



NATIVE TITLE COMPENSATION: HIGH COURT TIMBER CREEK DECISION

WHAT IS THE TIMBER CREEK DECISION?

On 14 March 2019, the High Court made a decision about the Ngaliwurru and Nungali Peoples native title compensation claim for extinguishment of native title over the township of Timber Creek (referred to as the Timber Creek decision).

It was the first time the High Court has provided guidance on how native title compensation should be calculated.

The Timber Creek compensation decision was specific to that particular native title claim. Each compensation claim will have different facts and legal issues a Court will need to consider. There are still a lot of unknowns, but the Timber Creek decision tells us some of the things a Court will look at when making compensation decisions in the future.

WHAT IS NATIVE TITLE COMPENSATION?

Native title holders can make a claim in the Federal Court for compensation where native title has been extinguished or impaired after 30 October 1975. For example, where the government has issued a freehold title or a lease or has undertaken public works.

Compensation claims can be made by native title holders who have been authorised by a compensation claim group, or by a PBC. A compensation claim can only be made by a PBC after it has consulted and obtained the consent of native title holders.

Some native title groups may choose to negotiate a settlement agreement for compensation with the government instead of going to Court.

HOW WAS COMPENSATION CALCULATED IN THE TIMBER CREEK DECISION?

In the Timber Creek decision, the High Court determined that there were three parts to calculating compensation:

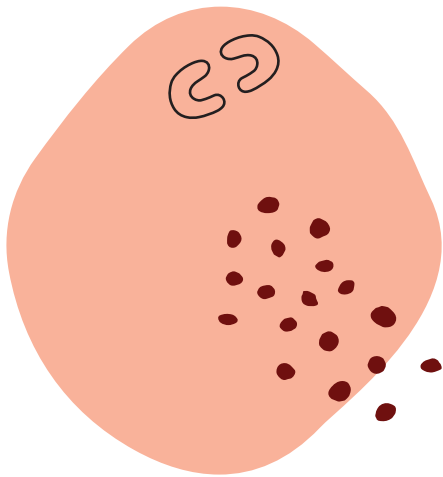
- Economic loss
- Interest payable on economic loss
- Non-economic or 'cultural loss'.

COMPENSATION FOR ECONOMIC LOSS + INTEREST

The High Court calculated compensation for economic loss by reference to the economic value of the land. From the Timber Creek decision, we learnt that:

- With exclusive native title, the court is likely to determine that economic loss is equivalent to 100% of the freehold value of the land.
- With non-exclusive native title, the court is likely to determine that economic loss is equivalent to a smaller percentage of the freehold value of land. In the Timber Creek decision this was 50%.

The Court said interest is to be paid on economic loss from the date the extinguishing act occurred. Depending on the evidence, this could be simple or compound interest. In Timber Creek it was simple interest.



COMPENSATION FOR CULTURAL LOSS

The High Court also explained how compensation for non-economic loss should be calculated. The High Court called this compensation for 'cultural loss' and it is concerned with the impact government actions have had on the spiritual relationship native title holders have with their country.

Cultural loss does not mean that native title holders have lost their culture, it means they have suffered cultural and spiritual harm because of government actions that have affected their native title rights and interests.

The High Court said that the compensation required for cultural loss is an amount that, in the Australian community, would be considered an appropriate amount for what has been done.

From the Timber Creek decision, we learnt that:

- The Court recognises the spiritual relationship claimants have with their Country and the spiritual harm caused to them when native title is extinguished or impaired.
- Compensation for cultural loss should be an amount society would regard as "appropriate, fair or just."
- Compensation for cultural loss is not related to the freehold value of the land but reflects the cultural loss to native title holders as a whole, both at the time and into the future.