

Ashurst

Native Title Year in Review 2022-2023

What you need to know (July 2023)



Native Title Year in Review 2022-2023 – what you need to know

July 2023

Welcome to the bite size version of Ashurst's annual review of native title legal developments in 2022-2023. We cover what you need to know about each issue in our eighth annual Native Title Year in Review.

No new Federal cultural heritage legislation in 2023 – but change is coming

The Federal Government continues to progress national cultural heritage protection reforms in partnership with the First Nations Heritage Protection Alliance.

The first stage of national engagement in 2022 resulted in a [Discussion Paper](#) and [Options Paper](#) setting out three options for reform. The three options all enshrine the right to free, prior and informed consent (**FPIC**) and the right to self-determination, with decision-making in the hands of First Nations people.

A second stage of consultation to test and explore the three options has been ongoing throughout 2023. This will culminate in a second options paper and ultimately the delivery of an Options Report to the Minister.

WA's new Aboriginal cultural heritage regime commences

Western Australia's new *Aboriginal Cultural Heritage Act 2021* (WA) substantially commenced on 1 July 2023. The new Act contains a material shift in heritage regulation following the destruction of Juukan Gorge in 2020, by:

- expanding the scope of protected Aboriginal heritage;
- putting knowledge holders in the centre of decision making and consultation for proposed activities on country;
- creating a new tiered activity and approvals process for proponents; and
- increasing penalties for offences and timeframes for commencing prosecutions.

Only in the months leading up to commencement did the State Government finalise and release the many statutory guidelines and supporting documents that contains so much of the detail that proponents need to follow, in order to ensure compliance with the new regime.

There is now a compliance pathway for proponents to follow, although the complexity of the regime introduces delay and cost risk for project timelines – proper planning and implementation is, as always, the key.

Treaty update: Federal focus on the Voice to Parliament, while Treaty and Voice progress continues in the States and Territories

The Federal Government continues to prepare for its upcoming referendum on the Aboriginal and Torres Strait Islander "Voice", which is anticipated to be held in the final quarter of 2023. A successful referendum would result in amendment to the Australian Constitution, recognising Aboriginal and Torres Strait Islander Peoples as the First peoples of Australia, and see the establishment of an independent advisory body, advising Government on matters that affect First Nations people.

Around Australia, most States and Territory are continuing efforts to develop Treaty, Truth-telling and/or Voice structures. The Federal Government has indicated that it will also be progressing Truth-telling and Treaty making.

FPIC's reach expands beyond native title and cultural heritage

The principles of FPIC have begun to appear beyond native title and cultural heritage matters. For example:

- the Queensland Government refers to FPIC in its legislation setting out the path to Treaty;
- FPIC was included in a United Nations biodiversity framework and the requirement to obtain consent for biodiversity projects under the Commonwealth Nature Repair Bill.

FPIC is a cornerstone of proposed cultural heritage reform legislation and the Senate has launched an inquiry into the application of UNDRIP in Australia.

First Nations underwater cultural heritage – no longer a submerged issue

The Federal Government has released [draft guidelines](#) for working in the near and offshore environment to protect underwater cultural heritage. The guidelines go further than the *Underwater Cultural Heritage Act 2018* (Cth) and will likely be followed by legislative reform.

Key recommendations include early engagement with First Nations groups and utilising specific methods for identifying and assessing First Nations underwater cultural heritage. This coincides with several other developments in the offshore First Nations' rights space, including NOPSEMA's new consultation guidelines for offshore petroleum projects.

Joining the national movement - South Australia begins process for cultural heritage law reform

In March 2023, the South Australian Government released the draft [Aboriginal Heritage \(Miscellaneous\) Amendment Bill 2023 \(SA\)](#) for consultation. The amendments propose significant increases to current penalties, further penalties on top of fines and imprisonment, and clarification of the obligations to report Aboriginal cultural heritage discoveries.

Tasmania continues to progress towards new Aboriginal cultural heritage protection legislation

The Tasmanian Government is developing a draft exposure bill for new Aboriginal cultural heritage protection legislation. In 2022, it invited submissions on its consultation paper: [A new Aboriginal Cultural Heritage Protection Act – High-level Policy Directions](#). Proponents operating in Tasmania should keep a watching brief for consultation on the draft bill in 2023.

Refusing mining approvals on human rights grounds – the Queensland Land Court and the Human Rights Act 2019

In late 2022, the Queensland Land Court handed down a landmark decision recommending the refusal of mining and environmental approvals for a coal mine in part due to impacts on First Nations' human rights ([Waratah Coal Pty Ltd v Youth Verdict Pty Ltd & Ors \(No 6\)](#) [2022] QLC 21).

The Court held that climate change impacts from emissions caused by the coal mine (including scope 3 emissions) would unreasonably and unjustifiably limit human rights, including cultural rights for coastal Aboriginal and Torres Strait Islander groups. The decision gives insight on how the Land Court (and other decision-makers) may approach the application of First Nations' human rights to their decision-making.

Full Court Tipakalippa decision – stakeholder consultation grows teeth

The importance of consultation with First Nations people has been highlighted in the recent Full Court decision of [Santos NA Barossa Pty Ltd v Tipakalippa](#) [2022] FCAFC 193.

The decision provided clarity on the concept of "interests" in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and regulations. The concept extends beyond legal interests to include the spiritual and cultural interests of First Nations people who have a connection to the relevant sea country. The Full Court made it clear that consultation can be a significant obligation and a meaningful right..

Following the Full Court's decision, the regulator NOPSEMA released a new Guideline [Consultation in the course of preparing an Environment Plan](#) under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth).

Traditional Owners continue to rely on ATSIHP Act in the face of slow progress with national cultural heritage reforms

Sections 9, 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) 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.

There have been a number of new applications made in the last 12 months in Western Australia, South Australia, New South Wales, and Queensland.

Full Court makes landmark decision about pre-1975 acts in Gumatj compensation claim

On 22 May 2023, the Full Federal Court handed down its landmark decision in [*Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* \[2023\] FCAFC 75](#). The Full Court held that pre-1975 acts of the Commonwealth could be compensable under the Native Title Act as invalid acquisitions of property without providing the just terms required by section 51(xxxi) of the Commonwealth Constitution.

This decision is the most important development in the native title compensation landscape since the Timber Creek decision and, subject to the appeal, will likely lead to the filing of new native title compensation claims, particularly in the Northern Territory.

The Commonwealth has filed an application for special leave to appeal to the High Court. It is not yet known when the leave application (or the appeal) will be heard.

Native title compensation: and we're off to the High Court again!

There are ten active native title compensation claims across Australia (as at 1 July 2023). The Tjiwarl compensation proceedings were largely settled in May 2023 following registration of a comprehensive settlement agreement. This claim was initially regarded as a likely test case on compensation for non-extinguishing acts and the construction and operation of the compensation pass through in section 125A of the *Mining Act 1978* (WA).

In addition to any High Court appeal in [*Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* \[2023\] FCAFC 75](#), the "potential test case" mantle has now been passed to the Yindjibarndi compensation claim (WAD37/2022) and the McArthur River Project claim (NTD25/2020) – both presently listed for hearing.

Section 47C of the Native Title Act gets first determination – with more on the way

New section 47C of the Native Title Act allows for prior extinguishment to be disregarded over national parks and other conservation reserves where agreed by the relevant government.

The Federal Court recently made its first determination considering the effect of section 47C ([*Ward, on behalf of the Pila Nature Reserve Traditional Owners v State of Western Australia* \[2022\] FCA 689](#)). In other recent determinations, parties agreed to defer determining certain areas in order to reach agreement under section 47C about disregarding extinguishment. It is also possible that existing determinations will be re-opened under the revised native title determination application process already available in the Native Title Act.

Recent decision highlights confusion around expert evidence

The Federal Court has recently provided some clarification about the admissibility of expert evidence in native title matters, where that expert evidence relies upon the opinion of others ([*Malone obh of the Western Kangoulu People v Queensland \(No 3\)* \[2022\] FCA 827](#)).

The Court clarified when experts could rely upon other experts – and when the opinions of those other experts are admissible, even if they aren't called themselves. However, the Court noted that this did not extend to all expert opinion being admissible when the author is not called.

Small miners struggle to satisfy good faith standard in right to negotiate process

In 2022, the National Native Title Tribunal upheld three out of six good faith challenges against mining companies participating in the right to negotiate process, finding that the proponents had failed to negotiate in good faith because of:

- a pattern of aggressive and unconstructive negotiation conduct ([*Kevin Alfred de Roma v Western Yalanji Aboriginal Corporation RNTBC*](#) [2022] NNTTA 40);
- a pattern of unreasonable negotiating behaviour and a failure to engage in adequate information sharing with the native title party ([*Pathfinder Exploration Pty Ltd v Malarngowem Aboriginal Corporation RNTBC*](#) [2022] NNTTA 52); and
- the grantee party's unilateral approach to negotiations ([*Mobile Concreting Solutions Pty Ltd & Another v Wintawari Guruma Aboriginal Corporation RNTBC*](#) [2022] NNTTA 56).

Santos wins strongly in the National Native Title Tribunal, but Full Federal Court will hear Gomeri appeal

In December 2022, the National Native Title Tribunal handed down its determination in [*Santos NSW Pty Ltd and Another v Gomeri People and Another*](#) [2022] NNTTA 74, following proceedings considering the proposed grant of petroleum production leases for the Narrabri Gas Project.

The Tribunal made two key findings:

- in response to the good faith challenge brought by the Gomeri against Santos, Santos had not failed to negotiate in good faith; and
- an evaluation of the factors in section 39 of the Native Title Act showed that the proposed act would be in the public interest and that any impacts on native title rights or heritage would be appropriately managed.

The Tribunal made a number of useful observations regarding 'good faith', including the relevance of the reasonableness of offers made during negotiations and that in assessing 'good faith', the Tribunal must consider the whole of both parties' conduct during negotiations.

Appeal proceedings are currently on foot and are to be heard by the Full Bench of the Federal Court in August 2023. The Full Court's decision will be an important contemporary benchmark, dealing with the conduct of relatively sophisticated parties over a long period of time.

Costs Update: when conduct becomes costly – the risk of unreasonable behaviour in native title proceedings

We have been following native title costs decisions for many years. 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.

Unreasonable conduct in mediation may lead to an order for wasted costs ([*Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia* \[2022\] FCA 221](#) and [*\[2022\] FCA 593*](#)). A local Council and its solicitor were lucky to avoid a costs order in circumstances where the Court found their conduct was disrespectful to the other parties and to the Court ([*Ross on behalf of the Cape York United #1 Claim Group v State of Queensland \(No 10\)* \[2022\] FCA 1129](#)).

NSW Aboriginal Land Rights Act developments

In November 2022, amendments to the *Aboriginal Land Rights Act 1983* (NSW) came into effect. The amendments address Stage 1 of the three-stage reform process that was recommended following a five-year statutory review of the Act that concluded in 2021.

In his second reading speech on the Amendment Bill, then-Minister for Aboriginal Affairs Ben Franklin indicated that Stages 2 and 3 of the Act reforms would be considered in the next Parliament. The new Minns Labor Government has not yet indicated its position on the remainder of the reforms proposed in the statutory review.

After a quiet year in 2021, the Courts have made two decisions overturning the Minister's decision to refuse claims under the *Aboriginal Land Rights Act 1983* (NSW) ([*Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Management Act* \[2022\] NSWCA 275](#) and [*New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act – Waverton Bowling Club* \[2022\] NSWLEC 130](#)).

Land reserved for charitable purposes and a former Bowls Club was transferred to Aboriginal Land Councils. If the Minister says land is not claimable because it is needed for an essential public purpose, the Courts will not be satisfied of this unless the government actually turned its mind to whether it was needed at the date of the claims.

Transparency for Adnyamathanha people over trust's use of native title monies

In *Adnyamathanha Traditional Lands Association & Ors v Rangelea Holdings Pty Ltd* [2023] SASC 51, the South Australian Supreme Court held that the Adnyamathanha common law native title holders were entitled to inspect trust account records associated with the Adnyamathanha Master Trust despite being denied access by the trustee.

The Court determined that the applicants had a proper interest in the Trust and it was proper to appoint an inspector to investigate the Trust's administration. It ordered that the trustee immediately produce the financial records as required by the *Trustee Act 1936* (SA) for inspection by the applicants.

Native title appeal decisions to watch out for in 2023

There are a number of appeal decisions expected in 2023-2024:

- High Court decision regarding the "infrastructure mining lease" provisions of the Native Title Act (s24MD(6B)) in an appeal from [Harvey v Minister for Primary Industry and Resources](#) [2022] FCAFC 794. (See our *Native Title Year in Review 2021- 2022* article "[Mining leases for infrastructure get a judicial workout](#)".)
- High Court decision regarding native title compensation in an appeal from [Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia](#) [2023] FCAFC 75 (assuming special leave is granted).
- Full Federal Court decision regarding connection in an appeal from the negative determination in [Malone v State of Queensland \(The Clermont-Belyando Area Native Title Claim\) \(No 5\)](#) [2021] FCA 1639. (See our *Native Title Year in Review 2021-2022* article "[Proving connection becomes harder in 2021](#)".)
- Full Federal Court decision regarding good faith and the right to negotiate process in an appeal from the decision of the National Native Title Tribunal in [Santos NSW Pty Ltd and Another v Gomeroi People and Another](#) [2022] NNTTA 74.

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