



NATIVE TITLE YEAR IN REVIEW 2025-2026

WHAT YOU NEED TO KNOW

October 2026

**ASHURST
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Native Title Year in Review 2025-2026 – what you need to know

26 October 2026

Welcome to a bite size version of Ashurst's annual review of native title legal developments in 2025-2026. We cover what you need to know about each issue in our 11th annual Native Title Year in Review.



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

Chambers and Partners, Asia-Pacific 2026

ALRC recommends sweeping Native Title Act changes

The Australian Law Reform Commission has released its final report, [*Fulfilling the Promise of Mabo: Reforming the Future Acts Regime in the Native Title Act 1993 \(Cth\)*](#). The Report recommends significant reforms, including a new pathway to future act validity, replacing the current “batting order” regime with impact-based categories. It also recommends upfront “redress” compensation payments for future acts.

The Report makes far-reaching recommendations about agreement-making, including the right to negotiate (RTN) process. It recommends repealing the expedited procedure (which is widely used to secure exploration tenure) and the current RTN exemption for mining tenure renewals.

If implemented by the Commonwealth Government, these recommendations would affect all parties who need land access where native title exists: Government, mining, petroleum and gas, infrastructure providers, utility companies, and renewable project proponents.

Stakeholders should remain engaged (including with their industry body) and monitor the Federal Government’s response to the Report. Consider the impact of overlapping policy developments in the cultural heritage space, including the proposed National Environment Standard for First Nations Engagement under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and possible reforms to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act).

Native title compensation

\$54M for cultural loss in McArthur River Mine native title compensation claim

The Federal Court ordered the Northern Territory Government to pay native title holders more than \$54 million compensation for the impact of the McArthur River Mine and Bing Bong Port on their native title rights and interests ([*Davey on behalf of Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory* \[2026\] FCA 153](#)) (McArthur River). The decision has not been appealed.

This was only the second time a Court has calculated the dollar value of native title compensation (the first being the High Court’s landmark [*Northern Territory v Griffiths* \[2019\] HCA 7](#) decision (Timber Creek)). This award dwarfs the \$2.5 million awarded in *Timber Creek*.

In considering economic loss, the Court applied the freehold comparison approach endorsed in *Timber Creek* and rejected the Claim Group’s case for a much larger

amount based on a hypothetical voluntary bargain that might have been reached with the mining company.

The Court would have awarded \$60 million compensation for cultural loss but reduced it by 10% to \$54 million because of a 2025 ILUA between the mining company and the Claim Group.

Federal Court creates more precedent for native title compensation (Yindjibarndi)

The Federal Court has ordered Fortescue to pay native title holders slightly more than \$150 million compensation for the impact of the Solomon Hub Mine on their native title rights and interests ([*Yindjibarndi Ngurra Aboriginal Corporation RNTBC v State of Western Australia \(No 2\)* \[2026\] FCA 585](#)) (Yindjibarndi).

While now the subject of appeal, the judgment at first instance has delivered a wealth of guidance on native title

compensation issues, particularly relevant to mining and mining tenure.

This is the third time a Court has calculated the dollar value of native title compensation (after *Timber Creek* and *McArthur River*). This award dwarfs the \$2.5 million awarded in *Timber Creek* and more than doubles the \$60 million award in *McArthur River*, in part due to the relative size of the compensation claim areas.

The Court rejected the Claim Group's primary case for \$800 million economic loss (based on a royalty-derived "exchange value" approach) and like in *McArthur River*, applied the freehold comparison approach endorsed in *Timber Creek* to value economic loss at \$136,757.

For the first time, the Court found that \$217,152 compound interest was payable on the economic loss component of the award from the date of the compensable acts, given the Yindjibarndi People's clear evidence demonstrating how the funds would have been used and invested over time.

The Court awarded \$150 million compensation for cultural loss, significantly less than the Claim Group's claim for \$1 billion. The Court applied the principles decided in *Timber Creek* and considered many of the same issues as *McArthur River*.

This is the first case to consider the compensation pass through in section 125A of the *Mining Act 1978* (WA). The Court rejected Fortescue's argument about the constitutional invalidity of that provision and concluded that Fortescue is liable to pay the compensation. The Yindjibarndi advanced numerous other arguments relating to various components of economic loss and cultural loss, most of which were refused. As a result, the judgment considered and resolved a broad range of possible arguments, significantly enhancing its precedent value.

Each of Yindjibarndi, the State and Fortescue have appealed aspects of the judgment to the Full Federal Court.

Other native title compensation developments

There are only a handful of active native title compensation claims across Australia despite over 300 native title groups having a statutory right to seek compensation. No new claims have been filed in the Federal Court in the last 12 months.

The active claims we are tracking continue to progress slowly. The Gumatj and related claims over the Gove Peninsula are provisionally listed for hearing in 2027, though the Indigenous parties have been unable to agree on who holds native title in the area. The Pitta Pitta claim has reached an in principle settlement but final resolution is delayed by disputes between third party claimants and the applicant.

The *Yindjibarndi* and *McArthur River* decisions will have wide-ranging implications for the assessment of compensation for mining and resource extraction projects, and more generally for the negotiation of future native title agreements. Monitor the outcome of the *Yindjibarndi* appeal.

Consider whether the benefits provided under existing agreements are likely to be considered as a set off in the calculation of cultural loss associated with any relevant project.

Monitor the Gumatj and related proceedings over the Gove Peninsula. If the matter proceeds to hearing in 2027, it will be the next major contested compensation claim to be determined.

Native title connection decisions

There were two Full Federal Court and five single judge decisions relating to connection in the last year.

In [*Blucher on behalf of the Gaangalu Nation People v State of Queensland*](#) [2025] FCAFC 177, the Full Federal Court set aside a negative determination of native title, finding that the primary judge had applied the wrong tests to traditional laws and customs and to connection under the *Native Title Act 1993* (Cth). *Gaangalu FC* warned against overemphasis on concepts of "society" and explained how adaptation of traditional laws and customs is permissible. These findings were applied in several later decisions.

In [*Richards v State of South Australia \(Far West Coast Sea Claim\)*](#) [2026] FCAFC 97, the Full Federal Court upheld the trial judge's finding that native title existed only in that part of the sea claim area that was physically accessible from the land at the time of sovereignty, rejecting as insufficient evidence that native title existed "as far as the eye can see".

Several decisions resolved disputes between native title holding groups about overlap or boundary areas between already determined native title land areas. These decisions lead to some surprising outcomes for the parties.

Be aware that the law on connection is still developing, with the focus moving to second generation issues – the areas between determined claims and sea areas adjoining determined claims. Don't assume that the Federal Court will accept pragmatic solutions just because the parties have agreed. The judge must be satisfied that the orders proposed reflect the native title landscape, and can decline to make the orders.

Extinguishment and validity of tenure still being litigated

The law in relation to extinguishment of native title based on its tenure history continues to be contested. Three recent Federal Court decisions have held that a compulsory acquisition, a resumption and a vesting of land in the Crown extinguished native title. Two of these decisions considered whether Torrens title registration itself can extinguish native title separately from the earlier dealing and also dealt with issues relating to general law validity.

Non-claimant applications remain a source of authority relating to extinguishment of native title as applicants rely on historical extinguishment to found claims for determinations that native title does not exist.

Do not assume that a tenure history review is straightforward. It can be, until it isn't. When investigating a tenure history to determine whether native title has been extinguished, remember that general law validity must be established before extinguishment is considered.

Developments relating to the RTN, expedited procedure and section 47B

Second mining lease renewals and the right to negotiate

The Full Federal Court in [*Forrest on behalf of the Nangaanya-ku Native Title Claim Group \(Part B\) v State of Western Australia*](#) [2025] FCAFC 160 upheld the primary judge's construction of section 26D(1) of the *Native Title Act*, confirming that the phrase "earlier right to mine" can be read in the plural.

The WA Government guidance note, [*Applying for a second renewal of a mining lease made in accordance with the Mining Act 1978*](#), confirms that the second renewal of mining leases is not exempt from the future act provisions of the *Native Title Act*. This guidance note remains unchanged with no further amendments.

Mining and petroleum leases prevent section 47B applying

Two recent Federal Court decisions have held that a WA mining lease and a Queensland petroleum lease are each a "lease" for the purposes of section 47B(1)(b)(i) of the *Native Title Act* that prevent historical extinguishment from being disregarded ([*Gilla on behalf of the Yugunga-nya People v State of Western Australia \(No 5\)*](#) [2026] FCA 1255) and ([*Doyle on behalf of the Iman People #4 v State of Queensland \(No 2\)*](#) [2026] FCA 1334).

These decisions do not affect existing authorities confirming that exploration licences and permits are not "leases" within the meaning of that term in section 47B(1)(b)(i), but may engage section 47B(1)(b)(ii) in some cases.

Expedited procedure challenge heads to the High Court

The Full Federal Court in [*Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia*](#) [2026] FCAFC 7 has confirmed that a government party's inclusion of an expedited procedure statement in a section 29 notice under the *Native Title Act* is not open to judicial review. The Full Court held that including the statement is a procedural step that triggers statutory consequences. It is not a substantive decision about whether the act attracts the expedited procedure. Instead, native title parties can challenge the statement by objecting to the NNTT.

On 11 June 2026, the High Court granted [*special leave*](#) to appeal. The appeal gives the High Court its first opportunity to consider a line of authority that dates back to 2001.

Costs at the crossroads: native title and section 85A

The default position under section 85A(1) of the *Native Title Act* that each party bears its own costs continues to be robustly applied, and the threshold for adverse costs orders remains high. The Federal Court has confirmed that conduct amounting to an abuse of process, particularly the repeated filing of fatally flawed or late claims, will attract adverse costs orders under section 85A(2).

A significant new question has emerged about whether the Court has the power to award costs where both parties are funded by a native title representative body and neither has a personal liability for costs. In [*Fagan on behalf of the Wadawurrung Native Title Claim v State of Victoria \(No 2\)*](#) [2026] FCA 11 the Court held that it did not.

The general costs discretion under section 43 of the *Federal Court of Australia Act 1976* (Cth) remains relevant in native title matters resolved outside the *Native Title Act* framework, where the ordinary principle that costs follow the event may apply.

The High Court's refusal of special leave in [*State of Queensland & Anor v Blucher & Ors on behalf of the Gaangalu Nation People & Ors*](#) [2026] HCADisp 168 leaves standing a Full Court costs order that departed from the section 85A(1) default on appeal, potentially encouraging costs applications by successful appellants.

Metropolitan native title claims – Melbourne's Wurundjeri Woi-Wurrong claim in the context of other capital city claims

On 30 October 2025, the Wurundjeri Woi-Wurrong People filed a native title claim over Melbourne and the surrounding region, which is now registered. This is the fifth capital city claim, and the first since the Perth determination in 2021.

Past capital city claims have produced three outcomes: a determination at trial that native title does not exist (Darwin and Brisbane); a consent determination of native title over parts of the claim area (Adelaide); and a consent determination of no native title as part of a broader settlement (Perth).

Victoria's settlement framework under the *Traditional Owner Settlement Act 2010* (Vic) (TOS Act) and the November 2026 Victorian election may shape the outcome.

Developments relating to Aboriginal cultural heritage and First Nations engagement

Federal law reform

Reform to the ATSIHP Act remains unresolved.

We understand that the Commonwealth Government intends to progress this in tandem with the National Environment Standard for First Nations Engagement (FNES) under the reformed EPBC Act.

The FNES has not yet been released for public consultation. It is expected to establish minimum requirements for First Nations engagement in EPBC Act assessment and approval processes.

State law reform

In Western Australia, the review into the State Government's native title and cultural heritage processes produced 25 recommendations for systemic reform, including enforceable minimum requirements for tenure granted under the expedited procedure.

Tasmania has released a draft Aboriginal Heritage Bill for consultation, which would replace the ageing *Aboriginal Heritage Act 1975* (Tas).

Commonwealth cultural heritage protection applications are on the rise

The number of applications under sections 9 and 10 of the ATSIHP Act has increased significantly in the last 12 months, reversing a slowdown in applications gazetted since 2021.

Applications for protection under the ATSIHP Act enable the Federal Minister for the Environment (or in certain circumstances, authorised officers) to make a declaration for the protection and preservation of significant Aboriginal areas and objects from a threat of "injury or desecration". A successful application can stop a project or activity from proceeding.



STOP PRESS

On 14 October 2026, the Federal Court handed down its decision in [*LFB Resources NL v Minister for the Environment and Water \(No 3\)*](#) [2026] FCA 1504, upholding a judicial review challenge brought by LFB Resources NL (a subsidiary of Regis Resources) against the declaration made in August 2024 under section 10 of the ATSIHP Act by the then Minister for the Environment and Water, Tanya Plibersek. The declaration had declared part of the McPhillamys Gold Project site in New South Wales to be a significant Aboriginal area to be preserved and protected from injury or desecration. Ashurst Perkins Coie acted for LFB Resources in the proceedings.

The declaration impacted a critical part of the project development site, namely the proposed tailings storage facility.

The Court determined the declaration was invalid. It indicated that the appropriate remedy would be a formal declaration of invalidity, with the section 10 application remitted to the current Minister for reconsideration and determination according to law.

Treaty update

Victoria continues to lead Treaty progress, and on 13 November 2025, Victoria became the first Australian jurisdiction to sign a Statewide Treaty with First Peoples.

The Victorian *Statewide Treaty Act 2025* (Vic) establishes Gellung Warl, a permanent representative and deliberative body for First Peoples in Victoria comprising three arms: the First Peoples' Assembly (representative and decision-making body), Nginma Ngainga Wara (Outcomes and Justice Commission), and Nyerna Yoorrook Telkuna (Office of Truth-telling and Healing).

The *Statewide Treaty Act* does not change the *Native Title Act*, the TOS Act or, at this stage, existing land access frameworks. However, there will be changes. New Victorian bills must include a statement of compatibility with Treaty principles, and Treaty consultation obligations will inform policy development.

Other jurisdictions have made varying progress. NSW is concluding a 12-month Treaty consultation process, South Australia has announced funding for a Truth-telling and Treaty Commission, and Tasmania is progressing Truth-telling. Queensland and the Northern Territory have abandoned Treaty plans.

Native title and cultural rights to water

Native Title Holders have won a High Court appeal in their challenge to a 30-year groundwater licence in the Northern Territory ([*Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* \[2026\] HCA 23](#)). Relying on administrative law principles, the High Court held that the Native Title Holders were denied procedural fairness because they were not given notice of a licence condition that allocated the Aboriginal cultural values impact assessment to the proponent rather than to the Native Title Holders, as they had requested.

In *Yindjibarndi*, the impact of groundwater extraction on native title rights and interests was included in the calculation of compensation for cultural loss.

The Australian Law Reform Commission has recommended enhanced procedural rights for Native Title Holders affected by the grant of water licences.

Sentencing

First prison sentence imposed under NT Sacred Sites Act

On 28 January 2026, the Darwin Local Court handed down the first prison sentence in the 36-year history of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). Kimberley Smith mined more than eight tonnes of turquoise from the registered Putyenge Sacred Site on Ammaroo Station, and was sentenced to four months' imprisonment (suspended for 18 months) for working on a sacred site in breach of section 34 of the *Sacred Sites Act*.

Mrs Smith was also fined \$28,000 for two breaches of the *Mineral Titles Act 2010* (NT) and banned from entering the Northern Territory for 18 months.

Cultural harm now a factor in environmental sentencing

For the first time in the context of forestry offences, the NSW Land and Environment Court considered cultural harm to the Gumbaynggirr Nation as a relevant sentencing consideration for offences involving the unlawful felling of nine protected trees in Wild Cattle Creek State Forest ([*Environment Protection Authority v Forestry Corporation of New South Wales \(No 3\)* \[2026\] NSWLEC 25](#)).

The Court ordered that \$450,000 be paid to the Yurruungga Aboriginal Corporation (rather than the State) to fund restorative justice activities. These activities included a healing ceremony, a biocultural repair plan, cultural mapping for an Indigenous Protected Area, and establishing the Gumbaynggirr Guardians ranger program.

This decision reflects a growing trend across Australian environmental legislation to recognise and redress cultural harm to First Nations People in environmental decision-making, including recent reforms to the *Protection of the Environment Operations Act 1997* (NSW), *Water Management Act 2000* (NSW) and the EPBC Act.

Meaning of Claimable Crown Lands in NSW Aboriginal Land Rights Act

Three recent decisions of the NSW Land and Environment Court have further clarified the scope of the definition of "claimable Crown lands" under s 36(1) of the *Aboriginal Land Rights Act 1983* (NSW) (ALR Act) and continue to narrow the grounds on which the Minister can resist Aboriginal land claims.

NSW Parliament has passed the *Crown Land Management Amendment (Statutory Review) Bill 2026*. The Bill establishes, amongst other things, new powers for the Minister to validate and vary holdings under the *Crown Land Management Act 2016*. The exercise of such powers may pose significant challenges for existing and future claims made under the ALR Act in terms of satisfying the definition of "claimable Crown lands".

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