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The Native Title Act - the first 25 years - Old and New Challenges
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When I was asked to give this year's Richard Cooper memorial lecture, I first had to check whether this year's lecture would be in maritime or native title law as I have an interest in both areas.

Whilst I was somewhat relieved that this year's lecture would concern native title law, in what is almost the 25th anniversary of the commencement of the Native Title Act, I was uncertain what to cover in the short amount of time that I have and noting that there will not be much that those present this evening do not already know.

What I will endeavour to do is provide an overview of the current native title landscape, look at where we have come from and how the landscape has changed over the past 25 years and identify a range of developments and challenges that lie ahead.

An initial snapshot of the native title landscape

A very brief snapshot as to the current native title landscape reveals:

- There have been 1,864 claimant applications lodged with the National Native Title Tribunal (**NNTT**) or filed in the Federal Court:
    - 958 have been dismissed, discontinued, struck-out or withdrawn;
    - 372 of which have been determined:
        - 354 determinations that native title exists - 32 of them litigated determinations; and
        - 18 determinations that native title does not exist - 12 of them litigated determinations;
    - 188 Registered Native Title Bodies Corporate (**RNTBCs**);
    - 238 active claimant applications (83 in Western Australia, 59 in Queensland, 47 in the Northern Territory, 24 in New South Wales, 22 in South Australia and 4 in Victoria);
    - Excluding determinations covering offshore areas, the determinations that native title exists cover approximately 54% of the landmass of Western Australia and South Australia, 27% of Queensland, 22% of the Northern Territory and less than 1% of New South Wales and Victoria;
    - In terms of areas the subject of exclusive determinations of native title, approximately 95% concern areas in Western Australia;

- There have been 412 non-claimant applications, 53 of which have been determined and with 43 still active (22 in Queensland, 18 in New South Wales, 2 in the Northern Territory and 1 in South Australia);

- 41 compensation applications have been lodged or filed, 4 of which have been determined and 6 still active (3 in Queensland and 3 in Western Australia);

- 10 revised native title determination applications have been filed, 1 of which has been determined and with 6 still active (5 in the Northern Territory and 1 in Western Australia);

- There are now 1,250 registered ILUAs - 898 Area ILUAs, 352 Body Corporate ILUAs and, interestingly, no Alternative Procedure ILUAs;

- Countless confusing acronyms - ILUAs, PEPAs, PERBAs, PNEPAs, RTNs, NTRBs, NTSPs, RNTCs, RNTBCs, PBCs and FA Protection to name a few and, in Queensland, NTPCs and, in the ILUA negotiation on the WCCCA (Western Cape Communities Co-existence Agreement) that I was involved in many years ago, SBMLs (special bauxite mining leases) and SPMPLs (a special perpetual mining purposes leases).

There have been 15 High Court decisions from appeals (or proceedings commenced in the High Court's original jurisdiction) that have considered issues concerning or relating to the interpretation or application of the Native Title Act. The High Court's judgment in the three appeals concerning the Timber Creek compensation claim is currently reserved following the hearing in early September 2018. In June 2018 the High Court granted special leave to appeal in the two Tjiwarl matters (which will consider whether a petroleum exploration permit and a mineral exploration licence is a "lease" under section 47B(1)(b)(i) of the Act). The two Tjiwarl appeals are due to be heard by the High Court on 8 November 2018. Just last week the High Court refused special leave to appeal on three applications concerning the Lake Torrens claims.

Initial interaction with the Native Title Act

My first involvement with the Native Title Act commenced on Monday, 3 January 1994 when I was asked to work with Counsel retained for the Applicants on the Wik native title claim to determine the impact that the Act would have on the various claims for relief that had been brought in that proceeding.

The day after the High Court's decision in *Mabo (No 2)* in June 1992, representatives of the Wik People had written to the Cape York Land Council seeking advice on the implications of that decision. In late 1992 early 1993, it was already being asserted by those with interests in the Wik region that they had received legal advice that the effect of the Mabo decision was clear and that there was no prospect of any native title having survived the grant of any pastoral and mining leases. To suggest otherwise, it was said, ran the grave risk of creating unrealistic expectations in the minds of the local Aboriginal people.

Notwithstanding these views, the Wik claim was commenced in the Federal Court on 30 June 1993 (within weeks of the Commonwealth publishing a discussion paper entitled *Mabo, the High Court Decision on Native Title* which was discussed at a COAG meeting in early June 1993) as a common law action seeking:

- orders declaring that the Wik Peoples are the owners of all the land, tidal land and seas in the claim area pursuant to their Aboriginal title and possessory title;

- damages and compensation for wrongful dealings with or breach of fiduciary duties and/or trust obligations in relation to the Aboriginal title and possessory title of the Wik Peoples; and

- orders declaring that some titles granted by Queensland over the land, tidal land and seas of the Wik peoples are invalid under Australian law being beyond power, granted in breach of Queensland's fiduciary duties and/or trust obligations to the Wik Peoples or contrary to the provisions of the Racial Discrimination Act.

The Wik claim was an action brought by 185 members of the Wik People on their own behalf and all members of the Wik Peoples. In the second half of 1993 it was following the well worn path of the Mabo proceedings with extensive requests for further and better particulars and production of documents including a large confidential estate, clan and site register for part of the Wik People's traditional lands that had been prepared by a number of anthropological and an archaeological consultants based on fieldwork and research that they had undertaken in the region since the 1960s.

The Wik Peoples were no strangers to litigation. In 1976, the late Donald Peinkinna and other members of the then Aurukun Council commenced proceedings in the Supreme Court of Queensland against Queensland's Corporation of the Director of Aboriginal and Islanders Advancement, Pat Killoran, on behalf of all other Aboriginal residents of the Aurukun Aboriginal Reserve challenging the power of the Director to enter into an agreement with the so called Aurukun Associates which allowed bauxite mining to be conducted on the Aurukun Aboriginal Reserve, with no direct benefit to Wik people and only a payment of a small (3%) share of the net profits to the Director on behalf of all Aborigines of the State. Although the Full Court of the Supreme Court overruled a motion by the Director to summarily determine the proceedings, the Director appealed this decision to the Privy Council which, in 1978, overturned the Full Court's decision on the basis that the *Aurukun Associates Agreement Act 1975* (Qld) had ratified the Director's agreement and that it was not possible to claim that the Director was in breach of trust by entering into it. Shortly after the outcome of this appeal, the Queensland Government moved to revoke the Aurukun Aboriginal Reserve, create the Shire of Aurukun and granted the Aurukun Shire Lease to prevent the Commonwealth Government from gaining control over affairs on Aboriginal reserve lands. As time ultimately told, Pechiney acquired the interests of the other Aurukun Associates in the bauxite mining lease but undertook no further exploration or mining operations on the land over the next 29 years. In May 2004, as Pechiney was in breach of its obligations under the various agreements, the Queensland Government passed legislation to cancel Pechiney's mining lease (which had been granted shortly after the commencement of the Racial Discrimination Act) and repeal the Aurukun Associates Agreement Act. Yet more than 50 years after the first exploration tenements were granted to the Aurukun Associates, the Aurukun bauxite resource remains undeveloped.

The varied claims for relief in the Wik claim had clearly assisted those drafting the "past act" provisions of the Act because it became very apparent that the Act, coupled with complimentary legislation enacted by the State and Territory governments, would validate grants made after 31 October 1975 which may otherwise have been invalid by virtue of the operation of the Racial Discrimination Act or the existence of native title. Although it was no longer possible to "put Wik law on top", the ability to access the claim and mediation processes under the Act were viewed favourably.

Within the first few months of the commencement of the Act, the Wik Applicants were given the option of either giving an undertaking not to prosecute their claims to Aboriginal title and possessory title in the Wik common law claim with a view to promptly lodging a claimant application seeking an approved determination of native title with the NNTT or continuing those claims in the current proceeding. The Wik Applicants chose the former and the Wik People's claimant application was lodged with the NNTT in March 1994.

The Federal Court then proceeded to set down a number of preliminary questions in what was left of the Wik common law claim. Beyond the hearing of those preliminary questions, and the appeals that were removed into the High Court for hearing, no further steps were taken in the Wik common law claim before it was discontinued in or about 2002. The WCCCA facilitated the resolution of all costs orders arising from the proceedings and related appeals.

The early days of the Native Title Act

I would have to say that my early memories of the Act some 20-odd years ago are somewhat hazy. What I can recall is that, prior to the 1998 amendments to the Act there was:

- An informal approach by the NNTT to the lodging and conduct of claimant applications. A Form 1 application could, for example, be amended by simply writing to the Registrar of the NNTT.

- No need for the Applicant to be authorised by the members of the native title claim group to make the claimant application.

- No need for the native title claim group to be described with any certainty.

- No registration test as such, but rather the requirement for the Registrar to "accept" a claim unless he or she was of the opinion that the application was frivolous or vexatious or that prima facie the claim could not be made out, which then required the Registrar to refer the application to the President.

- Numerous overlapping and registered claimant applications. There was, I recall, an area in Western Australia - most likely the Goldfields region - that was referred to as spaghetti junction because of the large number of overlapping claims.

- Numerous mediation conferences and meetings convened by the NNTT but very little substantive engagement with the State or any other parties on any consent determinations of native title.

- Limited future act activity.

- Major litigation and very little negotiation between the parties to claimant applications.

The entry of claimant applications on the Register of Native Title Claims on the date that they were lodged with the NNTT raised significant implications for the lodging and conduct of claimant applications in the early days of the Act, particularly with the right to negotiate process. The first Waanyi claimant application was filed in June 1994 over a small camping and water reserve known locally as "Ten Mile Waterhole" which also happened to be where part of the proposed Century Zinc Mine was located. The Registrar formed the view that the Waanyi claim could not be made out as native title had been extinguished by two historical pastoral leases that were said to have been "granted" in 1882 and 1904. The President agreed with the view of the Registrar and, in February 1995, directed the Registrar not to accept the application. Notwithstanding the President's decision, which was appealed, the Waanyi claim remained registered on the Register of Native Title Claims until it was withdrawn in November 1999.

The Waanyi claim was also one of the first (and most likely the last) instance where the Applicant on that claimant application were two Indigenous corporations, North Ganalanja Aboriginal Corporation and Bidanggu Aboriginal Corporation. I cannot now recall the rationale for this.

During 1994 and 1995 there was an incredible amount of manoeuvring by all interested parties to secure the most appropriate vehicle to determine what became known as "the pastoral lease point".

The Wik People had opposed the setting down of any preliminary questions in the Wik common law claim in advance of the mediation of their recently lodged claimant application and applied for leave to appeal that decision which was heard by the Full Federal Court in June 1994. The initial preliminary questions that were set down for early determination did not include any questions concerning pastoral leases. It was not until 2 September that the Holroyd pastoral lease question (leases granted in 1945 and 1973) was formulated, which occurred only a few days after the remaining pastoralists were joined as respondents. On 6 September the Full Federal Court dismissed the Wik Peoples' application for leave to appeal, following which on 16 September the Thayorre People, the southern neighbours of the Wik People, were joined as respondents and the Mitchellton pastoral lease question (leases granted in 1915 and 1919, but with possession never taken by the lessee and the land reserved in 1922 for the benefit of Aborigines) was formulated. The hearing of the preliminary questions took place before Justice Drummond in October and December 1994.

In the middle of that hearing the NNTT convened mediation conferences in the Wik claimant application on Strathburn station (to discuss issues relating to the pastoral

lease areas under claim) and at Napranum (to discuss issues relating to the mining lease areas under claim).

The Waanyi People had appealed the decision of the President of the NNTT to the Full Federal Court, both on the procedural point (that the Registrar of the NNTT must accept claimant applications if a question of law upon which it depends is fairly arguable) and the substantive pastoral lease point. In advance of the hearing of that appeal, the Waanyi People applied to remove that appeal to the High Court proposing, with the support of the Attorney-General for the Commonwealth (who had intervened), a case stated concerning the pastoral lease point. That application was opposed by the State and CRA and was dismissed by the High Court in May 1995. The Full Federal Court appeal was then heard in June 1995 and was dismissed by the majority on 1 November 1995. The Waanyi People filed an application for special leave to appeal but did not pursue the procedural point as a ground of appeal.

At the hearing of the special leave application on 15 December 1995, the High Court invited the Waanyi People to seek leave to amend their application to include the procedural point, which they did and which was opposed by the State and CRA. The High Court granted leave to amend but otherwise adjourned the matter to the Full Bench for determination, the hearing of which took place on 7 and 8 February 1996. The parties were told to be ready to argue all aspects of the matter but that the Court would proceed, first of all, as an application for special leave to appeal on the procedural point. With the High Court hearing focused on the procedural point, a number of the respondents and intervening Attorneys-General submitted that, if the Court was minded to grant special leave and allow the appeal on the procedural point, it should nonetheless proceed to hear and determine the pastoral lease point as it was an issue of national importance. I can recall Justice McHugh stating during the hearing that he found it difficult to control his anger that these points were being put forward and later said that:

> *it does seem to me a large step to ask a court to sacrifice the rights of individuals so that commercially and perhaps socially we can get a quicker decision on the question of pastoral leases. It is a proposition that I find very difficult to accept.*

It is important to note that, just ten months later, Justice McHugh was in the minority in Wik on the pastoral lease point.

In the Waanyi High Court appeal, 21 Counsel appeared for the parties and interveners, a record at the time.

Following the outcome in Waanyi, there would be no further manoeuvring in Wik. Justice Drummond's decision on the preliminary questions had been delivered on 29 January 1996. The Wik People and the Thayorre People promptly sought and obtained leave to appeal, but the State moved quickly to remove the appeals to the High Court, which was ordered on 15 April 1996 with the hearing take place in mid-June 1996. With that appeal our Senior Counsel, Walter Sofronoff, was firmly of the view that the Wik People should not pursue any arguments that might be detrimental to, or distract from, the arguments that we intended to raise on the pastoral lease

point. For this reason, the grounds of appeal concerning the so-called limitation of power point and the native title rights in minerals and petroleum point were abandoned in advance of our outline of argument being filed.

Significant pressure was placed on the Wik People (and also the Thayorre People), and those supporting and assisting with the appeals, to abandon their appeals on the pastoral lease point so as to provide a later and better vehicle for this important issue to be determined. The form of the pastoral leases in Western Australia, South Australia and the Northern Territory were said to be preferred. As this would have left the Wik People and the Thayorre People in the position that they were bound by the decision at first instance, it was simply not possible to do so. In the Wik High Court appeal, 35 Counsel appeared.

I have wondered what the native title landscape would now look like had the minority of the judges of the High Court on the pastoral lease point been in the majority. I very much doubt that I would be speaking to you today. In Queensland at least, there would have been very few areas south of Cape York where native title may have survived. In the Wik region, native title would have been likely to be only capable of being recognised in about one third of the original claim area, noting that sections 47A and 47B were only introduced by the 1998 amendments.

Beyond the Waanyi and Wik High Court appeals, prior to the 1998 amendments the High Court was only troubled on one other occasion, in 1995, to consider the Western Australian Government's unsuccessful challenge to the validity of the Act on the basis that it was inconsistent with the Racial Discrimination Act. During this same period there were only four approved determinations of native title (that native title exists) made by the Federal Court:

- two of these - Hopevale and Western Yalanji - by consent;
- the Croker Island Sea Claim - which was litigated;
- Dunghutti - by consent but with native title extinguished pursuant to an agreement between the Applicant, the State of New South Wales and the New South Wales Aboriginal Land Council,

and with only three RNTBCs established, two of the three RNTBCs required for the Hopevale determination and the Dunghutti Elders Council (Aboriginal Corporation) for the Dunghutti determination. Two of these RNTBCs - Walmbaar Aboriginal Corporation and Dunghutti Elders Council (Aboriginal Corporation) - have subsequently had periods of time in special administration under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**).

It was, unfortunately, a time of major uncertainty for all stakeholders. Notwithstanding the 1998 amendments to the Act, this uncertainty remained until the High Court's decision in Miriuwung Gajerrong (*Western Australia -v- Ward*) in 2002.

Native Title Act reforms

There is simply not time to work through the various amendments to the Act in any detail. The Australian Law Reform Commission Report 126 entitled "Connection to Country: Review of the Native Title Act" (June 2015) states that there have been many reviews, consultations and proposed amendments to the Act with the outcomes being a modest series of largely technical and procedural amendments to the Act since 1997. I would tend to agree with this assessment, although I would acknowledge that the ILUA provisions that were introduced by the 1998 amendments have certainly encouraged a level of agreement making that was originally lacking under the Act.

The Act was last amended in June 2017. The amendments were small in scope they were not without controversy. The primary aim to resolve the uncertainty created by the Full Federal Court decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (***McGlade***) which concerned the ability of the Registrar of the NNTT to accept an Area ILUA for public notification in circumstances where it had not been signed by all of the persons comprising the Registered Native Title Claimant for the agreement area.

The Area ILUAs in question in *McGlade* concerned the South West (Noongar) Native Title Settlement, a regional settlement that has been many years in the making and, if it comes into effect, will be the largest native title settlement in Australian history. Four of the six Area ILUAs that were impacted by *McGlade* were again lodged with the NNTT for registration following the commencement of the 2017 amendments and, notwithstanding 31 objections which were lodged by 16 objectors, they (together with the remaining two Area ILUAs) were all registered last week by the Registrar of the NNTT. Without descending into too much of technical details of the settlement and the ILUAs (all of which are publicly available), each Area ILUA refers to the need for them to be "conclusively registered" for the overall settlement to come into effect, being a date after the exhaustion and determination of all legal proceedings that might challenge the registration of the ILUAs. It is thus likely to be some further time before the settlement comes into full force and effect.

The most recent reforms to the Act were announced in November 2017 with the release of an options paper which sought stakeholder views on a range of options which are intended to improve the efficiency and effectiveness of the native title system to resolve claims, better facilitate agreement-making around the use of native title land and promote the autonomy of native title groups to make decisions and resolve internal disputes. Again, the options paper appeared to focus on mostly technical and procedural amendments to the Act and did not confront some of the more substantive recommendations from the ALRC Report. Submissions on the options paper closed at the end of February 2018 with numerous submissions received. The latest indication from the Attorney-General's Department is that an exposure draft of the native title amendment bill will be released for public comment before the end of this year. What happens after that is uncertain.

The one positive reform that I would briefly mention, which is related to the Act, is the 2013 amendments to the *Income Tax Assessment Act 1997* (Cth) (**ITAA**) concerning the tax treatment of native title benefits, which applies only to benefits received on

and from 1 July 2008. The "native title benefit" provisions were introduced through a 2012 amendment bill which commenced on 28 June 2013. It has taken several years to get some degree of clarity through a number of private binding rulings (**PBRs**) as to the types of entities that are Indigenous Holding Entities and whether particular types of payments made to such entities under a variety of agreements qualify as native title benefit.

It has taken the same amount of time to get clarity through a number of PBRs as to whether the payments made under these agreements directed to these types of trusts were subject to GST as consideration for a taxable supply by the claimant/native title holding group or a corporation as their agent/trustee RNTBC.

Some emerging challenges under the NTA

(1) Proliferation and ongoing funding needs of RNTBCs

As I noted earlier, there are now 188 RNTBCs registered on the National Native Title Register. It has not been possible, in the time available, to verify how many approved determinations of native title are yet to come into force and effect because no RNTBC has been nominated. Needless to say, with the 238 active claimant applications, there is the real likelihood that the number of RNTBCs will significantly increase.

By way of comparison, as at October 2002 there were 20 RNTBCs. At that time there was no government funding program in place for RNTBCs, nor for NTRBs to provide assistance to RNTBCs. As a result, the existing RNTBCs were, on the most part, essentially dysfunctional, had no infrastructure and were unlikely to meet their regulatory compliance obligations. Prior to the 2007 amendments to the Act (the introduction of section 60AB), the position was that RNTBCs could not charge fees to third parties for the performance of their statutory functions under the Act or the PBC Regulations.

Today, of the 188 RNTBCs, 133 of them are regarded as small corporations under the CATSI Act. To be a small corporation means that at least two of the following conditions are satisfied - either the operating income or gross assets of the corporation (and the entities that it controls) are less than $100,000 or it has fewer than 5 employees. In many instances, the general reports for RNTBCs lodged with ORIC reveal that they have limited to no income, expenditure, assets and liabilities and no employees.

The majority of RNTBCs are reliant on Commonwealth funding to perform their statutory functions and meet their regulatory compliance obligations under the CATSI Act. This Commonwealth PBC funding is limited but, in the absence of RNTBCs having access to benefits provided under native title agreements, cost recovery processes or third party funding arrangements, it will need to continue and hopefully enhanced in some shape or form for many years to come.

There has also been a separate PBC capacity building funding program in place under the Indigenous Advancement Strategy since June 2015, with a total of $20.4 million available over the first four years, which is to provide:

- direct support to increase the capacity of PBCs to take advantage of economic opportunities;
- support for training to build long-term organisational capacity within PBCs and to obtain professional expertise; and
- direct support for effective native title agreement making.

This program is said to be ongoing, but there is currently no funding allocation beyond the 2018/19 financial year which had $6.548 million allocated.

In recent times, a number of RNTBCs have been placed under special administration by the Office of the Registrar of Indigenous Corporations. There has been a range of litigation involving RNTBCs. I would highlight the Western Australian Supreme Court proceedings involving the Yindjibarndi Aboriginal Corporation RNTBC where allegations of oppressive conduct on the part of the RNTBC were ventilated and the appointment of a receiver and manager sought.

(2) Compensation

It is hard to believe that only last month the High Court heard the first appeals from a determination of compensation arising under a compensation application.

Of the 41 compensation applications that have been filed, 37 of them were filed or lodged before 2014. Only 6 compensation applications are now active, with 3 filed in 2016 (all concerning areas in Queensland) and 3 in 1998 (Bodney).

Only 4 compensation applications have been "determined":

- Barkandji (Paakantji) #11 (2004) - native title was found not to exist in relation to the determination area (Lake Victoria) with no compensation payable to the Applicant, the land having been resumed in 1922;
- De Rose Hill (2013) – by consent with the quantum of compensation kept confidential – 4.7 km²;
- Town of Timber Creek (2014 and 2016) – litigated - 1.27 km²;
- Tjayuwara Unuru (2017) - over about 4.2 km² of land in South Australia comprising part of the Stuart Highway and a digital radio concentrator site - by consent with the quantum of compensation kept confidential.

There was also the Town of Yulara compensation application which was dismissed in 2006 following a 42 day trial over 18 months on liability issues only (with the Applicant's appeal also dismissed). The claim area for that application covered 104 km².

With the three active compensation applications lodged after 2014, they all relate to areas in Queensland – all lodged in 2016 – covering about 21,000 km² (according to the NNTT). They relate to previous claimant applications that have proceeded to approved determinations of native title by consent – Butchulla, Wulli Wulli and Iman. They appear to be in abeyance pending the outcome of the Timber Creek High Court appeals.

Turning to the Timber Creek Compensation Claim which was filed in 2011, it is important to appreciate that it concerns land claims under the Aboriginal Land Rights Act and claimant applications under the Act that span the better part of four decades.

By the time the Timber Creek Compensation Application reached the High Court it concerned 53 past and intermediate period acts comprising land grants and public works covering about 1.27 square kilometres in the township of Timber Creek, attributable to the Northern Territory, which took place after the commencement of the RDA between 1980 and 1996 and which either extinguished native title in its entirety, or impaired or suspended native title in areas where native title continues to exist, but which were validated by the Validation (Native Title) Act (NT).

The decision of the trial judge on the quantum of compensation was delivered on 24 August 2016. The Northern Territory was found liable to pay to the Ngaliwurru and Nungali Peoples compensation totalling $3,300,661 for the extinguishment of their non-exclusive native title rights and interests, being:

- $512,400 – for the economic value of the extinguished native title (80% of the freehold value of the relevant land at the time of the compensable acts)
- $1,488,261 – simple interest on the economic loss of $512,400
- $1,300,000 – allowance for solatium (non-economic/intangible loss)

On 20 July 2017 the Full Court of the Federal Court decreased, albeit only slightly, the native title compensation award to the Ngaliwurru and Nungali Peoples. In doing so, the Full Court upheld most of the trial judge's findings. The only significant change was to the finding on economic loss, with the Full Court reducing the total award for economic loss from 80% to 65% of the freehold value of the relevant land at the time of the compensable acts (being $416,325), with a consequential reduction in the allowance of interest to $1,183,121. The Full Court otherwise agreed with the trial judge that only simple interest was payable on the economic loss component of the award and upheld the trial judge's award for $1.3 million for non-economic loss, giving a total compensation of $2,899,446.

There were three applications for special leave to appeal to the High Court, by the claimants, the Northern Territory and the Commonwealth, with special leave granted in respect of all grounds of appeal, being:

- Quantum of economic loss:
    - Did the Full Court err in determining that the economic value of the non-exclusive native title rights was 65% of the freehold value of the land (Commonwealth, Northern Territory)
    - Is a legally correct assessment of the economic value of the rights no more than 50% of the freehold value (Commonwealth, Northern Territory) or the value assessed by expert economist Wayne Lonergan (that the fair value for the Claim Group's non-exclusive native title rights and interests could be established by reference to two components: (1) the **usage value** of remote land in the area, which reflects the value to the native title holders of the use of the land for the purpose of the exercise of their native title rights and interests; and (2) the **negotiation value**, which is said to arise because the value of the land

may be greater in an alternative use not directly available to the native title rights holders, so a potential purchaser would be willing to share some of the gains in order to capture the balance. A fair outcome of the negotiation between the hypothetical purchaser and the Claim Group would be an equal sharing of the difference between the usage value and the freehold value. That formulation was said to be consistent with economic models which value property that produces no cash flow (Northern Territory)
    - Does the Racial Discrimination Act operate in any respect to require that non-exclusive native title rights must be valued as exclusive native title rights or freehold (Claimants)
- Interest:
    - Is interest payable on compensation and not as part of compensation (Commonwealth)
    - Should the pre-judgment interest award be compounded and, if so, what is the appropriate interest rate (Claimants)
- Quantum of non-economic/intangible loss:
    - Did the Full Court err in holding that the trial judge's award of $1.3 million for solatium was not manifestly excessive (Commonwealth, Northern Territory)
    - If so:
        - $230,000 would be a fair and just amount of compensation for non-economic loss (Commonwealth)
        - a supplementary award of 10% of the amount awarded for economic loss (including interest) provides moderate and fair solatium (Northern Territory)

Whilst the High Court judgment in Timber Creek is eagerly awaited, it will not resolve all issues for future compensation applications, in particular for future acts that are done invalidly or in the absence of any agreement with the relevant native title holders. The negotiation of appropriate arrangements as to compensation as between the Commonwealth and the States and Territories remains elusive.

In what is usually a no cost jurisdiction, I would question whether it will be possible for compensation claims (at least the next tranche) to be conducted efficiently and cost effectively such that the costs incurred by the parties, in particular the claimants in prosecuting such claims, do not dwarf the compensation that is ultimately awarded. Even with a good level of cooperation that existed between the claimants, the Northern Territory and the Commonwealth, the trial and appeals concerning the Timber Creek compensation claim still appear to have occupied something in the order of 30 hearing days.

Concluding remarks

Justice Greenwood made the final determinations of native title that finalised what was then the two Wik and Wik Way claimant applications in 2009 and 2012. It is, however, important that I make mention of the role of the late Justice Cooper in the Wik claim. I can recall discussing the Federal Court's role in native title litigation with Justice Cooper at a maritime law conference in Hobart in 1997. At the time, it seemed to me that his Honour was perhaps not that interested in getting too involved

in native title matters. That soon changed with his Honour's involvement in the Wellesley Sea Claim amongst other native title claims.

Justice Cooper became the docket judge for what was then known as the Wik and Wik Way claim in 2003 following the retirement of Justice Drummond. It was a difficult period, with the mediation between the claimants and various parties having become protracted and bogged down on a range of issues that seemed incapable of resolution. The two determinations of native title that Justice Cooper made in October 2004, at a hearing held in the new sports hall in Aurukun and attended by hundreds of Wik and Wik Way claimants, finalised the Wik claim over all of the remaining areas where the claimants were able to secure the application of sections 47A and 47B of the Act to have their exclusive native title recognised. This included the area that had previously been the subject of the mining lease that was granted to the Aurukun Associates which I mentioned earlier. It also represented the first occasion in Cape York that native title was recognised over current pastoral leases.

On the tragic early passing of Justice Cooper in March 2005, I conveyed the news to the then Mayor of the Aurukun Shire Council, Mr Pootchemunka, a Wik native title holder. Mr Pootchemunka sent a letter of condolence to the then Chief Justice of the Federal Court conveying the Aurukun community's and the Wik and Wik Way People's condolences but also expressing their appreciation to the Court and Justice Cooper's family for the recent determination hearing. Chief Justice Black read Mr Pootchemunka's letter at the memorial sitting held at the Federal Court in Brisbane on 13 April 2005. Sadly, Mr Pootchemunka passed away tragically and early in April 2012 aged only 50 while still the Mayor. He is sorely missed by the Aurukun community and his people.