Case Note

Mabo and the Valuation Vibe: Substantive Equality in the Timber Creek Compensation Case

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Abstract

The High Court of Australia's decision in *Northern Territory v Griffiths* (2019) 269 CLR 1 ('the Timber Creek compensation case') provided long-awaited judicial guidance on the operation of the compensation provisions of the *Native Title Act 1993* (Cth). It is now clear that compensation for extinguished native title rights and interests incorporates awards for: economic loss; simple interest on that economic loss; and cultural loss. The cultural loss component of the High Court's judgment has been widely praised. Yet there is a gap in the literature in respect of the Court's analysis of the economic value of extinguished native title. Additionally, as compensation for invalid future acts was not argued before the Court, the applicable principles in that area are not yet clear. Accordingly, this case note focuses on those elements of the Timber Creek litigation. It contends that, viewed through the lens of substantive equality, the High Court's economic valuation of the claimants' native title rights and interests is open to criticism. That said, the judgment is a step towards achieving substantive equality in native title, particularly when viewed in the light of recent native title jurisprudence. It is, however, open to question as to whether substantive equality can be achieved without further judicial guidance on the compensation payable for invalid future acts.

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I Introduction

The concept of 'equality' has been the subject of varying interpretations in native title jurisprudence and commentary despite widespread recognition of its central importance both at common law and in statute.[1] While the *Native Title Act 1993* (Cth) ('*Native Title Act*') purports to address 'the consequences of past injustices',[2] many scholars argue that native title is 'inferior' to other real property interests, by reference to the *Native Title Amendment Act 1998* (Cth) ('Ten Point Plan')[3] and a series of High Court of Australia decisions of the late 1990s and early 2000s, such as *Fejo (on behalf of Larrakia People) v Northern Territory*,[4] *Members of the Yorta Aboriginal Community v Victoria*[5] and *Western Australia v Ward*.[6] These statutory and case law developments arguably cemented in real property a discriminatory perception of Indigenous uses of land relative to western ideals.[7] Yet a series of more recent High Court decisions, including *Akiba v Commonwealth*,[8] *Karpany v Dietman*[9] and *Western Australia v Brown*,[10] have offered hope of realising the spirit of equality envisaged in *Mabo v Queensland (No 2)*[11]. In contrast to earlier cases, these decisions arguably represent a move towards substantive equality by demonstrating a better understanding of Indigenous law and custom, and therefore positing a much stronger conception of native title rights and interests.[12]

However, the monetary value of native title rights relative to other real property interests remained unanswered until the High Court's decision in *Northern Territory v Griffiths*[13] ('*Timber Creek (HCA)*'). In this case, the Court considered

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1 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2877 (Paul Keating, Prime Minister); Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths Australia, 4th ed, 2019) 17–34; Sean Brennan 'Native Title and the "Acquisition of Property" under the *Australian Constitution*' (2004) 28(1) *Melbourne University Law Review* 28, 29, 35; Jonathon Hunyor, 'Dancing with Strangers: Native Title and Australian Understandings of Race Discrimination' in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 99, 110–11. See also *Mabo v Queensland* (1988) 166 CLR 186 ('*Mabo No 1*)'; *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*').

2 *Native Title Act 1993* (Cth) ('*Native Title Act*') Preamble.

3 Bartlett (n 1) at 56–70 cites amendments that provided for the automatic extinguishment of native title by certain leases: see *Native Title Act* (n 2) ss 23A–23JA, and the reduced application of the right to negotiate: see, eg, *Native Title Act* (n 2) ss 26A–26D.

4 *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96 ('*Fejo*').

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

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

7 Hunyor (n 1) 112; Shireen Morris, 'Re-evaluating *Mabo*: The Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity' (2012) 5(3) *Land, Rights, Laws: Issues of Native Title* 1; Bartlett (n 1) 56–70; Asmi Wood, 'Native Title' in Larissa Behrendt, Chris Cunneen, Terri Libesman and Nicole Watson (eds) *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd ed, 2019) 167, 174.

8 *Akiba v Commonwealth* (2013) 250 CLR 209 ('*Akiba*').

9 *Karpany v Dietman* (2013) 252 CLR 507.

10 *Western Australia v Brown* (2014) 253 CLR 507.

11 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo (No 2)*') 30, 58 (Brennan J), 109 (Deane and Gaudron JJ).

12 See, eg, Sean Brennan, 'The Significance of the *Akiba* Torres Strait Regional Sea Claim Case' in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29.

13 *Northern Territory v Griffiths* (2019) 269 CLR 1 ('*Timber Creek (HCA)*').

the compensation provisions of the *Native Title Act* for the first time, providing a direct, uncompromising answer to what equality requires in this context. Limited only by the mandate to provide compensation on 'just terms',[14] the High Court was presented with an opportunity to continue the recent trend towards substantive equality.

This case note considers whether the High Court's approach to native title compensation in *Timber Creek (HCA)* achieves substantive equality for native title relative to other real property interests. Compensation for extinguished native title was claimed on a bifurcated basis, requiring separate assessments of economic loss, interest on that economic loss, and cultural loss. An additional claim for general law damages was made for certain acts that were invalid for the purposes of the *Native Title Act*'s 'future acts' regime[15] and, as such, did not extinguish native title. This was not argued before the High Court.

The cultural loss component of the judgment and its implications for native title have, unsurprisingly, been the subject of considerable critical analysis and appraisal.[16] Yet there is a gap in the literature in respect of the High Court's analysis of economic loss and the lack of clarity on compensation for invalid future acts. In my view, these two aspects are just as significant for the future of native title compensation and are, consequently, the subject of this case note. The interest claim also raises some considerations of substantive equality,[17] but is beyond the scope of this case note. Further, while scholars have questioned the adequacy of compensation for incursions to Indigenous land rights awarded solely in monetary form,[18] this case note does not engage with that discussion.

This case note argues that, viewed through the lens of substantive equality, the methodology applied to the valuation of economic loss has both positive and negative implications for future claimants. In *Timber Creek (HCA)*, the High Court adopted a modified *Spencer v Commonwealth* approach to valuation of the extinguished rights of the Ngaliwurru and Nungali peoples of Timber Creek, envisaging a hypothetical negotiation for a sale by a 'willing but not anxious vendor' to a 'willing but not anxious purchaser',[19] adapted to the unique nature of native title. This approach attributed economic value only to the legal content of the rights. It relied upon heavily criticised native title jurisprudence, leading to some disappointing outcomes for the native title holders in this case. However, considered

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14 *Native Title Act* (n 2) s 51(1).

15 Ibid pt 2 div 3.

16 See Brendan Edgeworth, 'Valuable, Invaluable or Unvaluable? The High Court on Native Title Compensation' (2019) 93(6) *Australian Law Journal* 442; Justice Michelle Gordon, 'The Development of Native Title: Opening Our Eyes to Shared History' (2019) 30(4) *Public Law Review* 314.

17 *Timber Creek (HCA)* (n 13) 66–85 [108]–[151] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

18 See, eg, Sam Adkins, Bryn Gray, Kimberly Macnab and Gordon Nettleton, 'Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title' (2016) 54(2) *Alberta Law Review* 351; Brenda L Gunn, 'More Than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal Title' (2013) 46(2) *University of British Columbia Law Review* 299; Peter Genger, 'What is Authentic and Meaningful Compensation in the Eyes of Indigenous Peoples?' (2018) 38(2) *The Canadian Journal of Native Studies* 65.

19 See, eg, *Timber Creek* (*HCA*) (n 13) 56–7 [84], 61 [96] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) citing *Spencer v Commonwealth* (1906) 5 CLR 418, 432, 440–41 ('*Spencer*').

in light of more recent cases, the judgment contains some positive statements of principle for substantively equal native title valuation following extinguishment.

Additionally, since compensation for invalid future acts which do not extinguish native title was not argued before the High Court, this case note contends that the *Timber Creek* litigation does not provide much-needed guidance in that respect. The appropriate remedy for non-adherence to the procedural rights contained within the *Native Title Act*'s future acts regime remains unclear.

I first provide a definition of substantive equality in the context of native title. Next, I briefly recount the history of the *Timber Creek* litigation. I then closely examine the High Court's approach to economic loss to ascertain whether the decision constitutes a step towards achieving substantive equality for valuation of native title relative to other real property interests. Finally, I consider the unresolved issue of compensation for invalid future acts.

II Substantive Equality in Native Title

Principles of equality and non-discrimination are at the heart of native title in Australia by virtue of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'), which guarantees the equal treatment of all property interests before the law.[20] Yet equality can be separated into two categories, 'formal' and 'substantive', neither of which are mandated by the statute. Hunyor succinctly distinguishes the two, writing:

> An approach of 'formal equality' prohibits all racial distinctions and requires identical treatment. 'Substantive equality' permits (even requires) distinctions where such differential treatment is justified by differing circumstances or where it reduces existing inequalities in public life.[21]

Thus, while formal equality is simply akin to procedural equality or equal 'treatment', substantive equality is more nuanced and directed. Sadurski writes that substantive equality in judicial decision-making should be guided by 'fairness and distributive justice with respect to a group most victimised by the rest of the community'.[22] This kind of deliberation incorporates a distinct practical element, as Bartlett notes:

> Genuine equality before the law requires that regard be had to the particular *effect* of the law in order to determine if there is a denial or abridgement of a protected right. It is not enough to apply the same principles without regard to their effect.[23]

Watson also argues that the idea of substantive equality imports a 'recognition of cultural difference which is not founded in disadvantage':[24] that is, 'incorporation of Indigenous world views and experiential knowledge'.[25] It follows

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20 *Racial Discrimination Act 1975* (Cth) ('*RDA*') s 10(1). See also Bartlett (n 1) 346–7.

21 Hunyor (n 1) 100.

22 Wojciech Sadurski, '*Gerhardy v Brown* v the Concept of Discrimination: Reflections on the Landmark Case That Wasn't' (1986) 11(1) *Sydney Law Review* 5, 8.

23 Bartlett (n 1) 347 (emphasis added).

24 Nicole Watson 'Racial Discrimination and the Law' in Larissa Behrendt, Chris Cunneen, Terri Libesman and Nicole Watson (eds) *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd ed, 2019) 217, 225.

25 Ibid 230.

that deficit-based characterisation of native title rights as 'weak' or 'inferior' to western uses of land due to mere cultural difference is offensive to notions of substantive equality. Rather, what is required is a characterisation of native title that acknowledges historical context and cultural difference.

The *Native Title Act* resonates with these ideas. Its Preamble recognises the progressive, non-consensual dispossession of Indigenous Australians of their lands and the consequent need for compensation.[26] The Act therefore provides for compensation where native title has been extinguished.[27] Moreover, the Act seeks to facilitate economic participation for native title holders through, for example, the future acts regime.[28] As such, it is both retrospective and forward-looking in its aim for equal standing between holders of native title and other interests. In light of these elements, the *Native Title Act* can be understood as a 'special measure' under the *RDA*,[29] which arguably permits characterisation of the Act with substantive, rather than merely formal, equality in mind.[30]

The High Court has cited this understanding of substantive equality in the native title context, particularly in early cases. For example, in *Mabo (No 1)*[31] Deane J identified that s 10 of the *RDA* 'is to be construed as concerned not merely with matters of form, but with matters of substance, that is to say, with the practical operation and effect of an impugned law'.[32] *Mabo (No 2)* was similar in its recognition that the doctrine of *terra nullius* perpetuated systemic discrimination against Aboriginal people and thus required abolition.[33] Additionally, in *Western Australia v Commonwealth*, the Court held that s 10 of the *RDA* mandated protection of native title in a manner equal to western private property rights, despite its roots in traditional laws and customs outside of the common law.[34]

At a broad level, substantive equality in native title therefore demands that courts recognise and address historical injustices. It is achieved by having regard to the practical effect of laws, in the light of a proper appreciation of existing inequalities and divergent worldviews. In contrast, formal equality merely ensures that all are afforded the same treatment before the law, irrespective of these differences. Judicial appreciation of substantive equality was occasionally demonstrated in early cases such as *Mabo (No 1)*, *Mabo (No 2)* and the *Native Title Act Case*. However, scholars such as Bartlett suggest that, in tandem with the Ten Point Plan, native title jurisprudence of the late 1990s and early 2000s indicates that the High Court may have misunderstood the spirit of substantive equality expressed

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26 *Native Title Act* (n 2) Preamble.
27 Ibid pt 2 div 5.
28 Ibid pt 2 div 3.
29 *RDA* (n 20) s 8(1); *Native Title Act* (n 2) Preamble.
30 Morris (n 7) 10. For another example of the concept of a 'special measure', see *Gerhardy v Brown* (1985) 159 CLR 70 and the commentary of Bartlett (n 1) 16.
31 *Mabo (No 1)* (n 1).
32 Ibid 230.
33 *Mabo (No 2)* (n 11) 30, 58 (Brennan J), 109 (Deane and Gaudron JJ).
34 *Native Title Act Case* (n 1). See also Bartlett (n 1) 142, 369.

in the early cases.[35] These developments inform evaluation of *Timber Creek* in its proper context,[36] and are considered below.

III *Timber Creek*: The Facts

The Ngaliwurru and Nungali Peoples ('the Claim Group') are the Traditional Owners and native title holders of the township and land surrounding Timber Creek in the Victoria River region of the Northern Territory. The town itself comprises an area of approximately 2,362 hectares.[37] In *Timber Creek*, the Claim Group sought compensation for the extinguishment of native title over approximately 127 hectares, or 6% of the total area, as a consequence of 53 acts attributable to the Northern Territory Government between 1980 and 1996 ('compensable acts'). The compensable acts largely consisted of public works (including, for example, the construction of roads, a school, and a water tank), development leases leading to a grant of freehold title, Crown leases, and freehold grants to government authorities (for example, the NT Housing Commission) where public works were later constructed.[38] Some took place in close proximity to sacred sites.[39] The extinguished native title comprised various non-exclusive rights and interests, including rights of access, subsistence, and the practice and protection of culture in accordance with the traditional laws and customs of the Claim Group.[40]

The Claim Group also claimed compensation for three additional acts throughout 1998 and 1999, comprising grants of freehold interest by the Northern Territory and subsequent improvements on the land. Those acts were accepted by the parties to have been invalid future acts for the purposes of the future acts regime ('the invalid future acts').[41] The invalid future acts did not extinguish native title.[42]

Section 51(1) of the *Native Title Act* establishes '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'.[43] Section 51(4) provides that regard may be had to State or territory compulsory acquisition legislation in determining 'just terms'.[44] In the *Timber Creek* litigation, the *Lands Acquisition Act* (NT) was therefore a relevant, but not mandatory, consideration. Section 51A provides that compensation must not exceed the equivalent of the freehold value of

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35 Bartlett (n 1) 71–92.

36 For the implications of differing conceptualisations of native title for compensation, see Paul Burke, 'How Can Judges Calculate Native Title Compensation?' (Discussion Paper, Native Title Research Unit, Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 11–17.

37 *Griffiths v Northern Territory (No 3)* (2016) 337 ALR 362 ('*Timber Creek (FCA)*') 370 [33] (Mansfield J).

38 Ibid 369–71 [32]–[40] (Mansfield J); *Northern Territory v Griffiths* (2017) 256 FCR 478 ('*Timber Creek (FCAFC)*') 485–8 [9]–[13] (North ACJ, Barker and Mortimer JJ); *Timber Creek (HCA)* (n 13) 30–1 [6] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

39 See, eg, *Timber Creek (HCA)* (n 13) 91 [174] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

40 *Timber Creek (FCA)* (n 37) 376 [71(3)] (Mansfield J); *Timber Creek (FCAFC)* (n 38) 492 [33] (North ACJ, Barker and Mortimer JJ); *Timber Creek (HCA)* (n 13) 32 [10] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

41 *Timber Creek (FCA)* (n 37) 443–4 [449]–[450] (Mansfield J).

42 Ibid 443 [450]. See *Native Title Act* (n 2) s 24OA.

43 *Native Title Act* (n 2) s 51(1).

44 Ibid s 51(4).

the land (or waters),[45] however s 53 allows for an amount exceeding the freehold value to be awarded if the freehold value would not constitute just terms pursuant to a compulsory acquisition under s 51(xxxi) of the *Australian Constitution*.[46] Section 53 has been described as a 'shipwrecks clause':[47] that is, it ensures the constitutional validity of the *Native Title Act*'s compensation provisions.[48] The *Native Title Act*'s future acts regime does not itself provide for compensation for invalid future acts that do not extinguish native title.[49] Yet the shipwrecks clause also provides for constitutional 'just terms' compensation where 'the doing of any future act' would result in the compulsory acquisition of native title.[50]

The Claim Group framed their argument for 'just terms' compensation for the compensable acts under the heads of economic loss, interest, and non-economic or intangible loss. This framework itself was not contested.[51] For the invalid future acts, the Claim Group sought general law compensation on the grounds that an injunction preventing those acts could have successfully been sought pursuant to the future acts regime.[52] That regime importantly confers certain procedural rights upon native title holders.[53] The Claim Group alternatively argued that compensation was payable for 'wrongful occupation and use of the land' in the form of trespass.[54] They did not make submissions as to compensation payable under s 53.[55]

At first instance, Mansfield J of the Federal Court of Australia made an *in globo* award for economic loss due to the compensable acts comprising 80% of the value of the freehold ($512,400), simple interest on that amount until the date of judgment ($1,488,261), and $1.3 million for non-economic loss, termed 'solatium'.[56] Solatium is an element of compulsory acquisition compensation for subjective, non-tangible disruption to a person's life flowing from the non-voluntary nature of their surrender of rights.[57] For the invalid future acts, Mansfield J also awarded damages for 80% of the market value of the lots on which the three acts took place.[58] On appeal, the Full Court of the Federal Court (North ACJ, Barker and Mortimer JJ) upheld the amount awarded for solatium. However, the Full Court reduced the economic loss component to 65% of the freehold value, largely by virtue

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45 Ibid s 51A(1).
46 Ibid s 53(1)(b).
47 See, eg, *Timber Creek (HCA)* (n 13) 44–5 [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
48 Ibid; Bartlett (n 1) 735.
49 *Timber Creek (FCA)* (n 37) 443 [450] (Mansfield J).
50 *Native Title Act* (n 2) s 53(1)(a).
51 *Timber Creek (FCA)* (n 37) 371 [42] (Mansfield J); *Timber Creek (FCAFC)* (n 38) 495 [40]–[42] (North ACJ, Barker and Mortimer JJ); *Timber Creek (HCA)* (n 13) 33–6 [11]–[18] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
52 *Timber Creek (FCA)* (n 37) 443–4 [450] (Mansfield J). This argument has been successful since the *Timber Creek (HCA)* judgment was delivered: see, eg, *Kaurareg Native Title Aboriginal Corporation RNTBC v Torres Shire Council* [2019] FCA 746.
53 See n 28 and accompanying text.
54 *Timber Creek (FCA)* (n 37) 444 [450]. See also at 444 [454].
55 See Ngaliwurru and Nungali Peoples, 'Submissions of the Appellant (D3/2018)/First Respondent (D1 & D2/2018)', Submission in *Northern Territory v Griffiths (on behalf of the Ngaliwurru and Nungali Peoples)*, Case D1/2018, 4 May 2018, [27] ('Claim Group Submissions').
56 *Timber Creek (FCA)* (n 37) 446 [466] (Mansfield J).
57 *Timber Creek (HCA)* (n 13) 118–9 [272] (Edelman J).
58 *Timber Creek (FCA)* (n 37) 405 [232], 441 [429], 442 [434], 445 [463] (Mansfield J).

of the inalienability of the native title rights,[59] and accordingly the simple interest component was decreased.[60] The Full Court rejected Mansfield J's award of damages for the invalid future acts.[61]

The Claim Group, the Northern Territory and the Commonwealth each appealed to the High Court of Australia on a number of bases. This case note is concerned with the Claim Group's argument that the economic value of the rights was equivalent to the freehold, and the opposing argument of the Northern Territory and the Commonwealth that 50% was appropriate.[62] The Full Court's rejection of Mansfield J's award for invalid future acts was not agitated in the High Court,[63] however this case note argues that it also has implications for substantive equality in native title valuation. It is considered separately in Part V.

The High Court majority, comprising Kiefel CJ and Bell, Keane, Nettle, and Gordon JJ, found the economic loss for extinguishment of the rights due to the compensable acts to be 50% of the freehold value, and accordingly reduced the award for simple interest.[64] However, their Honours upheld Mansfield J's first instance award for non-economic loss, instead terming it 'cultural loss'.[65] Gageler J provided a separate opinion regarding the calculation of economic loss, but otherwise agreed with the majority.[66] Edelman J also reached the same amounts albeit for different reasons.[67] Thus, the total amount awarded for the extinguishment of the Claim Group's native title rights was $2,530,350.[68]

IV *Timber Creek*: Towards Substantive Equality?

The High Court in *Timber Creek* was presented with an opportunity to ascertain the economic value of the Claim Group's extinguished rights in a manner that achieved substantive equality for native title valuation compared with other real property interests. While some native title compensation claims have come before lower courts, the claimants have either failed to prove that native title existed,[69] or have consented to determinations.[70] The High Court was 'in unchartered waters';[71] and international authority from similar jurisdictions (such as Canada) is sparse.[72] Additionally, the *Native Title Act* provisions are broad, requiring only that compensation for extinguishment of native title be provided on 'just terms'.[73] There was therefore scope for judicial delineation of principles that recognised the historical

59 *Timber Creek (FCAFC)* (n 38) 519–20 [129]–[139] (North ACJ, Barker and Mortimer JJ).
60 Ibid 589 [465] (North ACJ, Barker and Mortimer JJ).
61 Ibid 587 [448] (North ACJ, Barker and Mortimer JJ).
62 *Timber Creek (HCA)* (n 13) 34–6 [16–17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
63 Claim Group Submissions (n 55).
64 *Timber Creek (HCA)* (n 13) 29–30 [3] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
65 Ibid 46 [54], 86 [154], 109–10 [237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
66 Ibid 111–12 [240]–[250] (Gageler J).
67 Ibid 113–148 [251]–[360] (Edelman J).
68 Ibid 110 [238] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
69 See *Jango v Northern Territory of Australia* (2006) 152 FCR 150.
70 See *De Rose v South Australia* [2013] FCA 988.
71 Edgeworth (n 16) 442.
72 See Adkins et al (n 18).
73 *Native Title Act* (n 2) s 51(1).

context of dispossession, had regard for the practical effect of western valuation laws, and appreciated Indigenous cultural differences in respect of land use.

A *Economic Loss: The Methodology*

The High Court majority set out a methodology that was, on its face, entrenched in notions of substantive equality. Their Honours framed their approach to compensation for the extinguishing acts in terms of the *Native Title Act*'s role in ameliorating the effects of colonial dispossession.[74] Importantly, the majority also noted that the *Native Title Act* establishes a compensation system for addressing these consequences 'in a practical way'.[75] However, this task is fundamentally complex because 'the Act seeks to deal with concepts and ideas which are both ancient and new; developed but also developing; retrospective but also prospective'.[76]

The majority identified s 51(1) as the 'core' compensation provision.[77] Significantly, their Honours then stated that 'just terms' comprised compensation for both 'the physical or material aspect (the right to do something in relation to land) and the cultural or spiritual aspect (the connection with the land)'.[78] Moreover, their Honours considered that the effect of each act will be unique and 'fact specific' according to 'the native title holders' identity and connection to the affected land'.[79] However, the task does not require that 'the consequence directly arise from the compensable act'; rather, it is necessary to assess compensation holistically 'in the particular context of the *Native Title Act*, the particular compensable acts and the evidence as a whole'.[80] Finally, the majority explained the operation of the freehold cap contained in s 51A,[81] concluding that ss 51(1) and 51A require that 'the compensation payable to the native title holders is to be measured by reference to, and capped at, the freehold value of the land *together with* compensation for cultural loss'.[82] In this sense, the *Native Title Act* permits an economic loss claim for an amount equivalent to the freehold value in addition to a further amount for cultural loss. This clarification is important, as both legislators and academics had previously questioned the capacity for a native title compensation award to constitute 'just terms' without an element for cultural loss.[83]

Lawyers and anthropologists have praised the High Court's cultural loss award, particularly for its endorsement of Mansfield J's methodology.[84] In

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74 *Timber Creek (HCA)* (n 13) 39 [26] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
75 Ibid 39 [27].
76 Ibid.
77 Ibid 43 [41] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
78 Ibid 43 [44] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
79 Ibid 44 [46].
80 Ibid.
81 Ibid 45–6 [50]–[54] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
82 Ibid 46 [54] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (emphasis added).
83 *Parliamentary Debates* (Keating) (n 1); Burke (n 36); Wanjie Song, 'What's Next for Native Title Compensation: The *De Rose* Decision and the Assessment of Native Title Rights and Interests' (2014) 8(10) *Indigenous Law Bulletin* 11; Adkins et al (n 18); Jude Mannix and Michael Hefferan, 'New Dimensions in Land Tenure — The Current Status and Issues Surrounding Native Title in Regional Australia' (2018) 24(3) *Australasian Journal of Regional Studies* 284.
84 See, eg, Edgeworth (n 16); Gordon (n 16); Cath McLeish, 'Compensation Awarded in Australian First' (April 2019) *Land Rights News (Northern Edition)* 11; Pamela Faye McGrath, 'Native Title

formulating the award for cultural loss, His Honour had correctly referred to the evidence of significant and ongoing 'spiritual hurt' suffered by the Claim Group as a result of extinguishment.[85] Having regard to that evidence, the Court was of the view that his Honour's award was not manifestly excessive.[86] In upholding Mansfield J's award, the High Court prioritised the worldview of the Ngaliwurru and Nungali peoples in a way that meets international standards for monetary compensation for incursions of Indigenous rights to land.[87] This component of the judgment will have many positive implications for future compensation outcomes.[88] However, relatively little attention has been directed to the question of whether the High Court's analysis of economic loss also meets the requirements of substantive equality in native title valuation. This is explored below.

B *Economic Loss: The Analysis*

This case note contends that the High Court's valuation of economic loss did not achieve substantive equality for the Claim Group's native title rights in *Timber Creek*. The majority approached the task as if it were a compulsory acquisition of real property, adopting a modified *Spencer* approach to valuation. This test envisages a hypothetical negotiation for a purchase of rights by a willing but not anxious purchaser from a willing but not anxious vendor,[89] adapted in order to 'accommodate the unique character of native title rights and interests and the statutory context'.[90] In applying this modified test, the majority made an 'evaluative judgment' of the economic value of the non-exclusive rights held by the Claim Group based on a comparison to full exclusive native title,[91] which is given the proxy value of the freehold, being the estate which confers 'the greatest degree of power that can be exercised over the land'.[92] Ultimately, the Court accepted that the non-exclusive rights of the Claim Group were worth 50% of the economic value of the freehold estate.[93]

Cath McLeish, a senior lawyer at Northern Land Council who assisted in the case, considered this part of the decision to be disappointing.[94] A close examination of the practical effects of the application of the modified *Spencer* test (as

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Anthropology after the Timber Creek Decision' (2017) 6(5) *Land, Rights, Laws: Issues of Native Title* 1; Sandra Pannell, 'Framing the Loss of Solace: Issues and Challenges in Researching Indigenous Compensation Claims' (2018) 28(3) *Anthropological Forum* 255; Mannix and Hefferan (n 83).

85 See, eg, *Timber Creek (HCA)* (n 13) 86 [155] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also *Timber Creek (HCA)* (n 13) 108–9 [233]–[234] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

86 Ibid 109–10 [235]–[237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

87 Garrick Small and John Sheehan, 'The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value' in Robert A Simons, Rachel M Malmgren and Garrick Small (eds), *Indigenous Peoples and Real Estate Valuation* (Springer, 2008) 103; Genger (n 18); Burke (n 36); Özlem Ülgen, 'Aboriginal Title in Canada: Recognition and Reconciliation' (2000) 47(2) *Netherlands International Law Review* 146; Adkins et al (n 18); Gunn (n 18). See also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 28.

88 McGrath (n 84); Pannell (n 84).

89 *Spencer* (n 19) 432, 440–41.

90 *Timber Creek (HCA)* (n 13) 50 [66] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

91 Ibid 51 [70] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

92 Ibid 50 [67].

93 Ibid 66 [107] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

94 McLeish (n 84) 11.

substantive equality requires) reveals that the Claim Group were afforded mere formal equality by the High Court in their analysis of economic loss. This is so for the following reasons.

1 *Legalism in the Act of Translation*

The High Court in *Timber Creek (HCA)* showed a formalistic interpretation of what the *RDA* requires in valuing the economic worth of the Claim Group's native title rights. Consequently, the modified *Spencer* test attributed little economic value to the practical exercise of the rights, focusing on their legal content in a manner that denied substantive equality. The majority, in stating that the *RDA* requires 'parity of treatment',[95] noted that:

> There is nothing discriminatory about treating non-exclusive native title as a lesser interest in land than a full exclusive native title or, for that reason, as having a lesser economic value than a freehold estate. To the contrary, it is to treat like as like.[96]

However, substantive equality in native title valuation is not concerned with mere 'treatment'. Rather, it requires examination of the practical effect of the law in question in order to discern whether the *outcome* would result in a characterisation of native title as inferior relative to other interests.[97] Central to this exercise is the effective completion of the act of 'translation', which addresses the incommensurability of Indigenous and western land usage by having regard to both perspectives.[98] In *Timber Creek (HCA)*, however, the modified *Spencer* test failed to account adequately for the perspective of the Claim Group, focusing solely on the *legal content* of the non-exclusive rights when compared to the freehold, which confers the greatest power, in theory, to grant rights and interests and exclude others from the land.[99] Having regard to its effect, this legalism disregarded practical aspects of the exercise of the rights that were translatable to western notions of economic value.

Due to this formalistic understanding of equality, the majority attributed economic value solely by reference to the 'limited'[100] legal content of the Claim Group's non-exclusive native title.[101] Indeed, while the rights were 'perpetual and objectively valuable in that they entitled the Claim Group to live upon the land and exploit it',[102] they did not extend to commercial purposes and were essentially 'usufructuary, ceremonial and non-exclusive'.[103] They did not include any 'entitlement to exclude others from entering onto the land and no right to control the conduct of others on the land'.[104] In this sense, they were 'considerably less

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95 *Timber Creek (HCA)* (n 13) 53 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
96 Ibid 53 [74].
97 See above nn 20–25 and accompanying text.
98 Burke (n 36) 11–12.
99 See above n 92 and accompanying text.
100 *Timber Creek (HCA)* (n 13) 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
101 The Court relied on *Ward* (n 6) in maintaining an inherent difference in economic value between exclusive and non-exclusive native title. That position is examined below.
102 *Timber Creek (HCA)* (n 13) 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
103 Ibid 65 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
104 Ibid 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

extensive than full exclusive native title'.[105] Moreover, the Claim Group could not 'grant co-existing rights and interests in the land',[106] and their native title rights were highly susceptible to extinguishment by other grants, irrespective of the likelihood of those grants in fact being made.[107] The prior valuations of 80% and 65% of the economic value of the freehold were therefore so manifestly excessive within the framework for valuation of non-native title rights that they constituted an 'error of principle'.[108] The majority implied that the rights may have been worth less than 50%, however this amount was accepted because no lower figure was argued.[109] This analysis was deficit-based: it focused on the theoretical limitations of the rights when compared with the freehold.

This focus on 'parity of treatment'[110] through the adapted *Spencer* approach did not attribute any economic value to the 'secular, economic, and pragmatic aspects of Indigenous connections to land',[111] which are increasingly being accepted by legal scholars and other academics.[112] The High Court in *Timber Creek (HCA)* acknowledged evidence of these aspects, but their Honours considered that it was relevant only to cultural value. In this sense, it was impermissible to also consider it in the assessment of economic value.[113] For example, the Court recognised the authority that the Claim Group exercised in respect of the land around Timber Creek in that the rights and interests contained the right to protect certain areas.[114] Additionally, the Court found that the Claim Group's authority to exclude people from certain areas, such as the proposed site for a diamond mine, was respected by non-Indigenous people.[115] This was evidence of secular and pragmatic components of the Claim Group's native title rights that were capable of translation to western notions of, for example, control of access to land. Yet the majority did not look to the exercise of the Claim Group's rights when translating their economic value. Instead, the Court focused solely on their legal content and thus the theoretical limitations inherent to their non-exclusive nature.

The majority's approach to valuation was contrary to that of Mansfield J. Having received the Claim Group's evidence of land usage at first instance, his Honour found that exclusivity and non-exclusivity made little difference to the exercise of the rights of the Claim Group. The extinguished rights were 'in a practical sense very substantial',[116] and were 'in a practical sense exercisable in such a way as to prevent any further activity on the land, subject to the existing tenures'.[117] Consequently, Mansfield J considered that their value, when compared to the

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105 Ibid 54 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
106 Ibid 65 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
107 Ibid 55 [81] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
108 Ibid 66 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
109 Ibid 66 [107] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
110 See above nn 95–6 and accompanying text.
111 Sean Brennan, 'Native Title in the High Court of Australia a Decade after *Mabo*' (2003) 14(4) *Public Law Review* 209, 214. See also Brennan (n 1) 37.
112 See, eg, Gordon (n 16) 324; Brennan (n 111) 214; Bruce Pascoe, *Dark Emu* (Magabala Books, 2014); Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2012).
113 *Timber Creek (HCA)* (n 13) 56 [83] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
114 Ibid 92–4 [180] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
115 Ibid 94 [182]–[183] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
116 *Timber Creek (FCA)* (n 37) 404 [231] (Mansfield J).
117 Ibid 404 [232] (Mansfield J).

freehold, should not be significantly reduced.[118] His Honour appears to have recognised the flaws of a native title valuation exercise grounded in legalism, noting the danger of abstracting the rights from their 'true' and 'real' characteristics.[119]

The Full Federal Court, in obiter dictum, empathised with these difficulties.[120] Yet in focusing on the idea that 'Aboriginal rights and interests in land have dimensions remote from the notions enshrined in Australian land law',[121] their Honours did not attempt to translate the practical elements of the Claim Group's rights to notions of western land usage. Instead, the Full Court rejected Mansfield J's assessment and approach,[122] speculating that his Honour had thereby impermissibly double-counted the value of cultural aspects in his assessment of economic value.[123] The High Court majority reaffirmed this rejection.[124] Yet a broader reading of Mansfield J's reasoning indicates that this is doubtful: in fact, his Honour's analysis avoided a deficit-based translation of the rights removed from their context.[125]

Later in the High Court judgment, the majority reinforced their formalistic understanding of the requirements of the *RDA*, stating:

> There is no disparity of treatment if the economic value of native title rights and interests is assessed in accordance with conventional tools of economic valuation adapted as necessary to accommodate the unique character of native title rights and interests and the statutory context.[126]

As such:

> The proper comparison was not between the native title rights and interests and the rights and interests which comprise an estate in fee simple, but between the native title rights and interests and the rights and interests of a full exclusive native title.[127]

These references to the peculiarities of the Claim Group's extinguished native title rights, and the need to value them accordingly, appear to demonstrate an understanding of the dictates of substantive equality. Yet they are contestable in two respects. First, the comparison between exclusive and non-exclusive native title was artificial in this case, because the non-exclusive native title rights contained substantive characteristics that were likened to those seen in exclusive native title.[128] Second, the analysis is in fact based on a comparison between the limited legal content of non-exclusive native title and the extensive rights of the freehold estate.[129] The majority intend to take account of 'the unique character of native title rights and

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118 Ibid 404–5 [232] (Mansfield J).
119 Ibid 402 [212]–[213] (Mansfield J).
120 The Full Court consequently questioned the appropriateness of the bifurcated approach: see *Timber Creek (FCAFC)* (n 38) 520–2 [140]–[144] (North ACJ, Barker and Mortimer JJ). This was rejected by the High Court: see *Timber Creek (HCA)* (n 13) 58 [86] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
121 *Timber Creek (FCAFC)* (n 38) 521 [144] (North ACJ, Barker and Mortimer JJ).
122 Ibid 508–9 [82]–[84] (North ACJ, Barker and Mortimer JJ).
123 Ibid 514 [111] (North ACJ, Barker and Mortimer JJ).
124 *Timber Creek (HCA)* (n 13) 65 [105] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
125 See, eg, *Timber Creek (FCA)* (n 37) 402 [214] (Mansfield J).
126 *Timber Creek (HCA)* (n 13) 53–4 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
127 Ibid 54 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
128 See above nn 110–19 and accompanying text.
129 See above nn 97–107 and accompanying text. See also *Timber Creek (HCA)* (n 13) 58–9 [87], 65–6 [104]–[106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

interests',[130] however are prevented from doing so through relying on the legal content of other real property interests and western ideals of land usage as an indicator of economic value.

This discussion reveals an implicit tension in the judgment: the majority defer to Mansfield J's first-hand consideration of the evidence of non-economic loss, but reject his Honour's view of the practical, non-cultural realities of the exercise of the rights of the Claim Group.[131] Thus, the majority in *Timber Creek (HCA)* appear to have overlooked the 'peculiar features'[132] of the Claim Group's native title rights through the legalistic translation exercise in the modified *Spencer* test, and therefore translated their economic value in a manner inconsistent with substantive equality.

2 *Extinguishment and Compensation: A Reliance on* Ward

The legalism inherent to the modified *Spencer* approach to economic valuation in *Timber Creek (HCA)* largely derives from the 'inconsistency' test for extinguishment expounded in late 1990s and early 2000s native title jurisprudence, including *Fejo*[133] and *Ward*.[134] The alignment of the extinguishment doctrine with the compensation arena prevented substantively equal valuation of the native title rights of the Claim Group in this case.

Like the approach to economic valuation in *Timber Creek (HCA)*, the test for extinguishment established in *Fejo* and *Ward* failed to account for the very real possibility of ongoing practical connections to country and seemingly placed native title in an inherently weak position as against the grant of other real property interests.[135] For Bartlett, the test represented a 'judicial denial of equality'[136] in its emphasis on the *sui generis* nature of native title rights in a manner which in fact established their 'unique susceptibility to extinguishment' as against other interests.[137] Bret Walker SC argues that *Fejo* in particular denied the qualities of 'title' to native title,[138] and in a scathing critique writes that the extinguishment principle represents 'a triumph of logic and a denial of human experience'.[139] Watson further asserts that *Fejo* and *Ward* are symbolic of the High Court's inability to recognise cultural differences in an 'affirmative and ongoing way'.[140]

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130 *Timber Creek (HCA)* (n 13) 50 [66], 53–4 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
131 Ibid 65–6 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
132 Tina Jowett and Kevin Williams, '*Jango*: Payment of Compensation for the Extinguishment of Native Title' (2007) 3(8) *Land, Rights, Laws: Issues of Native Title* 1, 10, quoting *Western Australia v Thomas* (1996) 133 FLR 124, 192.
133 *Fejo* (n 4).
134 *Ward* (n 6).
135 Sean Brennan, 'Native Title Extinguishment Law in the High Court' (2014) 25(1) *Public Law Review* 8, 9, 12.
136 Bartlett (n 1) 72.
137 Ibid 73.
138 Bret Walker, 'The Legal Shortcomings of Native Title' in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 14, 17–18.
139 Ibid 18.
140 Watson (n 24) 229.

In this sense, the repeated citing of *Ward* by the majority in *Timber Creek (HCA)* is concerning for substantive equality as it imports the legalism inherent to the extinguishment doctrine to the *Native Title Act*'s compensation requirements, which had been formulated in ambiguously broad terms by the legislature.[141] Consequently, the necessary act of translation to ascertain economic value was not carried out in a manner alert to the secular realities of the Claim Groups' native title rights. The majority stated:

> It is plain from the holding in *Ward* that, because the non-exclusive native title rights and interests in that case did not amount to having 'lawful control and management' of the land, the native title holders were not to be assimilated to 'owners' but could at best be regarded as 'occupiers' and thus could be compensated only at the lesser rate applicable to occupiers.[142]

Edelman J took a slightly different approach: his Honour appeared to examine the extent to which the native title rights burden or encroach upon the use of the fee simple in a practical sense.[143] However, the citing of *Ward* had a similar effect to that of the majority's analysis, postulating a theoretical 'difference of "kind"'[144] between exclusive and non-exclusive native title rights. In Edelman J's view, this expressly precludes consideration of whether any 'right to control access is included within the so-called "bundle of rights" held by the native title claimants',[145] and his Honour thereafter attributes the Claim Group's use of the land solely to cultural value.[146] Despite the thinly veiled jab at *Ward*'s 'bundle of rights' construction of native title, Edelman J's analysis seemingly contains an unresolved methodological tension. On the one hand, the economic value of extinguished native title should be ascertained, at least to some extent, by reference to the Claim Group's practical exercise of their native title rights (in the sense of their burden on the fee simple). On the other hand, the *Ward* approach dictates that value should be determined completely in accordance with their non-exclusive legal content.

The pervasiveness in *Timber Creek (HCA)* of *Ward*'s discriminatory distinction between owners and occupiers is a stark reminder of a view seen in the late 1990s and early 2000s that Indigenous uses of land were inferior.[147] Its presence in the compensation context undermines the efforts of both the majority and Edelman J to attribute value to the perpetual nature of the Claim Group's interests in the land, but for irreversible extinguishment.[148] This fact is highly significant: as Burke argues, '[n]ative title is an ancient title compared to a freehold title which needs only to have been owned for an instant before full market value is payable upon acquisition.'[149] However, the alignment of native title compensation law with extinguishment principles largely disregards any value attributable to historical

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141 Burke (n 36) 17–18. See also *Timber Creek (FCAFC)* (n 38) 521 [142] (North ACJ, Barker and Mortimer JJ).

142 *Timber Creek (HCA)* (n 13) 53 [75] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

143 Ibid 124–8 [288]–[301] (Edelman J).

144 Ibid 114 [256] (Edelman J).

145 Ibid.

146 Ibid 123 [285] (Edelman J).

147 See Bartlett (n 1) 277–8, 280–81.

148 See, eg, *Timber Creek (HCA)* (n 13) 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 127 [300] (Edelman J).

149 Burke (n 36) 15.

occupation independent from cultural use. Therefore, the practical effect of the High Court's entwining of the *Spencer* test and *Ward* was, to adopt McLeish's position, disappointing. It prevented adequate translation of the evidence of the Claim Group's secular authority over the land, and as such failed to achieve substantive equality.

3 *Wider Implications: A Positive Outlook for Future Claims?*

Despite the flaws identified above, there are some positive statements of principle that can be drawn from the economic loss component of the *Timber Creek (HCA)* judgment. These may offer hope for future claimants in terms of achieving a substantively equal valuation of their native title rights when compared with other real property interests.

First, the High Court's acknowledgement that even non-exclusive native title rights have some economic value is important. The significance of this recognition is not diminished by the fact that in this case, their 'limited' nature resulted in a reduced award. The majority noted that the native title rights of the Claim Group 'had a recognisable economic worth',[150] and stated that generally, extinguishment of exclusive native title attracts the full value of the freehold.[151] The certainty that more extensive rights will attract higher compensation in respect of economic loss will have positive implications for future native title compensation applications, even if the combined effect of ss 51 and 51A of the *Native Title Act* appears to limit that economic value to that of the freehold estate.[152] Furthermore, that limit is also not necessarily set in stone: the Claim Group did not advance any entitlement to compensation pursuant to the constitutional 'shipwrecks clause'[153] contained in s 53 of the *Native Title Act*.[154] It therefore remains theoretically possible that extinguished native title rights in a future compensation claim could be given a higher value than the freehold estate under that provision.[155]

These implications are evident when considered in light of significant recent native title jurisprudence such as *Akiba*[156] and subsequent Federal Court native title determinations, which have moved away from the 'frozen rights' interpretation of native title propounded in the late 1990s and early 2000s. Early cases such as *Ward*[157] and *Yorta Yorta*[158] established a narrow conceptualisation of native title rights that have been described as 'frozen'[159] or 'berry picking' rights;[160] that is, limited only to practices that can be proved to have survived colonisation and

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150 *Timber Creek (HCA)* (n 13) 57 [85] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
151 Ibid 29 [3](1) (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
152 Ibid 44–5 [48]–[51](Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
153 Ibid 45 [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). Edelman J describes that provision as a 'safety net' at 137 [330]: quoting Explanatory Memorandum, Native Title Amendment Bill 1997, 224 [24.10].
154 See Claim Group Submissions (n 55) [27]. See also nn 46–8 and accompanying text.
155 See, eg, Aaron Moss and William Isdale, 'Where to Next? Native Title Compensation following Timber Creek', *AUSPUBLAW* (Blog Post, 3 April 2019).
156 *Akiba* (n 8).
157 *Ward* (n 6).
158 *Yorta Yorta* (n 5).
159 Bartlett (n 1) 72, 295.
160 Noel Pearson, 'Promise of Mabo Not Yet Realised', *The Australian* (29 May 2010).

dominated by the spiritual element of native title.[161] The frozen rights interpretation significantly reduces the potential for any future practical or economic benefit to claimant groups.[162] In *Timber Creek (HCA)*, the particularised and largely 'frozen' 2006 native title determination of the Claim Group also limited the compensation payable under the adapted *Spencer* approach.[163] The judgments of the majority and Edelman J reflect this outcome: both argued that the practical content of the rights was largely cultural,[164] with the minor exception of rights to live off the land.[165]

In recent cases such as *Akiba*, the High Court has avoided over-specifying rights, even accepting that native title is not fundamentally incompatible with western notions of resource exploitation. For some scholars, this signifies a 'turn towards greater moderation and realism in the judicial treatment of native title'[166] and an application of 'the standard fundamentally determined by the dictates of equality'.[167] In *Akiba*, the Court rejected the notion that 'the right to take for any purpose resources in the native title areas' should be read down to exclude commercial rights,[168] and subsequent Federal Court native title determinations have followed this development. For example, in *Willis (on behalf of the Pilki People) v Western Australia (No 2)*, McKerracher J also found that the native title rights of the Pilki People included 'the right to access and take *for any purpose* the resources of the land and waters'.[169] Cases such as these have two significant implications for compensation. First, as stated by the majority and Edelman J in *Timber Creek (HCA)*, commercial rights have, of themselves, significant economic value under the adapted *Spencer* test.[170] Second, a broader framing of rights increases what could possibly be the subject of compensation.[171] In line with the practical approach to extinguishment taken in *Akiba*,[172] these kinds of conceptualisations of native title could allow for more emphasis to be placed on the exercise of the rights in question when translating their economic value, contrary to the legalistic approach in *Timber Creek (HCA)*.

The second positive statement of principle that future claimants can take from the adapted *Spencer* exercise in *Timber Creek* is that inalienability is irrelevant in ascertaining economic value. Inalienability is a significant barrier to achieving

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161 See, eg, Paul Finn, 'A Judge's Reflections on Native Title' in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 23, 27.

162 Morris (n 7) 3–4.

163 Burke (n 36) 36; Bartlett (n 1) 748.

164 *Timber Creek (HCA)* (n 13) 56 [81] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 123 [285] (Edelman J).

165 Ibid 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 391 (Edelman J).

166 Brennan (n 12) 29.

167 Bartlett (n 1) 109.

168 See, eg, *Akiba* (n 8) 218 [5], 224 [21] (French CJ and Crennan J).

169 *Willis (on behalf of the Pilki People) v Western Australia (No 2)* [2014] FCA 1293, [3] (emphasis added). For a similar and more recent example, see *Fulton (on behalf of the Mambali Amaling-Gan, Murungun Igalumba, Murungun Milgawirri, Budal Yuwaran and Guyal Bardi Bardi Dumnyun-Ngatanyana Estate Groups) v Northern Territory* [2020] FCA 1271, [9](b) (White J).

170 See, eg, *Timber Creek (HCA)* (n 13) 65 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 391 127 [299] (Edelman J).

171 See Brennan (n 12) 34–7.

172 Brennan (n 12).

substantial equality for native title, with Morris noting that it is 'ill-suited to economic development in the modern Australian economy' and contradictory to the special measures contained in the *Native Title Act*.[173] The assumption that native title is inalienable has not been challenged since *Mabo (No 2)*, despite its justifications having been described as 'circular'[174] and symbolic of the continued pervasion of the 'noble savage' and paternalism in native title jurisprudence.[175] In *Timber Creek (HCA)*, however, the majority held that inalienability was irrelevant to economic valuation of native title on the basis of statutory interpretation of s 51A of the *Native Title Act*, read in light of its explanatory memoranda: 'Just as the inalienability of full exclusive native title is deemed to be irrelevant to the assessment of its economic value, so too must it follow that the inalienability of non-exclusive native title is irrelevant to its economic value.'[176]

Edelman J took a similar position, finding that inalienability was irrelevant to economic value because the adapted *Spencer* approach focused on what a willing but not anxious purchaser would pay to extinguish, rather than acquire, the native title rights.[177] The High Court's delineation of this principle, and its emphatic rejection of the Full Court's opinion that inalienability on its own reduced the economic value of native title rights,[178] are symbolically important. It resists a framing of native title rights that is both frozen and inferior, instead placing native title on more equal footing with other real property interests in the compensation context. Therefore, while the High Court's approach to the compensable acts is, in some respects, disappointing for the *Timber Creek* claimants, the judgment contains some positive statements of principle that clarify the relevance of inalienability, as well as indicating increased potential for compensation of broader native title rights like those in *Akiba*.

V Unanswered Questions: The Invalid Future Acts

Having considered the implications of the modified *Spencer* approach in *Timber Creek (HCA)* in respect of the compensable acts, this case note now returns to the claim for damages for the invalid future acts. This issue was not agitated in the High Court.[179] The resulting lack of clarity in this area is significant for substantively equal valuation of native title rights compared to other real property interests.

Since its enactment in 1993, the *Native Title Act* has sought to address inequality and promote economic participation for native title holders, having regard to the effects of non-consensual use and dispossession of land.[180] The future acts

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173 Morris (n 7) 1.

174 Ibid 11. See also at 6.

175 Ibid; David Yarrow, 'The Inalienability of Native Title in Australia: A Conclusion in Search of a Rationale' in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 60, 69; Kent McNeil, 'Self-Government and the Inalienability of Aboriginal Title' (2002) 47(3) *McGill Law Journal* 473.

176 *Timber Creek (HCA)* (n 13) 64 [101] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

177 Ibid 122 [283] (Edelman J).

178 *Timber Creek (FCAFC)* (n 38) 513–17 [109]–[122] (North ACJ, Barker and Mortimer JJ).

179 See n 63 and accompanying text.

180 See nn 26–30 and accompanying text.

regime is central to that effort,[181] providing for the right to negotiate in certain circumstances[182] and for the making of Indigenous Land Use Agreements ('ILUAs').[183] ILUAs are now routine in many remote commercial and government projects and often provide economic benefits to Traditional Owners, such as monetary compensation, employment and education schemes, in exchange for use of land in which native title rights exist.[184] Invalid future acts may also be validated pursuant to the terms of an ILUA in return for compensation.[185] These procedural rights conferred by the *Native Title Act* are central to ensuring equal treatment of native title rights compared with other real property interests.

The relevant provisions of the *Native Title Act* and the arguments of the Claim Group in *Timber Creek* have been described above.[186] At first instance, Mansfield J awarded general law damages for the invalid future acts, comprising 80% of the market value of the land on which the invalid future acts took place.[187] It is not clear whether this was made on the basis of relief for the tort of trespass, or as an alternative to injunctive relief under the future acts regime.[188] The Full Federal Court rejected the award on the basis of this lack of clarity.[189]

Yet the Full Court also noted that the issue of compensation under the *Native Title Act* for invalid future acts remains unaddressed, and highlighted the consequent need for applicable principles.[190] This was especially so in the present circumstances, where an ILUA had not been instituted following the invalid future act.[191] It is therefore surprising that the Claim Group in *Timber Creek* did not advance any entitlement to compensation in the High Court, either based on the general law or the shipwrecks clause in s 53 of the *Native Title Act*. While it is not clear whether the acts in this case enlivened the right to negotiate, the rights conferred by the future acts regime had been in operation since 1993, five years prior to the first invalid act. Given that the existence of native title over the relevant lots was not contested,[192] it is likely that such grants would today take place pursuant to an ILUA or otherwise be the subject of compensation.[193] Yet having not been argued in the High Court, there is currently no certainty for future claimants that compensation may be available for non-adherence to those procedures. As the Full Federal Court recognised, some indication of the applicable principles in these circumstances would therefore have been useful, particularly in light of their purpose.

There is consequently an uncomfortable temporal disjuncture in the native title compensation exercise post-*Timber Creek (HCA)*. On one hand, the case purports to clarify the compensation payable to native title holders under the *Native*

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181 Bartlett (n 1) 63, 543–4, 589, 600–3; Gunn (n 18) 302; Song (n 83) 12.
182 *Native Title Act* (n 2) pt 2 div 3 sub-div P.
183 Ibid pt 2 div 3 sub-divs B–D.
184 Bartlett (n 1) 690–91. See, eg, the Ord Final Agreement ILUA: Bartlett (n 1) 703.
185 Ibid 695–6.
186 See nn 49–50, 52–55 and accompanying text.
187 *Timber Creek (FCA)* (n 37) 443–5 [449]–[462] (Mansfield J).
188 Ibid 445 [459]–[462] (Mansfield J).
189 *Timber Creek (FCAFC)* (n 38) 586–7 [446]–[448] (North ACJ, Barker and Mortimer JJ).
190 Ibid 587 [447]–[448] (North ACJ, Barker and Mortimer JJ).
191 Ibid.
192 *Timber Creek (FCA)* (n 37) 443 [450] (Mansfield J).
193 *Timber Creek (FCAFC)* (n 38) 587 [447] (North ACJ, Barker and Mortimer JJ).

Title Act for economic loss due to acts extinguishing native title from 1975 onwards: that is, following the enactment of the *RDA*. On the other hand, the case appears to do so based on an economic valuation of traditional laws and customs which, by legal definition, have largely remained incapable of change since before British sovereignty. Further, the law as it presently stands does not clarify the value of rights to economic participation contained in the future acts regime, which have operated since 1993. The task is conceptually stuck between the two worlds. This can be contrasted with the High Court's judgment in respect of cultural loss: there, the majority joined the past and the future through, for example, permitting consideration of the consequences of extinguishment for 'future descendants' of the Claim Group.[194]

Thus, in the lack of delineation of principles in respect of compensation for lost *Native Title Act* procedural rights, there remains some doubt as to whether the compensation landscape post-*Timber Creek (HCA)* provides for substantively equal valuation of native title when compared with other real property interests. It is clear that the value attaching to lost *Native Title Act* procedural rights requires judicial clarification in the future.

VI Conclusion

Timber Creek (HCA) is a landmark case for native title. While it is largely accepted that the award for cultural loss achieves substantive equality, the same cannot be conclusively stated in respect of the High Court's modified *Spencer* approach to economic valuation of the Claim Group's rights in this case. The Court's commitment to legalism came at the expense of considering the secular and pragmatic realities of the Claim Group's exercise of their native title rights in this case, and the alignment of economic value with the stringent extinguishment doctrine represented by *Ward* is concerning.

The case also leaves doubt as to the amount payable for invalid future acts, having not been argued in the High Court. *Timber Creek (HCA)* fails to secure substantive equality for native title compensation in these respects.

However, there are some important positives to be drawn from the decision which, in the context of recent cases, place native title on more equal footing with other real property interests. The potential for broader, *Akiba*-like rights to attract significant awards for compensation is clear from this decision, and the rejection of inalienability as a relevant factor to economic value is symbolically important. Overall, then, there are shortcomings in the test applied in relation to the rights of the Ngaliwurru and Nungali peoples. However, considered in tandem with the award of compensation for cultural loss, the decision in *Timber Creek (HCA)* is a step towards securing substantive equality for native title compared to other real property interests.

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194 *Timber Creek (HCA)* (n 13) 107–8 [228]–[231] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).