Since the commencement of the Native Title Act 1993 (cth) on 1 January 1994, infrastructure providers have mostly focused on two aspects of Native Title Law – Native Title Claims and so-called “Future Acts”.

Oliver Gilkerson, Legal Practice Director, Gilkerson Legal explains that in 2017, focus is likely to sharpen on another, albeit connected, aspect. It concerns Native Title compensation.

Native Title Claims and Future Acts
Native title claims involve the legal process through which the Federal Court decides whether native title exists over an entire claim area. Infrastructure providers can join as parties to the claim process to ensure the recognition and protection of their interests in the claim outcome.

Where a claim results in the Federal Court recognising native title within the outer boundaries of the claim area, it makes a native title determination to that effect. When infrastructure providers are a party to the claim they can ensure the determination recognises that previously constructed public works have extinguished native title over the site of the works. In other circumstances, the determination can provide for ongoing coexistence between the interests of infrastructure providers and the native title.

Also, before and after a native title claim is finalised, infrastructure providers involved in new land dealings, statutory approvals and construction and maintenance activities, may need to take measures to ensure their activities comply with the Native Title Act 1993. If it cannot be shown that native title has already been extinguished over a proposed site, these kinds of activities may affect native title and hence constitute so-called future acts.

A valid future act is one done in accordance with compliance provisions in the Native Title Act 1993. That might mean the activities are covered by an Indigenous land use agreement (“ILUA”) or, in some circumstances, the activity might be covered by other statutory provisions. Many of those other provisions give native title parties procedural rights, such as a right to be notified before the activity is done and a right to comment on it. Future acts which are not covered by an ILUA or any of the other legislative provisions are invalid future acts.

The extent to which an infrastructure provider is able to ensure compliance, largely depends on their knowledge of the statutory requirements relating to future acts and the systems they have in place to meet the requirements. For some, native title compliance has not been a high priority; perhaps because the potential consequences of non-compliance have not yet hit home. The emerging issue of native title compensation means that may need to change.

Native Title Compensation
On 24 August 2016, Justice Mansfield in the Federal Court for the first time made judicial decisions about the legal details on how native title compensation should be quantified.

The liability to pay compensation has long been established through statutory provisions in the Native Title Act 1993 and, for invalid future acts, through the common law. Subject to appeal outcomes, the decision of Justice Mansfield provides judicial guidance about how to assess the amount, or quantum, of compensation. This will ultimately lead to more and more compensation claims being made.
His decision is called Griffith v Northern Territory (No.3) [2016] FCA 900 or the Timber Creek Case after the small town in the Northern Territory where native title holders had identified their entitlement to compensation for activities done by others over a number of separate lots.

An appeal to the Full Federal Court on some aspects of the decision is currently under way. From there an appeal to the High Court is likely. The appeal process will play out in 2017. Once a High Court decision is made, the die will be cast for calculating native title compensation throughout the country.

Justice Mansfield observed that justice requires compensation entitlements to be addressed. He noted that the preamble to the Native Title Act 1993: “recognises that the dispossession of Aboriginal people and Torres Strait Islanders from their lands occurred largely without compensation and that successive governments have failed to reach a lasting and equitable agreement with Aboriginal People and Torres Strait Islanders concerning the use of their lands. It is also unexceptional to observe that, if acts have extinguished native title and are to be validated or allowed, justice requires that compensation on just terms be provided for the holders of native title whose rights have been extinguished.”

**Right to Compensation**
It’s not just cases where native title was extinguished in the past, where the right to compensation arises. Past and future activities which impair native title, without extinguishing it completely, are also compensable.

Activities that extinguish or impair native title include different types of tenure grants, mining tenements, legislative and regulatory measures and the construction of public works and other infrastructure the effect of which is to inhibit or otherwise affect the existence, exercise or enjoyment of native title rights by native title holders.

Although the Timber Creek case did not deal with any activities done prior to the commencement of Racial Discrimination Act 1975, it’s generally considered that most compensation entitlements only arise for activities done after the 31 October 1975 commencement of that legislation.

Beyond that, the Native Title Act 1993 creates a complex categorisation of activities done in the past that are deemed to have extinguished or impaired native title and for which a statutory entitlement to compensation is established. In broad terms, for most categories of compensable acts done before the Native Title Act 1993 was amended on 23 December 1996, the liability for compensation will be attributable to either the Commonwealth or the applicable State or Territory government. The same applies to valid future acts.

**Implications for Infrastructure Providers**
Native title compensation law does however involve some important implications for infrastructure providers other than the Commonwealth, States and Territories:

- Legal liability for compensation for invalid future acts attaches to the person doing the act irrespective of their government status. Infrastructure providers will be directly liable in these circumstances. In the Timber Creek case, the court awarded damages on the basis that invalid future acts constitute a common law trespass on the rights of native title holders. Once a native title claim is successfully finalised, it’s likely that native title holders will start to audit activities that have taken place within the outer boundaries of their determination area. Where compensation liability is identified for past acts, valid future acts and invalid future acts, native title holders will start to formulate compensation claims against the persons to which the liability attaches. Suddenly the need to ensure acts are done as valid future acts (where the liability attaches to government), becomes much more important.
At a policy level, infrastructure providers also need to watch how the so-called “flow through” provisions in the Native Title Act 1993 play out. For some types of valid future acts, it’s possible for Commonwealth, State and Territories to make legislation that passes the liability which they otherwise bear onto the person that does, or benefits from, the valid future act. Hence the liability may end up “flowing through” from government to infrastructure providers themselves.

Sometimes infrastructure providers compulsorily acquire native title as a means of addressing native title compliance alternative to an ILUA. In those cases, the infrastructure provider for whose benefit the compulsory acquisition was done, bears the compensation liability. The liability may be audited and pursued against the infrastructure provider after there has been a successful native title determination. Similar quantification principles to those in the Timber Creek case will apply.

Local governments and other public sector entities in Queensland have benefited from a State government policy that provides a discount on the freehold purchase price where the entity has itself addressed native title through compulsory acquisition. Discounts of up to 50% have been allowed to offset the actual or contingent native title compensation liability the entity incurs. If the quantification principles decided in the Timber Creek case are substantially upheld on appeal, the purchase price discount of up to 50% will likely fall well short of the actual native title compensation liability that the entity itself ends up having to pay.

Methodology for quantifying compensation

Some aspects of the compensation methodology decided by Justice Mansfield were widely expected. Others have generated more surprise. The overall structure of the compensation awarded in the case broadly followed the quantification methodology under the Northern Territory’s compulsory acquisition compensation guidelines. Hence compensation was awarded under each of three heads of loss as follows:

(a) Economic loss – The amount of compensation under this head of loss was assessed as a percentage of the full freehold value of the lot over which native title had been extinguished or substantially impaired. The value was assessed through professional valuation evidence as at the date the compensable act was done. Some of the compensable acts involved past grants of exclusive possession land tenures that had completely extinguished native title. Other compensable acts involved the construction of public works in ways that were non-compliant and hence rendered them invalid future acts.

Because the native title determination at Timber Creek recognised non-exclusive possession native title, Justice Mansfield discounted the full freehold value by 20%. Hence the economic loss component in this case was 80% of the freehold value of the land. Where exclusive possession native title is affected in a similar way, subject to any other relevant considerations, the economic loss component might well be 100% of freehold value.

(b) Interest – Interest was calculated on the economic loss amount for each compensable act from the day the act was done to the day of the decision. Because most of the compensable acts occurred many years ago, the total interest component was about three times the amount of the economic loss on which the interest was calculated. Justice Mansfield left the door open to the possibility of a compound rate of interest being applied in some circumstances.

(c) Non-economic loss – In the language of compulsory acquisition law, this component is also referred to as “solatium”. In something of a surprise to many observers, Justice Mansfield selected a methodology involving a judicially assessed award made on a global basis – that is, covering all of the lots where compensable acts had occurred, rather than the lot by lot assessment used for assessing economic loss. The quantum of the award was intuitively assessed by the judge based on the evidence led by the native title holders about emotional hurt, cultural heritage site impacts and diminution in the area of native title left for the native title holders to enjoy. Evidence about the affects of the construction of public works...
and the associated emotional impacts on the native title holders, was analysed carefully by the judge.

As the Timber Creek decision has been appealed, analysis of the longer term implications for infrastructure providers has so far been limited. Irrespective of any ultimate High Court decision, the case sounds a number of warning bells.

Perhaps the most important is that infrastructure providers should be scrupulous in their efforts to ensure their activities constitute valid future acts – hence minimising the potential financial impact on themselves when the day of compensation reckoning does finally arrive.

Gilkerson Legal is a leading Queensland law firm specialising in the land law applicable to infrastructure projects, including native title and other Indigenous land laws. Doyles Guide to the Legal Profession in Australia has just ranked the firm’s practice director, Oliver Gilkerson, in its Leading Native Title Lawyer Rankings – Australia 2017.

To discuss how IPWEAQ can help you gain an up-to-date, practical understanding of Indigenous Cultural Heritage and Native Title compliance requirements, contact Craig Moss Director, Professional & Career Development

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