Ashurst

Native Title Year in Review 2024-2025

What you need to know

September 2025

Outpacing change

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8 September 2025

Welcome to the bite size version of Ashurst's annual review of native title legal developments in 2024-2025. We cover what you need to know about each issue in our 10th annual Native Title Year in Review.

Landmark High Court decision exposes Commonwealth to native title compensation liability

On 12 March 2025, the High Court of Australia handed down its landmark decision of *Commonwealth of Australia v Yunupingu on behalf of the Gumatj Clan or Estate Group* [2025] HCA 6 (Gumatj). The High Court agreed with the Full Federal Court that pre-1975 acts of the Commonwealth could be compensable under the *Native Title Act* 1993 (Cth) as invalid acquisitions of property contravening the just terms guarantee imposed by section 51(xxxi) of the Australian Constitution.

Prior to *Gumatj*, the Courts had only considered whether post-1975 acts by the States and Commonwealth that offended the *Racial Discrimination Act 1975* (Cth) were compensable. However, the possibility that contravention of section 51(xxxi) might lead to invalidity was contemplated at the time of the enactment of the Native Title Act. *Gumatj* is simply the first compensation claim to test this principle.

It is important to note that the Court has not yet ordered that the Commonwealth pay compensation to the Gumatj Clan. This decision is the legal step necessary to allow the Gumatj Clan to progress their claims that the 1939 vesting of minerals in the Crown and the grant of certain leases between the 1930s-1960s are compensable acts under the Native Title Act. It will be some years before the claim is fully resolved.

Gumatj predominantly affects the Commonwealth. The decision has no direct impact on State Governments or third parties. For non-Commonwealth land users operating on land or using minerals in respect of which native title was extinguished by Commonwealth legislation, the question is whether liability for native title compensation has been passed on by legislation or in contracts.

Glacial progress of developments in native title compensation

There are only six active native title compensation claims across Australia despite over 300 native title groups having a statutory right to seek compensation. Only one new claim has been filed in the Federal Court in the last 12 months and a couple are close to finalisation. We are aware that there are some claims being negotiated with Governments. For example, the Queensland Government's preference is to negotiate rather than litigate native title compensation.

The High Court's decision in the Gumatj compensation claim is the most significant judicial development on this topic since the *Timber Creek* decision in 2019 (*Commonwealth of Australia v Yunupingu on behalf of the Gumatj Clan or Estate Group* [2025] HCA 6). It has exposed the Commonwealth to significant liability for many of its land dealings in the Northern Territory and other Commonwealth Territories from the early 1900s onwards.

Other recent developments include the hearing of the Yindjibarndi Ngurra compensation claim in Western Australia. The decision in this case will provide much needed guidance on a range of issues relating to the assessment of compensation for mining projects and the construction and operation of the compensation pass through in section 125A of the *Mining Act 1978* (WA).

The Yindjibarndi decision will cover a range of new matters relating to the assessment of compensation for mining projects and the construction and operation of the compensation pass through in section 125A of the *Mining Act 1978* (WA). It is likely to have wide-ranging implications for the assessment of compensation for mining projects and more generally for the negotiation of future native title agreements.

High Court confirms the test for connection

In *Stuart v South Australia* [2025] HCA 12, the High Court held that connection does not necessarily need to be demonstrated by acts of physical connection to the claim area but can be maintained through spiritual and cultural connection to that area.

In *Miller v State of South Australia (Far West Coast Sea Claim) (No.4)* [2025] FCA 388, the Federal Court found that native title exists in relation to only the physically accessible parts of the sea claim area. The applicants did not base any case on spiritual connection to the places that could not be accessed.

In *Malone on behalf of the Western Kangoulu People v State of Queensland (No 6)* [2025] FCA 363 the Federal Court found that the Western Kangoulu People had maintained their connection to Country and hold native title to their claim area. The Full Federal Court heard an appeal in March 2025 from the negative determination made in relation to the neighbouring Gaangalu National People's claim (*Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4)* [2024] FCA 425). An appeal has also been filed from the decision in *Briggs on behalf of the Boonwurrung People v State of Victoria (No 2)* [2025] FCA 279 relating to a dispute about the apical ancestors of the Boonwurrung People.

Watch out for the Full Federal Court's decisions in the Gaangalu and Boonwurrung appeals for further guidance about how connection issues are to be resolved. Monitor reliance on neighbouring determinations in disputes about connection and watch for further judicial guidance on this issue.

Full Court upholds negative determination in contested non-claimant application

All non-claimant applications heard over the last 12 months have resulted in determinations that native title does not exist, as applicants proved the absence of native title.

The Full Federal Court has upheld a negative determination made in a contested non-claimant application and confirmed the principles for determining these applications (*North Queensland Land Council v Harris* [2025] FCAFC 70). Another Queensland non-claimant application was also successful, despite evidence of an overlapping registered ILUA (*O'Shea v State Minister for the State of Queensland* [2025] FCA 52.

Monitor the outcome of the Redland City Council non-claimant applications, which may provide detailed judicial consideration of the impact of a range of Queensland tenures and Council public works on native title.

Public interest key to Santos' success in the National Native Title Tribunal

On 19 May 2025, the National Native Title Tribunal (NNTT) determined that the grant of four petroleum production lease applications required for the Narrabri Gas Project may be done, subject to 23 conditions, pursuant to section 38(1) of the *Native Title Act 1993* (Cth) (*Santos NSW Pty Ltd v Gomeroi People and ors* [2025] NNTTA 12).

The NNTT's determination in favour of Santos turned largely on its findings that the project would provide domestic energy reliability and security which would deliver meaningful benefits to the public. The NNTT's determination included a domestic gas supply condition, which required all gas produced from the project to be supplied to the Australian domestic gas market and not be exported.

Despite finding that environmental risks and climate change impacts would arise from the project, and that the project would affect the Gomeroi People's enjoyment of their native title rights and interests, the NNTT considered that these could be effectively ameliorated by the project's mitigation and rehabilitation measures as well as various conditions imposed by the NSW Independent Planning Commission and the NNTT. The NNTT emphasised the cultural significance of particular sites in the Pilliga and was critical of the Aboriginal cultural heritage regulatory regime in New South Wales.

The Native Title Party has again appealed the NNTT's decision, with a hearing scheduled for 25 November 2025.

The NNTT may consider environmental features of a project, including climate change impacts, as part of its weighing of the public interest. Consider project approvals holistically. Though legally distinct, there is considerable overlap between environmental approvals, Native Title Act consents and heritage protection obligations.

Native title claims with authorisation defects risk strike-out applications

Where a claim group is to be reconstituted, a two-step authorisation process is required. The first step is for the existing claim group itself to resolve to be reconstituted. The second step is for the reconstituted group to authorise the current applicant or a new applicant to make and prosecute the claim on its behalf (*Illin on behalf of the Bindal People #2 v State of Queensland* [2024] FCA 1242).

Where there has already been a determination of native title in favour of a group, a further claim by that group must be made by and on behalf of that same group using the same description. A claim that describes the group with a qualifier will be a subgroup and not be properly made under the Native Title Act (*Sandow on behalf of the Bigambul People #5 v State of Queensland* [2025] FCA 53).

Proper authorisation of a claim is fundamental to the legitimacy of the claim. However, the legislature has empowered the Court to hear and determine a claim despite a defect in authorisation. In exercising that power, the Court is required to balance the need for due prosecution of the application and the interests of justice to do so (*Nangalaku on behalf of the Dak Djerat Guwe People v Northern Territory* [2025] FCA 217).

Summary judgment can be granted in relation to a native title claim if it is possible to conclude with confidence that there is no reasonable prospect of success, and it is in the interests of justice (eg to avoid the substantial time and expense of a contested 'on country' hearing) (*Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia (No 3)* [2024] FCA 1132).

Whether it is authorisation of a claim or an ILUA, authorisation meeting resolutions must be carefully and specifically drafted to capture every step in the authorisation process. Ensure that future native title claims (and ILUAs) made on behalf of a determined native title holding group are made and authorised by and on behalf of the determined group and not a subset of that group. Get the group description right!

Indigenous respondents can be removed from native title claims

The Court has power under section 84(8) of the Native Title Act to remove a respondent from a native title claim, including an Indigenous respondent asserting competing native title rights and interests.

Persons seeking to be a respondent to native title claims on the basis that they have native title rights and interests in the claim area are permitted to pursue only a personal claim in those rights and interests; that is, to protect their personal rights and interests from erosion, dilution or discount. A person cannot be joined, or remain, as a respondent if their purpose is to act as a representative to assert native title on behalf of other people (*Bates v Attorney General of New South Wales* [2024] FCA 1439).

Indigenous respondents can be removed as parties if they fail to participate in the progress of the claim (*Warrabinga-Wiradjuri People #7 v Attorney General of New South Wales (No 4)* [2024] FCA 1458).

The removal of non-active respondents (including Indigenous respondents) is not an unusual step in native title claim proceedings as they move to the stage of active case management towards a consent determination of native title or a hearing. Indigenous respondents must ensure that they comply with Court orders to progress the claim if they wish to remain a party.

Native title costs decisions: trends and recent developments

The Federal Court continues to exercise its discretion to award costs in native title proceedings where a party has acted unreasonably or without reasonable cause, or where it is just to do so. Unreasonable conduct may include pursuing a joinder application that is highly prejudicial, late, and unsupported by evidence, or appealing a NNTT decision that has no prospects of success.

Section 85A of the Native Title Act - which provides that unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs - does not apply to proceedings that do not relate to native title, such as proceedings concerning payments under ILUAs.

Be mindful of the potential cost consequences of pursuing or defending native title proceedings that are not based on sound legal grounds or evidence, or that are likely to cause significant prejudice or delay to other parties. Seek legal advice before making or opposing any interlocutory applications, appeals, or joinder requests in native title proceedings, and consider the prospects of success and the risks involved.

Second mining lease renewals to trigger the right to negotiate: WA guidance causes uncertainty for proponents

The WA Government has published guidance stating the second renewal of mining leases are not exempt from the future act provisions of the Native Title Act. The basis for this interpretation of the Native Title Act is unclear, but if followed, would require the second renewal of certain mining leases to go through the right to negotiate process prior to grant.

Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v State of Western Australia (No 2) [2024] FCA 729 considered the interpretation of section 26D of the Native Title Act for the re-grant and re-making of mining tenure. The Full Federal Court heard an appeal in March 2025 and judgment has been reserved.

Uncertainty about the application of section 26D of the Native Title Act to second mining lease renewals remains. Review tenure portfolios to check when mining leases are coming up for second (and in the future, fourth!) renewal and seek legal advice about the application of the right to negotiate process. Monitor the Full Court's decision in the Forrest No.2 appeal for further clarification of the interpretation of section 26D of the Native Title Act for the consolidation of mining tenements.

Native Title Act's expedited procedure under challenge

The Federal Court has determined two challenges relating to the expedited procedure in the last 12 months.

In *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory* [2025] FCA 22, the Federal Court considered the test that the National Native Title Tribunal (NNTT) must apply when assessing an objection to the expedited procedure on the grounds that the grant is likely to interfere with an area or site of particular significance to native title parties. It concluded that native title parties are not necessarily required to explain the particular significance of the site, but must demonstrate its particular significance beyond a mere assertion through cogent evidence.

In *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2025] FCA 490) the Federal Court held that judicial review is not available in relation to a government party's decision to include the expedited procedure statement in a section 29 notice. The correct avenue to challenge the decision is by way of an objection to the NNTT.

The Australian Law Reform Commission (ALRC) suggests the repeal of the expedited procedure in its May 2025 *Discussion Paper: Review of the Future Acts Regime* on the grounds that it is not operating effectively, efficiently or fairly. It suggests that future acts currently subject to the expedited procedure (most commonly exploration tenements) could be subject to exploration ILUAs or one of the proposed new statutory procedures described in the Discussion Paper. This would see many exploration tenements subject to the full RTN process, with its longer timeframes and more detailed process.

In expedited procedure processes, consider whether native title parties have provided cogent evidence that a site is of particular significance. If so, that is likely to mean the expedited procedure process cannot be applied and the full RTN process will be required. Watch for the ALRC's Final Report in December 2025.

Australian Law Reform Commission releases Discussion Paper in future acts regime inquiry

The Australian Law Reform Commission released its *Discussion Paper: Review of the Future Acts Regime* in May 2025 seeking feedback on proposed reforms to the future acts regime in the Native Title Act. It suggests a range of significant reforms, including a new pathway to future act validity, which replaces the current 'batting order' regime with an impact-based categorisation of future acts. Furthermore, it proposes that native title holders be empowered to develop native title management plans to replace the future acts legislative regime in their determination area.

The Discussion Paper includes far-reaching proposals relating to all aspects of agreement-making. In relation to the right to negotiate (RTN) process, these include: an expanded 18-month RTN process; a right for native title parties to object to future acts on their Country; a five-year moratorium on the grant of similar future acts if an objection if upheld; and a right for the National Native Title Tribunal (NNTT) to impose conditions relating to the payment of consideration (including royalties). It also proposes the removal of the expedited procedure, which is widely used in the mining sector to secure the grant of exploration tenure.

The proposals, if adopted, would affect all parties – Government, mining, petroleum and gas sectors, infrastructure providers, utility companies and renewable project proponents – who require access to land where native title exists.

Submissions on the Discussion Paper have closed. The Commission is due to publish its final report in December 2025. Stakeholders should remain engaged (including with their industry body) and monitor the progress of the reforms. If enacted, some of the reforms would provide native title parties with significantly greater rights than ordinary title holders facing future acts on their land.

Little progress in cultural heritage reform around Australia in 2024-2025

It is more than five years since the Juukan Gorge incident, and calls remain for legislative reform. The Federal Government has renewed its partnership with the First Nations Heritage Protection Alliance to work together on developing new Federal cultural heritage legislation (extending the formal agreement to June 2026). However, no reports, papers or other documents have been published since 2022.

Most State and Territory Governments are in the process of reviewing their cultural heritage legislation. Several of these reviews have been going on for many years with little apparent progress. Only South Australia and the Northern Territory have introduced (or passed) reforms in the last 12 months.

Since the return to the *Aboriginal Heritage Act 1972* (WA) in late 2023 (with some amendments), the WA Government is undertaking an initial review to identify policy and other improvements that can be made to the WA regime.

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. The trends are pretty clear - don't assume that what is required in 2025 will be sufficient in the future. Monitor announcements about Federal cultural heritage law reform by the new Federal Minister for the Environment and Water.

Commonwealth cultural heritage protection applications: still top of mind for First Nations Groups

Applications for protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) 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.

In August 2025, the Yagara Magandjin Aboriginal Corporation lodged a section 10 application to protect Aboriginal cultural heritage in Victoria Park from the threat of injury from the proposed development of the Brisbane 2032 Olympic stadium at that site.

The proponent for the McPhillamy's Gold Project in NSW has brought judicial review proceedings in the Federal Court seeking to set aside the Minister's Section 10 Declaration over part of that Project site, with a hearing set for December 2025. In *Kelly v Minister for the Environment and Water* [2025] FCA 264, the Federal Court dismissed a judicial review application which sought to overturn the Minister's decision not to make a declaration for the protection and preservation of Aboriginal ancestral remains in NSW, including the remains of Mungo Man and Mungo Lady.

The absence of statutory timeframes and the slow pace of decision-making under the ATSIHP Act is creating significant challenges for all stakeholders. In *Cooper v Minister for Environment and Water* [2025] FCA 1009, the Federal Court found that the Minister's delay in making a decision on a section 10 application was unreasonable in the legal sense. However, because the decision was imminent at the time of judgment, the Court did not order the Minister to make a decision.

Be aware that a protection application under the ATSIHP Act is a powerful means by which First Nations People can express dissatisfaction with the cultural heritage protection provided under State or Territory legislation. Recognise that these applications can take years to resolve and require significant effort from proponents to engage with the process.

First Nations underwater cultural heritage under increasing scrutiny

The Federal Government has finalised and released ***Guidelines to assessing and managing impacts to Underwater Cultural Heritage in Australian waters***, and has released Draft Technical Guidelines focusing on First Nations underwater cultural heritage. These Guidelines are an attempt to retrofit the *Underwater Cultural Heritage Act 2018* (Cth), which has previously focused on non-Indigenous underwater heritage such as shipwrecks, to ensure Australia's likely extensive First Nations underwater cultural heritage is identified and protected.

In the absence of a legislative requirement for project proponents to comply with the Guidelines, they may be most influential as a "best practice" standard for projects below the high-water mark. Assessment of impacts on underwater cultural heritage will be part of the approvals process for major offshore projects, beyond the requirements of the *Underwater Cultural Heritage Act 2018.*

Be aware that the risk of impact to heritage does not end at the water's edge. Where underwater cultural heritage is unknown, assess whether it needs to be investigated further and include Traditional Owners in those investigations. Ensure consultation with local communities (including First Nations groups) is thorough to satisfy the requirements of offshore project legislation (for offshore projects) and/or State-based environmental assessment processes (for nearshore and some offshore projects).

First Nations issues relevant to offshore infrastructure projects

Proactive engagement with First Nations peoples about offshore projects is increasingly the focus of policy and legislative reform at both the Commonwealth and State/Territory level.

New regulations in the offshore wind sector, and updated guidance in the offshore oil and gas space, highlight the importance of appropriate consultation with First Nations peoples.

Ensure that consultation with First Nations people and groups is carried out in accordance with the latest regulations and applicable guidance documents. Be open to looking at approaches in other offshore industries if there are gaps. Actively identify First Nations peoples who will be affected by your project and undertake consultation that is genuine, transparent and fit for purpose. .

Treaty update – full steam ahead in some jurisdictions, while others wind back progress

The Federal Government has not pursued Treaty or Truth-telling nationally since the unsuccessful Voice Referendum in 2023. While the Government remains elusive about its position, it has supported States and Territories individually advancing these initiatives.

The pace and prioritisation of Treaty, Truth-telling and Voice is now quite different across the States and Territories. Victoria and NSW have taken steps forward to progress local Treaty, whilst Western Australia has prioritised Settlement Agreements, and now along with Tasmania has shifted gears towards Truth-telling initiatives. A Voice is now established in South Australia. Queensland and the Northern Territory have abandoned Treaty plans.

Don't expect the Federal Government to take the lead on Treaty. As the activity is happening at a State level, look there to see what is possible, and what might be coming down the track.

"Claimable Crown lands" under NSW Aboriginal Land Rights Act – 40+ years on there is still new law

In a significant development for case law concerning land claims under the *Aboriginal Land Rights Act 1983* (NSW) (ALR Act), a majority of the High Court in September 2025 found that land is not "lawfully used" by the Crown merely by reason of the land being the subject of an existing lease. Land is only "lawfully used" if, when the land claim was made, the land is being physically deployed for a purpose (*La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd* [2025] HCA 32).This decision likely means that a broader range of land claims could be granted.

In another notable decision in December 2024, the NSW Court of Appeal in *New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2024] NSWCA 294 confirmed that, to prove that claimed land was required for an "essential public purpose", the Minister must be able to show evidence of an actual decision to that effect, as at the date of claim.

Consider any leasehold interests you may hold in Crown land and if the land subject of those interests is being physically deployed for a purpose. If you are planning to access Crown land in NSW, you need to think about the ALR Act – develop a strategy to be able to lawfully access the Crown land having regard to potential claims under the *Aboriginal Land Rights Act 1993 (NSW).* Government decision-makers should document any decisions that Crown land is required for an essential public purpose and their reasons for that decision.

Contacts

Tony Denholder
Partner
T +61 7 3259 7026
tony.denholder@ashurst.com
Band 1 *– Chambers Asia-Pacific, 2025*
Leading Partner *– Legal 500 Asia Pacific, 2025*

Clare Lawrence
Partner
T +61 3 9679 3598
clare.lawrence@ashurst.com
Band 2 *– Chambers Asia-Pacific, 2025*
Leading Partner *– Legal 500 Asia Pacific, 2025*

Guy Dwyer
Partner
T +61 2 9258 6540
guy.dwyer@ashurst.com

Cheyne Jansen
Counsel
T +61 8 9366 8738
cheyne.jansen@ashurst.com
Leading Associate *– Legal 500, Asia Pacific, 2025*

Joel Moss
Counsel
T +61 7 3259 3287
joel.moss@ashurst.com
Leading Associate *– Legal 500 Asia Pacific, 2025*

Andrew Gay
Partner
T +61 8 9366 8145
andrew.gay@ashurst.com
Band 1 *– Chambers Asia Pacific, 2025*
Hall of Fame *– Legal 500 Asia Pacific, 2025*

Geoff Gishubl
Partner, Chief Operating Officer
T +61 8 9366 8140
geoff.gishubl@ashurst.com
Band 1 *– Chambers Asia Pacific, 2025*
Hall of Fame *– Legal 500 Asia Pacific, 2025*

Tony Hill
Partner
T +61 2 9258 6185
tony.hill@ashurst.com

Libby McKillop
Counsel
T +61 7 3259 7529
libby.mckillop@ashurst.com
Associate to Watch *– Chambers Asia-Pacific, 2025*

Leonie Flynn
Expertise Counsel
T +61 7 3259 7253
leonie.flynn@ashurst.com

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