Ashurst

# Native Title Year in Review

## 2023-2024

May 2024

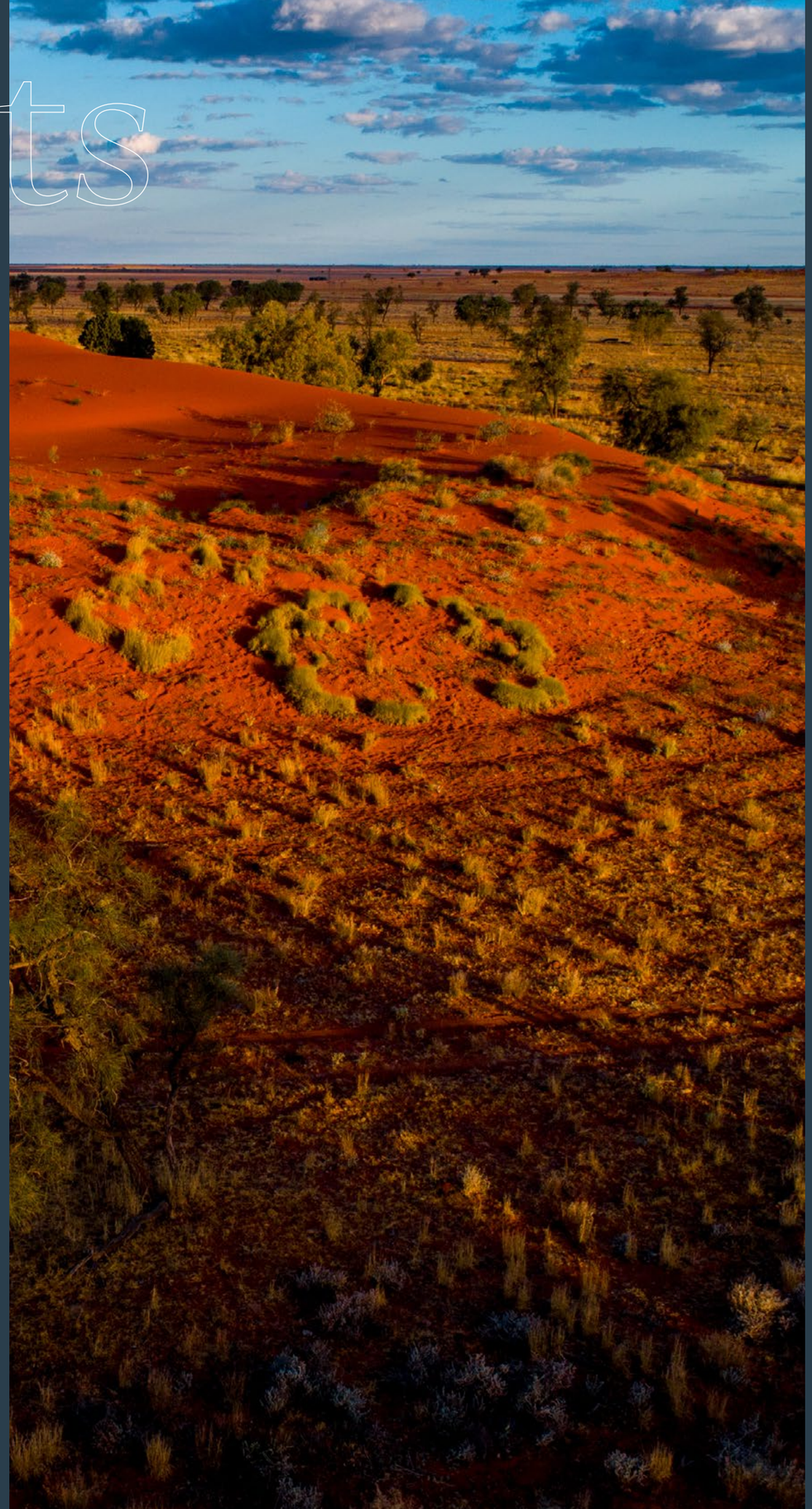
Outpacing change

# contents



Ashurst provide holistic native title services to our company. Ashurst take time to deeply understand our business and objectives and provide advice to us on that basis. They have a team approach with a wide variety of skills and capabilities that we can draw on."

Legal 500 Asia-Pacific 2024





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. Their experience goes beyond the legal framework and to a deeper understanding of how aspects of native title law can be implemented in the field and methods to ensure mutual benefit can be achieved, both for their clients and for the traditional owners of the lands where projects are developed."

Legal 500 Asia-Pacific 2023

# Foreword

**31 May 2024**

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

This is our ninth annual Native Title Year in Review.

The last (almost) decade has seen enormous change in our field.

In recent years, native title case law has taken a back seat to non-native title issues – including the role of First Nations communities in land use engagement and decision making, the protection of tangible and intangible cultural heritage, FPIC (Free, Prior and Informed Consent) and human rights.

Native title case law has been mostly focused on the critical issue of compensation, and a number of 'test cases' about discrete issues.

After a flurry of developments between 2020-2023, the last 12 months has seen a reduction in significant legislative and judicial developments as all stakeholders consider the way forward after the Referendum decision.  Other than, of course, the roller coaster that was the introduction, and the swift repeal, of a whole new cultural heritage regime in Western Australia that itself was over 5 years in the making.

Our national Ashurst team has remained at the forefront of these developments.

Over the last 12 months, our highlights have included:

- being recognised as Band 1 in Native Title (Proponents) in Chambers Asia-Pacific, a ranking which we have maintained since 2007.  We could not have achieved this recognition without the opportunities and trust our clients place in us, for which we are - as always – incredibly grateful;
- agreement negotiations for projects that will deliver the critical energy transition needed for the Australian and global economies and communities; and
- continuing to assist clients to navigate the gap between current laws and best practice.

The next twelve months will bring some important native title appeal decisions (including a High Court decision in the Gumatj native title compensation case) and possibly the introduction of new Federal cultural heritage legislation.

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 around Australia, and, in particular, playing our discreet role in the world's energy transition.

The articles in this 2022-2023 publication are current as at 31 May 2024.

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.



**25**
New determinations that native title exists

**502**
Total positive native title determinations around Australia*

**127**
Total active native title claimant applications yet to be resolved around Australia*

**16**
New claimant applications filed

**3.4M KM²**
Native title land around Australia**

**7**
Active compensation claims around Australia*

**31**
New ILUAs registered

**1474**
Total registered ILUAs around Australia*

**6**
Applications for protection under section 10 Aboriginal and Torres Strait Islander Heritage Protection Act

**76**
Section 31 agreements (RTN Agreements) received by the NNTT

* Source: National Native title Tribunal as at 7 May 2024

**Source: National Native title Tribunal as at 1 April 2024

Figures not marked with an asterisk relate to the 2023 calendar year

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

## What you need to know

- 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.

## What you need to do

- If you are operating in this space, get familiar with the Guide. It is ambitious and probably unrealistic, but a good articulation of best practice.
- Interestingly, the Guide seeks to use the structure of the financial system to influence corporate behaviour and social outcomes. It asks investors (including superannuation funds and fund managers) to monitor businesses' implementation of the Principles and human rights issues generally and hold them to account. It advocates for the integration of cultural heritage considerations into decision-making during due diligence, assessing disclosures, corporate engagement, stewardship and whether to buy, hold or sell an asset.
- Be aware that change will come to Federal heritage laws. When it does, it will be closer to the expectations expressed in these recent publications than the current legal framework.



## How did we get here – what happened to legislative reform?

The First Nations Heritage Protection Alliance started out as a collaborator with the Federal Government on legislative reform. This work led to the publication of a number of papers in 2022 (Discussion Paper that will guide consultations as part of the national engagement process, Directions Report – First Nations Cultural Heritage Reform, and Options Paper: First Nations cultural heritage protection reform).

The Options Paper set out three options for reform, including standalone Federal legislation, Federal accreditation of State/Territory legislation and model legislation to be adopted by States and Territories. We wrote about these developments in our *Native Title Year in Review 2023* article "No new Federal cultural heritage legislation in 2023 – but change is coming".

Further engagement and reports were planned for 2023 with a view to introducing new legislation in early 2024. None of this has happened. Perhaps the Government was keen to separate itself from developments in Western Australia (see our *Native Title Year in Review 2023-2024* article "WA Aboriginal heritage laws restored with key changes". It moved away from the option that would involve standalone Federal legislation. In the October 2023 Senate Estimates hearings, the Department stated that "states and territories have primary responsibility around cultural heritage legislation", and reiterated the Minister's position that any Federal reform "would not override state or territory legislation".

When pressed on the timing of further reforms, the Department's representative confirmed that they would not be rushed and will take the time to consult widely to get the reform right. When pressed about whether there would be legislation before the next election, a representative said:

> It's unclear. … the Government is committed to making sure that they get it right. It has been a slow process. It's a tricky reform. We are working through the detail very carefully with the cultural heritage alliance. When we feel that we are ready to go to a broader consultation process, … we'll go to peaks and to industry. We've got to engage with the states quite extensively. The Government is very committed to the reform, but we don't yet have a time frame.
> (page 101 Senate Estimates hearings).

The 2024-2025 Federal Budget's Future Made in Australia – Strengthening Approvals Processes section includes $17.7 million to reduce the backlog and support administration of complex applications under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and progress the reform of Australia's cultural heritage laws.

## No progress for First Nations underwater cultural heritage law reform

In March 2023, the Federal Government released draft guidelines outlining proponent requirements to protect underwater cultural heritage under the *Underwater Cultural Heritage Act 2018* (Cth) (UCH Act). The draft guidelines go further than current legislative requirements, signalling future legislative reform. We wrote about this in our *Native Title Year in Review 2023* article "*First Nations underwater cultural heritage – no longer a submerged issue*".

Despite the Department indication that finalised guidelines would be released in late 2023, progress has stalled. See our *Native Title Year in Review 2023*-2024 article "Further litigation of First Nations consultation rights for offshore projects in the wake of Tipakalippa"

## Dhawura Ngilan business and investor initiative

In the meantime, the First Nations Heritage Protection Alliance has sought to set the agenda. In March 2024, they launched the Dhawura Ngilan business and investor initiative. The initiative comprises 20 Aboriginal heritage protection principles alongside a Guide for Business and Investors. about how the principles should be implemented.

The Initiative has been endorsed by Responsible Investment Association Australasia, BHP, Lendlease, HESTA and others.

The Principles and Guide both assert that current Australian legislative frameworks do not adequately protect First Nations cultural heritage and are not in line with international legal standards. They state that the Principles and Guide present an opportunity for the private sector to go beyond legislative standards and actively contribute to the Dhawura Ngilan (Remembering Country) Vision for Aboriginal and Torres Strait Islander heritage in Australia.

Much of the content reflects the outputs of the Parliamentary inquiries into Juukan Gorge incident in May 2020. There is a focus on FPIC (free, prior and informed consent), human rights and international instruments/ guidelines.

**Key things to note:**

- The Guide asks investors (including superannuation funds and fund managers) to monitor businesses' implementation of the Principles and Guide and human rights issues generally and hold them to account.
- It wants investors to influence corporate behaviour and social outcomes by integrating cultural heritage considerations into decision-making during due diligence, assessing disclosures, corporate engagement, stewardship and whether to buy, hold or sell an asset.
- The Principles and Guide entrench "FPIC" and the right to say no.
- The Guide contains detailed lists of what businesses and investors should be doing in relation to each of the principles, set out as a checklist. They are very specific.
- There is no real acknowledgment of the issues of standing (it suggests anyone who wishes to be consulted should be involved) or intra-Indigenous conflict in relation to cultural heritage management.
- There is much detail about First Nations prosperity and benefit sharing, but little acknowledgment of the difference between benefits flowing to businesses by the commercialisation of First Nations ideas and the management/protection of cultural heritage before land/sea-based projects are carried out.

## Other non-legislative developments in the clean energy space

In November 2023, DCCEEW released the First Nations Clean Energy Strategy Consultation Paper, and indicated that a draft strategy will follow in 2024.

In February 2024, the Clean Energy Council released Leading Practice Principles: First Nations and Renewable Energy Projects.

We expect aspects of these publications will be used by First Nations organisations, NGOs, and presumably some investor organisations as a benchmark for corporate conduct. They will inevitably influence the Commonwealth heritage reform process, though their scope extends beyond heritage protection discussion.

**Authors:** Leonie Flynn, Expertise Counsel, Clare Lawrence, Partner and Lydia O'Neill, Graduate

## Key insights

The slow pace of reform, coupled with the demands of energy transition projects, has led to non-Government players filling the gap with their own view of best practice.

Although there are commonalities among all these publications (in terms of complying with FPIC, international standards etc), the guidance is not the same, and of course, they have no legislative force.

There is some confusion. The many International companies attracted to Australia by the apparent demand for large scale renewable energy projects, are finding the lack of certainty challenging. Even those proponents familiar with the Australian environment feel as if they are facing changing and divergent expectations.

The sooner the Federal Government progresses legislative measures the better – for all concerned. Unfortunately, time is running out for the Federal Government to introduce cultural heritage reform legislation during the current term (ie by May 2025).

# WA Aboriginal heritage laws restored with key changes

## What you need to know

- 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.

## What you need to do

- Proponents must, as always, prioritise maintaining and strengthening relationships with Traditional Owner stakeholders.
- Internal policies and procedures should be updated and rolled out through internal training programs, to ensure compliance with WA Aboriginal cultural heritage reform.

## What legislation now applies in WA?

On 15 November 2023, following repeal of the *Aboriginal Cultural Heritage Act 2021* (WA) (2021 Act), the WA Government restored the *Aboriginal Heritage Act 1972* (WA) (old 1972 Act) with some additions and amendments (new 1972 Act).

The supporting *Aboriginal Heritage Amendment Regulations 2023* (WA) (Amendment Regulations), which amend the *Aboriginal Heritage Regulations 1974* (WA) (old Regulations), commenced on the same day.

We wrote about the 2021 Act in our *Native Title Year in Review 2022-2023* article "1 July 2023 – WA's new Aboriginal heritage laws have commenced".

## Key changes to the new 1972 Act

### Revised section 18 consent

The new 1972 Act reinstates the section 18 consent process that existed under the old 1972 Act with some significant changes. The main difference is that the section 18 consent process and historic and future section 18 consents are now subject to the 'new information' regime, outlined below.

Notice of section 18 consent decisions are published on the Department of Planning, Lands and Heritage's (DPLH) website, pursuant to new Ministerial obligations.

### 'New information' regime

The section 18 consent process is now subject to the 'new information' regime, by which all section 18 consents (including historic section 18 consents) are now subject to 'new information' requirements, where:

- proponents **must** inform the Minister if new information about an Aboriginal site becomes known; and
- the Minister can (either because a proponent has notified them, or because it has come to their attention via other means) amend the section 18 conditions, add conditions, confirm the consent or revoke the section 18 consent altogether.

While making such a decision, the Minister can suspend the operation of section 18. This regime goes further than the 2021 Act (where the 'new information' regime did not apply to historic section 18 consents).

The new 1972 Act provides threshold dates for when these requirements are triggered. Most historic section 18 consents likely fall into the category of being notified before 23 December 2023 and new information becoming known on or after 1 July 2023. In any case, owners of land subject to a section 18 consent will need to comply with the new positive obligation to notify the Minister (or risk breaching their consent conditions, which is an offence under section 55 of the new 1972 Act).

### SAT review of section 18 decisions

The new 1972 Act also provides the right for the proponent or native title party to seek State Administrative Tribunal (SAT) review of any Ministerial decision that flows from 'new information' (even if the Minister decides to simply 'confirm' the section 18).

Problematically, the obligation to notify new information is at odds with circumstances where Traditional Owners request / require proponents to keep survey information confidential.

In addition to this new review provision for proponents and native title parties, the new 1972 Act also provides the Premier with a power to determine the outcome of a SAT review application where it raises issues of State or regional importance. The landowner and native title party can make submissions as part of this process. The Premier must take into account any submissions made, the general interest of the community, and any other matters considered relevant.

### Transfer of section 18 consent

The new 1972 Act requires landowners to notify the Minister where there is a change in ownership of land the subject of a section 18 consent. The Minister will have the ability to amend the consent if satisfied that the consent does not "have its intended effect" because of the change in ownership. Alternatively, a landowner can apply to the Minister to revoke the section 18 consent where there is a change in ownership of the land.

Failure to notify the Minister within 14 days of a change of ownership of land is an offence under the new 1972 Act.

### Prohibition on ‘gag clauses’

Under the new 1972 Act, native title parties are now able to oppose section 18 consents and seek review of section 18 Ministerial decisions, regardless of any current agreement with any proponent.

The new 1972 Act provides that the provision of a contract or other agreement that would otherwise prohibit or have the effect of prohibiting a native title party from making an application for SAT review, commencing or being heard in proceedings in relation to a section 18 consent decision, is of no effect.

### Supporting policy and guidelines

To support the re-introduction of the new 1972 Act, the Department has published accompanying guidelines:

- a consultation policy for section 18 applications (Policy); and
- new guidelines (Guidelines).

Both the Policy and the Guidelines talk to key issues such as the:

- matters to be considered by landowners in determining whether a section 18 may be required;
- content to be included in or addressed by a section 18 application;
- level of consultation expected of proponents;
- ‘new information’ regime; and
- transfer of ownership, among other things.

### Other notable changes

Other notable changes to WA’s Aboriginal cultural heritage regime forming part of the legislative updates include:

- any Aboriginal cultural heritage permit (ACH Permit) and any Aboriginal cultural heritage management plan (ACH Management Plan) granted under the 2021 Act becomes a section 18 consent under the new 1972 Act;
- the Aboriginal Cultural Heritage Council under the 2021 Act will effectively operate under the new 1972 Act in place of the old Aboriginal Cultural Material Committee. It will now be called the “Aboriginal Cultural Heritage Committee” (ACHC); and
- the Aboriginal Cultural Heritage Directory under the 2021 Act reverts to the ‘Register’ under the 1972 Act.



## Key changes in the Amendment Regulations

The Amendment Regulations set out additional detail on matters covered in the new 1972 Act, including in relation to the process for section 18 applications.

### Additional categories of ‘native title party’

The Amendment Regulations create additional categories for what constitutes a ‘native title party’ under the new 1972 Act, in addition to determined native title holders and native title claim groups. The expanded definition includes, among other things, the Murujuga Aboriginal Corporation, the Badimia Land Aboriginal Corporation and native title representative bodies and service providers (such as CDNTS, NTSG, KLC and YMAC). Most of these parties are only applicable if there is no other native title party.

### Timeframe and notices for the section 18 consent process

The Amendment Regulations set out timeframes for various steps as part of the section 18 process, as follows:

| Step | Timeframe |
|---|---|
| Landowner responding to request from Committee for more information about section 18 notice. | Within 14 days after request (can be extended once). |
| Committee submitting section 18 notice, and its recommendations, to the Minister. | Within 70 days after submission to Committee (can be extended once, by up to 30 days). Note: excludes period where Committee has requested further information from applicant. |
| Minister making decision on section 18 notice. | Within 28 days after submission to Minister (or as soon as practicable after that). |
| Landowner or native title party applying to SAT for review of section 18 decision. | Within 28 days after Minister publishes the decision (can be extended by SAT). |
| Landowner notifying Minister of new information, as part of condition of section 18 consent. | Within 21 days after becoming aware of new information. |
| Minister making a decision on new information. | Within 28 days after becoming aware of new information (or as soon as practicable after that). |
| Premier giving direction to SAT to refer an application to the Premier for determination (ie 'call-in application'). | Within 28 days after application is made to SAT. |
| Landowner or native title party making submission to Premier about call-in application. | Within 28 days after receiving copy of direction (can be extended by Premier once). |
| Premier determining call-in application. | Within 28 days of (1) submission period, or (2) application and recommendations being referred to Premier (or, in each case, as soon as practicable after that). |
| Landowner notifying the Minister of a change in ownership of land subject to a section 18 consent. | Within 14 days after change of ownership. |
| Landowner giving copy of notice (of change in ownership) to the Committee and native title parties. | Within 28 days after change of ownership. |

The Amendment Regulations also require that proponents giving notices under section 18 and providing ‘new information’ under a section 18 must do so using the Department’s specified online management system.

## Aboriginal Cultural Heritage Committee (ACHC)

The Amendment Regulations set out the procedures that apply to the new ACHC, including nominations, terms, subcommittees, disclosure of conflicts, holding meetings, quorum and voting requirements.

The Amendment Regulations also allow the ACHC to request further information in relation to a section 18 application where a landowner has made that application.

## Applicable penalties

The Amendment Regulations amend and clarify penalties that apply for some offences that already exist under the old Regulations. For example, the penalty for entering or remaining on a protected area to which the public is not admitted has increased from $100 to $1,000.

## Fees Regulations and Transitional Regulations

The *Aboriginal Heritage (Fees) Regulations 2023* (WA) (Fees Regulations) and the *Aboriginal Heritage (Transitional Provisions) Regulations 2023* (WA) (Transitional Regulations) also commenced on 15 November 2023.

The Fees Regulations set out the fees that are payable under the new 1972 Act for section 16 and section 18 applications.

- Where a 'commercial proponent' applies for a section 16 authorisation, the fee is $250, plus $5,096 for each 'proposed investigation site', payable within 14 days of the application. Proposed investigation sites mean the relevant places that are proposed to be entered, excavated, examined or removed.
- Where a 'commercial proponent' applies for a section 18 consent, the fee is $250, plus $5,096 for each 'identified place', payable within 14 days of the application. Identified places means the relevant places that are or may be Aboriginal sites.

The Transitional Regulations set out additional detail in relation to various transitional matters associated with the repeal of the 2021 Act and the commencement of the new 1972 Act, including Aboriginal remains and objects, protected areas, ACH Permits and ACH Management Plans, defences, remediation and compliance.

**Authors:** Ellise O'Sullivan, Senior Associate; Andrew Gay, Partner

# FPIC continues to dominate the discourse

## What you need to know

- 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.

## What you need to do

- As a proponent, be aware of the difficulty in getting a major project approved without the support of Traditional Owners, irrespective of whether there is a legal requirement to do so.
- As a Traditional Owner, be aware that not every project can support significant benefit sharing models. It depends on project financials, which need to be assessed on a case-by-case basis, as well as the nature of the contribution you are able to provide.
- So, use the opportunity to get creative in discussions about working together.



## Free, Prior and Informed Consent

In previous years, we have reported on how the "free, prior and informed consent" standard has been implemented in the native title landscape. This year, we have seen that FPIC continues to be an influential concept in the development of legislation, guidelines and the expectations of Traditional Owners.

We summarise developments of note during the last 12 months below.

## Inquiry into application of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia

In November 2023, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs handed down its Final Report from The Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia. The Committee recommended that Governments ensure their approach to developing policy and legislation affecting Aboriginal and Torres Strait Islander peoples be consistent with UNDRIP. It suggests mechanisms, such as incorporating UNDRIP into Australia's human rights scrutiny legislation and a national action plan developed in consultation with First Peoples, to guide coordinated efforts for implementing UNDRIP holistically into Australia.

Further, the Committee recommended that the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended to include UNDRIP in the definition of 'human rights', so that it is formally considered by the Parliamentary Joint Committee on Human Rights when scrutinising legislation. However, the Committee stopped short of recommending that UNDRIP be legislated in full in Australia.

## Dhawura Ngilan Business and Investor Initiative

In March 2024, the Dhawura Ngilan Business and Investor Initiative published the Principles for Businesses and Investors and A Guide for Businesses and Investors which describe principles of engagement with Traditional Owners that are influenced by the concept of FPIC.

The guide provides that investors have an opportunity to drive industry observance of and respect for FPIC. It also challenges companies to measure themselves by how holistically they apply FPIC in cultural heritage matters. The Guide includes a helpful list of what FPIC can look like in practice and importantly, clarifies that consent includes allowing Traditional Owners to withhold consent.

See our *Native Title Year in Review 2023-2024* article "Little movement on Federal cultural heritage reform in 2023 – but stakeholders and industry are instigating change" for more.

## Full Federal Court decision in Gomeroi People v Santos

In March 2024, the Full Federal Court handed down its decision in *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26. This case discussed the policy position of the Government that effective veto in relation to the doing of future acts sits with the Tribunal, not the native title party.

As part of this discussion, the Chief Justice referred specifically to criticisms of the *Native Title Act 1993* (Cth) made by the Joint Standing Committee on Northern Australia in A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge, released in October 2021. These criticisms stemmed from the Report's recommendations to amend the Native Title Act. Specifically, to address inequalities in the negotiation position of Traditional Owners in the context of the future act regime as well as to develop standards for negotiation of agreements that require proponents to adhere to the principle of FPIC as set out in the UNDRIP. These reforms have not been actioned to date, but could be part of reform foreshadowed in the recent Federal Budget, as explained below.

## Federal Budget includes allocation for Native Title Act reform

The 2024-2025 Federal Budget allocates $500,000 to the Australian Law Reform Commission to review the future acts regime within the Native Title Act. TThe 4 June 2024 referral requires the ALRC to report by 8 December 2025. The Terms of Reference do not mention FPIC but they do require consideration of International instruments like UNDRIP.

## Offshore infrastructure legislation

Offshore infrastructure legislation introduced in 2022 has been criticised for failing to require the consent of Traditional Owners in offshore infrastructure projects like offshore wind farms. At the end of April 2024, the Government released a consultation draft of the *Offshore Electricity Infrastructure Amendment Regulations 2024 (Cth)*. The draft regulations will require proponents to consult with Traditional Owners that have native title rights and interests or "sea country" in the licence area. This language no doubt directly reflects recent case law developments in respect of offshore projects, such as *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 and *Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2023] FCA 1158.

The draft regulations also reflect the broader trend of FPIC influencing expectations in new legislation. See our *Native Title Year in Review 2023*-2024 article "*Further litigation of First Nations consultation rights for offshore projects in the wake of Tipakalippa*" for more about these decisions.

## Victorian Government's evidence at the Yoorrook Justice Commission mentions wealth sharing and informed consent

The Victorian Minister for Energy, Lily D'Ambrosio, gave a statement at a public hearing held by the Yoorrook Justice Commission in Victoria on 22 April 2024. The hearing is a formal Truth-Telling process about the injustices against First Peoples related to land, sky and waters.

Minister D'Ambrosio's statement indicated the Victorian Government's intention to introduce into law some form of wealth sharing mechanism with Traditional Owners from resources and renewable energy projects. During her evidence, Minister D'Ambrosio made it clear that the approach to addressing wrongs of the past was not just about wealth sharing but it was about:

> Informed consent... and the principles that are certainly embedded in the United Nations Declaration for Indigenous Peoples. So that is something that is guiding my approach, the Department's approach and Government.

It will be important for Victorian proponents to consider how these future legislative mechanisms may need to be reflected in any agreements with Traditional Owners.

### Key insights

Irrespective of a lagging legal framework, it is now difficult for proponents to get major projects approved without the support of Traditional Owners.

FPIC is a concept whose time has come, but statements regarding "best practice" overlook the on-ground complexities of correctly identifying the Traditional Owners for country and incorporating traditional decision-making processes.

The mammoth task of new builds required for the energy transition will give all involved the opportunity to embed and test the limits of the FPIC standard in Australia.

**Authors:** Sophie Westland, Senior Associate and Clare Lawrence, Partner

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

## What you need to know

- 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.

## What you need to do

- If you are currently consulting on an environment plan under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth), you will be aware of the NOPSEMA Guidelines, Consultation in the course of preparing an environment plan. Genuine consultation of the type required needs thoughtful planning and careful execution. Do not defer this, as NOPSEMA does not have the power to accept an environment plan unless it is satisfied consultation is complete.
- If you currently hold an in-force environment plan, the decision in *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9 provides increased certainty that it can be relied upon for environmental risks and impacts that existed up until the date of approval. Revision of the plan and further consultation will only be required due to new facts and circumstances arising after approval.

### Reminder of the Tipakalippa decision

In *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, the Full Federal Court upheld a decision to overturn NOPSEMA's acceptance of Santos' environment plan for the drilling and completion activities as part of its Barossa Project. This was on the basis that it had not consulted with all relevant persons whose "functions, interests or activities may be affected" by the activities (regulation 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (OPGGS(E) Regulations 2009), as then in force).

The Court held that Santos did not consult the "relevant person" being Dennis Tipakalippa, an elder, senior lawman and traditional owner of the Munupi Clan on the Tiwi Islands. We wrote about that decision in our *Native Title Year in Review 2022-2023* article "Full Court Tipakalippa decision – stakeholder consultation grows teeth".

Following Tipakalippa, there have been two further challenges to approvals for offshore gas projects by traditional owners heard and decided by the Federal Court:

- *Cooper v NOPSEMA (No 2)* [2023] FCA 1158;
- *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9.

## Cooper v NOPSEMA

### What were the Cooper proceedings about?

*Cooper* concerned an application by Ms Raelene Cooper, a Murdudhunera lore woman, for judicial review of a decision by NOPSEMA to accept an environment plan. The plan was for a seismic survey associated with Woodside's Scarborough Project, located in offshore waters off the coast of the Pilbara region of Western Australia. Woodside was the second respondent to the proceeding.

NOPSEMA had accepted the Environment Plan subject to conditions, one of which required Woodside to further consult with representatives of Aboriginal and Torres Strait Islander bodies prior to the commencement of the seismic survey.

Ms Cooper commenced proceedings on 17 August 2023, primarily on the basis that NOPSEMA did not have the statutory power to make the decision to approve the environment plan. In particular, Ms Cooper contested whether NOPSEMA could approve the plan when it was not reasonably satisfied that consultation requirements under the OPGGS(E) Regulations 2009 had been carried out. Alternatively, Ms Cooper claimed Woodside had not complied with conditions requiring Woodside to consult with her and that Woodside should be permanently restrained from undertaking the seismic survey.

Ms Cooper sought an urgent injunction shortly after the commencement of the proceedings, which was granted. Following this, an expedited hearing occurred to determine the preliminary issue of whether NOPSEMA had power to make its decision.

### Did NOPSEMA have power to make the decision?

In finding that NOPSEMA did not have the statutory power to make its decision, Justice Colvin considered several requirements and powers under the OPGGS(E) Regulations 2009.

The Court observed that NOPSEMA can only accept an environment plan if it is reasonably satisfied criteria in the regulations are met, which relevantly includes that the necessary consultation has been carried out.

NOPSEMA can accept an environment plan subject to "any limitation or condition applying to operations for the activity".

The Court referred to *Tipakalippa* as highlighting that NOPSEMA is materially depending on the consultation undertaken by a titleholder to identify impacts and risks, and that the regulatory scheme contemplates that consultation will be completed before the plan is submitted to NOPSEMA for acceptance.

This position is not affected by the regulations also containing provisions requiring consultation after an environment plan has been accepted. This is because those aspects of the scheme are a mechanism to deal with future developments as they unfold, rather than an indication that NOPSEMA has power to defer the assessment of the consultation requirements.

The Court decided that NOPSEMA's power to include conditions on the acceptance of a plan could not include conditions to undertake further consultation, as the consultation does not form part of the "operations for the activity". The Court further held that such a condition would impermissibly delegate part of NOPSEMA's statutory task (the evaluation of whether environmental impacts and risks have been reduced as low as reasonably practicable and to an acceptable level) to Woodside.

### What does this mean for consultations in the course of preparing an environment plan

The *Cooper* decision makes a clear statement that all consultation required under the OPGGS(E) Regulations 2009 (which is now regulation 25 of *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth)) must be completed before an environment plan is submitted to NOPSEMA for acceptance. NOPSEMA is not able to accept an environment plan subject to conditions

requiring further consultation while also meeting its statutory obligation to be reasonably satisfied that the necessary consultation has occurred.

It is important to note that the Court in *Cooper* did not actually determine whether the consultation that had occurred with Ms Cooper had been completed or whether it was open to NOPSEMA to be reasonably satisfied that the consultation was complete, and this decision does not provide guidance on when such a consultation could be said to be complete.

# Munkara v Santos

## What were the Munkara proceedings about?

*Munkara* concerned an injunction application brought by Mr Simon Munkara regarding Santos' Barossa Project Gas Export Pipeline. Unlike *Tipakalippa* and *Cooper*, both of which were judicial review applications of recently accepted environment plans, *Munkara* related to an environment plan originally approved in November 2021. The basis for the application was to seek an injunction for an anticipated breach of regulation 17(6) of the OPGGS(E) Regulations 2009 (as then in force) due to Santos' alleged failure to revise its environment plan following the occurrence of a significant new or increased environmental impact or risk.

Mr Munkara alleged that information provided to Santos and NOPSEMA before the proceedings about Tiwi Islander cultural heritage and sea country in the vicinity of the pipeline constituted a significant new risk or impact that was not accounted for in the approved environment plan. Two other Tiwi Islanders joined as applicants after the commencement of the proceedings.

The injunction sought would have restrained Santos from installing its pipeline until its environment plan had been revised and submitted to NOPSEMA. A consequence of such an injunction would also be that Santos would be required to carry out new consultation before NOPSEMA could accept the revised EP.

## When are cultural beliefs considered part of the environment?

The OPGGS(E) Regulations 2009 define environment as meaning (among other things) the "cultural features" of "ecosystems and their constituent parts, including people and communities" and "the heritage values of places". The Applicants argued this definition included a crocodile man songline, and a rainbow serpent (the Mother Ampiji) said to reside offshore where a lake existed 20,000 years ago.

When considering the meaning of "environment" and the extent to which it could include cultural beliefs, Justice Charlesworth found that it was necessary to show that any beliefs were broadly representative of the beliefs held by the relevant clans "as a people". Cultural features are part of the ecosystem, and the focus should not be on an individual devoid of the context of the ecosystem. If a belief held by an individual or some individuals does not broadly represent those beliefs, they are not a cultural feature within the definition of environment.

## The parties' evidence

Both the Applicants and Santos had a number of Tiwi Islander lay witnesses, and each had their own experts that prepared reports and gave oral evidence during the proceeding.

Twenty three Tiwi Islanders gave evidence, twelve for the applicants and eleven for Santos. This constituted a roughly even split of those saying that the pipeline would harm the cultural features and beliefs of the Tiwi Islanders, and those that said there would be no cultural impacts or impediments as a result of the pipeline being installed along the sea floor.

The Applicants' experts had prepared a number of anthropological, geomorphological and archaeological reports. Most of this evidence was prepared in the months prior to the commencement of proceedings and was a product of workshops held with Tiwi Islanders to undertake a cultural mapping exercise. The primary output of those meetings was a map that purportedly showed the Santos

pipeline intersecting the crocodile man songline and being located between the Tiwi Islands and the location of a Mother Ampiji (Ampiji being the rainbow serpent caretaker of the Tiwi Islands).

Santos' expert evidence consisted of anthropological, archaeological and geological evidence, which was largely prepared in response to a general direction from NOPSEMA issued in January 2023 that required Santos to undertake an assessment of underwater cultural heritage along the pipeline route.

Justice Charlesworth was not satisfied there was any risk of environmental impact of the kind asserted by the Applicants. In reaching this conclusion, Her Honour described the cultural mapping exercise and the opinions expressed about it as "so lacking in integrity that no weight can be placed on them".

Throughout Her Honour's decision, the judgment was critical of the conduct of the Applicants' independent experts. This criticism included the fact that the conduct of one expert suggested that they sought to present a case that they perceived might assist the Applicants, and therefore not behaving as an independent expert whose principal obligation is to assist the Court.

Justice Charlesworth was also critical of one of the Applicants' solicitors, commenting that the conduct of that solicitor during one of the workshops with the Tiwi Islanders was sufficient to reduce the integrity and reliability of the cultural mapping exercise to naught.

The Court also rejected the Applicants' evidence of possible impacts on tangible cultural heritage such as alleged burial sites. Justice Charlesworth found there was no factual or scientific underpinning that those alleged sites would survive 10,000 years of tidal currents, and further rejected the Applicants' expert evidence on this issue.

### What constitutes the occurrence of a "new" environmental risk?

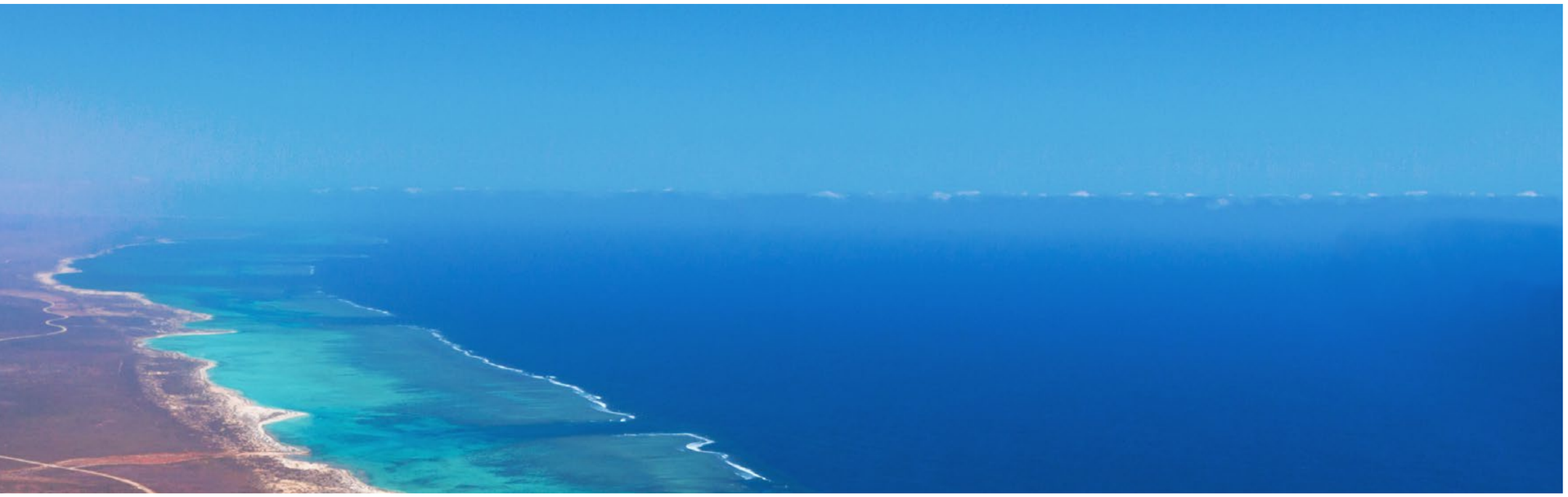
Notwithstanding the Court's findings on the basis of the evidence, Justice Charlesworth made further findings that the risks identified by the Applicants were not "new" within the meaning of regulation 17(6).

The Applicants asserted that a risk "occurred" when it was brought to Santos' attention, and was "new" because it was not provided for in the environment plan. The Court disagreed, finding that a new risk only occurs when the facts or circumstances giving rise to the asserted risk are facts and circumstances coming into existence after the approval of an environment plan.

While not stated by the Court, this construction would appear to make it very difficult for the existence of Indigenous cultural heritage to be a new environmental risk requiring a revision of an in-force environment plan.

### What did the Court decide?

For the reasons outlined above, the Court dismissed the application, allowing Santos to proceed with installing its pipeline.



## Regulatory updates

On 10 January 2024, the OPGGS(E) Regulations 2009 was repealed and replaced by the OPGGS(E) Regulations 2023. The OPGGS(E) Regulations 2023 largely remake and renumber the OPGGS(E) Regulations 2009, without any substantial amendments, as a result of the sunsetting of the 2009 regulations.

The consultation requirements have been re-enacted unchanged.

On 12 January 2024, the Department of Industry, Science and Resources released a consultation paper to clarify the consultation requirements for offshore oil and gas regulatory approvals. The two themes of the consultation follow some of the issues ventilated in the *Tipakalippa and Cooper* proceedings, namely:

- how to clarify the process for identifying who may be affected by offshore resources activities, the roles of representative bodies in consultations, and whether relevant persons should be able to self-identify and in what time frame; and
- how to determine when the consultation process can be considered complete.

The consultation closed on 8 March 2024 (extended from its original closing date of 23 February 2024).

The review has yet to reply to the responses received to the consultation paper, but there will be a further opportunity to comment on any proposed changes.

## Consultation under the Offshore Electricity Infrastructure Regime

The Government is currently working on draft amendment regulations under the *Offshore Electricity Infrastructure Act 2021 (Cth)*, which would introduce consultation requirements for the approval of management plans to carry out certain offshore electricity infrastructure activities, such as the construction and operation of offshore wind farms.

The consultation requirements with respect to First Nations people are expressed in different terms from those in the OPGGS(E) Regulations, providing that a licence holder must consult with (among others):

Aboriginal or Torres Strait Islander communities or groups that the licence holder reasonably considers may have:

- native title rights and interests (within the meaning of the *Native Title Act 1993*) in relation to the licence area; or
- sea country in the licence area.

There is a number of notable differences between this requirement and the "relevant person" consultation requirement in the OPGGS(E) Regulations 2023, including:

- A licence holder is only required to consult with First Nations communities or groups, not an individual relevant person;
- there are express references to sea country (but no clear method for determining its existence or extent); and
- the existence of First Nations rights and interests is now subject to the reasonable opinion the licence holder has about the existence of those rights and interests, compared to the functions, interests or activities of a relevant person under the OPGGS(E) Regulations 2023, which can exist as an objective fact regardless of the knowledge and opinions of a title holder (as was the case in *Tipakalippa*).

The proposed regulations may change during the course of the consultation. It will be interesting to see if there is some degree of uniformity with the OPGGS(E) Regulations 2023 once both consultation and review processes are complete.

**Authors:** Clare Lawrence, Partner; Sophie Westland, Senior Associate and Ian Harris, Senior Associate

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

## What you need to know

- 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.

## What you need to do

- Be aware that, although law reform around heritage protection has slowed, the incorporation of First Nations' viewpoints in the environmental approval process continues.
- There will be further law reform, and the trends are pretty clear. Don't assume that what is required in 2024 will be sufficient in 2027.
- Be ready to participate in any consultation process about reforms that affects your business.

## State/Territory reforms waiting for outcome of Federal law reform process

We last wrote about the progress of nationwide State and Territory cultural heritage law reform in our 2019 edition of *Native Title Year in Review*. This was of course before the incident at Juukan Gorge in 2020 and the monumental shift in the national approach to cultural heritage protection.

Heritage law reform is hard. In 2022, the Commonwealth flagged a new scheme setting standards to which the State and Territory regimes must conform. With this major change on the horizon, it seems that the States and Territories are holding off on reform, pending clarity at the Commonwealth level. As noted in our *Native Title Year in Review 2023-2024* article "Little movement on Federal cultural heritage reform in 2023 – but stakeholders and industry are instigating change"

A snapshot of the status and enthusiasm for reform amongst the States and the NT is summarised below.

### Western Australia

Western Australia's *Aboriginal Cultural Heritage Act 2021* (WA) substantially commenced (briefly) on 1 July 2023. We wrote about Western Australia's cultural heritage reforms in our *Native Title Year in Review 2022-2023* article "1 July 2023 – WA's new Aboriginal cultural heritage laws have commenced".

Amid widespread public pushback that the legislation had been 'rushed through' without adequate consultation of industry stakeholders, the WA Government announced that it would repeal the 2021 Act shortly after it had commenced.

The WA Government subsequently amended the preceding *Aboriginal Heritage Act 1972* (WA) and introduced accompanying regulations, new application guidelines for consents to harm heritage (known as section 18 applications) and a consultation policy for section 18 applicants. The amended Act fully came into operation from 15 November 2023 and is now the primary State regime regulating Aboriginal cultural heritage.

For more information, see our *Native Title Year in Review 2023-2024* article "WA Aboriginal heritage laws restored with key changes".

### Queensland

The review of the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) initially began in 2019, then recommenced in 2021 after a COVID-19 induced pause. The Queensland Government released its Options Paper in December 2021 and public consultation closed in March 2022.

Since then, the Government has been finalising its review of the legislation and still has not committed to any timeframes.

### New South Wales

Reform of Aboriginal cultural heritage laws in NSW has been ongoing since 2011. It has been six years since the release of the draft Cultural Heritage Bill 2018, and targeted consultation with key stakeholders continues.

According to Aboriginal Affairs NSW, the Minister for Aboriginal Affairs and Treaty is progressing the reforms, with a commitment to deliver standalone legislation within this term of Parliament (ie before March 2027).

## Victoria

There are not currently any Government led proposals for reform in Victoria. For a long time, the Victorian regime has been held up as a national benchmark for the management of cultural heritage.

However, in 2021 the Victorian Aboriginal Heritage Council (a Traditional Owner advisory committee to the Victorian Government) proposed recommendations for reform to the legislation, that go towards making it clear that registered Aboriginal parties have the ability to say **"no"**.

These recommendations have not been adopted by the Government.

There has been recent criticism of the current regime as obstructing development, in the particular subdivision of land for housing. Not long after the 2024 Referendum outcome, the Victorian coalition indicated that its support for Treaty making in Victoria would be contingent on the loosening of some of the protections in the *Aboriginal Heritage Act 2006* (Vic) (see the ABC article from 22 January 2024).

For the first time in many years, the *Aboriginal Heritage Act 2006* (Vic) is coming under scrutiny, both from RAPs, who think they have insufficient power, and the Coalition, who think the opposite. It is not likely however that this will lead to reform, at least until the outcomes of the Federal cultural heritage reform process is known.

## South Australia

South Australia released draft legislation to amend the *Aboriginal Heritage Act 1988* (SA) in early 2023. The draft reforms proposed significant increases to current penalties, expanded penalties beyond just fines and imprisonment and clarification of the obligations to report Aboriginal cultural heritage discoveries.

We wrote about SA's proposed reforms in our *Native Title Year in Review 2022-2023* article "*Joining the national movement – South Australia begins process for cultural heritage law reform*".

Consultation on the draft amendments ended on 6 April 2023. The SA Government has not committed to any timeframes to progress this further.

## Tasmania

In 2022, the Tasmanian Government invited submissions on its consultation paper: A new Aboriginal Cultural Heritage Protection Act – High-level Policy Directions.

We wrote about Tasmania's proposed reforms in our *Native Title Year in Review 2022-2023* article **"***Tasmania continues to progress towards new Aboriginal cultural heritage protection legislation***"**.

In December 2023, the Tasmanian Government released an update on the development of its draft Exposure Bill for new Aboriginal cultural heritage protection legislation. It committed to releasing the exposure draft in 2024.

It is not clear whether the outcome of the 2024 Tasmanian election (the incumbent Liberal party returned with a minority Government) will have any impact on these plans.

## Northern Territory

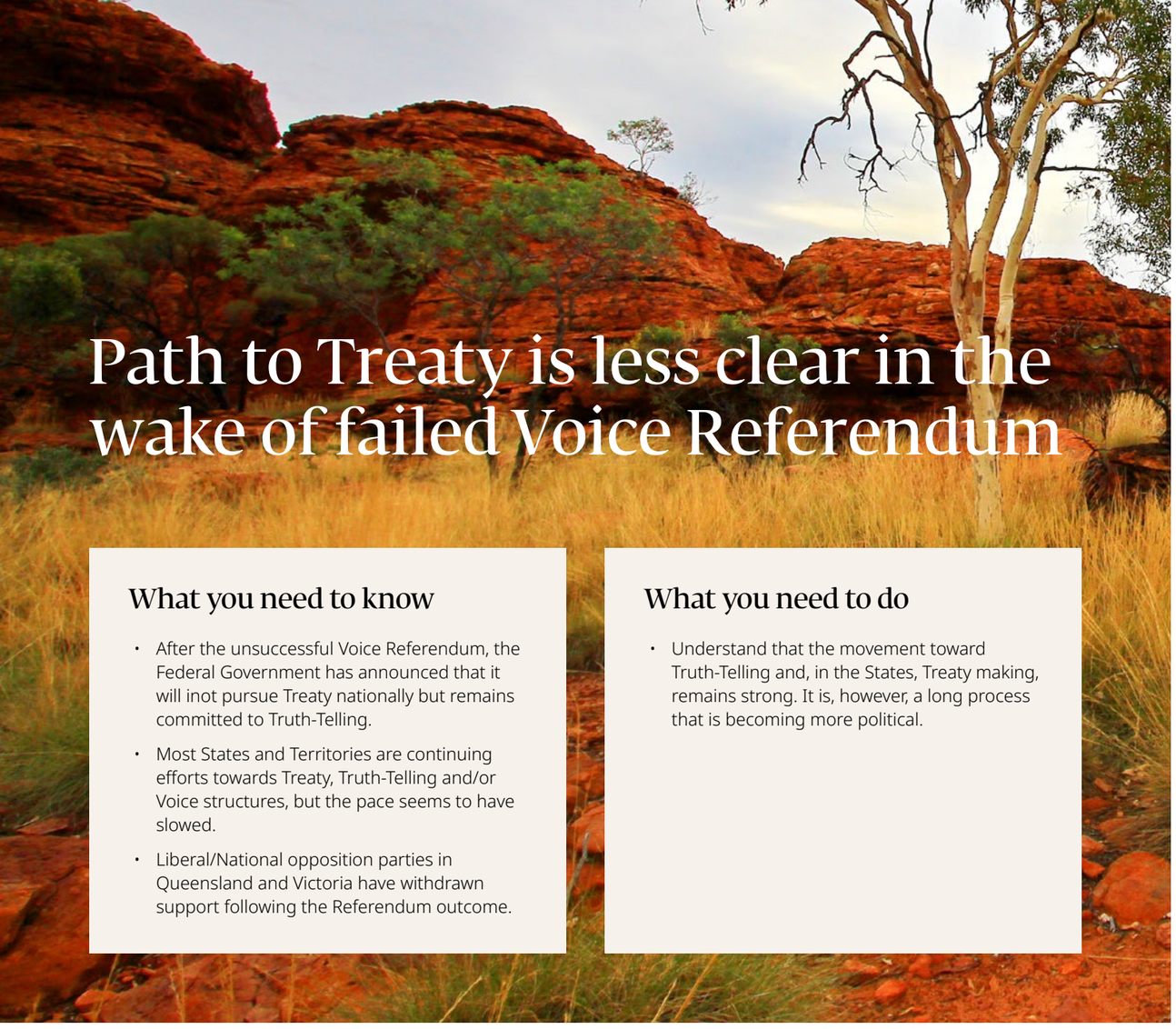
According to the Aboriginal Areas Protection Authority's (AAPA) 2022-2023 Annual Report, the AAPA is working with the Northern Territory Government to make the *Northern Territory Aboriginal Sacred Sites Act 1989* stronger in response to the A Way Forward recommendations.

The AAPA has also held discussions with the NT Environment Protection Authority (EPA) about accounting for aspects of tangible and intangible heritage that are not protected under the *Sacred Sites Act* or the *Heritage Act 2011*. These discussions included, situations where provisions of the *Native Title Act 1993* do not grant sufficient rights to recognise such values. Resolution of these issues remains a key challenge for the AAPA and the NT Government.

The NT EPA in its 2022-2023 annual report states that it is currently focusing on how it delivers its responsibilities under the *Environment Protection Act 2019* (NT) in relation to Aboriginal cultural heritage. It seeks to do so without unnecessarily taking on the responsibilities of other statutory authorities and is committed to increasing its engagement with First Nations people and their representative bodies.

The Northern Territory Government has not released any materials relating to legislative reform.

**Author:** Leonie Flynn, Expertise Counsel



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

## What you need to know

- After the unsuccessful Voice Referendum, the Federal Government has announced that it will inot 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.

## What you need to do

- Understand that the movement toward Truth-Telling and, in the States, Treaty making, remains strong. It is, however, a long process that is becoming more political.

## Reminder of background to Treaty in Australia

Australia continues to be the only Commonwealth country to have never signed a Treaty with its First Nations people. The Federal Government has recently confirmed that it will not be pursuing a Commonwealth level Treaty.

However, most State and Territory Governments continue to actively work towards Treaty, and we include a summary of that activity below.

## Voice

The year 2023 did not deliver a unifying position on First Nations recognition.

As is well known, on 23 March 2023, the Federal Government announced the question and Constitutional amendment that would be put to the Australian people at a Referendum. 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-Telling).

We set out the proposed Constitutional amendment in our *Native Title Year in Review 2022-2023* article "Federal focus on the Voice to Parliament, while Treaty and Voice progress continues in the States and Territories".

On 14 October 2023, a 60.06% majority of the 89.95% of Australians who voted, voted 'No' and the Referendum did not pass. The ACT was the only state or territory that voted 'Yes' by majority.

Since the outcome of the Voice Referendum, delays to Treaty and Truth-Telling processes have already been seen in some jurisdictions, and a number of opposition Governments have formally withdrawn support for Treaty.



## Status of Treaty making around Australia

The status of Treaty making in Australian States and Territories is broadly summarised below.

| Status of Treaty making around Australia | |
|---|---|
| **Cth** | Despite previously committing to Treaty-making as a result of its commitment to implementing the Uluru Statement of the Heart in full, the Federal Government appears to have walked back its preparedness for a national Treaty.<br><br>In February 2024, Prime Minister Anthony Albanese announced that the Federal Government would "take the time needed to get Makarrata and Truth-Telling right", and instead highlighted that Treaty making would continue at the State and Territory level. |
| **Victoria** | **Treaty**<br><br>Victoria is the most progressed jurisdiction when it comes to Treaty, with Victoria's First Peoples Assembly (Assembly) expected to commence Treaty negotiations later this year.<br><br>The Assembly, which currently comprises 30 members, is the independent and democratically elected body that represents Traditional Owners of Country and Aboriginal and Torres Strait Islander peoples in Victoria.<br><br>Under the *Treaty Authority and Other Treaty Elements Act 2022* (Vic), the Assembly has established a Treaty Authority (with five appointed First Peoples members, known as "Treaty Umpires"), Treaty Negotiation Framework and Self-Determination Fund to facilitate Treaty negotiations between the State Government and First Nations Victorians.<br><br>The Assembly aims to negotiate a statewide Treaty, as well as empowering other Traditional Owner groups in Victoria to negotiate Treaties that reflect specific aspirations and priorities in their areas.<br><br>In January 2024, the Victorian Coalition announced it was withdrawing its support for Treaty making in Victoria, citing concerns regarding delays caused by cultural heritage processes. It is not known what impact this will have on Treaty progress.<br><br>**Truth-Telling**<br><br>The Yoorrook Justice Commission, Victoria's formal Truth-Telling inquiry, continues its work.<br><br>In August 2023, Yoorrook released the Yoorrook for Justice report into Victoria's child protection and criminal justice systems which contained 46 recommendations. In April 2024 the Victorian Government published its formal response, accepting four recommendations in full and 24 in principle. Only three recommendations were rejected with the remaining 15 placed 'under consideration'.<br><br>Yoorrook is now looking into land, sky and waters, health, housing and education and economic prosperity and will deliver its final report in 2025. |
| **Tasmania** | There has not been much public activity on Treaty making in the last 12 months. Tasmania's Aboriginal Advisory Group (which comprises six First Peoples members working together with Government to design a process for Truth-Telling and Treaty that is led by Aboriginal people) met for the first time in February 2023. Since then, the Aboriginal Advisory Committee has not released any updates. Separately, in early 2023, a delegation named 'tuylupa tunapri' submitted a draft Lutruwita (Tasmania) Treaty Bill 2023 to the Tasmanian Government. The Tasmanian Government is yet to formally respond. |
| **ACT** | The ACT Government does not appear to have established the 'First Nations Eminent Panel for Community Engagement', which it announced in early 2023. The intent of the Panel is to oversee the process for Treaty and Truth-Telling in the ACT. |

## Status of Treaty making around Australia

| | |
|---|---|
| **NT** | **Treaty**<br><br>Treaty in the Northern Territory is currently being progressed by the **"Treaty Unit"** within the Office of Aboriginal Affairs. In January 2024 Aboriginal Affairs Minister Chansey Paech announced that the Government was proceeding with a revival of the "Treaty Working Group" and a Treaty Symposium was held in April 2024.<br><br>**Truth-Telling**<br><br>Truth-Telling was identified as an imperative step on the NT's Treaty journey. The Truth, Healing and Reconciliation Grant Program has been established, with the NT Government is offering grants of up to $20,000 each to support Truth-Telling activities and initiatives |
| **QLD** | Queensland continues to progress Treaty, in accordance with the *Path to Treaty Act 2023* (Qld), which established a First Nations Treaty Institute (Institute) and Truth-Telling and Healing Inquiry (Inquiry).<br><br>On 26 April 2024, the Queensland Government announced appointments to the Institute and Inquiry.<br><br>A ten member First Nations Council will oversee the Institute. Key functions of the Institute include co-developing a Treaty making framework with the Queensland Government and supporting First Peoples in Queensland to participate in Treaty negotiations with the State. The future of the Institute will depend on the outcome of the state election later this year. Following the Voice Referendum, the Queensland Coalition withdrew its support for Treaty making in Queensland and in January 2024 announced that if elected, it would abolish the Institute.<br><br>The Inquiry consists of five members and will be chaired by Barrister Joshua Creamer. The Inquiry will commence work on 1 July 2024 for a minimum of three years. The functions of the Inquiry include conducting Truth-Telling sessions and research into the impacts and effects of colonisation on First Peoples in Queensland.<br><br>Queensland has also been developing its own Voice, via a First Nations Consultative Committee, which was set to report back to Government in mid-2023. The final report has not yet been publicly released. |
| **SA** | South Australia continues to progress Treaty and Voice, in accordance with the *First Nations Voice Act 2023* (SA), which established the First Nations Voice in South Australia.<br><br>In March 2024, 46 representatives were elected to the South Australian Voice to Parliament. The Voice is an advisory body and cannot veto decisions made by South Australia's Parliament. However, it is an opportunity for First Nations people to raise community priorities in a public, transparent and accountable way.<br><br>SA had previously commenced a Treaty process in 2016, however this has been on hold for some time following a change in Government. The Treaty-making process is expected to recommence following the re-election of a Labor Government, which have committed to "delivering on a state-based Voice, Treaty and Truth for the Aboriginal people of our state." |
| **NSW** | In October 2023, NSW Minister for Aboriginal Affairs and Treaty David Harris, announced that the NSW Labor Government is aiming to set up an independent Treaty Commission by mid-2024. A motion to progress Treaty processes passed the NSW Upper House with a slim majority in December 2023.<br><br>As of April 2024, the NSW Government is committed to a 12-month consultation process with Aboriginal communities on their aspirations for a Treaty framework or other formal agreement making process, to be led by three dedicated Commissioners. The Government is currently seeking applicants for the Treaty Commissioner roles. |
| **WA** | Western Australia is now the only State or Territory that is not committed to a formal Treaty process.<br><br>However, as noted in our previous articles, Settlement Agreements such as the Noongar Settlement, Yamatji Settlement and Tjiwarl Palyakuwa are considered by some to be Treaty equivalents.<br><br>In June 2023, following Mark McGowan's resignation, Roger Cook was appointed by the ALP as the replacement leader and Premier of WA. As a former President of Australians for Native Title and Reconciliation (ANTaR), it is possible that Premier Cook will accelerate the Treaty process, but as of May 2024 there have been no announcements regarding a formal Treaty process in WA. |

## Where to from here?

In the aftermath of the failure of the Voice Referendum, the path to Treaty has become far less clear. Although progress and commitments continue in each State and Territory, it appears likely that there will be significant delays and setbacks.

Ashurst will continue to monitor updates and progress toward Treaty and Truth-Telling at the Federal level and around Australia.

## Reminder about background about Treaty and Voice

This is our fifth annual update on the status of Treaty-making in Australia and focuses on developments in the second half of 2023 and first half of 2024. For further information and background see our:

- *Native Title Year in Review 2022-2023* article: "Federal focus on the Voice to Parliament, while Treaty and Voice progress continues in the States and Territories", which provided a 2022 and early 2023 Treaty and Voice update.
- Native Title Year in Review 2021-2022 article "Federal Government commits to Uluru Statement from the Heart while Treaty momentum gathers", which provided a 2021 and early 2022 Treaty update.

**Authors:** Tess Birch, Senior Associate and Ben Cranley, Lawyer

# Native title compensation – a big year ahead

## What you need to know

- 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 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).

## 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.
- 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.

## Recent developments in native title compensation

It has been a pretty quiet year in the native title compensation space across Australia (since July 2023). Only two new claims were filed, one of which was discontinued with no significant developments in the law relating to native title compensation.

The stage has, however, been set for a more exciting year ahead and it is likely we will see judicial decisions that will greatly influence the law relating to native title compensation.

We refer of course to the Commonwealth's appeal of the Full Federal Court's decision on constitutional issues in the Gumatj compensation claim, which is listed for hearing before the High Court in August 2024.

The High Court's decision on the appeal is anticipated to be delivered in mid-2025 and will be the most significant development in native title compensation law since its decision in the 2019 Timber Creek case. The decision will have important consequences for the scope of the Commonwealth's native title compensation liability.

We also anticipate seeing important decisions in the McArthur River Project compensation claim and the Yindjibarndi Ngurra compensation claim in the next 12 months. Both claims concern compensation for non-extinguishing acts, with the Yindjibarndi claim also being a test case for the construction and operation of the compensation pass through in section 125A of the *Mining Act 1978* (WA).

We report on recent developments in native title compensation claims over the last 12 months below.

## Active compensation claims

### Gumatj Compensation Claim – Northern Territory (NTD43/2019; D5/2023)

**Recap:** The Gumatj Clan are seeking compensation from the Commonwealth and Northern Territory Governments 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 under the *Native Title Act 1993* (Cth) as an acquisition of property other than on "just terms" in accordance with section 51(xxxi) of the Australian Constitution.

In May 2023, the Full Federal Court handed down its unanimous decision on two threshold questions concerning the application of the "just terms" requirement in section 51(xxxi) of the Constitution. The Court found that the pre-1975 acts of the Commonwealth could be compensable under the *Native Title Act* as invalid acquisitions of property in contravention of the "just terms" requirement. The Commonwealth promptly filed an application for special leave to appeal to the High Court.

For further details about the claim and the Full Federal Court's decision, see our *Native Title Year in Review 2022-2023* articles "Landmark Gumatj Clan compensation decision opens up a new class of compensation claims against the Commonwealth" and "Native title compensation: we're off to the High Court again".

**What's new:** In October 2023, the High Court granted the Commonwealth leave to appeal the Full Federal Court's decision. The appeal is listed for hearing on 7-9 August 2024, which suggests a decision will be handed down before June 2025.

The High Court's decision will be the most important development in the native title compensation landscape since the Timber Creek decision and will have significant implications for the extent of the Commonwealth's potential exposure to compensation liability. Look out for Ashurst's summary of the decision and what implications it might have for you.

### McArthur River Project Compensation Claim – Northern Territory (NTD25/2020 and NTD16/2023)

**Recap:** The Gudanji, Yanyuwa and Yanyuwa-Marra People are seeking compensation from the Northern Territory Government in respect of the effects of various post-1993 acts associated with the development of the McArthur River Mine and Bing Bong Port to which the non-extinguishment principle is said to apply.

The original claim (NTD25/2020) did not fully encompass the area of the claimed compensable acts, and the Federal Court refused the applicants' application for leave to amend the claim and include the additional areas. Accordingly, the applicants filed a second compensation claim over the expanded geographic area in June 2023 (NTD16/2023).

**What's new:** The second claim was consolidated with the first claim by orders made on 15 August 2023 and the second claim was then discontinued.

The Court file indicates that pleadings as to liability were exchanged between the parties in August 2023 and the matter was heard over three days in November 2023. This suggests judgment in the proceedings will be handed down in the next month or two. Watch this space.

### Yindjibarndi Ngurra Compensation Claim – Western Australia (WAD37/2022)

**Recap:** This claim was filed by the Yindjibarndi Ngurra Aboriginal Corporation RNTBC — a registered native title body corporate for the Yindjibarndi People — in February 2022. The claim relates to grants of various mining tenements associated with Fortescue Metals Group's (FMG) Solomon Hub mining operations in the Pilbara region of Western Australia. The relationship between the Yindjibarndi People and FMG has been strained for some years according to media reports. The media have previously reported (*AFR and West Australian, both 24 February 2023*) that the applicant is seeking a 10% royalty (approximately $500 million per year).

**What's new:** The hearing of the matter commenced in August 2023 and continued in April 2024, with the hearing of oral closing submissions listed for 14 to 18 October 2024. This suggests the claim will be determined in the first half of 2025.

With discontinuance of the Tjiwarl compensation claims during 2023 (see below), this claim will most likely become the 'test case' for the construction and operation of the compensation pass through in section 125A of the *Mining Act 1978* (WA).

### Malarngowem Compensation Claim – Western Australia (WAD203/2021)

**Recap:** In September 2019, the Malarngowem Aboriginal Corporation RNTBC commenced a compensation claim in relation to the grant of a single exploration licence to Kimberly Granite Holdings Pty Ltd in 2016 over a small area in the eastern Kimberley region of Western Australia. Preservation evidence was taken in late 2021 and a hearing of the matter set for late 2022 was vacated in mid-2022 to allow for mediation between the parties.

**What's new:** No orders have been made since 27 July 2022 and mediation is continuing.

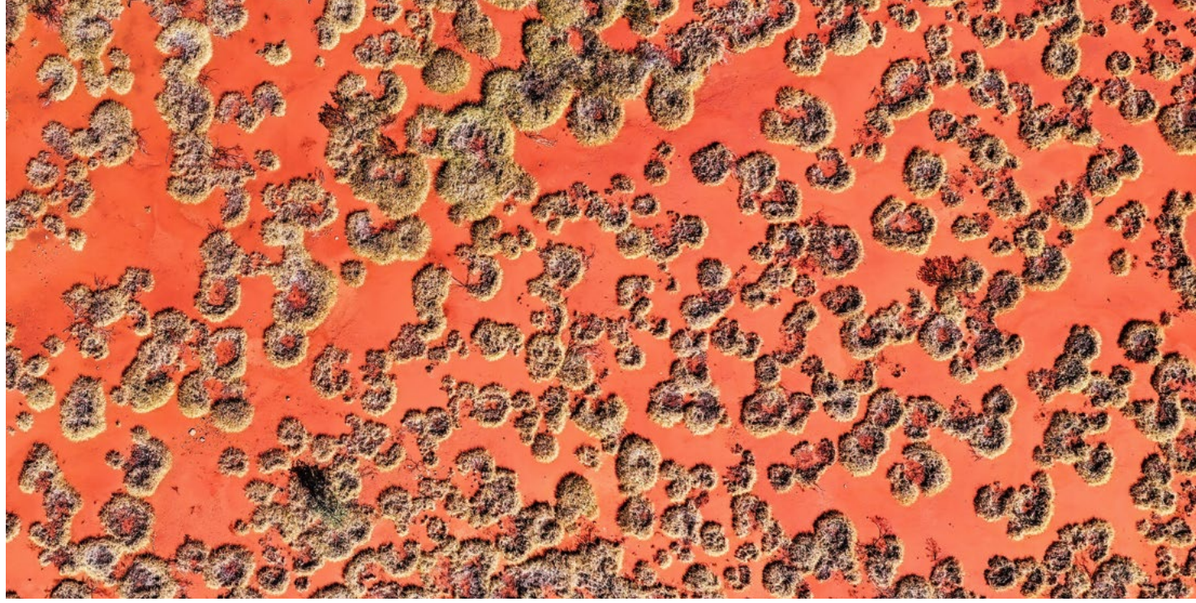
### Antakirinja Matu-Yankunytjatjara Compensation Claim – South Australia (SAD61/2022)

**Recap:** The Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC (AMYAC) seeks compensation for over 1,000 compensable acts (freehold grants, pastoral leases, Crown leases, mining tenements and the construction of public works and roads) in an area that covers over 60,000 square kilometres of land in central South Australia. The claim was filed in April 2022 and immediately referred to mediation between AMYAC and the State of South Australia. A hearing of preservation evidence listed for June 2023 was vacated due to the deteriorating health of the key witness.

**What's new:** Mediation occurred throughout 2023 and is set to continue in 2024. The Commonwealth is also participating in the mediation.

### Pitta Pitta Compensation Claims – Queensland (QUD327/2020 and QUD60/2024)

**Recap:** The original Pitta Pitta compensation claim was filed by five individual Pitta Pitta native title holders in 2020. The claim relates to hundreds of compensable acts spanning over three million hectares of land in Queensland and involves a large number of respondents. It has the potential to be a test case on the assessment of compensation for the grant of exploration and mining interests in Queensland.



The claim has been beset by difficulties relating to authorisation and legal representation, including applications by the State and the Pitta Pitta Aboriginal Corporation RNTBC (PPAC) — which holds the Pitta Pitta people's determined native title — to strike out or summarily dismiss the claim on the basis of lacking authorisation or standing. Those applications were dismissed in April 2022 and the matter listed for hearing in 2023, however those hearing dates were vacated after the applicant lost their legal representation in early 2023 and the matter was referred to mediation.

**What's new:** The original claim is scheduled to remain in mediation throughout 2024 between the applicant, State and PPAC. The applicant is again legally represented, with three changes in legal representation to date. In late 2023, a timetable was developed for resolution of the proceeding and the matter re-listed for hearing in October 2024 (lay evidence), December 2024 (expert evidence) and April-May 2025 (closing submissions).

A new compensation claim was filed by the PPAC on 8 February 2024 over the same area covered by the original claim and in respect of the same compensable acts. No orders have been made in respect of the new claim to date.

## Discontinued compensation claims

### Tijwarl Compensation Claims – Western Australia (WAD141/2020; WAD142/2020 and WAD269/2020)

**Recap:** All three of the Tijwarl compensation claims were commenced in June 2020. The Tijwarl People claimed compensation in respect of the grant of a number of interests in Western Australia's Goldfields region including roads, pastoral leases and water bores, easements, mining tenements and groundwater licences. In May 2023, the Western Australian Government confirmed that it had entered into an Indigenous Land Use Agreement (ILUA) with the Tjiwarl Aboriginal Corporation. This ILUA provided for the full and final settlement of the Tjiwarl compensation proceedings as against the State. Notably, the agreement excluded 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).

**What's new:** The applicant was granted leave to discontinue the primary compensation proceedings (WAD141/2020) on 13 December 2023. The orders provide that the discontinuance cannot be pleaded as a defence to any future proceedings in respect of the grant of certain mining tenements, indicating that the applicant was unable to settle its claims with the holders of those mining tenements. Ultimately, the discontinuation means that the Tijwarl compensation claims did not deliver any new law on compensation liability under section 125A of the *Mining Act 1978* (WA).

### Queensland Government Native Title Compensation Settlement Framework

**Recap**: Last year we reported on two compensation settlement agreements being negotiated between the Queensland Government and the Jangga people and Iman people in accordance with the Queensland Government's Native Title Compensation Settlement Framework.

**What's new:** Both the Iman People's Compensation ILUA and the Jangga People's Compensation ILUA have been registered on the Register of Indigenous Land Use Agreements.

The success of those negotiations may encourage further compensation settlement negotiations between the Queensland Government and native title holding groups in Queensland.

**Authors:** Joel Moss, Counsel and Claudia Shelley, Lawyer

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

## What you need to know

- 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.

## What you need to do

- Ensure that you are following the correct future act process for current mining and petroleum tenement applications. The new clarity as to the breadth of the meaning of "right to mine" and "infrastructure facility" may mean that the section 24MD(6B) process should be followed where previously the right to negotiate process has been applied.
- If section 24MD(6B) does apply, proponents will need to ensure that project timeframes provide for the 8 month objection resolution timeframe introduced by the *2021 Native Title Act* amendments.

## Dispute about which Native Title Act process applied to the grant of an ancillary mineral lease for the McArthur River Mine

*Harvey v Minister for Primary Industry and Resources* [2024] HCA 1 involved a dispute between native title holders and the Northern Territory Department of Primary Industries about which *Native Title Act 1993* (Cth) process applied to an application for a mineral lease for the McArthur River Project in the Northern Territory.

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

### Native Title Act processes

The *Native Title Act* contains three distinct processes that might apply to the grant of the mineral lease if it affects native title rights and interests. Which process applies turns, in part, on whether the future act involves the creation of a "right to mine".

While such a future act passes the freehold test, the procedural rights accorded to native title claimants and native title holders under each process vary.

| Future act | NTA provisions | NTA process |
|---|---|---|
| **Creation of right to mine, except one created for the sole purpose of the construction of an infrastructure facility associated with mining** | Subdivision P (Right to Negotiate) applies | Right to negotiate process and agreement or NNTT determination |
| **Creation of right to mine for the sole purpose of the construction of an infrastructure facility associated with mining** | S.24MD(6B) applies | Notice and objection process (including new 8 month timeline) |
| **Creation of interest that is not a right to mine** | S.24MD(6A) applies | Simple freehold test – same procedural rights as ordinary title holders |

### The parties' views on interpretation of the right to mine

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

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

### Decisions at first instance and on appeal

Both the primary judge and the Full Federal Court found that the ancillary mineral lease did not fall within section 24MD(6B) of the *Native Title Act* because the right to store dredged material was neither a right to mine nor within the scope of "infrastructure facility" such that the simple freehold test applied. We wrote about the Full Federal Court's decision in our *Native Title Year in Review 2021-2022* article "Mining leases for infrastructure get a judicial work out".

The native title holders appealed to the High Court.

## High Court overturns Full Federal Court and adopts a broad interpretation of section 24MD(6B) of the Native Title Act

On appeal, the High Court considered which of the three alternative processes outlined above applied to the proposed grant of the mineral lease.

The High Court looked at two issues:

- the meaning of "creation of a right to mine"; and
- the meaning of "infrastructure facility".

We discuss their conclusions below, along with our observations about the potential implications of this decision.

### Right to mine

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.

Having looked at the range and variety of tenements available, it held at [66]:

> In its particular statutory context, the phrase "right to mine" should be construed as a composite term used to denote all those mining tenements which are capable of being issued under State and Territory natural resource laws. The Native Title Act uses such a phrase precisely because it is sufficiently descriptive of the very many different types of mining tenements that can be created under State and Territory natural resource laws and of the very many different names by which such tenements are identified.
> (our emphasis)

The High Court went on to say that the right to negotiate process generally applies to the grant of such tenements (if they are "future acts") 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).

### Infrastructure facility

The High Court also adopted a broad interpretation of "infrastructure facility", with the effect that the "carve out" from the right to negotiate process is wider than suggested by the Full Federal Court.

The issue in dispute was whether the ordinary meaning of "infrastructure facility" applied in addition to the categories of infrastructure specified in section 253 of the *Native Title Act*.

The High Court said that it did include the ordinary meaning, and that the dredge spoil deposition area the subject of this dispute was clearly an infrastructure facility within the ordinary meaning of that term.

## Insights

The terms "right to mine" and "infrastructure facility" are frequently considered in practice. The High Court's very clear guidance has resolved a longstanding debate.

Firstly, the High Court put great emphasis on the Native Title Amendment Bill 1997 Explanatory Memorandum and its express statement that the term should have its ordinary meaning in addition to the listed facilities. It was critical of the Full Federal Court for disregarding this.

Secondly, the High Court noted that section 253 of the *Native Title Act* contains 75 definitions and only seven of these use the word "includes" (most use "means"). It said at [76]:

> Throughout s 253 Parliament has thus made choices about how to express a given definition and uses the word "includes" in contrast to the word "means". The function served by using the word "includes" in contrast to the word "means" in a definition, as it was put in Corporate Affairs Commission (SA) v Australian Central Credit Union, "is commonly both to extend the ordinary meaning of the particular word or phrase to include matters which otherwise would not be encompassed by it and to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases.

Thirdly, the Court's understanding of the operation of the *Native Title Act* was informed by the State and Territory mining legislation to which it applies.

### End result – section 24MD(6B) applies

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.

## Implications – better check the processes assumed to apply to current tenement applications

The impact of this broad meaning of "right to mine" is a presumption that either the right to negotiate or the section 24MD(6B) process will apply to the grant of interests under state or territory mining or petroleum legislation.

Following the High Court's decision, there does not seem to be room for the application of the simple freehold test to such interests. Given that State regulators have tended to apply a more conservative interpretation of "infrastructure facility" than the High Court, it is worth testing assumptions that the right to negotiate applies to current tenement applications for non-extractive uses.

## Reminder about 2021 amendments to section 24MD(6B)

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

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

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

# Next generation good faith issues - Gomeroi v Santos appeal

## What you need to know

- 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.

## What you need to do

- Proponents in a right to negotiate process can take comfort that if they are genuinely trying to reach a deal and their conduct reflects this, they will likely satisfy the good faith standard.
- Monitor the Australian Law Reform Commission's review into the future act regime, due in December 2025. The Commission will no doubt have something to say about the good faith test and the right to negotiate process more generally.



## Full Federal Court rejects Gomeroi appeal on good faith grounds

We reported on the good faith challenge brought by the Gomeroi native title party against Santos in relation to the grant of petroleum production leases required for the Narrabri Gas Project in our *Native Title Year in Review 2022-2023* article "Santos wins strongly in National Native Title Tribunal, but Full Federal Court will hear Gomeroi appeal". The Tribunal concluded there was no basis for finding Santos had failed to negotiate in good faith. The Gomeroi native title party appealed.

On 6 March 2024, the Full Federal Court handed down its judgment in the appeal proceedings (*Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26). The Full Court unanimously rejected the Gomeroi party's five 'good faith' grounds of appeal, but allowed the appeal by majority on the basis that the Tribunal had erred in interpreting and applying the 'public interest' requirement under s 39(1)(e) of the *Native Title Act 1993* (Cth).

In rejecting the Gomeroi's five good faith grounds of appeal, the Full Court found that:

- Santos' conduct in making offers was not so inherently unreasonable as to indicate an ulterior motive, a lack of honesty or an unwillingness to deal fairly and with an open mind with the Gomeroi; and
- Santos was correct in negotiating with those Gomeroi claimants on the official Register of Native Title Claims in circumstances where it knew there had been a community vote to change the claimant group but before the Federal Court had ruled on the formal application for change.

### Reasonableness of offers

Much of the Gomeroi's case relied on assertions that Santos' offers were unreasonable having regard to the Gomeroi's own benchmarking research, and that this indicated an absence of good faith.

The Full Court made short work of those assertions.

After reviewing previous authorities, it confirmed that, in some circumstances, the Tribunal may need to make some kind of assessment about whether the position adopted by a negotiation party involved an offer that was objectively unreasonable. However, the Tribunal should not become bogged down in its own assessment of whether an offer was "reasonable", and divert focus from the good faith constraint. The Full Court accepted, for example, that even a patently unreasonable offer might not indicate a lack of good faith – it all depends on the evidence and the circumstances.

### Negotiated benefits v compensation

The Full Court made it clear that the right to negotiate about the provision of benefits in the right to negotiate process is distinct from the right to claim compensation for the effect of compensable acts on native title rights and interests. It said at [112]:

> it can be accepted that the ability of native title holders, or registered claimants, to pursue payments as part of their statutory right to negotiate serves a different and wider purpose from the ability to seek compensation for the doing of certain acts under Division 2 of Part 5 of the NTA, although the two purposes are not mutually exclusive and there may be some overlap.

### Managing changes in the Applicant

Over the seven year duration of the negotiation, the Applicant changed several times. The Gomeroi asserted that Santos has shown a lack of good faith by negotiating with the original Applicant in the year or so between a meeting to authorise a new Applicant and the making of the formal Federal Court orders giving effect to the change.

The Full Court confirmed the Tribunal's decision that unless and until an order was made to formally change the Applicant, the existing Applicant was the "native title party" with whom Santos, as the "grantee party", must negotiate to discharge the good faith obligation.

### Full Federal Court reinforces familiar good faith test

Despite thousands of pages of evidence and legal argument, the Full Court did not tamper with the fundamentals of the law relating to good faith, much of which was developed in the 1990s.

## Small miners did not learn the lessons from de Roma

In 2022, in Kevin Alfred de Roma v Western Yalanji Aboriginal Corporation RNTBC [2022] NNTTA 40, the Tribunal found there was a failure of a mining lease applicant (Mr de Roma) to negotiate in good faith. Of note in the determination was the conduct of Mr de Roma's representative, John Withers, who the Tribunal found showed a pattern of aggressive and unconstructive negotiation correspondence. We discussed this decision in our *Native Title Year in Review 2022-2023* article "Small scale miners struggle to satisfy good faith standard in right to negotiate process".

This year, Mr Withers appeared in two more good faith decisions: as the grantee party in *John William Withers and Others v Ewamian People Aboriginal Corporation RNTBC and Another* [2023] NNTTA 34 (6 October 2023) and as the representative of the grantee party in *Western Yalanji Aboriginal Corporation RNTBC v Edmund James Fitzgerald and Another* [2023] NNTTA 41 (30 November 2023). Mr Withers was criticised by the Tribunal in a very similar manner to de Roma, being described in Fitzgerald as engaging in 'aggressive and unconstructive negotiation'.

## Australian Law Reform Commission to report on the future act regime in the Native Title Act

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 do not specifically refer to the good faith obligation or the right to negotiate, but are wide enough to allow the Commission to explore these issues in the context of the future act regime as a whole.

**Authors:** Joel Moss, Counsel and Clare Lawrence, Partner

### Recap of the good faith requirement in the right to negotiate process

In certain circumstances, the grant of a mining or petroleum tenement will attract the right to negotiate (RTN) process under the *Native Title Act 1993* (Cth).

Where the RTN process applies, the tenement applicant (ie the grantee party) and relevant government party must 'negotiate in good faith' with any native title party for the tenement area, with a view to obtaining the native title party's agreement to the grant of the tenement.

If agreement has not be reached and at least six months have passed since 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.

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

## What you need to know

- 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).

## What you need to do

- Watch for the High Court's decision in the appeal from *Stuart v SA*, in particular what it says about loss of connection and the use of findings in neighbouring determinations.
- Watch for the outcome of the special leave application in Clermont-Belyando appeal.
- If negative determinations are ultimately made in relation to any of these matters, consider the impact on your interests in the claim area.

## A busy year for connection decisions

The Full Federal Court has handed down three decisions in the last 12 months relating to loss of connection. These decisions are:

- *Malone on behalf of the Clermont-Belyando Area Native Title Claim Group v State of Queensland* [2023] FCAFC 190 (the Clermont-Belyando Appeal);
- *McLennan on behalf of the Jangga People #3 v State of Queensland* [2023] FCAFC 191 (the Jangga #3 Appeal); and
- *Stuart v South Australia* [2023] FCAFC 131 (Stuart v SA).

The Federal Court has also made similar findings in the Gaangalu claim (*Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 3)* [2023] FCA 600), which we write about in "*Federal Court makes negative determination of native title*"

## Full Court resolves overlapping native title claims over Oodnadatta in SA but High Court to ultimately decide some issues

In *Stuart v SA*, the Full Federal Court was asked to resolve two appeals in the context of overlapping claims in the vicinity of Oodnadatta in South Australia. As a result, the previous determination in favour of one group was overturned and the claims of both groups were dismissed.

The two overlapping claim groups — the Arabana people and the Walka Wani people — each had consent determinations of native title to land surrounding the overlap area.

The judge at first instance determined that the Arabana people had occupied the overlap area at the time of effective European sovereignty but had moved away and had (over time) lost connection with the overlap area. On the other hand, the judge considered that the Walka Wani people had some form of 'use' rights under traditional law and custom at the time of effective sovereignty, and that these rights and interests had continued to the present day and could be recognised as native title rights. A determination of native title was therefore made in their favour in relation to the overlap area.

Both the Arabana people and the State of South Australia separately appealed against this decision and the Full Court made a number of useful findings about connection.

### Full Court held that the Arabana People could not rely on their neighbouring consent determination

The Arabana people appealed the dismissal of their claim on the basis that they should have been entitled to rely on their neighbouring determination (and the findings therein) to support their claim to the overlap area. They argued that this was sufficient to infer connection to the overlap area for the purposes of section 223 of the *Native Title Act 1993* (Cth).

The Full Court rejected this ground of appeal. It upheld the first instance finding that the Arabana people could not rely on adjacent determinations to avoid having to prove the elements of native title under the Native Title Act to this additional area. Whether by consent or after a contested hearing, a determination is geographically specific and binding only with respect to the land and waters that are the subject of the determination.

### Parcel by parcel approach queried

The Arabana People also argued that the trial judge had wrongly taken a "parcel by parcel" approach to determining native title in the overlap area, when it was a small portion of a much larger region in respect of which they claimed native title.

The Full Court rejected this argument and pointed out that the Arabana people had commenced separate proceedings in relation to separate parcels of land, the claim was opposed by the State and was tried by way of adversarial process in which the rules of evidence applied. The Arabana people were put to proof which required the test for connection to be established in relation to the parcel being claimed.

The Full Court noted that things might be different when a claim is not opposed on geographical grounds. In cases of that kind, for the purposes of the Native Title Act s 223(1)(b), inferences concerning connection with respect to the whole of the claimed area may be readily drawn where they are reasonably available, and particularly where no defence case is made against them.

### High Court to decide correct statutory test under section 223 of the Native Title Act

The Arabana people argued that the trial judge had wrongly formulated the test for connection in section 223 of the Native Title Act by inadvertently introducing a geographical component to the acts of acknowledgement and observance of traditional law and custom.

The majority disagreed with this submission and rejected this ground of appeal.

Justice O'Bryan, in dissent, considered that the trial judge focused too much on whether the Arabana people had demonstrated their connection to the overlap area through particular acts and conduct, rather than whether they had identified traditional laws and customs by which they held native title rights and interests.

In February 2024, the High Court granted the Arabana people special leave to appeal in relation to this issue. The High Court will consider the test under section 223 and whether any aspects of the adjoining consent determination should have been considered. No hearing date has yet been set.

### Full Court prefers oral witness testimony over expert report

One of the issues which arose in the Arabana appeal was whether the trial judge should have given more weight to the opinion of the appellant's expert anthropologist.

The anthropologist's report referred to the results of interviews with 13 Arabana people about their traditional laws and customs. On this basis, the expert expressed the view that the Arabana people continued to hold native title rights and interests to the overlap area.

The trial judge did not accept the expert's opinion on the issue of connection, on the basis that the Court had heard much more detailed evidence on the issue directly from the five Arabana witnesses. The Full Court agreed with the trial judge's approach, considering it "plainly appropriate" to prefer evidence adduced at trial over the informant material referred to in an expert report.

### The State's appeal against the Walka Wani determination upheld

The State of South Australia appealed the determination in favour of the Walka Wani people on a number of grounds. Primarily, the State contended that the Walka Wani people, at effective sovereignty, were only able to be present and exercise rights on the land with the permission of the Arabana people. Therefore, the Walka Wani people's 'rights and interests' were personal rights and not rights in relation to the land and waters themselves — and therefore were not native title rights.

The Full Court accepted the State's submissions and overturned the determination of native title in favour of the Walka Wani people.

In summary, the Full Court found that the Walka Wani people — or at least, one of the constituent sub-groups — was not present in the area at effective sovereignty other than in a transient way. Because of this, there could be no native title rights and interests continuing from prior to that time.

Separately, the Full Court considered that the trial judge had misinterpreted the expert evidence that supported the conclusion that the Walka Wani people had their own, separate, native title rights and interests in the overlap area.

### Result – both overlapping claims dismissed

As a result of the two appeals, the claims of both the Arabana people and the Walka Wani people were dismissed.

The final outcome for this claim area will not be known until the High Court makes its decision on the Arabana people's appeal.

## Full Court upholds trial judge's decision that no native title exists in relation to the Clermont-Belyando claim area in central Queensland

The Full Federal Court in the Clermont-Belyando Appeal and Jangga #3 Appeal upheld determinations that native title does not exist in respect of two central Queensland claims .

We discussed the first instance decision of Justice Reeves in both claims in our *Native Title Year in Review 2021-2022* article "Proving connection becomes harder in 2021". Both claims failed to prove connection and both native title applicants were unsuccessful in their appeals.

### Clermont-Belyando appeal

The Clermont-Belyando appealed on a number of grounds, including whether the current claim group had proven that they constituted a normative society united in and bound by a body of laws and customs that they continued to acknowledge and observe.

The Court unanimously dismissed the appeal, upholding the trial judge's findings that the ongoing issues with how the group described itself and determined its members meant that they could not prove they constituted a normative society as set out above.

The Clermont-Belyando appellant has filed an application for special leave to appeal this decision to the High Court, but it has not yet been heard.

### Jangga #3 appeal

The Jangga people also appealed on multiple grounds, including whether they could rely on findings made in a previous consent determination to a neighbouring area.

The Court also dismissed this appeal for the reasons set out above in relation to *Stuart v SA*. The Jangga #3 group has not appealed this decision.

### Result of appeals

These appeals have confirmed that (subject to the outcome of the appeal to the High Court) native title does not exist in area of the Clermont-Belyando claim.

It is not yet known whether the High Court will grant special leave to appeal, and if so, when the hearing of that appeal would occur.

## Key Insights

### High Court to decide relevance of findings in neighbouring determinations when considering connection issues

In the *Stuart v SA* appeal, the High Court will ultimately decide whether any use can be made of findings in consent determinations over adjoining land.

In both the Jangga #3 Appeal and *Stuart v SA*, the Full Court confirmed first instance findings that the native title parties could not rely on consent determinations over adjoining land to avoid needing to prove the elements of native title under the Native Title Act.

The Full Court in both cases considered that while an approved determination is a determination in rem (regarding property), it is binding only with respect to the area that is the subject of the determination. Native title is held **in relation to land or waters** — parties cannot divorce a determination of native title from the land and waters to which it relates.

### Primacy of Aboriginal lay evidence

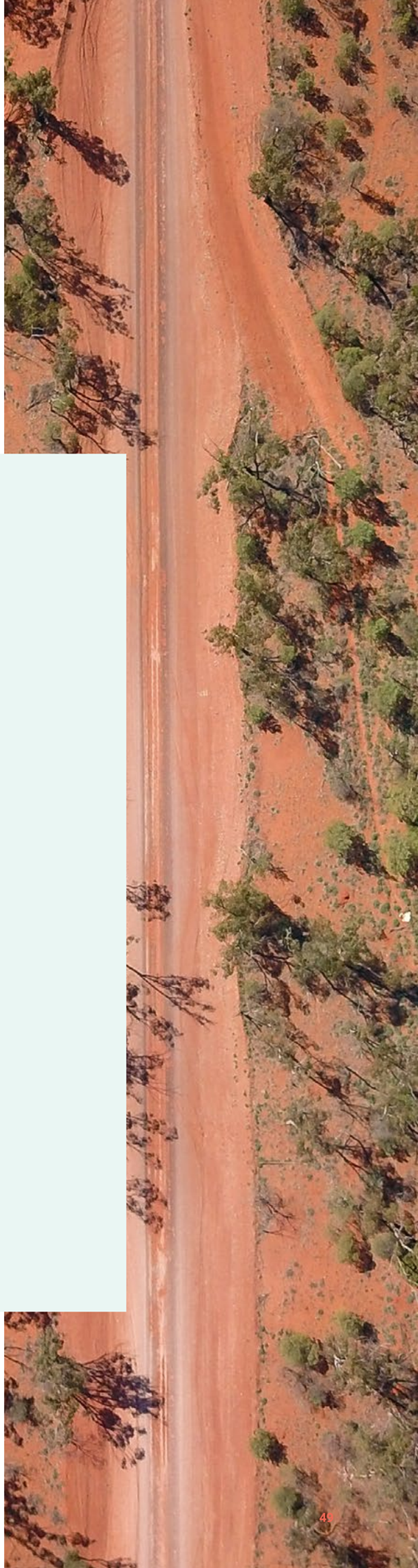
The Full Court's findings in Stuart v SA about the expert evidence is another reminder of the primacy of Aboriginal lay testimony — particularly sworn testimony — in native title proceedings. Courts will, by and large, prefer such evidence in native title proceedings over expert reports.

### Negative determinations may be available in due course

Once all appeals have been exhausted, if the decisions that native title does not exist are not overturned, any party to the proceedings may apply to the Court for a negative determination.

If a negative determination is made in relation to any of these matters, proponents should consider the impact on their interests in the claim area.

**Authors:** Martin Doyle, Lawyer; Leonie Flynn, Expertise Counsel



# Federal Court makes negative determination at the request of respondent parties

## What you need to know

- 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.

## What you need to do

- Be aware that the Court may be willing to make a negative determination (rather than simply dismissing an unsuccessful claim), even if the only party seeking it is a third-party respondent and not the State.
- Consider the impact of any negative determination on your interests in the determination area — existing and future grants, compensation liability and any previous agreements reached with the claim group.
- Watch for the outcome of the appeal filed by the Gaangalu People.



## Court makes negative determination at the request of respondents, in the face of a neutral stance by the State

In *Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4)* [2024] FCA 425 (Gaangalu Determination), the Federal Court was asked to make a negative determination in relation to land in central Queensland on the submission of two respondents (but not the State).

### Reminder: what is a "negative determination"?

A "negative determination" is a formal determination under the *Native Title Act 1993* (Cth) that native title does not exist in relation to particular land or waters.

In contrast to the mere dismissal of a native title claim, a negative determination prevents further native title claims over the area.

### Court had previously found that native title didn't exist

The Gaangulu claim related to approximately 25,000 square kilometres of land on the east and west of the Dawson River in Central Queensland. In June 2023, after a contested hearing of separate questions regarding connection, the Court made a finding that native title did not exist in relation to the whole of the claim area (*Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 3)* [2023] FCA 600).

Specifically, the Court found that as at the date of effective sovereignty in the mid-1850s, the Gaangalu people held rights and interests to parts of the claim area to the west of the Dawson River (but not to most of the east of the claim area). However, their observance and acknowledgement of those rights and interests had not continued to the present day, and thus native title no longer existed.

### Two respondents sought a negative determination and the State did not take a position

Commonly, in situations where adverse findings about native title are made, native title claimants will ask the Court to simply dismiss their application rather than make a negative determination. That was the case here.

However, two respondents (the Woorabinda Aboriginal Shire Council and Woorabinda Pastoral Company) — but not the State — made submissions seeking a negative determination in relation to the land west of the Dawson River. This was opposed by the claim group and the Representative Body.

The Court was somewhat critical of the State's approach in declining to take a position on the merits of the negative determination application, noting that the Court lacked the assistance it was entitled to expect from the State in determining the appropriate orders.

### Test for making a "negative determination" has two limbs

The Court said that it was well established that where the evidence fails to prove the existence of native title in an area, a discretion may arise to determine that native title does not exist. However, that discretion does not arise unless the Court is first satisfied on the balance of probabilities that native title does not exist in relation to that area (*CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2016] 204 FCAFC 67 (Badimia)).

The Court noted that no party was seeking a "negative determination" in relation to the land to the east of the Dawson River. In the earlier 2023 decision, the Court had not been required to make findings as to which group held rights and interests in respect of that area at sovereignty and had only held that the Gaangulu People did not. Therefore, the Court was not satisfied that native title does not exist in that area, and the pre-condition for making a negative determination had not been met in relation to it.

The situation was different for the land to the west of the Dawson River. The Court was satisfied that, at sovereignty, it was the Gaangalu people alone who occupied and held rights and interests under traditional laws and customs to this area. Given that the Court found that they had lost their connection and could not establish their native title, the Court was satisfied on the balance of probabilities that native title does not continue to exist in the claim area west of the Dawson River.

### Court says respondents entitled to seek negative determination even if they didn't actively participate in the hearing

The Court then considered the exercise of discretion as to whether a negative determination **should** be made in respect of the whole of the claim area west of the Dawson River. The claim group and the Representative Body made a number of submissions against the exercise of discretion in this case.

The representative body initially submitted that the respondent parties were only entitled to relief for the

geographic area of their interest in the claim area. They ultimately withdrew this submission.

Nevertheless, the Court made it clear that the respondents were entitled to make submissions for the whole of the claim area and have those submissions assessed on their merits. Furthermore, the fact that they played no active role in the contested hearing did not mean that their submissions should be given less weight or rejected. The Court noted that the Native Title Act contemplates the making of a negative determination even without the submission of any respondent party.

In addition, the fact that the State did not take a position on the issue was of little relevance to the Court. It said that any submissions made by the State would have to be judged on their merits, just like the submissions of any other parties.

Finally, the Court considered that a negative determination in respect of the western part of the claim area would assist to avoid a multiplicity of proceedings. There is also public interest in certainty concerning the native title status of particular areas after a finding that native title does not exist.

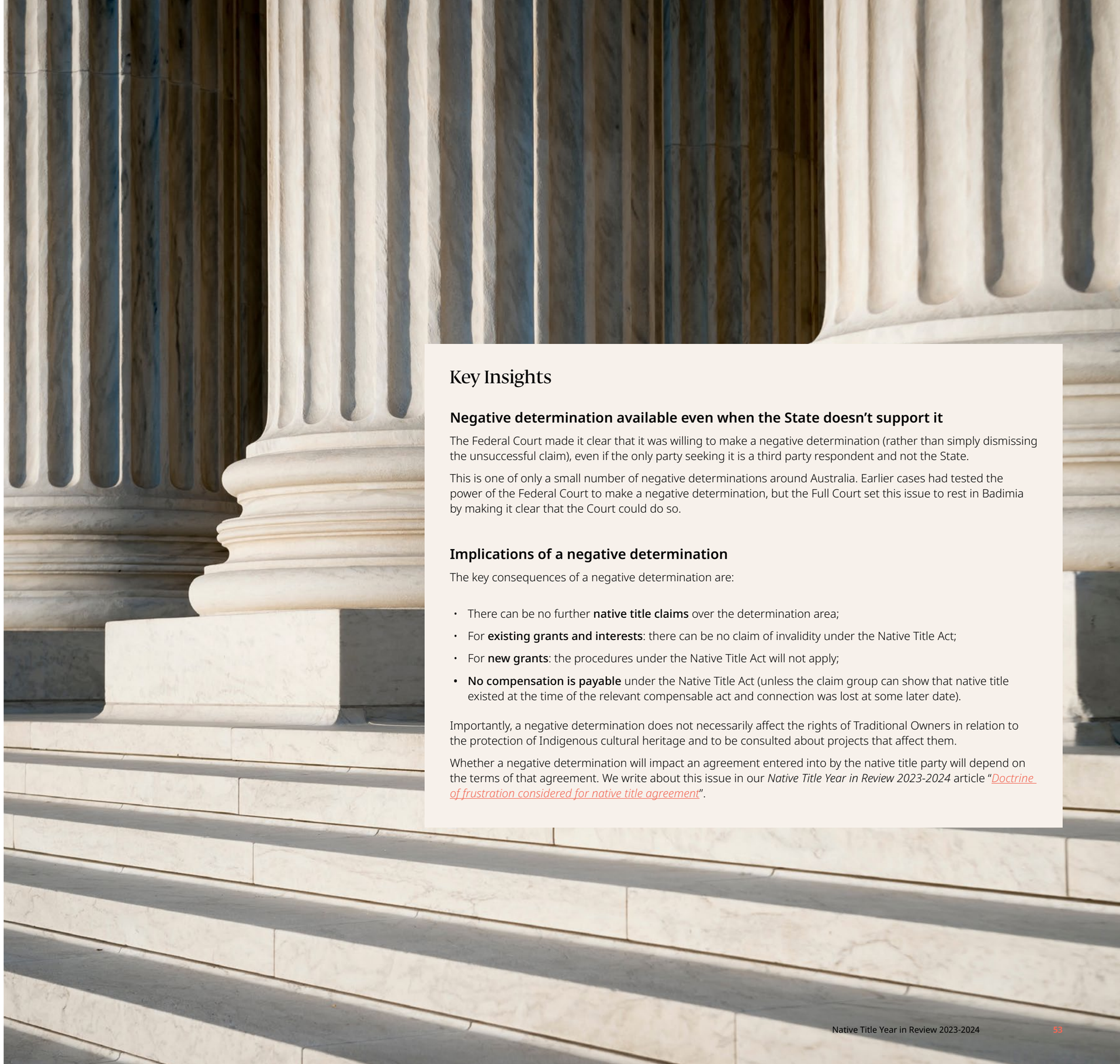
The Court held that, in the circumstances of the case, it was appropriate to give weight to that aspect of the public interest by making a negative determination in respect of the claim area to the west of the Dawson River.

## Gaangalu appeal

On 28 May 2024, the Gaangulu People filed an appeal against the decision and the negative determination.

**Authors:** Martin Doyle, Lawyer;
Leonie Flynn, Expertise Counsel





## Key Insights

### Negative determination available even when the State doesn't support it

The Federal Court made it clear that it was willing to make a negative determination (rather than simply dismissing the unsuccessful claim), even if the only party seeking it is a third party respondent and not the State.

This is one of only a small number of negative determinations around Australia. Earlier cases had tested the power of the Federal Court to make a negative determination, but the Full Court set this issue to rest in Badimia by making it clear that the Court could do so.

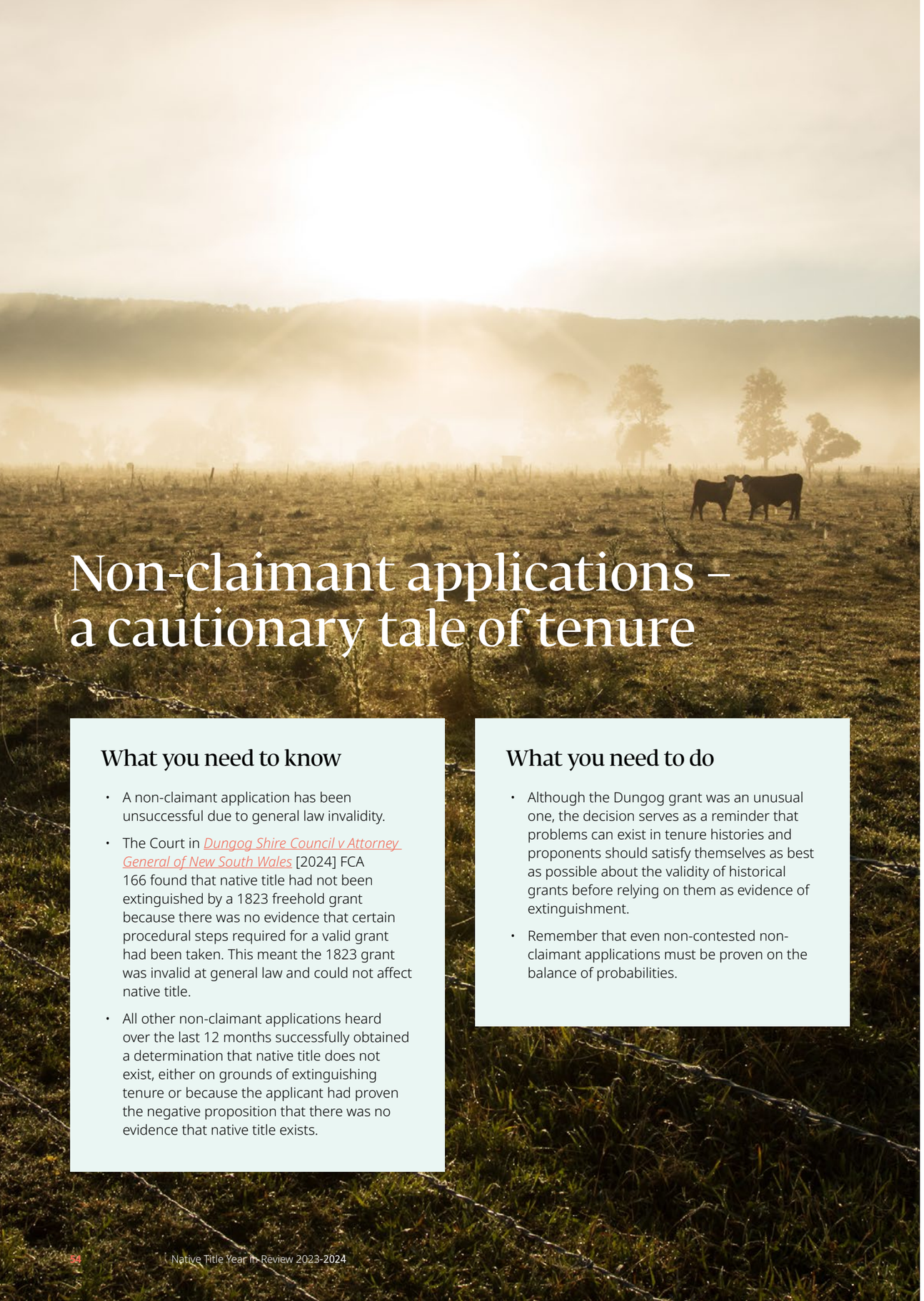
### Implications of a negative determination

The key consequences of a negative determination are:

- There can be no further **native title claims** over the determination area;
- For **existing grants and interests**: there can be no claim of invalidity under the Native Title Act;
- For **new grants**: the procedures under the Native Title Act will not apply;
- **No compensation is payable** under the Native Title Act (unless the claim group can show that native title existed at the time of the relevant compensable act and connection was lost at some later date).

Importantly, a negative determination does not necessarily affect the rights of Traditional Owners in relation to the protection of Indigenous cultural heritage and to be consulted about projects that affect them.

Whether a negative determination will impact an agreement entered into by the native title party will depend on the terms of that agreement. We write about this issue in our *Native Title Year in Review 2023-2024* article "*Doctrine of frustration considered for native title agreement*".



# Non-claimant applications – a cautionary tale of tenure

## What you need to know

- 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.

## What you need to do

- Although the Dungog grant was an unusual one, the decision serves as a reminder that problems can exist in tenure histories and proponents should satisfy themselves as best as possible about the validity of historical grants before relying on them as evidence of extinguishment.
- Remember that even non-contested non-claimant applications must be proven on the balance of probabilities.



## Dungog: A cautionary tale

The decision in *Dungog Shire Council v Attorney General of New South Wales* [2024] FCA 166 (Dungog) reminds us of the need to confirm that historical grants of tenure are valid at general law before relying on them as evidence of the extinguishment of native title.

A non-claimant application was brought by Dungog Shire Council seeking a determination that native title does not exist in relation to a sportsground reserve in a town within the Hunter Valley, NSW.

The land had originally been part of approximately 2,000 acres granted by Governor Brisbane to Mr James Phillips in 1823. It was later purchased by Queen Victoria and in 1885 declared a park.

The Council argued that native title had been extinguished to the sportsground by the 1823 grant, which it said was the grant or vesting of a freehold estate that extinguished native title at common law.

As the party seeking a determination that native title does not exist, the Council had the burden of proving on the balance of probabilities that native title did not exist.

The non-claimant application was challenged by Mr Scott Franks and the Representative Body on several grounds, including that the 1823 grant was not valid at general law and could not therefore extinguish native title.

### The 1823 grant should have had the King's approval before it occurred

The Governor's 1821 Commission and Instructions from King George IV allowed him to grant Mr James Phillips no more than 200 acres. Any more than that needed "approbation" (approval) from the King.

Because the 1823 grant was for 2,090 acres, the parties were required to demonstrate that approbation had been given, or otherwise that it was reasonable to assume that approbation had been given.

While there was significant evidence presented in the case regarding the circumstances of the 1823 grant, the Court concluded that there was not sufficient evidence to demonstrate that approbation had been granted, nor was it possible on the facts to assume it had been.

This was even though the 1823 grant was expressed as being immediately operative ("have Given and Granted, and by these Presents do Give and Grant") and would therefore indicate the conveyance of an estate in fee simple.

### Presumption of regularity did not apply

Furthermore, the Court held that the presumption of regularity did not apply.

The presumption of regularity was considered in *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154, stating:

> Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled.

The Court in *Dungog* concluded that the approbation of the King could not have been said to be merely a formality where all other requirements were met. Accordingly, the presumption of regularity was not applicable, as it "is not a panacea for all evidentiary absences".

Ultimately, the Court decided that the 1823 grant was not valid at general law because it was beyond the power of Governor Brisbane to make it. It therefore had no effect on native title.

The non-claimant application was dismissed.

## Key Insights

The legal principle that the grant of tenure must be valid at law to extinguish native title is not new. There have been several instances where the validity of historic grants has been successfully challenged by native title parties.

The tenure history of the sportsground was unusual, so the same issue is unlikely to be widely replicated in relation to other historical freehold grants in NSW.

However, the *Dungog* decision is an important one for any party that is relying on extinguishment of native title to allow dealings to proceed without regard to the Native Title Act. It serves as a reminder that problems can exist in tenure histories and proponents should satisfy themselves as best they can about the validity of historical grants before relying on them as evidence of extinguishment.

## Other non-claimant applications were successful

All other non-claimant applications heard over the last 12 months successfully obtained a determination that native title does not exist.

The Courts in each case noted that an applicant can establish that native title does not exist on two bases:

- First, on the basis that any native title that did exist has been extinguished; or
- Second, on the basis that no native title exists because it is either not claimed or cannot be proved by a native title claimant.

The principles governing the making of non-claimant applications were laid down by the Full Federal Court in 2019 in *Mace v State of Queensland* (2019) 375 ALR 717 and summarised by the Federal Court in *Wagonga Local Aboriginal Land Council v Attorney General of New South Wales* [2020] FCA 1113. They include:

- Courts look at the nature of the land and the tenure involved, the presence or absence of any present or previous native title claims and the nature and content of those claims, and any evidence adduced by the parties.
- The principal evidence likely to impede the grant of a negative determination is evidence of an assertion of native title that is objectively arguable, not evidence of the potential for the assertion of native title. The quality of such evidence, rather than its extent, will be determinative.
- The reason for a non-claimant application does not govern the Court's approach to the exercise of the power.
- Whether there is a contradictor to a non-claimant application or not, the legal question remains the same: has the applicant discharged its burden of proof that no native title exists in the area the subject of the non-claimant application.

### Queensland applications were seeking upgraded tenure

Three Queensland applications (*South Terrick Pty Ltd ATF the South Terrick Trust v State of Queensland* [2023] FCA 646; *Russell Estates Pty Ltd v State Minister for the State of Queensland* [2023] FCA 1588; and *Arnaboldi v State of Queensland* [2023] FCA 788) were made by leaseholders not on the basis of extinguishing tenure, but because native title could not be proven to exist. They made non-claimant applications because the State required a negative determination (or an ILUA) before upgrading their tenure. We have noticed an increase in non-claimant applications in Queensland since 2021 because of this requirement.

In each case the applicants were successful in their arguments that native title could not be proven and obtained determinations that native title did not exist.

### The NSW applications were made by Local Aboriginal Land Councils over freehold land held by them

Four NSW applications were made by Local Aboriginal Land Councils to be able to sell freehold land held by them under the *Aboriginal Land Rights Act 1983* (NSW) (ALR Act).

Any transfer of lands to an Aboriginal Land Council for an estate in fee simple is subject to any native title rights and interests existing in relation to the lands immediately before the transfer (section 36(9) ALR Act) and cannot be sold unless the land is the subject of an approved determination of native title (section 42(1) ALR Act). This provision has triggered over 60 non-claimant applications in NSW over the last 25 years.

Three of the non-claimant applications were fairly standard in that context and relied upon historical extinguishment of native title. Interesting findings included:

- That the appropriation of a Crown road for the purpose of the *Murrumbidgee Irrigation Act 1910* (NSW) under the *Public Works Act 1900* (NSW) vested a freehold estate in the Minister that extinguished native title at common law *(Griffith Local Aboriginal Land Council v Attorney General of New South Wales* [2023] FCA 457); and
- That the grant of special leases for various purposes extinguished native title as "Scheduled Interests" under the Native Title Act. The Court considered evidence about each lease before making its findings about extinguishment in the same way it would have done had extinguishment submissions been made by a respondent to a native title claim (*Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales* [2023] FCA 813).

The applicant in *Armidale Local Aboriginal Land Council v Attorney General of New South Wales* [2024] FCA 50, on the other hand, contended that native title did not exist because it has not been claimed or could not be proven by a native title claimant. It did not have historical extinguishing tenure to rely upon. The issue for the Court was therefore like the Queensland cases referred to above.

The Court noted that the Land Council's evidence had to establish a negative proposition. The Land Council provided evidence from persons with knowledge of cultural and traditional uses of the land to demonstrate a lack of connection to the land under traditional laws or customs for the purpose of the Native Title Act.

The Court was careful to clearly limit its findings about the absence of native title to the land in question to avoid affecting any potential claims to nearby lands.

**Authors:** Anna Seddon, Senior Associate; Leonie Flynn, Expertise Counsel

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

## What you need to know

- 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.

## What you need to do

- The decision highlights the importance of drafting native title agreements in a way that clearly contemplates the array of possibilities that may occur with respect to the relevant native title claim landscape and clarifies how any ongoing benefits are to be treated in the event of particular native title outcomes.
- Remember that native title agreements are contracts, and the doctrine of frustration applies to them in the same way as other commercial instruments.



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

*Lockyer for and on behalf of the Robe River Kuruma People v Citic Pacific Mining Management Pty Ltd (No 2)* [2024] FCA 154, is the first time the Federal Court has been required to consider whether a native title agreement has been frustrated.

The only previous judicial consideration of this issue we are aware of has been by the WA Supreme Court and QLD Land Court.

## Background to the dispute

In 2008, the Participants in the Sino Iron project entered into indigenous land use agreements (ILUAs) and accompanying compensation deeds with three different native title parties who each had registered native title claims over the agreement area.

The agreement area covered a much larger area than the relevant mining tenements, and two of the native title claims overlapped at the time the agreements were entered into. One of those compensation deeds was with the Kuruma Marthudunera People (KM People).

Over the next 10 years, the native title parties resolved their overlapping claims which resulted in the KM People reducing their native title claim area so that it no longer covered the overlapped area. This meant that their claim only covered a very small part of the agreement area.

In 2019, the KM People were determined to hold native title over less than one percent of the agreement area, and their land sat a considerable distance away from the core mining project. In light of the determination, the Participants ceased making payments under the Compensation Deed and argued that future performance of the Compensation Deed had been frustrated by the determination. The KM People sought to enforce the Participant's obligations to pay compensation under the Compensation Deed.

## Applying the doctrine of frustration in this case – there was no 'common assumption'

The Participants argued that the KM People's voluntary reduction in their claim boundary so that it did not cover any part of the tenement area was an event never contemplated by the parties, and resulted in a radically different situation to that which was contemplated when they entered the Compensation Deed.

The Participants failed to establish that there was a common assumption that future performance would only be required if the KM People's native title claim was successful over some part of the land on which the Project was undertaken, as opposed to a successful application over some part of the broader Agreement Area.

The Court interpreted the Compensation Deed in the context of the terms of the ILUAs. It found that contrary to the Participants' submissions, the Compensation Deed evidenced an intention that its terms **would** continue to apply irrespective of the outcome of the KM People's native title claim. In particular, the Court found the Compensation Deed:

- was not confined to claims and interests of the KM People that were only native title interests and was instead comprehensive in relation to other matters such as obligations not to object to the project;
- was not confined to the area of project activities and instead applied the same way to the entire Agreement Area;
- did address circumstances that may unfold in respect of the native title applications, but only provided mechanisms to ensure the Compensation Deed remained binding.

Justice Colvin found that self-evidently, there was the possibility that native title claims to some or all the relevant area may not succeed, yet the Compensation Deed made no provision for this "obvious possibility" indicating that it was the intention of the parties that its terms would apply irrespective of the eventual outcomes of the native title claims.

In rejecting the frustration claim, the Court also ordered the Participants pay the native title parties' costs associated with the proceedings.

**Authors:** Libby McKillop, Counsel, Leonie Flynn, Expertise Counsel and Lydia O'Neill, Graduate

## Key Insights

It is important to remember that native title agreements are contracts, and the doctrine of frustration applies to them in the same way as other commercial instruments.

A decision about frustration will turn on the facts of the case and whether there is a "common assumption" about a state of affairs that no longer exists. The common assumption is a matter that must be established from the terms of the contract considered in the context of any surrounding circumstances that bear upon its proper construction.

The decision highlights the importance of drafting native title agreements in a way that:

- clearly contemplates the array of possibilities that may occur with respect to the relevant native title claim landscape; and
- clarifies how any ongoing benefits are to be treated in the event of particular native title outcomes.

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

## 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.
- 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.

## What you need to do

- Be aware that all parties can be liable for costs if they behave unreasonably in native title proceedings, even native title parties seeking to protect their native title interests.
- Ensure that you are compliant with all procedural obligations to minimise the risk of an adverse costs order.

## Trends in costs orders in native title proceedings

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

We reported on a number of costs decisions with adverse outcomes for parties pursuing unreasonable positions in litigation and mediation in our *Native Title Year in Review 2022-2023* article "When conduct becomes costly - the risk of unreasonable behaviour in native title proceedings".

This trend continues in 2023-2024. The below decisions provide guidance on the application of section 85A of the *Native Title Act 1993* (Cth) (see below) and what the Court considers unreasonable conduct.

## Native title parties represented by native title representative bodies are able to recover costs

In two recent costs applications, the Federal Court rejected arguments that native title parties represented by native title representative bodies are unable to recover costs and confirmed a 2014 decision that costs could be recovered in these circumstances.

In *Alvoen on behalf of the Wakaman People #5 v State Minister for the State of Queensland (No 5)* [2023] FCA 1593, the Wakaman Applicant and the State sought costs against the Uwoykand Corporation in respect of a successful interlocutory application to remove the Uwoykand Corporation as a party to the proceedings. The Court held that the Uwoykand's conduct was "unjustifiably oppressive" and had constituted an abuse of process.

We wrote about this case in our *Native Title Year in Review 2022-2023* article "When conduct becomes costly - the risk of unreasonable behaviour in native title proceedings".

Uwoykand contended that any adverse costs order would be "punishment of an unsuccessful party". However, the Court held that punishment is not relevant to section 85A of the Native Title Act, which is solely focussed on whether the conduct of a party constituted "any unreasonable act or omission".

Uwoykand also submitted that Wakaman could not seek costs because it was represented by a representative body (the North Queensland Land Council). The Court rejected this submission and adopted the approach taken in *Far West Coast Native Title Claim v State of South Australia (No 8)* [2014] FCA 635.

The Court ordered Uwoykand to pay the Wakaman Applicant and State's costs of and incidental to the interlocutory application, on a party-party basis, such costs to be taxed if not otherwise agreed.

The Federal Court took the same approach in *Mann on behalf of the Bigambul People #2 v State of Queensland (No 2)* [2023] FCA 1598. It held that representation by a representative body is no impediment to an award of costs.

We discuss this costs decision further below.

## Court finds unreasonable conduct sufficient to depart from usual rule that each party bears own costs

In *Mann on behalf of the Bigambul People #2 v State of Queensland (No 2)* [2023] FCA 1598, the Gamilaraay Applicant sought costs of and incidental to:

- a successful interlocutory application seeking to join and then strike out the Bigambul #2 native title claim; and
- an unsuccessful interlocutory application by the Bigambul #2 Applicant seeking to extend the time for filing an application for leave to appeal.

The Federal Court struck out the Bigambul People #2 native title claim because it was not properly authorised and was an abuse of process. We wrote about this case in our *Native Title Year in Review 2022-2023* article "When conduct becomes costly - the risk of unreasonable behaviour in native title proceedings".

In the costs case, the Court found that conduct constituting an abuse of process could be viewed as unreasonable within the meaning of section 85A(2) of the Native Title Act.

The Court found the unreasonable conduct included:

- extreme delay in commencing the claim and absence of an explanation;
- substantial defects in the authorisation of the claim;
- the inference that the claim was commenced in order to require the Gamilaraay Applicant to include additional descent lines in its own claim, rather than being a genuine claim to the overlapping area; and
- the serious prejudice caused to the Gamilaraay Applicant and the progression of the Gamilaraay consent determination by the conduct of the Bigambul Applicant.

The Court held that it was appropriate that the Bigambul #2 Applicant pay the costs of the Gamilaraay Applicant of and incidental to Interlocutory Application 1, on a party-party basis, such costs to be taxed if not otherwise agreed.

Costs were not awarded in relation to the second interlocutory application because:

- no arguments of substance were put by any party; and
- although there was a procedural error from the Bigambul #2 Applicant, this did not constitute an unreasonable act or omission causing another party to the proceedings to incur costs within the meaning of section 85A of the Native Title Act.

## Compensation "test case" not sufficient to depart from starting point that each party bears their own costs

This Full Court decision considered the application of section 85A to the hearing of separate questions in a native title compensation "test case".

In *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia (No 2)* [2023] FCAFC 113, the Full Court dealt with the issue of costs in relation to the hearing of separate questions determined by the Full Court in May 2023. We wrote about the May Full Court decision in our *Native Title Year in Review 2022-2023* article "Landmark Gumatj Clan compensation decision opens up a new class of compensation claims against the Commonwealth".

The Gumatj and the Rirratjingu parties accepted the starting point was that each party bears their own costs. However, they submitted that a number of factors supported the making of a costs order in their favour in relation to the hearing of the separate questions.

The Full Court was not satisfied that there was a sufficient basis to depart from the starting position provided under section 85A(1) of the Native Title Act. Accordingly, the Full Court ordered that each party bear its own costs of, and in relation to, the hearing of the separate questions.

More details about the arguments and findings are below.

The Gumatj Clan submitted that:

- the nature of the separate question hearing was significantly different from that of a typical native title determination or compensation application, and raised complex constitutional issues of broader significance;
- the complex constitutional issues extended beyond issues relating to native title, to include much broader principles of constitutional power and structure;
- the Gumatj Clan was wholly successful on each of the separate questions and each of the underlying legal issues in dispute;
- the separate question hearing involved considerable costs, including lengthy submissions and a five day hearing; and
- the Gumatj Clan did not receive any litigation funding from a native title representative body or other public funding.

The Rirratjingu parties also relied on those submissions, subject to the following additions and qualifications:

- the Commonwealth could have raised and resolved the constitutional issues in various types of proceedings, and had it done so, the ordinary position would be that the successful party would be awarded costs;
- the Commonwealth expressly acknowledged the constitutional issue was a "High Court question", but elected not to exercise its rights to remove those issues to the High Court. Had it done so, section 85A — being a provision directed only to the power of the Federal Court — would not have applied. Therefore, a likely consequence of that decision exposed the parties to paying legal fees in two proceedings (one in the Federal Court and one in the High Court);
- Rirratjingu's costs are not considerable;
- where the Rirratjingu parties made submissions, several were accepted by the Court; and
- the Rirratjingu parties did not receive any litigation funding, or any other public funding.

The Full Court found that four factors weighed against making a costs order:

- while the hearing involved constitutional issues that could have been raised in a non-Native Title Act case, they were raised in a proceeding to which section 85A applies;
- given the substantial nature of the claims for compensation, it was reasonable to expect that the claims would be fully tested, and that a process involving separate questions was likely to occur;
- while the hearing occupied five days, this must be viewed in the context of the costs of the proceedings as a whole, which is likely to be considerable; and
- the fact that neither the Gumatj Clan nor the Rirratjingu people received public funding was not a basis to depart from the starting principle that each party bears its own costs.

## Potential award for costs against applicants, non-party and solicitor following dismissal of native title claim as an abuse of process

In *Brownley on behalf of the Gulgoordi-Garlgurla Wongi People v State of Western Australia* [2024] FCA 208, the Court dismissed the Gulgoordi-Garlgurla Wongi People's native title claim as an abuse of process.

The claim wholly overlapped the Marlinyu Ghoorlie claim which was 12 months into a trial and was close to determination.

Both the State and the applicant in the overlapping claim filed interlocutory applications seeking orders that the Gulgoordi-Garlgurla Wongi People's native title claim be dismissed as an abuse of process.

The Court dismissed the claim. It considered section 85A of the Native Title Act but said (at paragraph [79]):

> Having regard to the findings I have made on this application, including the involvement of non-parties in the bringing of the GGW application, I will make an order permitting any application by a respondent to the GGW application for an award of costs against any person to be filed and served within 14 days.

The non-parties that the Court referred to were Ms Colbung (who had been an Indigenous respondent to the Marlinyu Ghoorlie claim but consented to being removed as a party) and her solicitor Mr Linde. The Court held that they were both actively involved in the preparation and filing of the Gulgoordi-Garlgurla Wongi People's native title claim.

An application for costs against the individual applicants in the Gulgoordi-Garlgurla Wongi People claim, Ms Colbung and solicitor Mr Linde was filed by the Marlinyu Ghoorlie claim group in March 2024. It will be heard in 2024. We will report on the outcome in our next edition of Native Title Year in Review.

**Authors:** Roxane Read, Senior Associate and Claudia Shelley, Lawyer

### Reminder of the provisions governing costs in native title proceedings

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

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

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

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

## What you need to know

- 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.

## What you need to do

- Native title representative bodies that are considering joining a native title claim proceeding should be clear about their functions and the parameters within which they must operate under the *Native Title Act 1993* (Cth).
- The question they should ask themselves is whether their joinder would assist them to perform these functions.



## History of the Representative Body's joinder status in the Marlinyu Ghoorlie native title claim

In 2020, Native Title Services Goldfields Limited (NTSG) made an application to join the Marlinyu Ghoorlie native title claim proceeding on the basis that its own interests may be affected by a determination.

NTSG had received requests for assistance to research and file native title applications that would overlap the Marlinyu Ghoorlie claim. NTSG argued it was conducting research into such claims and, if made a party, it could take part in the proceeding while doing so. Moreover, NTSG submitted that if native title was found to exist in the area, it would have obligations to perform its functions as the representative body. NTSG also submitted that accurately identifying native title holders was of direct relevance to it.

The Court ordered (by consent) that NTSG be joined as a respondent to the proceeding subject to two conditions. NTSG's active participation was limited to:

- issues relating to membership of the Marlinyu Ghoorlie claim group; and
- the extent of the Marlinyu Ghoorlie claim area within NTSG's native title representative body area.

The Marlinyu Ghoorlie claim and another overlapping claim were set down for hearing in October 2023. Shortly before the hearing commenced, NTSG filed an application to remove the limitations on its joinder which, it submitted, restricted its ability to fully participate in the proceeding.

In *Dimer on behalf of the Marlinyu Ghoorlie Claim Group v State of Western Australia (No 2)* [2023] FCA 1060, the Court determined to:

- remove the geographic limitation from NTSG's participation in the proceeding; but
- otherwise dismiss NTSG's application, stating that to remove the issues limitation from NTSG's participation would only worsen an "already unsatisfactory state of affairs".

Notably, the role that NTSG wanted to play in the proceedings was not clear and it made a number of contradictory representations in its documentation. It also failed to clarify its position at the hearing of its application before the Court.

## What is the role of representative bodies in native title proceedings?

The Court said that the lack of clarity over NTSG's interests and participation in the native title claim proceeding, was symptomatic of a broader issue concerning the proper role of representative bodies in native title proceedings.

In being joined and then petitioning to remove its limitations, NTSG had relied on the representative body's "facilitation and assistance functions" and additional functions (respectively in section 203BB and section 203BJ of the *Native Title Act 1993* (Cth)).

Broadly, these statutory functions include the representative body's role to identify persons who may hold native title in the area and assist people in lodging native title applications or participating in proceedings that relate to such applications.

However, these functions and powers are subject to various statutory limitations and conditions (largely contained in Division 3 of Part 11 of the Native Title Act). The purpose of these limitations is to ensure that the representative body acts in relation to matters specifically requested of it, consults with the right people and has decision-making procedures in place to ensure fairness.

The Court noted that these statutory functions do not contemplate a representative body becoming a party to proceedings. It went on to acknowledge that the Native Title Act allows a representative body to become a party in the ordinary course: first, as of right within the notification period and secondly, if outside of the statutory notification period, then by an application to become a party if its interests may be affected by a determination and its joinder is in the interests of justice.

The Court held that in deciding to become a party to a native title proceeding, a representative body assumes the usual obligations of a litigant. This means that they must conduct the proceeding in accordance with the same principles that govern civil practice and procedure.

The Court also noted the potential for a representative body to be placed into a position of conflict by reason of being a party to a native title proceeding.

The Court concluded by highlighting four matters:

- Joinder as a party to a proceeding is not a necessary step to be taken by a representative body.
- Joinder may or may not assist a representative body to perform its statutory functions.
- Joinder imposes the usual obligations of a litigant on the representative body.
- Joinder may place a representative body into a position of conflict with respect to the Aboriginal peoples or Torres Strait Islanders for whom it is a representative body.

### Key Insights

The Federal Court has made clear that there is no mandate on representative bodies to be parties to native title proceedings and in fact joinder might place them in a position of conflict.

Representative bodies that seek joinder should be clear on their statutory role (and limitations) and remember that they must comply with the usual obligations of litigants.

**Authors:** Richard Anthonisz, Senior Associate; Jordan Soresi, Lawyer; Georgia Bertolini, Graduate

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

## What you need to know

- 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.

## What you need to do

- Ensure authority certificates under the Northern Territory Aboriginal Sacred Sites Act are obtained and complied with in relation to works in the Territory.
- If you represent a statutory body or corporation, do not assume that any presumption of statutory interpretation will apply to protect the body or corporation from prosecution. This will need to be assessed on a case-by-case basis, having regard to the terms of the statute.

## Work done at Gunlom Falls without authority certificate impacted a sacred site

In 2019, the Federal Director of National Parks (DNP) engaged a contractor to perform construction works on the realignment of a walking track at the iconic Gunlom Falls in Kakadu National Park.

The works were conducted without obtaining an authority certificate under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (Sacred Sites Act). Generally, an authority certificate will identify areas where works can be conducted or conducted subject to conditions. Authority certificates will also identify sacred sites where works cannot be done. Unfortunately, in this case, the works were done on a Jawoyn sacred site.

## AAPA prosecutes the Federal Director of National Parks

The Chief Executive Officer of the Aboriginal Areas Protection Authority prosecuted the DNP under section 34(1) of the Sacred Sites Act, which makes it an offence for a "person" to "carry out work on or use a sacred site". *The Interpretation Act 1978* (NT) defines "person" to include a body politic and a body corporate.

The DNP is a body corporate under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Its statutory functions include administering, managing and controlling Commonwealth reserves, including Kakadu National Park.

The prosecution began in the Local Court of the Northern Territory, which stated a special case for the Supreme Court on the question of whether the DNP could be liable under section 34 of the Sacred Sites Act. The matter was then referred to the Full Court.

In the Full Court, the DNP essentially admitted the facts of the offence, but pleaded not guilty on the basis that it couldn't be convicted based on the principle in *Cain v Doyle* (1946) 72 CLR 409. This is a presumption of statutory interpretation that legislation does not make the Crown liable to be prosecuted for or convicted of an offence.

The Full Court held that the DNP, as a government instrumentality, enjoyed the privileges and immunities of "the Crown" or the Executive Government of the Commonwealth, including the presumption against the imposition of criminal liability in *Cain v Doyle*.

The Aboriginal Areas Protection Authority was granted special leave to appeal to the High Court.

## Clarifying the scope of the Bropho and Cain v Doyle presumptions

The High Court considered two linked presumptions which are principles of statutory construction:

- the *Bropho* Presumption, which is that legislation does not bind the Crown (arising from the decision of *Bropho v Western Australia* (1990) 171 CLR 1); and
- the *Cain v Doyle* Presumption, which is that legislation does not make the Crown liable to be prosecuted or convicted of an offence.

In this case, the High Court was clear that the *Bropho* Presumption had been displaced by the words of section 4 of the Sacred Sites Act. Section 4 made it very clear that the Sacred Sites Act was intended to bind the Crown, both in right of the Territory and also the Commonwealth.

The next issue was whether the *Cain v Doyle* Presumption applied. The Court found that it did not. The *Cain v Doyle* presumption is a very "strong but narrow" presumption that applies only to a body politic (ie the Commonwealth, States or Territories as distinct legal persons); it does not apply to natural persons or bodies corporate, including statutory corporations such as the DNP.

The Court observed that statutory corporations "are not and never do become the Crown itself". Thus, they are not entitled to the protection of the *Cain v Doyle* Presumption.

Consequently, the appeal was allowed, with the High Court finding that the offence and penalty prescribed by section 34(1) of the Sacred Sites Act could apply to the DNP.

## Key Insights

Statutory corporations are not entitled to the benefit of the *Cain v Doyle* Presumption, nor should they assume that legislation does not apply to them by application of the *Bropho* Presumption.

Instead, they will need to carefully consider their liability on a case-by-case basis about the terms of the relevant statute and the clarification offered by this decision regarding the scope of important principles of statutory construction.

In addition, this decision is also a timely reminder of the following, more practical, considerations:

- sacred sites protection in the Northern Territory is very different to other States and Territories;
- the Sacred Sites Act is a powerful tool for the protection of Aboriginal culture and heritage in the Northern Territory;
- the Aboriginal Areas Protection Authority will investigate and prosecute breaches of the Sacred Sites Act; and
- where works are being undertaken in the Territory, it is an important protective measure for all proponents to obtain and abide by an authority certificate under the Sacred Sites Act, including statutory entities.

**Author:** Rebecca Hughes, Senior Associate

# Update on Federal cultural heritage protection applications

## What you need to know

- 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.
- 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 section 9 and 10 applications and progress the reform of Australia's cultural heritage laws.

## What you need to do

- Be aware that a protection application under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is a powerful means by which First Nations People can express dissatisfaction with the cultural heritage protection provided under State or Territory legislation.
- Be conscious of the length of time it is likely to take for the Minister to respond to these matters and the amount of work required for a proponent to participate.
- Strong relationships between proponents and First Nations Peoples (particularly in relation to the protection of cultural heritage) could avoid an application under the regime.

## Update on protection applications made in 2023-2024

In the last 12 months, new protection applications under sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) have been made in the Northern Territory, Victoria and Western Australia.

### Northern Territory: Binybara (Lee Point)

A section 10 application was made on behalf of the Batcho Family of the Kulumbirigin Danggalaba clan to seek the protection of an area at Binybara (Lee Point) near Darwin. The applicant claimed the land was part of a cultural landscape connected to the registered sacred sites at the tip of Lee Point and Darriba Nungalinya (Old Man Rock) located offshore from Binybara (Lee Point). It is claimed that Dreamings, burial sites, stone scatters, camping places and the remains of the prehistoric dolphin are also on the land, as well as being a ceremonial place.

The applicant alleged the specified area was under threat from development by Defence Housing Australia, which included residential housing, commercial and public infrastructure and community facilities. In response to significant community opposition, Defence Housing Australia agreed to cease its operations while the section 10 application was considered by Minister Plibersek.

The ABC reported on 28 March 2024 that Minister Plibersek had rejected the application for protection under the ATSIHP Act. The Minister told the ABC that based upon the evidence before her, she was not satisfied at law that there was a significant Aboriginal area within the project site. The Minister was satisfied that significant sites were "already protected under Northern Territory law" (ABC News, 28 March 2024).

This application was decided comparatively quickly (in approximately six months), bucking the usual timeframe of a year or even years between application and resolution.

### Victoria: Direl (Lake Tyrell)

A section 10 application has been made on behalf of five Aboriginal people from Wergaia, Wamba Wamba, and Nyeri Nyeri Traditional Owners to seek the protection of an area known as Direl, near Sea Lake, Victoria. The applicants claim the area forms a cultural landscape of high cultural significance, containing burials, archaeological and cultural sites.

The applicants claim the specified area is under threat from the potential return of the Mallee Motorised Dune Buggy Rally, ongoing industry works, a new tourist park, planning and development activities and failure of the State and Shire of Buloke to undertake a full Cultural Heritage Management Plan.

### Western Australia: Pulyku (Booylgoo Range)

A section 10 application has been made by certain Tjiwarl Traditional Owners seeking the protection of an area known as Pulyku (Booylgoo Range), near Sandstone, Western Australia.

The applicants claim that the specified area is under threat from exploratory drilling and associated infrastructure proposed by Mabrouk Minerals Ltd. They state that as the spiritual essences associated with Pulyku is of a dangerous nature, any disturbance and desecration of Pulyku will result in spiritual retributions and damaging consequences for Tjiwarl native title holders.

The applicants further claim that the section 18 consent decision caused desecration and injury to the site area of Pulyku and to the Tjiwarl native title holders.

## Federal Budget allocates funds

The Federal Government has allocated $17.7 million in the 2024-2025 Federal Budget to reduce the backlog and support administration of complex applications under the ATSIHP Act and progress the reform of Australia's cultural heritage laws.

This funding will hopefully help ease the delay in applications being determined, with some in recent years taking over two years to be finalised.

**Authors:** Connor Davies, Senior Associate; Claudia Shelley, Lawyer and Lydia O'Neill, Graduate

## Key Insights

Protection applications are a powerful mechanism to challenge projects that may be regarded by First Nations People as having unacceptable impacts on cultural heritage and being inadequately protected under State and Territory laws. This is especially true while national cultural heritage law reform remains outstanding.

Strong relationships between proponents and First Nations Peoples (particularly in relation to the protection of cultural heritage) could avoid an application under the regime.

We write about a number of publications in the cultural heritage space coming from Government, the First Nations Heritage Protection Alliance, industry bodies and others in our *Native Title Year in Review 2023-2024* article "Little movement on Federal heritage reform in 2023 – but stakeholders and industry are instigating change". These publications contain a number of principles and recommendations that may help proponents to adhere to best practice standards and build strong relationships with First Nations People.

## 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 Commonwealth Minister 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 Minister forms the view that the area is not adequately protected under State or Territory legislation.

While there are no statutory timeframes for an application to be resolved, application processes can take several years to conclude, and almost certainly longer than 12 months for section 10 applications.

Other provisions of the Act are also relevant, namely section 12 in respect of applications to protect objects, and section 18 regarding emergency declarations that can be made by authorised officers without any application having been made.

# Federal Court confirms river mouth can be granted under ALRA

## What you need to know

- 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.

## What you need to do

- If you are interested in the remaining unresolved ALRA land claims, consider the significance for those claims of this expanded interpretation of 'land'.
- Be aware that ownership of river estuaries is a very significant right that makes Traditional Owners the key decision makers in respect of the use of that environmentally sensitive and abundant "land".



## Reminder: what is the ALRA and why was Justice Bromberg "delighted" with this case?

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) was the first and most influential land justice scheme dating from the Whitlam era (though passed into law by the Fraser Government).

Almost half of the land in the Northern Territory is now held as Aboriginal freehold under the ALRA.

You would think that the meaning of "land" in the ALRA had been resolved during the many decades since its enactment.

However, much to Justice Bromberg's delight, the decision *Northern Territory of Australia v Aboriginal Land Commissioner* [2023] FCA 1183 required the Court to consider whether the mouth of a river (ie an estuary) was "land" that could be granted under the ALRA.

As Justice Bromberg put it, "where the does the sea end and the land begin?".

## The dispute was about whether the estuaries of certain rivers were "land" for the purposes of the ALRA

In 1997, the Land Council made two land claim applications on behalf of Aboriginal groups claiming to be the traditional Aboriginal owners of the following areas of unalienated Crown land in the Northern Territory:

- the Legune Area Land Claim, which included the estuaries of the Keep River and the Victoria River; and
- the Fitzmaurice River Region Claim, which included the estuary of the Fitzmaurice River.

In 2022, the Commissioner recommended that the land claims be granted, and that the grants include the mouths of the respective rivers.

The Northern Territory sought judicial review of this aspect of the decision. It did not dispute that the Aboriginal claimants were the traditional owners of the areas claimed but argued that the grants were beyond the Commissioner's jurisdiction as they included areas that did not constitute "land in the Northern Territory" within the meaning of the Act.

There was no disagreement between the parties that:

- "land" is not confined to dry land but includes streams and creeks, as well as the beds of rivers and lakes; and
- the seabed is not "land" under the Act.

The question in dispute was whether the mouth of a river — ie an estuary — was considered "land" for the purposes of the Act.

The Court noted that the parties were "literally miles apart" on this issue.

## High Court decision in Risk

In 2002, the High Court held in *Risk v Northern Territory of Australia* (2002) 210 CLR 392 that the seabed of bays and gulfs within the limits of the Northern Territory cannot be subject to a claim under the ALRA.

The *Risk* decision concerned an appeal against the Commissioner's refusal to grant land over thousands of square kilometres of seabed beyond the low water mark in Darwin harbour and offshore areas. In this new case, the Northern Territory asserted that the Commissioner had misapplied the reasoning in the *Risk* decision and had therefore acted beyond its jurisdiction in making recommendations in respect of areas that did not constitute "land" for the purposes of the Act.

In other words, the Northern Territory argued that the *Risk* decision also applied to estuaries.

## Where did the Court draw the line?

The Court rejected the Northern Territory's arguments. In the *Risk* decision, an important distinction was made between:

- internal waters of the Northern Territory that have seabeds (ie bays and gulfs); and
- internal waters of the Northern Territory that abut the coast but are internal to the coastline and do not have seabeds (ie rivers and estuaries).

The Court found that the Commissioner was correct to reject the contention that the reference made to "bays and gulfs" in the Risk decision was intended to extend to a "bay, gulf, inlet, estuary or watercourse". The Court noted that Gummow J in *Risk* explicitly noted that "nothing decided by this litigation denies the efficacy of grants under the Act in respect of areas including rivers and estuaries".

The Court found that the Commissioner had correctly reviewed the evidence and formed its view of the proper characterisation of "land" in respect of the areas subject to the claims. For this reason, the Court was not persuaded that the Commissioner's recommendations were tainted by the jurisdictional errors advanced by the Northern Territory.

On that basis, the application was dismissed.

## Where to from here?

Ownership of river estuaries is a very significant right. Succeeding in this claim ensures that the Traditional Owners become the key decision makers in respect of the use of this "land" rich in flora and fauna.

As at June 2023, 26 years after the sunset date for land claims under the ALRA, there were still 34 claims yet to be resolved (see the Aboriginal Land and Sea Action Plan Yearly Report 1 2022 - 2024).

Who knows whether any of these claims will present the Federal Court with further opportunities to consider fascinating issues like the ones that delighted Justice Bromberg in this decision.

**Authors:** Leanne Mahly, Lawyer; Hannah Schmidt, Lawyer; Leonie Flynn, Expertise Counsel

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

## What you need to know

- 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.

## What you need to do

- Note that occupation, that is lawful at common law, but not permitted by the *Crown Land Management Act 2016* (NSW) is not sufficient to defeat a land claim. This land will now be transferred in freehold to the claimant land council.
- If you are developing a project in NSW, be aware that accessing land within the scope of the *Aboriginal Land Rights Act 1983* (NSW) can be difficult, for reasons including that a land council cannot grant interests absent a determination of native title.

## Aboriginal Land Rights Act 1983

The *Aboriginal Land Rights Act 1983* (NSW) (ALR Act) adds complexity to proposals to access land within its scope. It is more difficult to navigate than the *Native Title Act 1993* (Cth).

The ALR Act has generated much litigation around the definitions of land required to be transferred to land councils under the scheme.

The latest judicial consideration is by the Land and Environment Court of NSW, which recently looked at the meaning of "lawfully used or occupied" in the definition of "claimable Crown land".

## Court determines meaning of "lawfully used for occupied"

*Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 134 concerned an appeal from the Minister's refusal of the Darkinjung Local Aboriginal Land Council's 2019 land claim over land in Doyalson.

The Minister refused the claim on the basis that the land was subject to a special lease issued in 1967 which the Minister said remained in force at the date of the claim. The Land Council successfully appealed.

The Court considered the definition of "claimable Crown lands" in section 36 of the ALR Act. It 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 — … are not lawfully used or occupied".

There was no argument made in support of lawful use, because the use of the land was obviously unlawful. The Court found that the land was not, in fact, occupied at the time of the claim (lawfully or unlawfully) and was therefore "claimable Crown land".

## The history of the claimed land

In 1967, the claimed land was leased to a Mr Graham under a special lease for the purpose of a poultry farm. The Minister later approved an extension of the special lease for the purpose of "poultry farm and hatchery" to expire in December 1996.

In 1993, Mr Graham applied to purchase the land. It seems that because of this undetermined application, after its term expired in 1996, the lease was "kept current on a month by month basis until a determination is made".

From the mid-1980s, there was evidence that Mr Graham was using the claimed land for purposes other than a poultry farm. In 1985 he was fined for illegal removal of fill (quarrying) in breach of the special lease. Another conviction followed in 2003 relating to use of the site as a landfill to dispose of waste material from Mr Graham's demolition business on the adjacent property and breach of various EPA notices. There was also evidence that Mr Graham sublet the land to third parties for purposes outside of the lease purpose.

The application to purchase the land was not determined before the land claim was made in 2019.

### Minister's consent had not been obtained in relation to Mr Graham's continued occupation of the land after the cessation of the special lease in 1996

The Court noted that a statutory precondition to the creation of a new monthly tenure under the *Crown Lands (Continued Tenures) Act 1989* (NSW) after the expiry of the special lease was the grant of the Minister's consent.

There was no evidence that consent had been granted, notwithstanding that the Department proceeded on the assumption that Mr Graham had a monthly tenure (and rent was paid). The Court rejected the Minister's argument that consent was implied from conduct.

The Court held that the Ministerial consent requires active engagement with the question of whether the holder of an expired special lease for a term ought to remain in possession of the land on a monthly tenancy. Furthermore, it must be given prior to the commencement of the periodic tenancy.

This issue became important later in the decision.

## Relevant legal principles relating to whether land is "lawfully used or occupied" under the ALR Act

The Court summarised the relevant legal principles as follows:

- Either a lawful use or a lawful occupation of the land will defeat the claim. Whether the land is lawfully used or occupied is a question of fact.
- Occupation will usually be constituted by a combination of legal possession, conduct amounting to actual possession, and some degree of permanence or continuity.
- A continuous physical presence over the entirety of the land is not necessary to establish occupation. The fact that some of the land has been left undeveloped does not in and of itself mean that the whole of the land is unoccupied.
- Occupation includes legal possession, that is, being able to exclude third parties.
- For land to be used or occupied, it must be actually used or occupied in the sense of being used in fact and not in a nominal sense or merely to a notional degree. Total abandonment is not required to find that the land is not lawfully used or occupied.
- The term "lawfully" means the Minister must satisfy the Court not only that the claimed land was in use or occupied as at the date of the claim, but that such use or occupation was legally authorised.

### Lawfulness of "use" and "occupation"

While the matter was decided reasonably simply on the facts, the Court examined several conflicting authorities on the concept of "lawfulness".

The High Court held in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; (2016) 260 CLR 232 (Berrima Gaol) that for use of land to be lawful, it had to conform to the purpose for which it was dedicated. However, lawful occupation does not require this. To do so would deny the distinction between use and occupation. That is, land does not need to be actively used for dedicated purposes to be lawfully occupied.

The Court in this case noted this example, "a tenant may be in lawful occupation of land subject to a lease, even though the tenant carries out unlawful activities on the land".

### Was Mr Graham "occupying" the land at the time of the claim?

There was ample evidence of Mr Graham occupying the land until mid-2018, but no evidence was led about the period from mid-2018 until the date of the claim in 2019. The Court drew an adverse inference from the fact that the Minister did not lead evidence from Mr Graham as to his occupation at the relevant date.

**The Court said that:**

> While a continuous physical presence over the entirety of the land is not necessary to demonstrate occupation, and total abandonment is not required to find that the land is not occupied, there remains a six-month evidential gap where the Minister has failed to establish actual occupation of almost all the land as at the date of the claim.

The Minister relied upon the continual payment of rent to show occupation of the land. The Court said that the payment of rent is no more than evidence of legal possession and not actual possession and not sufficient for section 36(1)(b) of the ALR Act.

The Court concluded that the Minister had not discharged the statutory onus of proof of demonstrating that there was actual occupation of the claimed land by Graham as at the claim date.

### Was the occupation "lawful"?

Notwithstanding this, the Court went on to consider whether, if occupation had been established, it was lawful considering the illegal activities being carried out upon it.

The evidence in this case disclosed that Mr Graham was not using or occupying the land for the purpose of the lease. In fact, the evidence strongly supported a finding of unlawful use insofar as the land was being used as a waste disposal site, was subject to contaminants, had been sublet to third parties and had been subjected to unlawful clearing and construction.

The Court rejected the Land Council's argument that lawful occupation is constricted to the narrow purpose of the subject-matter of the special lease, namely, as a poultry farm and hatchery. As the High Court stated in Berrima Gaol, to constrict the composite term "lawfully… occupied" in this way is to effectively conflate the concepts of lawful use and lawful occupation in a manner that was not intended by their distinct and separate identification in section 36(1)(b) of the ALR Act.

### So, the unlawful use did not render the occupation unlawful, but what was the nature of that occupation?

The Court held that:

> A new periodic monthly lease arose by reason of Mr Graham's continued occupation of the claimed land, his continued payment of rent … and the continued knowledge by the Crown Lands Office and various State departments of his occupation and use of the land … after [the special lease] expired.

Where a tenant remains in occupation after the expiry of a lease for a term, which does not contain provision for the holding over, a new agreement is implied. The terms and conditions of the original lease, so far as relevant, are imported into this new agreement.

Therefore, at common law, Mr Graham held a lawful right to occupy the claimed land. This was so, irrespective of the fact that as at the claim date the land was no longer being used for the purpose for which it was leased, in breach of that lease.

But "lawful use or occupation" must be under the Crown Land Management Act, not just at common law

However, none of this assisted the Minister to defeat the claim. The Court referred to the "almost sacrosanct nature of the prohibition on the dealing with Crown lands other than in accordance with the Crown lands statutory regime". It concluded that because the month-by-month tenancy arrangement did not conform with the requirements of the *Crown Land Management Act 2016* (NSW), Mr Graham's occupation was unlawful for the purposes of the ALR Act.

The land was therefore claimable Crown land and should be granted to the Land Council under the ALR Act.

**Authors:** Joel Moss, Counsel; Leonie Flynn, Expertise Counsel Benjamin Cranley; Lawyer

# Matters to watch out for in 2024-2025

Our *Native Title Year in Review 2023-2024* covers the major legislative, judicial and policy developments over the last 12 months.

The next 12-18 months will see some significant developments on all three fronts.



## 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 ask the Commission to consider some of the following:

- the current operation of the future acts regime, with the aim of rectifying any inefficacy, inequality or unfairness;
- options for efficiencies in the future acts regime to reduce the time and cost of compliance for all parties;
- the rights and obligations in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);
- options to support native title groups to effectively engage with the future acts regime and to support consensus within groups in relation to proposed future acts;
- options to support native title groups, project proponents and governments to share in the benefits of development on native title land, and for ensuring native title groups receive commensurate and timely compensation for the diminution of native title rights and interests caused by future acts;
- options for how the future acts regime can support fair negotiations and encourage proponents and native title groups to work collaboratively in relation to future acts;
- the different levels of procedural rights of native title groups in relation to different types of future acts and whether these are appropriately aligned with the impacts on native title rights and interests; and
- how the rights in the future acts regime compare with other land rights regimes.

We will monitor the progress of the review and provide more information in further publications.

## Other legislative and policy developments

The next 12 months may see:

- potential progress on Federal cultural heritage law reform (but query what will be released publicly before the next election); and
- further reforms of the consultation requirements for offshore projects.

## 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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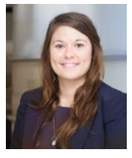

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"Ashurst is a go-to firm for proponents for advice on complex native title and cultural heritage mandates"

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