Ashurst

Native Title Year in Review

2022-2023

July 2023

Outpacing change

contents

"Ashurst has consistently shown a strong understanding of broader commercial factors."

Chambers Asia-Pacific 2023, Native Title: Proponents

"Highly engaging, superbly competent and an ability to recruit specific expertise from across the Ashurst environment to complement the Native Title advice where required."

The Legal 500 Asia Pacific 2022, Native Title

Foreword

July 2023

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

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

As we drafted our review this year, it became apparent that developments in the non-native title space now make up half our publication. ESG matters are a priority across politics, policy and in boardrooms, and the momentum for change is significant and gathering steam. Reform of heritage laws, calls for Treaty, FPIC, Constitutional recognition and of course the Voice, are now part of the public discourse.

Our national Ashurst team has remained at the forefront of these developments. Highlights over the last 12 months include:

- being recognised as Band 1 in Native Title (Proponents) in Chambers Asia-Pacific, a ranking we have held since 2007. This reflects the opportunities and trust our clients place in us; and
- continuing to help clients to navigate the gap between current laws and community expectations in relation to Indigenous cultural heritage and FPIC.

The next 12 months will see some important native title appeal decisions, as well as further developments across cultural heritage, FPIC, Treaty and the Voice.

We look forward to working with our commercial, government and First Nations clients to find practical and respectful ways to address native title and cultural heritage matters on projects throughout Australia.

The information in this 2022-2023 publication is current as at 25 July 2023.

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.

22
New determinations that native title exists

479
Total positive native title determinations around Australia*

21
New claimant applications filed

148
Total active native title claimant applications still to be resolved around Australia*

3.2M
KM² Native title land around Australia**

10
Active compensation claims around Australia*

37
New ILUAS registered

1450
Total registered ILUAS around Australia*

5
Applications for protection under section 10 Aboriginal and Torres Strait Islander Heritage Protection Act

78
Section 31 agreements (RTN Agreements) received by the NNTT

*Source: National Native title Tribunal as at 23 June 2023

**Source: National Native title Tribunal as at 1 January 2023

Figures not marked with an asterisk relate to the 2022 calendar year

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

What you need to know

- 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 an Options Paper setting out three options for reform. All three options 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 is ongoing throughout 2023. It will culminate in a second options paper and ultimately the delivery of an Options Report to the Minister.

What you need to do

- Look out for the second options paper to be published by the Federal Government and the First Nations Heritage Protection Alliance later this year.
- Consider the cultural heritage standards in the Way Forward Report when addressing cultural heritage matters, given that they are likely to be incorporated into Australian law.

Reminder: Federal Government's response to the Joint Standing Committee's Way Forward and Never Again Reports

On 24 November 2022, the Federal Government tabled its response to the Joint Standing Committee on Northern Australia's *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* released in October 2021 (Way Forward), and the *Never Again: Inquiry into the destruction of the 46,000 year old caves at Juukan Gorge in the Pilbara region of Western Australia – Interim Report* released in December 2020 (Never Again).

The Government agreed, or agreed in principle, to seven of the eight recommendations arising from the Way Forward report.

The Government reiterated its commitment to reform the national cultural heritage protection legislative framework through a co-design process with First Nations people, and re-signed the Partnership Agreement with the First Nations Heritage Protection Alliance.

We wrote about the Government's response in our 25 November 2022 Alert "Federal Government responds to Way Forward Report". For more information about the Way Forward Report and Never Again Report and their implications, see our *Native Title Year in Review 2021* article "Modernisation of cultural heritage protection legislation begins" and our *Native Title Year in Review 2020* article "The long shadow of heritage destruction: Fundamental reset of Aboriginal cultural heritage protection in Australia".

What has happened in the last 12 months?

Minister Plibersek re-signed the Partnership Agreement with the First Nations Heritage Protection Alliance, which was previously signed by the Morrison government in 2021. The new partnership agreement extends the term of the original agreement (which was due to expire on 28 November 2022) and broadens its scope. The goal of the Partnership Agreement is to develop a recommendation for comprehensive reform of cultural heritage protection, to be put before Minister Plibersek by 30 May 2023 (since extended), with further policy and implementation details to be developed thereafter.

The first stage of national engagement in 2022 resulted in the release of *Discussion Paper that will guide consultations as part of the national engagement process* and *Options Paper: First Nations cultural heritage protection reform*, which sets out three options for reform.

Three options for reform

Option 1: Overarching federal standalone legislation

This model would replace all current federal, state and territory regimes with standalone federal legislation (including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)).

It would create a national body representing First Nations people from each state and territory, which would appoint and empower local First Nations groups to make decisions about their cultural heritage. Decisions about impacts on cultural heritage would, as far as possible, be made by local First Nations groups.

The Options Paper acknowledges difficulties in relation to appointments, funding and governance of local First Nations groups and the interaction between the national scheme and state and local planning legislation.

Option 2: Federal accreditation of state and territory legislation that meets mandatory national standards

The Federal Government would develop a set of best practice national standards. The national standards would be informed by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and enshrine the right to free, prior and informed consent (FPIC) and the right to self-determination.

For more information about UNDRIP and FPIC see our *Native Title Year in Review 2022-2023* article "FPIC's reach expands beyond native title and cultural heritage", *Native Title Year in Review 2021-2022* article "A big year for FPIC – an increasing global focus on the need to secure free, prior and informed consent" and *Native Title Year in Review 2020* article "Free, prior and informed consent".

If state and territory legislation meets the national standards, it can be accredited. If legislation is not accredited, federal legislation applies. Federal legislation would be similar to that referred to in option 1 above. The proposed national body would assess state and territory legislation against the national standards.

This option would allow states and territories to continue providing heritage management protections which are suited to their jurisdictions and which would work in conjunction with other state/territory development planning mechanisms. How to support and resource local decision-making bodies is an important consideration (as with option 1).

Option 3: Model legislation that state and territory governments can adopt

The Federal Government would draft overarching model legislation to protect First Nations cultural heritage, which would implement UNDRIP and include the right to free, prior and informed consent (FPIC) and self-determination. This legislation would be adopted and implemented by states and territories within their individual jurisdictions, replacing current state and territory legislation.

Intangible heritage

The Way Forward Report recommended that the Government ratify the *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*. In its response, the Government said that it would carefully consider the 2003 Convention and its application nationally. The Government noted the overlapping processes and the relevant inquiries, including the Productivity Commission's inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts and IP Australia's study on standalone legislation to protect Indigenous Knowledge.

The Productivity Commission's Report *Aboriginal and Torres Strait Islander Visual Arts and Crafts* was released in November 2022, and IP Australia has now released its *Scoping study on standalone IK legislation*. In January 2023, the Minister for the Arts announced in National Cultural Policy – Revive that the Government intends to release standalone legislation to protect First Nations knowledge and cultural expressions. It has still not yet ratified the 2003 Convention.

What next?

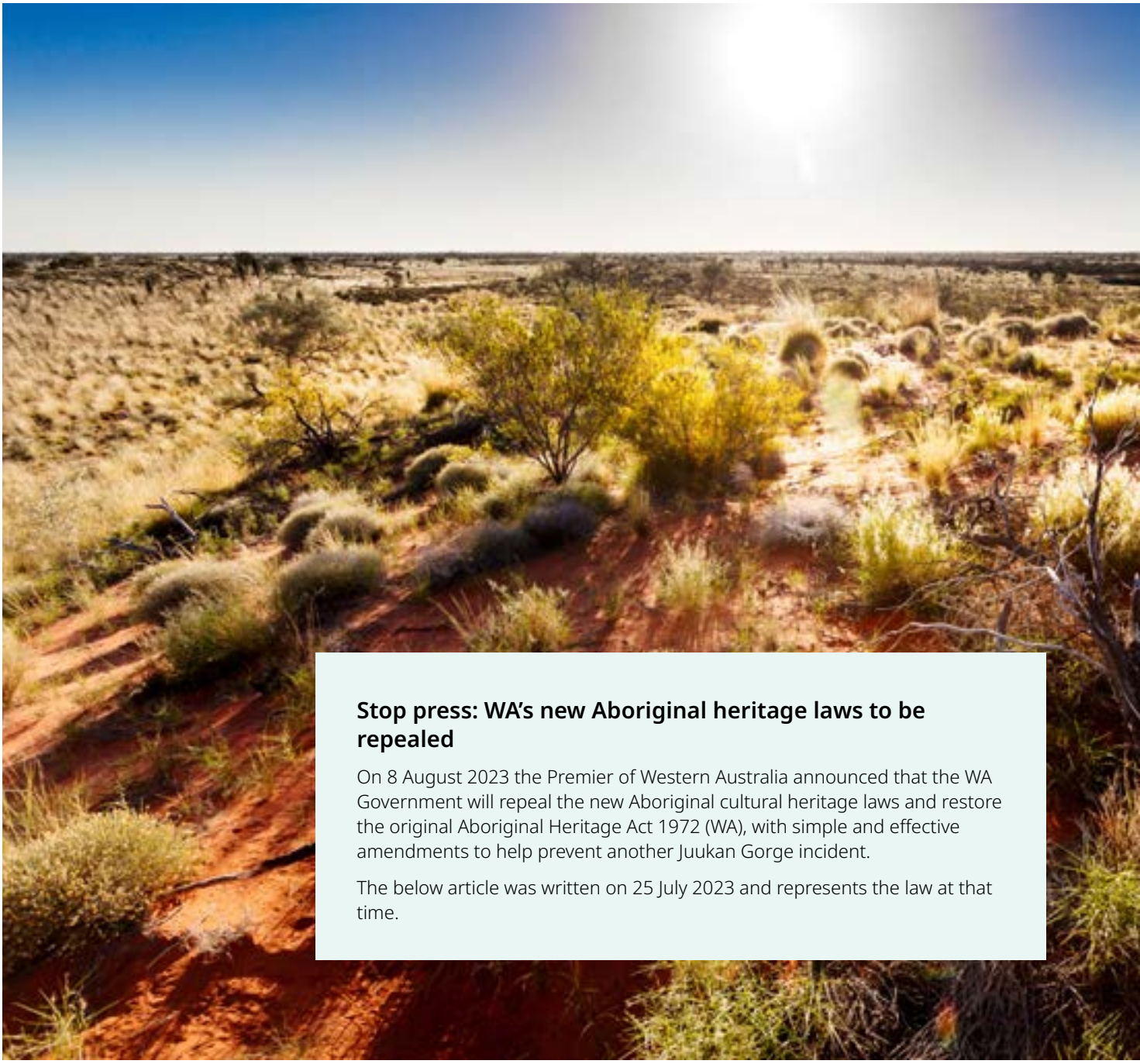
A second stage of consultation to test and explore the three options is ongoing. The timeline has been extended by several months and no end date has been publicly announced.

There will then be a second options paper and ultimately an Options Report.

The Federal Government refuses to be pressed on the reform timeline. The Minister recently told Radio National that the Government will take as long as it needs to get it right. Jamie Lowe of the National Native Title Council has told Radio National that he hopes legislation will be introduced in early 2024. It remains to be seen whether the Government's pledge to introduce legislation during the current term (ie by May 2025) will be met.

Author: Leonie Flynn, Expertise Counsel

1 July 2023 - WA's new Aboriginal cultural heritage laws have commenced



Stop press: WA's new Aboriginal heritage laws to be repealed

On 8 August 2023 the Premier of Western Australia announced that the WA Government will repeal the new Aboriginal cultural heritage laws and restore the original Aboriginal Heritage Act 1972 (WA), with simple and effective amendments to help prevent another Juukan Gorge incident.

The below article was written on 25 July 2023 and represents the law at that time.

What you need to know

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. In particular, it:

- expandS the scope of protected Aboriginal heritage;
- puts knowledge holders at the centre of decision making and consultation on proposed activities on country;
- creates a new tiered activity and approvals process for proponents; and
- increases penalties for offences and time frames for commencing prosecutions.

It was not until the months leading up to commencement that the State government finalised and released the many statutory guidelines and supporting documents that contain so much of the detail that proponents need to follow to ensure they comply with the new regime.

There is now a compliance pathway for proponents. The complexity of the regime means inevitable delay and associated costs for project timelines. As always, proper planning and implementation is the key.

What proponents need to do

- Focus on maintaining and strengthening relationships with Traditional Owner stakeholders.
- Ensure internal policies and procedures are updated and rolled out through internal training programs to ensure compliance.
- See our practical tips on ACH implementation for proponents, prepared by our Ashurst Risk Advisory team.
- Raise any implementation issues with the Department of Planning, Lands and Heritage, and the new ACH Council, as the regime is rolled out, to ensure the State's Implementation Committee takes these into account during initial implementation and to inform likely refinements to the guidelines.

Aboriginal cultural heritage legislation commences with a raft of supporting guidelines

The Aboriginal cultural heritage landscape in Western Australia has shifted significantly in the last 2-3 years as a result of a number of factors, now culminating in the complete reform of the *Aboriginal Heritage Act 1972* (WA) (**1972 Act**).

Among these factors are a stronger global focus on Indigenous rights, the increasing importance of a proponent's social licence to operate and, in particular, the 2020 destruction of the Juukan Gorge rock shelters.

The new Act completely reforms Aboriginal cultural heritage protection in WA. The fundamental changes include:

- a new broader definition of Aboriginal cultural heritage, which captures tangible and intangible elements;
- new management structures, notably the Aboriginal Cultural Heritage Council (ACH Council) as the peak strategic body for Aboriginal heritage matters including the issuing of ACH Permits, and Local Aboriginal Cultural Heritage Services (LACHS), which can be designated as a single point of contact for cultural heritage in an area;
- a four-tier system of activities with a corresponding process for authorising each tier, aligned with all new approvals pathways; and
- broader offence provisions and far higher penalties for individuals and corporations, including prison terms. Also, prosecutions can now be commenced within six years after the date of the offence (compared with the one year window in the 1972 Act).

For more information about the lead-up to the commencement of the new Act, see our *Native Title Year in Review 2021-2022* article "Western Australian Aboriginal heritage law reform amendments passed but still much work to do".

Statutory guidelines published in support of the new Act's implementation

The WA Department of Planning, Lands and Heritage has developed and published statutory guidelines to support the operation, implementation and interpretation of the new Act (the Guidelines). The key Guidelines for proponents are:

ACH Management Code, which sets the framework due diligence assessment (DDA) proponents must undertake before carrying out any activities in Western Australia;

Activity Tiers Guidelines, which provide a non-exhaustive list of tiered activities (classified as Exempt, Tier 1, Tier 2 or Tier 3) based on their scale, nature and permanent effect on land;

Investigation Guidelines, which set out the types of investigations a proponent should undertake for the purposes of a DDA;

Survey Report Guidelines, which specify the circumstances in which a heritage survey report (arising from a heritage survey) can be relied on to satisfy a DDA of a proposed activity (which, in turn, can be relied on for the benefit of any due diligence defence should heritage be inadvertently harmed in carrying out the relevant activities); and

Consultation Guidelines, which establish expectations for how proponents will consult with LACHS and other knowledge holders on Aboriginal cultural heritage management plans.

Cultural Heritage Survey Report and Investigation Guidelines

Cultural Heritage Survey Report Guidelines concern the ability to rely on past heritage survey reports when conducting a DDA.

Whether a past survey report can be relied on depends on a number of factors. In particular:

- the age of the survey report;
- the identity and knowledge of survey participants;
- whether the report covers archaeological and ethnographic values; and
- whether the PBC or claim group (both now or at the time) endorsed the report or nominated the survey participants.

While all survey reports must be assessed against the guidelines, proponents will need to heavily scrutinise any reports dated before 1 January 2013 in particular, to ensure they satisfy the requirements set out in the Guidelines and can therefore continue to be relied on. Reports older than 1 January 2013 are increasingly considered to be less reliable. They can be formally "relied upon" for the purposes of a DDA in only a few very narrow cases.

The Guidelines also prescribe the contents of any new survey reports to be produced, in order to ensure DDA reliance. While the "new" requirements apply to reports dated on or after 1 July 2024, the State is already encouraging the adoption of these new standards from 1 July 2023 as 'best practice'. As a result, new survey reports should contain more specific information, including:

- an express endorsement by the Aboriginal party;
- a list of survey participants and their knowledge holder status;
- the information provided to the Aboriginal party or survey participants relating to the purpose and context of the survey; and
- a description of the survey methodology and the information provided by the survey participants.

A person proposing to carry out an activity that may harm cultural heritage must undertake a DDA in accordance with the ACH Management Code. If a proponent cannot determine from the DDA whether Aboriginal cultural heritage is present in the area of a proposed Tier 3 activity, then the proponent must conduct an investigation.

The Investigation Guidelines set out the three types of investigations a proponent can undertake, namely:

- ACH investigation meeting: Any engagement between the proponent and the Aboriginal party must address specific matters in writing, such as the area of the engagement, the location of Aboriginal cultural heritage, and whether it is tangible or intangible, and any limitations that may prevent all of the Aboriginal cultural heritage from being identified;
- ACH work area clearance survey: Identifies an area free of Aboriginal cultural heritage but does not provide information on that heritage (ie location or characteristics);
- ACH avoidance survey: Identifies Aboriginal cultural heritage that may be present in an area and provides the boundary of its location. It does not provide information on the characteristics of the identified Aboriginal cultural heritage.

Transitioning consents

Section 18 consents granted by the Minister under the 1972 Act which were notified (effectively, applied for) before 23 December 2021 have been grandfathered and will remain valid until 1 July 2033.

They will continue to be valid after that time if the proponent applies to the Minister for an extension and the Minister is of the opinion that the stated purpose in the section 18 consent has been substantially commenced.

The Determining "Substantially Commenced" Guidelines prescribe the criteria to assess this question. They include whether:

- the land is being used for the purpose stated in the section 18 consent;
- licences, permits and approvals have already been obtained for that purpose; and
- certain activities have been completed (and whether they have been completed over any other land in the larger project). These activities include site clearing works, construction of roads and pathways and the installation of services such as power, water or telecommunications.

Implementation updates

A number of stakeholder groups called on the State government to delay the new Act's commencement.

While the State pushed ahead with the new Act's commencement, the State has established an implementation working group (for six months) to monitor, report and address issues arising in the initial stages of implementation. The group will include members of key industries impacted by the new Act, such as Traditional Owners, mining, property, farming and local government.

In its Statement of Regulatory Intent, the State government also announced it would take an "education-first" approach to compliance with the Act in the first 12 months. While this applies to technical/minor breaches, it will not (as some people have suggested in public commentary) prevent the State from prosecuting under the harm to heritage offences, which the State makes clear in the Statement itself.

Practical Tips on ACH implementation for proponents

Establish adequate controls

- Review and leverage your existing processes for managing land access, ground disturbance permits and environmental approvals.
- Identify where you are able to leverage current internal processes to embed the due diligence assessment into existing processes.
- Ensure there are sufficient controls in place to identify and manage the risk of harm to heritage without creating unnecessary inefficiencies in day-to-day operations.

Develop tools and procedures to assist your daily operations

- Introduce tools to help your staff navigate the complexity of the new requirements, including: due diligence assessment checklist, survey reliability checklist and how to identify knowledge holders.
- Leverage technology systems, such as your GIS or electronic workflow tools, to create efficiencies and enable more accurate and consistent assessments across the organisation.

Ensure clarity of processes

Where there are practical inconsistencies in how to apply the new Act, ensure there are clear lines of accountability for decision making, to avoid internal roadblocks and confusion.

Develop clear procedures and maintain a register of assessments and internal decision making on:

- Activity tier determinations
- Survey reliability assessments
- Risk of harm to ACH
- Identification of Traditional Owners and knowledge holders.

Establish clear lines of accountability and escalation points for high-risk decisions

- Identify accountable persons.
- Develop escalation processes that clearly identify when higher risk decisions must be reviewed and authorised.
- Communicate accountability and escalation processes across the business.

Prepare your employees for their new obligations under the new regulations.

- Conduct whole-of-organisation training to ensure all employees have the same base level understanding of the new Act.
- Conduct role-specific training focusing on specific updated processes and systems that impact an employee's day-to-day role.

Use a variety of communication techniques to ensure messaging is adequately conveyed and understood. Consider using:

- Verbal communication in meetings and training sessions
- Written communication in emails and on intranet sites
- Visual communication on notice boards in high-traffic areas.

Our Risk Advisory consultants take a strategic approach to assessing those threats and opportunities arising from the growing importance of social licence and environmental custodianship. They are currently working extensively with clients on being Aboriginal Cultural Heritage Act ready – so reach out to Elena Lambros (Partner) or Kate Wilson (Director) if you require implementation assistance, or want to discuss any of the practical tips above.

Key insights

Proponents must always prioritise maintaining and strengthening their relationships with Traditional Owner stakeholders.

Now is the time to ensure internal policies and procedures are updated and rolled out through internal training programs, to ensure compliance.

This includes undertaking a review of existing relationships, heritage agreements, survey coverage, approvals and heritage reports, with a view to identifying operational gaps that need to be filled.

Proponents should also consider the extent to which existing agreements may need to be varied, whether new agreements are required or contractual support is to be obtained from Traditional Owner stakeholders.

Finally – remember to raise any implementation issues with the Department of Planning, Lands and Heritage, and the new ACH Council, as the new regime is rolled out, to ensure the State's Implementation Committee takes them into account during initial implementation and to inform likely refinements to the guidelines.

Authors: Andrew Gay, Partner; Cheyne Jansen, Counsel; Jordan Soresi, Lawyer; Kate Wilson, Director Ashurst Risk Advisory; Elena Lambros, Partner Ashurst Risk Advisory

Treaty update: Federal Government focuses on the Voice to Parliament, while Treaty and Voice progress continues in the states and territories

What you need to know

- The Federal Government continues to prepare for its upcoming referendum on the Aboriginal and Torres Strait Islander "Voice", which is due to be held in the final quarter of 2023.
- A positive referendum result will see an amendment to the Australian Constitution, recognising Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia, and the establishment of an independent advisory body to advise government on matters that affect First Nations people.
- Around Australia, most states and territories are continuing their efforts to develop Treaty, Truth-telling and/or Voice structures. The Federal Government has indicated that it too will continue its progress with Truth-telling and Treaty making, in due course.

What you need to do

- Learn about the Voice in preparation for the referendum later this year.

Reminder of background to Treaty in Australia

Australia continues to be the only Commonwealth country to have never signed a Treaty with its Indigenous peoples. However, the Federal Government and most state and territory governments are committed to developing Treaties with First Nations people.

In our fourth annual update on the status of Treaty making in Australia, we focus on developments in the second half of 2022 and the first half of 2023. This update also covers recent developments in the federal Voice. For further information and background:

- Our *Native Title Year in Review 2021-2022* article "Treaty update: Federal Government commits to Uluru Statement from the Heart while Treaty momentum gathers in the States" provides a 2021 and early 2022 Treaty update.
- Our *Native Title Year in Review 2020* article "Treaty update: Progress in State based Treaty negotiations and proposals for a national Indigenous Voice" provides a 2020 Treaty update and sets out the former Federal Liberal Government's proposal for a Voice to Parliament.
- Our *Native Title Year in Review 2019* article "Treaty making in Australia – Will the pieces of the puzzle come together?" explains the concept of Treaty and describes progress towards Treaty making in each state and territory and at the federal level.

Status of Treaty making in Australia

The status of Treaty making in the Australian states and territories can be broadly summarised as follows:

Cth

Although the Federal Government has committed to Treaty making in Australia soon (as a result of its commitment to implementing the Uluru Statement of the Heart in full), the Voice remains the focus, with a referendum anticipated in October-December 2023. We set out more information on the Voice below.

It had been anticipated that, following a positive outcome of the Voice referendum, the next step would be the establishment of a "Makarrata Commission". Makarrata is a Yolngu word which describes a process of conflict resolution, peacemaking and justice, and which is used as a synonym for Treaty. It is not clear how the establishment of the Makarrata Commission will progress in the event of a negative referendum outcome.

Vic

On 23 August 2022, the Treaty Authority was established following the enactment of the *Treaty Authority and Other Treaty Enactments Act 2022* (Vic)**.** The role of the Treaty Authority is to mediate negotiations between the state government and Aboriginal Victorians, by promoting fairness and due process and providing legal oversight on the development of Treaty.

In October 2022, the First Peoples' Assembly of Victoria and the Minister executed the Treaty Negotiation Framework and Self-Determination Fund. The Treaty Negotiation Framework creates fundamental rules for negotiating Treaties in support of fair Treaty development. The Self-Determination Fund provides funding for First Peoples to support the objective of fair Treaty development.

Formal Treaty negotiations are set to commence in 2023, but are yet to begin. In May 2023, the State Budget allocated $138 million for investment in the Treaty process for a four-year period. $82 million of this amount was directed to the First Peoples' Assembly. Voting in the First Peoples' Assembly Elections closed on 3 June 2023 and determined the First Peoples' choice of representatives participating in Treaty negotiations.

On 17 June 2023, the Traditional Owners who are to negotiate Treaty with the Victorian government were chosen in the State's Treaty Election. A total of 22 Traditional Owners were elected to represent the North West, North East, South West, South East, and Metro regions of Victoria.

Truth-Telling in Victoria

The Yoorrook Justice Commission, Victoria's formal Truth-telling inquiry, continues its work.

Yoorrook delivered its Interim Report in June 2022. Since then, Yoorrook has continued to conduct hearings, including with Aboriginal leaders, experts, service providers, Aboriginal community members, as well as government and public service witnesses, in relation to Victoria's criminal justice and child protection systems. Yoorrook was set to deliver a Critical Issues Report on injustices against First Peoples in the criminal justice and child protection systems in August 2023.

In April 2023, Yoorrook's timetable and an extension to its mandate was agreed. Yoorrook will deliver its report in December 2024, with the inquiry set to conclude in June 2025.

Tas

In December 2022, the Tasmanian government announced that, following meetings with Aboriginal representatives regarding how Truth-telling and Treaty should proceed in Australia, it would establish an Aboriginal Advisory Group.

The Aboriginal Advisory Group comprises six Aboriginal people who can work together with the government to design a process for Truth-telling and Treaty that is led by Aboriginal people.

The Aboriginal Advisory Group met for the first time in February 2023. The Group has no set time frame or predetermined outcome for its work.

ACT	The ACT is working towards self-determination for First Peoples in accordance with its *ACT Aboriginal and Torres Strait Islander Agreement 2019–2028*. In July 2022, Professor Kerry Arabena provided a Final Report to the ACT government. The ACT government is currently considering the recommendations in the Report, as well as other community feedback in relation to the Report and Treaty-making process for the ACT.
NT	On 29 June 2022, the Northern Territory Treaty Commission released its Final Report. On 29 December 2022, the Northern Territory government provided its response to the Final Report, which included establishing a Treaty Unit within the Office of Aboriginal Affairs to support next steps in the Treaty process. The work of the Treaty Commission is now complete, with the Treaty Unit now focused on developing and implementing Treaty-related policies and legislation, stakeholder engagement, creation of a Truth-telling process across the Northern Territory, and engagement with regional, local and national Commonwealth representatives for developing the Voice at regional, local and national levels.
Qld	Further to our 15 March 2023 article, "Queensland introduces Bill to Parliament to enshrine Treaty-making process", the *Path to Treaty Act 2023* was assented to on 17 May 2023. The *Path to Treaty Act* establishes a First Nations Treaty Institute and Truth Telling and Healing Inquiry. Over the coming months, we anticipate that the Queensland government, in partnership with the Interim Truth and Treaty Body, will commence developing these two bodies, including by appointing Institute and Inquiry members. While the *Path to Treaty Act* does not deal with a Voice, "a First Nations Consultative Committee has been established" that will assist with developing a First Peoples' Voice in Queensland. This committee was established in July 2021, representing First Nations people in eight regions within Queensland, to inform the development of a Voice. The committee is set to report back to the government on progress towards recommending a model for the Queensland Voice in 2023.
SA	In March 2023, the *First Nations Voice Act 2023* (SA) was passed, which established the First Nations Voice in South Australia. SA is the first Australian jurisdiction to implement a Voice. The SA government website states that the SA First Nations Voice will be a "direct and independent line of communication for First Nations people to South Australia's parliament and the government". It will be made up of six Local First Nations Voices and a State First Nations Voice. The inaugural First Nations Voice election will be held on 9 September 2023, for Aboriginal and Torres Strait Islander peoples living in South Australia to vote for their Local First Nations Voice representative. SA had previously commenced a Treaty process in 2016; however this has been on hold for some time following a change of government. The Treaty-making process is expected to recommence later in 2023, following the re-election of a Labor government.
NSW	Following the election of a Labor government on 25 March 2023, there are hopes of progress towards Treaty in NSW. However, there has been little progress in the months since. In January 2023, the Labor opposition stated that it would commit $5 million towards a year-long consultation on the legally binding agreement between the government and First Nations people, which allows for partnership in respect of decision making. However, the commitment was timed to commence *after* the referendum on the Voice, and would go ahead regardless of the outcome. Accordingly, there is likely to be little progress in the NSW Treaty process before 2024.
WA	Western Australia is now the only state or territory not committed to a formal Treaty process. However, as noted in our previous articles, Settlement Agreements such as the Noongar Settlement and the Yamatji Settlement are considered by some to be Treaty equivalents. The recent Tjiwarl Palyakuwa (Agreement) also provides for settlement of most of the State of WA's compensation liability to the Tjiwarl people. See our *Native Title Year in Review 2022-2023* article "Native title compensation: we're off to the High Court again!" for more about this agreement. Since our last article, the then Premier Mark McGowan has noted that he will focus on ensuring the success of the federal referendum before turning his attention towards developing a WA Voice.

Voice

What is the Voice?

On 23 March 2023, the Federal Government announced the question and constitutional amendment that will be put to the Australian people in a referendum later in 2023. The announcement came as part of the Government's commitment to implement the Uluru Statement from the Heart in full, with "Voice" being one of three elements of the Uluru Statement (along with Treaty and Truth).

The question and constitutional amendment were developed in consultation with the First Nations Referendum Working Group, and are as follows:

Question: "A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?"

The proposed constitutional amendment was introduced via the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023* (Cth), which was passed in the House of Representatives and the Senate in June 2023.

The Constitution Alteration proposes to amend the Australian Constitution as follows:

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.
- The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.
- The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

How will the Voice work?

The Federal Government website states that the "Voice would be an independent and permanent advisory body. It would give advice to the Australian Parliament and Government on matters that affect the lives of Aboriginal and Torres Strait Islander peoples".

The Federal Government has also released the *Voice design principles*, which have been developed in conjunction with the First Nations Referendum Working Group. These state that the Voice will:

- give independent advice to the Parliament and Government;
- be chosen by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities;
- be representative of Aboriginal and Torres Strait Islander communities, be gender-balanced and include youth;
- be empowering, community-led, inclusive, respectful and culturally informed;
- be accountable and transparent;
- work alongside existing organisations and traditional structures;
- not have a program delivery function; and
- have no power of veto.

Following a positive referendum outcome, there will be a detailed consultation process with First Nations people, Parliament and the broader public to determine the Voice design. This will culminate in legislation to establish the Voice, which will go through the standard parliamentary processes.

Further context – the Voice is not a new concept

This is not the first referendum to consider First Nations issues. In 1967, over 90% of Australians voted to change the Constitution such that Aboriginal and Torres Strait Islander peoples would be counted in the census, and the Federal Parliament would be able to make laws for them. However, this constitutional amendment did not recognise Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia, unlike the current proposal.

The concept of the Voice is not new, and calls for a Voice date back to the 1800s. As noted above, calls for the Voice were reiterated in the May 2017 Uluru Statement from the Heart, and the Voice has been actively progressed at federal government level since then, albeit in a slightly different form.

As noted in our 1 April 2021 article, since October 2019, the former Liberal government had been progressing an "Indigenous Voice co-design process" and had published an Interim Report seeking feedback on its Indigenous Voice Proposals. However, the former Liberal government's proposal differs from the current proposal, in that it did not support establishing the Voice in the Constitution. The Liberal opposition has announced its formal opposition to the Labor government's model for the Voice.

Constitutional recognition of the Voice would align Australia with other international jurisdictions. For example, Brazil's Constitution is structured to integrate Indigenous peoples' views on various matters, including participation rights where development projects affect traditional lands. Additionally, Canadian courts have found that Canada's Constitution confers consultation rights in relation to any matters that include resource development.

Where to from here?

Given the intense political debate about the Voice, the likely outcome of the referendum is not clear. While a positive outcome will mean both an exciting development for First Nations peoples and a more representative Australia, a negative outcome would be a setback for progress towards implementing the Uluru Statement from the Heart in full, and for reconciliation in general.

Ashurst will continue to monitor updates and progress towards both Voice and Treaty at Federal Government level and around Australia.

Authors: Tess Birch, Senior Associate; Clare Lawrence, Partner; Patrick Stratmann, Graduate

FPIC's reach expands beyond native title and cultural heritage

What you need to know

- The principles of FPIC now extend beyond native title and cultural heritage matters. For example, the Queensland government refers to FPIC in its legislation setting out the path to Treaty, and 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.
- The Senate has launched an inquiry into how UNDRIP is applied in Australia.

What you need to do

- Proponents need to understand what FPIC means for Traditional Owners who are affected by their projects and ensure that any engagement or agreement making process is aimed at satisfying FPIC requirements.
- FPIC is not just a factor in native title and cultural heritage matters – proponents should consider how FPIC principles are embedded in all activities that involve or require engagement with Traditional Owners around Australia.

FPIC on the agenda

The concept of "free, prior and informed consent" (FPIC) has been at the forefront of the conversation about native title and Aboriginal cultural heritage reform ever since the Juukan Gorge incident in 2020. Since we published our *Native Title Year in Review 2021-2022* article "A big year for FPIC – an increasing global focus on the need to secure free, prior and informed consent", we have seen the concept applied in new areas, including biodiversity frameworks and Treaty legislation.

What is FPIC?

There is no universally accepted definition of FPIC. The concept 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. FPIC refers to the right of Indigenous peoples to consent on a free and informed basis to activities carried out on their land.

We discussed the origins of the concept of FPIC in our *Native Title Year in Review 2020* article, "Free, prior and informed consent".

Developments in 2022-2023

Inquiry into the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) begins

In August 2022, Senator Thorpe reintroduced the *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022*. The Senate referred the Bill to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs for report.

The committee's terms of reference provide that it should report on options to improve adherence to the principles of UNDRIP in Australia.

Several submissions made by native title bodies and Traditional Owners suggest that a lack of appropriate processes for FPIC are at the heart of problems with heritage and environmental protection laws. They highlight the importance of FPIC being defined by Indigenous peoples, rather than by governments.

The National Native Title Council submission calls for FPIC to be incorporated into the *Native Title Act 1993* (Cth) and other related legislation and suggests that the right of veto in the *Northern Territory Aboriginal Land Rights Act* "ensures that traditional Aboriginal owners in the Northern Territory have a significant say" in respect of projects on their lands.

Proponent submissions emphasised the need for greater clarity on the application of FPIC to ensure that communities and land users understand their respective rights and obligations. In particular, proponents called for clarity on:

- the definition of FPIC;
- how parties can prove FPIC has been obtained;
- whether FPIC provides a right of veto; and
- whom they should seek FPIC from (ie when native title has not been determined to exist).

Submissions have now closed and the committee has not indicated when it will deliver its report.

Although a private members Bill introduced by Senator Thorpe is unlikely to gain significant traction in the Federal Parliament, the committee's report will be a useful contribution on this topic and may indicate the likely progress of FPIC and UNDRIP in Australian law.

Queensland's Path to Treaty Act enshrines FPIC

In May 2023, the Queensland parliament passed the *Path to Treaty Act 2023*. We discussed the effect of the Act in our 15 March 2023 article, "Queensland introduces Bill to Parliament to enshrine Treaty-making process". Section 6(2)(c) of the Act highlights that a principle for administering the Act is "the importance of Aboriginal peoples and Torres Strait Islander peoples being able to give free, prior and informed consent as part of treaty negotiations and the making of a treaty".

This is one of the first express references to FPIC in Australia legislation. However, we expect that FPIC will be a fundamental concept in the path to Treaty in other states. For more information about the path to Treaty in Australia, see our Native Title Year in Review 2022-2023 article "Treaty update: Federal focus on the Voice to Parliament, while Treaty and Voice progress continues in the States and Territories".

Kunming-Montreal Global Biodiversity Framework

Australia is a party to the Convention on Biological Diversity. In December 2022, the parties to the Convention adopted the Kunming-Montreal Global Diversity Framework, which aims to halt and reverse biodiversity loss.

The framework acknowledges the important role and contributions of Indigenous peoples as custodians of biodiversity and partners in its conservation. The framework states that the knowledge (including traditional knowledge) associated with biodiversity should be respected, documented and preserved with Indigenous peoples' FPIC, including through their full and effective participation in decision making.

The Federal Government has begun to demonstrate its commitment to the Diversity Framework in a number of ways, including the introduction of the Nature Repair Market Bill (see below), which is currently passing through Parliament.

The Nature Repair Market Bill

On 29 March 2023, the Federal Government introduced the Nature Repair Market Bill 2023 to establish a national voluntary framework to enhance and protect biodiversity. The Bill borrows from the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act) by requiring proponents of a biodiversity project to obtain consent to its registration from a registered native title body corporate (RNTBC) or Aboriginal Land Council in certain scenarios.

Interestingly, the Bill departs from the CFI Act by providing that the regulator can register a project subject to the condition of obtaining the RNTBC's written consent to it being carried out, but only in circumstances where consent to its registration has already been obtained from the RNTBC.

This goes some way to adopting recommendation 11 of the Chubb Review Report that the CFI Act should be amended to remove the option to conditionally register carbon projects on native title lands prior to obtaining consent, because conditional registration is inconsistent with FPIC.

The drafting of the Bill could be a neat solution which gives the regulator comfort that the project's proponent has obtained in principle consent from the Traditional Owners for the project to be registered, while allowing the parties further time to work through the details of the finalised consent agreement.

Assuming the Bill passes in this form, it could also signal potential changes to the CFI Act to address the recommendations in the Chubb Review Report.

Federal Government's response to the report on the destruction of Indigenous heritage sites at Juukan Gorge

In November 2022, the Federal Government agreed to implement seven of the eight recommendations made in *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, which was released in October 2021.

We wrote about the Way Forward Report and its implications in our *Native Title Year in Review 2021-2022* article "Modernisation of cultural heritage protection legislation begins" and the Federal Government's response to it in our November 2022 article, "Federal Government releases response to Way Forward Report".

The Government has committed to reforming the national cultural heritage protection framework through a co-design process.

All three reform options currently being considered enshrine the right to FPIC and the right to self-determination, with decision making in the hands of First Nations people. See our *Native Title Year in Review 2022-2023* article, "No new Federal cultural heritage legislation in 2023".

What happens next?

We will continue to monitor how FPIC is influencing the development of legislation in Australia. The key question for Government to address in any new legislation that has touch points with Traditional Owners is what FPIC means in various scenarios.

We expect to see the release of the Joint Standing Committee's report on UNDRIP in the short term, and a second options paper for federal cultural heritage legislative reform.

In the meantime, proponents should understand what FPIC means for Traditional Owners affected by their projects and ensure that any engagement or agreement making process is aimed at satisfying FPIC requirements.

FPIC is not just a factor in native title and cultural heritage matters – proponents should consider how FPIC principles are embedded in all activities that involve, or require engagement with, Traditional Owners in Australia.

Authors: Sophie Pruim, Graduate; Sophie Westland, Senior Associate

First Nations underwater cultural heritage – no longer a submerged issue

What you need to know

- 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 use of specific methods for identifying and assessing First Nations underwater cultural heritage.
- The draft guidelines coincide with several other developments in the offshore First Nations rights space, including NOPSEMA's new consultation guidelines for offshore petroleum projects.

What you need to do

- Proponents should consider engaging with First Nations groups about offshore projects to identify and assess First Nations underwater cultural heritage in accordance with the new draft guidelines. Increased time and costs should be built into project planning.

Draft guidelines to protect underwater cultural heritage

The Commonwealth Department of Climate Change, Energy, the Environment and Water (DCCEEW) has released draft guidelines for working in the near and offshore environment to protect Underwater Cultural Heritage (the Guidelines), which outline proponent requirements under the *Underwater Cultural Heritage Act 2018* (Cth) (UCH Act).

The Guidelines go further than the current UCH Act and make recommendations which are not expressly required by the Act. It is likely that the Guidelines will serve as a stepping stone to legislative reform.

Consultation on the Guidelines has closed. The DCCEEW has indicated that the draft guidelines will be finalised in late 2023.

Current position of UCH Act with respect to First Nations underwater cultural heritage

There is currently no automatic protection for First Nations underwater cultural heritage in the UCH Act (as there is for shipwrecks etc). First Nations underwater cultural heritage is not specifically mentioned in the Act and will be protected only if it has been the subject of a Ministerial declaration under sections 17-19 of the UCH Act.

Once underwater cultural heritage is the subject of a protection declaration, no adverse impact can occur without a permit.

Guidelines

The Guidelines provide detailed best practice guidance in relation to the preparation of underwater cultural heritage impact assessments and management plans and recommended methods for identifying and assessing underwater cultural heritage before commencing work in offshore areas.

The Guidelines provide that, before issuing a permit to impact a site, the DCCEEW will consult with relevant stakeholders and may require mitigation measures to be put in place to protect underwater cultural heritage sites.

They state that these are not legal requirements under the UCH Act, but "should be read as the benchmark for Underwater Cultural Heritage assessment and management in relation to near and offshore work and undertaken by a maritime archaeologist".

First Nations underwater cultural heritage

The Guidelines make express reference to First Nations Underwater Cultural Heritage and encourage proponents to engage with First Nations groups who may have an interest in the proposed offshore activity. Early engagement with First Nations groups is considered essential to identify, assess and manage underwater cultural heritage.

The Guidelines state that, due to sea-level changes, large portions of Australia's continental shelf which now lie beneath coastal and Commonwealth waters were dry landscape for tens of thousands of years of First Nations occupation and may contain First Nations underwater cultural heritage. This could include archaeological remains which could be declared protected under the UCH Act.

Intangible heritage with no physical component is not protected under the UCH Act, but the Guidelines note that this type of heritage "may assist in understanding [First Nations] Underwater Cultural Heritage for the purposes of an Underwater Cultural Heritage Impact Assessment".

Interaction with state and territory cultural heritage legislation

The Aboriginal cultural heritage protection legislation in most states already expressly applies offshore. The only exceptions are NSW and the ACT. Its application is summarised below.

Jurisdiction	UCH covered
Western Australia	✓
Queensland	✓
South Australia	✓
Victoria	✓
Northern Territory	✓
Tasmania	✓
New South Wales	X
Australian Capital Territory	X

The Guidelines do not address whether any assessment under federal legislation might overlap with state and territory processes.

Other developments focusing on First Nations interests in the marine environment

The release of the Guidelines coincides with other developments affecting offshore and underwater First Nations rights.

Tipakalippa decision and NOPSEMA's new consultation guidelines

The Full Federal Court has recently provided guidance on the scope of the requirement for proponents of offshore petroleum projects to consult with First Nations people in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

Following this, NOPESMA released a new guideline *Consultation in the course of preparing an Environment Plan*, which clarifies requirements for consultation under the *Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2009* (Cth). The new NOPSEMA guideline does not refer to the UCH guidelines. We discuss this decision further in our Native Title Year in Review 2022-2023 article, "Full Court Tipakalippa decision – stakeholder consultation grows teeth".

Key insights

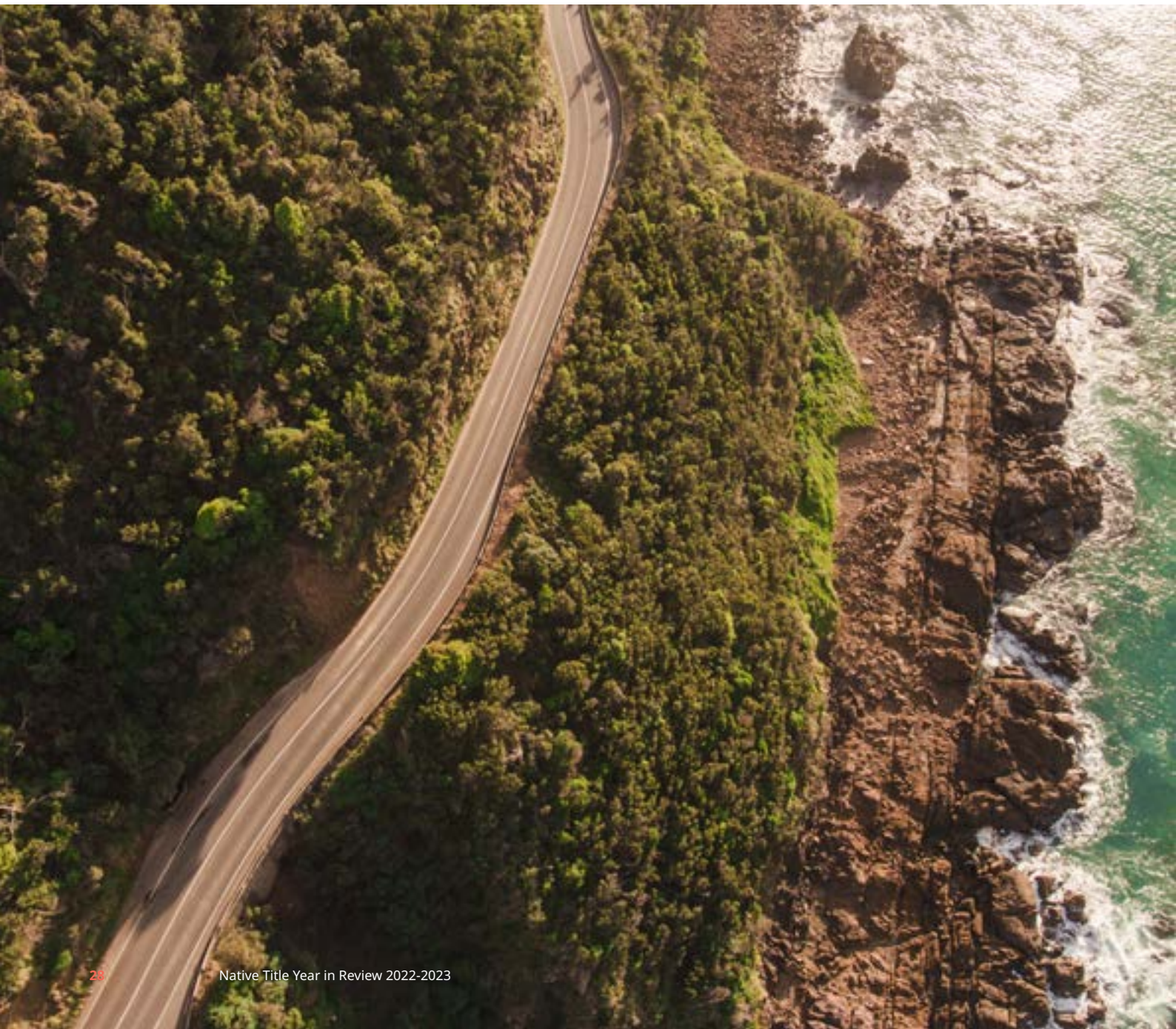
The ABC has reported the discovery of stone artefacts at two offshore sites in the Pilbara region of WA and noted calls for further protection of such sites.

It seems pretty clear that cultural heritage in, and traditional links to, the marine environment will come under greater regulatory scrutiny in coming years, as First Nations people become more involved in decision making regarding offshore developments.

Proponents planning to work offshore should be aware of the new draft guidelines and prepare to meet consultation requirements with sufficient resourcing to make their engagement meaningful and genuine.

Authors: Junaid Sheikh, Lawyer; Leonie Flynn, Expertise Counsel

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



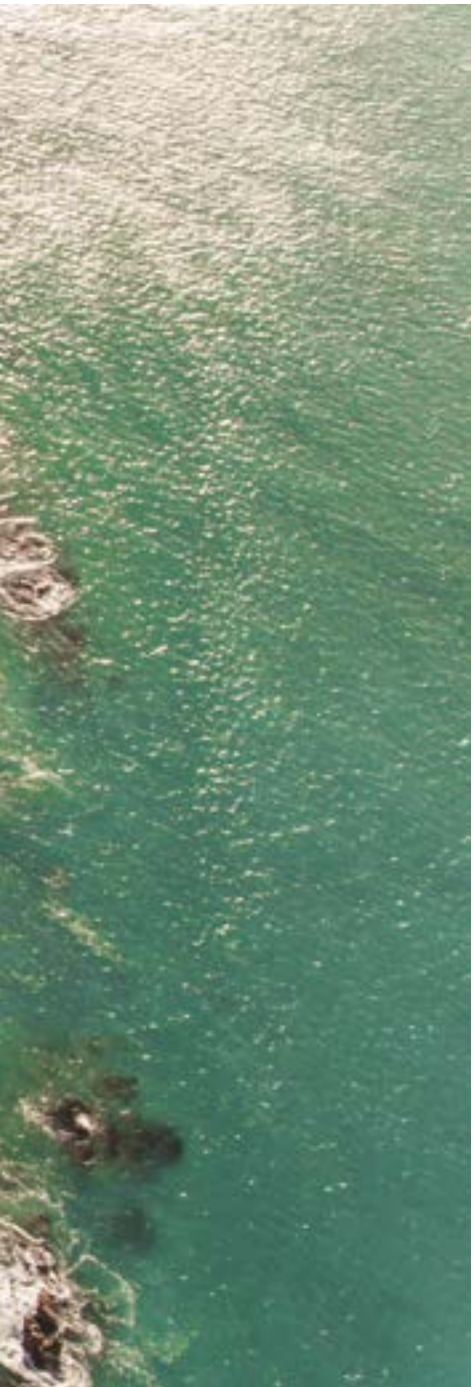
What you need to know

South Australia has recently released draft legislation to amend the *Aboriginal Heritage Act 1988* (SA).

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.

What you need to do

Proponents operating in South Australia should monitor the progress of the review and take the opportunity to participate in any further consultation undertaken by the government.



SA releases draft Amendment Bill

In March 2023, the South Australian government released the draft *Aboriginal Heritage (Miscellaneous) Amendment Bill 2023* (SA) for consultation.

The government specifically noted that the changes to the *Aboriginal Heritage Act 1988* (SA) are proposed "in line with a national movement to strengthen Aboriginal heritage protection". We foreshadowed this movement in our *Native Title Year in Review* articles "The long shadow of heritage destruction: Fundamental reset of Aboriginal cultural heritage protection in Australia" (2020) and "Modernisation of cultural heritage protection legislation begins" (2021) where we looked at the implications of the Joint Standing Committee on Northern Australia's Interim and Final reports into the destruction of Juukan Gorge.

The proposals in the draft bill focus on three key areas.

Significant increases to penalties for offences under the Act

The draft bill proposes up to a 25-fold increase in fines, and to either doubling (from three months to six months) or quadrupling (from six months to two years) the maximum prison sentences.

Further, under the current Act a person may face either a fine or imprisonment for committing an offence. The draft bill proposes that both fines and prison sentences could be imposed.

The proposed amendments would mean that South Australia has some of Australia's most significant penalties for causing harm to cultural heritage.

Additional penalty orders beyond fines and imprisonment

In addition to any penalties for offences under the Act, the draft Bill proposes that a court may also order an individual or company to:

- pay money towards the repair, restoration or reinterment of Aboriginal heritage, or any other costs incurred to make good any other harm;
- pay an Aboriginal party a sum determined by the court for reasonable costs, or compensation for harm suffered;
- pay an amount estimated by the court in consideration for any "economic benefit" that was received as a result of the contravention; or
- take specified action to publicise the contravention and its consequences – a "name and shame" provision.

Clarification of the obligations to report Aboriginal cultural heritage discoveries

Further proposed amendments to the Act clarify that:

- if there are any discoveries of Aboriginal heritage, work must immediately be stopped and the discovery must be reported to the Minister, even if the person making the discovery holds an authorisation under the Act; and
- authorisations may be granted to classes of persons and cover all Aboriginal heritage in an area, whether known or unknown.

These amendments specifically respond to the 25 August 2022 South Australian Supreme Court decision in *Dare, Bilney & Ors v Kelaray Pty Ltd, Premier of South Australia* [2022] SASC 91.

Dare v Kelaray concerned a judicial review application to set aside the Premier's determination – as the responsible Minister – under section 23. The determination authorised Kelaray, its agents and assignees to damage or interfere with *any* Aboriginal site, Aboriginal object or Aboriginal remains, subject to certain conditions.

In making his determination, the Minister had relied on Kelaray's Chance Find Procedure – which was part of its CHMP – to protect Aboriginal sites, objects and remains. The Chance Find Procedure allowed interference with an object or site before notifying the Minister, if the interference was in accordance with the advice of expert anthropologists or Aboriginal representatives of its choice.

At first instance, Chief Justice Kourakis set aside the Minister's determination, finding that:

> The breadth of the authorisation to damage, interfere or disturb Aboriginal sites, objects and remains allowed by the [Chance Find Procedure] subverts the statutory requirement of s 20 of the *Aboriginal Heritage Act* that any proposed action in relation to a particular object or site be brought to the Minister's attention as soon as practicable after its discovery so that the Minister may consider whether or not, and how, to best protect items of Aboriginal heritage.

The Chief Justice's decision was overturned on appeal in *Kelaray Pty Ltd v Dare & Others* [2023] SASCA 46. The Court of Appeal held that the Chance Find Procedure did not subvert section 20 of the Act, because the obligation under section 20(1) to report any discovery of Aboriginal heritage as soon as practicable remained in force, regardless of any conditions imposed upon the Minister's authorisation.

The draft legislation was released before the Court of Appeal handed down its decision in *Kelaray v Dare*. Regardless of the overturned decision, the proposed changes to the Act will ensure that all heritage discovered while working under an authorisation is reported to the Minister before it may be impacted. Any activity occurring under the authorisation would cease immediately:

- until the Minister authorises the activities to resume;
- until the Minister gives a direction for protecting and preserving the heritage; or
- for a prescribed period commencing after the day on which the proponent provides a proposed methodology for avoiding or managing the heritage.

Currently, activities are not explicitly required to cease when heritage is discovered, but a person must not excavate land for the purpose of uncovering any heritage or damage, disturb or interfere with heritage without authorisation by the Minister.

Next steps

Consultation on the draft amendment bill concluded on 6 April 2023. Feedback received from stakeholders is now being evaluated and reviewed, but the government has not committed to a time frame for reporting on key outcomes.

The outcomes of the engagement will be documented on the YourSAy website. The website indicates that this may include a summary of all contributions to the consultation, as well as recommendations for future action.

Author: Brigid Horneman-Wren, Lawyer

Tasmania continues to progress towards new Aboriginal cultural heritage protection legislation

What you need to know

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.

Tasmanian government releases consultation paper

Tasmania's *Aboriginal Heritage Act 1975* is generally regarded as inadequate. All reviews of the Act since the late 1990s have recommended its replacement.

In 2022, the Tasmanian government invited submissions on its consultation paper: *A new Aboriginal Cultural Heritage Protection Act – High-level Policy Directions*. The consultation paper outlined the government's proposed approach to new Aboriginal heritage protection legislation that will better respect and protect Tasmania's Aboriginal cultural heritage.

The paper outlined the government's eight proposed key elements of a new Act:

1. **Articulate an explicit purpose and objectives**, including recognition of Tasmania's Aboriginal cultural heritage and acknowledgment of Tasmania's Aboriginal people as custodians of their cultural heritage.
2. **Expanded and more appropriate definitions**, including removal of the term "relic", recognition and registration of intangible heritage, and potential specification of other categories of heritage (eg secret and sacred heritage).
3. **Address issues of ownership/custodianship of Aboriginal cultural heritage**, including removing current provisions that assign ownership of Aboriginal cultural heritage on Crown land to the Crown, and clarifying the rights of private landholders in relation to carrying out certain activities.
4. **Establish a statutory Aboriginal representative body with decision-making powers.** The government proposes to strengthen the existing Aboriginal Heritage Council (AHC) by legislating for relevant processes and developing membership requirements relating to eligibility, skills, gender balance and regional representation.
5. **Ensure Tasmanian Aboriginal people play a central role in deciding how Aboriginal cultural heritage is to be managed**, by pursuing a model in which decision-making lies with a strengthened AHC wherever practicable. The Minister may still be involved in certain matters, eg if proponents and the AHC cannot agree on a CHMP.
6. **Align with Tasmania's planning and development system** to ensure Aboriginal cultural heritage is considered early in the planning process.
7. **Introduce modern management mechanisms**, including providing for CHMPs for high-risk/high-impact projects; providing for smaller-scale or less complex developments to be subject to a streamlined assessment and approval process through a strengthened AHC; establishing a statutory Aboriginal Cultural Heritage Register; and creating Aboriginal Cultural Heritage Protected Areas for areas requiring the strongest protection.
8. **Strengthen compliance and enforcement** by retaining current penalties for disturbing or damaging Aboriginal cultural heritage, introducing penalties for administrative offences that do not directly harm heritage, including "stop work" and "vacate site" provisions, that allow the issue of infringement notices and remediation orders.

There was an initial six-week consultation period in March 2022. The government has continued to consult on the proposals with Tasmania's Aboriginal people and stakeholders since that time.

The submissions received in response to the consultation paper are now available on the Aboriginal Heritage Tasmania website.

A long path to this point

There have been multiple reviews of the Act since the 1990s.

A 2019 review of the Act resulted in a review report tabled in the Tasmanian parliament on 1 July 2021, along with a government response accepting the key findings of the review report.

We wrote about the 2019 consultation and the then-anticipated Review Report in our Native Title Year in Review 2019 article, "What is happening in the Indigenous cultural heritage space in each State?".

The consultation paper also refers to recent and ongoing Aboriginal cultural heritage reforms and examples of best practice, in other jurisdictions. We foreshadowed this national reform movement in our *Native Title Year in Review 2021-2022* article "Modernisation of cultural heritage protection legislation begins" and *Native Title Year in Review 2020* article "The long shadow of heritage destruction: Fundamental reset of Aboriginal cultural heritage protection in Australia", where we looked at the implications of the Joint Standing Committee on Northern Australia's Interim and Final reports into the destruction of the Juukan Gorge.

Next steps: a draft Bill

The Tasmanian government is now developing a draft exposure Bill for new Aboriginal cultural heritage protection legislation.

The government has committed to undertaking a full process of public consultation on that draft Bill in 2023, before finalising it for introduction into Parliament for debate.

Author: Brigid Horneman-Wren, Lawyer

Refusing mining approvals on human rights grounds

What you need to know

- In late 2022, the Queensland Land Court handed down a landmark decision recommending the refusal of mining and environmental approvals for a coal mine due partly 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 of coastal Aboriginal and Torres Strait Islander peoples.
- The decision gives insight on how the Land Court (and other decision makers) may factor First Nations human rights into their decision making.

What you need to do

Proponents of all new mining projects in Queensland (whether thermal coal mines or any other type) will need to address the Human Rights Act – from an Indigenous and a non-Indigenous perspective.

Land Court determines objections to mining lease based on human rights grounds

On 25 November 2022, President Kingham of the Land Court of Queensland handed down her decision in *Waratah Coal Pty Ltd v Youth Verdict Pty Ltd & Ors (No 6)* [2022] QLC 21. It considered Waratah Coal's applications for a mining lease and environmental authority for its proposed Galilee Basin coal mine development.

Multiple objections were made to these applications under the *Mineral Resources Act 1989* (Qld) and the *Environmental Protection Act 1994* (Qld). Some of these objections were on the basis that any decision to grant approval would be incompatible with human rights, including Aboriginal and Torres Strait Islander peoples' cultural rights.

The court recommended that the ultimate decision maker refuse both the mining lease and the environmental authority. This was based in part on the court's finding that approval of the mine would unjustifiably limit a number of human rights under the *Human Rights Act*.

This article focuses on how the court reached its conclusion that Indigenous cultural rights would be limited by the granting of approvals.

Objections related to impacts on human rights and other matters caused by the coal mining project

At the time of the hearing, the objections raised the following issues relevant to Indigenous cultural rights:

- climate change impacts – including scope 3 emissions from the coal extracted from the proposed mine;
- disputes about the economic and social benefits of the mine; and
- human rights.

The inquiries on the above matters are interrelated – the evidence and findings on the other topics were crucial to the Land Court's findings on the human rights issues.

What are Indigenous cultural rights under the Human Rights Act?

Section 28 of the *Human Rights Act* sets out the cultural rights of Aboriginal and Torres Strait Islander peoples:

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

1. Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
2. Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community:
   a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
   b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
   c) to enjoy, maintain, control, protect and develop their kinship ties; and
   d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
   e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
3. Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

The Explanatory Note to the *Human Rights Bill 2018* states that these rights are drawn from Article 27 of the International Covenant on Civil and Political Rights and Articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples.

The court considered the nature of these rights, including international jurisprudence on similar rights in other jurisdictions.

The court concluded that these Indigenous cultural rights are directed to both self-determination and survival of culture and recognise the holistic nature of the relationship between Indigenous groups and land, waters and resources. These rights specifically protect the rights to conserve and protect country and to develop and protect culture. Given that an important part of traditional law and custom is about passing down culture to the next generations these rights are also inherently intergenerational.

Climate change could limit Indigenous cultural rights, and that limit is unjustified

The court held that climate change could limit human rights. It applied a broad interpretation of the word "limit". In the court's view, there was a logical connection between the act of authorising the project and the climate-change-related harm caused by emissions from combustion of the coal. This meant the approval had the capacity to limit rights.

Climate change impacts (such as rising sea levels for coastal groups) were found to limit Indigenous cultural rights. For example, rising sea levels could displace Torres Strait Islander peoples from their country and erode their important coastal cultural sites.

The court then analysed whether the limit on Indigenous cultural rights was justifiable, having regard to the factors in section 13 of the *Human Rights Act*.

The court accepted that there were likely to be some economic and social benefits (for example, the provision of electricity in South East Asia) if the mine were to be approved. However, it considered that the benefits were uncertain and the proponent's evidence inflated the benefits. The court disagreed that burning coal was the only way to achieve some of these benefits.

On the other hand, preserving Indigenous cultural rights was considered to be of fundamental importance to Indigenous peoples, particularly given their history of dispossession and destruction of their culture. This was supported by the evidence of the Indigenous witnesses, who spoke about the importance of preserving culture and country, and the deep extent to which climate change would impact their culture and identity.

On balance, the court considered that the important purpose of the limitation – the economic and social benefits of the mine – was outweighed by the importance of preserving Indigenous cultural rights. The court therefore considered that approving the project was an unreasonable and unjustifiable limitation on Indigenous cultural rights.

Key insights:

Consider human rights when making future resource authority applications in Queensland and gather good evidence

It is clear that proponents cannot ignore the effect of the *Human Rights Act* on decision making on key approvals for new projects, particularly thermal coal. Good evidence about impacts and justification must be gathered. Decision makers could use statutory information request powers (such as section 386J of the *Mineral Resources Act*) to force proponents to prepare and provide this evidence.

Findings in relation to Indigenous cultural rights will depend on the evidence presented to the court about the impacts of climate change versus the economic and social benefits of the mine.

Proponents must ensure they understand this decision and its ramifications for resources development in Queensland. Whether an application for a key project approval is successful may depend on how well they understand the potential human rights impacts and the evidence they produce in response to those impacts.

In order to increase the likelihood of obtaining project approvals, proponents must be prepared to argue (supported by high quality evidence) that their project does not impact human rights – or that any impact is justified. Depending on the nature of the impact, this evidence may need to be compelling.

Authors: Martin Doyle, Lawyer; Sophie Pruim, Graduate; Tony Denholder, Partner

Full Court Tipakalippa decision – stakeholder consultation grows teeth

What you need to know

- The importance of consultation with First Nations stakeholders 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).

What you need to do

- Proponents of offshore gas projects should ensure that their consultation process meets the standards set by the Full Court and complies with NOPSEMA's new Guideline.
- These requirements will be relevant as offshore wind projects reach development stage.

Consultation with First Nations stakeholders

Consultation forms a key part of native title, cultural heritage, and environment and planning legislation around Australia. Many statutes require governments/proponents to consult stakeholders before they carry out activities that have the potential to impact their interests in land. However, legislative regimes offer little guidance about the manner and scope of the required consultation with First Nations stakeholders and/or with respect to interests in the sea.

The Full Court of the Federal Court has left no doubt about the significance of that opportunity, and the importance of doing it properly.

What was the Tipakalippa decision about?

Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 relates to Santos' offshore gas project in the Timor Sea, known as the Barossa Project.

In October 2021, Santos submitted an environmental plan to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) to permit it to conduct certain drilling activities in the course of the Barossa Project.

Santos was required to consult with any "person or organisation whose functions, interests or activities may be affected" by the Barossa Project (regulation 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth)).

In March 2022, NOPSEMA approved the drilling activities, and was satisfied that Santos had carried out all necessary consultations.

Mr Tipakalippa is an Elder, senior lawman and Traditional Owner of the Munupi Clan on the Tiwi Islands. He challenged NOPSEMA's decision on the basis that the Munupi Clan and surrounding Traditional Owners had a traditional connection to sea country in the Barossa Project area and should have been consulted under regulation 11A.

The Federal Court at first instance set aside NOPSEMA's decision to accept the environmental plan (*Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121).

Santos appealed the decision to the Full Federal Court, which dismissed the appeal.

What did the Full Court say about the consultation requirement?

Functions, interests or activities include "cultural and spiritual interests"

It was common ground that the Tiwi Islanders are Traditional Owners of the Tiwi Islands under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). However, there was no legal interest under the *Aboriginal Land Rights Act,* or claim/determination under the *Native Title Act* to the sea country that included the Barossa Project area.

The main question before the Full Court was whether the Tiwi Islanders' "functions, interests or activities" may have been affected by the Barossa Project (and should therefore have been consulted).

The Full Court said that the phrase "functions, interests or activities" should be assigned a broad meaning in order to give effect to the intention of the regulations that require an environment management plan. As such, "interests" cannot be confined to legal interests and must include "cultural and spiritual interests".

The Full Court held that the Tiwi Islanders were "relevant persons" and should have been consulted by Santos. It said:

- Mr Tipakalippa's and the Munupi Clan's interests in the sea country and the marine resources close to the Tiwi Islands are immediate and direct.
- They are interests of a kind that is well known in contemporary Australian law.
- Interests of this kind, which arise from traditional cultural connection to the sea, without any proprietary overlay, are acknowledged in federal legislation (such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) and have previously been considered by the courts.

Was the consultation obligation unworkable?

Santos described an obligation to consult under regulation 11A with First Nations people who have traditional connections to the sea and the marine resources of the Barossa Project area as a "complex, difficult and indeterminate" task. It submitted that the "sheer magnitude of the classes of persons who might need to be individually consulted would be unworkable".

The Full Court held that regulation 11A imposed an obligation that must be capable of practicable and reasonable discharge. It described consultation as a "real world" activity with specific purposes. In this context, the purpose is to ensure that Santos had ascertained, understood and addressed all environmental impacts and risks that might have arisen from the proposed activity.

The Full Court saw no difficulty with the proposition that the First Nations people with a traditional connection to the sea country and marine resources of the Barossa Project area can be reasonably ascertained. However, because the statutory obligation to consult must be reasonably capable of performance, the obligation to consult did not require exhaustive communications with each and every person.

What is required for consultation to be "genuine "?

The Full Court was critical of Santos's consultation efforts with the Tiwi Land Council, stating that a "consultation with First Nations groups may not be as simple (or quick) as sending an email with a package of information… and perhaps following up with one further email". Such consultations appear to be superficial or token, and "properly notified and conducted meetings" would be a better alternative.

The Full Court said that a titleholder must:

- give each relevant person "sufficient information to allow [them]… to make an informed assessment of the possible consequences" of the proposed activity on their "functions, interests or activities";
- "be genuine", demonstrated by giving relevant persons a reasonable time to identify the effect of the proposed activity on their functions, interests or activities and to respond to [the titleholder] with their concerns;
- "adopt appropriate measures in response to the concerns conveyed to the titleholder" during consultation.

The Full Court emphasised that the consultation obligation must be interpreted in such a way that it is reasonable and practicable. The court observed that processes developed from *Native Title Act* requirements illustrate how a seemingly rigid statutory obligation to consult persons holding a communal interest may operate in a workable manner.

NOPSEMA's new guideline

Following the Full Court's decision, 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). The new Guideline sets out how to identify relevant persons to consult and some general principles for effective consultation.

The Guideline's key principles for consultation are:

- **Communication**: Open and effective engagement should be undertaken during the consultation process to ensure that accurate and relevant information is provided and that any feedback is received and addressed openly.
- **Transparency**: Wherever possible, all aspects of the consultation process should be open and transparent, including the methods adopted, the relevant persons consulted, details of the activity and any points of interest or controversy. A productive consultation process will establish agreed information and feedback processes.
- **Collaboration**: An effective consultation process will have mutually beneficial outcomes for the relevant persons and the titleholder by approaching consultation as a collaborative process.
- **Inclusiveness**: Titleholders should recognise, understand and involve relevant persons early and throughout the life cycle of the activity.
- **Integrity**: The consultation process should foster respect and trust.

Key insights

This decision will affect expectations about consultation processes in other statutory contexts. Proponents engaging in consultation with First Nations people should remember that the right to be consulted is a meaningful and significant right. The Full Court's description of what is required for consultation to be "genuine" is a useful guide for any mandatory (or non-mandatory) consultation processes. For a proponent, the effort spent getting it right first time beats the difficulties involved in a second attempt.

Authors: Eric Zykov, Lawyer; Rebeca Hughes, Senior Associate; Clare Lawrence, Partner

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

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.
- In the last 12 months, the number of protection applications has fallen from an unprecedented high in the previous year. This bucks the trend of increasing numbers in recent years.

What you need to do

- Despite a slight slowdown in the number of applications in the past year, be aware that a protection application under the ATSIHP Act remains a powerful mechanism by which First Nations people can express dissatisfaction with cultural heritage protection outcomes under state or territory legislation.
- Do not underestimate the amount of work and time it takes to secure robust cultural 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.

While there is no statutory times frames for resolving applications, a decision usually takes more than 12 months.

Protection applications made in 2022 and 2023

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

We summarise these applications below.

New South Wales

Mount Pleasant Operation mine and The Pocket, near Muswellbrook: A section 10 application has been made by representatives of the Indigenous community of the Plains Clans of the Wonnarua People seeking the long-term preservation and protection of an area that contains a high concentration of Aboriginal sites.

The applicant attributes the threat of injury or desecration to the operation and extension of the Mount Pleasant Operation mine and rehabilitation work. See https://www.legislation.gov.au/Details/C2023G00382.

Western Australia

Burrup Peninsula and Dampier Archipelago: This section 10 application follows an earlier refusal by the Federal Environment Minister to make a section 9 emergency declaration, which would have stopped the construction of a fertiliser plant.

The application has been made on behalf of the Mardudhunera language group and the Kuruma/Mardudhunera language group to protect parts of the area known as Murujuga (or the Burrup Peninsula and Dampier Archipelago). The applicant seeks to protect the area from several proposed gas projects and the fertiliser plant project. The applicant primarily claims a threat of injury or desecration to many sacred sites and ancient rock carvings of Murujuga. See https://www.legislation.gov.au/Details/C2022G01016.

South Australia

Morrison Bore: A section 10 application has been made on behalf of an Anangu senior lore man to seek the protection of the area known as Morrison Bore and an area of a radius of six kilometres around Morrison Bore, in the Anangu Pitjantjatjara Yankunytjatjara Lands. The applicant claims that land of extreme spiritual and cultural significance is under threat from unauthorised occupants and the claim of ownership by another person. See https://www.legislation.gov.au/Details/C2023G00629.

Queensland

Djaki Kundu, near Gympie: This 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. See https://www.legislation.gov.au/Details/C2023G00579.

Point Lookout, North Stradbroke Island: A section 10 application has been made by eight Aboriginal Elders, together known as the Quandamooka Truth Embassy. The applicants seek to protect the area known as Point Lookout, on Stradbroke Island from the threat of the construction of a Whale Interpretation Facility. The applicants stated that the Facility is inconsistent with Aboriginal tradition, is culturally disrespectful to Quandamooka peoples and changes the cultural integrity of the area. . See https://www.legislation.gov.au/Details/C2023G00648.

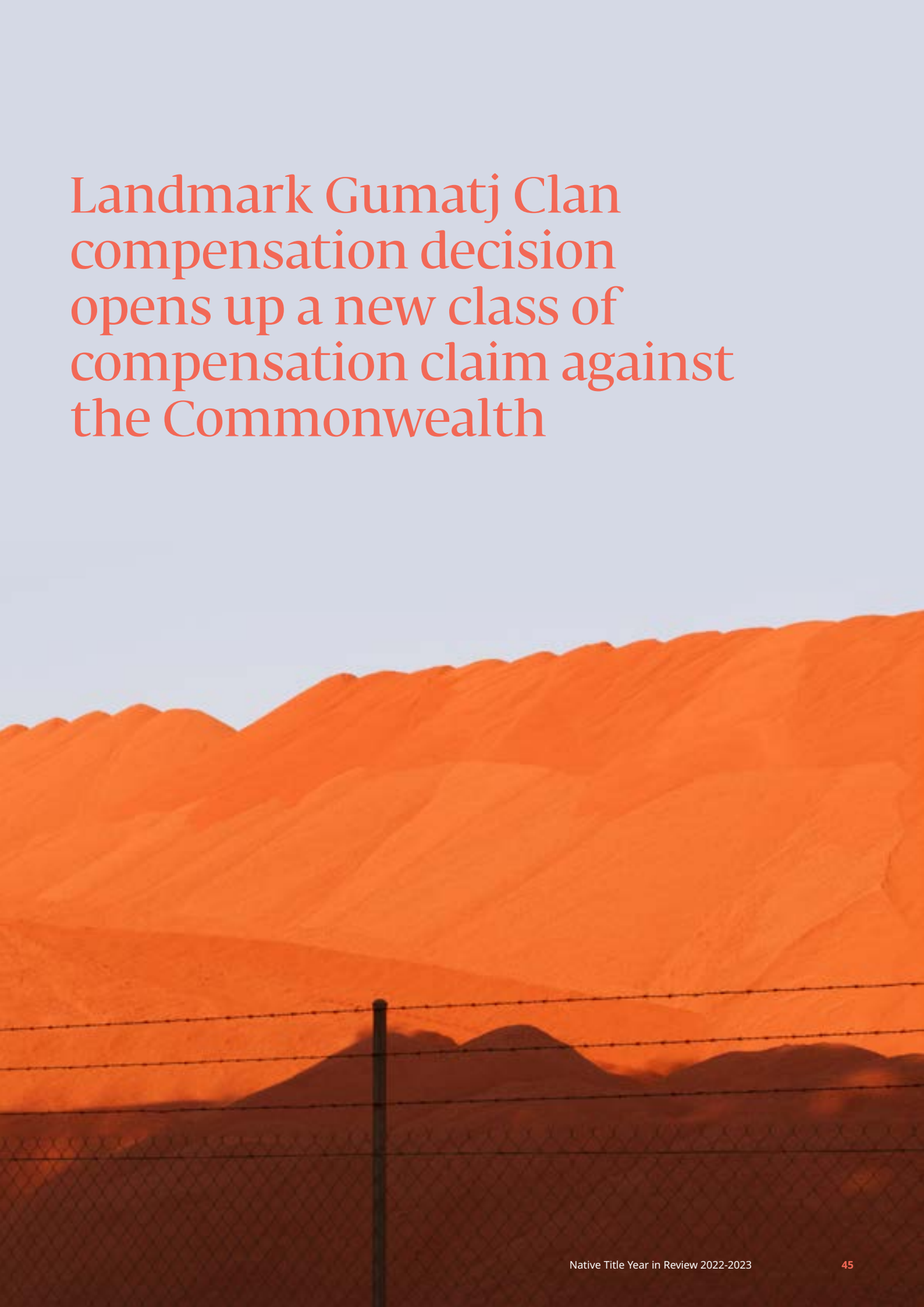
Legislative reform

We discuss progress on cultural heritage reform in our *Native Title Year in Review 2022-2023* article, "No new Federal cultural heritage legislation in 2023 - but change is coming". The Federal Government has re-signed the Partnership 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, while Stage 2 consultations are currently under way, the modernisation of cultural heritage protection legislation still has a long way to go.

In the meantime, protection applications under the ATSIHP Act remain a powerful mechanism by which First Nations people can express their dissatisfaction with the effectiveness of cultural heritage protection outcomes under state and territory legislation.

Author: Connor Davies, Senior Associate

Landmark Gumatj Clan compensation decision opens up a new class of compensation claim against the Commonwealth



What you need to know

- On 22 May 2023, the Full Court of the 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 contravening the just terms obligation imposed by section 51(xxxi) of the Australian Constitution.
- 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.
- This decision is the most important development in the native title compensation landscape since the Timber Creek decision. Subject to the appeal, it has significantly expanded the range of potentially compensable acts.
- The High Court's decision will be an important one, and will affect the Commonwealth's exposure to native title compensation liability well beyond the area claimed by the Gumatj Clan.
- The Commonwealth and the other parties will be actively engaged in the appeal process, while the rest of us await the decision with interest.
- If you are a non-Commonwealth land user operating on land or using minerals where native title was extinguished by federal legislation, you need to know whether liability for native title compensation has been passed on to you by legislation or in contracts.

Context of the Gumatj compensation claim – a test case for pre-1975 acts

The Gumatj Clan filed a claim in late 2019 seeking compensation from the Commonwealth and the Northern Territory in respect of the acquisition of land and minerals in the Gove Peninsula in the Northern Territory from the 1930s to the 1960s. This claim revisits the same Commonwealth actions that gave rise to the Yirrkala people's bark petitions to parliament and the Gove land rights case in – *Milirrpum v Nabalco*.

Since this claim was filled, we have written about it in all of our native title compensation updates: see our *Native Title Year in Review 2021-2022* article, "Native title compensation: Not much to see but plenty happening below the surface", *Native Title Year in Review 2020* article, "Native title compensation update: no claims tsunami but the tide has turned" and *Native Title Year in Review 2019* article, "Compensation update: What next for native title compensation?".

The claim is an important test case. It asserts that certain acts that affected native title were invalid because they amounted to an acquisition of property without providing "just terms", as required by section 51(xxxi) of the Australian Constitution. The Commonwealth will be liable for compensation only if the Gumatj Clan can prove invalidity because invalidity is necessary to trigger the validation (and associated compensation) provisions of the *Native Title Act*. The Commonwealth will not be liable for compensation if the acts were valid.

The parties agreed to have several threshold questions determined by the Full Court of the Federal Court before the claim progressed any further. This decision addresses those questions. The hearing took place over six days in October 2022. The Full Court was asked to consider whether the just terms requirement in the Constitution:

- applies to laws made by the Commonwealth under the territories power; and
- applies to acquisitions of native title rights and interests.

The resolution of the constitutional issues relates to the question of whether certain acts and dealings may be "compensable acts" under the *Native Title Act*.

The relevant Constitutional provisions		
The territories power	section 122	The Commonwealth has the power to make laws for the government of a territory.
The "just terms" requirement	section 51(xxxi)	The Commonwealth has the power to make laws with respect to the acquisition of property on just terms from any state or person for any purpose in respect of which Parliament has the power to make laws.

Full Court finds that the Commonwealth's acquisition of native title rights and interests other than on just terms is a compensable act

On 22 May 2023, the Full Court handed down its unanimous decision in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 73. The Full Court answered the constitutional questions as follows:

Does the just terms requirement contained in section 51(xxxi) of the Constitution apply to laws enacted pursuant to the "territories power" in section 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) and the Ordinances made thereunder?	Yes
If section 51(xxxi) does apply to such laws, can the extinguishment or impairment of native title by exercise of the Crown's radical title give rise to an acquisition of property for the purposes of section 51(xxxi) of the Constitution?	Yes

The just terms requirement applies to laws made under the territories power

The first constitutional question was whether the just terms requirement applies to a law made under the territories power for the compulsory acquisition of property.

The Full Court said that the territories power was subject to section 51(xxxi) of the Constitution. This issue came down to precedent and competing arguments about whether one High Court case overturned another.

Native title rights and interests are property and subject to the just terms requirement

The second constitutional question is more generally interesting: Is extinguishment or impairment of native title rights capable of being characterised as an "acquisition of property" for the purposes of section 51(xxxi) of the Constitution? The property in question was the non-exclusive native title rights potentially remaining after exclusive native title rights were extinguished by the grant of pastoral leases in the 1880s.

The Commonwealth and the Northern Territory argued that the acquisition of native title rights and interests does not have to be made on just terms. That is, there is no acquisition of property when rights are extinguished or diminished in a manner to which they were always susceptible. In particular, they observed, native title rights and interests are inherently susceptible to extinguishment or impairment by an inconsistent exercise of the Crown's radical title. They pointed out that the High Court has consistently described native title rights and interests as "inherently fragile" or "inherently weaker".

The Full Court rejected the governments' argument. It said that the language of fragility conveyed no more than an acknowledgment that the Crown's assertion and exercise of powers to control ownership of land will prevail over the rights of the native title holders. The Full Court did not accept that native title rights and interests were "inherently defeasible".

The Full Court said that native title rights and interests are proprietary in nature and constitute "property" for the purposes of section 51(xxxi). A grant or act that extinguishes native title rights and interests is capable of amounting to an acquisition of property within the meaning of section 51(xxxi). Accordingly, any extinguishment of native title rights and interests that does not provide just terms is an invalid act.

High Court – application for special leave to appeal filed by the Commonwealth

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.

What does this mean for the Gumatj claim?

The Gumatj Clan has pleaded the following acts as compensable acts:

- the vesting of minerals in the Crown under section 107 of the *Mining Ordinance 1939* (NT);
- the grant of a 1938 lease to the Methodist Missionary Society of Australia Trust pursuant to the *Aboriginals Ordinance 1918-1937* (NT); and
- the grant of special mineral leases in 1958 and 1963 pursuant to the *1939 Ordinance*, and in 1969 pursuant to the *1939 Ordinance* and the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT).

Subject to the outcome of the appeal, the Full Court's decision allows the Gumatj Clan to progress their claims that the acts are "compensable acts" under the *Native Title Act*. This is on the basis that they were acquisitions of property other than on just terms (and therefore invalid under section 51(xxxi) of the Constitution), and validated as "past acts" by the *Native Title Act,* thereby triggering a right to claim compensation from the Commonwealth.

However, there are still a number of unresolved questions in the Gumatj Clan's parallel native title claim. Even if the High Court resolves the constitutional issue in their favour, they still have significant hurdles to overcome. For the Gumatj Clan's compensation claim to succeed, they must prove that they hold native title in the area (a claim contested by other clans) and that there is a native title right to take and use minerals. Finally, the extent to which any native title holders have already been compensated for the Government's acts is also a live issue.

We expect that this claim will not be resolved for a number of years.

Key insights

Subject to the outcome of the appeal, the Full Court's decision will likely lead to new compensation claims being filed. Before this decision, the courts had considered only whether post-1975 acts that offended the *Racial Discrimination Act 1975* (Cth) were compensable. This decision recognises a new category of invalid acts: Commonwealth acquisitions of native title rights and interests that did not provide just terms in accordance with section 51(xxxi) of the Constitution (including those that occurred before 1975).

The High Court's decision will be an important one and will, affect the Commonwealth's exposure to native title compensation liability well beyond the area claimed by the Gumatj Clan. The Commonwealth and the other parties will be actively engaged in the appeal process, while the rest of us await the decision with interest.

If you are a non-Commonwealth land users operating on land or using minerals where native title was extinguished by Commonwealth legislation, you need to know whether liability for native title compensation has been passed on to you by legislation or in contracts.

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

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

What you need to know

- There are eight active native title compensation claims across Australia and a number of compensation settlement agreements being negotiated by the Queensland government under its Native Title Compensation Settlement Framework.
- The Full Federal Court's recent decision on constitutional issues in the Gumatj compensation claim concerns the Commonwealth's potential liability for pre-1975 acts that extinguish native title. The Commonwealth has applied for special leave to appeal to the High Court.
- 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). The "potential test case" mantle has now been passed to the Yindjibarndi compensation claim (WA) and the McArthur River Project claim (NT) – both currently listed for hearing.

What you need to do

- Consider whether you should join a compensation claim if it concerns interests granted to you (even if those interests are no longer current). This is particularly relevant where government has made you liable for any compensation payable for that interest or tenure.
- The likelihood and outcome of any compensation claim may also inform your decision whether to engage in agreement-making for legacy projects that do not currently benefit from a contractual compensation release.
- Keep up to date with the progress of active native title compensation claim test cases, as they may have ramifications for land users across Australia.

Developments since Timber Creek

This year we saw an extremely significant development in the law relating to native title compensation with the Full Federal Court's decision in the Gumatj claim (*Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75). See our article "Landmark Gumatj Clan compensation decision opens up a new class of compensation claims against the Commonwealth". This decision relates to whether certain acts are compensable and not to the calculation of compensation.

The High Court's judgment in *Northern Territory v Griffiths* (2019) 269 CLR 1 (Timber Creek) remains the only judicial consideration of principles relating to the calculation of native title compensation.

We have regularly commented on developments following the High Court's Timber Creek decision: see our *Native Title Year in Review 2021-2022* article, "Native title compensation: Not much to see but plenty happening below the surface" and *Native Title Year in Review 2020* article, "Native title compensation update: no claims tsunami but the tide has turned".

There are currently eight active native title compensation claims across Australia (as at 25 July 2023).

We summarise significant developments from the last 12 months below.

Active compensation claims

Gumatj Compensation Claim – Northern Territory

In November 2019, Dr Galarrwuy Yunupingu filed a native title compensation claim (NTD43/2019) on behalf of the Gumatj Clan seeking compensation from the Commonwealth and the Northern Territory in respect of the acquisition of land and minerals in the Gove Peninsula from the 1930s to the 1960s.

The claim stands as a test case for whether certain pre-1975 acts of the Commonwealth are compensable as an acquisition of property other than on "just terms" as required by section 51(xxxi) of the Constitution. In the light of the Commonwealth's application for special leave to appeal to the High Court, it will be some years before the pre-1975 question is finally resolved.

A number of unresolved questions remain in the Gumatj Clan's parallel native title claim. Even if the High Court resolves the constitutional issue in their favour, they still have significant hurdles to overcome. For the Gumatj Clan's compensation claim to succeed, they must prove that they hold native title in the area (a claim contested by other clans) and that there is a native title right to take and use minerals. Finally, the extent to which any native title holders have already been compensated for the Government's acts is also a live issue.

We expect that this claim will not be resolved for a number of years.

McArthur River Project Compensation Claims – Northern Territory

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 applicants claim compensation against the Northern Territory for a range of post-1993 acts to which the non-extinguishment principle is said to apply.

In March 2023, the court refused an application for leave to amend the geographic area of the claim, on the basis that it would have been contrary to section 64(1) of the *Native Title Act* to include areas not covered by the original compensation application (*Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia* [2023] FCA 303). Accordingly, in June 2023, the applicants filed a second compensation claim over the expanded geographic area (NTD16/2023, called the McArthur River Project Compensation Claim 2).

The hearing of the original claim began in June 2023 and continues in November 2023. The second claim is yet to be listed.

Tjiwarl Compensation Claims (mostly settled) – Western Australia

The Tjiwarl compensation proceedings, which consisted of three separate compensation claims by the Tjiwarl people heard together (WAD141/2020, WAD142/2020 and WAD269/2020), were commenced in June 2020 (Tjiwarl Compensation Claims).

The Tjiwarl people claimed compensation in respect of the grant of a number of interests in Western Australia's Goldfields region – including 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.

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.

On 22 May 2023, the Western Australian government confirmed that it had reached "a historic settlement" for all three of the Tjiwarl Compensation Claims and had entered into an Indigenous Land Use Agreement with the Tjiwarl Aboriginal Corporation, known as the Tjiwarl Palyakuwa (Agreement) (Media statement, 22 May 2023).

The State has made the Tjiwarl Palyakuwa (Agreement) publicly available. It provides for the full and final settlement of the State's liability for compensation to the Tjiwarl people in relation to the acts the subject of the Tjiwarl compensation proceedings (and other acts), and for the resolution of the Tjiwarl compensation proceedings to the extent the Tjiwarl people claim compensation against the State of Western Australia.

Under the agreement, the Western Australian government made a number of commitments, including to:

- provide monetary compensation in the amount of $25.5 million;
- transfer ownership of a number of land parcels to the Tjiwarl people;
- create and expand the Tjiwarl Conservation Estate;
- recognise exclusive native title rights under section 47C of the *Native Title Act* within the Tjiwarl Conservation Estate;
- support Tjiwarl-specific future act processes (eg for the grant of certain resource tenements on Tjiwarl country); and
- provide funding to open up further economic opportunities for Tjiwarl native title holders.

Notably, the agreement expressly excludes any compensation liability that mining tenement holders may have for mining tenements granted or renewed after the commencement of section 125A of the *Mining Act 1978* (WA) on 11 January 1999 to which Part 2, Division 3, Subdivision M of the *Native Title Act* apples. This remains a live issue.

Yindjibarndi Ngurra Compensation Claim – Western Australia

In February 2022, the Yindjibarndi Ngurra Aboriginal Corporation RNTBC – a registered native title body corporate for the Yindjibarndi people – filed a native title compensation claim (WAD37/2022) in respect of the grants of various mining tenements associated with the FMG Solomon Hub mining operations in the Pilbara region of Western Australia.

The media has reported (AFR and West Australian, both on 24 February 2023) that the applicant is seeking a 10% royalty, which would amount to approximately $500 million per year. This is in stark contrast to the Pilbara standard of a 0.5% royalty. Given Fortescue's highest settlement offer (as at 25 February 2023) was $4 million per year over the life of the mine (which is estimated to last at least another 20 years), it is evident that the expectations of the parties are a long way apart.

This claim may well become the most important test case for the Western Australian mining industry.

The matter has been listed for a hearing from 7 to 25 August 2023, and a conference from 18 to 22 September 2023.

Malarngowem Compensation Claim – Western Australia

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 Western Australia. Notably, this claim relates to only one compensable act – being the grant (and any extensions of the term) of an exploration licence in 2016 to Kimberley Granite Holdings Pty Ltd.

The limited nature of this claim initially ensured speedy progress through the Federal Court. Preservation evidence was taken in late 2021, and the matter was set down for hearing in late 2022. These dates were however vacated in mid-2022 and the matter is subject to mediation before the Federal Court Registrar.

Antakirinja Matu-Yankunytjatjara Compensation Claim – South Australia

The Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC is the only active compensation claim in South Australia. It covers over 60,000 square kilometres of land in central South Australia (SAD61/2022). The application seeks compensation for over 1,000 freehold grants, pastoral leases, Crown leases, mining tenements and the construction of public works and roads in the claim area, and potentially stands as a test case for compensation in South Australia.

The parties are currently preparing for a hearing of preservation evidence.

Pitta Pitta Compensation Claim – Queensland

The Pitta Pitta Compensation Claim (QUD327/2020) is the only active compensation claim in Queensland. It has been beset by difficulties relating to authorisation and legal representation and has not progressed significantly in the last 12 months.

The claim relates to hundreds of compensable acts spanning three million hectares of land in Queensland. It has the potential to be a test case on the assessment of compensation for the grant of exploration and mining interests in Queensland.

In 2021-2022, the claim was delayed by applications from the State and the Pitta Pitta Aboriginal Corporation RNTBC – which holds the Pitta Pitta people's determined native title – to strike out or summarily dismiss it on the basis of lack of authorisation or lack of standing. These applications were dismissed in April 2022 (see more about the decision in our *Native Title Year in Review 2021-2022* article, "Native title compensation: Not much to see but plenty happening below the surface"). In August 2022, the Full Court dismissed the RNTBC's application for leave to appeal (*Pitta Pitta Aboriginal Corporation RNTBC v Melville on behalf of the Pitta Pitta People* [2022] FCAFC 154).

The matter was then set for the hearing of lay evidence in mid-2023 and expert evidence in late 2023. Unfortunately, the applicant then lost their legal representation in early 2023 and the court vacated the hearing dates. In the meantime, the matter has been in mediation before Federal Court Registrars McGregor and Ingram since May 2023.

Queensland government Native Title Compensation Settlement Framework

The Queensland government has released the Native Title Compensation Settlement Framework, which we wrote about in our *Native Title Year in Review 2021-2022* article, "Native title compensation Not much to see but plenty happening below the surface".

According to the Queensland government, the Framework offers a pathway for native title holders seeking to negotiate and settle native title compensation by agreement. The negotiation process supports the principles of self-determination and the right to free, prior and informed consent when making agreements.

The framework is guided by six principles:

- Settlement of compensation is by negotiation rather than litigation where possible.
- Compensation settlement agreements are voluntary and deliver fair outcomes.
- The method used to value compensation is consistent and repeatable.
- Arrangements are monetary, but can include non-monetary components if requested by the claimants and agreed by both parties.
- Settlements are financially sustainable and provide opportunities for self-determination for native title holders now and in the future.
- Settlement agreements are registered with the National Native Title Tribunal for accountability and transparency.

We are aware of at least two compensation agreement negotiations to date:

- **Jangga:** The Jangga people are negotiating an agreement in partial satisfaction of the State's compensation liability and have arranged an authorisation meeting to discuss it (see the public notice: https://koorimail.com/wp-content/uploads/NNTT-805.pdf).
- **Iman:** The Iman people have reached in principle agreement for an interim payment in partial satisfaction of the State's compensation liability and held an authorisation meeting to discuss it in June 2023 (see the public notice: https://koorimail.com/wp-content/uploads/NNTT-802-1.pdf).

Claims dismissed in 2022–2023

In the past 12 months, a number of compensation claims have been dismissed for lack of authorisation or failure to identify compensable acts.

Wirrilimarra Compensation Claim – Western Australia

The Wirrilimarra Compensation Claim (WAD157/2021) was commenced in July 2021 by Archie Tucker on behalf of the Wirrilimarra Banyjima Custodians Aboriginal Corporation in relation to over 10,000 square kilometres in the Pilbara region of Western Australia.

In November 2022, the Federal Court dismissed the compensation application on the basis that it had "some fatal flaws" that could not be cured (*Tucker v State of Western Australia* [2022] FCA 1379, [6]). Namely, the absence of lawful authorisation of the compensation application required under section 61(1) of the *Native Title Act* and the failure to identify any compensable act together rendered it lacking any reasonable prospect of success.

Yilka Compensation Claim – Western Australia

The Yilka Compensation Claim (WAD266/2020) was commenced by a single applicant, Mr Bruce Smith, whose authority was questioned by the State and the PBC. We wrote about the authorisation problems in *our Native Title Year in Review 2021–2022* article, "Native title compensation: Not much to see but plenty happening below the surface". The compensation application was consequently dismissed on 19 August 2022 (*Smith on behalf of the Wati Tjilpi Ku on behalf of the Yilka Sullivan Edwards People v State of Western Australia (No 2)* [2022] FCA 959).

Bodney Compensation Claims – Western Australia

The Bodney 1 (Burswood) (WAD 6289/1998), Bodney 2 (Kings Park) (WAD 6290/1998) and Bodney 3 (Bold Park) (WAD 6291/1998) compensation claims date from 1998 but were never notified. On 13 June 2022, the court ordered that, if no submissions were received, the claims would be dismissed. As no submissions were filed, the claims were dismissed on 27 July 2022.

Where to from here?

It is not clear whether the next 12 months will see any additional new law in this space, with several likely claims being settled or moving to Federal Court mediation rather than hearing.

This approach aligns with the key outcome of the National Guiding Principles for Native Title Compensation Agreement agreed by all federal, state and territory ministers in 2021 – namely 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: https://www.niaa.gov.au/sites/default/files/publications/national-guiding-principles-native-title-compensation-agreement-making.pdf.

With the settlement of the Tjiwarl compensation claims, the "potential test case" mantle has now been passed to the Yindjibarndi compensation claim (WA) and the McArthur River Project claim (NT) – both currently listed for hearing.

We also await the outcome of the possible High Court decision on the Commonwealth's liability for pre-1975 acts in the Gumatj compensation claim appeal.

Authors: Leanne Mahly, Lawyer; Joel Moss, Senior Associate; Leonie Flynn, Expertise Counsel

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

What you need to know

- Section 47C of the *Native Title Act* allows for prior extinguishment to be disregarded for 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*.

What you need to do

- Parties that hold interests in land covered by national parks and other similar reserves should take note not only of the possibility of section 47C applying to future determinations, but also of the potential to re-open current determinations to change the outcome for a park area.

Native Title Act reforms allow extinguishment to be disregarded for national parks

The *Native Title Act* was amended in 2021 to insert section 47C, which allows extinguishment to be disregarded for areas covered by national parks and similar reserves (also known as park areas).

Previously, the High Court had held in *Western Australia v Ward* (2002) 213 CLR 1 that the designation and vesting of certain kinds of reserves extinguished native title. Section 47C allows extinguishment by reservation – and any other form of prior extinguishment for the area – to be disregarded, effectively sidestepping the court's decision.

However, unlike sections 47, 47A and 47B, which simply do or do not apply in accordance with their terms, in order for section 47C to apply, the claimants must reach an *agreement* with the government that created the park or reserve. All section 47C agreements must be publicly notified.

It is important to note that a section 47C agreement can be reached for areas which have already been determined – assuming that the government party agrees – using the revised native title determination application process already available in the *Native Title Act*.

First determination made including section 47C agreement

On 15 June 2022, the Federal Court made a determination by consent in *Ward, on behalf of the Pila Nature Reserve Traditional Owners v State of Western Australia* [2022] FCA 689.

Prior to the *Native Title Act* amendments that introduced section 47C, the claim group had made a claim for compensation for the vesting of the Pila (formerly Gibson Desert) Nature Reserve. This reserve had (per the High Court in *Ward*) extinguished native title.

While the compensation application was on foot, the parties became aware of the intention to introduce section 47C. The claim group and the WA government agreed as part of the settlement package that the extinguishment could be disregarded pursuant to section 47C, and began negotiating on that basis even before the commencement of the *Native Title Act* amendments.

The parties subsequently entered into a formal section 47C agreement. The Federal Court made orders by consent recognising non-exclusive native title over the area of the nature reserve and disregarding prior extinguishment.

Future section 47C agreements flagged in a number of recent determinations

Since the *Pila Nature Reserve* decision, only one other decision has included a determination under section 47C, *Drill (on behalf of the Purnululu Native Title Claim Group) v Western Australia (No 2)* [2022] FCA 1538. However, there has been a recent trend in determinations flagging the future application of section 47C to park areas.

As we noted in our *Native Title Year in Review 2020* article "Native Title Act reforms finally enacted", part of the purpose of section 47C is to allow existing determinations to be re-opened to obtain the benefit of this section. This is, ordinarily, by way of a revised native title determination application under sections 13(1)(b) and 13(5) of the *Native Title Act*.

A recent example is *Austin on behalf of the Eastern Maar People v State of Victoria* [2023] FCA 237. In that case, it was specifically noted in the determination that section 47C could apply to certain park and reserve areas in the determination, but that no agreement had been reached by the date of the determination. The parties agreed to negotiate in good faith about these areas – and that the State and Commonwealth would not oppose the Eastern Maar People amending their original application to include those areas, or their bringing a new application for them.

The State of Victoria publicly notified the intention to enter into a section 47C agreement on 2 June 2023.

The Cape York United #1 proceedings, from which multiple determinations have been made, have also included similar clauses in their determinations indicating that the parties were intending to negotiate a section 47C agreement and making an application to revise the determination.

According to the NNTT website, no revised native title determination applications have yet been made to take advantage of section 47C. We will continue to monitor this.

The Western Australian government recently announced it had settled compensation claims made by the Tjiwarl people with a comprehensive settlement agreement known as the Tjiwarl Palyakuwa. This agreement includes the creation of a new park, the Tjiwarl Conservation Estate, from some former reserve areas and an additional area excised from a pastoral lease. It also includes an agreement, pursuant to section 47C, that section 47C would apply to that park, allowing exclusive native title to be recognised over it.

What's next?

It is likely that more section 47C agreements will be reached in those state and territories where parks and reserves would otherwise extinguish native title.

When such agreements are reached, it is not just the extinguishment by the creation of the park area that is disregarded, but all prior extinguishment on the relevant land (in a similar way to sections 47, 47A and 47B).

This will affect current claims as well as existing determinations where extinguishment has already been determined but may be re-opened under section 47C via a revised native title determination application. Proponents with tenure or prospective projects in current or former "park areas" may find that this kind of negotiation forms part of the process towards a consent determination.

Key insights

Outside of current claims, proponents should keep track of public notices to see whether relevant governments are intending to enter into section 47C agreements that could affect their interests. As noted above, the relevant government must give public notice of proposed section 47C agreements. It must also provide "interested persons" with a three-month window to make comments under section 47C(6) before entering into any such agreement.

A public notice may be the first a proponent hears of the proposed agreement, so the opportunity for comment should not be wasted.

Proponents with tenure or prospective projects on areas that are, or have historically been, park areas will need to consider whether future grants, renewals and operations may require *Native Title Act* compliance. They should also consider whether a section 47C determination might trigger unanticipated native title compensation liability. On the other hand, compensation liability for the historical extinguishing acts may be reduced to reflect the changed circumstances.

Author: Martin Doyle, Lawyer

Recent decision highlights confusion around expert evidence

What you need to know

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)* [2002] FCA 827) .

The court clarified when experts could rely upon other experts – and when the opinions of those other experts are admissible, including when they are not themselves called upon to give evidence. However, the court noted that this did not extend to all expert opinion being admissible when the author is not called.

What you need to do

Consider the implications of this case when briefing experts to prepare reports. It could mean the difference between certain evidence being admissible or not.

Native title expert evidence again in focus for the Federal Court

As we noted in our *Native Title Year in Review 2021-2022* article, "Proving connection becomes harder in 2021", often an important role of expert witnesses is to assist the court in understanding the evidence of Traditional Owners, as well as the anthropological and genealogical data. Expert witnesses are also important generally for providing the court with the inferences that may properly be drawn from that material.

However, expert evidence still remains subject to the usual rules of evidence under both the common law and the *Evidence Act 1995* (Cth). Generally, section 79(1) of the *Evidence Act* provides that expert evidence is admissible to the extent it is wholly or substantially based on specialised knowledge obtained through a person's training, study or experience.

Parties regularly contest the admissibility of the evidence of the many experts who are retained by claim groups, government parties and other respondents in native title proceedings.

Western Kangoulu people wished to rely upon various reports

The Western Kangoulu people claim native title in the area around Emerald in central Queensland. In 2017, the court set the claim down for a trial of separate questions. These questions related to the continued existence of native title and who, if anyone, holds native title rights and interests in the area.

The applicant had proposed to adduce both oral and written evidence from a number of witnesses – in particular, expert anthropological evidence from Dr Richard Martin.

The applicant also proposed to adduce additional expert reports that had been prepared in the course of nearby proceedings, which, along with the Western Kangoulu people's claim, formed a cluster of native title claims known as the Ganggalu cluster. Dr Martin had been involved in the preparation of some, but not all, of these additional reports, and the applicant proposed to call only Dr Martin.

The State challenged both Dr Martin's evidence and the additional expert material on a number of grounds.

Court rules in favour of admissibility generally, but not without caveats

First issue: Whether Dr Martin merely adopted the opinion of others

The court dismissed the State's objection that Dr Martin merely adopted the opinion of others. While it was correct to say that mere adoption and restatement of an opinion does not involve the application of specialised knowledge, that was not the case here.

Dr Martin had considered the opinions of other qualified persons, both in historical literature and more recent reports, and had made it clear where he had done so. These other expert opinions formed the basis for his own independent opinions about the relevant facts.

This is normal – experts often refer to, and rely upon, the existing state of knowledge in a field. It would be impractical to require experts to base their opinions only on knowledge of information that has been independently proved.

To the extent that Dr Martin referred to historical literature as it was presented in the additional expert materials, this was acceptable shorthand for referring to the material in that literature instead of directly citing the original sources.

Furthermore, as Dr Martin is a co-author of some of the additional expert material, which represents the joint concurrent opinions of multiple experts, it could not be said that Dr Martin (in relying upon it) was merely relying upon the opinions of others.

Second issue: Whether the additional material was inadmissible as hearsay or not acceptable basis material

The court also rejected the contention that Dr Martin could not rely upon the opinions of others where those other opinions would not be admissible under section 79 of the *Evidence Act*.

In a circular manner, these opinions were themselves admissible to prove the basis of Dr Martin's opinion (and so were admissible other than as opinion evidence). The weight given to these materials would be a matter for submissions.

Third issue: Whether hearsay is admissible to show harmony with expert witness's opinion

The court rejected the applicant's submission, instead holding that some of the expert material was not admissible on the basis that it would show harmony with Dr Martin's opinion.

Unlike the additional material referred to in the second issue, Dr Martin had not relied upon certain additional reports in reaching his own opinions. Therefore, those reports were relevant only to the extent that the opinions expressed were truly the opinions held by the original author. In other words, they were inadmissible hearsay, since reliance depended upon the truth of the assertion that they were, in fact, the original author's opinion.

Key insights:

Decision highlights confusion about admissibility of expert opinion and the material it is based on

Expert opinion is a well-known area of evidence law that is regularly used in native title proceedings. However, it is not always easy to understand whether something is properly admissible when multiple experts have been retained over the course of multiple long proceedings. This is especially so where those multiple experts seek to rely upon each other in reaching their own opinions.

Parties should note the underlying principles of this case:

- Expert opinion is not inadmissible merely because it relies upon the expert opinion of others.
- It is acceptable for experts to refer to previous expert reports that they co-authored to the extent that the final report describes their own opinion.
- It is also acceptable to refer to previous reports as shorthand for referencing the material discussed in them.
- Where an expert refers to other material, that other material is admissible.
- Where an expert does not refer to certain material, that material is not admissible merely to show that the expert's opinion is supported by it.

If you wish to have certain material admitted, consider briefing an expert who can consider the material and potentially rely upon it.

Author: Martin Doyle, Lawyer

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

What you need to know

- 2022 was a big year for good faith challenges in the context of the right to negotiate process. Three of the six challenges resulted in a finding that a grantee party had failed to negotiate in good faith.
- In each good faith challenge, the Tribunal found that various kinds of conduct evidenced a lack of good faith, namely: a pattern of aggressive and unconstructive negotiation correspondence from the grantee party's representative; a pattern of unreasonable negotiating behaviour and a failure to engage in adequate information sharing with the native title party; and the grantee party's unilateral approach to negotiations.
- The good faith requirement in the right to negotiate process appears to be a struggle for some small-scale miners.

What you need to do

- A proponent's conduct during the right to negotiate process is always under scrutiny. Proponents must make genuine attempts to seek the native title parties' agreement and be prepared to show the Tribunal that they have done so.
- Proponents must constructively engage in negotiations, including by appropriate information sharing, providing timely responses, and engaging with any concerns raised in relation to cultural heritage.
- Smaller operators should not assume that their size will exclude them from the good faith requirements in responding to requests for information.

Three out of six good faith challenges successful

Of the six good faith challenges brought before the National Native Title Tribunal in 2022, the Tribunal found that the relevant mining proponent had failed to negotiate in good faith in three cases. In those three cases, the Tribunal dismissed the application under section 148 of the *Native Title Act* on the basis that it lacked jurisdiction.

Recap of the right to negotiate process and "good faith"

The right to negotiate (RTN) process in the *Native Title Act* applies to the grant of mining and petroleum tenements in certain circumstances. Where the process applies, the applicant (ie the grantee party) and the relevant State government are required to negotiate with the native title party in good faith with a view to obtaining the native title party's agreement to the grant of the tenement.

If the parties have not reached agreement within six months of the notification day specified in the section 29 notice, any of the negotiation parties can apply to the Tribunal for a determination as to whether the tenement may be granted.

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

Miner's pattern of aggressive and inflexible conduct demonstrates an absence of good faith

In *Kevin Alfred de Roma v Western Yalanji Aboriginal Corporation RNTBC* [2022] NNTTA 40, the Tribunal found that the mining lease applicant (Mr de Roma) failed to negotiate in good faith as a result of behaviour which was "aggressive" and "inflexible" and which was based on misconceptions about native title.

Mr De Roma commenced negotiations with Western Yalanji Aboriginal Corporation (***WYAC***), following the issue of a section 29 notice by the State in March 2021. After more than six months of negotiation, the parties had not reached agreement and Mr de Roma applied to the Tribunal for a determination that the future act may be done.

During the Tribunal proceedings, WYAC's representatives alleged that Mr de Roma had failed to negotiate in good faith. Although noting that the nature of the native title party's contentions made it difficult "to understand the basis for its assertion of a lack of good faith by the grantee party", the Tribunal agreed that Mr de Roma had not negotiated in good faith.

The Tribunal considered the whole of Mr de Roma's conduct on an objective basis. In doing so, it noted that Mr de Roma's representative, Mr Withers, showed a pattern of aggressive and unconstructive negotiation correspondence. For example, Mr Withers had mocked the native title party, refused to assist with consultation and consent costs, and had taken an inflexible stance based on a misunderstanding of WYAC's native title rights. Overall, the grantee party had failed "to constructively engage in negotiations" and had an "overall negative impact on the negotiation process".

As a result of Mr de Roma's failure to constructively engage in negotiations and Mr Withers' vehement commentary, the Tribunal concluded that the grantee party's overall behaviour evidenced a lack of good faith.

"Small and impecunious" gemstone miner fails to negotiate in good faith

In *Pathfinder Exploration Pty Ltd v Malarngowem Aboriginal Corporation RNTBC* [2022] NNTTA 52, the Tribunal considered whether a small mining company (Pathfinder) failed to negotiate in good faith due to deficiencies in engaging with the native title party and information sharing.

Pathfinder had applied for a mining lease in respect of an area north of Halls Creek in Western Australia in which it intended to mine for iolite, a semi-precious gemstone. The State issued a section 29 notice on 25 September 2019, at which time the relevant native title parties were the Malarngowem people and the Ngarrawanji people.

The parties subsequently commenced negotiations; however, these stalled at several points as a result of:

- complications associated with COVID-19 and with the involvement of two native title parties; and
- the initial negotiation budget put forward by the native title parties, which Pathfinder considered "staggering" and which in its view required "reconsidering the potential economics of the project", but which the native title holders considered was not intended to be prohibitive but was to meet the costs of obtaining free, prior and informed consent.

The parties were ultimately unable to reach agreement, and on 7 December 2021 Pathfinder made a future act determination application to the Tribunal.

During the Tribunal proceedings, the native title parties alleged that Pathfinder did not negotiate in good faith. The Tribunal ultimately agreed on the basis that Pathfinder had, at various points, failed to engage properly with the native title parties or provide sufficient information in a timely manner.

In failing to respond to the native title parties' requests for further information, the Tribunal observed "a lack of regard for their basic information [and/or] negotiation requirements". Further, the fact that Pathfinder was a "small and impecunious" miner did not assist their case, as the Tribunal observed that there was no compelling reason why it could not have provided the information requested.

Miner's "unilateral" approach to negotiations demonstrates an absence of good faith

In *Mobile Concreting Solutions Pty Ltd & Another v Wintawari Guruma Aboriginal Corporation RNTBC* [2022] NNTTA 56 the Tribunal found that the grantee party had failed to negotiate in good faith because it had taken a "unilateral" approach to negotiations.

In this case, Mobile Concreting sought a mining lease for a small area located northwest of Tom Price, Western Australia, in respect of which Wintawari Guruma was the relevant native title party. The application was notified by the State under section 29 on 28 May 2021 and the parties subsequently commenced negotiations.

The parties were unable to reach agreement. On 3 March 2022, Mobile Concreting made a future act determination application to the Tribunal seeking a determination that the act could be done.

During the proceedings, the native title party alleged that Mobile Concreting had failed to negotiate in good faith because it engaged in unilateral conduct and failed to engage with the native title party's concerns regarding cultural heritage.

The Tribunal ultimately agreed that Mobile Concreting had failed to negotiate in good faith because its conduct "did not reflect a subjective honesty of intention and an objective standard of overall reasonableness in the circumstances".

The Tribunal made this finding on the basis of a pattern of unreasonable negotiating behaviour by Mobile Concreting which include:

- "unilateral conduct which [harmed] the negotiating process", evidenced by, for example, its failure to confer with the native title party in relation to mediation, or its willingness to assist with negotiations; and
- failure to engage with the native title party's concerns in relation to cultural heritage, including by seeking a section 18 approval in lieu of cultural heritage protections, and provision of draft agreements to the native title party that did not adequately address cultural heritage protections.

Santos passes the good faith test

In a good faith challenge brought by the Gomeroi native title party against Santos in relation to petroleum production leases required for the Narrabri Gas Project, the Tribunal concluded that there was no basis for finding that Santos had failed to negotiate in good faith. An appeal from this decision will be heard by the Full Federal Court in August 2023. For more information, see our article "Santos wins strongly in National Native Title Tribunal, but Full Federal Court will hear Gomeroi appeal."

Authors: Samantha Marsh, Lawyer; Joel Moss, Senior Associate; Clare Lawrence, Partner

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

What you need to know

In December 2022, the National Native Title Tribunal handed down its determination in *Santos NSW Pty Ltd and Another v Gomeroi 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 Gomeroi 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 ongoing 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, as it will deal with the conduct of relatively sophisticated parties over a long period of time.

Right to negotiate and failure to reach agreement

The National Native Title Tribunal's decision in *Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2022] NNTTA 74 is one the most high-profile good faith decisions in recent years.

The decision relates to Santos' Narrabri Gas Project in New South Wales. The Project falls within the area of the Gomeroi people's native title claim.

The State gave notice of its intention to grant four petroleum production leases (PPLs) for the Project in May 2014, thereby triggering the right to negotiate process. Santos, the Gomeroi people and the State were required to negotiate in good faith with a view to obtaining the Gomeroi people's agreement to the proposed grants (section 31(1) *Native Title Act*).

Despite persistent attempts over nearly seven years , the parties were ultimately unable to reach agreement with the Gomeroi people about the grant of the PPLs.

Future act determination application

In 2021, Santos filed a future act determination application, seeking a determination from the Tribunal that future acts, namely the grant of the PPLs, could be done.

During proceedings, the Gomeroi people alleged, among other things, that Santos had failed to negotiate in good faith, and that the PPLs should not be granted based on consideration of factors set out in section 39 of the *Native Title Act*.

Determination summary

On 19 December 2022, the Tribunal handed down its determination, finding that:

- the evidence before it did not justify a finding that Santos had failed to negotiate in good faith with the Gomeroi people in good faith; and
- based on consideration of the section 39 factors, the future act could be done, subject to a condition that Santos conduct an "Additional Research Program" to identify and protect Aboriginal cultural heritage before construction of the project commences.

The "Additional Research Program" had been put forward in the Project Cultural Heritage Management Plan as a means to identify additional tangible and intangible Aboriginal cultural heritage in the project area that had not been uncovered during preparation of the Environment Impact Assessment. During the course of the hearing, Santos proposed bringing forward the Program by 12 months in response to the Gomeroi people's concerns about identification and protection of cultural heritage.

No failure to negotiate in good faith

The Tribunal is unable to make determinations in a future act determination application where it is satisfied that the grantee party (or State) has not negotiated in good faith.

The Gomeroi people made numerous assertions in support of their contention that Santos had failed to negotiate in good faith, including claims that Santos had:

- contributed to conflict between the Gomeroi people and their legal advisers, and among members of the Gomeroi applicant;
- negotiated with the wrong Gomeroi applicant during negotiations; and
- offered compensation that was unreasonably below market value and had adopted a fixed position on compensation.

The Tribunal rejected every allegation made by the Gomeroi people and found that there was "no basis for finding that at any time since the notification day, or before that day, Santos failed to negotiate in good faith, with a view to obtaining the Gomeroi people's agreement to the proposed grants".

In coming to this decision, the Tribunal found that:

- the duty to negotiate in good faith arose on the section 29 notification day. Events occurring prior to notification could be considered by the Tribunal to the extent that they shed light on conduct occurring after notification day;
- in assessing 'good faith', the Tribunal must consider the whole of *both* parties' conduct during negotiations; and
- Santos had actively engaged with the Gomeroi people across a period of many years and had provided a substantial amount of financial support to the Gomeroi people in that time.

Further, the Tribunal consistently accepted the evidence of the Santos witnesses, preferring their evidence over that of the Gomeroi people. The Tribunal found the advice of the latter's financial experts to be unsatisfactory and, at times, incorrect and suggested that this may have contributed to the ongoing disagreement between parties.

Consideration of s 39 factors – act may be done

Section 39 of the *Native Title Act* requires the Tribunal to take into account a range of factors when making a determination, including (among other things) potential impacts on the native title party's enjoyment of their native title rights, access to the area, and sites of particular significance, as well as the economic significance and public interest in doing the act.

The Tribunal considered each of the section 39 factors, concluding that:

- the Gomeroi people's evidence failed to show that the project would negatively impact the Gomeroi people's culture, lands and waters or that it would contribute to climate change;
- the project would be to the public benefit (economically, culturally and socially); and
- any impacts on Aboriginal cultural heritage would be appropriately managed and conditioned, including through the Cultural Heritage Management Plan, Aboriginal Research Program and the flexible design and micro-siting of wells.

Appeal to Full Federal Court

In January 2023, the Gomeroi people filed an appeal from the Tribunal's decision. Appeal proceedings are currently on foot and are to be heard by the Full Bench of the Federal Court in August 2023.

Key insights

Be aware that good faith challenges continue to be made in future act determination applications. Although Santos was found to have passed the good faith test, in 2022 the Tribunal found that three other mining companies had failed to negotiate in good faith (see "Small-scale miners struggle to satisfy good faith standard in the right to negotiate process").

Proponents who are seeking the grant of a tenement that triggers the right to negotiate process can drive a hard bargain, but in doing so they must engage in genuine attempts to reach agreement with the native title party. This will means, among other things, approaching negotiations with an open mind, acting honestly, and being willing to compromise.

Good faith challenges remain a feature of the native title landscape. Small-scale miners, in particular, seem to struggle with the requirements. However, few cases progress on appeal. The Full Court's decision in the Gomeroi people's appeal will be an important contemporary benchmark, as it will deal with the conduct of relatively sophisticated parties over a long period of time.

Authors: Samantha Marsh, Lawyer; Alice Jiang, Lawyer; Clare Lawrence, Partner

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

What you need to know

- Although the general position remains that parties bear their own costs in the native title jurisdiction, the Federal Court will make costs orders in the face of unreasonable conduct.
- Unreasonable conduct is not limited to the courtroom – unreasonable conduct in mediation may lead to an order for wasted costs.
- The court seems increasingly willing to entertain costs orders against individuals responsible for unreasonable conduct. It has said it would consider applications for personal costs orders against members of a native title applicant and the solicitor for a local council.
- The court has also held that a native title party's lawyers were entitled to enforce their equitable right to solicitor/client costs in the course of a long running dispute about an existing Indigenous Land Use Agreement (ILUA).

What you need to do

- Take note of timetables and procedural obligations - the court has indicated it is willing to order costs against a party where unreasonable conduct derails its processes.
- Be aware of potential personal liability – the Federal Court has foreshadowed ordering costs against individuals responsible for unreasonable conduct.

We have followed native title costs decisions for many years

We follow native title costs decisions to identify new principles and trends. We reported on a number of costs decisions with adverse outcomes for some parties in our *Native Title Year in Review 2021-2022* article "Costs Update: it doesn't matter who you are, unreasonable conduct risks a costs order".

In 2022, we saw fewer costs applications. However, the decisions handed down provide guidance on what the court considers unreasonable conduct in native title matters.

A 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* 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.

Refusing to honour in-principle agreements made in mediation could lead to an order for wasted costs

The Mullewa Wadjari people have made a native title claim near Geraldton in Western Australia. Their claim overlaps with claims brought by the Nanda and Wajarri Yamatji peoples.

The resolution of the overlapping claims was referred to mediation. The Mullewa Wadjari representatives entered into in-principle agreements with the Nanda and Wajarri Yamatji claim groups relatively early in the mediation process. The agreements provided that the Mullewa Wadjari applicant would withdraw their claim over the overlapping areas in exchange for certain concessions by the other claim groups.

More than three years into the mediation process, the Mullewa Wadjari applicant informed the two other native title parties that they would not implement the in-principle agreements. At that point, the other claim groups had started taking action to uphold their side of the agreement.

The Federal Court found that this conduct was unjustifiably oppressive and an abuse of the court's mediation processes (see *Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia* [2022] FCA 221).

Court ordered that other native title applicants could file an application for wasted costs if the claim group refused to honour the agreements

The court ordered that the claim group hold a meeting to decide whether to honour the in-principle agreements or not.

The court said that if the Mullewa Wadjari claim group decided not to honour the agreements, the court could consider whether there should be compensation (by way of a costs order) for the "tremendous amount of legal time and resources the Wajarri Yamatji and Nanda parties have expended, in reliance on the actions of the Mullewa Wadjari applicant, but which would have been thrown away".

The court indicated that the Nanda and Wajarri Yamatji claim groups could make an application for a personal costs order against the representatives of the Mullewa Wadjari applicant present at each of the mediations, or each of the members of the Mullewa Wadjari applicant who are responsible for instructions given to their lawyers.

The court made orders granting the two other claim groups leave to file an application for wasted costs in the event that the claim group refused to honour the in-principle agreements and the filing of material in relation to that application.

Mullewa Wadjari applicant discontinued their appeal

The Mullewa Wadjari applicant sought to appeal the orders Mortimer J made with regard to costs. However, on 21 November 2022, the Mullewa Wadjari applicant discontinued their appeal during oral submissions before the Full Court. The non-State respondents made an application for their costs of the application.

The Mullewa Wadjari claim group decided not to give effect to the in-principle agreement (see *Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia* [2022] FCA 593). The other claim groups have filed an application for costs that were thrown away.

The costs applications in the appeal and first instance proceedings have not yet been decided.

Court foreshadowed a personal costs order for non-compliance with timetabling orders

In *Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 10)* [2022] FCA 1129, the court ordered that if a council's non-compliance with court orders continued, the applicant and the State could make an application for costs against the council or its legal representatives.

Council's non-compliance with timetabling orders threatened to derail two consent determinations

This matter arose in the context of a council failing to execute agreements in accordance with timetabling orders made by the court, thereby jeopardising two scheduled consent determinations.

The determinations covered part of the broader Cape York United #1 claim. The claim is complex and relates to a large claim area. The court had made detailed timetabling orders to facilitate the most effective resolution of the claim. The court emphasised the scale and complexity of the task of keeping the claim on track for the applicant and the State. The council had a minimal role in progressing the application towards determination.

Fifteen days after the council was required to sign a section 87A agreement for a consent determination (and one day before it was required to sign another), the council indicated it would not be able to consider the agreements for another week.

Conduct of council and its representative considered disrespectful to the other parties and the court

During an urgent case management hearing, the council's legal representative initially failed to make any application that would vary the court's orders, instead focusing on the council's "inability" to comply with the existing orders.

The court noted that it was unsatisfactory that the council had not filed an interlocutory application and supporting affidavit relating to its non-compliance, particularly in circumstances where that non-compliance threatened to disrupt an imminent closely programmed proposed determination of native title.

The court held that the conduct of the council and its legal representatives, imposed considerable burdens on the applicant and the state, including an additional case management hearing, amendments to the consent determination submission and preparation of additional written submissions regarding non-compliance at short notice. The court stated that such conduct was "tardy, inconsiderate, and without any apparent consciousness" of its impact on the parties, and "deserves to be subject to criticism".

The court ultimately extended the deadline for signing the section 87A agreements because it was the most effective way for the court to preserve the likelihood of the determinations going ahead.

The court noted that if the council did not comply with the amended timetabling orders, the applicant and the State would be required to attend another urgent case management hearing. The costs of the extra hearings, preparing for them and their consequential effects would exist only because of the council's conduct. Accordingly, the court ordered that the applicant and/or the State could make cost applications against the council or its legal representatives personally if the non-compliance continued.

Compliance with orders – the determinations went ahead

The council executed the section 87A agreements in accordance with the dates in the amended timetables, and the consent determinations proceeded on time. Accordingly, neither the state nor the applicant made a costs application against the council or its legal representatives.

Costs application following a successful strike-out application

In *Mann obh of Bigambul People #2 v State of Queensland* [2023] FCA 450, the Gamilaraay applicant was successful in its interlocutory application seeking orders that the competing overlapping Bigambul People #2 native title determination application be struck out, or summarily dismissed, and sought costs incurred in connection with the proceedings.

In respect of costs, the court noted that, "as is plain from section 85A(2) of the *Native Title Act*, the court must be satisfied that the Bigambul People #2 applicant has by an unreasonable act or omission caused the Gamilaraay applicant to incur costs in connection with the proceedings".

Authorisation process

The court held that the authorisation process for the Bigambul People #2 native title determination application was "fatally flawed" because the Bigambul people were not given a reasonable opportunity to participate in the authorisation meeting.

Abuse of process

The court also held that the delay on the part of the Bigambul People #2 applicant in commencing the native title claim constituted an abuse of process. In particular, the court found that:

- no satisfactory explanation had been given by the Bigambul People #2 applicant for the delay;
- correspondence between the parties supported a finding that the Bigambul #2 application was brought for the ulterior motive of requiring additional descent lines, rather than a genuine claim to the overlapped area; and
- the delay on the part of the Bigambul People #2 applicant seriously prejudiced the consent determination of the Gamilaraay claim, which was vacated four weeks prior to the listed hearing date.

For these reasons, the court considered it appropriate to hear the parties further in respect of costs.

On 7 June 2023, the court made orders requiring the issue of costs to be determined on the papers, and set out a timetable for the Gamilaraay applicant and Bigambul #2 applicant to serve submissions on costs and evidence in June 2023.

Costs application following a successful interlocutory application

In *Alvoen obh Wakaman People #5 v State of Queensland (No 4)* [2023] FCA 837, the applicant was successful in its interlocutory application seeking orders to remove a respondent party from the proceedings.

The applicant sought the removal of the respondent party in circumstances where the respondent party had previously agreed with the contents of a section 87A agreement for a consent determination, and then sought amendments to that agreement only weeks before the programmed consent determination date.

The court held that the interests of the respondent party were adequately protected by the section 87A agreement, and it was not entitled to insist on the inclusion of requested amendments. Further, the court held that the conduct of the respondent party was "unjustifiably oppressive" and had constituted an abuse of process, such as to warrant its removal as a respondent to the proceeding.

For these reasons, the court considered it appropriate to hear the applicant and the State further in respect of the costs of the interlocutory application. On 24 July 2023, the court made orders requiring the issue of costs to be determined on the papers, and set a timetable for the applicant, the State and respondent party to serve submissions on costs in August 2023. We will report on the outcome in our *Native Title Year in Review 2023-2024*.

Federal Court enforces equitable right to solicitor/client costs in ILUA case

In *QGC v Alberts (No.2)* [2021] FCA 540, which we reported on in our *Native Title Year in Review 2021-2022* article "Federal Court declares implied term in ILUA", QGC commenced proceedings due to concerns that the "nominated entity" under the ILUA, BCJWY Aboriginal Society, was no longer capable of receiving or distributing the monies payable by QGC under the ILUA.

Before then, the native title party had appointed a legal firm to act for it in relation to seeking a replacement nominated entity. The course of action undertaken by the legal firm to establish the new nominated entity was ultimately unsuccessful. However, that failure provoked the solution that the parties ultimately decided to pursue in agreeing to entity establishment orders and their subsequent implementation.

In *QGC v Alberts (No.4)* [2022] FCA 1590, the Federal Court was required to consider whether the legal firm appointed by the native title party had an equitable lien over, or other enforceable right in respect of, the financial benefits that QGC had paid into court on behalf of the native title party.

In doing so, the court considered whether the legal firm's course of action to replace the nominated entity (which was ultimately unsuccessful) created a sufficient causal link to the eventual successful resolution of the matter (being the creation of 11 replacement entities to which the monies held in court can be paid) to justify the legal firm's claim for the equitable right to be paid out of those monies.

The court held that the legal firm's conduct was instrumental in obtaining the result of substantial compliance with the entity establishment orders.

The court applied the principles of *Roam* [1997] FCA 980 and held that "the fact the solicitors' retainer had ended before their client negotiated the compromise did not break the chain of causation that the solicitors' work had led, at least in part, to a compromise and thus they were entitled to enforce their equitable right to be paid out of the settlement".

As a result, the court held that each of the 11 nominated entities was liable for its one-eleventh share of the legal firm's costs out of the monies held in court and any monies due but unpaid by QGC.

The court declared that the firm was entitled to enforce its equitable right to $299,348.18 as the taxed solicitor/client costs recoverable on its claim against the monies held in court. As a result, that sum reduced the amount that each of the 11 nominated entities ultimately received.

On 3 February 2023, the court made orders requiring that the funds paid into court by QGC plus any interest accrued from the funds being held by the court be distributed: first, $299,348.18 to be paid to the legal firm; and second, the balance to be distributed by payment in 11 equal shares to the 11 nominated entities.

Authors: Roxane Read, Senior Associate; Sophie Pruim, Graduate; Libby McKillop, Senior Associate

New South Wales begins implementing Aboriginal Land Rights Act reform

What you need to know

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

What you need to do

- Keep an eye out for implementation of further reform by the new Minns Labor government.

Amendments address stage one of reform process

In November 2021, the NSW government released the *2021 statutory review of the Aboriginal Land Rights Act 1983 (NSW)*. The statutory review recommended three stages of reform of the Act:

- Administrative and operational changes to improve existing structures and provisions to improve the administration of the Act and Aboriginal land councils (ALCs).
- Consultation on proposals to consider ways for ALCs to undertake land dealings subject to native title.
- Further consideration of major policy matters, aspirational reform of the Act and intersecting legislative frameworks and administrative matters.

In November 2022, the *Aboriginal Land Rights Amendment Act 2022* came into force. The amendments address stage one of the reform process and are intended to improve the operation of the Act. We flagged this in our *Native Title Year in Review 2021-2022* article, "Other matters to watch out for in 2022-2023".

Key amendments include:

- changes to land claim and land dealing provisions, aimed at clarifying administrative provisions and reducing burdens on local ALCs;
- changes relating to the NSW ALC and the local ALCs to enhance good governance, align with similar provisions in the *Local Government Act 1993* (NSW) regarding office holders and staff members, provide greater self-determination and ease some administrative requirements;
- rewriting Part 10 of the Act in relation to conduct and disciplinary matters for officers and staff members of ALCs;
- updating how the Register of Aboriginal Owners is to be maintained; and
- updating the Act's preamble to reference "waters" as well as lands to reflect the importance of water to Aboriginal people.

Where to from here?

In his second reading speech on the Amendment Bill, the then Minister for Aboriginal Affairs Ben Franklin indicated that stages two and three of the Act's 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.

Author: Brigid Horneman-Wren, Lawyer

Essential public purpose: NSW courts raise the bar for the Minister to refuse claims under the Aboriginal Land Rights Act

What you need to know

- After a quiet year in 2021, the courts have twice overturned the Minister's decision to refuse claims under the *Aboriginal Land Rights Act 1983* (NSW).
- Land reserved for charitable purposes and for a former bowls club was transferred to Aboriginal Land Councils in two cases, following successful appeals.
- To prove that claimed land was required for an essential public purpose and so not in fact "claimable", the Minister had to show that consideration had been given as to whether it was needed at the date of the claim.

What you need to do

- Keep an eye out for potential claims made over any Crown land in which you hold an interest.

Reminder of definition of "claimable Crown lands" in NSW Aboriginal Land Rights Act

Section 36 of the *Aboriginal Land Rights Act 1983* (NSW) (ALR Act) relevantly defines "Claimable Crown lands" as follows:

> *Claimable Crown lands* means lands vested in Her Majesty that, when a claim is made for the lands under this Division – …
>
> (b) are not lawfully used or occupied;
>
> (d) are not needed, nor likely to be needed, for an essential public purpose.

Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Management Act

In 2009, the Darkinjung Local Aboriginal Land Council made a claim under the ALR Act for two lots in Gosford.

The lots were Crown land subject to a reserve trust. The land was reserved for the purpose of charitable organisations in the 1970s. The trustee of the reserve was a charity that worked with people with intellectual disabilities. The charity established a workshop to provide employment and training on the land.

The Minister refused the claim on the basis that the land was needed for an essential public purpose. The Minister's decision was upheld by the Land and Environment Court, but overturned by the Court of Appeal (*Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Management Act* [2022] NSWCA 275).

The Minister must prove they considered the land was needed for an essential public purpose when the claim was made

The key issue on appeal was whether the Minister had formed a view at the time the claims were made that the land was needed for an essential public purpose.

The primary judge decided it was unnecessary for the Minister to prove that the government held the view that the land was needed for an essential public purpose on or about the date of the claim. The primary judge considered the Minister's onus of proof was discharged by proving that:

- a decision was made in the 1970s that the land was needed for an essential purpose; and
- the land has been continuously used for that purpose.

The Court of Appeal overruled the primary judge. It said that the government at the time the claim was made must have considered whether the land was needed for an essential public purpose and concluded that it was. Where the decision that land is needed for an essential public purpose significantly pre-dates the claim for land, there must be evidence that the government at the date of the claim had adopted the earlier decision.

That evidence was totally lacking in this case. While investigating the Land Council's claims, the government became aware that the charitable organisation had not occupied the reserve since the 1980s. In fact, it was wound up more than 30 years ago. Another charitable organisation had occupied the land and operated the workshop ever since. The government had never authorised it to occupy or use the reserve.

The Court of Appeal concluded that the government at the date of the claim did not hold the view that the land was needed for an essential public purpose. Accordingly, the land was claimable Crown land and the court ordered that the Minister transfer it to the Land Council.

New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act – Waverton Bowling Club

In 2020, the New South Wales Aboriginal Land Council claimed land which had previously been used by the Waverton Bowls Club.

In December 2020, the Minister refused the claim on the basis that the land was not claimable Crown land, because it was lawfully used and occupied by the North Sydney Council and the public, and it was needed for the essential public purpose of public recreation.

The council said the use and occupation of the land by the council and the public was lawful because it had licences that related to the land when the land was claimed. However, the licences did not allow the council or the public's use of the land at the date of the claim. The licences permitted the council to conduct site investigations, and contained provisions that they could only be relied upon for that purpose. The site inspections were completed in May 2019, before the claims were made. The licences did not authorise the council to open the grounds to the public.

The Land and Environment Court found that council's use and occupation of the land after the site investigation report was finalised was unlawful (*New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act – Waverton Bowling Club* [2022] NSWLEC 130).

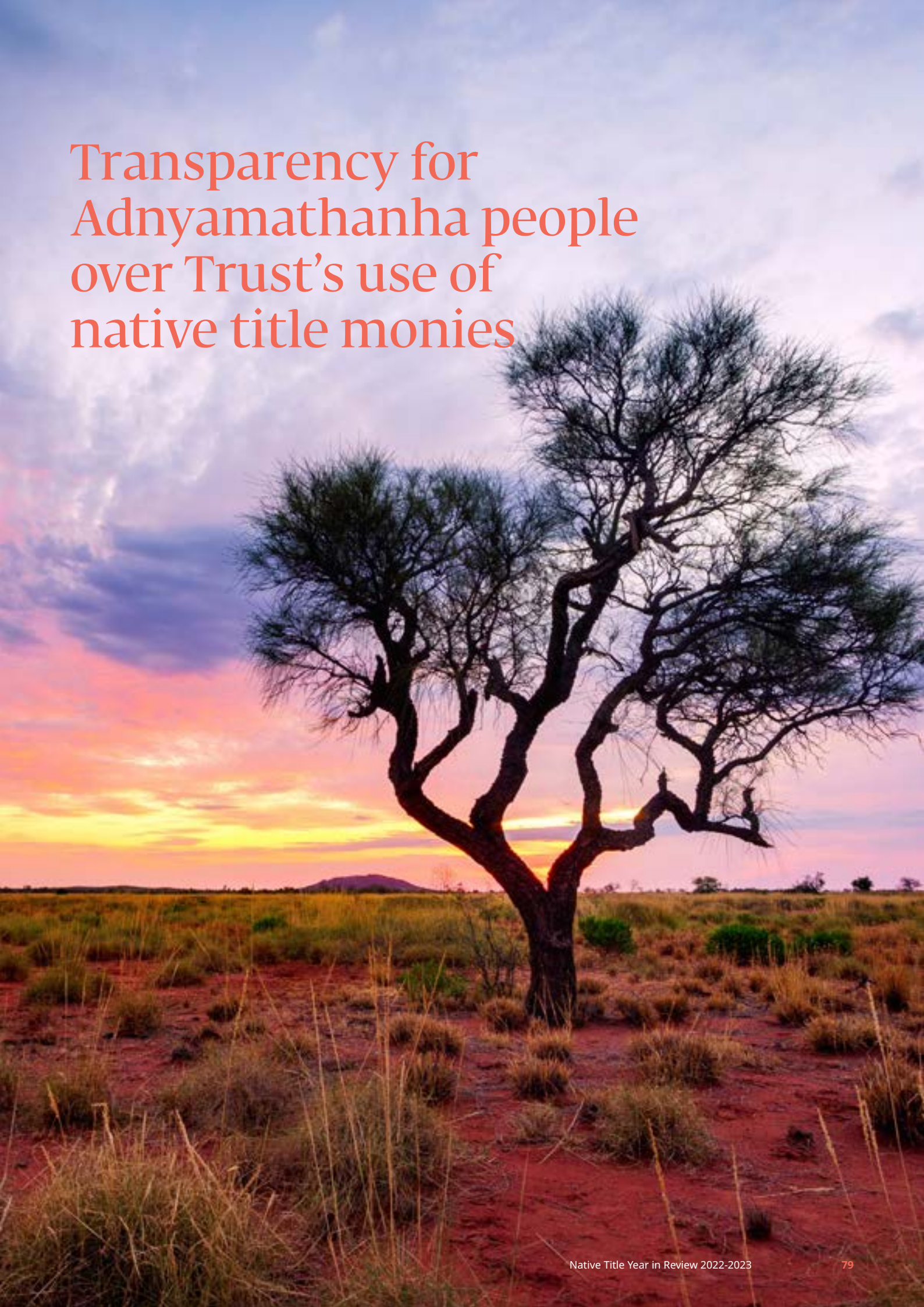
As a consequence, the public's use and occupation of the land was also unlawful.

The Minister argued that the land was likely to be needed for the essential public purpose of recreation. The court was not satisfied that, at the date of the claim, the government had formed the view that the land was needed for that essential public purpose. The government was then in the early stages of determining the use of the claimed land. On the claim date, the process had not progressed in any meaningful way.

The court therefore found the land was claimable Crown land and the Minister was ordered to transfer it to the Land Council.

Authors: Sophie Pruim, Graduate; Sophie Westland, Senior Associate

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



What you need to know

- 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 for inspection by the applicants, as required by the *Trustee Act 1936* (SA).

What you need to do

- Be transparent. This decision is a timely reminder that a lack of transparency in the distribution of native title compensation benefits from trusts can give rise to confusion and tension among the native title holder community resulting in lengthy and time consuming litigation.
- Take steps to ensure that the native title holders, the trustee and the community are clear about how, and for what purposes, trust monies can be distributed and what mechanisms are available to hold that process to account.
- Trustees need to fully understand their obligations in relation to managing and distributing trust monies and to ensure they that provide beneficiaries with appropriate information and access to accounts. They should also be transparent about how native title monies are managed and distributed among the community to help prevent misinformation, mistrust and disputes.

Adnyamathanha common law native title holders seek court order for access to trust account records

The Adnyamathanha Master Trust received money from native title agreements which the trustee then distributed to individual representatives of each sub-group or a representative entity of a sub-group. The representatives would then disburse payments to individual Adnyamathanha common law holders.

This dispute arose because the applicants raised concerns about irregularities in the lists of those Traditional Owners receiving trust distributions, discrepancies in payments amongst individuals within a sub-group and general concerns regarding a lack of transparency about how much money the Trust was receiving and what the Trust was doing with that money.

In 2020, the registered native title body corporate for the native title holders was placed under special administration and the special administrator together with various Adnyamathanha people sought to access the Trust's financial records. This request was denied by the trustee on the basis that the Trust was a charitable trust and therefore the applicants did not have the right to inspect the books (unlike individual beneficiaries of a private discretionary trust).

In response, the applicants applied to the court under section 60 of the *Trustee Act 1936* (SA), seeking orders for access to the records of the Trust. Section 60 applies to charitable trusts, not discretionary trusts. Therefore, the court was asked to consider whether the:

- Trust was a private discretionary or charitable trust; and
- registered native title body corporate and the applicants had standing to seek court orders for access and inspection of the trust books under the *Trustee Act* or the general jurisdiction of the courts to supervise the administration of trusts.

Was the Trust a private discretionary trust or a charitable trust?

The court undertook a detailed analysis of the cases that explain the characteristics of a charitable trust.

The court acknowledged that a trust which limited the potential beneficiaries to Aboriginal people generally or a specific Aboriginal clan fell within the nationality charitable trust exception. The nationality exception means that a trust can still be charitable, even if it applies to a small sub-set of the community, as long as that trust has a charitable purpose.

However, in this instance, the court found that the Trust was a private discretionary trust because:

- there were no provisions in the deed which described the Trust as a charitable trust, provided for a particular charitable purpose or required the trustee to have regard to any need that members of the sub-group may have for relief from poverty, to be educated or to engage in spiritual or cultural observances;
- the primary purpose of the Trust was the distribution of funds to the Adnyamathanha people to spend on their personal advancement as they saw fit. The trustee did not have significant visibility as to which individuals actually received the funds or how they were used;
- the language used throughout the trust deed indicated that group members were individual beneficiaries (and not just "mere objects of benefaction", which is the case for charitable trusts); and
- the trustee was making payments to an eligible entity that did not need to have a charitable purpose.

Consequences of finding that the Trust was a private discretionary trust

The consequences of the court sfinding that the Trust was a private discretionary trust include the following:

- The applicants did not have standing to apply for court orders under section 60 of the *Trustee Act* because this applied to charitable trusts.
- Each of the named sub-group members was entitled as a beneficiary of the Trust to the due administration of the Trust.
- The court was empowered to make orders under the general law to ensure that the trustee administered the Trust in accordance with the requirements of the Trust.
- The trustee had administered the Trust on an incorrect basis (ie that it was a charitable trust when it was not) which could have adverse consequences for the beneficiaries (and the court separately identified that the erroneous treatment of the Trust may have tax consequences).
- The trustee was bound by a fiduciary duty which it owed to all the group members to seek and maintain records. The trustee's refusal to provide any information about its management of the Trust deprived the group members of information they would require to determine whether to bring an action against the trustee or an eligible entity who had received trust funds from the trustee.

The court held that in the absence of an exceptional countervailing consideration, it has general power to order a trustee to grant access to trust account records. On this basis, the court ordered that the trustee make the trust account records available for inspection by the applicants. The court also appointed an inspector pursuant to section 84C of the *Trustee Act* to investigate the administration of the Trust.

Approach to distributing money

The trustee adopted a model of distributing funds to each sub-group entity by a single payment before further distribution to members. On this point, the court commented that:

- this approach meant that there was no transparency as to any further distribution beyond the sub-group entity; and
- the nature of the Trust or the equitable obligations assumed by the sub-group entity in that context, if any, was problematic (though this was not explored by evidence or submissions in the proceeding).

These comments are particularly interesting when considered in the broader context of how native title rights and interests are managed.

Registered native title bodies corporate (RNTBC) are appointed to hold native title rights and interests on trust or as agent for the common law holders and must meet the regulatory requirements of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). This includes the requirement for the RNTBC's financial statements and rule book to be made available to the public on the ORIC website.

However, at the same time, the native title payments flowing from agreements between proponents and RNTBCs are commonly held in trusts. These trusts typically have less transparency and fewer financial reporting obligations. This case shows the difficulties individual beneficiaries can have in holding trustees to account.

Legislative reform

The need for greater transparency regarding the use of native title monies is not a new issue. It was featured in much of the feedback received by the National Indigenous Australians Agency (NIAA) during its comprehensive review of the CATSI Act between 2019 and 2021.

The CATSI Act Review: Final Report published in February 2021 recommended that the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to require reporting to common law holders on the management and use of native title monies and non-monetary benefits held on trust. It also recommended that the ORIC Registrar consider introducing similar consistent reporting requirements in section 336-5 of the CATSI Act. The NIAA stated in September 2021 that it was working to implement these recommendations, which may lead to further legislative change. It is not clear whether this is still on the agenda since the change of Government.

Key insights

Trust structures can be useful for managing money for communities over the long term. However, they are less transparent compared with the level of disclosure required by a corporation established under the CATSI Act.

A lack of transparency in the distribution of native title compensation benefits from trusts can give rise to confusion and tension within the native title holder community resulting in lengthy and timing consuming litigation.

Therefore, the RNTBC, the trustee and the community should be clear about how and for what purposes trust monies will be distributed and what mechanisms are available to hold that process to account.

Authors: Sophie Westland, Senior Associate and Miranda Aprile, Lawyer

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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"Ashurst's native title team is pre-eminent in my view, with outstanding knowledge and practical experience in guiding clients through complicated native title and cultural heritage processes."

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