Ashurst

# Native Title Year in Review

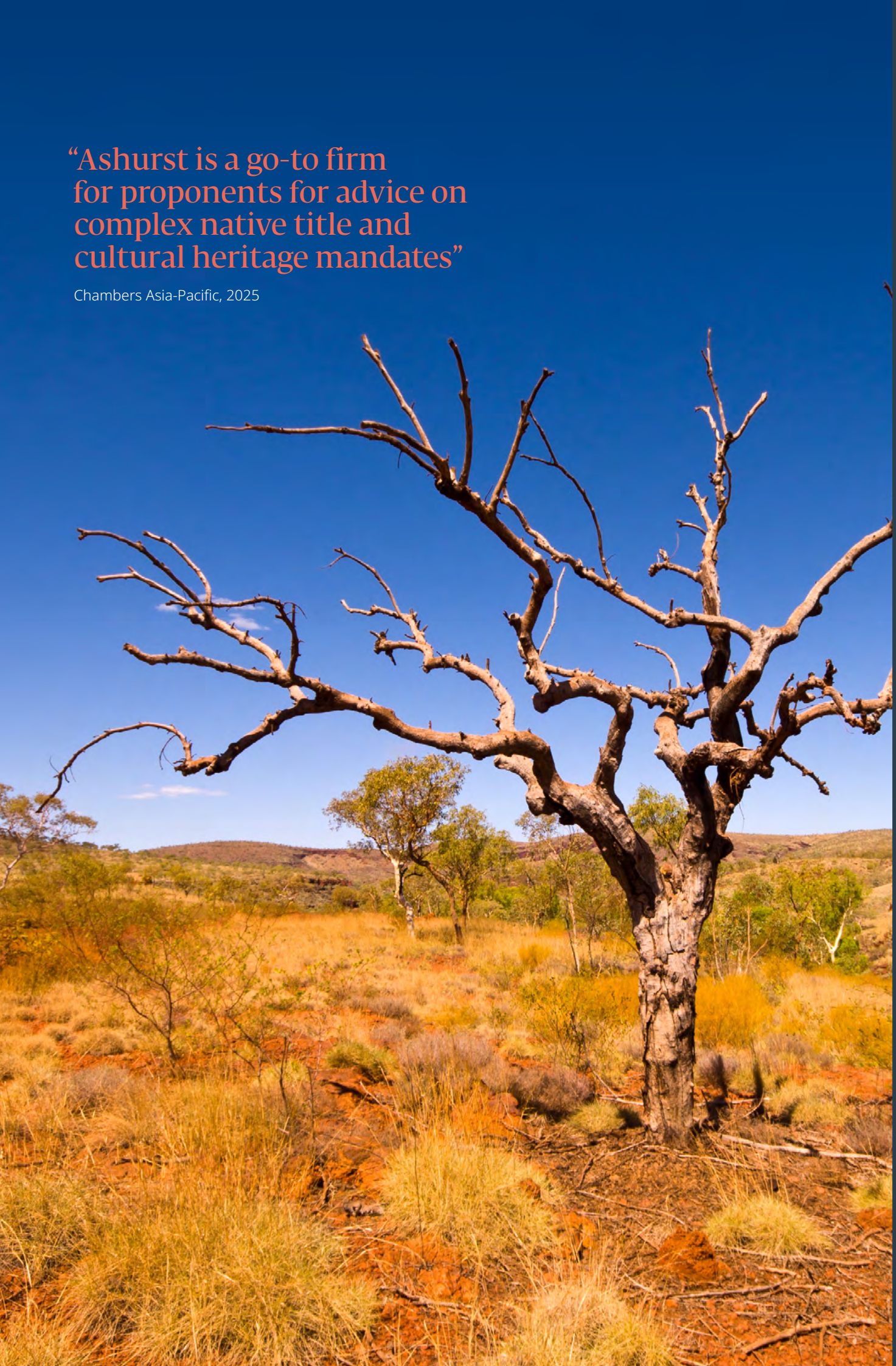
## 2024-2025

September 2025

Outpacing change

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

Chambers Asia-Pacific, 2025



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# Foreword

**8 September 2025**

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

We are delighted to publish our tenth annual Native Title Year in Review!

So much has changed in this critical area of law and practice since our Native Title Year in Review 2015, most notably the increased role that First Nations communities rightfully play in relation to land use on their country. Commonwealth and State laws, together with government policy, societal expectations and the demands of achieving and maintaining social licence, are constantly changing.

In our 2015 edition, we noted that, "native title remains a contested field", but that the resolution of some complex claims and other disputes that year showed, "the maturing of the native title system". We said that, "looking forward, we expect the much anticipated compensation phase to gain more traction".

While compensation issues have been at the forefront of some developments over the last few years, no one could predict the enormous impact that developments in the non-native title space would have on native title law and practice.

Consistent with our longstanding practice, in addition to covering the last 12 months of native title case law, this publication also covers developments in relation to cultural heritage, land rights, Treaty and agreement-making with First Nations Peoples.

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

Over the last 12 months, highlights of our team's work have included:

- being recognised as Band 1 in Native Title (Proponents) in Chambers Asia-Pacific, a ranking that we have maintained since 2007. We could not have achieved this recognition without the opportunities and trust our clients place in us;
- undertaking agreement negotiations for projects that will deliver critical energy transition for Australia, and for countries beyond our shores; and
- continuing to assist clients to navigate the gap between current laws and best practice.

The next 12 months will bring some important native title appeal decisions and possibly the introduction of new Federal cultural heritage legislation. There may even be proposed reforms to the Native Title Act arising from the Australian Law Reform Commission's current review into the future acts regime.

As always, we look forward to working with our commercial, government and First Nations clients to find practical and respectful solutions addressing native title and cultural heritage matters on projects around Australia, and, in particular, playing our role in the world's energy transition. We are so grateful for the support and collegiality of our clients, colleagues and friends across the sector, with whom we get to work on exciting projects, developments and transactions.

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.

The articles in this 2024-2025 publication are current as of 22 August 2025.

# Native Title Year in Review: Fast facts 2024

**26**
New determinations that native title exists

**527**
Total positive native title determinations around Australia*

**15**
New claimant applications filed

**41**
New ILUAs registered

**3.5M KM²**
Native title land around Australia**

**5**
Active compensation claims around Australia*

**130**
Total active native title claimant applications yet to be resolved around Australia*

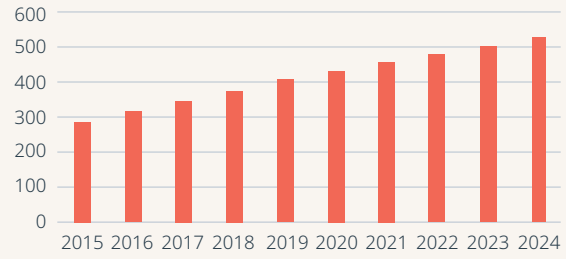
**1519**
Total registered ILUAs around Australia*

**2**
Applications for protection under section 10 Aboriginal and Torres Strait Islander Heritage Protection Act gazetted***

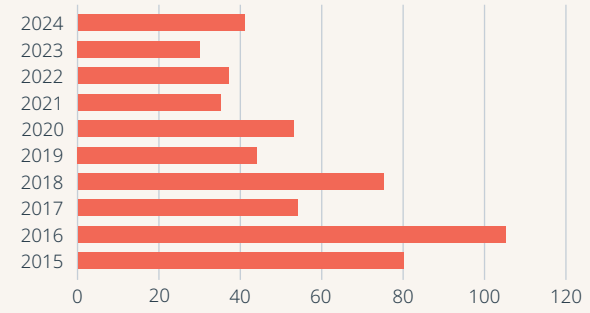
**61**
Section 31 agreements (RTN Agreements) received by the NNTT

## A decade of fast facts:

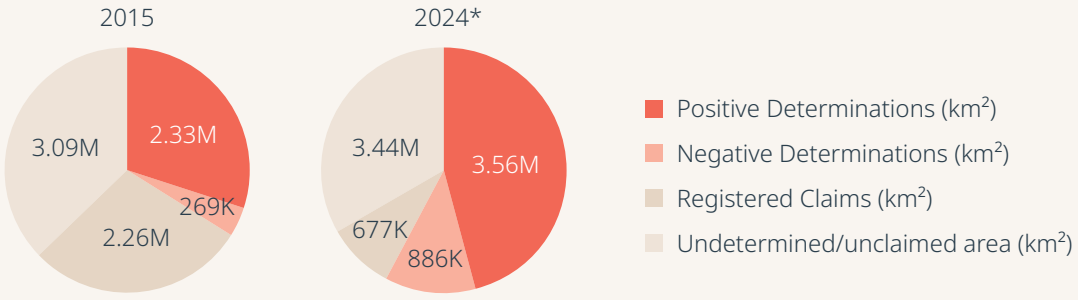
Cumulative total positive determinations of native title around Australia: 2015–2024




Total new registered ILUAs around Australia: 2015–2024




Total native title land around Australia: 2015–2024




All data sourced from the National Native Title Tribunal except the Aboriginal and Torres Strait Islander Heritage Protection Act applications.
Figures not marked with an asterisk relate to the 2024 calendar year
*as at 30 June 2025
**as at 1 April 2025
*** Stop Press: In August 2025, an application was lodged over the Brisbane 2032 Olympics Games proposed Victoria Park stadium site

# Landmark High Court decision exposes Commonwealth to native title compensation liability

## What you need to know

- 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.

## What you need to do

- 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.

# Gumatj compensation claim was a test-case

The Gumatj compensation claim stood as a test case for whether certain pre-1975 acts of the Commonwealth are compensable under the Native Title Act as an acquisition of property other than on "just terms" in accordance with section 51(xxxi) of the Australian Constitution.

The Full Federal Court said that they were, and the Commonwealth appealed to the High Court. We wrote about the Full Court's decision in our 2 August 2023 alert, "Landmark Gumatj Clan compensation decision opens up a new class of compensation claims against the Commonwealth".

# High Court decides Constitutional questions

On 12 March 2025, the High Court dismissed the appeal.

The High Court answered the Constitutional questions as follows:

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

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

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

The High Court said that the territories power was subject to section 51(xxxi) of the Constitution. It said:

> The time has come for it to be finally and authoritatively declared that the power conferred on the Commonwealth Parliament by s 122 of the Constitution to make laws for the government of a territory does not extend to making a law with respect to an acquisition of property otherwise than on just terms within the meaning of section 51(xxxi) of the Constitution.

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

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

The Commonwealth and the Northern Territory argued that the acquisition of native title rights and interests does not have to be made on just terms. They said that native title rights and interests are inherently susceptible to extinguishment or impairment by an inconsistent exercise of the Crown's radical title and that the High Court has consistently described native title rights and interests as "inherently fragile" or "inherently weaker".

The High Court agreed with the Full Court's rejection of this argument. The High Court agreed with the Full Court that native title rights and interests are proprietary in nature and constitute "property" for the purposes of section 51(xxxi). To say otherwise would be "untenable". A grant or act that extinguishes native title rights and interests is capable of amounting to an acquisition of property within the meaning of section 51(xxxi). Accordingly, an extinguishment of native title rights and interests that did not provide just terms is an invalid act that gives rise to a compensation entitlement under the Native Title Act.

# What does this mean for the Gumatj claim?

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

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

The High Court said, "the theory of the claim is sound" and the decision allows the Gumatj Clan to progress their claims that the acts are "compensable acts" under the Native Title Act. This is on the basis that they were acquisitions of property other than on just terms (invalid under section 51(xxxi) of the Constitution), validated as "past acts" by the Native Title Act and triggering a right to claim compensation from the Commonwealth.

There are still a number of unresolved questions in the Gumatj Clan's parallel native title claim. For the Gumatj Clan's compensation claim to succeed, they must prove that they hold native title in the area (a claim contested by other clans) and that there is a native title right to take and use minerals. Finally, the extent to which any native title holders have already been compensated for the Government's acts is also a live issue. We expect that this claim will not be resolved for a number of years.

# Key insights: implications of the High Court's decision

The High Court's decision increases the Commonwealth's exposure to native title compensation liability well beyond the area claimed by the Gumatj Clan.

The Commonwealth argued during the hearing that if the Full Court's decision was allowed to stand, it would expose the Commonwealth to "100 years or more" of compensation claims for land grants awarded in the Northern Territory. The Commonwealth submitted that "Everything that happened after the Commonwealth accepted the Territory is at risk of invalidity". The High Court noted that in an earlier High Court case about the operation of section 51(xxxi) in the Territory, the Commonwealth argued that "the application of s 51(xxxi) to the Northern Territory would have the effect of invalidating significant provisions of Commonwealth legislation and would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Territory since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law".

In addition to invalid land dealings, the potential Commonwealth liability for compensation for the vesting of minerals in the Northern Territory in the Crown is likely to run into the many millions of dollars.

The Commonwealth may attempt to resolve its liability by way of Indigenous Land Use Agreements with relevant native title holding groups or consider attempting a multi-claim area negotiated settlement similar to that reached by the WA Government with the Noongar People.

It is important to note that 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.

*This article was first published on 12 March 2025. For an update on recent developments in the Gumatj claim, see our next article, "*Glacial progress of developments in native title compensation*".

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# Glacial progress of developments in native title compensation

## What you need to know

- 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).

## What you need to do

- Watch out for the decision in the Yindjibarndi Ngurra compensation claim, which 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.
- The Federal Court decision in the McArthur River Project Compensation Claim in the Northern Territory is also imminent.

# Summary of developments in the last 12 months

We have reported on developments regarding native title compensation annually since our inaugural *Native Title Year in Review* in 2015.

The last 12 months have seen significant judicial developments in the form of the High Court's decision in *Gumatj* and the hearing of the highly contested Yindjibarndi Ngurra compensation claim over Fortescue's Solomon Hub mine in Western Australia.

However, no entirely new compensation claims have been filed for some years. There may be a number of reasons for this. We know that some native title groups have been waiting for the outcome of these test cases to help guide their own claims. It is possible that claims have slowed down because of "large scale litigation fatigue" and the reality that many groups face significant financial and human resourcing barriers to pursuing native title compensation proceedings (see *Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v State of Western Australia* [2024] FCA 1114). Notably, there is no statute of limitations for the filing of native title compensation claims, and interest accrues on economic loss from the date of the compensable acts.

A final reason is that some Governments have opted to negotiate compensation directly with groups. When these negotiations reach a conclusion, the agreed terms are incorporated into an ILUA. This can be followed by the lodgement of what is effectively an uncontested native title compensation application and the making of a consent determination of compensation by the Federal Court, so as to formalise the agreement by Court order.

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

# Active compensation claims

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

**Recap:** The Yindjibarndi Ngurra Aboriginal Corporation RNTBC (a registered native title body corporate for the Yindjibarndi People) filed this compensation claim in February 2022. The claim covers 2462 km$^2$ of land in the Pilbara region of Western Australia and relates to grants of various mining tenements associated with Fortescue's Solomon Hub mining operations. The application documents refer to nine mining leases, 16 miscellaneous licences, 22 exploration licences and three prospecting licences. The Yindjibarndi People were granted exclusive native title over the compensation claim area in 2017.

**What's new:** The hearing continued throughout 2024 and early 2025. Judgment has now been reserved and is expected in late 2025 or early 2026.

In the February 2025 closing submissions, the parties' final positions on the assessment of compensation were revealed. The Yindjibarndi claim over $1.8 billion. This comprises $678 million for economic loss (in the form of a 1% royalty and including compound interest), $1 billion for cultural loss and additional sums of $34.85 million for destruction of sites and $112.14 million for the impact of social disharmony caused by Fortescue. The State puts the economic loss at approximately $92,000 (plus simple interest of $221,000) and cultural loss at $5 to 10 million.

This claim is a test case for a number of issues relating to the assessment of native title compensation and who is responsible for paying it. In particular, the decision should address the following new issues that were not considered by the High Court in *Timber Creek* or *Gumatj*:

- the operation of the "similar compensable interest" test in the Native Title Act, whether the claim for compensation should have been made under the *Mining Act 1978* (WA) and whether any "top up" compensation is payable by the State under the Native Title Act;
- whether the economic loss component should be calculated with reference to royalty style payments made in native title agreements covering similar Pilbara mining or the freehold value of the land (as occurred in *Timber Creek*);
- the assessment of a lump sum for cultural loss in the context of mining operations (*Timber Creek* did not deal with mining);
- how compensation for the effects of the destruction of culturally significant sites pursuant to a section 18 consent under the *Aboriginal Heritage Act* (WA) should be calculated; and
- whether Fortescue or the State will ultimately be responsible for the payment of compensation in light of the compensation pass through in section 125A of the *Mining Act 1978* (WA) (and the proper construction of s125A).

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

**Recap:** The Gumatj Clan filed a claim in late 2019 seeking compensation from the Commonwealth and the Northern Territory in respect of the acquisition of land and minerals in the Gove Peninsula in the Northern Territory between the 1930s and 1960s.

**What's new:** On 12 March 2025, the High Court handed down its decision in *Commonwealth of Australia v Yunupingu on behalf of the Gumatj Clan or Estate Group* [2025] HCA 6. 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. We discuss this decision in more detail in our 12 March 2025 alert, "Landmark High Court decision exposes Commonwealth to new native title compensation liability".

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, not least because the question of who holds native title for the compensation claim area has not yet been determined.

Since the High Court's decision, four overlapping native title claims, and one overlapping compensation claim have been filed to the Gove Peninsula, and the Court has ordered that they be case managed with the Gumatj claims. In early August 2025, the Court referred the combined proceedings to mediation before a retired Federal Court Judge with a background in native title matters and a Federal Court Registrar, for the purpose of attempting to reach agreement between the Indigenous parties about identifying the groups and persons who hold native title to the claim areas. This mediation is to be completed by 30 January 2026.

It is likely to be many years before the Gumatj Clan's compensation claim is fully resolved.

## Rirratjingu compensation claim- Northern Territory (NTD24/2025; DP2025/001)

**What's new:** This claim was filed in July 2025 (along with a native title determination application) by Bakamumu Marika & ors on behalf of the Rirratjingu People and overlaps with the Gumatj claims. In early August 2025, the Court ordered that a preservation of evidence hearing (in relation to evidence of cultural loss by three named members of the claim group) be listed on dates to be fixed.

## 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.

**What's new:** This matter was heard in November 2023 and judgment has been reserved. A decision is expected at any time and will consider the assessment of compensation for the impact of mining and related infrastructure on native title.

## 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 was beset by difficulties relating to authorisation and legal representation for many years, including a dispute with the Pitta Pitta Aboriginal Corporation RNTBC (which holds the Pitta Pitta People's determined native title). A new compensation claim was lodged on 8 February 2024 by the Pitta Pitta Aboriginal Corporation RNTBC which was identical to the original claim. In May 2024 the Court ordered that the new claim be consolidated with the original claim and the RTNBC be named the second applicant in the original claim.

**What's new:** Following Court supervised mediation, "in principle agreement" was reached between the State, the applicant and the RNTBC for the settlement of the consolidated proceeding by way of the payment of a sum for all compensable acts. However, there are still issues to be resolved between the applicant and the RNTBC, including in relation to the payment of the applicant's former and current legal advisers from the compensation sum. See *Melville on behalf of the Pitta Pitta People v State of Queensland (No 2)* [2025] FCA 753 for more information about this.

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

**Recap:** The Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC seeks compensation for over 1,000 compensable acts (freehold grants, pastoral leases, Crown leases, mining tenements and the construction of public works and roads) covering over 60,000 km$^2$ in central South Australia. The claim was filed in April 2022 and immediately referred to mediation. A hearing of preservation evidence listed for June 2023 was vacated due to the deteriorating health of the key witness. Mediation occurred regularly throughout 2023 and 2024.

**What's new:** Mediation is continuing in 2025.

# Claims dismissed, discontinued or settled in 2024-2025

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

**Recap:** The Malarngowem Aboriginal Corporation RNTBC 2019 compensation claim related 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.

**What's new:** The claim was discontinued on 28 February 2025 after extensive mediation between the parties throughout 2022-2024. An authorisation meeting for a settlement agreement between the native title holders and the State of Western Australia was held in November 2024, where the parties were to discuss the settlement of the claim, the execution of a settlement agreement and the creation of a Malarngowem Trust Fund. It seems likely an agreement was reached given that the claim was discontinued.

# Potential future claims

## Queensland

For the last few years we have reported on compensation settlement ILUAs negotiated pursuant to the Queensland Government's Native Title Compensation Settlement Framework. We wrote about this framework in our *Native Title Year in Review 2022-2023* article, "Native title compensation: we're off to the High Court again". Since that publication, two further milestones have been reached. In early 2024, the NNTT registered the Jangga People compensation settlement ILUA (QI2023/006) and the Iman People #2 compensation settlement ILUA (QI2023/009), each of which provide for an interim payment to the native title holders in partial satisfaction of the State's compensation liability.

We are not aware of any further compensation settlement discussions having reached the stage where authorisation meetings have been publicly notified. We know that the Djungan People are considering filing a compensation claim, as an authorisation meeting for the preparation of a claim was publicly notified in November 2024, but so far no new claim has been filed.

## Western Australia: Preservation evidence taken for future Karajarri compensation claim

In September 2024, the Federal Court made an order allowing for the taking of preservation evidence from elderly witnesses for a future compensation claim about compensable acts arising from the pearl industry near Port Smith (*Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v State of Western Australia* [2024] FCA 1114). This was a novel application requiring the Court to consider whether it had jurisdiction and power to make such an order, and also whether it should exercise its discretion to do so.

The decision contains evidence about the barriers to commencing native title compensation claims at regional and local levels, including funding and capacity. The Court heard from the Kimberley Land Council and the RNTBC that the work required is time consuming, complex and expensive and requires the assistance of legal advisers and experts. There are also significant costs and resources associated with consultation and authorisation. The Court also heard about "large scale litigation fatigue" leaving deep scars within communities. The Court said (at [44]):

> The requirements for commencing a compensation claim under the NTA, as contained in both the NTA and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), are on their face heavily prescriptive, and resource and time intensive. As I said more than once during the hearing of this application, the burdens imposed on First Nations Peoples as moving parties in NTA proceedings, in terms of simply being able to commence a proceeding, are much higher under this legislative regime than in other commensurate practice areas of this Court.

The preservation evidence was heard in late October 2024. No further developments in this matter have been reported publicly.

# Negligence claim based on impact of climate change on Ailan Kastom fails (Pabai v Commonwealth)

In this representative negligence claim, brought by Torres Strait Islanders against the Commonwealth, the Applicants alleged that successive Commonwealth governments had failed to take reasonable steps to shield their low-lying islands, culture and way of life from already-foreseeable impacts of climate change. Although the Applicants made it clear they were not claiming for loss or impairment of native title rights and interests, they sought damages for loss of fulfilment of Ailan Kastom (ie Torres Strait custom), characterising the loss as a cultural and human-rights-based harm. In doing so, they sought to rely on the High Court's *Timber Creek* decision relating to native title compensation for cultural loss (along with decisions in other legal contexts such as personal injury case law).

The Federal Court rejected their claim (*Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796). The Court accepted extensive evidence that climate impacts are eroding sacred sites, cemeteries, subsistence gardens and traditional hunting grounds, thereby diminishing the Torres Strait Islanders' capacity to practise Ailan Kastom. However, the Court rejected the Applicants' argument that this form of harm was compensable under the common law of negligence. The Court held that, for damage to be actionable, it must involve a "right or interest recognised as capable of protection by law". The cases relied on by the Applicants did not establish that loss of fulfilment of Ailan Kastom constitutes such a right or interest.

For more about this decision, see our 16 July 2025 alert, "Pabai v Commonwealth: climate change, government responsibility and what it means for business" and in relation to climate change globally, see our 24 July 2025 alert, "ICJ's landmark climate opinion: what it means for business".

**Authors**: Tony Denholder, Partner; Andrew Gay, Partner; Leonie Flynn, Expertise Counsel; Roxane Read, Senior Associate; Katrina Hall, Lawyer

# High Court confirms the test for connection

## What you need to know

- 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.

## What you need to do

- Watch 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 the reliance on neighbouring determinations in disputes about connection and watch for further judicial guidance on this issue.

# Connection disputes continue to proceed to trial 30+ years since the Native Title Act commenced

The Federal Court is regularly required to hear separate questions in native title claim proceedings relating to what can loosely be described as 'connection issues'. This includes: disputes between applicant groups and the relevant government party about whether native title still exists in relation to a claim area; and, disputes between applicant groups, the relevant government party, and often other Indigenous respondents, about the correct native title holders for the claim area.

This year, we have seen decisions on connection issues from the High Court and Federal Court, with the Full Federal Court reserving a decision after hearing an appeal in March 2025. We summarise the latest developments on connections issues below.

# High Court clarifies test for connection in section 223(1)(b) of the Native Title Act

In *Stuart v South Australia* [2025] HCA 12 (Stuart), the High Court was asked to consider the test for connection in section 223(1)(b) of the Native Title Act.

The background to *Stuart* is set out in our *Native Title Year in Review 2023-2024* article, "Full Court considers connection but High Court to have final word". In summary, the Arabana People claimed native title over the vicinity of Oodnadatta in South Australia. The Federal Court had already made a consent determination in favour of the Arabana People over adjacent land to the east and south of the claim area (2012 Determination). The current claim area covered a small section that had been removed from the original claim. The trial judge considered that, despite the broader 2012 Determination, the Arabana People had failed to demonstrate ongoing connection with current claim area. In particular, the trial judge considered that the Arabana People had failed to provide sufficient evidence in relation to the acknowledgement and observation of traditional laws and customs in relation to the specific geographic location of the current claim area. The Full Federal Court agreed with the trial judge on appeal.

The Arabana People appealed to the High Court on two grounds:

1. The Full Court erred by failing to find that the primary judge had not properly construed the definition of native title in section 223(1) of the Native Title Act.
2. The Full Court erred by treating all aspects of the 2012 Determination as being geographically specific – particularly, failing to find that the determination in the 2012 Determination that the Arabana People continued to acknowledge and observe traditional laws and customs was a determination that should have been applied to the Arabana People in the current claim area.

## Ground one: Test in section 223(1)(b) of the Native Title Act does not require physical connection

The High Court held that the connection referred to in section 223(1)(b) of the Native Title Act does not necessarily have to be a physical connection. Establishing connection requires identifying the nature of the laws and customs by which that connection arises but proving that connection may not depend on evidence of physical acts of acknowledgment or observance in the claim area.

The Court said (at [22] and [53]):

> Because the "connection" for the purposes of s 223(1)(b) is to be "by [the] laws and customs", it does not need to be a *physical* connection with the claim area. The nature of the "connection" will depend on the "laws and customs". That is, if the laws and customs demonstrate that connection with the relevant land and waters is generally by undertaking physical acts of acknowledgment or observance within the area of those land and waters, then establishing a connection may depend on whether such acts were performed. But equally, if the laws and customs demonstrate that connection may be established other than by physical acts of acknowledgment or observance within the relevant area, then such acts may not be necessary to demonstrate "connection".
>
> The proper approach to s 223(1)(b) is to ask whether there is a "connection" with the claim area "by [the] laws and customs" for the purposes of s 223(1)(a). This does not necessarily require that there be physical acts of *acknowledgment* or *observance in the claim area*. If, as here, the laws and customs include that the Arabana have a collective right to Arabana country, "connection" may arise from knowledge of the Overlap Area as Arabana country, together with "spiritual" or "cultural" connection to Arabana country that is not necessarily demonstrated by acts of "acknowledgment" or "observance".

## Ground two: Relevance of the neighbouring determination of native title

Unfortunately, because of its findings about the test for connection, it was not necessary for the High Court to decide the second ground of appeal relating to the Full Court's treatment of the 2012 Determination.

However, the High Court referred extensively to reports and other materials prepared for the 2012 Determination that the primary judge relied upon pursuant to section 86 of the Native Title Act in the current claim proceedings. It noted the matters that were expressly determined in the 2012 Determination and that, in making the consent determination, the Court had expressed confidence in the basis on which the State had accepted connection. It said (at [83] – [85]) that:

> In that context, the primary judge's finding that "the requisite continuity of connection of the Arabana in the Overlap Area in accordance with traditional law and custom must be established by the evidence in these proceedings" revealed two errors. First, the primary judge considered that the 2012 Arabana Determination could not be sufficient evidence of "connection", as it was not evidence of "connection" "in" the Overlap Area. Second, the primary judge did not consider the 2012 Arabana Determination to be "evidence in these proceedings".
>
> On the first error, as explained, "connection" must be by laws and customs, so connection with an adjacent area may be evidence of connection "by laws and customs" where, as here, the laws and customs emphasise a collective right of all Arabana People to Arabana land, and there is evidence that Oodnadatta is regarded by the Arabana as Arabana country.
>
> On the second error, the 2012 Arabana Determination as well as evidence on which it was based were before the primary judge and were significant. As has been explained, s 86 of the Native Title Act relevantly and expressly provides for the Federal Court to receive into evidence the transcript of evidence in any other proceedings before the Court and draw any conclusions of fact from that transcript that the Court thinks proper and also to adopt any decision or judgment of the Court. The 2012 Arabana Determination and the reports prepared and relied upon for that Determination were therefore evidence of and relevant to the question of connection.

## Result

The appeal was allowed, and the matter was referred back to the Full Court to consider making a determination of native title in relation to the current claim area.

# Federal Court applies High Court decision in Stuart and considers the effect of another neighbouring determination

The Federal Court had an opportunity to apply the High Court decision in *Stuart* in the decision of *Miller v State of South Australia (Far West Coast Sea Claim) (No.4)* [2025] FCA 388 (Miller), which was handed down only a few weeks later.

This native title claim relates to a long and narrow area of the sea off the far west coast of South Australia. It incorporates sea waters up to 300 metres from the low water mark and some islands. The claim group are the determined native title holders of the area of land and waters to the low water mark abutting the sea claim area (FWC Land Determination Area). The claim went to trial on separate preliminary questions about whether native title exists in the sea claim area, and if so, who holds the native title.

At the outset, the Court considered the test for connection and said:

- The High Court in *Stuart* reiterated that the connection required by s 223(1)(b) of the Native Title Act need not manifest itself in physical presence or tangible activity.
- The rights and interests referred to in the native title definition are native title rights and interests in relation to land or waters. That is a location-specific enquiry. The focus is on rights and interests in relation to the particular land and waters that form the subject of the application, and not on some other place or related to some other societal order unrelated to land or waters.

## Relevance of the neighbouring consent determination

Like *Stuart*, the claim group made submissions about the effect of the FWC Land Determination.

In particular, the group submitted that the Court could not make findings that contradicted the FWC Land Determination (because it was a judgment in rem) and that even if it was not binding on this Court, it supported a compelling inference that the claim group members hold native title to the abutting sea claim area. The group submitted that the Court was legally bound to find that those who held native title rights and interests in the sea must necessarily be described in the same way as those who hold native title in the adjacent land, and that the Court was prohibited from enquiring into the existence or significance of coastal estates existing at sovereignty. The Court disagreed with the applicants on this point, for the reasons set out below.

The Court rejected the proposition that matters have been conclusively established because they were mentioned as facts in Mansfield J's reasons (whether or not expressed as factual findings). It said that the only factual matters necessarily and intrinsically determined by virtue of the in rem status of the FWC Land Determination are to be found in the determination itself, not in the reasons for judgment accompanying it. They include factual matters such as who the holders of the native title are, the nature of the rights and interests and the interaction between those rights and interests with the rights and interests of other persons in relation to the same land.

The Court held that it was not in the interests of justice to exercise the discretion under section 86(1)(c) of the Native Title Act to adopt any findings, decision or judgment comprised in, or accompanying, the FWC Land Determination over and above what is required by general law according to its status as a judgment in rem. However, after considering all of the evidence in the sea claim proceedings, the Court went on to note that, "the FWC Land Determination has special evidentiary significance because of its geographical position in relation to the Sea Claim Area" and said that, "the Court places great store on the circumstance that the FWC Land Determination Area is immediately adjacent to the sea waters."

## Native title to the sea claim area limited to areas that are physically accessible

The Court ultimately concluded that native title exists to that part of the sea claim area that was physically accessible from the land at the time of sovereignty, which it defined by reference to distances (usually 30 metres) from the lower water mark. The findings were based on physical access because that was the case that was put by the applicants, who did not base any case on spiritual connection to the places that could not be accessed.

The Court noted that the connection enquiry under s 223(1)(b) of the Native Title Act is fundamentally concerned with spiritual connection, but it is for the claim group to articulate its case as to how connection arises by their traditional laws and customs. The case on the question of connection was presented as one involving actual access, use and responsibility for country, as well as mythological narratives that were said to give rise to a connection to those physically accessible areas.

**Appeal:** We understand that the claim group intends to appeal to the Full Federal Court.

# Federal Court determines that Western Kangoulu People hold native title

In *Malone on behalf of the Western Kangoulu People v State of Queensland (No 6)* [2025] FCA 363, the Federal Court determined separate questions relating to connection in favour of the Western Kangoulu People after almost of decade of negotiation, mediation and litigation between the claim group and the State.

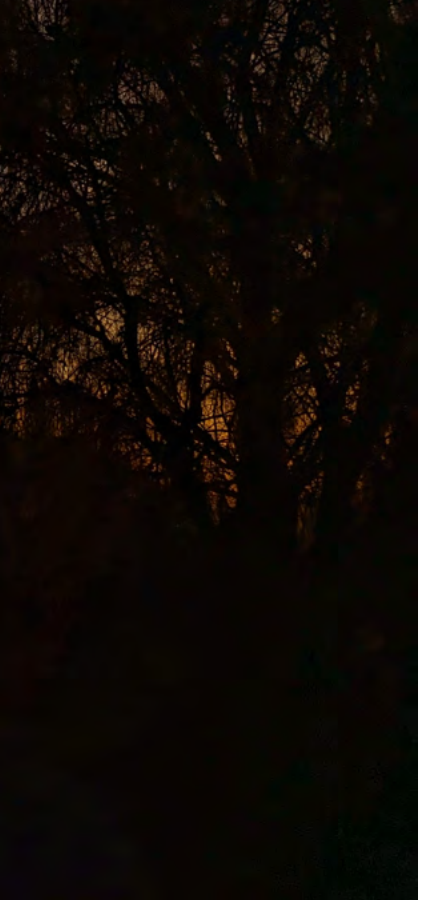
This case proceeded in an unusual manner because after the hearing of the separate questions in 2022 (where the State put the applicants to proof), the parties entered into some years of mediation. We wrote about some of the interlocutory steps in our *Native Title Year in Review 2022-2023* article, "Recent decision highlights confusion around native title expert evidence" and in our *Native Title Year in Review 2021-2022* article, "Proving connection becomes harder in 2021".

Then in March 2025, with leave of the Court, the hearing of the separate questions was re-opened to allow the applicants to file an additional expert report and a statement of agreed facts relating to connection. The statement records an agreement between the applicants and the State about the central factual issues the subject of the separate questions for the purposes of a consent determination. However, rather than waiting for a consent determination to occur, the Court decided to determine the separate questions based on the statement of agreed facts and the evidence heard at the separate questions hearing.

The Court considered all of the lay and expert evidence (and the statement of agreed facts) ultimately determined that the Western Kangoulu People had proven connection and held native title to the claim area.

Interestingly, the Court held that they were a separate and distinct group descended from a wider group of Ganggalu People who held native title to a much larger area at the time of sovereignty. The Court held that at sovereignty, the Ganggalu People were a society united by their laws and customs, language and identity, but where rights and interests in land were held by local descent groups. The present day Western Kangoulu claim group comprise a distinct group, united by their laws and customs and holding rights and interests in the claim area by descent from their ancestors.

The Court said that, despite being forcibly removed from their traditional country, and despite the hardships endured by them, the evidence shows that the claim group's forebears continued to acknowledge and observe their laws and customs, and to teach those laws and customs to each generation. It held that the evidence supports a finding that knowledge of those laws and customs has been passed from generation to generation and has its origin in the society of Ganggalu People who occupied the claim area before European settlement.



## Full Federal Court hears appeal by Gaangalu Nation People after Federal Court found native title did not exist

Notably, the neighbouring Gaangalu Nation People claim group were not successful in proving their continuing connection to country and did not succeed in their claim at first instance. In *Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 3)* [2023] FCA 600, 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. The Court found that as at the date of effective sovereignty, the Gaangalu People held rights and interests to parts of the claim area but their observance and acknowledgement of those rights and interests had not continued to the present day. The Court went on to make a negative determination of native title (*Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4)* [2024] FCA 425).

The Full Federal Court heard an appeal from these decisions in March 2025, and a decision has been reserved. We wrote about this claim in our *Native Title Year in Review 2023-2024* article, "Federal Court makes negative determination of native title".

## High Court refused to grant special leave to appeal from Clermont-Belyando decision

In December 2023, the Full Federal Court upheld determinations that native title does not exist in respect of two other Queensland claims (*Malone on behalf of the Clermont-Belyando Area Native Title Claim Group v State of Queensland* [2023] FCAFC 190 and *McLennan on behalf of the Jangga People #3 v State of Queensland* [2023] FCAFC 191). We wrote about these appeals in our *Native Title Year in Review 2023-2024* article, "Full Court considers connection but High Court to have final word" and the first instance decision of Justice Reeves in our *Native Title Year in Review 2021-2022* article, "Proving connection becomes harder in 2021".

The Clermont-Belyando Area Native Title Claim group applied for special leave to appeal to the High Court, but the application was refused with costs in August 2024.

# Federal Court considers "tripartite test" in Mabo in deciding dispute about apical ancestors for Boonwurrung native title claim

In *Briggs on behalf of the Boonwurrung People v State of Victoria (No 2)* [2025] FCA 279 (Briggs No. 2), the Federal Court considered a dispute about the apical ancestors of the Boonwurrung People. The claim area covers much of metropolitan Melbourne and all of Mornington Peninsula and Western Port and has been beset with issues relating to the composition of the claim group, authorisation and boundaries with other groups. This decision resolves a dispute about the correct apical ancestors for the claim group, but does not address other issues.

The Court was also asked to consider whether membership of the Boonwurrung People at sovereignty required "mutual recognition", as described by Brennan J in *Mabo v Queensland (No 2)* [1992] HCA 23. Brennan J in *Mabo* at [70] referred to a "tripartite test" as follows: "Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people".

The Boonwurrung Applicants submitted that the tripartite test from *Mabo*, including a requirement of "mutual recognition", formed the criteria for membership of a First Nations group at both common law and under the Native Title Act.

The Court noted that Brennan J's dictum in *Mabo* regarding the tripartite test, including the mutual recognition element, has been considered by courts, without criticism, in numerous decisions both inside and outside the native title context. However, it is incorrect to describe the test as applying as a matter of law under either the common law or the Native Title Act. The High Court has explained that, beyond the common law's recognition of native title, it plays no role in determining whether native title exists in a particular case. In all cases under the Native Title Act, the statutory criteria govern.

The separate question is concerned with the requirements for membership of the Boonwurrung People at sovereignty. Those requirements must be those prescribed by the traditional laws and customs of the Boonwurrung People; not requirements arising as a matter of law under the common law or the Native Title Act.

**Appeal**: The Federal Court's decision in relation to the apical ancestors has been appealed to the Full Federal Court (VID530/2025).

## Key insights

The High Court's decision in *Stuart* may change the way that applicants plead their case for connection to focus equally on physical and spiritual connection.

*Stuart* has not entirely resolved the issues surrounding the use of neighbouring determinations of native title in further claims. Although the High Court was comfortable in allowing materials from the previous determination to be used as evidence in that claim, the Federal Court was not willing to do so in *Miller*. Although handed down before *Stuart*, it is worth noting that the Full Federal Court in *McLennan on behalf of the Jangga People #3 v State of Queensland* [2023] FCAFC 191, took a similar approach to the Court in ***Miller***. We will continue to monitor the reliance on neighbouring determinations in disputes about connection and to watch for further judicial guidance on this issue.

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# Full Court upholds negative determination in contested non-claimant application

## What you need to know

- 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.
- 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.

## What you need to do

- Remember that even if a non-claimant application is uncontested, applicants must still prove, on the balance of probabilities, that native title does not exist.
- 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.

# Significant numbers of non-claimant applications continue to be filed each year

More than 30 non-claimant applications were filed in 2024-2025 by individuals or entities seeking a negative determination of native title. The appetite to bring non-claimant proceedings is generally driven by:

- the need to satisfy State Government regulators about the absence of native title in order to obtain an upgrade of tenure (particularly in Queensland); or
- the NSW *Aboriginal Land Rights Act 1983* provision that prevents the sale of Aboriginal land unless it is subject to a determination of native title.

We previously wrote about the trend of increasing non-claimant applications in Queensland due to the State's requirement for a negative determination in our *Native Title Year in Review 2023-2024* article, "Non-claimant applications: A cautionary tale of tenure".

Of the thirteen non-claimant applications determined in the last 12 months, two determinations warrant special mention: *North Queensland Land Council v Harris* [2025] FCAFC 70 and *O'Shea v State Minister for the State of Queensland* [2025] FCA 52.

## Recap: legal principles governing non-claimant applications

The key principles for assessing and determining non-claimant proceedings were established in *Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3 and *Mace v State of Queensland* (2019) 375 ALR 717. In summary, the principles and considerations relevant to the Court's assessment include:

- 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.
- 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 commencing 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 that is the subject of the non-claimant application?

# Full Federal Court rejects Land Council's appeal and upholds negative determination in Harris

Mr Harris brought a non-claimant application over a very large area of land located in the Gulf Country in far northwestern Queensland which formed part of Strathmore Station, over which Mr Harris is the lessee. The North Queensland Land Council Native Title Representative Body Aboriginal Corporation and the State of Queensland opposed the application. The primary judge determined that native title does not exist in respect of non-claimant application area (*Harris v State Minister for the State of Queensland* [2024] FCA 1059). The Land Council appealed to the Full Court.

Somewhat unusually for a non-claimant application, the Court heard from lay and expert witnesses for both Mr Harris and the Land Council over the course of two weeks. It was common ground that native title had existed at the time of European settlement. There was a dispute as to the identity of those Aboriginal People who held rights and interests under the laws and customs of the society that was in existence at that time and also as to the content of those laws and customs. There were also issues as to whether, since then, there had continued to be acknowledgment and observance of laws and customs by Aboriginal people with connection to the land.

Evidence was received from Mr Harris as to his own observations and experience over a period of 18 years concerning access by Aboriginal people to the land. There was also evidence as to the history of native title applications and determinations in respect of the land and surrounding land as well as what had occurred in the course of the conduct of the proceedings. There was lay evidence from four Aboriginal people as to their alleged connection to the land. Both parties also called expert witnesses.

The primary judge held that the evidence from lay and expert witnesses adduced by the Land Council as to the existence of native title did not cast sufficient doubt on Mr Harris' assertion of an absence of native title. After weighing the evidence of both parties, the Court found for Mr Harris and made a determination that native title did not exist. The Full Court dismissed the Land Council's appeal and upheld the decision of the primary judge.

The Full Court confirmed the principles laid down by the Full Court in *Mace v State of Queensland* (2019) 274 FCR 41 (summarised above). It confirmed that the party seeking a determination that native title does not exist must adduce evidence that discharges the onus and such an application can be successfully opposed on the basis that the evidence adduced is insufficient (even where no affirmative evidence is adduced to support the existence of an objectively arguable claim of native title).

The Full Court held that the burden to be discharged is the demonstration that there are no traditional rights and interests in relation to the land and waters of the relevant area that find their source in a normative system of laws acknowledged and customs observed by a society of people that existed before the common law arrived and has continued since then. Referring to the recent High Court decision in *Stuart v South Australia* [2025] HCA 12, it said (at [18]):

> Significantly, the traditional laws and customs of such a society may sustain connection to land or waters without members of the society being possessed of the land or waters in ways familiar to common lawyers. As the authorities demonstrate, the connection to land and waters under various traditional normative systems observed by Aboriginal and Torres Strait Islander peoples is spiritual and depends upon ancestral and traditional links to a place. They may not require regular or continued physical presence upon the land in order for the connection to be maintained. Rather, what is essential is the continuation of the societal normative system which confers the native title rights and interests in relation to the land and waters. There must be a practice of acknowledgment and observance of traditional laws and customs amongst a group of people that is the source of the requisite connection to the particular land and waters.

The Full Court said that considerable care must be exercised in reaching conclusions as to whether it has been demonstrated by an applicant that native title does not exist in an area based upon the extent to which there has been observed presence of Aboriginal people on the land in issue. However, in considering whether Mr Harris had discharged his onus it was relevant to bear in mind that the Land Council had responsibilities under the scheme established by the Native Title Act to advance any claims to native title where requested to do so and a very considerable amount of time had been afforded for that to occur. The history of determinations established that over many years much had been done to advance native title claims in and around the land but, despite that, no applications had been maintained in respect of the land.

The Full Court rejected the Land Council's contention that, by reason of the parties' acceptance that there had been an Aboriginal society that held native title at effective sovereignty, it was necessary for Mr Harris to identify the apical ancestors with traditional connections to the land at effective sovereignty and then establish that there were no descendants of those apical ancestors or that those descendants who remained had lost native title by reason of a failure to continuously observe law and custom.

The Full Court said that it is still forensically possible to demonstrate that there are no present holders of native title without knowing what the past position may have been.

# First successful non-claimant application over area of a registered ILUA

In *O'Shea v State Minister for the State of Queensland* [2025] FCA 52, the applicants sought a determination that native title does not exist over particular lands and waters associated with their pastoral interests. The application had a storied history. It commenced in 2017, but was amended in 2023 to remove an area of overlap with the Wakaman People #4 (QUD728/2017) proceeding. The amended non-claimant application was unopposed and was ultimately successful.

This is the first non-claimant application of which we are aware that overlapped with the area of a registered Indigenous Land Use Agreement (ILUA). The Bar Barrum Small Mining Indigenous Land Use Agreement (QI2005/001) was registered in 2007 and was entered into between the State, Bar Barrum Aboriginal Corporation, North Qld Land Council, North Qld Miners Association Incorporated and the applicants for the Bar Barrum People #2, #3, #4, #5, #6 and #7 native title claims. The purpose of the ILUA was to provide the consent of the Bar Barrum People to a range of future acts associated with prospecting and other "small mining" activities in the ILUA Area. The ILUA had a prescribed end date in 2011.

The Bar Barrum claims were determined in 2016-2017, but the determination areas were all east of the non-claimant application area. The Bar Barrum #4 Determination referred to a proposed Bar Barrum/O'Shea ILUA over the O'Shea's pastoral lease that was authorised by the Bar Barrum People, but it was not registered, and the pastoral lease area was outside of the Bar Barrum #4 claim area.

The Bar Barrum People did not respond to the non-claimant application when it was notified in 2017 or to correspondence from the North Queensland Land Council about the application in 2023. The Bar Barrum People took no steps to assert or pursue native title rights and interests over the amended non-claimant application area since it was filed in 2017.

The Court said that:

- No material weight should be given to the Small Mining ILUA (and by implication the proposed Bar Barrum/O'Shea ILUA). This was because, although they suggested that historically the Bar Barrum People asserted native title over the non-claimant application area, the Bar Barrum People have taken no steps to assert or pursue native title rights and interests over the area since the non-claimant application was filed in 2017. The Court also noted that the North Queensland Land Council did not participate in the proceedings or seek to be a party.
- 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. To this extent, the Court was not satisfied that the existence of the expired ILUA or the proposed Bar Barrum/O'Shea ILUA (which was never registered), constituted an assertion of native title that is objectively arguable.
- There was no evidence provided to the Court of any physical connection to the claim area by Indigenous people, nor evidence adduced of the existence of any sites of significance to Indigenous people in the claim area.

The applicants adduced detailed evidence in support of their contention that native title does not exist on the basis that it is not claimed by or cannot be proved by any person or group who may hold native title rights and interests. The Court found that the applicants had discharged their onus of proof, and it was appropriate in the circumstances to exercise its discretion and make a negative determination.

# Key insights: Non-claimant applications to monitor in 2025-2026

The Redland City Council in south east Queensland filed two non-claimant applications relating to various lands and waters within its local government area to obtain certainty in respect of extinguishment of native title in the context of the 530 km$^2$ Quandamooka Coast Claim (QUD92/2022 and QUD92/2022). According to the Council, these relate to 2500 parcels of land within the claim area where the Council believes native title has been extinguished by grants of tenure or public works. The Quandamooka Coast Claim (QUD126/2017) and the two non-claimant applications have been set down for a four-week hearing commencing in September 2025. Redland City Council filed another non-claimant application in June 2025 (QUD410/2025) that has not yet been listed for hearing with the other claims.

A decision in these proceedings may include detailed consideration of the impact of a range of Queensland tenures and Council public works on native title. It may also provide commentary on the treatment of potentially extinguishing tenures during the negotiation of consent determinations over large claim areas where extinguishment assessment would be expensive and time consuming.

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

## What you need to know

- 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.

## What you need to do

- 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.

## Recap: Long history of the right to negotiate process for the Narrabri Gas Project

This is the third decision in a long running right to negotiate (RTN) process between Santos and the Gomeroi claim group about the Narrabri gas project in NSW. The RTN process officially began in June 2015, when the State gave notice of its intention to grant four petroleum production leases (PPLs) for the project. Santos, the Gomeroi and the State were required to negotiate in good faith with a view to obtaining the Gomeroi claimant's agreement to the proposed grants. Despite persistent attempts to reach agreement over nearly seven years, the parties were ultimately unable to do so and in 2021 the matter was referred to the NNTT for determination.

The NNTT was required to consider whether Santos had negotiated in good faith as required by the Native Title Act, and then whether the PPLs should be granted, taking into account the matters set out in section 39 of the Native Title Act. In 2022, the NNTT determined that Santos had met the good faith standard and that the PPLs could be granted subject to conditions (*Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2022] NNTTA 74). We wrote about that decision 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 Gomeroi appealed and the Full Federal Court handed down its decision in March 2024 (*Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26). The Full Federal Court unanimously rejected the good faith grounds of appeal, but a majority found that the NNTT had erred in narrow application of the "public interest" requirement under section 39(1)(e) of the Native Title Act so as to exclude environmental features of the future act. The Full Court set aside the original determination and remitted the matter to the NNTT for a fresh determination on section 39(1) factors (but not good faith). We wrote about this decision in our *Native Title Year in Review 2023-2024* article, "Next generation good faith issues – Gomeroi v Santos appeal".

# NNTT again determines that the PPLs can be granted subject to conditions

On 19 May 2025, the NNTT handed down its decision in the remitted matter (*Santos NSW Pty Ltd v Gomeroi People and ors* [2025] NNTTA 12).

The NNTT determined that the grant of the PPLs could be done, subject to 23 conditions imposed pursuant to section 38(1)(c) of the Native Title Act. The conditions fall into four broad categories:

1. **Domestic gas supply** – a condition requiring that gas extracted by the project must be supplied to the Australian domestic gas market and not be exported from Australia.

2. **Cultural heritage** – conditions intended to strengthen the project's Aboriginal Cultural Heritage Management Plan and address the perceived insufficiency of the current NSW regime in relation to the protection of Aboriginal cultural heritage.

3. **Ranger program** – conditions to establish a Ranger Program for the purpose of monitoring and managing the effects of climate change in the Pilliga Forest.

4. **General conditions** – conditions relating to administration, compliance and process for variation by agreement between the parties.

# What the NNTT said about the factors in section 39(1) of the Native Title Act

Section 39(1) of the Native Title Act sets out the matters that the NNTT must take into account in making a determination about whether a future act may be done. The NNTT noted that the mandatory criteria in section 39 requires the NNTT to weigh potentially conflicting matters, with the weight to be afforded dependent on the evidence. In considering the effect of the acts on the matters listed in section 39(1)(a), the NNTT must also take into account the nature and extent of existing non-native title rights and interests in relation to the land or waters concerned and existing use by persons other than Gomeroi.

**Effects on Native Title Rights and Interests and Social Structures:** The NNTT found that the project would affect the Native Title Party's enjoyment of their native title rights, way of life, cultural traditions and social, cultural and economic structures. Nevertheless, the NNTT was satisfied that the combination of the mitigation and remediation measures included as part of the project's design and operation, and the conditions imposed under the State planning approval, together with those imposed by the NNTT, would sufficiently address these impacts.

**Cultural Heritage:** The NNTT imposed several conditions to supplement the protection and preservation of cultural heritage including modifications to processes under the State planning approval. These conditions give greater prominence to the role of the Native Title Party, than is provided for in the State law processes.

The NNTT also concluded that additional measures, over and above those imposed through the State planning approval, were necessary for the protection of intangible cultural heritage, imposing extended no impact zones around several areas of significance to the Gomeroi People.

**Environmental and Climate Change Impacts:** The NNTT accepted there were environmental and climate change risks arising directly or indirectly from the project, but determined that the conditions imposed through the State planning approval and the NNTT, in conjunction with the application of the Safeguard Mechanism, would "effectively ameliorate the detriments". In imposing the Ranger Program conditions, the NNTT found that there was strong utility in having increased engagement of the Gomeroi people in the management of the Pilliga to assist in mitigating the effects of the project, including with respect to climate change.

**The Public Interest:** In its assessment of the public interest, which was a major focus of the remittal proceedings, the NNTT found that the project would provide domestic energy reliability and security and therefore deliver an important benefit for the wider

community, provided that the gas from the project is reserved for domestic use. The project could supply up to 50% of NSW's gas needs. The NNTT's determination included a domestic gas supply condition, which requires all gas produced from the project to be supplied to the Australian domestic gas market and not be exported.

While the NNTT accepted the Native Title Party's social impact evidence in relation to local and regional risks and impacts and acknowledged it as a serious detriment, the NNTT found that significant weight must be placed on energy reliability (as the absence of reliable, secure energy has significant short to medium term detrimental impacts upon the wider community, including the Native Title Party).

The NNTT ultimately determined that the project would deliver a net public benefit and could proceed, subject to the comprehensive set of conditions.

## What's next?

On 16 June 2025, the Native Title Party filed a Notice of Appeal in relation to the NNTT's determination of 19 May 2025, seeking that the determination be set aside, or in the alternative, be remitted to the NNTT to be heard by a differently constituted Tribunal and with further evidence from the Native Title Party. A hearing has been scheduled for 25 November 2025.

**Authors**: Clare Lawrence, Partner; Alice Jiang, Lawyer

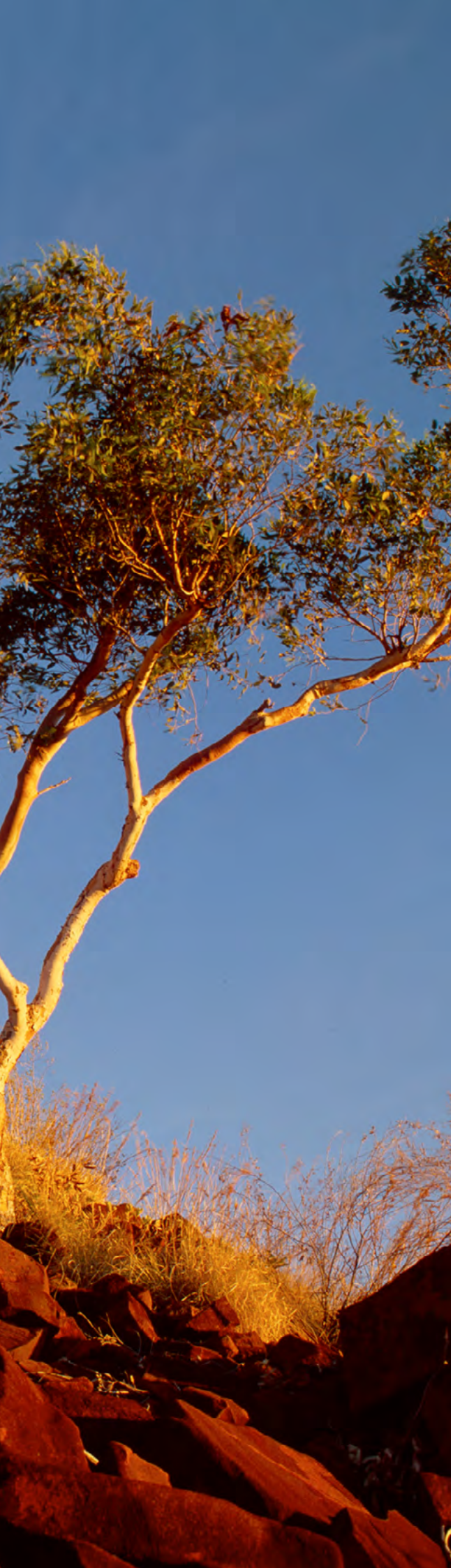
# Native title claims with authorisation defects risk strike-out applications

## What you need to know

- 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).

## What you need to do

- 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!
- Don't assume that a defect in authorisation will be 'forgiven'. The Court will not proceed to hear a claim with a substantial authorisation defect if it would prejudice members of the claim group.



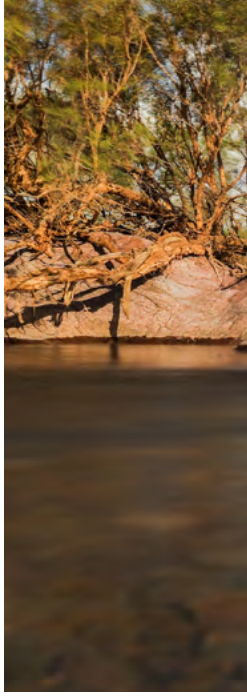
# Authorisation of native title claims and strike-out applications

We have not written about these issues for some years. However, a number of decisions in the last 12 months have canvassed these issues and these provide a welcome reminder of some important legal principles surrounding authorisation, the exercise of the strike-out power and the availability of summary judgment.

## Recap: what does the Native Title Act say about authorisation?

The Native Title Act makes it clear that a native title claim must be brought on behalf of all persons who hold native title in relation to the claim area, and not by a subset of those persons. The applicant for a claim must be authorised by all persons in the native title claim group in accordance with the requirements of section 251B of the Native Title Act.

The Court may strike out a claim that does not comply with these and other requirements (section 84C Native Title Act). Summary judgment is also available in some cases. However, where a claim is affected by a possible defect in authorisation, the Court may hear and determine the application despite the defect in authorisation and may make such other orders as the Court considers appropriate (section 84D).



# Where a claim group is to be reconstituted, a two-step authorisation process is required

In *Illin on behalf of the Bindal People #2 v State of Queensland* [2024] FCA 1242, the Court was asked to consider authorisation requirements when a claim group is reconstituted to add a new apical ancestor.

The Court ordered the Bindal People #2 applicant to hold an additional authorisation meeting to authorise the applicant (or a different applicant) to conduct the claim, after an amendment to the claim added a new apical ancestor and thereby reconstituted the claim group.

In the lead up to the hearing of separate questions about a connection issue, the applicant in the Bindal People #2 claim sought leave to amend the claim to add an additional apical ancestor and reconstitute the claim group to add their descendants. They held two authorisation meetings where there was no dispute that the group had validly authorised the amendment of the claim. However, the State and some Indigenous respondents submitted there was insufficient evidence the reconstituted group had authorised the applicant to prosecute the claim, and that another authorisation meeting was required. The applicant argued that authorisation had occurred, but if there was a defect in authorisation, the Court should exercise its power under section 84D to hear and determine a claim despite the defect.

The Court said:

- Although it is true that section 251B does not impose prescriptive requirements as to authorisation of an applicant, it is of central importance to the conduct of native title applications that those who bring them, and exercise the associated rights and responsibilities, have the authority of their groups to do so.
- Where a claim group is to be reconstituted a two-step 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.

The Court held that on a plain reading of the resolutions passed at the authorisation meeting, the reconstituted claim group was authorising the amendment of the claim and the appointment of its legal advisers to prosecute the claim, and no more. The descendants of the new apical ancestor were not given an opportunity to participate in any form of decision about who should represent them as applicant in the claim. The applicant argued that re-authorisation was inferred by the other resolutions, but the Court disagreed.

The Court further held it was not appropriate to exercise the power under section 84D to hear and determine the matter despite the defect in authorisation because this was a substantive defect that would cause the descendants of the new apical ancestor significant prejudice. The only appropriate course was for there to be a further authorisation meeting at which the applicant (or a different applicant) was properly authorised to conduct the claim. The Court ordered this to occur before the hearing of the separate questions.

# New claim by a determined group must be made by and on behalf of the same group using the same description

In *Sandow on behalf of the Bigambul People #5 v State of Queensland* [2025] FCA 53, the Bigambul #5 claim was struck out on the application of the Gamilaraay claim group on the basis that it was not properly authorised and was brought on behalf of only a subset of the Bigambul People. It followed an earlier decision to strike out another Bigambul claim on the same grounds, also brought by the Gamilaraay claim group (*Mann on behalf of the Bigambul People #2 v State of Queensland* [2023] FCA 450). Both Bigambul claims overlapped the claim area of the Gamilaraay People. We wrote about this earlier strike-out decision in our *Native Title Year in Review 2022-2023* article, "Costs update: when conduct becomes costly – the risk of unreasonable behavior in native title claim proceedings".

The Court noted that caution needs to be exercised before a native title claim is struck out. It is only where the application is obviously without merit, for example where there is no realistic prospect on the material before the Court of the authorisation being shown to have existed at the time it was purportedly granted, that an order will be made summarily dismissing or striking out a claim.

The Court was satisfied that the Bigambul #5 Claim should be struck out or summarily dismissed for two reasons.

First, the Bigambul #5 Claim was brought on behalf of a subset of the Bigambul People. In this case, there had been two determinations of native title in favour of the Bigambul People, both of which described the claim group as the biological descendants of six named ancestors. The Court said that it follows that any further native title claims by the Bigambul People must be by and on behalf of that native title group. However, the Bigambul #5 claim described the claim group differently by adding the qualification "who identify and are recognised as Bigambul People in accordance with the traditional laws and customs acknowledged observed by them". The Court said that because this was a narrower group than the persons determined to be Bigambul native title holders in earlier determinations, it was fatal to the Bigambul #5 claim.

Second, the claim was not properly authorised. The Court said the notice for the authorisation meetings was "fatally misleading". The notice purported to arrange for people to come to one of four meetings for the purpose of authorising the Bigambul #5 Claim. In reality only those at the first meeting were given the opportunity to determine the composition of the Bigambul #5 applicant.

Finally, the Court found that the Bigambul #5 claim was an abuse of process. It was filed a few days after the Gamilaraay claim was listed for a consent determination, causing another Gamilaraay consent determination not to proceed (the same thing happened in relation to Bigambul #2 which was also eventually struck out). The Bigambul #5 applicant had ample time to file a further claim following the strike out of the Bigambul #2 Claim. No satisfactory explanation was given for the delay.

**Appeal:** The Bigambul #5 applicant filed an application for leave to appeal on 20 February 2025 (QUD101/2025). It was heard on 11 August 2025 and the decision was reserved.

# Proper authorisation of a claim is fundamental to the legitimacy of the claim

In *Nangalaku on behalf of the Dak Djerat Guwe People v Northern Territory* [2025] FCA 217, the claim was struck out because it was only authorised by a subgroup of the claim group described in the native title determination application.

The native title determination application stated that the Dak Djerat Guwe claim group comprised 22 clans. However, the claim was only authorised by persons described as the ritual elders of seven of those clans. The applicant contended that, under the traditional law and custom of the Dak Djerat Guwe People, the ritual elders of those seven clans have the authority to make the decision to bring the claim on behalf of all clans. The Court decided there was insufficient evidence to support this. It could not be satisfied the claim had been authorised by the native title claim group and the claim contravened the principle that a subgroup is not permitted to bring a claim on behalf of the native title holding group.

The Court noted that the applicable principles for the exercise of the section 84C strike-out power are:

- The burden of showing a claim does not comply with a Native Title Act requirement lies on the party bringing the strike-out application.
- Section 84C is concerned with matters of form and authority, not with the merits of the claim.
- The test to be applied is equivalent to the test to be applied on a summary judgment application. That is, it should be approached with caution and should only be allowed where a clear case has been made. As with applications for summary judgment, it is permissible to adduce evidence on the application and the fact that extensive argument may be required is not a barrier to the success of a strike-out application.

The Court said (at [146]):

> The Court does not take an excessively pedantic approach to matters of authorisation. To do so would be inconsistent with the purpose of the NTA which is to provide for the recognition and protection of native title. At the same time, proper authorisation of a claimant application is fundamental to the legitimacy of the claim. Where there is an apparent defect in the authorisation of a claim, the Court must undertake a balancing exercise. Under s 84D(4), the legislature has empowered the Court to hear and determine a claimant application 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.

# The principles governing the grant of summary judgment in a native title claim

There were six overlapping native title claims in the Geraldton region of Western Australia, brought on behalf of the Nanda People, the Wajarri Yamatji People and the Mullewa Wadjari People, respectively. The applicants in the Nanda and Wajarri Yamatj claims made a joint application seeking summary judgment against the applicant in the Mullewa Wadjari People's claim on the grounds the applicant had no reasonable prospect of successfully prosecuting its case on any of the issues to be decided in a pending hearing of separate questions on connection. The State supported the joint application.

In *Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia (No 3)* [2024] FCA 1132, the Court granted the application for summary judgment, which allowed the Nanda and Wajarri Yamatji People's claims to move to consent determination of native title.

The Court said at [3]:

> In my view particular caution is appropriate when summary judgment is sought in a native title determination application. The preamble to the *Native Title Act 1993* (Cth) (NTA) provides that the NTA is intended, amongst other things, to rectify the consequences of past injustices suffered by Australia's First Peoples, to ensure their full recognition and status within the Australian nation, and to advance the process of reconciliation among all Australians. It is important that applicants seeking a determination of native title are heard, and important too that they feel they have been heard. If an application for determination of native title is decided summarily, without hearing the claimants' oral testimony they may not feel they have been heard.

The Court was persuaded it was appropriate and in the interest of justice to hear and decide the summary judgment application before the parties were put to the substantial time and expense of a contested 'on country' hearing of the separate questions. The circumstances included the Mullewa Wadjari claim group's behaviour in relation to withdrawing from agreements previously reached to settle their disputes with the Nanda and Wajarri Yamatj People. We wrote about the dispute between the claim groups in our *Native Title Year in Review 2022-2023* article, "Costs update: when conduct becomes costly – the risk of unreasonable behaviour in native title claim proceedings".

The Court summarised the legal principles governing a summary judgment order as follows:

- Summary judgment is granted only if it is possible to conclude with confidence that there is no reasonable prospect of success. This involves practical consideration as to whether the applicants have a more-than-fanciful prospect of success.
- The moving party in the summary judgment application has the onus to establish that the applicant has no reasonable prospect of success on its case.
- The standard of proof in the summary judgment is the ordinary civil standard, being the balance of probabilities.
- If the moving party for summary judgment establishes a prima facie case, the onus shifts to the opposing party to point to some factual or evidentiary issues that make a trial necessary.

The Court noted that documentary materials relied on by the parties were substantial and that it had the benefit of all the evidence filed for the separate questions hearing.

It held that the Nanda and Wajarri Yamatji applicants made out a prima facie case for summary judgment and it was therefore necessary for the Mullewa Wadjari applicant to establish specific factual or evidentiary disputes that make a trial necessary. The Mullewa Wadjari applicant singularly failed to establish that there were factual or evidential questions in relation to the separate questions that must be determined at a trial.

The Court noted that its reasons were lengthy but said that the fact that an extensive consideration of the evidence was necessary to conclude that the applicant had no reasonable prospects of success on the issues in the case is not a reason to refuse summary judgment. The Court was also concerned to ensure that the applicant could see that the evidence had been considered.

The Court granted the application for summary judgment and vacated the hearing dates for the separate questions. Consent determinations were made on 13 February 2025 in relation to the Nanda and Wajarri Yamatji claims and there was no order for costs.

## Key insights

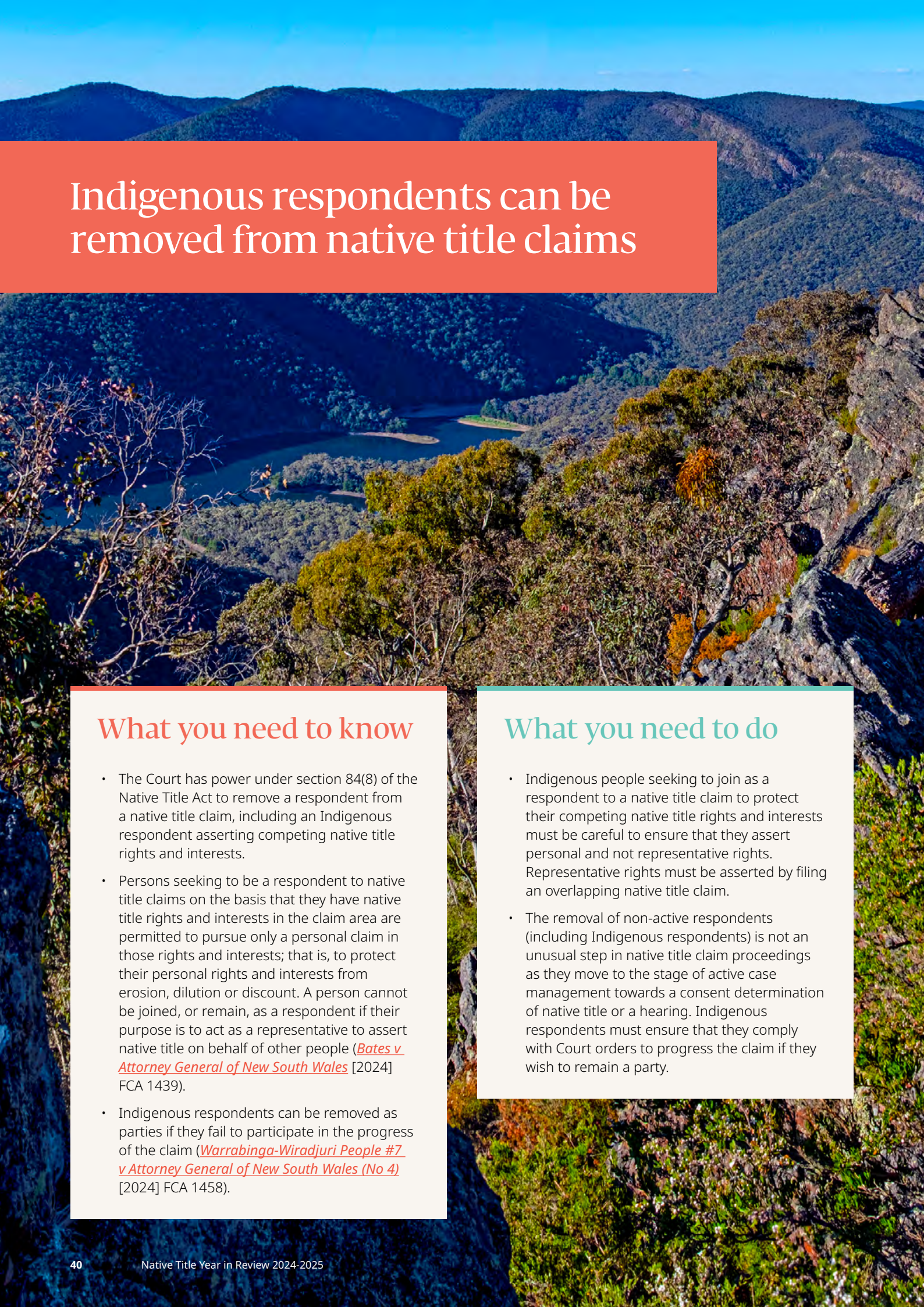
An overriding theme in each of these decisions is that proper authorisation of a claimant application is fundamental to the legitimacy of the claim.

The Bindal #2 and Bigambul #5 decisions are interesting because unlike many earlier decisions about authorisation, it was not a case of insufficient notification or failure to invite all of the claim group to the meeting. The problems related to the resolutions passed at the meetings. They are a reminder of the need for careful and specific drafting that captures every step in the authorisation process. This is just as important for the authorisation of ILUAs.

These cases also confirm that the Court is willing to strike out a claim or deliver summary judgment if the circumstances require it. This is particularly the case where overlapping claims are being prevented from progressing to consent determination.

**Authors:** Andrew Gay, Partner; Leonie Flynn, Expertise Counsel

# Indigenous respondents can be removed from native title claims



## What you need to know

- 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).

## What you need to do

- Indigenous people seeking to join as a respondent to a native title claim to protect their competing native title rights and interests must be careful to ensure that they assert personal and not representative rights. Representative rights must be asserted by filing an overlapping native title claim.
- 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 respondents to native title claims can pursue only personal claims, not representative ones

In *Bates v Attorney General of New South Wales* [2024] FCA 1439, the Court ordered the removal of two Indigenous respondents from the Malyangapa native title claim on the grounds that they were asserting representative, not personal, native title rights and interests. The Court noted that earlier authorities on the issue of joinder and 'dis-joinder' had said:

> Persons seeking to be joined, or to remain as, a respondent to native title proceedings on the basis that they have native title rights and interests in the subject land which may be affected by a determination in the proceedings, 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. Conversely, a person cannot be joined, or remain, as a respondent party if their purpose in being so joined is to act as a **representative** to assert native title rights on behalf of other people.

The two Indigenous respondents in this case failed to convince the Court that they sought to remain respondents to protect their personal native title rights and interests in the claim area. Properly understood, the interests which they sought to assert were representative on behalf of the Wongkumara People, who hold native title nights and interests in the neighbouring land. Both had been applicants in the Wongkumara claim before it was determined.

## Indigenous respondents can be removed as parties if they fail to participate in the progress of the claim

In *Warrabinga-Wiradjuri People #7 v Attorney General of New South Wales (No 4)* [2024] FCA 1458, the Court ordered the removal of 54 Indigenous respondents to the Warrabinga-Wiradjuri People #7 claim because they failed to participate in the progress of the claim after filing their joinder applications many years earlier, despite a number of Court orders requiring them to do so.

The Court noted that section 84 has been interpreted by the Court to place obligations upon a respondent claiming an interest to do more than simply assert a mere interest and then sit back. The following factors are relevant to the exercise of the discretion to remove a respondent: the legislative purpose to encourage parties to resolve native title claims by conciliation and negotiation; the overarching purpose of facilitating the just determination of proceedings before the Court in the most inexpensive and efficient way possible; the significant time, money and other resources invested in the proceedings by the active and participating parties; the probable delay in, if not significant impediment to negotiating an agreed outcome to the claim; and, whether the parties' interests are already adequately addressed by the claim group.

In exercising its discretion, the Court took into account the following:

- The non-compliant Indigenous respondents' claimed Wiradjuri native title interest was expressed in a broad and generic form. It provided no details to identify how each respondent comes to have native title interests in the claim area or why it is that the applicant does not hold rights as claimed. Nor did any of the non-compliant Indigenous respondents supply documentary evidence to support their claim. At no stage since filing the Form 5 did the non-compliant Indigenous respondents make the nature of their claims clear or provide material to support them.
- It may be inferred that since 2017 the active parties, particularly the applicant, incurred considerable expense in the conduct of the proceedings. The Court record indicated that numerous mediations have been conducted over a number of years by a Registrar of the Court, including mediations concerning the interests claimed by these respondents. The non-compliant Indigenous respondents had participated in none.
- The orders of the Court on 4 December 2023 and 1 March 2024 required the non-compliant Indigenous respondents to take steps in the proceedings, but none were taken.

## Key insights

Indigenous people seeking to join as a respondent to a native title claim to protect their competing native title rights and interests must be careful to ensure that they assert personal and not representative rights. Representative rights must be asserted by filing an overlapping native title claim.

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 they comply with Court orders to progress the claim if they wish to remain a party.

**Authors**: Andrew Gay, Partner; Leonie Flynn, Expertise Counsel

# Native title costs decisions: trends and recent developments

## What you need to know

- 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 National Native Title Tribunal (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.

## What you need to do

- 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.

# The 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 mediation and litigation in our *Native Title Year in Review 2023-2024* article, "High price of poor conduct - unreasonable conduct risks costs order".

This trend continues in 2024-2025. The following decisions provide guidance on the application of section 85A of the Native Title Act and what courts consider unreasonable conduct.

## 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.

# Costs orders sought by native title parties

In *Malone on behalf of the Western Kangoulu People v State of Queensland (No 4)* [2025] FCA 36, the Court dismissed a joinder application made after the completion of a hearing of separate questions concerning the existence of native title. The Court found that the joinder application was objectively unreasonable, as it was highly prejudicial, late, and unsupported by evidence.

In *Malone on behalf of the Western Kangoulu People v State of Queensland (No 5)* [2025] FCA 353, the Court dealt with the question of costs. The applicant sought an order for costs on an indemnity basis against the joinder applicant and his solicitor, which if awarded, would warrant a higher level of compensation due to the behaviour of the parties involved. The joinder applicant submitted that the circumstances did not warrant a departure from the general rule in section 85A(1) of the Native Title Act, that each party bear their own costs.

The Court accepted that the joinder application was objectively unreasonable and caused the applicant to incur costs, such that it would have been unjust to require that the applicant bear its own legal costs of the joinder application. However, the Court declined to make an order for indemnity costs, as it was not satisfied that the joinder applicant had an ulterior purpose in bringing the joinder application. In addition, the Court found that while the joinder application was misconceived and doomed to fail, the interests of justice would not be served by an order for indemnity costs.

Accordingly, the Court ordered the joinder applicant to pay the applicant's costs of opposing the application, capped at $5,000. The Court considered that this amount reasonably reflected the quantum of costs that would be recoverable by the applicant on a party and party basis. The Court also declined to order costs against the joinder applicant's solicitor, as there was no evidence of abuse of process or improper conduct on her part.

In contrast, in *Bates v Attorney General of New South Wales* [2024] FCA 1439 the Court ordered the removal of two Indigenous respondents from a native title claim on the grounds that they were asserting representative, not personal, native title rights and interests. The claim group sought costs against the Indigenous respondents notwithstanding the provisions of section 85A of the Native Title Act. The Court rejected the submission that their conduct amounted to an abuse of process and said there was no basis upon which it could be conferred that they acted unreasonably so as to cause the claim group to incur costs. It was ordered that each party bear their own costs.

In *Sandow on behalf of the Bigambul People #5 v State of Queensland* [2025] FCA 53, the Bigambul #5 claim was struck out on the application of the Gamilaraay claim group on the basis that it was not properly authorised and was brought on behalf of only a subset of the Bigambul People. The Gamilaraay applicant sought costs notwithstanding the provisions of section 85A. The Court asked the parties for timetabling orders for the provision of submissions in respect of costs. Until determination of the issue of costs, it was ordered that costs be reserved. We will monitor the outcome of this application and report on it in next year's *Native Title Year in Review*.

## No costs order in judicial review of decision to include an expedited procedure statement in a section 29 notice

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 way to challenge is by way of an objection to the NNTT.

The Court ordered that each party bear their own costs, notwithstanding that section 85A did not apply to these proceedings. It said that while the State has been successful in seeking judgment against the applicants, there had been no unreasonable conduct by the applicants and there was a public interest in clarifying the meaning and application of the relevant provisions in Subdivision P of the Native Title Act and the question of whether and to what extent decisions by the Government party to include an expedited procedure statement in a s 29 notice are amenable to judicial review.

## Fixed costs awarded for proceedings instituted without reasonable cause

In *Little v Wajarri Yamaji Aboriginal Corporation RNTBC (No 2)* [2024] FCA 841, the Court determined the costs of an appeal from a National Native Title Tribunal decision that was dismissed on a summary basis. The Court found that the appeal was misconceived, instituted without reasonable cause, had no prospects of success and the appellant had put the respondents to costs that they should not have incurred. The Court ordered the appellant to pay the first respondent's costs of the proceeding, fixed at $5,278. The Court fixed the reasonable costs at this sum based on the analogy of a migration appeal that is dismissed before hearing.

# Indemnity costs awarded to native title party to be paid from funds held by the Court

In *Malone v B&M Aboriginal Corporation (In Administration)* [2025] FCAFC 24, the Full Court of the Federal Court allowed an appeal of a judgment concerning payments required to be made under an ILUA. In *Malone v B&M Aboriginal Corporation (In Administration) (No 2)* [2025] FCAFC 51, the Full Court considered the question of the costs of the appeal.

The Full Court rejected the respondent's submission that section 85A of the Native Title Act applied to the proceeding. The Full Court found that the proceeding was not subject to section 85A, as it was not a proceeding relating to native title, but a proceeding concerning the proper construction of an ILUA.

The Full Court also rejected the respondent's submission that, even if section 85A did not apply, the appropriate order was that the parties bear their own costs having regard to the parties' success on the issues raised on the appeal. The Full Court held that the appellants' success on the appeal was not contestable and that there was no significant issue on which the respondent was successful. Accordingly, the Full Court held that an order for costs should be made in favour of the appellants.

It noted that the respondent was insolvent and unable to satisfy an order for costs, and the appellants had applied for an order that their costs be paid by certain non-parties to the proceeding, namely three directors who resolved to place the respondent into administration, the lawyer who represented the respondent in the proceeding up until the appointment of the administrator, and the administrator.

The Full Court declined to order costs against these non-parties, as there was no evidence to show that they had funded, controlled, or benefitted from the litigation, or acted improperly or unreasonably in bringing the application.

The Full Court concluded that the appropriate order was for the appellants' costs to be paid out of the funds in Court held for the benefit of the Daylight family (as defined in the ILUA). The Full Court also found that the appellants had an interest in the funds held by the Court, and that it would be unfair for them to bear the burden of the costs that they incurred to protect those funds for the benefit of all members of the Daylight family. The Full Court held that the circumstances of the present case were analogous to those concerning beneficiaries of a trust who properly and reasonably incur legal costs in connection with the administration of the trust. The usual order in these circumstances was for the costs to be quantified on an indemnity basis, being an indemnity for all costs properly and reasonably incurred.

Accordingly, the Full Court ordered that the appellants' costs of the appeal, quantified on an indemnity basis, be paid out of the funds held by the Court for the benefit of the Daylight family in priority to any other distribution of those funds.

# Native title solicitor personally ordered to pay indemnity costs due to AI use

In *Murray on behalf of the Wamba Wemba Native Title Claim Group v State of Victoria* [2025] FCA 731, the Federal Court addressed the consequences of a law firm's reliance on AI-generated content to prepare court documents. The solicitors acted for the applicant in a native title determination application and had used AI to generate or supplement citations in an amended Form 1 application and a supporting summary document. Many of the references were subsequently found to be non-existent or incorrect, causing the other parties to incur unnecessary costs and delaying the efficient conduct of the proceedings.

The Court considered the firm's conduct particularly serious given the solicitors' professional obligations, remarking that AI is a useful but limited tool that must be subject to appropriate human oversight and verification. By failing to review the AI-generated output, the firm acted unreasonably and contributed to a "fabrication" of references, thus undermining the administration of justice.

As a result, the Court ordered that the solicitors personally pay the respondents' costs, on an indemnity basis, that were incurred through the firm's use of AI in the preparation of the documents served on the respondents.

**Authors:** Tony Denholder, Partner; Roxane Read, Senior Associate

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

## What you need to know

- 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.

## What you need to do

- 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.

### Recap: the application of the right to negotiate to the renewal of mining tenements

Mining tenures granted and renewed under the *Mining Act 1978* (WA) (WA Mining Act) must also comply with the Native Title Act in order to be valid insofar as they affect native title. The right to negotiate process under Subdivision P of the Native Title Act generally applies to the grant of mining tenure unless the tenure is exempted by a relevant carve-out.

Section 26D of the Native Title Act contains an exemption from the right to negotiate for certain renewals and re-grants of an "earlier right".

## Federal Court finds that consolidated mining lease falls within exemption to the right to negotiate, but Full Court to decide issue

The Federal Court's recent decision in *Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v State of Western Australia (No 2)* [2024] FCA 729 (Forrest No 2), provided some clarity regarding the interpretation of the right to negotiate exemption in section 26D of the Native Title Act, but in relation to the replacement of mining leases.

Forrest No 2 involved the grant of a single mining lease to consolidate the area of thirty-one mining leases previously held by the same proponents. The replacement mining lease was of the same duration, total area, rights and obligations as the previous mining leases.

The primary issue in Forrest No 2 was whether the grant of the mining lease was excluded from the right to negotiate process under section 26D(1) of the Native Title Act. The Court considered two questions:

- Was the grant of the mining lease a 'renewal, re-grant, or re-making of an earlier right to mine', under section 26D(1)(a)?
- Did the grant have the result that the area to which each of the previous mining leases relates has been extended under section 26D(1)(c)?

The Court held the replacement of the previous mining leases was a 're-making' of those previous leases and that the exemption in section 26D(1)(a) of the Native Title Act applied. This meant the grant of the replacement mining lease did not trigger the right to negotiate process and was valid to the extent that it affected native title.

**Appeal:** The Full Federal Court heard an appeal in March 2025. We will report on the outcome of that appeal in next year's *Native Title Year in Review*.

## Second mining lease renewals to trigger the right to negotiate: WA Guidance and uncertainty for proponents

The WA Department of Energy, Mines, Industry Regulation and Safety has issued guidance setting out its position on the Native Title Act implications of the second renewal of mining leases under the WA Mining Act. This guidance states that the second renewal of a mining lease is not exempt from the right to negotiate process. The basis for this interpretation of the Native Title Act is unclear.

### Key insights

While the basis for WA's interpretation of section 26D is not without doubt, if accepted, any mining lease approaching its second (or subsequent) renewal, that is not otherwise exempt from the future act provisions of the Native Title Act, must go through the right to negotiate process prior to grant. Any non-compliant renewal application may otherwise be refused, and the mining lease will expire.

Proponents with mining leases that are coming up to their second (or subsequent) renewal period should seek legal advice as soon as possible to understand any relevant Native Title Act implications.

The Full Court's decision in the appeal from Forrest No 2 may have implications for consolidated mining leases in all States and Territories. If the appeal is upheld, the holders of existing consolidated mining leases should consider the implications for their tenements.

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# Native Title Act's expedited procedure under challenge

## What you need to know

- 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.

## What you need to do

- 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.

### Reminder: What is the expedited procedure?

The expedited procedure is a fast-track process for certain future acts attracting the right to negotiate process (RTN) in the Native Title Act (usually the grant of exploration tenements) that the relevant government party considers will have minimal impact on native title.

Under this process, the government party issues a notice that it considers that the expedited procedure applies and that, unless a registered claimant or prescribed body corporate objects within the notice period, the full right to negotiate will not apply to the relevant grant.

If no objection is lodged within the notice period, the government and grantee party are not required to negotiate with native title parties about whether the grant may be done. However, if a native title party objects, the NNTT must determine whether the act does in fact attract the expedited procedure

## Areas or sites of particular significance (Top End)

One of the requirements for a future act to attract the expedited procedure is that "the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders... of the native title in relation to the land or waters concerned" (section 237(b) Native Title Act).

The decision in *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory* [2025] FCA 22 (Top End), considers this requirement in relation to two grants of exploration licences by the Northern Territory government. Objections were made in response to both notices on the grounds that the future acts were likely to interfere with areas or sites of particular significance. Neither objection was upheld because the NNTT determined that the sites were not of "particular significance" given that the native title parties did not provide sufficient explanation of the particular significance of the sites. The native title party appealed to the Federal Court in relation to both decisions and the matters were heard together.

The Court held that the NNTT had taken the wrong approach in requiring the native title parties to provide an explanation of the particular significance of a site. For example, in one of the objection proceedings, the NNTT recognised that it was clear one of the sites was a site of significance and acknowledged compelling evidence demonstrating this. However, the NNTT said that "the test is whether the site is of particular significance and it is [the NNTT's] view that the evidence provided falls short of showing this". While the NNTT recognised that an affidavit given by the relevant native title party provided a foundation of evidence describing the attributes of the place including an outline of the traditions of the group as it pertains to the site, the "description d[id] not then go on to explain the particular significance of the site". Consequently, the NNTT was of the view that insufficient evidence has been provided to establish the site's particular significance in the context of s 237(b).

The Court held that the NNTT was wrong to create an additional hurdle, namely requiring that there be evidence explaining the particular significance of the site. It accepted that native title parties must adduce evidence which goes beyond the mere assertion that a site has a particular significance. However, the Native Title Act does not expressly or implicitly require the native title parties to provide an explanation of the particular significance. On this basis, the Court held that there are a number of ways to discharge the particular significance requirement in section 237(b). It said (at [80]):

> That a site is of particular significance (in accordance with the traditions of the native title holders) may be established in a variety of ways. Those ways do not necessarily require an *explanation* of the particular significance of the site. For example, it may be sufficient to show (with cogent evidence) that the site is considered to be of special or more than ordinary significance (in accordance with the traditions of the native title holders), without providing an *explanation* of *why* the site is so regarded. Indeed, it may be very difficult to explain why the site is so regarded. For these reasons, in my view, there is no implicit requirement that an *explanation* of the particular significance of the site be provided.

The appeal succeeded, and the matters were remitted to the Tribunal to be decided according to law.

# No judicial review of decision to include an expedited procedure statement in future act notices

In *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2025] FCA 490, the native title party applied for judicial review of the State of Western Australia's decision to include an expedited procedure statement in a section 29 notice. The native title party argued that the State had failed to actively consider whether the proposed future acts met the expedited procedure test in section 237 of the Native Title Act, that the inclusion of the expedited procedure statement without proper consideration was unlawful and that this rendered the notices invalid. In response, the State sought summary judgment to dismiss the proceedings on the grounds that the applicants had no reasonable prospect of success or that it was an abuse of process.

The Federal Court found for the State and dismissed the application on the basis that the inclusion of the expedited procedure statement in a section 29 notice was not a reviewable decision.

In doing so, the Court considered the proper construction of section 29(7) of the Native Title Act and agreed with an earlier Federal Court decision in *Holt v Manzie* (2001) 114 FCR 282. The Court held that the inclusion of an expedited procedure statement in a section 29 notice given by a Government party does not involve a decision that is amenable to judicial review. Furthermore, it is clear that it is the NNTT that has jurisdiction to determine an expedited procedure objection application irrespective of whether or not there is any "error" in a decision by the Government party to assert that the act is one attracting the expedited procedure.

The Court said at [148]:

> In my view, the legislative intention to establish an "expedited" procedure is not consistent with the insertion of a process by which the Government party is required to make an administrative decision that it considers that the act is an act attracting the expedited procedure, which may then be subject to judicial review on the ground that the Government party has made a legal or jurisdictional error in its consideration or application of the definition contained in s 237. This would give rise to fragmentation, uncertainty and delay that is antithetical to the notion of an expedited process. It would potentially undermine or frustrate the exercise by the NNTT or other arbitral body of its jurisdiction to inquire into and determine any expedited procedure objection applications.

The appropriate avenue to challenge a government party including an expedited procedure statement is an objection lodged under section 32 of the Native Title Act. The NNTT will then substantively determine whether the act is an act which attracts the expedited procedure process.

In conclusion, the Court was satisfied that the native title party had no reasonable prospect of success and dismissed the proceedings. Although it was unnecessary to decide, the Court indicated that the proceedings would not have been an abuse of process.

# Inquiry into the future acts regime under the Native Title Act

The Australian Law Reform Commission (ALRC) is considering the expedited procedure in its inquiry into the future acts regime under the Native Title Act. Its May 2025 *Discussion Paper: Review of the Future Acts Regime* suggests that it is not operating effectively, efficiently or fairly and should be repealed. 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. For more information, see our *Native Title Year in Review 2024-2025* article "Australian Law Reform Commission releases Discussion Paper in future acts regime inquiry".

## Key insights

*Top End* clarifies the level of justification and evidence that the NNTT can require in assessing whether a site is of particular significance for an expedited procedure objection. While an explanation of the site's particular significance is not required, native title parties must still demonstrate beyond a mere assertion through cogent evidence that, under their traditions, the site is of particular significance. Future decisions of the NNTT and the Federal Court may further clarify where this threshold falls, and the manner in which 'cogent evidence' must be adduced to reach it.

The decision in *Yanunijarra* was not unexpected and confirmed a number of authorities from over a decade ago.

The repeal of the expedited procedure would likely see the full RTN process applying to many exploration tenements, even if the other reforms proposed in the ALRC's Discussion Paper are enacted. The costs and timelines of this process may be prohibitive for many explorers.

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

## What you need to know

- 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.
- The Discussion Paper 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.

## What you need to do

- 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.

# Discussion Paper proposes major reform for the future acts regime

The Australian Law Reform Commission's inquiry marks the first comprehensive review of the future acts regime introduced in the post-Wik amendments to the Native Title Act in the late 1990s.

The Discussion Paper responds to widespread calls for reform, including recommendations from the ***A Way Forward*** report in October 2021 (see our *Native Title Year in Review 2021-2022* article, "Modernisation of cultural heritage protection legislation begins"). We wrote about the Terms of Reference for the Commission's inquiry in our *Native Tile Year in Review 2024-25* article, "Other matters to watch out for in 2024-2025".

The Discussion Paper builds on submissions received following the Issues Paper released in November 2024 and contains a suite of proposed reforms. A summary of the key proposals is below.

# A new impact-based future acts regime

Perhaps the most far-reaching proposal in the Discussion Paper is the replacement of the current future acts 'batting order' with a new impact-based model. . Under this approach, the process required to enable the valid grant of future acts would be determined according to their likely impact on native title rights and interests, rather than by the type of act or underlying land tenure.

Two main categories are proposed:

- Category A (lower impact), which would attract a right to consultation; and
- Category B (higher impact), which would attract a right to negotiate.

National guidelines would be developed to assist in assessing impact, considering factors such as the nature, scale, duration, and location of the act, and whether it forms part of a larger project. Native title parties would have a right to challenge the categorisation of a future act before the NNTT.

This shift purports to simplify the regime and ensure that procedural rights are proportionate to the real-world effects of proposed activities.

**Insights:** The proposed impact-based model could do the opposite of simplifying the regime. Instead, it could create an unacceptable level of complexity and uncertainty as to what constitutes higher impact, cause additional delays and increase costs. Government parties would be hit hardest by these proposals.

# Reforms related to agreement-making, including the right to negotiate process

The Discussion Paper proposes several changes to the RTN process, including:

- introducing a new right for native title parties to withhold consent and object to a proposed future act within six months of notification, suspending the negotiation process;
- if an objection is made, it would be heard by the NNTT, which would apply a new or revised test to decide whether the act can proceed;
- if negotiations proceed, there would be mandatory conduct and content standards for agreements;
- if agreement is not reached after 18 months, allowing the NNTT to determine the conditions on which the act may proceed, including conditions about financial consideration (including royalties); and
- imposing a five-year moratorium on the grant of substantially similar future acts in the same location if the Tribunal upholds an objection and determines that a future act cannot be done.

In addition, the Discussion Paper canvasses other changes to support all types of agreement-making, including:

- improved resourcing for Prescribed Bodies Corporate (PBCs) through establishing a perpetual capital fund to provide core funding for PBCs, expanded cost recovery rights;
- increased funding and support for the NNTT and Native Title Representative Bodies/Service Providers;
- the introduction of mandatory conduct and content standards for agreements;
- the expanded use of standing instructions;
- improved access to and assignment of agreements, enhanced transparency and additional dispute resolution mechanisms;
- proposals for timely and accessible compensation, including the introduction of 'future act payments' and a statutory entitlement to compensation for invalid future acts; and
- expanded powers and resources for the NNTT to provide facilitation, mediation, and binding determinations, as well as to maintain a central register of future act notices and agreements.

The Discussion Paper also proposes the repeal of the expedited procedure 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, Native Title Management Plans (see below) or one of the proposed new impact-based model referred to above. This would see many exploration tenements subject to the full RTN process.

**Insights**: These changes are said to ensure a fairer and more equitable agreement-making process. However, the suggested changes to the RTN process to add a right to object, a five-year moratorium on the grant of "similar future acts" if an objection if upheld and a right for the NNTT to impose conditions relating to the payment of consideration (including royalties) would create a system that is inconsistent with State/Territory legislation, and provides native title parties with significantly greater rights than ordinary title holders facing future acts on their land. Some stakeholders will argue that it swings the pendulum too far.

## New pathway to future acts validity: Native Title Management Plans

A centrepiece of the Commission's proposals is the introduction of Native Title Management Plans (NTMPs) as a new pathway to future acts validity. Under this model, PBCs could develop NTMPs for their determination areas, subject to registration by the NNTT.

These plans would set out alternative procedures for validating future acts, such as notification, consultation and payment requirements, tailored to local circumstances. NTMPs would only be available after a positive native title determination and would operate alongside Indigenous Land Use Agreements (ILUAs) and statutory future act procedures.

Where a registered NTMP applies, compliance with its procedures would be sufficient for a future act to be valid, and the usual statutory future act procedures under the Native Title Act would not apply to the extent covered by the NTMP. An ILUA, if in place, would take precedence over an NTMP.

NTMPs are intended to provide native title holders with greater control over activities on their land, promote early and meaningful engagement with proponents, and potentially streamline processes for both native title parties and project proponents. The Commission also suggests that NTMPs could be used for broader functions, such as signalling development opportunities and aspirations for collaboration, and may eventually be integrated with cultural heritage management requirements.

**Insights**: Stakeholders have expressed concerns about the potential overlap with State/Territory environment, planning and cultural heritage legislation as well as the complexity created by having different rules applying across different determination areas. It seems unlikely that many PBCs would have the resources (financial or human) to develop these plans.

## Next steps

Submissions on the Discussion Paper closed on 10 July 2025. The Commission is due to publish its final report in December 2025. These proposals represent only interim recommendations from the Commission. Whether they are included in the Commission's final report and, crucially, whether the Federal Government ultimately implements some or all of them, remains to be seen. Stakeholders should remain engaged and closely monitor developments as the process unfolds.

## Alignment with Government commitments: Garma Festival announcement

Echoing the Commission's recommendations, Prime Minister Anthony Albanese announced at the Garma Festival in August 2025 a new First Nations Economic Partnership between the First Nations Economic Empowerment Alliance, the Coalition of Aboriginal and Torres Strait Islander Community Controlled Peak Organisations and the Federal Government (Address to Garma Festival, 2 August 2025). One of the immediate priorities of the partnership is to reform the funding model for PBCs, ensuring meaningful participation and timely decision-making. The Prime Minister pledged $75 million in additional Government funding to support Native Title Holders to secure better agreements, drive faster approvals, and create enduring benefits for Indigenous communities.

**Authors**: Tony Denholder, Partner; Leonie Flynn, Expertise Counsel; Lydia O'Neill, Lawyer

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

## What you need to know

- 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.

## 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 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.

# Introduction

We have reported on the status of proposed reforms to Federal and State/Territory cultural heritage protection legislation annually since our 2020 *Native Title Year in Review*.

The raft of inquiries, reports and discussion papers since the Juukan Gorge incident have not yet led to the legislative reform that all stakeholders anticipated. Notwithstanding the lack of legislative reform however, the fundamental reset of cultural heritage protection practices that we predicted in 2020 has certainly occurred. Corporate Australia has made significant policy and practical changes to the way that it does business with First Nations communities that has delivered meaningful outcomes.

We summarise the status of Federal and State/Territory reforms below.

# Federal reform

We wrote about Federal cultural heritage reform 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". Very little has occurred in this space in the last 12 months (at least publicly). In fact, the Federal Government has not published any reports, papers or other documents relating to cultural heritage reform since 2022.

In June 2024, the Federal Government renewed its partnership with the First Nations Heritage Protection Alliance, extending the formal agreement to June 2026. The intended outcomes of the extended agreement are:

- The co-design of reforms to Commonwealth First Nations Cultural Heritage legislation that reflects the content of the Commonwealth response to the two reports of the Juukan Gorge inquiry and the preparation of proposed legislative amendments to give effect to these reforms.
- An implementation plan, including transitional arrangements, communications strategy, and related framework to identify resources necessary to implement the reformed First Nations cultural heritage protection law.
- Clear linkages with the new environmental law arising as a response to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) review and how these two pieces of legislation work together.

The 2024-2025 Federal Budget's Future Made in Australia – Strengthening Approvals Processes included $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. There were no further allocations in the 2025-2026 Federal Budget.

The Federal Government has not yet announced its priorities, and it remains to be seen whether the appointment of Senator the Hon Murray Watt as Minister for the Environment and Water will lead to progress in this difficult area.

On 23 May 2025 the Minerals Council of Australia and the First Nations Heritage Protection Alliance jointly announced that they have agreed on principles that can clear a path for the re-elected Government to provide lasting protection of cultural heritage. They said "A starting place... is identifying in our laws who speaks for country and [a] streamlined process for engaging with those that have cultural authority in a particular region. This will provide protection and certainty for community and industry so business can create new economic assets and opportunities, while protecting our cultural assets."

The Federal Government has not yet responded to this statement.

# State reform

We wrote about the current status of each State and Territory's reforms to cultural heritage legislation in our *Native Title Year in Review 2023-2024* article, "Heritage reforms stall as States wait for lead from reform shy Commonwealth". We outline the status of reforms below.

## South Australia

The *Aboriginal Heritage (Miscellaneous) Amendment Act 2024* (SA) commenced on 1 January 2025. It made various amendments to the *Aboriginal Heritage Act 1988* (SA), including the introduction of a new, lower-level offence for harm to heritage, expanded investigatory powers, amendments to timeframes for the bringing of prosecutions, significantly increased financial penalties, new powers for courts to impose non-financial penalties for a breach of the Act, and clarified 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".

## Northern Territory

The new Government introduced the *Northern Territory Aboriginal Sacred Sites Legislation Amendment Bill 2025* (NT) in March 2025 to amend the *Northern Territory Aboriginal Sacred Sites Act 1989* and the *Northern Territory Aboriginal Sacred Sites Regulation 2004*. According to the Explanator Notes, the reforms are intended to ensure the Act and the Regulation are both contemporary and remain effective in achieving their purpose. The Bill passed on 15 May 2025 and commenced on 30 May 2025

There are three specific changes:

- Inserting new provisions to allow for the transfer of authority certificates and the addition of named parties to an existing authority certificate, with no change to the original protections, limitations or controls put on the land to protect the relevant sacred sites. This reform is designed to reduce regulatory burden and red tape in long-term projects involving multiple parties by eliminating the need for each new party to apply for a separate authority certificate for the same work and land, ensuring continuity and efficiency.
- Inserting a new process for the AAPA to enter into enforceable undertakings with a person in relation to alleged contravention of the Act or an authority certificate. The purpose of enforceable undertakings is to achieve better compliance with the Act than would result from criminal or civil enforcement action alone, and in particular allow for the AAPA to ensure that remediation occurs where required.
- Modernising and clarifying the provisions governing the appointment and termination of members of the AAPA. New provisions confirm the existing practice that two of the ten members of the AAPA are appointed by the Minister.

The NT's Legislative Scrutiny Committee recommended that the Bill be passed with a number of minor amendments. It also recommended that, should the Act be subject to further reform, consideration be given to including a provision similar to section 18 of the *Aboriginal Heritage Act 1972* (WA), whereby if the Minister becomes aware of new information about an Aboriginal site on land that is the subject of an authority certificate, the Minister may amend, revoke or confirm the authority certificate.

## Queensland

The new Government has not announced its position on cultural heritage legislative reform since its election in October 2024. The latest development in this space remains the previous Government's Options Paper in December 2021.

However, Queensland's cultural heritage regime was modified by the July 2025 introduction of new Chapter 3A to the *Brisbane Olympic and Paralympic Games Arrangements Act 2021*. These amendments introduced an alternative process for developing cultural heritage management plans for venues, villages and transport infrastructure associated with the 2032 Brisbane Olympic Games. The key features of the alternative process include:

- a truncated negotiation timeframe for a cultural heritage plan;
- a requirement for the parties to negotiate in good faith;
- an avenue to agree a single cultural heritage plan with potentially multiple relevant Aboriginal and Torres Strait Islander parties for the project area;
- a requirement for the proponent to offer to pay the Aboriginal and Torres Strait Islander parties' reasonable costs of negotiating the plan up to a stated prescribed maximum amount; and
- the introduction of a 'default plan' that will apply in the event the parties are unable to agree a plan.

## Western Australia

It has been almost 24 months since Western Australia reverted to the *Aboriginal Heritage Act 1972* (WA), with some key changes. Since then, the State has seen a highly publicised prosecution of a landowner for destruction of Aboriginal cultural heritage.

The WA Government has recently announced a review of the interaction between Native Title Act and Aboriginal cultural heritage processes with a focus on the mining and exploration sector. This review is intended to improve the experience of heritage processes for both native title parties and proponents. It is not intended to propose legislative changes. Instead, policy approaches may shift to drive better outcomes and efficiencies. This could include

changes to the role of heritage protection agreements in the grant of tenure and use of the expedited procedure process under the Native Title Act.

## New South Wales

The NSW Government is still committed to progressing its decade-old reform plans, by building on the foundations of the draft ***Cultural Heritage Bill 2018***.

According to Aboriginal Affairs NSW, it is committed to delivering standalone legislation within this term of Parliament (ie before March 2027). The Government has outlined an "ACH roadmap" that provides details on the transition to the new system.

## Tasmania

The Tasmanian Government has not delivered on its commitment to deliver an exposure draft of new cultural heritage legislation in 2024. However, in March 2025 the Premier stated that the Government is committed to developing new, stronger, proactive Aboriginal cultural heritage protection legislation and is working through carefully and methodically with a large number of stakeholders to get the legislation right. The Tasmanian Government has also committed to other measures to support the proposed new legislation, including funding in the 2024-2025 State Budget for a new Aboriginal Heritage Register and training program for First Nations Tasmanians to become heritage consultants.

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".

## Victoria

There are not currently any Government-led proposals for reform in Victoria, which has one of the most highly regarded legislative regimes in the country.

## 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. We wrote about this in detail 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".

Law reform in this area is hard but it will come, with certainty to be preferred over the variable self-regulation that presently operates. It is a mistake to assume that what is required in 2025 will be sufficient in the future. In the meantime, if the Federal Government's Nature Positive Reforms to the EPBC Act precede cultural heritage law reform, we may get a glimpse of its appetite for tackling these difficult issues.

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

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

## What you need to know

- 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.

## What you need to do

- Be aware that a protection application under the ATSIHP Act is a powerful means by which First Nations People can express dissatisfaction with the adequacy of 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.

# Recent applications

**STOP PRESS**: On 5 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.

Only one new protection application under the ATSIHP Act has been publicly notified in the past year. This section 10 application was made by a Tijwarl Traditional Owner seeking protection for the entirety of Lake Miranda's lands and waters in Western Australia.

The applicant claims that the specified area is under threat from drilling and mining-related works on and under Lake Miranda proposed by a number of proponents. Specifically, the application claims that drilling beneath Lake Miranda will interrupt the Dreaming pathway of the snakes and destroy the Tjukurpa, which will break the Tjiwarl People's spiritual connection with Lake Miranda and the traditions that relate to the lake will die out.

Under the ATSIHP Act, only section 10 applications require public notification, and this notification does not occur immediately upon receipt of an application. As a result, there may be additional applications currently under Ministerial consideration that have not yet been publicly disclosed.

# Challenge to Section 10 Declaration over McPhillamy's Gold Project

On 13 August 2024, the Hon Tanya Plibersek MP, then Minister for the Environment and Water, declared an area that forms part of the project development site for the McPhillamys Gold Project to be a significant Aboriginal area that is to be preserved and protected from injury and desecration.

The proponent commenced proceedings in the Federal Court seeking judicial review of the decision, with a three-day hearing set for mid-December 2025.

# Unsuccessful challenge to Mungo Man and Mungo Lady reburial decision

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 for the Environment and Water's decision not to make a declaration for the protection and preservation of Aboriginal ancestral remains under section 12 of the ATSIHP Act. The Minister's decision related to an application by three Aboriginal elders for the protection of 108 Aboriginal ancestral remains in the Willandra Lakes Region of NSW, including the remains of Mungo Man and Mungo Lady, which are dated at 40,000 to 42,000 years old.

The section 12 application was brought in response to a proposal to rebury the ancestral remains close to their point of origin with a small private cultural ceremony, following which the burial sites would be returned to their existing conditions and unmarked. This proposal was approved under State and Commonwealth legislation following extensive consultation and was unanimously supported by the Willandra Aboriginal Advisory Group (AAG) which is comprised of elected members from the three Traditional Owner Groups of the Willandra Lakes Region, the Mutthi Mutthi, Ngayampaa, and Barkandji Peoples. It was also supported by the Willandra Lakes Region World Heritage Advisory Committee, which includes the nine members of the AAG.

The Minister accepted that the ancestral remains were significant Aboriginal objects, but was not satisfied that the ancestral remains were under threat of injury or desecration.

The Federal Court proceedings were brought by Mr Jason Kelly, a senior Mutthi Mutthi man. Mr Kelly contended that the Minister did not understand that the section 12 applicants' submissions had been that:

- agreement on the reburial of the ancestral remains should be obtained from the three Traditional Owner Groups free of pressure after being fully informed; and
- without free, prior and informed consent, the ancestral remains were under threat of being treated inconsistently with the Aboriginal tradition of Aboriginal people visiting and maintaining the burial sites of their ancestors in order to honour them, pay respects to them, maintain a spiritual connection to them, and pass those practices on to future generations.

The Federal Court found that the applicants had sought a declaration requiring a consultation process to determine whether an action is likely to be inconsistent with Aboriginal tradition, and that the Minister did not have the power to make such a declaration. It went on to find that,

in any event, the Minister had formed the view that the consultation and engagement with Traditional Owners in relation to the reburials was consistent with the principles of free, prior and informed consent.

Mr Kelly raised a number of other grounds for review, each of which were dismissed by the Court.

For more information about FPIC, see our *Native Title Year in Review 2023-2024* article "FPIC continues to dominate the discourse".

## Uncertain timeframes for making declarations impacts all stakeholders

A key procedural issue under the ATSIHP Act is the absence of statutory timeframes for the Minister for the Environment and Water to determine applications. This can result in significant delays, leaving both Traditional Owners and proponents in a state of prolonged uncertainty. We wrote about the Federal Government's commitment to reduce the backlog of applications under the ATSIHP Act in our *Native Title Year in Review 2023-2024* article, "Update on Federal cultural heritage protection applications".

In May 2025, the applicant for a section 10 application concerning Murujuga (Burrup Peninsula) in Western Australia filed proceedings in the Federal Court to compel the Commonwealth Minister to resolve the application, which has been pending for over three years. The section 10 application seeks protection of the area from existing and proposed gas, urea, ammonia and hydrogen projects, citing threats to sacred sites and ancient rock carvings. We wrote about this application in our *Native Title Year in Review 2022-2023* article, "Traditional Owners continue to rely on ATSIHP Act in the face of slow progress with national cultural heritage reforms".

In late August 2025, the Federal Court found that the Minister's delay in making a decision was unreasonable in the legal sense (*Cooper v Minister for Environment and Water* [2025] FCA 1009). However, because the decision was imminent at the time of judgment, the Court did not make an order requiring the Minister to make a decision. Instead, the matter will be listed for case management in mid-September 2025 to check on progress and case manage remaining issues, including costs.

The judgment includes extracts from the August 2025 Ministerial Brief, and notes that the Department has recommended that a section 10 declaration be made over certain parts of the application area. We will report on this further once the Minister's decision is made.

## Legislative reform – progress remains slow

We discuss progress on cultural heritage reform in our article "Little progress in cultural heritage reforms around Australia in 2024-2025". As set out in that article, the modernisation of cultural heritage protection legislation still has a long way to go.

While cultural heritage reform is awaited, the ATSIHP Act will continue to provide a powerful means for First Nations People to preserve or protect a specified area from a threat of injury or desecration on the basis of asserted cultural heritage significance, where adequate protection is not otherwise provided at a State or Territory level.

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# First Nations underwater cultural heritage under increasing scrutiny

## What you need to know

- 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.
- 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*.
- 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.

## What you need to do

- 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).

# New Guidelines regarding assessment and management of underwater cultural heritage

While Aboriginal cultural heritage has been an area of focus for onshore project development for years, assessment of underwater cultural heritage (UCH) has only more recently become an important consideration for infrastructure projects in Australia's coastal and offshore waters.

In 2024, the Australian Government's Department of Climate Change, Energy, the Environment and Water (DCCEEW) released two documents that provide guidance to proponents on assessing underwater cultural heritage:

- In June 2024, DCCEEW finalised and released new *Guidelines to assessing and managing impacts to Underwater Cultural Heritage in Australian waters* (UCH Guidelines), following consultation on draft guidelines to protect underwater cultural heritage in 2023. See our *Native Title Year in Review 2022-2023* article, "First Nations underwater cultural heritage – no longer a submerged issue".
- Not long after, in August 2024, DCCEEW released draft *Technical Guidelines on the Archaeological Assessment of First Nations Underwater Cultural Heritage in Commonwealth Waters*, which expand on the UCH Guidelines by identifying methods for finding and assessing First Nations underwater cultural heritage (Draft First Nations UCH Guidelines).

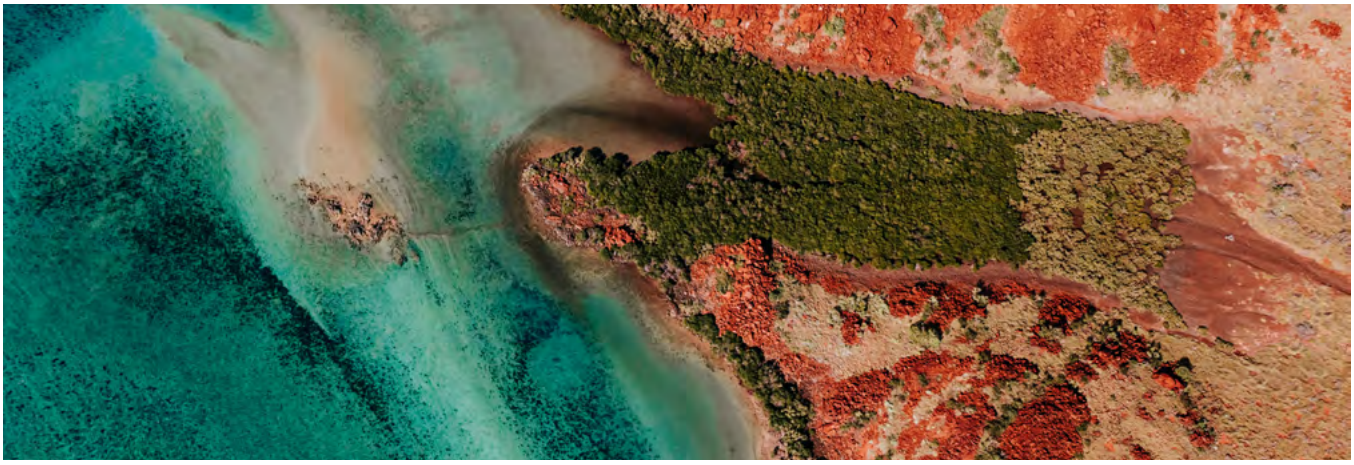
These guidelines are particularly relevant for projects where infrastructure will be placed at depths of up to 80 metres, such as offshore wind and some offshore gas projects, where underwater cultural heritage is most likely to exist.

# High standard recommended by Draft First Nations UCH Guidelines despite limitations of legislative framework

Together, the UCH Guidelines and Draft First Nations UCH Guidelines provide guidance on assessing underwater cultural heritage that may be protected under the *Underwater Cultural Heritage Act 2018* (Cth) (UCH Act). However, it appears that the Draft First Nations UCH Guidelines seek to retrofit the UCH Act to focus on First Nations underwater cultural heritage. This is a significant re-direction from the UCH Act's predecessor, the *Historic Shipwrecks Act 1976* (Cth).

## Limited scope of Underwater Cultural Heritage Act 2018

The UCH Act defines underwater cultural heritage relatively broadly – as any trace of human existence that (a) has a cultural, historical or archaeological character; and (b) is located under water. However, the UCH Act only provides protection to "protected underwater cultural heritage". This includes all remains of vessels and aircraft (and associated articles) that have been underwater in Australia for at least 75 years, and any other article of underwater cultural heritage in Commonwealth waters that the Minister has declared to be protected. As it stands, there are no declarations of protected First Nations underwater cultural heritage.



### Assessment and management process as recommended by Draft First Nations UCH Guidelines

The Draft First Nations UCH Guidelines propose a minimum standard for archaeological assessment and management of First Nations underwater cultural heritage by recommending project proponents to carry out the following steps:

1. Engage with local Traditional Owners.
2. Identify areas of underwater cultural heritage sensitivity through desktop studies, in-water, and predictive models (requiring a detailed assessment, including acoustic and seismic surveys, predictive modelling and potentially visual inspection).
3. Assess significance by establishing importance, meaning and value of a site or object by engaging underwater archaeologists, cultural archaeologists, geomorphologists, and local Traditional Owners.
4. Evaluate impact and quantification of risks to known or suspected underwater cultural heritage. The Draft First Nations UCH Guidelines suggest that all actions involving, or in proximity to, the seabed, have the potential for adverse impacts to underwater cultural heritage.
5. Create a management plan to mitigate and avoid impacts "detailing proactive and reactive measures to be implemented during project construction and operation phases".

While the Draft First Nations UCH Guidelines seem useful in a field where there is much uncertainty, there is no legal hook into the UCH Act that would require compliance.

## Protection of First Nations underwater cultural heritage under other legislative frameworks

There are other legislative frameworks protecting First Nations underwater cultural heritage. The Draft First Nations UCH Guidelines are perhaps intended to set a "best practice" standard beyond the UCH Act.

### EPBC Act

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) protects First Nations underwater cultural heritage in offshore areas as part of the marine environment, which is one of the nine matters of national environmental significance protected by the EPBC Act. Section 23 prohibits the following:

- the taking of an action **in** a Commonwealth marine area (essentially waters between 3 and 200 nautical miles from the coast) that has, will have or is likely to have a significant impact on the environment; and
- the taking of an action **outside** a Commonwealth marine area that has, will have or is likely to have a significant impact on the environment **in** a Commonwealth marine area.

In theory, this prohibition extends to actions that have a significant impact on First Nations underwater cultural heritage in offshore areas because the definition of "environment" in the EPBC Act includes heritage values of places and cultural aspects of other limbs of the definition (e.g. cultural aspects of ecosystems and their constituent parts). The DCCEEW Significant Impact Guidelines indicate that referral is required if there is a real chance of a substantial adverse impact on heritage values in the Commonwealth marine area. While this threshold may not frequently be reached, it does mean that an assessment of impacts is required.

## Offshore project legislation

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGS Act) and *Offshore Electricity Infrastructure Act 2021* (Cth) (OEI Act) are the primary statutes regulating the offshore oil and gas and offshore wind industries respectively.

Under both legislative frameworks, project proponents are required to carry out consultation in relation to the impacts of their authorised project activities, which are addressed in "environment plans" (under the OPGGS Act) or "management plans" (under the OEI Act). In this context, it is possible that the Draft First Nations UCH Guidelines will be a reference point for offshore proponents consulting with Traditional Owners who raise underwater cultural heritage as an issue. For more about these regimes, see our *Native Title Year in Review 2024-2025* article, "First Nations consultation requirements for offshore projects".

## Native Title Act and ATSIHP Act

Protection of underwater cultural heritage is also possible under the *Native Title Act 1993* (Cth) and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) as the application of these Acts extends to offshore waters.

Native title can be recognised in land and waters and there are determinations recognising native title over coastal waters across northern Australia.

Similarly, the ATSIHP Act can protect a site or object of particular significance to Aboriginal peoples occurring in any waters over the continental shelf of Australia or, as described by the Full Federal Court in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, "recognises the capacity for sea country, and its marine resources, to be 'of particular significance to [Aboriginal and Torres Strait Islander peoples] in accordance with Aboriginal tradition'. This is particularly important for offshore **intangible** cultural heritage, such as a song line located offshore that has cultural significance for Aboriginal people living onshore but is not a "trace of human existence" capable of being declared by the Minister as protected under the UCH Act.

## State & Territory cultural heritage legislation

State and Territory legislative frameworks may also apply, particularly to those parts of an offshore project that traverse coastal waters. Each State and Territory has its own specific Aboriginal heritage framework, some of which extend to protecting cultural heritage in the seabed. A summary of the scope of State and Territory heritage legislation is provided in our *Native Title Year in Review 2022-2023* article, "First Nations underwater cultural heritage – no longer a submerged issue".

## State & Territory environmental assessment processes

State and Territory environmental assessment processes may also require consultation with Traditional Owners, in which the Draft First Nations UCH Guidelines may be held up as "best practice" where First Nations underwater cultural heritage is a relevant consideration. However, it perhaps may be regarded as too onerous for work of the scale that often occurs nearshore.

In Victoria, First Nations underwater cultural heritage has been identified in Environment Effects Statement for major projects for several years. See for example the EES scoping requirements for the Star of the South Offshore Wind Farm, Marinus Link Undersea Transmission Cable and Viva Energy Gas Import Terminal, which all require assessment of "potential for adverse effects on … underwater Aboriginal cultural heritage" as part of an overarching heritage assessment.

## Key insights - what should proponents of offshore and nearshore projects do?

Identification and protection of offshore UCH is now an element of impact assessment for large scale sea-based projects. This work is a lot less familiar than onshore heritage assessments, which makes the Draft First Nations UCH Guidelines potentially useful beyond their origin in the rather limited UCH Act. It is important to plan ahead and engage early with Traditional Owners about both on- and off-shore components of a project. The location of songlines or other intangible heritage places should ideally be identified at the time of site selection. Although there is no comprehensive regime for the protection of UCH, the patchwork comes together to provide meaningful protection. The work needs to be done for the sake of sea country and for sake of efficient project delivery.

**Authors:** Clare Lawrence, Partner; Jeff Lynn, Partner; Fergus Calwell, Senior Associate; Anna Seddon, Senior Associate

# First Nations issues relevant to offshore infrastructure projects

## What you need to know

- 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.

## What you need to do

- 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.

# First Nations consultation requirements for offshore projects

Proactive engagement with First Nations peoples is increasingly the focus of policy and legislative reform at both the Commonwealth and State/Territory level, including in the offshore projects space. In the last 18 months:

- **May 2024** - NOPSEMA, Australia's offshore regulator for oil and gas projects, updated its Consultation Guidelines following a number of Federal Court proceedings which considered consultation with First Nations peoples in the context of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth) (OPGGS Regulations)).
- **August 2024** - DCCEEW released draft *Technical Guidelines on the Archaeological Assessment of First Nations Underwater Cultural Heritage in Commonwealth Waters*, which identify methods for finding and assessing First Nations underwater cultural heritage (Draft First Nations UCH Guidelines).
- **December 2024** - Amendments to the *Offshore Electricity Infrastructure Regulations 2022* (Cth) (OEI Regulations) commenced, requiring offshore wind project proponents to make reasonable efforts to identify and consult with First Nations peoples or groups with interests in, or management functions related to, the proponent's relevant licence area or an area adjacent to a licence area.
- **Early 2025** - Offshore Infrastructure Regulator, Australia's regulator for the offshore wind development, published its Guidance Note: *Consultation and engagement for OEI management plans* (Offshore Wind Consultation Guidance Note)

The regulatory regimes have some notable differences, including in respect of consultation requirements in the OEI Regulations and the OPGGS Regulations. However, they are generally moving in the direction of broader, more meaningful consultation and a requirement that risks to underwater cultural heritage are well understood as part of any project assessment. It seems that the OEI Regulations, with its more prescriptive approach, have sought to take some of the guesswork out of the consultation requirements following the Federal Court's 2023 examination of the OPGGS Regulations (see below).

# Consultation under the OEI Regulations for offshore wind projects

As explained in our 9 April 2025 alert, "*Consultation requirements in Australia's offshore wind space*", a proponent who has obtained a licence under the OEI Regulations for an offshore wind project must obtain approval of a management plan prior to undertaking any licence activities. For management plan requirements see our 19 February 2025 alert, "*Australia finalises new regulations for offshore wind projects*". In the process of preparing the management plan, proponents must "make reasonable efforts to identify and consult" with persons, communities and groups that may be affected by the activities covered by the management plan (reg. 64). This gives rise to the question of who to consult with and how.

The OEI Regulations address the "who" question with some particularity, by including specific categories of Aboriginal and Torres Strait Islander people or groups (reg. 64):

- Aboriginal or Torres Strait Islander peoples or groups that the licence holder reasonably considers may have native title rights and interests in the licence area, or areas of land or water that are adjacent to the licence area.
- Aboriginal or Torres Strait Islander organisations established under a law of the Commonwealth/State/Territory that the licence holder reasonably considers to have functions related to managing, for the benefit of Aboriginal or Torres Strait Islander people, land or water in the licence area, or that are adjacent to the licence area. This may include land councils established under Commonwealth and State laws.
- Aboriginal or Torres Strait Islander organisations or groups that the licence holder reasonably considers to be parties to agreements related to land and water rights for Aboriginal or Torres Strait Islander people (under the *Native Title Act 1993* or any law of a State), where rights relate to land or water in the licence area, or areas of land or water adjacent to the licence area. An example of the type of agreement that may be relevant is an Indigenous Land Use Agreement made for the use and management of land and water which is in the licence area, or adjacent to it.
- Communities that are located adjacent to the licence area which the licence holder reasonably considers may be directly affected by the activities subject to consultation.

At one level, there is useful detail in this list, but the identification task is not straightforward. It requires some careful analysis of the interest holder landscape. Certainly, its seems that proponents are encouraged to go wide in these discussions.

As to what constitutes adequate "consultation", the Offshore Wind Consultation Guidance Note acknowledges that "[c]onsultation occurs on a spectrum ranging from providing access to information, through to full empowerment of the stakeholders to make decisions" and states that proponents "may engage to the extent they consider appropriate however at a minimum… must be able to demonstrate that the regulatory requirements have been met." These regulatory requirements include (reg. 65):

- giving sufficient information to allow an informed assessment of any reasonably foreseeable effects of the proposed activities; and
- giving a reasonable period for the consultation.

Further, the Offshore Wind Consultation Guidance Note makes clear that what is reasonable will not be the same in all circumstances. Consultation undertaken in relation to approved offshore gas and oil projects provides some guidance on what appropriate consultation with First Nations peoples for offshore wind projects may look like.

Finally, it is important to recall that the consultation requirements under the OEI Regulations are legally distinct from requirements to engage with First Nations people under other legislation, such as the *Native Title Act 1993* (Cth) or applicable cultural heritage or land rights legislation. On the ground, though, there are likely to be ways to co-ordinate engagement.

# Consultation requirements for offshore oil and gas projects

## What consultation does the OPGGS Regulations require?

OPGGS Regulations, which predate the OEI Regulations, require that proponents, in the course of preparing an environment plan for an offshore oil and gas project, must consult with persons or organisations whose functions, interests or activities may be affected by the activities to be carried out under the environment plan (a relevant person) (reg. 25). An environment plan must be approved by NOPSEMA before a proponent can undertake any of its proposed activities.

As is well know, the OPGGS Regulations received a lot of judicial attention in 2023 (see below). It is now absolutely clear that First Nations people and groups, and their representatives, such as land councils and prescribed body corporates, may be relevant persons whose functions, interests and activities may be affected by activities proposed in environment plan.

Similar to the OEI Regulations, the OPGGS Regulations also requires that relevant persons are given sufficient information to allow them to make an "informed assessment of the possible consequences" of the activity on the functions, interests or activities of the relevant person and that a reasonable period of time is provided for consultation (reg. 25(2) and (25(3)).

The OPGGS Regulations have not been amended following their examination by Federal Court in 2023. It does appear though, that the 2024 OEI Regulations, with their more prescriptive approach, are intended to be simpler for proponents to apply.

## Updated consultation guidance from NOPSEMA

Those operating under the OPGGS Regulations do, however, have the benefit of the NOPSEMA Consultation Guidelines. These were published following the Full Federal Court appeal decision in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 and subsequent Federal Court judgments in *Cooper v NOPSEMA (No 2)* [2023] FCA 1158 and *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9. We summarise these decisions in our *Native Title Year in Review 2023-2024* article, "Further litigation of First Nations consultation rights for offshore projects in the wake of Tipakalippa".

The Consultation Guidelines set out what NOPSEMA will take into consideration when deciding whether the consultation requirements in the OPGGS Regulations have been met. In particular, they state that proponents must demonstrate that a reasonable opportunity to be consulted has been afforded to First Nation groups. Where interests are held communally (such as native title rights), NOPSEMA expects that reasonable notice be provided to group members but does not expect that exhaustive communications will occur with each and every person.

The Guidelines explain that determining whether "interests" have a communal or collective dimension relies on engaging with individuals who hold the relevant knowledge. It is important to assess what accurately reflects the views of the group in the proper cultural context, which includes identifying and engaging with those who are generally recognised as having the authority to speak on behalf of the group. Proponents may need to seek assistance from a suitably qualified expert to assist in making this assessment.

### Statements of reasons published by NOPSEMA

Recent statements of reasons published by NOPSEMA that approve environment plans suggest that reasonable ways to identify and consult with affected persons and groups may include:

- desktop studies of relevant databases (ie to identify relevant peoples, groups or organisations);
- reaching out directly to relevant organisations or people via email, mail or phone;
- advertising in national, state and local newspapers to invite engagement;
- publishing information in relation to the activity on the proponent's website and providing contact details;
- reaching out to groups to determine the best way to engage; and
- running various community information sessions, genuinely engaging with attendees and recording contact information of attendees.

## Consultation pursuant to the Draft First Nations UCH Guideline

The Draft First Nations UCH Guidelines encourage proponents to undertake genuine and culturally appropriate consultation with First Nations People. Our *Native Title Year in Review 2024-2025* article, "First Nations underwater cultural heritage under increasing scrutiny" describes the Draft First Nations UCH Guidelines in detail.

In respect of First Nations consultation, the Draft First Nations UCH Guidelines identifies the following key principles for genuine engagement (amongst others):

- engaging genuinely and respectfully, ideally through co-designing appropriate engagement protocols appropriate for the situation;
- engaging actively and directly, rather than relying on social media or other public announcements to share information or invite interest; and
- engaging collaboratively, meaning that all relevant information is provided to First Nations stakeholders and sufficient time provided to allow them to make informed assessments and decisions.

However, the Draft First Nations UCH Guidelines note that there is no "one size fits all" approach to First Nations consultation.

## Key insights: how should consultation occur?

Considered together, these distinct legislative regimes can assist proponents to determine how to appropriately consult First Nations people in relation to offshore projects more generally. Each operates in their own regulatory environment. However, there are some generally applicable learnings:

- The work of identification of 'consultees' largely falls on the proponent.
- Simply relying on public notices and allowing individuals to self-identify and opt in to consultation is unlikely to demonstrate adequate representation or ensure a reasonable chance to participate.
- Ensure sufficient information is provided to allow First Nations peoples to be fully informed and understand the proposal and how it may affect them.
- Tailor the information to suit the needs of the relevant persons being consulted, including tailoring the information so it is readily understood.
- Allow sufficient time for consultation, based on the specific persons or group's particular circumstances.
- Consider co-designing appropriate engagement protocols prior to undertaking consultation.
- Ensure that the information and opinions obtained through consultation are actively considered.

Offshore project proponents should see consultation with First Nations peoples as an opportunity to help identify or narrow key cultural heritage, environmental and social issues arising in relation to the project at an early stage, and as a means by which to enhance the project's social licence to operate.

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

## What you need to know

- 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.

## What you need to do

- 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.

# Status of Treaty-making around Australia

**Commonwealth**

The Government has not pursued Treaty since the unsuccessful Voice referendum in 2023, and the Opposition has consistently opposed Treaty at the Federal level. Treaty is therefore unlikely to be pursued at the Federal level in the foreseeable future.

Following the 2025 election, Senator the Hon Malarndirri McCarthy, Minister for Indigenous Australians stated that it was time to consider the steps needed to begin a truth-telling process led by the Federal Government. The Senator said her government would be closely considering the recommendations of Victoria's Yoorrook Justice Commission. Former Greens the Hon Senator Dorinda Cox had been expected to reintroduce her Bill for a Truth and Justice Commission, however following her move to the ALP in June 2025, this seems unlikely.

The Government has recently shifted its focus to Closing the Gap and economic selfdetermination for First Nations Australians. At the Garma Festival in August 2025, the Prime Minister announced a new First Nations Economic Partnership between the First Nations Economic Empowerment Alliance, the Coalition of Aboriginal and Torres Strait Islander Community Controlled Peak Organisations and the Federal Government (Address to Garma Festival, 2 August 2025) that builds on the commitments in the Closing the Gap Agreement.

With this announcement comes new funding that would seek to deliver the economic sovereignty that is fundamental to self-determination and secure the future of community controlled organisations and includes $75 million towards assisting native title holders to secure better deals and faster project approvals and $70 million towards supporting First Nations clean energy projects.

Victoria

### Treaty

Treaty negotiations will occur under the Treaty Negotiation Framework in the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), which regulates how negotiations are conducted and what subject matter Treaty negotiations can cover. The Framework includes a requirement for both a Statewide Treaty and multiple local Treaties, to ensure that self-determination can be exercised by all First Peoples in Victoria collectively and individually by local Traditional Owner groups.

Treaty will be negotiated by the First Peoples' Assembly of Victoria (the Assembly), the democratically elected independent body representing Traditional Owners in Victoria. One of the Assembly's key objectives in Treaty negotiations is for decisions about First Nations communities, cultures, and lands to be made by First Nations people.

Statewide Treaty negotiations officially commenced in November 2024 with a Treaty Commencement Ceremony on Wurundjeri Country. The first local Treaty negotiations commenced on 28 May 2025, with the Dja Dja Wurrung Clans Aboriginal Corporation making formal notification to the Victorian Treaty Authority. The Treaty Authority will now work with Dja Dja Wurrung on preparations before the State will be invited to participate in formal negotiations.

### Truth

The Assembly has worked closely with the Yoorrook Justice Commission, Victoria's formal Truth-telling inquiry, to prepare submissions on injustices experienced by First Nations peoples in Victoria since colonisation. The Commission's final report, which makes more than 100 recommendations, was tabled 1 July 2025. Yoorrook Chair Professor Eleanor Bourke AM confirmed that many of the Commission's recommendations will inform Treaty negotiations and highlighted the complementary nature of Truth and Treaty. Relevantly, the final report comprises both the:

- *Yoorrook Truth Be Told* report which provides a historical account of Victoria since colonisation, acknowledging the ongoing and embedded colonisation that exists within Victoria's contemporary institutions;
- *Yoorrook for Transformation* report which outlines a list of recommendations across a broad spectrum of policy areas including land, education, health, housing, economic prosperity, political life and access to records. The recommendations also call for reform through treaty process, self-determination, rights, accountability and redress.

### Voice?

On 4 July 2025, the Government committed to expanding the powers of the Assembly through the *Statewide Treaty Bill*, proposed to be tabled in 2025. In a joint statement with the Assembly, the State acknowledged a proposal for the codification of the Assembly as a permanent statutory advisory body, that will operate as an "independent voice to the Victorian Parliament" It is proposed that going forward, the role of the Assembly will aim to strengthen First Nations peoples' self-determination, rights and accountability, aligning with the key recommendations advanced by the Commission's report.

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| **New South Wales** | The NSW Government continues its consultation process with First Nations communities to determine if communities want a Treaty, and if so, what form Treaty would take.<br><br>On 26 September 2024, the Government announced it had appointed its three Independent Treaty Commissioners: former senator Aden Ridgeway, academic Todd Fernando, and Koori Mail newspaper CEO Naomi Moran. The Commissioners will sit for two-year terms and conduct consultations with First Nations Communities and Traditional Owners in NSW, which are expected to begin in the later half of 2025. Twenty-seven regional conversation hubs will be set up for five days each in the bigger cities, with an additional 50 day-long sessions in communities within a two-hour drive of those hubs.<br><br>The NSW Government has confirmed it will consider all recommendations from the Treaty Commission but will not progress beyond the consultation process until after the State election in early 2027. Opposition Leader Mark Speakman confirmed the NSW Coalition would not support a State Voice to Parliament, signposting that the party's focus would be on the "practical and urgent delivery of policies and programs in Closing the Gap partnerships". There was no comment on whether the Coalition would support Treaty. |
| **Queensland** | Following election in October 2024, the Government delivered on its promise to stop work towards Treaty and Truth. In November 2024, the ***Path to Treaty Act 2023*** (Qld) was repealed, and the First Nations Treaty Institute and Truth-telling and Healing Inquiry were also wound up. Queensland is no longer pursuing any form of Treaty or Truth and is now the only jurisdiction that has not implemented a redress scheme as compensation for survivors of the Stolen Generation.<br><br>The First Nations Consultative Committee gave its Final Report into aspirations of First Nations people for a Voice in Queensland to the then-Labor Government in late 2023, but given the change in government the report is unlikely to be released any time soon. |
| **Western Australia** | WA is not engaged in any formal Treaty process, instead maintaining its policy of preferring to enter into Settlement Agreements with First Nations and Traditional Owner groups.<br><br>WA does not have a national Truth-telling Commission or Inquiry. The Government has created the Wadjemup Project in collaboration with the Whadjuk, Noongar and greater First Nations communities, aimed at understanding and acknowledging the history and ongoing impacts of First Nations incarceration and segregation on Wadjemup (Rottnest Island). The Project is still in its Truth-telling and Consultation stage.<br><br>On 27 May 2025, the WA Government announced the Stolen Generations Redress Scheme, with survivors now eligible for payments of up to $85,000 as compensation for being forcibly removed from their families. |

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| **South Australia** | The SA Government has not progressed Treaty or Truth, although it remains committed to restarting Treaty discussions this term. The SA Voice to Parliament made its inaugural address on 27 November 2024 covering the Voice's activities in the past year, most notably its establishment, contributions to Government legislation, and feedback provided on several bills in Parliament. The Voice is now working to understand First Nations communities' priorities, and it can support those priorities.<br><br>The SA Government remains committed to implementing the Uluru Statement from the Heart. In contrast, the Opposition do not support the Government's First Nations agenda. The next State election is in early 2026. |
| **Tasmania** | The Aboriginal Advisory Group continues to develop its advice and recommendations on the development and implement of Truth-telling in Tasmania. Interim advice from the Group includes the appointment of independent Commissioners to guide an Aboriginal-led process for Tasmanian Aboriginal people, which will receive funding in the 2025-26 State budget. However, the State Government will no longer progress Treaty.<br><br>Separately, the Land and Sea Aboriginal Corporation Tasmania has reached an agreement with the Tasmanian Government for the long-term lease and buy-back arrangement of abalone fishing rights. The agreement also recognises the cultural and social significance of the sea to Tasmanian First Nations groups. Greater investment in commercial cultural fisheries was one of the recommendations in the Government's 2021 Pathway to Truth-telling and Treaty Report. |
| **ACT** | The ACT Government has made no progress on Treaty. While the Government has reiterated its commitment to starting Treaty conversations, it has not yet established the "First Nations Eminent Panel for Community Engagement and Healing," which it had announced in early 2023. The Government has confirmed that "there is no fixed timeline" for Treaty or Truth. |
| **Northern Territory** | Following the election of the Country Liberal Party in August 2024, progress towards Treaty has been dismantled. In February 2025, the NT Government announced it would no longer be pursuing Treaty, instead focusing on transitioning local control back to Aboriginal community councils. |

# Key insights – where to from here?

Since the unsuccessful Voice Referendum in 2023, a Federal Treaty has likely been abandoned and progress towards Truth-telling has stalled. Despite calls for progress in the wake of its strong Federal election win in May 2025, the Government has deferred Treaty efforts to the States and Territories. At the State and Territory level, Voice, Treaty and Truth-telling progress has proven susceptible to changes in Government.

This is a dynamic space. The aspirations of the Uluru Statement from the Heart have not been implemented as envisaged by the 2017 Constitutional Convention, but the issues they raised have become part of the national discussion. The examples of Victoria and South Australia will likely influence developments elsewhere. The story is not over. We will continue to monitor events in this space around Australia.

**Authors**: Clare Lawrence, Partner; Tess Birch, Senior Associate

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

## What you need to know

- 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.

## What you need to do

- 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.

### Refresher on the meaning of "claimable Crown lands" under the NSW Aboriginal Land Rights Act 1983

Section 36 of the ALR Act relevantly defines "Claimable Crown lands" as follows:

*Claimable Crown lands* means land vested in Her Majesty that, when a claim is made for the lands under this Division –

(b) are not lawfully used or occupied.

(c) are not needed, nor likely to be needed, for an essential public purpose.

## High Court finds Crown's leasing of land insufficient to establish "lawful use" – La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd

In 2016, the NSW Aboriginal Land Council lodged a bulk land claim over lands within the boundary of La Perouse Local Aboriginal Land Council including the former Paddington Bowls Club.

The relevant land was subject to a lease that gave the tenant the right to occupy and use the land for the purposes of "Community and Sporting Club Facilities, Tourist Facilities and Services, Access" and not for any other purpose. The facilities on the land had largely fallen into disrepair and the land was not being used by its tenant for any of the purposes permitted by the lease. Tennis courts on the land were being used by the Wentworth Tennis Club, which was not the tenant, under an oral sublease with the tenant but without the Crown's consent as lessor.

In 2021, the Minister determined that the land was claimable Crown land. The Minister's decision was upheld by the Land and Environment Court, but overturned by the Court of Appeal (*Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* [2024] NSWCA 107).

The Court of Appeal found that the term "used" must be interpreted having regard to the definition of "land" in the ALR Act, which includes "any estate or interest in land, whether legal or equitable". The Court of appeal said that it is an ordinary meaning of "use" or "used" that where land is leased, it is used by the tenant conducting physical activities on the land and also used by the landlord to derive rent from the land.

The Court of Appeal found that the Crown was lawfully using the land by leasing it and the land was not claimable.

On appeal to the High Court, a majority of the High Court found, for differing reasons, 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*).

# NSW Court of Appeal confirms test to establish that land is "needed for an essential public purpose"

*NSW Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2024] NSWCA 294 concerned an appeal from a decision of the Land and Environment Court in which the primary judge found no error in the Minister's decision that land occupied by the privately owned St George & Sutherland Community College was not claimable Crown land because it was needed for an essential public purpose of education.

The claimed land was part of the former Jannali Girls High School site. The High School closed in 1991, and the site was used by the College for adult and community education. In October 2016, the Minister signed a briefing note accepting a recommendation that the claimed land be declared "surplus to educational requirements" and sold to the College. The Minister approved the sale based on an eight-year settlement period and the College remaining on the site with an eight-year lease.

In December 2016, the NSW Aboriginal Land Council made two land claims including Crown land occupied by the College. In May 2021, the land claims were refused by the Minister.

At first instance, the primary judge accepted the Minister's argument that the land was needed for an essential public purpose of education. The primary judge accepted the Minister's submission that the Department of Education's intention was to sell the land specifically to the College so that the College could continue using the site to deliver education to members of the public.

## No evidence of an "actual decision" that the land was needed for an essential public purpose

The Court of Appeal found that the primary judge had correctly identified the principles that apply to section 36(1)(c) of the ALR Act, including that the executive government is required to form a positive opinion that claimed land is needed for an essential public purpose. However, the primary judge's reasons did not disclose a finding that an "actual decision" had been made by the Government that the land was needed for the essential public purpose of education. The briefing note signed by the Minister was not sufficient. The Court of Appeal noted that no evidence was adduced by the Minister that was capable of proving that the executive government considered that the land was necessary for the public purpose of community education.

## Could the sale to the College be for an "essential public purpose"?

The Court of Appeal notably found that:

- It was implausible that the claimed land could be considered surplus to educational requirements and simultaneously qualify as land needed, or likely to be needed, for an essential public purpose, particularly in the absence of restrictions on the College's use of the site. The conditions of sale and the eight-year lease did not impose restrictions on the College's use of the site. The College could have used the site for any available private purpose, including sale.
- The Court of Appeal's decision in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2016] NSWCA 253, could not be distinguished. In that case, the Court of Appeal said that, "I would not consider that land which is proposed to be sold (whether to developers for on-sale or directly to owner occupiers) for private residential purposes would amount to land which is needed or likely to be needed for an essential public purpose." Although in the context of another limb of the definition of "claimable Crown lands", the same considerations apply in this case.
- The College's purposes were its own *private* purposes (although the provision of those services may have benefited those members of the public to whom the services were provided). The Minister's decision that the claimed land was surplus to educational requirements and could be sold to a private body for its own purposes was inconsistent with a decision of the executive government that the claimed land was needed for an essential *public* purpose.

The Court of Appeal determined that the Minister had not established that the claimed land was claimable Crown land and ordered that the land be transferred to the land council.

# NSW Land and Environment Court further clarifies meaning of "lawfully used or occupied"

The case concerned an appeal from the Minister's refusal of the Deerubbin Local Aboriginal Land Council's (DLALC) December 2009 claim over land in Mount Irvine (*Deerubbin Local Aboriginal Land Council v Minister Administering the Crown Land Management Act* [2024] NSWLEC 127).

The claimed land was part of a reserve comprising the Mount Irvine Village Hall, an open area and a tennis court. The land was reserved in 1928 for the public purpose of "For Public Hall". A tennis court was built on the land in 1935. The claimed land was vested in the Reserve Trust, which had responsibility for the care, control and management of the reserve. The applicant did not press its claim to the public hall but argued that the uses and occupation of the open area and tennis court were not lawful because they were not for the reserve purpose of "For Public Hall". The issue for the Court was whether the claimed land was divisible into the three areas, and if so, whether the open area and tennis court were being *lawfully* used or occupied.

## The divisibility issue

The Court was satisfied that the claimed land was divisible in the manner contended by the applicant because the ALR Act contemplates the possibility of claims succeeding in part. As a practical matter, the open space and tennis court were used and occupied to a different extent and in a different manner from each other and from the public hall. No characteristic of the open space or tennis court was sufficient to warrant either of them being treated as part of the whole of the claimed land.

## Lawfulness of use and occupation

The Court said that it was incumbent upon the Minister to satisfy the Court that the use or occupation of the claimed land was lawful, or "legally authorised". To be "lawful" for the purpose of s 36(1)(b) of the ALRA, the use must be authorised by, or reasonably in furtherance or ancillary to, the purposes for which the claimed land was reserved and not for "some unrelated purpose".

The Court was satisfied that the open area was being lawfully used because the activities being carried out in that space served a purpose that was either consistent with the reserve purpose or an incident of or complementary to the use of the public hall. The reservation of the land "For Public Hall" is not limited to the use of the physical buildings. Rather, it being for the purpose of "For Public Hall," the open space surrounding that structure plays a central role in facilitating and furthering the reserve purpose.

The Court was not satisfied that the tennis court was being lawfully used because the recreational activities that took place on the tennis court were not consistent with the reserve purpose, or ancillary to that purpose. The recreational sporting activities carried out on the tennis court, while undoubtedly undertaken by the local community, were sufficiently divorced from the use of the public hall so as to remove it from the ancillary sphere of the reserve purpose.

Finally, the Court considered whether the open space and tennis court were lawfully occupied.

The Court held that the open space was lawfully occupied. While there was no continuous physical presence over the entirety of the open space, this is not necessary. The evidence demonstrates that the open space was regularly maintained and beautified by both volunteers and for payment, that were either organised, or at the very least, authorised by the Trust Board. The acts of occupation were the acts of the Reserve Trust. This was more than notional occupation or occupation as a matter of constructive inference - it was occupation in fact.

The same conclusion was not drawn in respect of the tennis court, for the following reasons:

- The tennis court was open to anyone, and the Reserve Trust exercised no control over its use other than locking the tennis net in the public hall.
- Evidence of the use of the tennis court by the public were not acts that constituted occupation by the Reserve Trust. Only acts of the Reserve Trust were relevant for the purpose of determining occupation in fact.
- It was not clear to what extent acts of maintenance were carried out by or for members of the Mount Irvine community rather than the Reserve Trust.
- To the extent that quotes for repair works were obtained and grant money was sought, the work was never executed.

Accordingly, the appeal was allowed in part and the Court ordered that the land comprising the tennis court be transferred to the DLALC.

## Key insights

**La Perouse:** The High Court's finding that land is not "lawfully used" by the Crown merely by reason of the land being the subject of an existing lease and is only "lawfully used" if the land is being physically deployed for a purpose represents a significant development in case law on this issue.

**Jannali**: The Court of Appeal's decision makes it clear that the executive government is required to form a positive opinion that the claimed land is needed for an essential public purpose and there must be evidence of an actual decision or view in this regard. It is not sufficient to rely on evidence of the nature of the activities carried out on the land being consistent with the public purpose.

**Mount Irvine**: The decision confirms that claim areas are divisible. Interest holders concerned about land claim risk should turn their mind to whether the whole of the relevant land is being lawfully used or occupied, consistently with its public purpose and is actually under their control and management.

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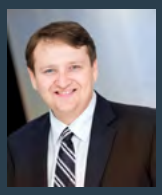
# Ashurst's national native title and Indigenous land law team



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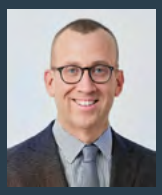

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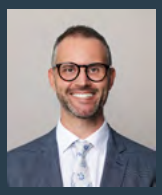

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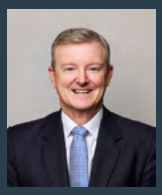

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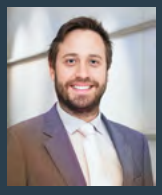

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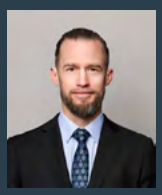

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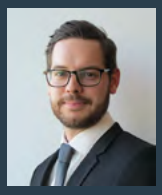

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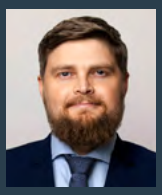
"Ashurst take time to deeply understand our business and objectives and provide advice to us on that basis. They have a team approach with a wide variety of skills and capabilities that we can draw on"

Legal 500 Asia-Pacific, 2024

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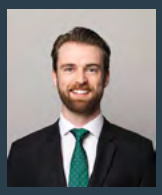

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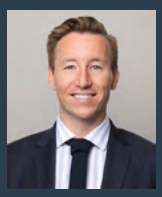

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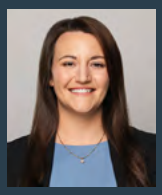

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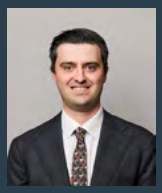

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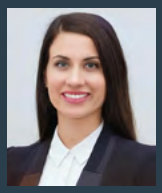

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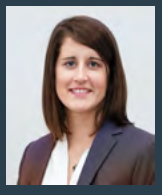

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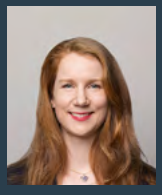

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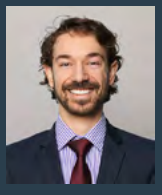

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