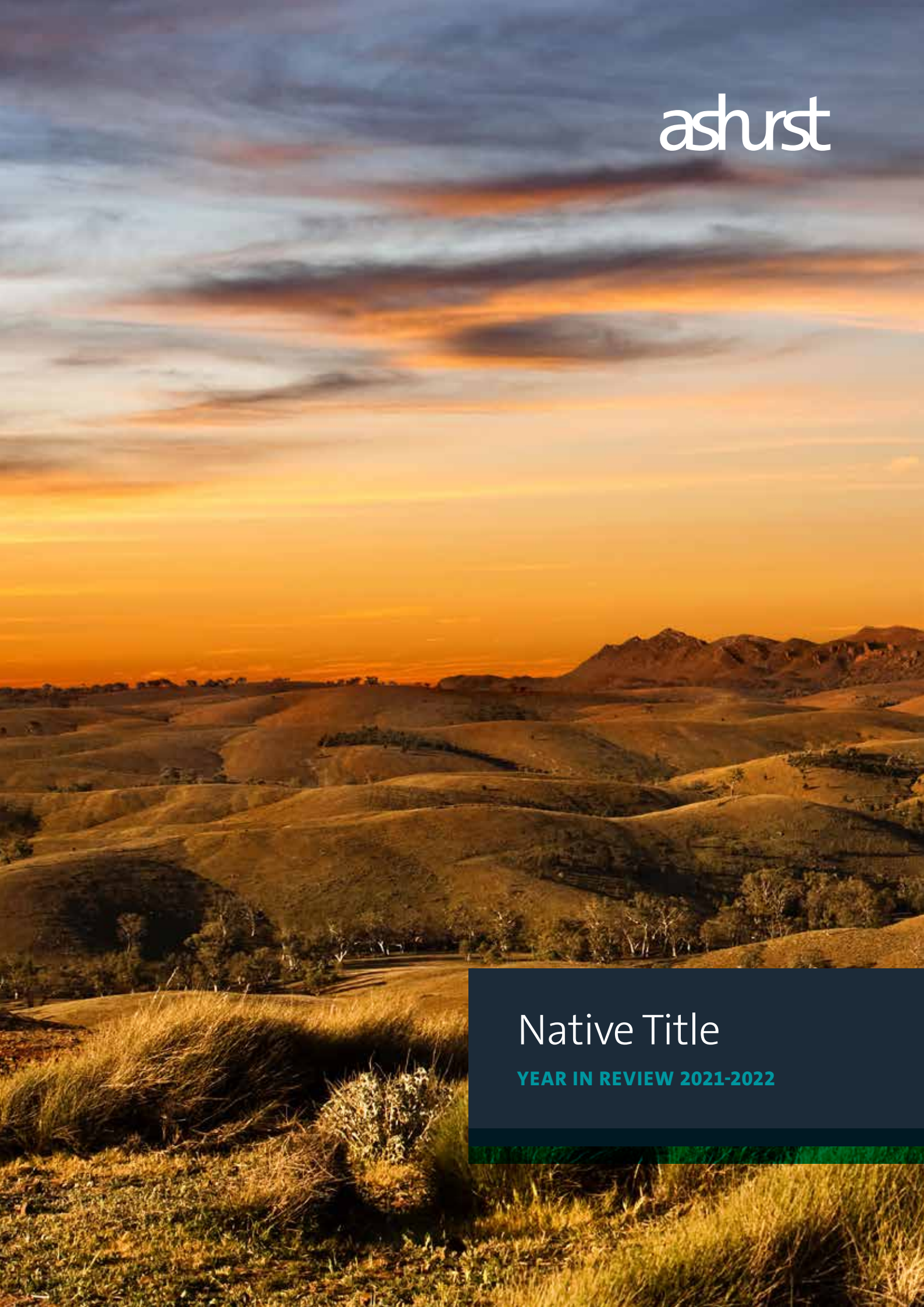

ashurst

Native Title

YEAR IN REVIEW 2021-2022

Contents

Foreword

Welcome to Ashurst's annual review of native title legal developments.

We are once again delighted to publish our seventh annual Native Title Year in Review.

As we come to draft our review each year, we are always surprised by the sheer number of developments over the previous 12 months in relation to this important area of law.

This year, significant legislative, policy, political and judicial developments have included:

- the publication of the Commonwealth's Joint Standing Committee on Northern Australia's Way Forward Report – responding to the Juukan Gorge incident - with key themes around minimum standards for heritage protection, co-design and free, prior and informed consent (FPIC);
- the WA Government passing its new Aboriginal cultural heritage legislation;
- the Federal Court resolving a number of connection disputes in cases in which 'traditional connection' was put to the evidential test;
- a busy year in the native title compensation space, although there has been no new law on the assessment of native title compensation;
- as predicted by us last year, an increase in the number of protection applications sought under the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act; and
- continued momentum for Treaty negotiations in six States.

Our national Ashurst team has remained at the forefront of these developments. Over the last 12 months, our highlights have included:

- being recognised as Band 1 in Native Title (Proponents) in Chambers Asia-Pacific, a ranking which we have maintained since 2007. We could not have achieved this recognition without the opportunities and trust our clients place in us; and
- continuing to assist clients to navigate the gap between current laws and community expectations in relation to Indigenous cultural heritage and FPIC.

We are also proud to have increased the size of our national team, with six new senior associates appointed in the last 12 months, most of whom started with us as graduates.

Looking to the year ahead, it was telling that the first words from Prime Minister elect Albanese on election night 2022 were to commit his government to implementing the Uluru Statement from the Heart – Voice, Treaty and Truth – in full.

With an ongoing focus on State and Commonwealth law reform across native title, Indigenous heritage and environmental matters, 2022/2023 will be another busy year for legal developments in this space.

We look forward to working with our commercial, government and Indigenous clients to find practical and respectful ways to address native title and cultural heritage matters, both across the table and in person (and not entirely by video conference!).

The articles in this 2021-2022 publication are current as at 1 June 2022.

We encourage you to contact us if you would like to discuss any aspect of this publication.

In the meantime, our best wishes for the next 12 months.

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24
NEW DETERMINATIONS THAT NATIVE TITLE EXISTS

457
TOTAL POSITIVE NATIVE TITLE DETERMINATIONS AROUND AUSTRALIA*

21
NEW CLAIMANT APPLICATIONS FILED

147
TOTAL ACTIVE NATIVE TITLE CLAIMANT APPLICATIONS STILL TO BE RESOLVED AROUND AUSTRALIA*

3.2M KM²
NATIVE TITLE LAND AROUND AUSTRALIA**

ACTIVE COMPENSATION CLAIMS AROUND AUSTRALIA*
15

35
NEW ILUAS REGISTERED

1412
TOTAL REGISTERED ILUAS AROUND AUSTRALIA*

9
APPLICATIONS FOR PROTECTION UNDER SECTION 10 ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT

44
SECTION 31 AGREEMENTS (RTN AGREEMENTS) RECEIVED BY THE NNTT

*Source: National Native Title Tribunal as at 17 June 2022
**Source: National Native Title Tribunal as at at 1 April 2022
Figures not marked with an asterisk relate to the 2021 calendar year

Western Australian Aboriginal heritage law reform – amendments passed but still much work to do

ABORIGINAL CULTURAL HERITAGE ACT 2021 (WA)

WHAT YOU NEED TO KNOW

- The new Aboriginal Cultural Heritage Act 2021 (WA) was assented to in December 2021 and limited parts are now operational.
- The Act proposes a modern approach to protecting Aboriginal cultural heritage in Western Australia that will fundamentally transform how Aboriginal cultural heritage is identified, protected and managed.
- Key features of the Act include:
  - a new definition of Aboriginal cultural heritage
  - new structures that empower Aboriginal voices in the management of Aboriginal cultural heritage
  - a new tiered land use assessment and approvals system that focuses on consultation and agreement making between Traditional Owners and land users

WHAT YOU NEED TO DO

- Proponents operating in Western Australia need to take stock and plan for the transition from the current to the new regime. Navigating the heritage landscape in project development in WA is going to get more complex over the next 12-24 months.
- Where appropriate, provide submissions on the co-design process, which is responsible for developing the regulations, statutory guidelines and operational policies to support the new Act.
- Keep a watching brief on Federal environment and heritage law reform and how State processes are managed. Regulatory (and policy) change in this space will no doubt continue to shift additional burdens to proponents that will need to be understood and implemented.

The final version of the new Aboriginal Cultural Heritage Act 2021 (WA) was assented to in December 2021 and limited parts are now operational. There is no date yet for the remainder of the Act to commence, as the regulations, statutory guidelines and operational policies required to support the new Act remain subject to further development.

The Act proposes a modern approach to protecting Aboriginal cultural heritage in Western Australia that will fundamentally transform how Aboriginal cultural heritage is identified, protected and managed.

Key features of the Act include:

- a new definition of Aboriginal cultural heritage
- new structures that empower Aboriginal voices in the management of Aboriginal cultural heritage
- a new tiered land use assessment and approvals system that focuses on consultation and agreement making between Traditional Owners and land users.

PROPOSED NEW FRAMEWORK FOR MANAGEMENT OF ABORIGINAL CULTURAL HERITAGE IN WA

New definition of Aboriginal cultural heritage

The Act provides a new definition of Aboriginal cultural heritage that moves beyond the current focus on sites and artefacts and captures the diverse perspectives of cultural heritage, including its tangible and intangible elements. The concept of cultural landscapes has also been introduced for certain limited purposes.

New management structures

The Act provides for the establishment of a new Aboriginal Cultural Heritage Council (ACH Council) as the peak strategic body for Aboriginal heritage, and for the appointment of Local Aboriginal Cultural Heritage Services (LACHS) to provide Aboriginal heritage services for discrete areas of the State.

The ACH Council's functions include deciding applications for ACH permits, determining whether to approve or refuse most Aboriginal cultural heritage management plans (CHMPs), making recommendations to the Minister about the making of protected area declarations, or whether the Minister should authorise CHMPs that are not agreed between proponents and LACHS.

LACHS, representing the knowledge holders for certain areas, are intended to operate as a single contact point and one-stop-shop for local Aboriginal people and proponents in their area. Their functions include facilitating notification and consultation with Traditional Owners in the area, arranging heritage surveys, facilitating the development and implementation of CHMPs and supporting the Council.

New tiered assessment and approval system

The Act introduces a new tiered assessment and approval system that considers the type of proposed land use activity, and prioritises notification and consultation with Aboriginal people with a focus on agreement making.

Before carrying out activities, proponents will be required to undertake a due diligence assessment in accordance with a management code (to be developed) to determine whether the proposed land use will impact Aboriginal cultural heritage and the likely level of impact. Depending on the category of activity, notification, consultation and negotiation with Aboriginal people may be required (via the LACHS, if one has been appointed in respect of the relevant area).

There are four categories of activities (although detailed definitions for some of the following are preserved for regulations that are not yet prepared):

- exempt activities
- Tier 1 Activities (for which no approvals are required to proceed)
- Tier 2 Activities (for which an ACH permit is required, before proceeding)
- Tier 3 Activities (for which an ACH management plan is required, before proceeding)

Proponents for Tier 2 Activities are required to notify Aboriginal parties and seek their comments before applying to the Council for an ACH permit. Council decisions on ACH permit applications are reviewable by the Minister on application of either the proponent or Aboriginal parties.

For activities requiring a CHMP, proponents will be required to consult with Aboriginal parties in accordance with consultation guidelines (to be prepared) with a view to negotiating an agreed CHMP. Where agreement cannot be reached within a prescribed period and with both parties using best endeavours to negotiate, the Council may act as mediator and may ultimately propose its own plan for the Minister's authorisation if agreement still cannot be reached.

As part of Phase 1 of the co-design process, the Aboriginal Cultural Heritage Reference Group released a 'Draft Activity Table' to facilitate discussion on the types of activities that will be included in the finalised Activity Category list.

Grandfathering of existing section 18 consents and section 16 authorisations

Existing section 16 authorisations and section 18 consents that remain in force will be grandfathered in the new Act (with section 16 authorisations having the same effect as an ACH permit, and with section 18 consents having the same effect as an approved CHMP). However, timelines will be applied to those grandfathered approvals and they can expire in various circumstances, with grandfathered section 18s expiring after 10 years unless the purpose for which they were granted has substantially commenced and the proponent makes an application for the s 18 to not expire.

Approvals are defeasible, and can be cancelled or suspended – or stop orders and prohibition orders issues – if "new information" comes to light about the heritage the subject of the approval

In a move that will set the absolute highest bar amongst all Australian State regimes for protection for Aboriginal heritage, ACH permits, approved or authorised CHMPs will all be capable of being cancelled or suspended, or will be capable of being rendered of no use through the imposition of stop orders, if "new information" about heritage comes to light after the date of the relevant approval, in some circumstances.

The Act also provides for remediation orders for remediation work to be undertaken to restore impacted Aboriginal cultural heritage to its original condition.

New offences and tougher penalties, and enhanced compliance and enforcement tools

The Act establishes significant new offences for harm to Aboriginal cultural heritage, with significantly higher penalties.

ISSUES TO NOTE WITH THE ACT

The Act sets out a structure and approvals pathway that, in conceptual terms, stakeholders were largely expecting. However, the Act introduces a level of complexity and uncertainty that, in our opinion, renders key aspects of the Act unworkable.

There are three primary factors for this/issues:

- **Capacity of LACHS:** There remains a significant risk around the appointment of LACHS, whether they will be able/wiling to function efficiently, whether they have the corporate/administrative capacity to function efficiently, and whether they will have the resourcing to skill up and ultimately discharge their functions. Without properly appointed, and properly functioning, LACHS, the new regime faces massive hurdles. The Act does contain a new funding application process, through which LACHS can make applications for funding from the ACH Council. Critical to whether this works is how the State will implement that process, and – fundamentally – whether the State will make enough funding available. It will be incredibly costly.
- **Regulations, policy and guidance materials are still not yet known.** The regulations, statutory guidelines and operational policies required to support the new Act remain unfinished. The State has appointed the Aboriginal Cultural Heritage Reference Group to oversee a co-design process with Aboriginal people and other stakeholders and prepare the guidance materials. The first phase of co-design is now complete, with the second phase to commence in July 2022. At this stage, the Reference Group has only produced a series of 'fact sheets', which (in essence) only put forward questions and discussion topics to enable Aboriginal people and other stakeholders to provide submissions. Phase 2 will provide more substantive materials.
- **Best endeavours to negotiate CHMPs**. The Act imposes a best endeavours obligation on parties to negotiate CHMPs. Unlike the "good faith" language in the Native Title Act's right to negotiate process, "best endeavours" has its own meaning at law, and particularly in the context of commercial negotiations and bargaining. How the obligation plays out in practice will likely be challenging.

CULTURAL HERITAGE REFERENCE GROUP APPOINTED

At the time the Bill was being progressed through WA Parliament, the Minister flagged establishing a 'co-design' task force (involving Traditional Owners, industry and government) to consider the regulations, and other documents and guidelines that will need to be in place to support the Act.

In February 2022 the State appointed the Aboriginal Cultural Heritage Reference Group, which comprises four members representing the Aboriginal community, industry and government: with two Aboriginal community leaders as the Aboriginal community representatives; the Manager for Resource Development and Sustainability at the WA Chamber of Minerals and Energy (CME) as the industry representative; and the Director General for the Department of Planning, Lands and Heritage as the government representative.

The Minister commented that "consultation and engagement with Aboriginal people and other stakeholders will continue with a focus on the co-design of key documents that will support the ACH Act", and that "The ACH Reference Group's first task will be to create a co-design process that ensures all interested stakeholders have an opportunity to take part in this significant reform".

As mentioned above, the first phase of co-design is now complete, with the second phase to commence in July 2022. At this stage, the Reference Group has only produced a series of 'fact sheets', which (in essence) only put forward questions and discussion topics to enable Aboriginal people and other stakeholders to provide submissions.

The State has indicated that the co-design process will take 12 months to complete. We consider it is likely to take at least 24 months, as the Reference Group faces an incredibly challenging job, given the ongoing opposition to the Acts introduction. In the face of those challenges, the Reference Group will need to operate incredibly effectively given their outputs will fundamentally shape the complexity of the new regime.

NEXT STEPS

There is currently a 12 month anticipated transition period (although that process will, in our view, take longer).

Proponents need to take stock to plan for the transition of the current regime to the new. Navigating the heritage landscape in project development in Western Australia is going to get more complex over the next 12-24 months.

Where appropriate, proponents should provide submissions on the co-design process and the development of the regulations, statutory guidelines and operational policies to support the new Act.

Stakeholders should also maintain a watching brief on environmental law reform and Federal heritage reform. With the Commonwealth's final report on heritage recommending such fundamental reform to Federal environment and heritage protection laws, and the State and EPA still continuing to bring the streams together when it comes to environment and heritage regulation, the ongoing reform of the regulatory landscape will no doubt continue to place additional burdens to industry that will need to be understood and implemented.

Authors: Andrew Gay, Partner; Cheyne Jansen, Counsel; Sam Gillis, Senior Associate

Queensland commences review of its cultural heritage legislation

ABORIGINAL CULTURAL HERITAGE ACT 2003 (QLD) AND TORRES STRAIT ISLANDER CULTURAL HERITAGE ACT 2003 (QLD)

WHAT YOU NEED TO KNOW

- The Queensland Government released its Options Paper – Finalising the review of Queensland's Cultural Heritage Acts.
- The Options Paper builds on a review that commenced in 2019. At this stage, the Government has not committed to any timeframes to finalise the review.

WHAT YOU NEED TO DO

- Proponents operating in Queensland should keep a watching brief on the progress of the review.

In December 2021, the Queensland Government released its Options Paper – Finalising the review of Queensland's Cultural Heritage Acts.

The review of the Aboriginal Cultural Heritage Act 2003 (Qld) and Torres Strait Islander Cultural Heritage Act 2003 (Qld) originally began in 2019, but was paused in 2020 because of the COVID-19 pandemic. The Government has announced that it is committed to finalising this review, and consultation on the proposals set out in the Options Paper is a key step in this process.

The proposals in the paper focus on three key areas:

1. Providing opportunities to improve cultural heritage protection through increased consultation with Aboriginal and Torres Strait Islander peoples, recognising intangible cultural heritage, and strengthening compliance mechanisms (see section 3 of the paper). The key proposals include:

   a) replacing the Duty of Care Guidelines with a new framework requiring greater engagement with the relevant Aboriginal party;

   b) integrating cultural heritage mapping into planning processes for State and local government;

   c) expressly recognising intangible elements of cultural heritage.

2. Reframing the definitions of "Aboriginal Party" and "Torres Strait Islander party" so that people who have a connection to an area under Aboriginal tradition or Ailan Kastom (Torres Strait Island Custom) have an opportunity to be involved in cultural heritage management and protection (see section 4 of the paper). The key proposal includes removing the "last claim standing" provisions, including for areas where there have been negative determinations of native title.
3. Promoting leadership by First Nations peoples in cultural heritage management and decision making (see section 5 of the paper).

Importantly, the Options Paper also states that any legislative reforms will consider the transitional arrangements needed to ensure continuity for existing arrangements and agreements, including Cultural Heritage Management Plans.

NEXT STEPS?

Submissions on the Options Paper were due to be provided to the Government by 31 March 2022. Beyond that, the Government has not committed to any timeframes to finalise the review and noted that preferred options would be subject to appropriate further government and budgetary considerations.

Authors: Libby McKillop, Senior Associate; Tony Denholder, Partner

Modernisation of cultural heritage protection legislation begins

A WAY FORWARD: FINAL REPORT OF THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA INQUIRY INTO THE DESTRUCTION OF THE JUUKAN GORGE

WHAT YOU NEED TO KNOW

- The Joint Standing Committee on Northern Australia Inquiry into the destruction of the Juukan Gorge released its final report entitled A Way Forward in October 2021.
- The Report roundly criticises the existing Federal and much of the State and Territory heritage protection regulation, calling for the Commonwealth to set minimum standards.
- Key themes are co-design, a national definition of cultural heritage covering intangible heritage and the importance of Traditional Owner informed consent to impact on heritage. Structural biases in the Native Title Act 1993 (Cth) also received some focus.
- The former Federal Government moved quickly to begin the process for developing new cultural heritage legislation by entering into an agreement with the First Nations Heritage Protection Alliance to jointly consider and develop recommendations for reform.
- There have been no specific announcements in this space from the new Government since the election, but it is clear that First Nations issues are high on its reform agenda.

WHAT YOU NEED TO DO

- Look out for further reports or papers published by the Federal Government and First Nations Protection Alliance joint working group and any invitations to participate in a consultation process.
- The law around cultural heritage is dynamic and the issues can be socially contentious. For proponents, it is so important to allow the time and resources to get the decision making processes around project approvals right.

THE JOINT STANDING COMMITTEE'S WAY FORWARD REPORT

The Joint Standing Committee on Northern Australia Inquiry into the destruction of the Juukan Gorge released its final report entitled A Way Forward in October 2021.

This report followed the Committee's December 2020 interim report titled Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report.

We wrote about the interim report and its implications in our Native Title Year in Review 2020 article The long shadow of heritage destruction: Fundamental reset of Aboriginal cultural heritage protection in Australia", 1 April 2021.

KEY THEMES ARISING FROM THE WAY FORWARD REPORT

FPIC, Traditional Owner consultation and veto rights

The Way Forward Report has a strong focus on early and effective consultation with Traditional Owners that supports the principle of free, prior and informed consent (FPIC).

For more information about FPIC see our Native Title Year in Review 2020 article "Free, prior and informed consent", 1 April 2021 and our article below "A big year for FPIC – an increasing global focus on the need to secure free, prior and informed consent".

The Report also seems to recommend that Traditional Owners have a right to veto the destruction of cultural heritage, in some circumstances. Recommendation 3 provides that in establishing minimum standards for State and Territory heritage protections, consideration should be given to:

- decision making processes that ensure that Traditional Owners and native title holders have primary decision making power in relation to their cultural heritage; and
- an ability for Traditional Owners to withhold consent to the destruction of cultural heritage.

This issue will be one of the most fraught aspects of the development of new legislation.

New Commonwealth legislation for Indigenous cultural heritage protection

The Report makes sweeping recommendations for a new framework for cultural heritage protection at the national level, which should be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples.

It recommends minimum standards for State and Territory heritage protections include:

- a definition of cultural heritage recognising both tangible and intangible heritage;
- clear processes for identifying who speaks for country;
- decision making processes that ensure Traditional Owners and native title holders have primary decision making power in relation to their cultural heritage;
- a process for the negotiation of cultural heritage management plans which reflect FPIC principles; and
- a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.

The Report also recommends that:

- the Commonwealth retain the ability to extend protection to and/or override decisions made under inadequate State or Territory protections that would destroy sites that are contrary to Aboriginal and Torres Strait Islander peoples' consent;
- Traditional Owners be able to effectively enforce Commonwealth protections through civil action; and
- the new legislation prohibit the use of clauses in agreements that prevent Traditional Owners from seeking protection through Commonwealth legislation.

Identification of correct Traditional Owners to speak for country

The Report notes the importance of identifying the correct Traditional Owners to speak for country. However, it offers little guidance about how those parties should be identified, noting:

- identifying the appropriate person to speak for country is complex, and may need to be jurisdictionally specific;
- in accordance with the principles of FPIC, Traditional Owners should be empowered to choose who speaks for them and represents them; and
- where prescribed bodies corporate (PBCs) exist, it is likely that there would be support for the PBCs to be the appropriate representative organisation. However, further transparency and accountability measures are required to ensure PBCs act appropriately and in line with community decisions and PBCs need sufficient funding in order to undertake this statutory role.

Dispute resolution / breaking deadlocks

Traditional Owners must be given a right of review or appeal of decisions. The Report suggests that an independent National Aboriginal and Torres Strait Islander Heritage Council could be established to, amongst others, assist in mediating disputes between Indigenous peoples and proponents.

Definition of Indigenous cultural heritage and inclusion intangible cultural heritage

The Report states that most legislation across Australia is inadequate in its definitions of cultural heritage, "focussing primarily on artefacts and history, and failing to recognise the living nature of Aboriginal and Torres Strait Islander culture". It recommends that the definition of Indigenous cultural heritage in Federal and State legislation be expanded to recognise intangible cultural heritage, and that the Australian Government ratify the Convention for the Safeguarding of the Intangible Cultural Heritage 2003.

Currently only the Aboriginal Heritage Act 2006 (Vic) and the new Aboriginal Cultural Heritage Act 2021 (WA) expressly recognise intangible cultural heritage.

It is inevitable that there will be amendments made to the definition of Indigenous cultural heritage in legislative frameworks around the country as each jurisdiction progresses reforms. It is less clear is whether a national definition will be achievable or whether any jurisdiction will attempt to draw a distinction between different levels of significance in either defining or protecting Indigenous cultural heritage.

Native Title Act reform

The Report recognises the inextricable link between native title and cultural heritage, especially in regards to the important role that PBCs play in relation to decisions relating to cultural heritage management and protection.

It concludes that the future act regime in the Native Title Act disadvantages Traditional Owners, and recommends a review of the Native Title Act to address:

- inequalities in the negotiating position of Traditional Owners in the context of agreement making (including the right to negotiate), including addressing the principles of FPIC;
- prohibiting "gag clauses" and clauses in agreements that prevent Traditional Owners from seeking protection through Commonwealth legislation (ie gag clauses); and
- reforms to increase the transparency and accountability requirements on PBCs and Native Title Representative Bodies under the Native Title Act to require that they demonstrate adequate consultation with, and consideration of, local community views prior to agreeing to the destruction/alteration of any cultural heritage sites.

The right to negotiate process under the Native Title Act has drawn the attention of the Committee throughout the Inquiry. The process is said to be inconsistent with FPIC principles, given the available recourse to the National Native Title Tribunal to make a decision about whether an act may be done (ie, a mining lease granted) in the absence of consent from the relevant native title party.

Transaction costs and funding PBCs

The Way Forward Report highlighted the importance of adequate funding for Traditional Owner participation. It recommends that the Commonwealth establish an independent fund to administer funding for PBCs under the Native Title Act. Revenue for this fund should come from all Australian governments and proponents negotiating with PBCs.

In February 2022, the Joint Standing Committee for Northern Australia released a further report on this theme - The engagement of Traditional Owners in the economic development of northern Australia. The new report examines the huge challenges involved in leveraging land held under land rights and native title legislation for the economic and social advancement of Indigenous communities. It focuses on the opportunities and challenges for Traditional Owners associated with land rights, native title and other land-related agreements, especially as it relates to structure and funding of representative bodies, other Indigenous organisations and government entities.

DEVELOPMENTS SINCE THE RELEASE OF THE WAY FORWARD REPORT

In November 2021, the former Government's Minister for the Environment signed an agreement with the First Nations Heritage Protection Alliance (made up of Aboriginal Land Councils, Native Title Representative Bodies and Aboriginal and Torres Strait Islander Community Controlled Organisations from across Australia) to establish a joint working group to develop advice on options to implement changes for modernising Indigenous cultural heritage protections.

The joint working group agreed to consider policy transformation, law reform, administrative improvement and the review and restructure of process, procedure and protocols. The first stage of their national consultation process commenced before the election and a Stage One Discussion Paper was published in May 2022.

The implementation plan prior to the election was to see stage two consultations, a directions report, a policy options paper, a further round of consultations and then a final options report by the end of 2022. This timetable has already slipped and the impact of the change in government is not yet clear. Prior to the election, the ALP committed to work with the First Nations Heritage Protection Alliance and other stakeholders to reform the national heritage protection framework, including through new stand-alone First Nations heritage protection legislation.

WHERE TO AFTER THE CHANGE IN GOVERNMENT?

Corporate Australia has already started adjusting its policies ahead of the Federal Government's formal legislative response. The direction is clear.

First Nations issues are high on the new Federal Government's reform agenda. Given its position on reconciliation and constitutional recognition, there is likely to be a greater appetite to act on cultural heritage matters. However, the new Government has not yet made any announcements in this space. The agenda is already very busy so it may be some time before heritage reform comes into focussed attention.

Authors: Leonie Flynn, Expertise Counsel; Clare Lawrence, Partner

A new era for the ALRA: The Northern Territory Aboriginal Investment Corporation and other changes to the Aboriginal Land Rights (Northern Territory) Act 1976

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT (ECONOMIC EMPOWERMENT) ACT 2021 (CTH)

WHAT YOU NEED TO KNOW

- The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALRA) was significantly amended in December 2021.
- Co-designed with Land Councils, the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Act 2021 (Cth) introduced a suite of changes to the existing legislation. These changes included the establishment of a new, Aboriginal-controlled body called the Northern Territory Aboriginal Investment Corporation to invest money from the Aboriginals Benefit Account. This body aims to promote the self-management, economic self-sufficiency, and social and cultural well-being of Aboriginal people in the Northern Territory.
- The changes also streamline exploration and mining processes on Aboriginal land and institute a range of practical land administration reforms.
- Traditional Owners retain their right to grant, or refuse consent to the grant of, an exploration tenement.

WHAT YOU NEED TO DO

- Stay informed about the implementation of the ALRA amendments. As the "highest water mark" in Australian Indigenous land right statutes, the ALRA is often used as a measure for native title and Indigenous heritage laws in other jurisdictions. The changes introduce creative new approaches to broader goals around indigenous self-determination. What happens in the Territory impacts the rest of the country.
- Aboriginal businesses should monitor the development of the Northern Territory Aboriginal Investment Corporation closely to ensure opportunities for funding and investment can be maximised where alignment with strategic objectives exists.
- Proponents planning to negotiate exploration, mining or other interests on Aboriginal land should consider the impact of the proposed process changes in the amended Act.
- If you access or have interests in Aboriginal land in the Northern Territory, you should ensure that you have regularised these arrangements through permits and Aboriginal land agreements.

On 1 December 2021, the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (Cth) (Bill) was passed, bringing about significant changes to the scope and operation of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).

The Federal Government worked closely with the Northern Territory Land Councils to create a package of generational reforms to the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). These changes leave untouched the core historic aspects of the statute such as the grant of Aboriginal freehold tenures to land trusts. However, they introduce innovative approaches directed at goals around self-determination.

According to the Federal Minister for Indigenous Australians, these are the "the most far-reaching set of reforms to the land rights act since it was enacted in 1976—and almost 55 years to the day after the Wave Hill walk-off in 1966."

ESTABLISHMENT OF THE NORTHERN TERRITORY ABORIGINAL INVESTMENT CORPORATION

The most significant aspect of the reforms is the establishment of a new, Aboriginal-controlled body called the Northern Territory Aboriginal Investment Corporation (NTAI Corporation).

Currently, the Minister for Indigenous Australians is responsible for approving beneficial payments from the Aboriginals Benefit Account (ABA) on the advice of the ABA Advisory Committee.

The ABA was established by the ALRA to receive and distribute the funds equivalent to the royalties generated from mining on Aboriginal land in the Northern Territory.

The ABA currently provides for operational funding for Land Councils, payments for Traditional Owners and other Aboriginal people affected by mining operations, funding for township leasing, administration of the ABA, and payments for the benefit of Aboriginal people living in the NT (beneficial payments). The funds in the ABA have grown significantly over the last couple of years as a result of increased mining activity on Aboriginal land and it currently holds $1.3 billion in royalty equivalents.

The NTAI Corporation will replace the current beneficial payments process, putting funding decisions squarely in the hands of Aboriginal people. The new corporation will be led by a board of eight Aboriginal representatives from the Northern Territory, two government-appointed directors, and two independent directors, who will be appointed by the board.

The NTAI Corporation will receive an initial $500 million endowment from the ABA, $60 million per year during the first three years of its operation and subsequent funding each year.

With these assets the new corporation will be a significant new driver of economic investment in the Northern Territory.

To hold the NTAI Corporation accountable at the local level, its investment priorities will be set out in a strategic investment plan based on consultations with Aboriginal people and organisations in the Northern Territory and tabled in the Parliament.

While the provisions formally establishing the NTAI Corporation will not commence until 13 December 2022, the provisions supporting transitional arrangements, including the appointment of an interim board (and most of the other changes to the Act), commenced on 14 December 2021.

REFORMS TO THE EXPLORATION AND MINING PROCESS

The reforms are designed to streamline arrangements for exploration and mining on Aboriginal land, while protecting the interests of Traditional Aboriginal Owners.

The changes will:

- enable exploration licence applicants to amend their original applications in certain circumstances without being required to recommence the application process;
- give Land Councils greater flexibility to determine how Traditional Aboriginal Owners are consulted; and
- remove the requirement for Ministerial consent for standard exploration licences that have been approved by Traditional Owners, while continuing to require Ministerial consent for high value proposals or the cancellation of exploration licences and mining interests.

Importantly, the Bill leaves untouched Traditional Owners' right to refuse exploration proposals on Aboriginal land. This powerful 'veto' right, and other rights under the ALRA, promote self-determination by ensuring Traditional Owners in the NT have a significant say in proposals and developments on Aboriginal land.

OTHER REFORMS

The final component of these reforms is a package of sensible and practical land administration amendments.

CONCLUSION

The promise of significant financial investment and significant Aboriginal ownership suggests an exciting future for the NTAI Corporation and its progress should be closely watched. However, the Northern Territory is a notoriously difficult space for project development and as a new player on the investment scene, we expect it will take some time to see this promise translate into measurable results for the NTAI Corporation. In the meantime, though, the practical reforms to the Act will have an immediate, positive impact on stakeholders involved with the administration of Aboriginal land in the Northern Territory.

Authors: Rebecca Hughes, Senior Associate; Clare Lawrence, Partner

Other matters to watch out for in 2022-2023

Our Native Title Year in Review 2021-2022 articles cover the major legislative, judicial and policy developments over the last 12 months.

The reform agenda in the Indigenous land law space remains dynamic. In addition to the heritage reforms at the Federal and WA level and the new Northern Territory Aboriginal Investment Corporation in the ALRA, there are a range of other developments to watch in 2022-2023.

WA's Forrest & Forrest issue still not resolved

Will the new Federal Government work with the WA Government to progress a fix for the validation issue arising from the High Court's Forrest & Forrest Pty Ltd v Wilson ([2017] HCA 30) mining lease invalidity case in WA?

See more in our Native Title Year in Review 2020 article "Native Title Act reforms finally enacted", 1 April 2021.

CATSI Act Reforms

The CATSI Act Amendment Bill 2021 lapsed when the 2022 election was called.

Many years of work has gone into the review, which has seen multiple consultation processes, reports and reviews.

See more in our Native Title Year in Review 2020 article "Changes abound for the governance of Indigenous corporations", 1 April 2021.

Where does this work sit in the new Federal Government's First Nations reform agenda?

Cultural heritage legislative reform in other States

Several States and Territories have flagged (or commenced) reforms to their cultural heritage protection legislation over the last few years.

Those with reforms commenced prior to the release of the Way Forward Report may need to go back to the drawing board in light of the recommendations in that Report.

Watch for announcement from the State and Territory governments in this space.

Further review of the Native Title Act 1993 (Cth)

Calls for review of the Native Title Act have been made in both Joint Standing Committee reports, particularly around agreement making.

Native Title Act reform would be a complicated addition to the new Government's First Nations issues reform agenda, particularly given the large amount of work to do on cultural heritage reform.

Will we see any developments in this space in 2022/2023?

Joint Standing Committee's further report

In February 2022 the Joint Standing Committee for Northern Australia followed up the Way Forward Report with The engagement of Traditional Owners in the economic development of northern Australia.

The report focuses on overcoming the obstacles to the realisation of the economic opportunities for Traditional Owners associated with land rights, native title and other land-related agreements, especially as they relate to structure and funding of representative bodies, other Indigenous organisations and government entities.

The Joint Standing Committee has made an enormous contribution over the last 2 years to the wider understanding of the aspirations of Indigenous Australians in relation heritage, as well as to the identification of legislative and other barriers to better outcomes in the agreement making space.

What next for this important Committee in 2022/2023?

NSW Aboriginal Land Rights reform

In November 2021, the NSW Government released the 2021 Statutory review of the ALRA. Watch for the release of a proposed public exposure draft of an amendment bill to make administrative and operational changes to improve existing structures and administration of the Act and Land Councils.

In April 2022 the NSW Audit Office released its report Facilitating and administering Aboriginal land claim processes. The report provides a series of recommendations to resolve the delays and inefficiencies in progress land claims. Watch for action by the NSW Departments of Premier and Cabinet and Planning and Environment in 2022/2023 in response to these recommendations.

Author: Leonie Flynn, Expertise Counsel

Proving connection becomes harder in 2021

MALONE V STATE OF QUEENSLAND (NO 5) [2021] FCA 1639

BLACKBURN V WAGONGA LOCAL ABORIGINAL LAND COUNCIL [2021] FCAFC 210

RAINBOW V STATE OF QUEENSLAND (NO 2) [2021] FCA 1251

WHAT YOU NEED TO KNOW

- The Federal Court resolved a number of connection disputes in 2021 in decisions which reinforced the rights of proponents to test the evidence.
- The Court expressed some misgivings about the expert evidence in Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5) [2021] FCA 1639, where connection was not established. It noted the primacy of Aboriginal lay evidence and the supporting role that expert witnesses should but do not always play.
- The Full Court has also made it clear that if native title to a specific area of land is put in issue, it will be necessary to evaluate whether connection to that particular parcel has been maintained, even if connection has been maintained in respect of other areas (Blackburn v Wagonga Local Aboriginal Land Council [2021] FCAFC 210).
- In Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251, the Federal Court rejected a pastoral company's challenge to connection. However, it is clear that respondents to native title claims have the right to challenge connection even after the State has indicated that it will not. Stakeholders should consider their position on connection in native title claims affecting their interests.

CLAIM GROUPS APPEAL FEDERAL COURT DECISION THAT NATIVE TITLE DOES NOT EXIST IN RELATION TO THE CLERMONT-BELYANDO CLAIM AREA IN CENTRAL QUEENSLAND

The Federal Court held in Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5) [2021] FCA 1639 that native title did not exist in the area of the Clermont-Belyando Area Native Title Claim (including the extent to which that claim area was overlapped by the Jangga People #3 claim) because:

- the claim group failed to establish that their ancestors comprised a society at effective sovereignty which acknowledged and observed traditional laws and customs, and
- even if they had established the above, the claim group failed to establish that the current claim group constituted a normative society united in and bound by a body of laws and customs that they continued to acknowledge and observe.

Both claim groups have filed notices of appeal. The appeals will be heard together in late 2022/early 2023. A Full Court decision in late 2023 may finally conclude these proceedings, which were commenced in 2004. The proceedings relate to over 30,000 square kilometres of land in Central Queensland.

Findings of note – role of the expert witness

The Court expressed some misgivings about the expert evidence in this case. It noted the primacy of Aboriginal lay evidence and the supporting role that expert witnesses should play. The purpose of expert evidence is to assist the Court to understand the Aboriginal evidence and the archaeological and ethnographic data, and the inferences that may properly be drawn from that material. It is not the role of the expert to draw inferences from the facts. That is the role of the Court.

This reminder is timely given the role that expert reports play not just in native title claim proceedings but also in Aboriginal and Torres Strait Islander cultural heritage matters.

Findings of note – cannot rely on other native title determinations as evidence of connection

The Federal Court was unmoved by nearby consent determinations, and the claim groups' attempts to rely upon them as evidence of connection in this matter.

The Federal Court said that the connection questions in each claim must be determined based on the issues raised in the pleadings, the evidence properly adduced at the trial and the relevant facts as established on the balance of probabilities.

FULL COURT UPHOLDS NEGATIVE DETERMINATION OF NATIVE TITLE IN CONTESTED NON-CLAIMANT APPLICATION

Blackburn v Wagonga Local Aboriginal Land Council [2021] FCAFC 210 involved an unsuccessful appeal to the Full Federal Court from a determination that native title does not exist in relation to a parcel of Aboriginal land in the town of Narooma, New South Wales, which was owned by the Wagonga Local Aboriginal Land Council.

The Land Council brought a non-claimant application seeking a determination that native title does not exist so that it could sell the Aboriginal land. Members of a registered native title claim group with an overlapping claim challenged the non-claimant application and tried to prevent the negative determination of native title.

Findings of note – contested non-claimant application should have been heard at the same time as the overlapping native title claim

The primary judge ordered that the non-claimant application be heard separately and in advance of the overlapping native title claim.

Although the Full Court upheld the primary judge's findings that native title did not exist, it noted that the separate hearing should not have occurred. Section 67 of the Native Title Act 1993 (Cth) imposes a mandatory requirement on the Court that, where two or more native title applications cover the same area of land or waters, the applications must be dealt with in the same proceeding to the extent they cover the same area. Section 67 was not followed in this case.

Findings of note – connection in relation to the surrounding area does not determine the question of connection to a particular parcel

According to the primary judge, the evidence suggested that the claim group did have a continuing connection with some land in the vicinity of the Aboriginal land in question (Wagonga Local Aboriginal Land Council v Attorney General of New South Wales [2020] FCA 1113).

However, on a similar note to its findings in Malone that nearby consent determinations cannot be relied upon, the Full Court said at [145]:

> If native title in a specific area of land is put in issue, it will be necessary to evaluate whether connection to that area (under traditional laws or customs) has, in reality, been substantially maintained since the time of sovereignty. The fact that connection has been maintained in respect of other areas, even areas in close proximity, does not determine that evaluation.

This decision suggests that there may be some circumstances where, in the resolution of native title claim proceedings or otherwise, non-native title parties may consider testing issues of connection in relation to particular land parcels, notwithstanding that connection is likely to exist in relation to the area as a whole.

PASTORALISTS UNSUCCESSFUL IN CONNECTION CHALLENGE

In Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251 the Federal Court rejected a pastoral company's challenge to connection.

The Kurtjar People's native title claim covered over 12,000 square kilometres of land in the Gulf of Carpentaria, Queensland, including a number of cattle stations. Although the State and other respondents accepted the Kurtjar People's connection to the claim area, and were willing to move to the negotiation of a consent determination of native title, Stanbroke refused to accept connection over its station, Miranda Downs.

This stance is relatively unusual in native title claim proceedings. There is an expectation that respondents will follow the lead of the State in relation to connection issues, and it can be difficult for respondents to even get access to connection material.

In this case, connection issues over Miranda Downs went to a hearing. The Court rejected Stanbroke's challenge and found that the Kurtjar people have native title rights and interests in Miranda Downs.

Although Stanbroke was unsuccessful, it is clear that respondents to native title claims have the right to challenge connection even after the State has indicated that it will not. Stakeholders should consider their position on connection in native title claims affecting their interests.

FULL COURT DISMISSES APPLICATION FOR LEAVE TO APPEAL AGAINST 2020 DECISION ON ROLE OF STATE IN NATIVE TITLE CLAIMS

In Malone on behalf of the Western Kangoulu People v State of Queensland [2021] FCAFC 176, the Full Court dismissed an application for leave to appeal the 2020 primary judge's decision relating to whether the State had acted improperly in the conduct of a native title claim. We wrote about the primary judge's decision in our April 2021 article The role of the State in native title claims litigation: balancing competing community interests and acting as a model litigant.

The dispute arose because the State refused to consider a consent determination of native title notwithstanding joint connection reports by the parties' experts agreeing that native title existed. The claim group challenged the State's position and tried to have its pleadings struck out on a number of grounds.

The Full Court's decision confirms that experts are not agents of the parties and cannot make admissions on their behalf. Just because the State's expert agrees with the claim group's expert does not automatically satisfy the State's threshold for a "credible basis" for a native title claim. Further, the State represents the interests of all of the community. In acting firmly and fairly (according to the Model Litigant Principles), the State must appropriately test all claims, particularly given that native title determinations affect proprietary rights. The Model Litigant Principles do not create rights in third parties.

Author: Leonie Flynn, Expertise Counsel

Native title compensation: Not much to see but plenty happening below the surface

NATIVE TITLE COMPENSATION DEVELOPMENTS OVER THE LAST 12 MONTHS

WHAT YOU NEED TO KNOW

- There are 15 active native title compensation claims across Australia (as at 1 June 2022). There is still no new law on the assessment of native title compensation and there is not likely to be any for some time.
- Several claims are in settlement negotiations with the State and hearing dates are being deferred to allow this to occur.
- The payment of native title compensation in NSW is occurring separately from the Native Title Act 1993 (Cth)'s native title compensation claims process in the context of compulsory acquisition of native title under the Land Acquisition (Just Terms Compensation) Act 1999 (NSW). The NSW Valuer General has released a policy setting out the principles of assessing compensation for cultural loss (Compensation for Cultural Loss Arising from Compulsory Acquisition).
- The Yindjibarndi People have filed their long awaited compensation claim in WA, which includes the native title impact of FMG's Solomon Hub mine.
- The question of who can bring a compensation claim is not proving simple. There have been a number of claims brought by common law holders, apparently without the support of the native title holders' prescribed body corporate (PBC), which have been delayed or entirely derailed by authorisation disputes.

WHAT YOU NEED TO DO

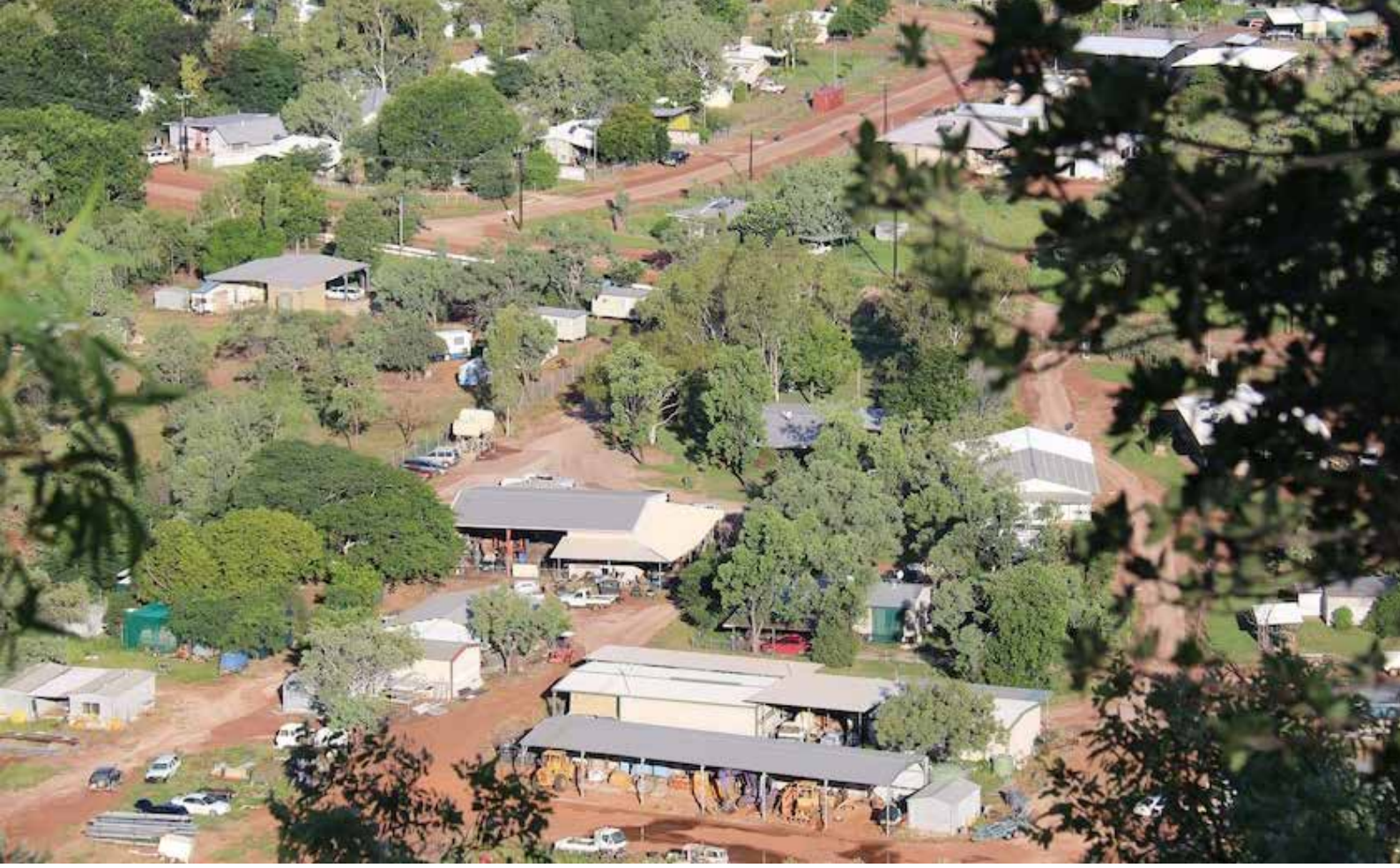
- Remember that new native title compensation claims may be lodged at any time. Over 300 determined native title holding groups around Australia are entitled to make compensation claims.
- Be aware that declining to join a compensation proceeding voluntarily will not shield you from compensation liability. Claimants are asking the Federal Court to join parties with potential liability for particular 'compensable acts' on the basis that their participation is necessary.

NATIONAL DEVELOPMENTS SINCE TIMBER CREEK

We have regularly published on developments following the High Court's judgment in Northern. Territory v Griffiths (2019) 269 CLR 1 (Timber Creek): see our articles "November 2020 Native Title Alert", 12 November 2020, and "Native Title Year in Review 2020 Compensation Update", 1 April 2021.

Timber Creek recap: still the only judicial consideration of principles related to the calculation of native title compensation

Three years ago (on 19 March 2019), the High Court handed down its first ever decision relating to native title compensation, including how to put a price on cultural loss (eg spiritual harm). The High Court awarded just over $2.5 million to the Ngaliwurru and Nungali Peoples for the effect of land grants and public works on their native title rights. This included an award of $1.3 million for cultural loss (or spiritual attachment to the land) (Northern Territory v Mr A Griffiths (decd) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples (2019) 364 ALR 208 (Timber Creek)). A summary of the case was provided in our Native Title Year in Review 2018 article "Compensation update: First High Court decision on native title compensation in Timber Creek case", 10 April 2019.



Since then, there have been a number of developments at a State and Territory level, both in terms of policy and progress of compensation claims. However, none of these claims have gone to a full hearing.

A focus on settlement, not litigation - National Guiding Principles adopted by all governments

In 2021, all Federal, State and Territory ministers responsible for native title met formally for the first time in 4 years. A key outcome was in-principle endorsement of the National Guiding Principles for Native Title Compensation Agreement (National Guiding Principles).

The National Guiding Principles provide that governments will use their best efforts to settle native title compensation by agreement in order to promote reconciliation with Aboriginal and Torres Strait Islander Peoples.

The National Guiding Principles can be read in full here. They:

- prioritise resolving claims through negotiation and agreement, while ensuring consistency across jurisdictions and with national best practice;
- require that any agreement reached should be negotiated with the free, prior and informed consent of all native title parties and consider the aspirations of native title parties; and
- require negotiated agreements to provide certainty for governments and native title parties as far as is reasonably practicable.

Despite the emphasis on settlement, the Principles note that some further test cases may be required to clarify legal issues.

The preference of governments to reach compensation claim settlements can be seen in current compensation proceedings, particularly the Tjiwarl Compensation Proceeding where settlement discussions have extended beyond the six months originally set aside.

Key State and Territory developments are discussed below.

Internal claim group disputes about who should bring compensation claims

There have been a number of compensation claims filed by individuals whose authorisation by the native title holders has been challenged by the State and/or the relevant registered native title body corporate (PBC). These challenges need to be resolved before the compensation claims can progress.

The Federal Court has recently dismissed one such challenge in the recent decision of Melville on behalf of the Pitta Pitta People v Queensland [2022] FCA 387 and ordered that the matter be prepared for a 2023 trial.

Recap: Authorisation

A compensation claim can be brought by the registered native title body corporate for the claim area or by a person authorised by all the people who claim to be entitled to compensation. Authorisation has the same meaning for compensation claims as it does in the context of native title claims.

There are two potential avenues to authorisation (set out in section 251B of the Native Title Act):

- **The first avenue is using a process of traditional decision making that, under the traditional laws and customs of the group, must be complied with in relation to authorising things of that kind.**
- **The second avenue is only available if there is no such traditional decision making process and allows the group to agree to and adopt a decision making process for the authorisation of the claim. The Federal Court has considered almost all aspects of the meaning of authorisation in the context of both claims and ILUAs.**

The Pitta Pitta compensation claim was brought by a group of elders who submitted that the claim was authorised using a traditional decision making process. This process did not require a whole of claim group meeting.

The Court was required to consider what authorisation under a traditional decision making process involved. In rejecting the challenge to authorisation, the Court was unable to agree with the approach taken in an earlier decision of Barker J in Kimberley Land Council Aboriginal Corporation (ICN 21) v Williams [2018] FCA 1955. We wrote about that decision in our Native Title Year in Review 2018 article "Authorisation and registration of ILUAs", 10 April 2019.

In Williams, Barker J said that "things of that kind" means "things of that kind specifically" and that when the subject matter of an authorisation is not readily analogous to anything dealt with under traditional law and custom, it is the people who acknowledge and observe those traditional laws and customs who must determine – as a group, as a whole – whether their laws and customs do, in fact, provide for "things of that kind".

Although it was not ultimately necessary to determine, Mortimer J in Melville disagreed and said that the provision does not require the group as a whole to form an opinion about whether it has a traditional decision making process for things of that kind. The Court said at [32]:

> Section 251A, like s 251B, is definitional. It is not formulated, in its text, by reference to the formation of an opinion or a state of satisfaction. In its definition, it provides that "where there is a process of decision-making" under traditional law and custom that must be followed, that process must be used. The definition requires the existence of such a process as a matter of objective fact. Of course, evidence from native title holders will be crucial in establishing that objective fact. However, the provision does not require the group as a whole to form an opinion and for that opinion to operate as the definition.

This take on section 251B has the potential to streamline the authorisation process for some claims and to avoid the need for whole of claim group meetings for authorisation if there is a traditional decision making process already established within the claim group.

NEW SOUTH WALES

NSW Valuer General's Policy on Compensation for Cultural Loss arising from Compulsory Acquisition

The payment of native title compensation in NSW is occurring separately from the Native Title Act's native title compensation claims process in the context of compulsory acquisition.

The NSW Valuer General determines compensation for the acquisition of land under the Land Acquisition (Just Terms Compensation) Act 1999 (NSW). This includes compensation for the acquisition of native title rights and interests in relation to land, including compensation for cultural loss. The NSW Valuer General has been required to grapple with the implications of Timber Creek without waiting for any further legal principles to be developed.

In March 2022, the NSW Valuer General released a policy Compensation for Cultural Loss Arising from Compulsory Acquisition, following its June 2021, draft report Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition.

The policy guides valuers on the approach to be adopted to determine compensation for non-economic loss (including cultural loss) arising from compulsory acquisition. The policy identifies:

- an indicative range of forms of cultural loss that may be compensable;
- a process by which the existence and significance of such forms of compensable cultural loss may be identified; and
- the valuation methodology to determine the amount of compensation payable for cultural loss identified.

The policy establishes a process allowing for a nine month consultation period during which it is envisaged that the native title party will provide materials as to cultural loss and participate in a conference with the Valuer General. The Land & Environment Court will consider any objections to the Valuer General's determination.

The policy also sets out the kinds of evidence that may be provided in support of a claim for compensation for cultural loss and a list of examples of the forms of cultural loss including:

- loss of **access** over land and **residence** on land;
- loss of **activities** on the land;
- loss of cultural **practices** on the land;
- loss of **ecology** due to impacts on plants, animals, lands and water ;
- loss of access and ability to look after cultural **sites**;
- **trauma** and **progressive impairment** associated with loss of country, loss of identity and intergenerational loss.

The policy sets out a number of principles for valuation methodology to quantify compensation for cultural loss. They include:

- that the compensation amount reflect a loss in perpetuity and compensated by the payment of a single capital sum for all generations;
- that the compensation amount be determined on an in globo basis without division by form of cultural loss or by parcel of land acquired (unless only one parcel acquired), with the apportionment or distribution of the award to be resolved among those who had suffered the loss;
- that the compensation amount has regard to other determinations for cultural loss made by the Valuer General, the Courts or by Valuers General of other States and Territories;
- that the compensation amount be determined intuitively; and
- that the compensation amount be an amount that would be considered appropriate, fair and just in the Australian community.

The policy also sets out details of valuation methodology. Although there is not a lot of land where native title has been determined to exist in NSW, this policy is presumably now in action.

Barkandji Malyangapa Compensation Claim discontinued

The Barkandji Malyangapa Compensation Claim (NSD925/2020) was commenced in August 2020.

The claim was filed by individuals and questions were immediately raised by the State and the Barkandji PBC about authorisation. We wrote about these issues in our article "Procedural issues lead to strike out of compensation claims", 1 April 2021.

After a number of case management hearings and a potential interlocutory hearing to consider authorisation, the claim was discontinued in April 2022 (before the Melville decision was handed down).

There are no longer any active compensation claims in NSW.

QUEENSLAND

Queensland Government's Native Title Compensation Project Management Office

In 2019, the Queensland Government established the Native Title Compensation Project Management Office (PMO) within Queensland Treasury to manage future compensation claims and develop a native title compensation settlement framework. Little has been publicly released about the PMO. The Treasury's 2020-2021 Annual Report states that the PMO is managing existing native title claims, while continuing to develop the compensation settlement framework.

Pitta Pitta Compensation Claim

The Pitta Pitta Compensation Claim (QUD327/2020) relates to hundreds of compensable acts spanning 3 million hectares of land in Queensland.

The Pitta Pitta Claim has the potential to be a test case on the assessment of compensation for the grant of exploration and mining interests in Queensland. Now that the challenge to authorisation has been rejected (see above), the Court has ordered that the matter be prepared for a 2023 trial.

This is the only active compensation claim in Queensland.

WESTERN AUSTRALIA

Tjiwarl Compensation Claims

The Tjiwarl Compensation Proceedings, which consist of three separate compensation claims by the Tjiwarl People heard together (WAD 141/2020, WAD 142/2020 and WAD 269/2020) were commenced in June 2020.

The Tjiwarl People claim compensation in respect of the grant of a number of interests in Western Australia's Goldfields region, such as roads, pastoral leases, water bores, easements, mining tenements and groundwater licences.

The compensable acts are all acts to which the non-extinguishment principle applies, in other words, acts which did not have the effect of completely extinguishing native title. This is a significant point of difference from Timber Creek, which only dealt with compensation for the complete extinguishment of native title. The construction and operation of the compensation pass through in section 125A of the Mining Act 1978 (WA) is also in issue.

A timetable was set for the resolution of the proceedings which saw an August 2022 trial. However, the timetable was vacated in December 2021 to allow settlement discussions to continue.

The Native Title Holders and the State have participated in regular mediation sessions convened by the Federal Court since mid-2021 and it is expected that these discussions will settle many of the issues in the proceeding. The Tjiwarl proceedings may not be the vehicle for long awaited new law on the assessment of compensation.

Malarngowem Compensation Claim

A compensation claim by the Malarngowem Aboriginal Corporation RNTBC (WAD203/2021) was commenced in September 2021 in relation to a small area in the eastern Kimberley region of WA. Notably, this claim relates to only one compensable act being the grant of an exploration licence in 2016 to Kimberley Granite Holdings Pty Ltd.

The limited nature of this claim seems to have ensured its speedy progress through the Federal Court. Preservation evidence from elderly or ill native title claimants was taken in December 2021 and the claim is scheduled for hearing from September to December 2022. In addition, the matter is in mediation before the Federal Court Registrar.

Yindjibarndi Compensation Claim

In February 2022, Yindjibarndi Ngurra Aboriginal Corporation RNTBC – a registered native title body corporate for the Yindjibarndi People – filed a native title compensation claim (WAD37/2022).

This is the long-awaited Yindjibarndi native title compensation claim, associated with the FMG Solomon Hub mining operations on Yindjibarndi country. This had previously been touted in the media as potentially being a multi-million-dollar compensation claim for economic loss and spiritual harm.

This new claim relates to grants of various mining tenements held by FMG and subsidiaries – the application documents refer to 9 mining leases, 16 miscellaneous licences, 22 exploration licences and 3 prospecting licences.

The claim is presently in notification with a long way to go. This new Yindjibarndi application is could well be the important test case for the WA mining industry (that the Tijwarl claim is not).

No Court dates have yet been listed.

Yilka Compensation Claim

The Yilka Compensation Claim (WAD266/2020) was commenced by Bruce Smith on behalf of the Wati Tjilpi Ku, on behalf of the Yilka Sullivan Edwards People in November 2020. Compensation is claimed with respect to hundreds of compensable acts including the grant of pastoral leases, mining leases, exploration tenements, miscellaneous licences, prospecting licences, mineral claims, ground water licences and the creation of a stock route and temporary reserve.

However, the compensation claim was commenced by a single applicant, whose authority was questioned by the State and the PBC. Before this issue could be resolved, the Applicant sadly passed away and an application was made under section 66B of the Native Title Act to replace him by two other individuals. This application was dismissed by the Federal Court in May 2022 for lack of authorisation by the compensation claim group (Smith on behalf of the Wati Tjilpi Ku on behalf of the Yilka Sullivan Edwards People v State of Western Australia [2022] FCA 581).

This claim is unlikely to progress unless the internal claim group issue can be resolved.

Wirrilimarra Compensation Claim

The Wirrilimarra Compensation Claim (WAD157/2021) was commenced in July 2021 by Archie Tucker on behalf of Wirrilimarra Banyjima Custodians Aboriginal Corporation in relation to 10,000 square kilometres in the Pilbara region of WA. This relates to land subject to the Banjima native title determination with Archie Tucker one of the applicant group in the original native title claim. Very little information was provided about the compensation claim group or compensable acts was included in the application.

The State filed an interlocutory application and supporting affidavit in April 2022 but it is not clear whether this seeks to strike out the claim. No hearing date has yet been set for this application.

NORTHERN TERRITORY

Gove Compensation Claim

In November 2019, Dr Galarrwuy Yunupingu filed a native title compensation claim (NTD43/2019) on behalf of the Gumatj Clan. The claim relates to the acquisition of land and minerals in the Gove Peninsula in the Northern Territory in the 1960s (Gove Compensation Claim).

The Gove Compensation Claim stands to be a test case for a number of issues, including native title rights to minerals, whether the Commonwealth is liable for compensation for extinguishment of native title prior to the commencement of the Racial Discrimination Act 1975 (Cth), and whether vesting of property in minerals in the Commonwealth under Mining Ordinance 1939 (NT) was invalid under the Commonwealth Constitution. A further issue will be whether the Gumatj Clan have already been compensated under the Rio Tinto Alcan Gove Traditional Owners Agreement.

We understand from orders published in the proceedings that the parties are exploring the possibility of certain discrete and narrow questions of law being determined in advance of a full trial of the matter. This would involve a hearing of those questions before the Full Federal Court prior to the main trial. Such a hearing would likely determine questions around the validity of certain actions of the Commonwealth prior to the commencement of the Racial Discrimination Act 1975 (Cth).

McArthur River Project Compensation Claim

The McArthur River Project Compensation Claim (NTD25/2020) was commenced in December 2020 by the Gudanji, Yanyuwa and Yanyuwa-Marra People in respect of the effects of various acts associated with the McArthur River Mine and Bing Bong Port.

The notification period for the claim ended in May 2021, with respondent parties now finalised. The claim has been set down for a hearing in June 2023.

SOUTH AUSTRALIA

The Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC compensation claim was filed in April 2022 and covers over 60,000 square kilometres of land in central South Australia (SAD61/2022).

The application seeks compensation for over 1000 freehold grants, pastoral leases, Crown leases, mining tenements and the construction of public works and roads in the claim area.

Authors: Ian Harris, Lawyer; Leonie Flynn, Expertise Counsel; Clare Lawrence, Partner

Federal Court declares implied term in ILUA

QGC V ALBERTS (NO.2) [2021] FCA 540

WHAT YOU NEED TO KNOW

- n a first, the Federal Court made orders declaring an implied term in an ILUA because the drafting did not contemplate any replacement process for the entity nominated by the native title party to receive funds from the proponent.
- To ensure compliance with the implied term, the Federal Court ordered the National Native Title Tribunal to participate in a process to appoint a new entity to receive the benefits under the ILUA.
- The mediation and other processes to resolve the issue of where the funds should go is ongoing and have been very expensive and resource-intensive for the parties.

WHAT YOU NEED TO DO

- Remember that representation arrangements for native title parties can, and often do, change over time.
- Ensure that your native title agreement contains a clear process for replacement of entities nominated to take a particular role, and accommodates other changes in the native title landscape that could occur over the term of the agreement

DECISION PART OF DISPUTE ABOUT AN EXISTING QGC ILUA

QGC v Alberts (No.2) [2021] FCA 540 arises in the course of a long running dispute about an existing ILUA (called the Barunggam, Cobble Cobble, Jarowair, Western Wakka Wakka, Yiman and QGC ILUA). The Court has already resolved two substantive disputes in relation to the ILUA (Conlon v QGC Pty Limited (No 2) (2017) 359 ALR 460 and QGC Pty Limited v Alberts [2020] FCA 1869).

In 2010, 14 persons signed the ILUA as representatives of various families comprising the Native Title Party. In 2011, the Native Title Party nominated BCJWY Aboriginal Society Ltd (BCJWY) as the "nominated entity" under the ILUA. The nominated entity was to receive substantial amounts of compensation from QGC over the course of 10 years.

QGC paid BCJWY the initial financial benefit of $2 million under the ILUA, and continued making the relevant annual payments. However, issues with the financial transparency of the BCJWY arose, and the entity lost the confidence of a majority of the families. From around 2017, this led to various attempts by some of the families to nominate a new entity to receive the funds. However, the ILUA did not include a replacement mechanism for the nominated entity.

Finally in 2019, BCJWY was placed into liquidation. QGC ended up paying over $1.5 million into Court in an interpleader action because of the ongoing dispute between the various families about the nominated entity.

The proceedings considered the problem created by the absence of a process for replacing the nominated entity in the ILUA.

Some members of the native title party contended that a majority of the native title party could simply vote to replace the nominated entity with another, which they had purported to do. These members submitted that the persons comprising the native title party who were alive and had capacity were able to vote to do so because they had been appointed, under the ILUA, to make decisions on behalf of the families and family groups. They argued that it followed that the native title party could establish a new nominated entity for and on behalf of the families, but without any additional consultation or authorisation steps.

IMPLIED TERMS IN ILUAS

Ultimately, Rares J found that a term could be implied into clause 2.1 of the ILUA to allow the appointment of a substitute nominated entity so that the clause would read (with the italicised and underlined implication) as follows:

> 2.1 As soon as practicable after the later of:
>
> (a) the Authorisation Date; or
>
> (b) the establishment of the Nominated Entity, if there is no Nominated Entity at the Authorisation Date *or, if at any time thereafter, the nominated entity for any reason has ceased to be capable of acting in accordance with clause 1.2;*
>
> the Native Title Party, on behalf of the Families, must notify QGC in writing of the name and address of the Nominated Entity.

The Court noted that while the ILUA is not, strictly speaking, a commercial contract (it is a statutory contract created by force of its registration and the requirements of s 24EA of the Native Title Act 1993 (Cth)), the common law rules about implied terms in contracts are still applicable. Rares J found that in construing a contract, a court should seek to give it an interpretation that the parties intended, that produces a commercial result and that avoids "making commercial nonsense or working commercial inconvenience" (at [64]).

The Court found that the parties could not have intended a construction of the ILUA that resulted in it being impossible to ever replace an existing nominated entity, particularly when that nominated entity was in liquidation. Rather, the Court found that the intention of the parties was that there be at all times a nominated entity, being either a corporation or trust, that would be able to distribute the financial benefits, that QGC had agreed to pay over the term of 10 years, to, or for the benefit of, the families.

COURT ORDERS A RESOLUTION INVOLVING THE NNTT TO ASSIST THE FAMILIES TO NOMINATE AN ENTITY

During the course of final submissions, QGC suggested that it may be possible for orders to be made to enable the NNTT to enter an agreement at the request of the Representative Body, Queensland South Native Title Services Limited, to formulate a process through which the families could meet, either individually or collectively, to see if they could establish one or more nominated entities to replace BCJWY.

Following his judgment, Rares J has made several prescriptive orders requiring family meetings to occur (convened by the NTTT and the Representative Body) to establish these replacement nominated entities. Family disputes have also been referred to the NNTT for mediation.

In his judgment, Rares J noted that there has been significant dysfunction and disruption within the native title party. He also noted that the current surviving original signatories of the ILUA have not had their positions "re-authorised, been re-elected or otherwise brought under the control" of the native title claim group for over 10 years. This certainly seemed to influence the Court's preferred resolution of the matter.

The Court's approach may have appeared practical and focused on positive communal outcomes. However, the nomination still seems a long way from occurring. The issues do not seem to be confined to the drafting omission.

QGC agreed to resource up to $75,000 to assist this process. We expect that is well and truly spent.

Author: Libby McKillop, Senior Associate

Mining leases for infrastructure get a judicial work out

HARVEY V MINISTER FOR PRIMARY INDUSTRY AND RESOURCES [2022] FCAFC 794

WHAT YOU NEED TO KNOW

- Harvey v Minister for Primary Industry and Resources [2022] FCAFC 794 is the first thorough consideration of the "infrastructure mining lease" provisions of the Native Title Act 1993 (Cth) (section 24MD(6B)).
- The Full Court said that for that provision to apply, a grant must be both the creation of a right to mine and be for the sole purpose of the construction of an infrastructure facility associated with mining. It also adopted a narrow interpretation of "infrastructure facility".
- In most cases, here the mining infrastructure process does not apply, the future act will either need to be validated by the right to negotiate process where it is the creation of a right to mine or by the simple freehold test process if it is not (as was the outcome in this case).
- The Full Federal Court's decision narrows the scope of section 24MD(6B), at the same time the new eight month consultation period is added to the section 24MD(6B) process in the Native Title Legislation Amendment Act 2021 (Cth).

WHAT YOU NEED TO DO

- Proponents should carefully consider the tenure options for infrastructure associated with mining facilities and ensure that the relevant Department correctly categorises the application under the Native Title Act.
- If section 24MD(6B) does apply, proponents will need to ensure that project timeframes adequately provide for the extended time period.

DISPUTE ABOUT WHICH NATIVE TITLE ACT PROCESS APPLIES TO THE GRANT OF AN ANCILLARY MINERAL LEASE FOR THE MCARTHUR RIVER MINE

Harvey v Minister for Primary Industry and Resources [2022] FCAFC 66 involved a dispute about which process in the Native Title Act 1993 (Cth) applied to an application for an ancillary mineral lease for the McArthur River Project in the Northern Territory.

The activities proposed by the ancillary mineral lease involved enlarging the existing dredge spoil deposition area for the McArthur River Mine. The spoils resulted from dredging the navigation channel used by vessels accessing the mine's loading facility.

The Native Title Act contains three distinct processes that might apply to the grant of the ancillary mineral lease if it affects native title. While such a future act passes the freehold test, the procedural rights vary according to the closeness of its association with mining.

Creation of right to mine, except one created for the sole purpose of the construction of an infrastructure facility associated with mining	Subdivision P (RTN) applies	Right to negotiate process and agreement or NNTT determination
Creation of right to mine for the sole purpose of the construction of an infrastructure facility associated with mining	S.24MD(6B) applies	Notice and objection process (including new 8 month timeline)
Creation of interest that is not a right to mine	S.24MD(6A) applies	Same procedural rights as ordinary title holders

In this case, the Department took the view that the ancillary mineral lease did not create a right to mine, and issued notices indicating that the process in section 24MD(6A) of the Native Title Act applied.

The native title holders argued that the process in section 24MD(6B) applied, because the application would involve "the creation of a right to mine for the sole purpose of an infrastructure facility associated with mining". They sought declarations to prevent the grant of the ancillary mineral lease because of a failure to accord them the procedural rights contained in section 24MD(6B).

The primary judge found that the ancillary mineral lease did not fall within section 24MD(6B) of the Native Title Act, and after an appeal by the native title holders, the Full Federal Court agreed.

Although the Full Court disagreed with the primary judge on some issues, the ultimate outcome was to confirm the narrow operation of section 24MD(6B).

FULL FEDERAL COURT FINDS THAT SECTION 24MD(6B) HAS TWO LIMBS

The question raised on the appeal was whether the grant of ML 29881 would be the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining within the meaning of s 24MD(6B)(b) of the Native Title Act.

First, the Full Court said that for a future act to fall within section 24MD(6B) it must satisfy two elements:

- it must be the creation or variation of a right to mine; and
- the sole purpose of the creation or variation must be the construction of an infrastructure facility associated with mining.

The Full Court disagreed with the interpretation adopted by the primary judge that sought to apply only one test that focused on the second element of the provision. If a future act is not the creation of a right to mine, then there can be no application of section 24MD(6B) even if the sole purpose of the future act relates to the construction of an infrastructure facility associated with mining.

MEANING OF "RIGHT TO MINE"

The Full Court noted that the phrase "right to mine" is not defined in the Native Title Act, but the word "mine" is defined to include exploration, extracting petroleum or gas from the land and quarrying. It was common ground between the parties that the word "mine" as used in the Native Title Act incorporates its ordinary meaning, being the extraction of minerals from the ground, plus the extended meaning from the definition in the Native Title Act.

The issue in dispute was the range of activities encompassed with the phrase "to mine".

The Full Court held that the immediate statutory context of section 24MD(6B) indicates that the phrase "right to mine" cannot be given an unduly narrow construction. The expression "right to mine" refers to a future act that confers a right to engage in mining activities, which typically involve the exploration for and extraction of a mineral (or petroleum or gas) from the ground, and **encompasses rights necessary for its meaningful exercise**. These might include activities such as the evaluation, processing or refining of minerals, the treatment of tailings, the storage of waste or the removal of minerals from the title area. The Full Court said that typically, each of those categories of activities will be directly associated with and form part of the mining activity on a given parcel of land. Rights permitting such activities can be appropriately described as a right to mine. The legislature contemplated that a right to mine might be created for the sole purpose of the construction of an infrastructure facility associated with mining.

In this case, the Full Court held that the grant of the mineral lease for the dredge spoil area did not constitute the creation of a "right to mine" within the meaning of section 24MD(6B) because the activities authorised by mineral lease were too remote from mining activities and could not be regarded as necessary for the meaningful exercise of a right to mine. The purpose of the dredge spoil area is to hold dredge spoil to enable vessels to ship ore from the loading facility to ocean going vessels. The Full Court said that the ordinary meaning of mining does not encompass the transportation of mined ore to customers. Clear statutory language would be needed for the phrase "right to mine" to encompass activities associated only with the transportation of mined ore.

The Full Court made it clear that the grant of a mineral lease that does not involve the creation of a right to mine, does not trigger section 24MD(6B) of the Native Title Act. Instead, native title holders and claimants have the same rights as holders of ordinary title by operation of section 24MD(6A).

MEANING OF " INFRASTRUCTURE FACILITY"

The definition of "infrastructure facility" in section 253 of the Native Title Act relevantly provides:

infrastructure facility includes any of the following:

(a) a road, railway, bridge or other transport facility; ...

(f) a storage or transportation facility for coal, any other mineral or any mineral concentrate;

(g) a dam, pipeline, channel or other water management, distribution or reticulation facility; ...

(i) any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph.

The question for the Full Court was whether this definition was intended to be exhaustive or inclusive. If inclusive, would it also encompass things within the ordinary meaning of the phrase.

The Full Court noted that definition of "infrastructure facility" was considered by it in South Australia v Slipper [2004] FCAFC 164. In Slipper, the Full Court was not asked to consider whether it was an exclusive definition and focused instead on whether the facility in question fell within the ordinary meaning of the phrase. Accordingly, this decision was considered in addition to the contentions advanced in this appeal.

The Full Court said that the use of the word "includes" is a strong indicator that the definition of "infrastructure facility" is intended to be non-exhaustive, but it is necessary to consider whether contrary indications arise from the statutory text, context and purpose. In this case, there are a number of strong indicators in favour of an exhaustive construction of the definition.

There were five indicators arising from the statutory text, context and purpose that led to the Full Court to conclude that "infrastructure facility" was an exhaustive definition. These include:

- each of the things enumerated in paras (a) to (h) of the definition appears to fall within the ordinary meaning of the phrase "infrastructure facility". This suggests that the legislature sought not to expand the ordinary meaning of the term, but to provide an exhaustive explanation of its meaning for the purpose of the Act;
- paragraph (i) empowers the Minister to determine, by legislative instrument, that "any other thing that is similar to any or all of the things mentioned in paras (a) to (h)" is an infrastructure facility for the purpose of the definition. If the definition were intended to be inclusive, para (i) would be unnecessary; and
- there is a discernible statutory purpose for limiting the definition to the enumerated things. It is understandable that Parliament defined the categories of infrastructure facility to be excluded from the right to negotiate in exhaustive terms.

This conclusion involves something of a departure from the reasoning of the Full Court in Slipper.

The Full Court agreed with the primary judge that the dredge spoil area does not meet the definition in paragraph (f) or (g) of the definition of "infrastructure facility" and would not be an "infrastructure facility" within the meaning of the Native Title Act.

RESULT - SECTION 24MD(6B) DOES NOT APPLY

Because the ancillary mineral lease was not the creation of the right to mine (or for an 'infrastructure facility') it did not fall within section 24MD(6B) of the Native Title Act, and only the process in section 24MD(6A) of the Native Title Act applied. Section 24MD(6A) provides that native title holders have the same procedural rights as ordinary title holders.

IMPACT ON THE RECENT AMENDMENTS TO SECTION 24MD(6B)

Section 24MD(6B) originally included a two month notification and objection process and an option for objections to be heard by an independent person or body. An objection could only be referred for hearing by the native title party, leaving many objections potentially unresolved.

The 2021 amendments to the Native Title Act (Native Title Legislation Amendment Act 2021 (Cth)) included a new section 24MD(6B)(f) that requires the Government party to refer an objection for hearing, but not until eight months after notification. This makes the section 24MD(6B) process potentially longer than the six month period in the right to negotiate process, which was intended to be the more significant procedural right.

The Full Federal Court's decision narrowing the scope of section 24MD(6B) looks to mean that it will be used less frequently than has been the case, in any event.

Authors: Leonie Flynn, Expertise Counsel; Clare Lawrence, Partner

Now we know: Full Court ends discussion on NSW statutory lease classes – no extinguishment

ATTORNEY GENERAL OF NEW SOUTH WALES V OHLSEN ON BEHALF OF THE NGEMBA/ NGIYAMPAA PEOPLE [2022] FCAFC 38

WHAT YOU NEED TO KNOW

- This was a test case brought by the State of NSW (in the context of the Ngemba native title claim) to get some certainty as to the effect on native title of eight different types of statutory leases.
- The Full Court explained the core requirements of an exclusive possession grant for a statutory lease in the Native Title Act 1993 (Cth) context of exclusive possession determines extinguishment.
- The lower court's findings of extinguishment by some classes of statutory leases still stands.

WHAT YOU NEED TO DO

- Consider the Full Court's findings when analysing whether statutory leases and other interests are grants of exclusive possession that extinguish native title.
- Unless extinguishment is clear, assume that native title may continue to exist and ensure compliance with the Native Title Act.

FULL COURT CONFIRMS THAT CERTAIN NSW STATUTORY LEASES DID NOT EXTINGUISH NATIVE TITLE

In Attorney General of New South Wales v Ohlsen on behalf of the Ngemba/Ngiyampaa People [2022] FCAFC 38 the Full Federal Court dismissed the State's appeal and upheld the primary judge's findings that certain historical statutory leases do not extinguish native title.

The appeal arose in the context of separate questions referred in the Ngemba/Ngiyampaa native title claim.

The interests in question were:

- statutory leases including Scrub Leases, Settlement Leases, Improvement Leases, Homestead Leases, 18th Section Leases, Western Lands Leases for a Term, Special Leases for a Term, Special Leases for Grazing; and
- a reservation for a temporary common.

The Court was asked to consider whether each lease extinguished native title as a grant of exclusive possession, a "Scheduled Interest" or a "commercial lease" under the Native Title Act.

The primary judge found that many of the leases had not extinguished native title and were not grants of exclusive possession (Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales [2021] FCA 169). The Full Court agreed with the primary judge on all findings that were the subject of the appeal. The primary judge's extinguishment findings in relation to some classes of statutory leases were not appealed.

FULL COURT'S FINDINGS ABOUT EXCLUSIVE POSSESSION

The Full Court considered previous authorities on the meaning of exclusive possession in the context of the Native Title Act and focused particularly on the High Court's decision in WA v Brown [2014] HCA 8.

The Full Court held that the core assessment is whether what was conferred by the grant could be characterised as being "a right to exclude anyone and everyone for any reason or no reason", including by an assessment of whether a lessee was granted a right to use the land as the lessee saw fit.

The Full Court noted that many leases granting exclusive possession have some restrictions on use. Broad reservations permitting the grantor and others to pass through or use the land in limited circumstances may not be inconsistent with exclusive possession.

Whether reservations or conditions are inconsistent with exclusive possession depends on the circumstances of the grant in question, including the nature of the right granted and the extent to which any such reservation precludes the grantee to use the land.

FINDINGS ABOUT EACH CATEGORY OF LEASE

The primary judge (whose approach was approved by the Full Court) took into account a number of factors when considering whether the statutory leases were grants of exclusive possession, including:

- the size of the lease areas;
- the precarious nature of the interests granted;
- third party rights of entry and other limitations on the rights of the lessee; and
- the purpose of the leases.

SCHEDULED INTERESTS

The following leases were held to be Scheduled interests under the Native Title Act that extinguished native title. These findings were not appealed:

- **Conversion of Settlement Leases to Conditional Leases**. Scheduled interest under conditional lease category.
- **Western Lands Lease for grazing and recreation (pony club) purposes**. Scheduled interest under the "equestrian grounds" category.
- **Special Lease for "irrigation purposes"**. Scheduled interest under the "agriculture", "agriculture or any similar purpose" and/or "cultivation" categories. The Court looked at the ordinary meaning of "agriculture" and "cultivate" and "irrigation" in its findings.
- **Special Lease for "grazing and dairying purposes"**. Scheduled interest under the "dairying" category. The Court held that grazing dairy cows was integral to dairying in the Australian climate.

Interestingly, the Full Court concluded that several Scheduled Interests which have the effect of extinguishing native title by virtue of the Native Title Act did not confer exclusive possession so would not have extinguished native title at common law. This will likely add to the State's compensation burden.

IMPACT OF THIS DECISION

The State of NSW ran this matter as a test case for extinguishment of native title by statutory leases that did not otherwise fulfil the criteria for extinguishment (as "Scheduled Interest" etc). The Full Court's dismissal of all of the State's grounds for appeal clearly resolves this issue in NSW and other States will similar types of statutory leases.

To prove exclusive possession in the context of a statutory lease under the Native Title Act, the Full Court held that the core assessment is:

- can the grant be characterised as "a right to exclude anyone and everyone for any reason or no reason"; and
- is the lessee granted a right to use the land as the lessee sees fit.

This test will make it difficult to argue that a statutory lease for limited purposes that does not otherwise meet the criteria for extinguishment under the Native Title Act (eg as Scheduled interest or commercial lease) is a grant of exclusive possession that extinguishes native title.

It is hard to believe there are any more unsettled extinguishment questions. However, novel circumstances will no doubt arise requiring further judicial guidance. In the meantime, compensation arising from extinguishment will be the subject of judicial attention.

Authors: Leonie Flynn, Expertise Counsel; Clare Lawrence, Partner

Costs Update: it doesn't matter who you are, unreasonable conduct risks a cost order

SECTION 85A OF THE NATIVE TITLE ACT

WHAT YOU NEED TO KNOW

- Costs have been sought against a range of parties in native title proceedings in 2021, including the State, a PBC, a Local Council and a claim group's solicitor.
- Although the general position remains that parties bear their own costs in the native title jurisdiction, the Federal Court will not hesitate to make costs orders in the face of unreasonable conduct.
- A claim group's solicitor was lucky to avoid a costs order in circumstances where the Court held their conduct was both unreasonable and unprofessional.

WHAT YOU NEED TO DO

- Be reasonable! Courts will respond to grandstanding or pursuit of pointless arguments with costs orders.

We follow native title costs decisions in our annual Native Title Year in Review to identify new principles and trends.

We reported on a number of costs decisions with adverse outcomes for some parties in our article Costs Update: Courts call out unreasonable conduct with costs orders", 1 April 2021. In April 2020, we reported on a rare exercise of the Federal Court's power to order costs against a solicitor personally in our Native Title Year in Review 2019 article "Costs update – Court extends costs order to solicitor propounding hopeless last minute application", 28 April 2020.

In 2021, we have seen an increasing number of costs applications affecting a range of parties.

Reminder of the provisions governing costs in native title proceedings

The Federal Court has discretionary power to award costs: section 43 Federal Court of Australia Act 1976 (Cth).

In addition, section 85A of the Native Title Act 1993 (Cth) provides:

1. **Unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs.**
2. **Without limiting the Court's power to make orders under subsection (1), if the Federal Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding, the Court may order the first-mentioned party to pay some or all of those costs.**

COMPENSATION CLAIMANT'S SOLICITOR AT RISK OF PERSONAL COSTS ORDER

In Saunders on behalf of the Bigambul People v State of Queensland (No 2) [2021] FCA 190, the Court ordered the dismissal of a compensation claim after an application by the State to have it struck out. We wrote about this decision in our Native Title Year in Review 2020 article "Procedural issues lead to strike out of compensation claims", 1 April 2021.

Various costs application were made against the compensation claimant and his solicitors, which were determined in Saunders on behalf of the Bigambul People v State of Queensland (No 3) [2021] FCA 444. These included applications that the claimant's solicitors personally meet the costs of various respondent parties.

Court inclined to order that the compensation claimant's solicitor personally pay the State's costs

The State initially indicated that it would seek a costs order against the claimant's solicitor personally, but later withdrew from this position. The Court noted [at 24-25]:

> In my opinion, the conduct of the applicant in filing a patently defective Form 4 compensation application, albeit upon his solicitors' advice, should be regarded as unreasonable conduct... Further, the conduct of the applicant's solicitors in advising the applicant to file an application that was patently defective was both unreasonable and unprofessional. The Form 4 plainly failed to comply with s 61(5)(c) of the NTA, and that should have been discernible from even the most rudimentary consideration by the applicant's solicitors. I infer that the applicant's solicitors either failed to consider the prospects of success of the application, or they were aware that it had no prospects of success but advised the applicant that it should be filed anyway. The compensation application in that form should never have been made. **If the State had maintained its application for orders for costs against the applicant's solicitors, I would have been inclined to make such orders.**

No order for costs in favour of the Rep Body or native title holders because they elected to join the proceedings and the claimant's conduct after that joinder was not unreasonable

Costs orders were also sought by Indigenous respondents to the compensation claims:

- the Representative Body, Queensland South Native Title Services (QSNTS), sought an order that the compensation claimants' solicitor pay QSNTS' costs;
- the registered native title holders sought an order that the compensation claimants pay their costs on an indemnity basis and, in addition, an order that the costs be paid by their solicitor personally.

The Court noted that the procedural history of the proceeding was relevant. In particular, QSNTS and the registered native title holders did not apply to become parties until after the State filed its strike out application and the claimant's conceded that the compensation application was defective (foreshadowing an application for leave to amend.)

The Court denied QSNTS and the Indigenous respondents' costs applications because:

- the unreasonable conduct of the compensation claimant and his solicitors continued only until the first case management hearing, when they conceded that the compensation application was defective and indicated that they would seek leave to amend. The application for leave to amend was reasonably arguable;
- QSNTS and the Indigenous respondents should not be awarded their costs incurred before they elected to become parties. They did not become parties until after the first case management hearing. The conduct of the applicant and his solicitors after the first case management hearing was not unreasonable.

The circumstances did not warrant departure from the usual position under section 85A(1) of the Native Title Act that each party bear their own costs.

COSTS ORDERED AGAINST COUNCIL FOR UNREASONABLE CONDUCT IN RAISING NEW APPEAL GROUND LESS THAN 24 HOURS BEFORE HEARING

In District Council of Streaky Bay v Wilson [2021] FCAFC 181, the Full Court awarded costs against the District Council of Streaky Bay in favour of the Indigenous respondent and the State.

This matter arose in the context of an appeal by the Council from extinguishment findings made by the Federal Court Wilson v State of South Australia (No 4) [2020] FCA 1805. We wrote about this decision in our Native Title Year in Review 2020 article "Extinguishment principles: Federal Court zeros in on general law validity and confirms that 'major' earthworks need to have real impact", 31 March 2021.

The Council was wholly unsuccessful in its appeal on the extinguishment issues.

The costs issue arose because the Council applied to amend its draft notice of appeal on the afternoon prior to the hearing, raising a new issue that was not raised at the trial. The Full Court refused this application and ordered that the Council pay the State's and the Indigenous respondents' costs of this eleventh hour application.

The Full Court held that the Council's conduct in raising a new ground less than 24 hours before the hearing of a fully programmed appeal was unreasonable within the meaning of s 85A of the Native Title Act.

STATE ORDERED TO PAY LOCAL ABORIGINAL LAND COUNCIL'S COSTS FOR "UNTENABLE" AND "UNREASONABLE" CROSS-APPEAL

In Blackburn v Wagonga Local Aboriginal Land Council [2021] FCAFC 210, the Full Court heard an appeal and cross-appeal against a determination that native title does exist in respect of land in Narooma, New South Wales. We wrote about this decision in our article above "Proving connection becomes harder in 2021".

The matter arose in the context of a negative determination of native title made after a non-claimant application by a Local Aboriginal Land Council. An appeal by the native title claim group was dismissed with no order as to costs.

The State brought a cross-appeal but had not actively participated in the hearing before the trial judge. The Full Court was not impressed. It dismissed the State's cross-appeal, and said [22]:

> It is extraordinary for the Attorney to seek to set side on appeal a determination that the Attorney did not oppose at first instance (and where the Attorney was a party at first instance and had the opportunity to participate fully in the hearing at first instance).

The Full Court held at [159]:

> ... the contentions advanced on behalf of the Attorney were untenable and the bringing of the cross-appeal can be properly characterised as unreasonable within the meaning of section 85A(2).

The Full Court ordered the State to pay the Land Council's costs of the cross-appeal on a lump sum basis.

ABORIGINAL CORPORATION RNTBC ORDERED TO PAY 75% OF INDIGENOUS APPLICANTS' COSTS OF PROCEEDINGS RELATING TO THEIR MEMBERSHIP OF THE NATIVE TITLE HOLDING GROUP

In Dhu v Karlka Nyiyaparli Aboriginal Corporation RNTBC (No 2) [2021] FCA 1496, the Applicants sought a declaration in relation to their membership of the Nyiyaparli People.

Resolutions had been passed by the common law holders to refuse to recognise the Applicants as Nyiyaparli People and to refuse membership of Karlka Nyiyaparli Aboriginal Corporation RNTBC (PBC).

For various reasons, the Court held that these resolutions were not decisions made under Nyiyaparli traditional law and custom and were not effective to refuse recognition of the Applicants as Nyiyaparli People. However, other remedies sought by the Applicants were refused.

In respect of costs, the Court held that although the Applicants had only been partially successful, it had been necessary for them to bring the proceeding, given the position taken by the PBC.

The Court ordered that PBC pay 75% of the Applicants' costs of the proceeding.

Authors: Roxane Read, Senior Associate; Leonie Flynn, Expertise Counsel

Show me the numbers: Mining companies lose good faith challenges for failing to provide financial information

RIGHT TO NEGOTIATE PROCESS IN THE NATIVE TITLE ACT

WHAT YOU NEED TO KNOW

- In 2021, the National Native Title Tribunal upheld two good faith challenges against mining companies participating in the right to negotiate process. In both instances, the miner failed to meaningfully respond to the native title party's request for financial information.
- While mining companies are not required to "lay bare" their financial situation, the obligation to negotiate in good faith requires them to actively participate in negotiations, respond to requests for information in a timely manner, and either provide relevant information or explain why the information cannot be provided.
- Two decisions in early 2022 considered the good faith implications of referring matters to the Tribunal for determination when the native title party was not able to arrange claim group meetings because of the COVID-19 pandemic. In both cases the Tribunal found that the mining company had acted in good faith.
- Despite these two decisions, only 14 out of 65 good faith decisions have found against the grantee party (which is usually a mining company) or the Government over more than 20 years of the right to negotiate process.

WHAT YOU NEED TO DO

- Grantee parties involved in the right to negotiate process should actively consider and respond to any request for information from the native title party and if necessary, explain why information cannot be provided.
- Smaller operators should not assume that the good faith requirements around financial information do not apply to them in the same way as larger mining companies.
- Native title parties should consider alternative ways to meet if claim group meetings are not possible because of the COVID-19 pandemic or similar events.

RECAP OF THE RIGHT TO NEGOTIATE PROCESS AND "GOOD FAITH"

The right to negotiate (RTN) process in the Native Title Act 1993 (Cth) applies to the grant of mining leases in certain circumstances. The negotiating parties are the mining lease applicant (being the grantee party), any relevant native title party and the relevant State Government. The RTN process requires the parties to negotiate in good faith with a view to obtaining the agreement of the native title party to the grant of the lease.

If agreement cannot be reached within 6 months of the notice commencing the process, any of the parties can apply to the National Native Title Tribunal to determine whether the mining lease may be granted.

However, the Tribunal has no power to determine the matter where the native title party satisfies the Tribunal that one of the other parties has not negotiated in good faith.

SILICA MINER FAILS TO NEGOTIATE IN GOOD FAITH

In Sunstate Sands Bundaberg Pty Ltd and Another v First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC [2021] NNTTA 44, the Tribunal found that the mining company (Sunstate Sands) failed to negotiate in good faith, describing Sunstate Sands' behaviour as "unreasonable".

Sunstate Sands began negotiations with the Native Title Holders in mid-2020 in relation to a proposed mining lease that would extend its existing silica mining operations near Coonar Creek, south of Bundaberg.

Negotiations stalled on two occasions:

- firstly, when the Native Title Holders requested a copy of the Cultural Heritage Management Plan (CHMP) covering Sunstate Sands' existing operations; and
- secondly, when the Native Title Holders requested financial information to explain why their offer was not "economically viable" for Sunstate Sands.

When the parties failed to reach agreement and Sunstate Sands lodged a determination application with the Tribunal, the Native Title Holders contended that Sunstate Sands did not negotiate in good faith because it failed to "respond to reasonable requests for relevant information within a reasonable time".

The Tribunal agreed with the Native Title Holders, finding two problems with Sunstate Sands' behaviour.

- **Unreasonable delay in providing copy of Cultural Heritage Management Plan**: Sunstate Sands took almost a year to provide a copy of a requested Cultural Heritage Management Plan. This was unreasonable when it was clear that cultural heritage was important to the Native Title Holders.
- **Unreasonable failure to provide sufficient information to explain Sunstate Sands' financial position**: Sunstate Sands advised the Native Title Holders that the terms of their latest offer were not "economically viable", but failed to explain why.

SMALL-SCALE GOLD MINER FAILS TO NEGOTIATE IN GOOD FAITH

In another case later in 2021, David Trow & Trojon Enterprises Pty Ltd v Aaron Banderson & Another on behalf of the Wagiman People [2021] NNTTA 68, the Tribunal also found that the miner failed to negotiate in good faith.

The proposal was for a small scale alluvial gold mining operation in the Northern Territory. Negotiations reached a sticking point in relation to the trigger for payments. The Native Title Holders contended that the grantee party failed to negotiate in good faith because it:

- ignored, or unreasonably refused, requests for financial information about the project; and
- failed to explain why the Native Title Holders' proposals were not commercially viable.

The miner proposed that, because its project would be small scale, the terms regarding various payments to the Native Title Holders would be enlivened where the value of saleable minerals produced from the operations in an financial year exceeded $500,000. The Native Title Holders asked for financial information in order to make an informed assessment of this offer, but were refused. The miner refused to provide any financial information, arguing that the information sought was "unrelated to the effect of the proposed future act on registered native title rights and interests".

The Tribunal held that failure to provide information, or explain why it could not be provided, impeded the Native Title Holders' ability to participate meaningfully in the negotiations. On this basis, the Tribunal found that the miner had demonstrated a lack of good faith.

COVID-19 CAUSES DELAYS TO CLAIM GROUP MEETINGS – WHAT DOES IT MEAN FOR GOOD FAITH?

Two decisions in early 2022 considered the good faith implications of referring matters to the Tribunal for determination when the native title party was not able to arrange claim group meetings because of the COVID-19 pandemic. Both matters involved an application for ministerial consent to explore on land where native title may exist pursuant to an existing exploration licence with the "native title condition". In both cases the Tribunal found that the explorer had acted in good faith.

In Tritton Resources Pty Ltd v Ngemba/Ngiyampaa, Wangaaypuwan and Wayilwan [2022] NNTTA 24 (23 March 2022) the parties negotiated for over six months and were close to finalising an agreement, which needed a claim group meeting to authorise it. A scheduled claim group meeting was deferred because of the COVID-19 pandemic and restrictions in NSW. Further attempts to convene a claim group meeting were unsuccessful and finally the explorer referred the matter to the Tribunal for determination some six months after the originally scheduled claim group meeting. The native title party challenged the explorer's good faith on the grounds that it was unreasonable not to wait until the native title party could convene a claim group meeting to authorise the agreement.

The Tribunal noted that the central issue was not that the parties were unable to reach agreement. On the contrary, the native title party intended to put the draft agreement to the claim group in order to seek their consent (or otherwise) to enter into it. They argued that they were not given a reasonable opportunity to do so. The explorer argued that it acted reasonably in waiting for a claim group meeting as long as it did so prior to lodging the application, that it is not bound by the claim group's authorisation conditions.

The Tribunal held that the conduct of both parties in the negotiation phase of this matter (prior to the attempts to arrange authorisation for the agreement) was credit worthy and displayed a state of mind that was focussed on reaching agreement. The issue is whether the conduct of the explorer, in not agreeing to the native title party's request to further delay lodging the application, negates conduct during agreement negotiations and overall amounts to a lack of good faith due to the unique circumstances, being an inability for the claim group to meet due to COVID-19 restrictions.

All parties agreed that the lodgement of an application to the Tribunal following the conclusion of the six month negotiation period does not, of itself, amount to a lack of good faith. This issue has been well ventilated in the courts and it is widely understood that a party who lodges an application is not showing a lack of good faith, but simply exercising a statutory right under the Native Title Act.

The Tribunal said at [65] and [66]:

> It appears as though the option of a hybrid or virtual style meeting was not favoured by [claim group] and so was not explored further. Meetings such as this have become more commonplace for native title groups and prescribed bodies corporate since the emergence of the COVID-19 pandemic although it must be acknowledged that even amongst those who participate in such meetings routinely, in-person meetings appear to be preferred.
>
> Despite the COVID-19 restrictions that native title groups and others are operating in, there may be alternative mechanisms that can be engaged to enable groups to meet and allow for decisions to be made, be they hybrid, virtual or otherwise.

The Tribunal held that the explorer had met its good faith obligations. It agreed to delay lodgement of its determination application on several occasions in order to allow the claim group to consider the proposed agreement. It put forward a number of proposals that provided options to embed the terms of the agreement when a claim group meeting could not occur.

The Tribunal held that the lack of exploration of a hybrid or virtual claim group meeting may have been a missed opportunity by the native title party. It noted that although the COVID-19 conditions are unprecedented, "so too is the need to find and implement what may be unprecedented solutions."

The situation was quite different in Jonathan Downes v Gomeroi People [2022] NNTTA 26 (31 March 2022).

The explorer made an application to the Tribunal for determination because he had "continuously attempted to negotiate for 16 months without success". The Tribunal noted the repeated efforts by the explorer to reach agreement with the native title party and the distinct lack of engagement by the native title party's legal representative (the NSW Aboriginal Land Council).

The native title party argued that the explorer's repeated meeting requests were unreasonable in light of the COVID-19 pandemic and the NSW Aboriginal Land Council's inability to meet with its clients to take instructions.

The Tribunal said that the crux of the native title party's argument was that the explorer should have waited until whenever the native title party was able to hold the necessary meetings to agree and authorise an agreement. The Tribunal said this takes a rather one sided view of the negotiation and that the native title party's legal representatives might have been able to explore alternative ways to meet with its clients.

The Tribunal said at [177] and [178]:

> I must say it beggars belief that at no time did the parties' representatives meet electronically or on those occasions when [the explorer's representative] was in New South Wales. [His] request to meet with [the NSW Aboriginal Land Council] during his visit in February 2021 also went unanswered.
>
> Gomeroi's argument now appears to be that [the explorer] should have done nothing but wait until it was ready to engage on this matter. That is not how negotiation works.

MORE INFORMATION ABOUT GOOD FAITH

For more information about the meaning of "negotiate in good faith", see our articles in earlier editions of our Native Title Year in Review: "You can't just rely on an earlier agreement: the good faith standard in the right to negotiate process requires more", 1 April 2021; "Right to negotiate process: Negotiation in good faith", 10 April 2019; "Government Party fails to negotiate in good faith in the right to negotiate process", 6 July 2018; "Full Court overturns long held view on "negotiation in good faith" in the RTN context", 16 May 2018; and "Lessons in good faith: Nothing new, just more examples of what not to do!", 9 May 2016.

Authors: Joel Moss, Senior Associate; Fergus Calwell, Lawyer; Leonie Flynn, Expertise Counsel

Cultural heritage protection applications under Commonwealth legislation on the rise with reform on the horizon

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984 (CTH)

WHAT YOU NEED TO KNOW

- Sections 9, 10 and 12 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHP Act) enable the Commonwealth Minister for the Environment to make a declaration for the protection and preservation of significant Aboriginal areas and objects from injury or desecration.
- The number of applications being made has continued to increase, following the upward trend since 2019.
- Finding the ATSIHP Act inadequate for a range of reasons, the Joint Standing Committee's final report into the Juukan Gorge incident, A Way Forward, recommended that a new framework for cultural heritage protection be legislated at the national level.

WHAT YOU NEED TO DO

- Be aware that a protection application under the ATSIHP Act is a powerful means by which Traditional Owners can express dissatisfaction with cultural heritage protection outcomes under State or Territory legislation.
- Don't underestimate the work and time required to gain robust heritage approvals.

RECAP OF THE ATSIHP ACT DECLARATION APPLICATION PROVISIONS

Sections 9 and 10 of the ATSIHP Act enable an Aboriginal person or a group of Aboriginal people to make an application to the Minister (in writing or orally) seeking a declaration for the preservation or protection of a specific significant Aboriginal area from injury or desecration.

A critical precondition to a declaration is that the Commonwealth Minister forms the view that the area is not adequately protected under State or Territory legislation.

PROTECTION APPLICATIONS MADE IN 2021 AND 2022

In our Native Title Year in Review 2020 article "The trend continues: More protection applications made under the Commonwealth heritage protection legislation", 1 April 2021, we correctly predicted increased recourse to the ATSIHP Act.

There have been an unprecedented number of new applications made in the last 12 months including in Tasmania, New South Wales, the Northern Territory, South Australia and Queensland. With lodgement occurring faster than resolution, newly installed Minister for the Environment and Water, Tanya Plibersek, has some difficult decisions ahead.

We summarise these applications below:

New South Wales

- 415 and 417 Barry Way, near Cobbin Creek, Jindabyne: A section 10 application has been made by a representative of the Ngarigo Nation Indigenous Corporation, to protect an area known as 415 and 417 Barry Way near Cobbin Creek, Jindabyne in New South Wales. The applicant attributes the potential injury or desecration to a proposed residential development. More details can be found here.
- **Dunmore Sand and Soil Project**: Two section 10 applications have been brought to protect an area known as Stage 5 (Stage 5A and Stage 5B) of the Dunmore Sand and Soil Project, Dunmore, New South Wales. The applicants seek to protect the area from archaeological excavation, salvage works and proposed sand mining associated with the project. More details can be found here.
- **Dhiiyaan Aboriginal Centre**: This section 10 application to protect an area known as the Dhiiyaan Indigenous Centre (now Dhiyaan Aboriginal Centre) has been made by a representative of the Indigenous Community of Moree in New South Wales. The applicant attributed the threat of injury or desecration to the denial of Kamilaroi control over the specified area, and in particular the Dhiiyaan Indigenous Collection. More details can be found here.

- **Wahluu/Mount Panorama**: On 30 April 2021, Federal Environment Minister Sussan Ley declared the Wahluu/Mount Panorama Site in Bathurst, New South Wales, to be a significant Aboriginal area, blocking the construction of a go-kart track. This followed an emergency declaration the Minister made under section 9 on 5 March 2021, signed only days before work was to begin on the track. On 9 June 2021, the ABC reported that the Bathurst Regional Council had confirmed that it would not challenge the decision.

  In November 2021, the Wiradyuri Traditional Owners Central West Aboriginal Corporation made a further application to extend the area of protection to six parts near and overlapping Wahluu/Mount Panorama. The applicant claims that the area is under threat from the construction of a second racing circuit, circuit maintenance and preparation, remediation works, the construction of a dwelling, and geotechnical test pits and bore holes for construction of a pipeline. More details can be found here.

- **Point Plomer Road**: This section 10 application was made by representatives of the Dunghutti Elders Council (Aboriginal Council) Registered Native Title Body Corporate. The Applicant sought to protect the area of Point Plomer Road, near Kempsey, New South Wales from the threat of roadworks, underground powerlines, and an increase in visitation to sites of significance that would result from sealing the road. The section 10 application followed an unsuccessful application for an emergency declaration under section 18 of the ATSIHP Act, which was reported in February. More details can be found here.

- **McPhillamys Gold Project:** A section 10 application was made by a Wiradjuri elder for the protection of an area known McPhillamys Gold Project, Kings Plains, Blayney, New South Wales. The applicant sought to protect the area from mining activities, including drilling activities. More details can be found here.

Tasmania

- **Robbins Island**: This section 10 application has been made on behalf of the Tasmanian Aboriginal people to protect the area of Robbins Island, Boullanger Bay wetlands and Robbins Passage, North-west Tasmania between Stanley and Smithton. The applicant seeks to protect the area from a proposed project to develop a renewable energy park on the island. More details can be found here.

South Australia

- **Sandy Bore, APY Lands**: A section 10 application has been brought to protect an area at Sandy Bore, APY Lands, in South Australia. The applicant seeks to protect a reburial site of a traditionally buried child, which had been listed on the Aboriginal Affairs and Reconciliation's (AAR) central archives under section 23 of the Aboriginal Heritage Act 1988 (SA), along with the larger area associated with the life of the child and the Minyama Kutjara-ku Tjukurpa ('The Two Sisters') dreaming. More details can be found here.

- **Lake Torrens**: A section 10 application was made on behalf of the Kokatha People and Aboriginal People for the protection of the area known as Lake Torrens, South Australia. The applicant attributed the potential injury or desecration to drilling activities. More details can be found here.

Northern Territory

- **Mount Peake Mine**: This section 10 application has been brought on behalf of the Kaytej Traditional people to protect the area known as Mount Peake Mine, near Wilora, Northern Territory. The applicant attributes the proposed threat to the drilling and sterilisation proposed by mining company TNG Ltd, and asserts that the drilling would threaten at least five fauna species part of the Mount Peake Dreaming. More details can be found here.

Queensland

- **Djaki Kundu**: On 19 May 2021, a section 10 application was made on behalf of the Sovereign Native Tribes of the Kabi First Nation State to protect the area known as Djaki Kundu, near Gympie, Queensland. The applicant attributed the potential threat of injury or desecration to the Queensland Department of Transport and Main Roads Bruce Highway – Cooroy to Curra project. The applicant stated that the project works would destroy a number of sacred sites, prevent the free exercise of religious and spiritual practice and destroy the foundations of spirituality and tribal law or lore customs and culture. More details can be found here.

THE A WAY FORWARD REPORT

The Joint Standing Committee on Northern Australia Inquiry into the destruction of the Juukan Gorge released its final report entitled A Way Forward in October 2021. The Committee noted that the increase in applications made since the incident indicated that the existing system of protection by declaration was being used proactively as far as possible. However, the report was critical of the regime under the ATSIHP Act, including for:

- being legislation of last resort;
- being limited as a means for protecting cultural heritage as a holistic concept;
- the delays in making declarations, with the average time for making a declaration after an application had been made being approximately two years;
- heritage continuing to be under threat even once a declaration had been made; and
- the input and resources required from Aboriginal and Torres Strait Islander peoples.

LEGISLATIVE REFORM

We discuss progress on the Way Forward Report's recommendations for legislative reform in our article above "Modernisation of cultural heritage protection legislation begins".

As set out in that article, the former Federal Government entered into an agreement with the First Nations Heritage Protection Alliance to jointly consider and develop recommendations for reform. That joint working group's reform timetable has already slipped and there have been no specific announcements in this space from the new Government since the election. It will be some time before we see new legislation.

In the meantime, protection applications under the ATSIHP Act are a powerful means by which Traditional Owners can express their dissatisfaction with cultural heritage protection outcomes under State or Territory legislation.

Authors: Brigid Horneman-Wren, Lawyer; Amaya Fernandez, Senior Associate

Treaty update: Federal Government commits to the Uluru Statement from the Heart while Treaty momentum gathers in the States

WHAT YOU NEED TO KNOW

- The Federal Labor Government has committed to the Uluru Statement From the Heart in full - Voice, Treaty and Truth.
- Meanwhile, momentum continues for Treaty negotiations in Victoria, Queensland, ACT, NT, SA and Tasmania, where governments are supportive of the process.
- In WA, alternatives to Treaty are at various stages of implementation.

WHAT YOU NEED TO DO

- While there is at last momentum for truth telling and treaty making, do not expect fast outcomes. It will still take years.
- First Nations Australians will have a stronger voice, both to Parliament and within legislation, on issues not typically seen as 'Indigenous'.
- There is a lot for all Australians to learn. It will be an interesting time ahead.

REMINDER OF BACKGROUND TO TREATY IN AUSTRALIA

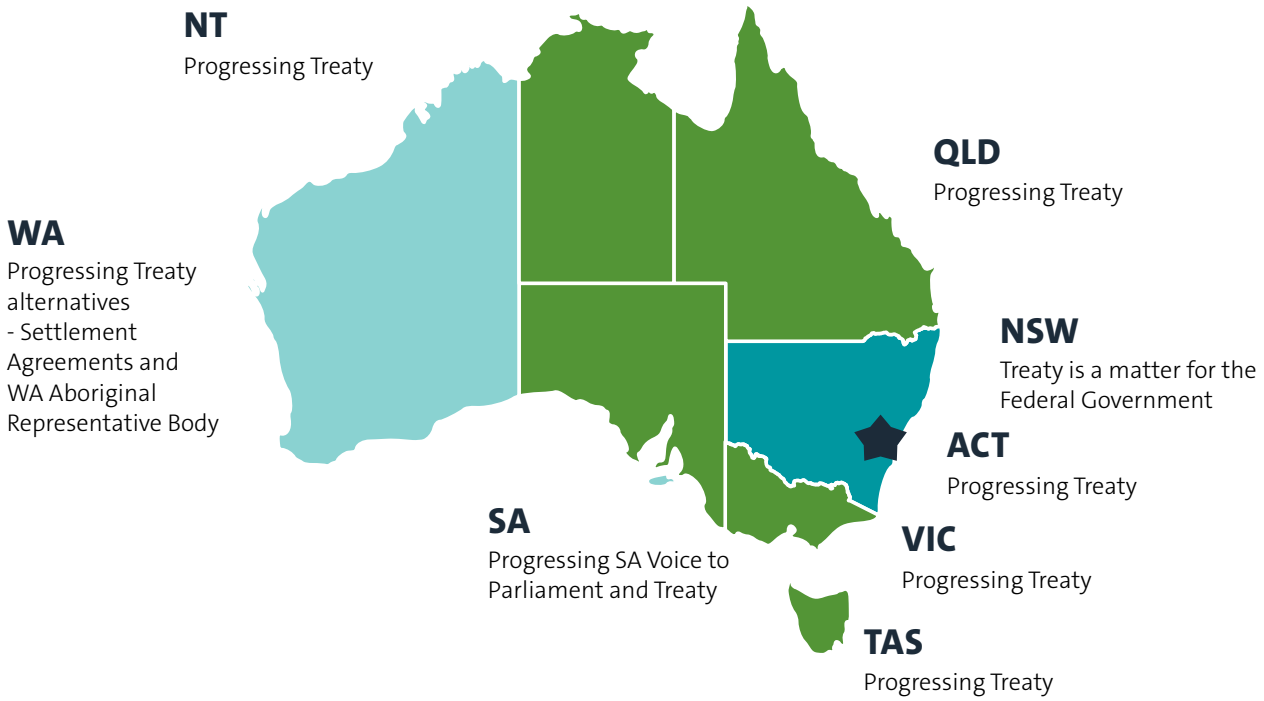
Australia continues to be the only Commonwealth country never to have signed a Treaty with its Indigenous people.

This is our third annual update on the status of Treaty making in Australia, and focuses on developments in 2021 and the first half of 2022.

In our article "Treaty making in Australia - Will the pieces of the puzzle come together?", 28 April 2020, we explained the concept of Treaty and set out how Treaty making was progressing in each State and Territory and at a Federal level. Our article "Treaty update: Progress in State based Treaty negotiations and proposals for a national Indigenous Voice", 1 April 2021, provided a 2020 update.

STATUS OF TREATY MAKING AROUND AUSTRALIA

The status of Treaty making in Australian States and Territories can be broadly summarised as follows:



Progressing Treaty, Truth-telling and/or Voice to Parliament	
Fed	The election of the Federal Labor Government has seen Prime Minister Anthony Albanese commit to the Uluru Statement from the Heart "in full," including the three key elements of Voice, Treaty and Truth. This means that subject to further consultation with First Nations communities, the Government intends to first progress a referendum to enshrine a Voice to Parliament in the Constitution. In doing so, it will need to consider the extent to which it proceeds with the work done by the former Liberal Government since October 2019, which has looked at establishing a national "Indigenous Voice to Parliament". The Indigenous Voice Co-Design Group Final Report to the Australian Government was made public in December 2021. It recommended establishing a Voice (that would form part of the Constitution) through the establishment of two new sets of advisory bodies: • 35 separate "Local & Regional Voices", which will "undertake community engagement, provide advice to and work in partnership with all levels of government; and • a "National Voice", comprising 24 members who will "provide a mechanism to ensure Aboriginal and Torres Strait Islander peoples have a direct say on any national laws, policies and programs affecting them" by advising both the Australian Parliament and Government. The new Labor Government is yet to commit to a firm timeline for a referendum to enshrine the Voice, but incoming Indigenous Affairs Minister Linda Burney has noted that it could occur as soon as May 2023. In implementing the other elements of the Uluru Statement, the Government will also establish a "Makarrata Commission" to work with the Voice to Parliament on a national process for Treaty and Truth-telling. Makarrata is a Yolngu word meaning "coming together after a struggle." Although the Uluru Statement calls for the establishment of a Voice to Parliament prior to Treaty and Truth-telling, Minister Burney has not ruled out the possibility of progressing all three elements simultaneously. Notwithstanding renewed Government support for the Uluru Statement, the challenge now will be seeking broader support for a referendum and Treaty making, as well as ensuring there is consensus of approach among First Nations people.

Progressing Treaty, Truth-telling and/or Voice to Parliament	
VIC	**Progressing Treaty and Truth Telling** See more below.
TAS	**Progressing Treaty** Independent Report "Path to Truth-Telling and Treaty" released on 25 November 2021. Completed by the former Governor of Tasmania and former law professor Tim McCormack and based on over 100 meetings over four months with First Nations Tasmanians, it contains recommendations for path to Treaty in Tasmania. The Tasmanian Government has committed to responding to the recommendations in 2022.
ACT	**Progressing Treaty** The ACT is working towards self-determination for First People in accordance with its ACT Aboriginal and Torres Strait Islander Agreement 2019 – 2028.
NT	**Progressing Treaty** The Northern Territory Treaty Commission is currently developing a framework for a proposed Treaty. A final report was due to be handed to the Minister for Treaty and Local Decision Making by March 2022. This final report is not currently publicly available.
QLD	**Progressing Treaty** The Queensland Government established the Treaty Advancement Committee in February 2021. Comprised of three First Nations members and two non-Indigenous members it delivered its Final Report to the Queensland Government in October 2021. The Government is considering the Report and has established the $300 million Path to Treaty Fund as part of its 2021-2022 State budget to assist its response.
SA	**Progressing Treaty and SA Voice to Parliament** In October 2021, the South Australian Liberal Government introduced the Aboriginal Representative Body Bill into Parliament. The Bill is for an Act to give Aboriginal people a voice that will be heard by the Parliament of Australia. It intends to establish a Commissioner for Aboriginal Engagement and an Aboriginal Representative Body. In March 2022 a new South Australian Labor Government was elected, with Premier Peter Malinauskas announcing that key priorities for the Aboriginal Affairs portfolio include to re-start the Treaty process commenced by the former Labor Government in 2016, and to deliver a SA Voice to Parliament. It is not yet clear whether this Voice to Parliament will be implemented via the existing Aboriginal Representative Body Bill, or via some other means.
No progress	
NSW	Government says Treaty is a matter for the Federal Government.
Progressing alternatives	
WA	**Progressing Treaty alternatives** Despite not actively progressing Treaty, recent native title settlement agreements, including the South West Settlement and the Geraldton Settlement contain some key elements of Treaty. In May 2021, the Western Australian Government announced that it would wait to see what Voice to Parliament model is chosen by the Federal Government, before considering how its own proposed Aboriginal advisory body would be established.

VICTORIA – TREATY AND TRUTH TELLING

The path to Treaty in Victoria continues to be led by the First Peoples' Assembly of Victoria, an elected body for Aboriginal Victorians.

In October 2021, the Assembly approved the draft Treaty Negotiation Framework, which will guide future discussions with the Victorian Government. Key elements of this framework include:

- negotiations towards both a State wide Treaty, and local Treaties with specific Traditional Owner groups;
- the establishment of a "meaningful voice" which may include seats in the Victorian Parliament or an independent representative body with decision making powers;
- an independent "Treaty Authority" to act as a neutral facilitator of negotiations. On 8 June 2022 the Victorian Government moved the second reading of the Treaty Authority and other Treaty Elements Bill 2022, to amend the Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic). The Bill will establish a Treaty Authority and makes other amendments in relation to advancing Treaty with First Nations Victorians;
- a "Self Determination Fund" which will fund Traditional Owners to negotiate with the Victorian Government.

Another core component of the Victorian Treaty process is Truth Telling. Truth Telling is a process of openly sharing historical truths after periods of conflict, and is regarded as a necessary precondition for successful Treaties in Victoria (and elsewhere).

In May 2021, the Yoo-rrook (Truth) Justice Commission was established by the Victorian Government in partnership with the Assembly, to investigate historical and ongoing injustices against Aboriginal Victorians.

The Commission is being led by five commissioners, four of whom are First Nations Peoples, making this Australia's first ever Aboriginal led Royal Commission. The commissioners are assisted by Tony McAvoy SC, a Wirdi man and the first Australian First Peoples Senior Counsel (who is also the Acting Treaty Commissioner for the Northern Territory), and Fiona McLeod SC, a human rights barrister. The Commission's key functions are to:

- establish an official record of the impact of colonisation on First Peoples in Victoria using First Peoples' stories; and
- make detailed recommendations about practical actions and reforms needed in Victoria.

The Commission has extensive terms of reference which include inquiring into and reporting on the following matters, including causes and consequences, and how these matters can be addressed or redressed:

- historical systemic injustice, including matters such as cultural violations, destruction of cultural knowledge, dispossession, massacres, forced removal of children; and
- ongoing systemic injustice, including matters such as policing, incarceration, child protection, health and healthcare.

The Commission also has strategic priorities, including to:

- uphold the sovereignty of First Peoples over their knowledge and stories;
- collect evidence in culturally appropriate ways;
- develop a public record of systemic injustice; and
- review the criminal justice system as it relates to First Nations people.

The Commission officially launched in March 2022. The first step was leading a yarning circle with Elders on Country in regional Victoria, with the first formal Truth Telling hearings commencing in April 2022. An Interim Report of the Commission is due in June 2022, with a Final Report due by June 2024. Already, it is flagged that this two year timeframe will need to be extended.

WHERE TO FROM HERE?

It is clear that Treaty making takes significant time, with negotiation frameworks and Truth Telling processes often required before negotiations can commence.

Furthermore, as has been seen with the recent Federal election and also in South Australia, changes in government may result in new or different approaches in particular jurisdictions. Ultimately, awareness of the importance of Treaty for both First Nations people and Australia more generally is continuing to grow, making it inevitable that progress will continue in this space. Over the course of 2022, we will continue to monitor the progress of Treaty and Voices to Parliament across Australia.

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A big year for FPIC – an increasing global focus on the need to secure Free Prior and Informed Consent

TRENDS AND DEVELOPMENTS IN FPIC IN 2021

WHAT YOU NEED TO KNOW

- 2021 was a big year for FPIC - most notably, in June the Canadian Parliament passed the United Nations Declaration on the Rights of Indigenous Peoples Act which enshrined FPIC into Canadian domestic law.
- In Australia, various groups continue to call for FPIC to be more robustly protected in Australia, with the Victorian Aboriginal Heritage Council advocating for the Aboriginal Heritage Act 2006 (Vic) to be amended to allow Registered Aboriginal Parties (RAPs) a veto power over cultural heritage management plans (CHMPs) that threaten harm to Aboriginal Cultural Heritage.

WHAT YOU NEED TO DO

Each proponent should:

- know what your local Indigenous community expects from you in relation to consultation and obtaining consent for project approvals;
- ensure your company's systems and processes provide for meaningful and authentic engagement with Indigenous communities over the full life cycle of a project – from mine planning to rehabilitation and closure;
- consider whether forums used to consult with Indigenous peoples could better incorporate FPIC; and
- reflect on how shareholders, investors, lenders and insurance companies are demanding greater accountability, transparency and performance from companies with respect to engagement with Indigenous communities.

IT HAS BEEN A BIG YEAR FOR FPIC

The Juukan Gorge incident changed the way native title and Aboriginal cultural heritage are regarded. Unsurprisingly, the concept of "free, prior and informed consent" (FPIC) continued to be front of mind for Government, native title parties and proponents alike throughout 2021.

Since we published our *Native Title Year in Review 2020* article "Free, prior and informed consent", 1 April 2021, some key events have illustrated that the need for FPIC continues to gain momentum. This article contains an overview of these key events and trends across society generally and with respect to project planning in particular.

WHAT IS FPIC?

The concept of FPIC has generally been characterised as a best practice process for safeguarding the rights of Indigenous peoples against the impacts of projects carried out within or near Indigenous territories. In short, FPIC refers to a right of Indigenous peoples to consent to activities carried out on their land on a free and informed basis.

DEVELOPMENTS IN FPIC IN 2021

June 2021 – UNDRIP Bill passes Canadian Parliament

In June 2021, the Canadian Parliament passed the United Nations Declaration on the Rights of Indigenous Peoples Act.

The purpose of the Act is to ensure that Canadian domestic laws reflect and implement the standards set for Indigenous Peoples in the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The Act requires (amongst other things):

- the Canadian Government to, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP;
- the relevant Minister to, in consultation and cooperation with Indigenous peoples, prepare and implement an action plan to achieve the objectives of UNDRIP; and
- the Canadian Government to provide an annual report on the measures taken in the action plan.

The Act will provide Indigenous communities with a strong platform to demand greater consultation and inclusion from proponents, the public and the Government.

June 2021 – Aboriginal Heritage Council calls for cultural heritage reform

Also in June 2021, the Victorian Aboriginal Heritage Council published a Discussion Paper entitled "Taking Control of Our Heritage", which called for self-determined reform of the Aboriginal Heritage Act 2006 (Vic).

The Heritage Council identified that, under current Victorian legislation, destruction like that of Juukan Gorge would be permitted, as long as a project proponent could argue that harm to Aboriginal cultural heritage had been minimised.

The Heritage Council discussion paper proposes a number of reforms to the Aboriginal Heritage Act including that:

- the Aboriginal Heritage Act be amended to allow RAPs to veto cultural heritage management plans that threaten harm to cultural heritage. Such a provision would be similar to the power to refuse an Authority Certificate found in s 10(f) of the Northern Territory Aboriginal Sacred Sites Act 1989 (NT);
- the rights and responsibilities of prosecuting offences under the Aboriginal Heritage Act be transferred to the Heritage Council; and
- a regulation system for Heritage Advisors be created.

Submissions regarding reforms to the Aboriginal Heritage Act and the Heritage Council discussion paper closed in November 2021. The Victorian regime is regarded as one of the more progressive State schemes. It is interesting to see that the Heritage Council thinks it still has some way to go.

October 2021 – Australian Heritage Council develops policy on FPIC

The Australian Heritage Council must work with Indigenous groups when assessing places for inclusion in the National and Commonwealth Heritage lists under the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

In October 2021, the Australian Heritage Council published a policy statement on FPIC, which defines important concepts with respect to FPIC and outlines how the Council will work with Indigenous peoples in connection with its statutory role.

The policy recognises that FPIC is both a process and an outcome, and that determining FPIC in practice will depend on the context of the particular case. The Council recognises that:

- seeking FPIC requires sustained and meaningful engagement throughout the life of the nomination and assessment of a place; and
- authority to speak for Country is determined by Indigenous communities themselves.

Further, the policy outlines that when seeking FPIC, the Council will not require the granting or withholding of consent to be unanimous, depending on the circumstances of the case. This is because there may be different levels of authority between those who speak for Country.

WHAT DOES THIS MEAN FOR PROJECT DEVELOPMENT?

FPIC will continue to be an important concept for proponents and Indigenous groups. The key challenge for proponents is learning how to turn FPIC as a theory into practice. At the heart of this challenge is understanding what FPIC means for the Traditional Owners relevant to your project.

FPIC will remain on the agenda in the coming year, with Traditional Owners seeking greater involvement in project planning and decision making throughout the life of projects. Looking beyond our shores, we are particularly interested to see whether other countries may follow Canada's lead by implementing UNDRIP into their respective domestic laws.

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Native Title & Indigenous Land Law

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