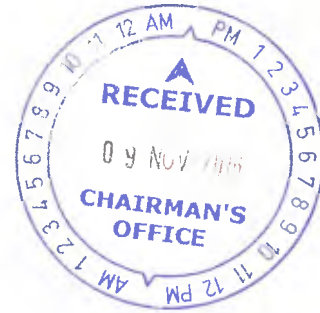


Our Ref: ORG  
Your Ref:

8 November 2016



Mr Peter Harris  
Chairman  
Australian Government  
Productivity Commission  
GPO Box 1428  
CANBERRA CITY  
ACT 2601

Email: [gwendoline.bennett@pc.gov.au](mailto:gwendoline.bennett@pc.gov.au)

Dear Chair

**Introducing Competition and Informed User Choice into Human Services:  
Identifying Sectors for Reform**

My firm specialises in the field of Indigenous law, including native title.

I write in connection with the Commission's preliminary report on *Introducing Competition and Informed User Choice into Human Services: Identifying Sectors for Reform*. In reading the report, it struck me that the range of service provision involved in the native title jurisdiction would greatly benefit from the user choice and contestability benefits identified in the report.

Under the *Native Title Act 1993* (Cth) a range of important statutory roles and functions are given to native title representative bodies ("NTRBs") and registered native title bodies corporate ("RNTBCs").

Where native title over an area of land or sea is recognised to exist through a native title claim in the Federal Court of Australia (called a "native title determination"), RNTBCs are appointed to provide native title trustee or agency services on native title, Aboriginal cultural heritage and related matters. The services are provided on behalf of the native title holding group for the area ("Traditional Owners").

Frequently RNTBCs also pursue social, cultural and business development related outcomes, often based on the Traditional Owners' land or sea rights.

NTRBs provide professional representation services for native title claimants (pre-determination) and RNTBCs (post-determination); particularly things like legal, anthropological and sometimes business development services.

My firm, for example, is often engaged by NTRBs on behalf of RNTBCs or, on occasions, directly by RNTBCs for the provision of specialist legal services.

Given the recent decision of Justice Mansfield in *Griffiths v Northern Territory of Australia (No.3) [2016] FCA 900* (Timber Creek decision), there will over time be substantial new service provision demands on both NTRBs and RNTBCs for the purpose of native title compensation claims. **Enclosed** are a couple of our case commentaries on the Timber Creek decision. Over coming years it can be expected that the range of human services needed to pursue compensation entitlements will grow considerably. Human services in the fields of project management, legal, land valuation and anthropology will be critical if these entitlements are to be effectively and efficiently realised.

I mention all of this in light of what I consider to be the relevant and important findings in the Commission's preliminary report.

I particularly support the identification of human services in remote Indigenous communities as a sector for potential reform and the relevant findings in Chapter 7 of the report.

The report refers to service delivery arrangements in remote communities in fields such as Indigenous health and housing. It rightly identifies better coordination and service integration, greater community control and engagement and more stable policy settings as areas where reform is needed.

Similar findings apply to native title services involving NTRBs and RNTBCs. Looking through your report I was reminded of important work done in 2014 by Deloitte Access Economics in its report for the Australian Government on a *Review of the Roles and Functions of Native Title Organisations*. A copy of that report is **enclosed**.

Some of the findings in that report, such as models for RNTBC groupings (from page 110), also reminded me of the "Getting Mutual in Human Services" ideas set out in the excellent submission to the inquiry by the Business Council of Co-Operatives and Mutuals.

There are a great many ways in which human services delivery through Co-Operatives and Mutuals would likely result in better outcomes for Indigenous people:-

- Where services are provided by member owned organisations, the organisation is legally bound to act in the best interests of its members.
- In that situation, the service provider will have motives other than just legal and commercial to provide the highest quality of service to its members.
- Where services are provided on a commercial basis, there may be means by which surpluses or profits are returned to the members.
- There are examples in Australia and overseas where Co-operatives and Mutuals have been very successful in designing innovative service models around the people using those services and specific to the locations where the services are needed.

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**Gilkerson Legal**  
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- Co-operatives and Mutuals can be engaged, personally and economically, directly in the service provision. Often members are required to demonstrate active and direct involvement in the organisation, meaning they are likely to be incentivised to be part of the solution.
  - Service provision by Co-operatives and Mutuals works particularly well in “thin” markets where it is harder to get competition and choice. Remote Indigenous communities are a classic example.

I’m not sure whether this angle on potential human services delivery reform for Indigenous communities has already been identified by the Commission. However as there seems to be a lot of synergies between the Commission’s preliminary findings report and the Deloitte Access Economic report findings, and especially given the important potential benefits of human services reform in the NRTB and RNTBC space, I thought the Commission might be interested in these observations.

I congratulate the Commission on its work to date. I hope it helps achieve the already identified service delivery changes in the years ahead.

Yours sincerely

Oliver Gilkerson  
**Gilkerson Legal**

## At a Glance

### Griffith v Northern Territory (No.3) – “Timber Creek Case”

#### *A landmark decision about native title compensation*

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**What did the case involve?** - A monetary award of compensation was made in favour of native title holders for 63 acts including tenure grants and the construction of public works affecting native title (“compensable acts”). The acts were done on multiple lots in the Northern Territory township of Timber Creek in the years following the commencement of the *Racial Discrimination Act 1975* on 31 October 1975. The Federal Court had previously made a *native title determination* recognising native title claimed by the Ngaliwurru and Nungali Peoples.

**What was the compensation for?** - The decision compensated the native title holders for the complete extinguishment of native title arising from some types of compensable acts and the impairment of native title for other types.

**What was the native title affected?** - All of the native title that was either extinguished or impaired involved non-exclusive native title. That is to say, native title comprising a bundle of rights and interests derived from traditional laws and customs (such as rights to access live, hunt etc on land).

**What was not involved?** - The native title did not involve exclusive possession native title. That is to say native title involving the possession, occupation, use and enjoyment of the land to the exclusion of all other people. Nor did it involve any native title rights of a commercial kind or native title over seas or other waters. Although some aspects of the compensation methodology will be relevant where native title is of those kinds, inevitably there will be some differences in other cases.

**What were the acts that affected the native title?** - The case included compensable acts that were “valid” because they were covered by native title legislation (these types are legally called “Category D past acts”, “intermediate period past acts” and “previous exclusive possession acts”). It also included acts done “invalidly” for native title purposes because they were not covered by the legislation (“invalid future acts”). The decision will be equally applicable to another type of compensable acts called “valid future acts”, although were not part of the case. All the acts involved various types of land tenure grants and the construction of various types of public works.

**Who pays the compensation?** - For compensable acts done validly, the Commonwealth, State or Territory to which the acts can be attributed is responsible for paying statutory compensation. For invalid future acts, the person who does the act pays damages under the common law tort of trespass. For acts done validly the award is technically called statutory compensation.

**How is the compensation claimed?** - Native title holders can make application to the Federal Court for compensation for all types of compensable acts (including invalid future acts), once there has been a native title determination made for the area.

**How is the compensation assessed?** - The methodology for quantifying statutory compensation involves the following components:-

- *Economic loss* (in *Timber Creek* this totalled \$512,000) - This amount was assessed at a percentage of the freehold value of each lot on which a compensable act was done as at the date the act was done. The percentage depends on the kind of (exclusive or non-exclusive) native title rights and interests involved. Given the nature of the bundle of non-exclusive rights and interests involved in this case, 80% of the freehold value was decided.
- *Interest on the economic loss* (in *Timber Creek* this totalled \$1,488,261) - This amount was calculated at a rate of simple interest on economic loss from the date each compensable act was done to the date the compensation was awarded by the Court. However in other cases there may be facts and circumstances that warrant compound interest being applied. The rate of interest was assessed at 4% above the RBA cash rate in accordance with a Federal Court practice note.
- *Non-Economic Loss*, also called *solatium* (in *Timber Creek* this totalled \$1,300,000) - This amount was assessed on a general basis across all of the lots taking into account the intangible affects of the compensable acts on the native title holders. They included the impacts native title holders felt to their spiritual connection to country, the emotional pain involved in damage and destruction caused by development works on some significant cultural sites and the reduction caused by township expansion to the area where they are able to exercise their native title rights.

***How were the damages for invalid future acts assessed?*** - The damages for the invalid future acts in *Timber Creek* involved a total award of \$48,597 including \$19,200 for economic loss and \$29,397 in interest accrued since then. The loss was again determined at 80% of the freehold value of the land at the date the acts were done.