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Native title year in review 2023-2024

What you need to know (May 2024)

Private and Confidential

Outpacing change

Native Title Year in Review 2023-2024 – what you need to know

31 May 2024

Welcome to the bite size version of Ashurst's annual review of native title legal developments in 2023-2024. We cover what you need to know about each issue in our eighth annual Native Title Year in Review.

Little movement on Federal heritage reform in 2023, but stakeholders and industry are instigating change

Reform to Federal cultural heritage protection laws has been on the agenda since the Samuel Review into the EPBC Act began in 2019 but there is not a lot of publicly discernible action.

Meanwhile, First Nations and industry bodies are taking the lead on standard setting. In March 2024, the First Nations Heritage Protection Alliance launched the Dhawura Ngilan business and investor initiative. The initiative comprises *Aboriginal heritage protection principles* alongside a *Guide for Business and Investors*. Other similar publications have been released in the context of First Nations involvement in clean energy projects (Clean Energy Council's *Leading Practice Principles: First Nations and Renewable Energy Projects*).

As you might expect, across these publications, there is a focus on FPIC (free, prior and informed consent), early engagement and respect for human rights.

WA Aboriginal heritage laws restored with key changes

The WA Government has restored the Aboriginal Heritage Act 1972 (WA) with some additions and amendments.

The new 1972 Act contains key changes to WA's Aboriginal cultural heritage framework that was in place before the commencement and repeal of the *Aboriginal Cultural Heritage Act 2021* (WA).

These key changes include: return of the section 18 consent regime; introduction of the 'new information' regime, applying to all existing and future section 18 consents; permitting landowners to transfer section 18 consents; and prohibiting "gag clauses".

In addition to these changes, the Amendment Regulations introduce different categories of 'native title party' and timeframes for the section 18 process.

Heritage reforms stall as States wait for lead from reform-shy Commonwealth

Most State and Territory Governments are in the process of reviewing their cultural heritage legislation. Several of these reviews have been going for many years with little apparent progress.

Only Western Australia has managed to enact cultural heritage law reform recently and the outcomes of that process are well known.

It is likely that State and Territory Governments are waiting for the outcome of Federal cultural heritage reform before progressing their own reform agendas.

FPIC continues to dominate the discourse

The free prior and informed standard for agreement making (or FPIC) continues to be an influential concept in the development of legislation, guidelines and the expectations of Traditional Owners.

At the moment the law lags behind the expectations, but the trend is clear. In the current climate, it is difficult to imagine Parliament moving forward with legislation in this space that does not move closer to the FPIC standard.

Further litigation of First Nations consultation rights for offshore projects in the wake of Tipakalippa

Following the Full Court's 2022 Tipakalippa decision, 2023 saw two further proceedings commenced in relation to offshore gas projects and their impact on First Nations sea country interests.

In *Cooper v NOPSEMA* (No 2) [2023] FCA 1158, the Federal Court decided that NOPSEMA did not have the power to approve an environment plan subject to conditions requiring further First Nations consultation. Accordingly, all consultation must be complete before the submission of an environment plan to NOSPEMA.

In *Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9*, the Federal Court was asked to consider what new information about risks and impacts to sea country would constitute a significant new environmental risk requiring a revised environment plan and fresh consultation.

Path to Treaty is less clear in the wake of failed Voice Referendum

After the unsuccessful Voice Referendum, the Federal Government has announced that will not pursue Treaty nationally, but remains committed to Truth-Telling.

Most States and Territories are continuing efforts towards Treaty, Truth-Telling and/or Voice structures, but the pace seems to have slowed.

Liberal/National opposition parties in Queensland and Victoria have withdrawn support following the Referendum outcome.

Update on Federal cultural heritage protection applications

The number of applications under sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) has slowed in the last couple of years, after a large number of applications between 2019 and 2021. Three applications have been made in the last 12 months relating to areas in Victoria, Northern Territory and Western Australia.

These applications enable the Federal Minister for the Environment to make a declaration for the protection and preservation of significant Aboriginal areas and objects from "injury or desecration". A successful application can stop a project or activity from proceeding.

The Federal Government has committed to reforming this legislation, but progress has been extremely slow. In the meantime, the Federal Government has allocated $17.7 million in the 2024-2025 Federal Budget to help reduce the backlog of complex sections 9 and 10 applications and progress the reform of Australia's cultural heritage laws.

Native title compensation – a big year ahead

There are seven active native title compensation claims across Australia and two registered compensation settlement ILUAs under the Queensland Government's Native Title Compensation Settlement Framework.

The High Court will hear an appeal in the Gumatj compensation claim in August 2024. The High Court's decision will be the most important development in native title compensation since the its decision in the 2019 Timber Creek case.

The year ahead could also see significant decisions in the McArthur River Project compensation claim, which appears to have finished hearing in November 2023, and the Yindjibarndi Ngurra compensation claim, which is listed for hearing of oral closing submissions in October 2024 and stands to be a test case on the compensation pass through in section 125A of the *Mining Act 1978* (WA).

High Court sets us straight on scope of "infrastructure mining lease" provisions of Native Title Act

The High Court has resolved a longstanding debate over the "infrastructure mining lease" provisions of the *Native Title Act 1993* (Cth) (*Harvey v Minister for Primary Industry and Resources* [2024] HCA 1) by looking back at the 1997 Explanatory Memorandum and applying some old school statutory interpretation.

The right to negotiate process generally applies to the grant of mining and petroleum tenements unless the carve out for "the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining" applies (the section 24MD(6B) process).

The High Court said that "right to mine" in the Native Title Act has a broad application which would embrace every sort of mining tenement granted under State and Territory natural resources legislation (noting there is a lot of variation).

The High Court also interpreted "infrastructure facility" broadly, preferring a definition that includes its ordinary meaning in addition to the example facilities listed in the Act.

Ultimately, the High Court declared that the Northern Territory Government cannot determine the relevant tenement application until completion of the procedures in section 24MD(6B) of the Act.

Next generation good faith issues - Gomeroi v Santos appeal

The Full Federal Court has recently considered next generation good faith issues in a rare opportunity to consider the actions of sophisticated parties in a good faith dispute.

In *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26 the Full Federal Court unanimously rejected the Gomeroi claimant's five 'good faith' grounds of appeal, and held that Santos had negotiated in good faith.

This is the first Full Court decision on good faith for many years and provides a comprehensive analysis of the adequacy of offers and the role of experts. The upshot however, is that the good faith fundamentals have not changed.

Meanwhile, some small miners have not learnt from past good faith decisions. In the past 12 months, three good faith challenges have all resulted in a finding that the grantee party failed to negotiate in good faith.

Full Court considers test for connection, but High Court to have the final word

Three Full Federal Court appeals have recently been decided in relation to connection issues and in each case the Full Court has held that native title did not exist.

The Full Court held that findings made in previous consent determinations over adjoining land could not be relied upon as evidence in relation to land outside of the original determination area.

The High Court has granted special leave to appeal in relation to *Stuart v State of South Australia* [2023] FCAFC 131, which will require it to consider the tests for connection (and loss of connection) and also what use, if any, can be made of findings in adjoining determinations.

A special leave application has also been filed in relation to the Clermont-Belyando appeal (*Malone on behalf of the Clermont-Belyando Area Native Title Claim Group v State of Queensland* [2023] FCAFC 190).

Federal Court makes negative determination at the request of respondent parties

In *Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4)* [2024] FCA 425 the Federal Court made a negative determination of native title in relation to land in central Queensland.

A negative determination is a formal finding that native title does not exist (as opposed to simply dismissing an unsuccessful native title claim). The Federal Court reminded us of the test for making a negative determination and the factors that should be considered in the exercise of its discretion.

The Gaangulu People have filed an appeal from the decision and negative determination.

Non-claimant applications – a cautionary tale of tenure

A non-claimant application has been unsuccessful due to general law invalidity.

The Court in *Dungog Shire Council v Attorney General of New South Wales* [2024] FCA 166 found that native title had not been extinguished by a 1823 freehold grant because there was no evidence that certain procedural steps required for a valid grant had been taken. This meant the 1823 grant was invalid at general law and could not affect native title.

All other non-claimant applications heard over the last 12 months successfully obtained a determination that native title does not exist, either on grounds of extinguishing tenure or because the applicant had proven the negative proposition that there was no evidence that native title exists.

Federal Court considers the doctrine of frustration in the context of a native title agreement

The Federal Court has considered the doctrine of frustration in the context of a native title agreement for the first time.

In *Lockyer for and on behalf of the Robe River Kuruma People v Citic Pacific Mining Management Pty Ltd (No 2)* [2024] FCA 154 the Court held that a compensation deed between participants in a mining project and a native title party had not been frustrated, notwithstanding the reduction in the area of their claim and a determination of native title over less than one percent of the agreement area.

The Court distinguished an earlier WA Supreme Court decision where a similar compensation deed was held to be frustrated after the dismissal of the native title claim of the native title counter party.

Cost update: the high price of poor conduct – unreasonable conduct risks a costs order

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.

A costs order can be awarded to a native title party represented by a native title representative body.

The hearing of separate questions in a native title compensation "test case" was not a sufficient reason to depart from the general rule that each party bears their own costs in native title claim proceedings.

Federal Court clarifies the role of representative bodies in native title proceedings

In *Dimer on behalf of the Marlinyu Ghoorlie Claim Group v State of Western Australia (No 2)* [2023] FCA 1060, the Federal Court was asked to remove limitations placed on a representative body's joinder to native title claim proceedings.

The Court clarified that native title representative bodies do not need to be joined as a party to proceedings to discharge their statutory duties and in fact joinder might place them in a position of conflict.

If they are joined as a party, they assume the obligation to discharge the same duties as any other litigant, in abiding by the usual standards of civil procedure.

Director of National Parks criminally liable for breaches of Sacred Sites Act

The scope of a presumption that legislation does not make the Crown liable to be prosecuted or convicted of an offence has been clarified in a recent High Court decision (*Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks & Anor* [2024] HCA 16).

The High Court confirmed that the Federal Director of National Parks, responsible for the management of Kakadu National Park, can be held criminally liable for breaches of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

The High Court also held that the presumption only applies to the 'body politic', that is, the Commonwealth, States or Territories as distinct legal persons. The presumption does not apply to natural persons, or statutory bodies/corporations.

Federal Court confirms river mouth can be granted under ALRA

The Federal Court has confirmed that the mouth of a river (ie an estuary) is "land" that can be granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*Northern Territory of Australia v Aboriginal Land Commissioner* [2023] FCA 1183).

The Federal Court confirmed that the 2002 High Court decision in *Risk v Northern Territory of Australia* (2002) 210 CLR 39 did not prevent estuaries falling within the definition of "land". The findings in that decision were confined to the seabed of bays and gulfs.

NSW Court clarifies meaning of "lawfully used or occupied" in the Aboriginal Land Rights Act

In *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 134 the Land and Environment Court confirmed that lawful occupation of land does not require that the use is also lawful.

The Court used the opportunity to consider whether a common law tenancy (involving payment of rent) after an expired special lease amounted to lawful occupation if the statutory precondition had not been met. It found that such occupation would not meet the lawfulness standard because the *Crown Land Management Act 2016* (NSW) prohibited any dealings with Crown lands other than in accordance with the Act. That is, the common law rights were ousted by the legislation and could not give rise to "lawful occupation".

The Court found that the land was "claimable Crown land" and the appeal succeeded.

Matters to watch out for in 2024-2025

Stop Press: Australian Law Reform Commission to report on the future act regime in the Native Title Act

In breaking news, on 4 June 2024 the Australian Law Reform Commission was asked to report on the future act regime in the *Native Title Act 1993* (Cth).

The need for reform was flagged in the A Way Forward report in October 2021 (see our *Native Title Year in Review 201-2022* article "Modernisation of cultural heritage protection legislation begins"). However, there was no progress on this front until recently, when the 2024-2025 Federal Budget allocated $500,000 for this review.

The Terms of Reference are very wide and ask the Commission to consider a range of factors relating to the future act regime. It is not limited to the right to negotiate process. We will monitor the progress of the review and provide more information in further publications.

Native title decisions

There are several decisions to watch out for in 2024-2025:

- 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. See our *Native Title Year in Review 2023-2024* article "Native title compensation: a big year ahead";
- High Court decision about the test for connection, loss of connection and the use of findings in neighbouring determinations an appeal from *Stuart v State of South Australia* [2023] FCAFC 131. We wrote about this decision in our article "Full Court considers connection but High Court to have final word"

- High Court decision on special leave application by the Clermont-Belyando Area Native Title Claim Group in relation to the Full Court decision that native did not exist (*Malone on behalf of the Clermont-Belyando Area Native Title Claim Group v State of Queensland* [2023] FCAFC 190). We wrote about this decision in our article "Full Court considers connection but High Court to have final word"
- South Australian Court of Appeal decision regarding access to trust records by common law native title holders in an appeal from *Adnyamathanha Traditional Lands Association & Ors v Rangelea Holdings Pty Ltd* [2023] SASC 51. We wrote about this decision in our ***Native Title Year in Review 2023-2024*** article "Transparency for Adnyamathanha people over distribution of native title monies".
- Native title compensation decisions in the ***McArthur River Project Compensation Claim*** (NTD25/2020 and NTD16/2023) (Federal Court), ***Yindjibarndi Ngurra Compensation Claim*** (WAD37/2022); and
- NNTT determination in the remitted Santos v Gomeroi future act application, after the Full Court decision in *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26. The NNTT will consider the application of the section 39 criteria in the Native Title Act and in particular the relevance of climate change when considering the public interest in the doing of the act. The remittal application with be heard and determined by the NNTT constituted as three members – President Smith, Member Eaton and Member Kelly.

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Chambers Asia-Pacific, 2024

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