas that have been extinguished by inconsistent Crown acts since 1975. Yet the evidentiary and financial barriers to successful native title claims are considerable, and potential compensation claimants who do not presently have native title will need to assess the opportunity cost of pursuing a claim versus the benefits of pursuing alternative ventures (such as commercial opportunities). There is a possibility that many potentially successful claims will not be pursued, or that by the time they are pursued, the task of demonstrating the requisite cultural connection for a successful claim will be much more difficult. On the other hand, the case demonstrates that over and above the

²⁶ There is a large academic literature on the nature of policy. This issues paper does not seek to go beyond a very straightforward notion of what policy involves. See Dye (2005:1) and McConnell (2010:4–6).

intrinsic value of country to First Nations, there is real and continuing potential financial benefit for native title holders in investing in the maintenance of connection to country.

While the attitude of the current Commonwealth Government is not enthusiastic²⁷, there is a likelihood that the State Labor Governments in Queensland, the Northern Territory, and Western Australia will see the election of a Commonwealth Labor Government (if it occurs) as an opportunity to re-open the issue of Commonwealth financial support for native title compensation. The argument in favour of such an arrangement boils down to the fact that their potential liabilities are the result of Commonwealth legislation, reinforced by the fact that in the mid-1990s, the Keating Government offered to underwrite 75% of the States' future compensation liabilities. For reasons that are difficult to comprehend (and reflect poorly on the preparedness of governments to look beyond the next election), not one jurisdiction was prepared to accept the offer, instead preferring to grandstand on the argument that the offer should be greater (or that the NTA should be dismantled). Notwithstanding this history, it seems unlikely that a future Labor Government would agree to reopen this issue. The motivation of the Keating Government in making the offer was to lock in State and Territory support for the NTA, at a time when native title faced widespread and 'white hot' political opposition across the community. That is no longer the case. Moreover, the provision of a significant support for State and Territory compensation liabilities may create inappropriate incentives on both governments and claimants, and in particular, may create a disincentive to commercial based negotiations and settlements that would avoid litigation of native title compensation claims.

A further reason for the Commonwealth to take this policy issue off the table is that it will increase pressure on the States and Territories to engage constructively in relation to alternative settlements. While nothing exists on the public record, there is little doubt that most if not all States and Territories will have undertaken some level of research into the potential compensation liabilities they face.²⁸ The ongoing pressure for the Commonwealth to reopen the Keating Government offer suggests that the scale of these potential liabilities has been and perhaps continues to be substantial. Of course, the corollary of this proposition is that Indigenous economic and cultural losses have been substantial. In addition, it is time that the Commonwealth engaged proactively in encouraging and facilitating alternative settlements across all jurisdictions.

In relation to the opportunity to move beyond case by case negotiation of compensation towards alternative settlements, regional agreements, and perhaps even treaties, I see the High Court decision as complementing and reinforcing a trend in the wider Indigenous policy domain which is already in play. Notwithstanding this, there is very little in the High Court decision itself that requires a shift to a new plane. While it represents significant and substantive progress along the path laid down by the High Court in *Mabo* and *Wik*, it remains firmly within the property law framework, and rests on the implicit and explicit assumptions that underpin those prior decisions. It does not represent a radical break with the current jurisprudential frame of reference. Accordingly, the Court's decision does not require new approaches to Indigenous policy. Rather, it is what is absent from the Court's decision that demands new approaches.

Taking this line of thought further, we might amend our question to a more normative one and ask: what should governments do as a result of the Timber Creek High Court decision? This is a policy relevant question, insofar as it involves an assessment of both merit and feasibility (if not immediately, then in the medium term).

As with all normative questions, the answers will particularly depend on the assumptions and values brought to bear. Accordingly, the answers below reflect my assumptions and values, and are proposed in order to move the discussion of these issues forward.

²⁷ See the comments of Attorney-General Christian Porter (2019) on Perth radio, where he affectively deflected the issue of Commonwealth contributions into the future.

²⁸ An *Australian Financial Review* article by Michael Pelly (2019) notes that 'State governments have been doing the sums on their possible liability for cultural loss...'

In my view, the single most important policy implication of the Timber Creek decision derives from the social, political, economic and cultural losses experienced by Indigenous peoples as a result of colonisation that are not compensable, and are beyond the remit of the law as it stands.

Consistent with the broadly progressive stance of the High Court since *Mabo*²⁹, the Timber Creek decision throws into sharper relief the extent of the loss in the two centuries preceding the enactment of the RDA.³⁰ In particular, the judicial acknowledgment and recognition of the extent of cultural loss by Indigenous landowning groups, even those such as the Ngaliwurru and Nungali peoples who have non-exclusive native title rights, is indicative of the enormity of the impact on Indigenous peoples since the British took possession of the eastern edge of the continent in 1770. While colonisation cannot be undone, it is possible to do more to properly recognise the importance of appropriate reparation for the economic, cultural and political dispossession imposed on Indigenous peoples. This suggests that the contemporary policy discussions around treaties, alternative settlements, regional agreements, a *Makarrata* and the proposed *Indigenous Voice to Parliament* all deserve serious consideration by policymakers.

Turning to particular policy opportunities that might exist which would contribute to a more effective native title system, the substantive recommendations of the 2015 Review of the NTA by the Australian Law Reform Commission is a good place to start (ALRC 2015). In particular, there is a strong case for reforming the legal requirements relating to connection to country as recommended in chapter five of the ALRC report. The Commission's Chapter 5 recommendations are directed to facilitating the resolution of claims, including by consent, by recognising that connections to country are socially fluid and laws and customs may adapt or evolve over time, sometimes with a loss of strict continuity in some periods.³¹

A second policy priority in the native title domain is to establish a system of properly resourced Prescribed Bodies Corporate (PBCs) which are the entities required to be established under the NTA to hold native title rights and interests. Notwithstanding their quasi-statutory basis, there has never been a comprehensive funding program established which is designed to ensure they can actually meet the environmental, planning and cultural responsibilities of land ownership. This policy failure by governments since 1993 when the NTA was enacted has meant that in many cases negotiated resource development payments have been diverted to land management responsibilities that were previously the responsibility of the Crown (Dillon 2018:11). Unless PBCs are properly resourced, this is also likely to be the case with compensation payments into the future.

A third more ambitious policy priority would be to recalibrate the allocation made to the Indigenous Land Fund³² following the passage of the NTA, to better reflect the extent and scale of Indigenous dispossession, and perhaps to establish it on a more secure and independent basis (Dillon 2017).

A fourth policy opportunity would be to reconsider the terms of section 51A of the NTA so as to ensure it operates to incorporate compensation for non-market economic elements of native title such as rights to forage, fish or mine ochre wherever they exist. Similarly, there would be little harm, and much symbolic significance, in providing for mandatory compound interest to apply for any delayed compensation.

²⁹ The *Mabo* decision recognised the existence of native title and established the policy framework for protecting native title from arbitrary extinguishment going forward. The *Wik* decision determined that pastoral leases do not wholly extinguish native title interests. Other key cases such as *Ward* and *Yorta Yorta* were not as progressive.

³⁰ See Dillon (2017) for a discussion of the genesis of the High Court decision in *Mabo*, and in particular, of the way in which the High Court forged a compromise position which recognised native title going forward, but limited its capacity to provide compensation looking back beyond 1975.

³¹ The Government recently introduced a Bill to amend various technical provisions of the NTA, however it does not deal with the substantive recommendations of the ALRC mentioned here.

³² This fund is now known as the Indigenous Land and Sea Future Fund following recent reforms to its structure and investment policies.

Finally, it is worth noting the potential tension between the criterion applied by the courts to whether a proposed compensation quantum is ‘manifestly excessive’ is a function of the courts’ interpretation of the views of the Australian community as to what is appropriate, fair and just. This suggests that the medium term viability of the new compensation regime will depend on ongoing community education relating to the history of the nation’s treatment of Indigenous peoples, and the maintenance of momentum in the national reconciliation process.

Conclusion

In *Northern Territory v Griffiths*, the High Court has provided an authoritative interpretation of the law in relation to compensation for loss of native title. In doing so, the Court has provided guidance to States and Territories and to Indigenous interests in relation to the conceptual content of ‘just terms’ compensation in relation to native title interests. It seems unlikely that the High Court decision will lead to further legislative change in relation to these issues, at least in the short to medium term.

The High Court decision highlights that the vast bulk of Indigenous dispossession, and the concomitant and often under-appreciated intergenerational impacts, remain beyond the remit of compensation law. This in turn creates both a risk and opportunity. The risk is that a decision by policymakers to ignore the legitimate aspirations of Indigenous citizens to play a role in the nation’s future will lead to a progressive diminution of the nation’s social and political cohesion. The opportunity for policymakers, and the nation, is to take a broader view of the High Court decision, and to systematically find ways to undo the social, economic and cultural damage inflicted on Indigenous peoples in the distant and not-so-distant past.

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