



# NATIVE TITLE YEAR IN REVIEW 2025-2026

October 2026

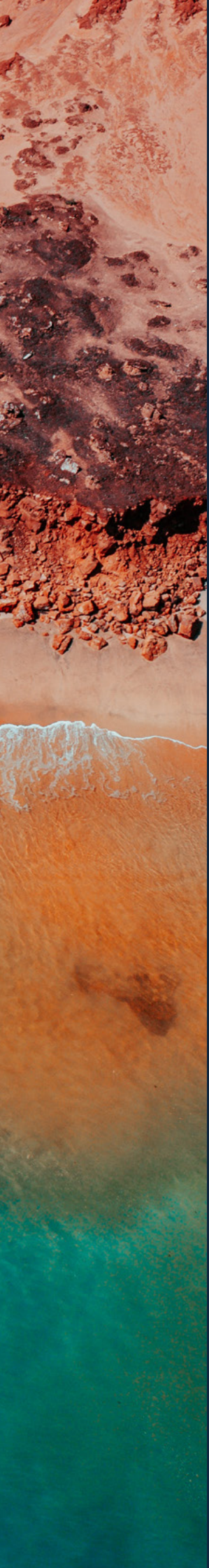
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"I am confident that the firm provides the most comprehensive and contemporary understanding of Indigenous land law in the Australian context."

*Chambers and Partners, Asia-Pacific 2026*

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# Foreword

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

We are delighted to publish our eleventh annual *Native Title Year in Review*.

Last year we reflected on the changes in this critical area of law and practice in the decade since publication of our first edition of *Native Title Year in Review* in 2015, most notably the ever-increasing role that First Nations communities play in relation to land use on their country.

The last 12 months has seen two significant native title compensation decisions that finally build on the High Court's 2019 *Timber Creek* decision to set out the method for calculating the dollar value of native title compensation (*Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia (No 5) (McArthur River Project Compensation Claim)* [2026] FCA 153 (McArthur River) and *Yindjibarndi Ngurra Aboriginal Corporation RNTBC v State of Western Australia (No 2)* [2026] FCA 585 (Yindjibarndi). *Yindjibarndi* is subject to an appeal, but in the meantime these decisions are already having an impact on claim resolution and agreement-making.

Progress on the policy front has been slow. Reform to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSHP Act) remains unresolved, and the Commonwealth Government is yet to release a draft National Environment Standard for First Nations Engagement under the reformed *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The Commonwealth Government is also yet to respond in any detail to the Australian Law Reform Commission's report *Fulfilling the Promise of Mabo: Reforming the Future Acts Regime in the Native Title Act 1993* (Cth) *Final Report*, which recommends sweeping changes to the future acts regime in the *Native Title Act 1993* (Cth).

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

Our national Ashurst team is committed to remaining at the forefront of developments in these fields.

In this regard we were very proud to have Libby McKillop join our partner ranks this year, reflecting her deep native title expertise and exceptional practice.

We were also delighted to combine with Perkins Coie on 28 June 2026, becoming Ashurst Perkins Coie – a global law firm with 52 offices worldwide. We have found many

like-minded colleagues in Perkins Coie's Native American law practice, which closely complements our native title and First Nations practice here in Australia. Our US colleagues advise on tribal lands, treaty rights, sacred sites, land claims, tribal consultation, intergovernmental agreements, and tribal co-management arrangements. Together, our combined team of native title and First Nations law experts shares expertise across jurisdictions, ensuring our clients benefit from a truly integrated global perspective.

Another highlight was being recognised again 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.

As always, we look forward to working with our commercial, government and First Nations clients in the coming year to find practical and respectful solutions addressing native title and cultural heritage matters on projects around Australia and beyond. We are so grateful for the support and collegiality of our clients, colleagues and friends across the sector, with whom we 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 2025-2026 publication are current as of 30 September 2026.



**Tony Denholder**  
Partner



**Clare Lawrence**  
Partner



**Andrew Gay**  
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**Libby McKillop**  
Partner





"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*

# Fast facts

18



New determinations that native title exists

560

Total positive native title determinations around Australia\*

19

New claimant applications filed

38

New ILUAs registered

3.6m km<sup>2</sup>

Native title land around Australia\*\*



Active compensation claims around Australia\*

130

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



1539

Total registered ILUAs around Australia\*

12



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

68

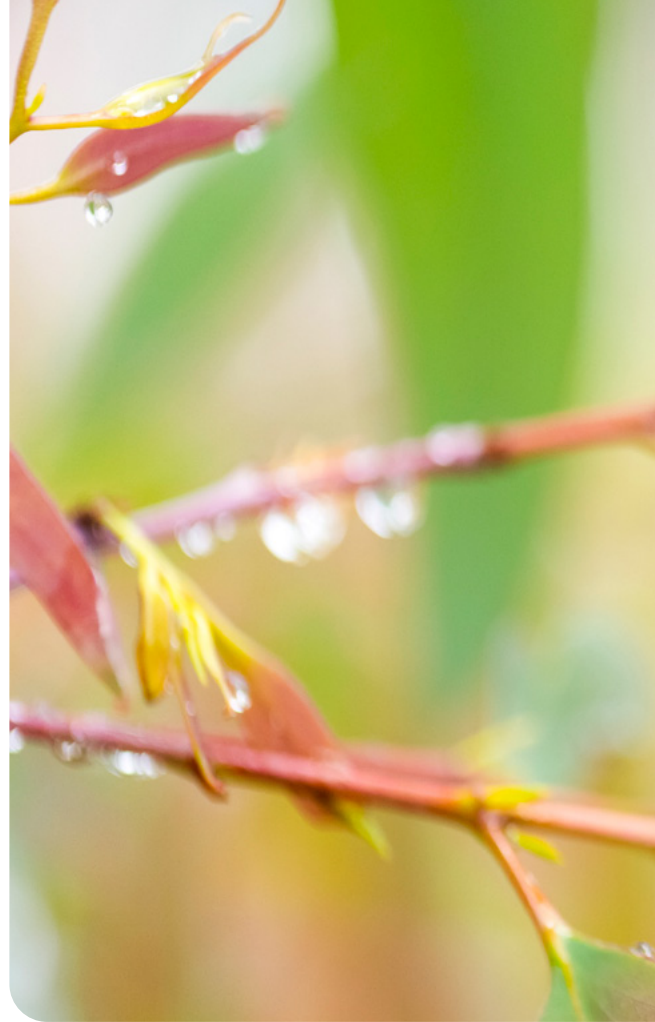
Section 31 agreements (RTN Agreements) received by the NNTT

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 2025 calendar year

\*as at 13 October 2026

\*\*as at 30 June 2026

# ALRC recommends sweeping Native Title Act changes



## What you need to know

- 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. These include 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.

## What you need to do

- 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 EPBC Act and possible reforms to the ATSIHP Act.



## ALRC Report recommends major reform for the Native Title Act's future acts regime

The Australian Law Reform Commission's March 2026 report ([\*Fulfilling the Promise of Mabo: Reforming the Future Acts Regime in the Native Title Act 1993 \(Cth\) \(ALRC Report 144\)\*](#)) (Report) represents the first comprehensive review of the future acts regime in the *Native Title Act* since the current regime was introduced by the post-Wik amendments to the *Native Title Act* in 1998.

Across more than 600 pages, the Report makes 86 recommendations that would radically transform the future acts regime nationwide if legislated by the Commonwealth.

The Report follows the May 2025 [Discussion Paper](#) and November 2024 [Issues Paper](#), which we wrote about in our *Native Title Year in Review 2024-2025* article, "[Australian Law Reform Commission releases Discussion Paper in future acts regime inquiry](#)". The Report responds to widespread calls for reform, including recommendations from the Joint Standing Committee on Northern Australia's [A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge](#) released in October 2021.

The recommendations respond to the Commission's overarching view that:

The future acts regime is not only unfair and inequitable but key aspects of it are also discriminatory because they deny to native title holders' equality before the law. That denial is in breach of Australia's international obligations; is out of alignment with s 10(1) of the *Racial Discrimination Act 1975 (Cth)*; is contrary to the motivating rationale of the High Court's decisions in *Mabo v Queensland (No 1)* and *Mabo v Queensland (No 2)*; and is out of accord with the intention of the NTA, as stated in the preamble (page 13 [Summary Report](#)).

Two key themes are reflected in the Report:

- application of the "equivalency principle", designed to ensure native title holders have equivalent rights to freeholders; and
- up-front "redress" or compensation, payable when future acts are done.

## A new impact-based future acts regime

The Report's most far-reaching recommendation replaces the current future acts "batting order" with a new impact-based model. Under this approach, the process for validating future acts depends on their impact on native title rights and interests, not the type of act or underlying land tenure.

Five main categories are proposed, as set out below.

| Group | Name                                | Procedural rights                                                                                                                                                   |
|-------|-------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A     | <b>Assessed limited impact acts</b> | Notification and opportunity to comment                                                                                                                             |
| B     | <b>Assessed lower impact acts</b>   | Opportunity to engage in consultation with relevant government party and/or future act proponent                                                                    |
| C     | <b>Negotiated lower impact acts</b> | For determined land: procedural rights and other conditions as agreed by the relevant prescribed body corporate (PBC), government party and/or future act proponent |
| D     | <b>Higher impact acts</b>           | Right to negotiate                                                                                                                                                  |
| E     | <b>Equivalency future acts</b>      | Same procedural rights as would be afforded to a holder of freehold title in the same circumstances                                                                 |

It is proposed that the Commonwealth Government would then make regulations to help determine a future act's category, following consultation and recommendations from the National Native Title Tribunal (NNTT). Relevant factors include major land disturbance or material impact on cultural rights.

The regulations could set conditions that the relevant State or Territory must impose on the grant of a future act to qualify as "assessed lower impact". Some conditions can be "validating", meaning that non-compliance leads to invalidity. Regulations can also require fair and just "redress" payments within a reasonable time.

## Alternative proposal – reforms to existing "batting order"

The Report acknowledges that the Government may not wish to implement a full-scale replacement of the future acts regime, and therefore includes recommendations for less drastic changes to several future act pathways in the *Native Title Act*.

These changes would either repeal or limit existing future act pathways or enhance the procedural rights available to native title parties. Of particular note are the recommendations that: (1) the taking of large amounts of water should trigger the RTN process; and (2) Subdivision K (Facilities for services to the public) should be limited to facilities that are "an essential service, or to facilitate the delivery of an essential service, to the general public".

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

The Commission originally proposed Native Title Management Plans as a new pathway to enable future acts. Under this model, a PBC could develop a plan for its determination areas, setting out alternative procedures for validating future acts tailored to local circumstances.

The Commission has scaled back this proposal after submissions questioned its workability. Now called "Native Title Plans", they must go through NNTT registration and remain voluntary unless the relevant State or Territory agrees.

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

The Report recommends significantly overhauling the RTN process by expanding the types of future acts that trigger it and changing how it works. The table below summarises the major recommendations.

| ALRC's recommendations about the right to negotiate process |                                                                                                                                                                                                                                                                                                                                                      |
|-------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Time</b>                                                 | Minimum good faith negotiation period increases from six to 12 months                                                                                                                                                                                                                                                                                |
| <b>Early determination procedure</b>                        | Native title party can apply to the NNTT after three months seeking a determination that the future act cannot be done                                                                                                                                                                                                                               |
| <b>Good faith</b>                                           | <ul style="list-style-type: none"> <li>• Good faith standards prescribed in legislation</li> <li>• Reversal of onus to prove negotiation in good faith</li> <li>• If a negotiation party has twice failed to negotiate in good faith with respect to a particular future act, NNTT may relieve parties of obligation to further negotiate</li> </ul> |
| <b>Separate issues referral</b>                             | Introduces an option for parties to refer separate issues for resolution by the NNTT or independent third party                                                                                                                                                                                                                                      |
| <b>Section 39 criteria</b>                                  | More robust criteria focussed on payment of "redress"                                                                                                                                                                                                                                                                                                |
| <b>Benefit-sharing conditions</b>                           | NNTT can determine financial conditions, including benefit-sharing conditions (this is currently precluded by section 38(2) of the <i>Native Title Act</i> )                                                                                                                                                                                         |
| <b>Agreed arbitrator</b>                                    | Introduces an option for parties to agree consent arbitration conducted by an agreed arbitrator                                                                                                                                                                                                                                                      |
| <b>Reduced Ministerial oversight</b>                        | All mandatory reporting to the Minister, and the Ministerial "step-in" powers, removed                                                                                                                                                                                                                                                               |
| <b>Increased case management assistance</b>                 | Increased role for NNTT in more proactive case management                                                                                                                                                                                                                                                                                            |
| <b>New RTN triggers</b>                                     | <ul style="list-style-type: none"> <li>• Renewals</li> <li>• Offshore acts</li> <li>• Large water takes</li> </ul>                                                                                                                                                                                                                                   |
| <b>Costs</b>                                                | Ability for native title parties to recover reasonably incurred costs participating in mediation and NNTT processes                                                                                                                                                                                                                                  |

Where parties cannot reach agreement and the matter goes to arbitration, the Report recommends significant changes:

- The NNTT can determine financial conditions, including benefit-sharing conditions. This is a major change from the current system, where such conditions are precluded in section 38(2) of the *Native Title Act*.
- The NNTT must not determine that the future act can be done without the native title parties' agreement unless it is satisfied that the environmental, economic, social, or cultural impact of the act on the list of factors will be addressed by a condition placed on the determination that fairly and justly (within a reasonable time) provides "redress" and "mitigation". This represents a change in the practical evidentiary burden – the NNTT must be satisfied of these things or cannot make a determination. Currently, the NNTT simply has a list of matters to consider and no requirement for some to be weighed more heavily than others.
- Currently, section 39 includes consideration of the economic or other significance to Australia, the State or Territory and local area plus the public interest and "any other matter". These are replaced with a requirement to consider the "just and compelling requirements of the nation". This is a remarkably high bar.
- If the NNTT determines that a future act cannot be done, there will be a five-year moratorium on the grant of substantially similar future acts in the same location (without first obtaining leave of the NNTT).

The Report recommends the following for all future act agreements:

| Recommendations for all agreements    |                                                                                                                                                                                                                                                                                                                                                                                    |
|---------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Prohibited terms in agreements</b> | Certain clauses in agreements are void and unenforceable (including so-called "gag clauses" and clauses restricting access to remedies under cultural heritage legislation)                                                                                                                                                                                                        |
| <b>Management of funds</b>            | Any clauses which limit or restrict how native title parties administer or manage payments are prohibited, void and unenforceable                                                                                                                                                                                                                                                  |
| <b>Review</b>                         | A model periodic review clause deemed to apply in future act agreements with a term of more than five years                                                                                                                                                                                                                                                                        |
| <b>Dispute resolution</b>             | <ul style="list-style-type: none"> <li>• Dispute resolution clause must include process for consultation, mediation, or conciliation (which may incorporate traditional processes) and, should those processes fail, resolution by arbitration conducted by the NNTT or an agreed arbitrator</li> <li>• Provide for an appeal on a question of law to the Federal Court</li> </ul> |
| <b>Federal Court jurisdiction</b>     | Federal Court empowered to construe and make a binding declaration as to the meaning of a future act agreement.                                                                                                                                                                                                                                                                    |

## Expedited procedure – repeal or amend

The Report recommends repealing the expedited procedure because it concluded that the procedure does not operate effectively, efficiently, or fairly. Instead, exploration would fall under the recommended impact-based scheme.

The Report rejects the assumption that exploration has low impact. Exploration activities vary materially depending on disturbance, location, vegetation clearing, and proximity to cultural sites, watercourses, and communities. If the regulations categorise exploration as “higher impact”, the RTN would apply.

If the expedited procedure remains, the Report recommends amendments including requiring consultation with native title parties and changes to the section 237 criteria.

## Renewals – no longer excluded from the RTN

The Report recommends repealing section 26(1) of the *Native Title Act* so that mining tenure renewals are no longer excluded from the RTN. The Report says that the current system enables serious and ongoing infringements of native title rights and interests and is discriminatory because ordinary title holders would have consent rights or other procedural protections for renewals.

The Report recommends that the “equivalency principle” apply to renewals. Native title parties’ procedural rights would be no less favourable than those afforded to ordinary title holders. Where an agreement validating the original grant (such as an Indigenous Land Use Agreement (ILUA) or section 31 agreement) provides for renewal, no procedural rights would apply. Without such an agreement, the renewal would be subject to the *Native Title Act* like a new grant. For mining, this means the RTN or an ILUA, with no guarantee of renewal.

## Upfront compensation or “redress”

The *Native Title Act* currently provides for compensation for any loss, diminution, impairment, or other effect on native title rights and interests. The Report notes that compensation is retrospective, assessed by reference to effects on those rights. It says that for the vast majority of future acts validated over the last 32 years, native title holders have not received a single dollar in compensation (note: the Report was finalised before the Yindjibarndi decision).

“Redress” is not currently used in the *Native Title Act* but features prominently in the Report. The Commission defines “redress” as remediation for adverse impacts on Indigenous Peoples’ lands, territories, or resources. It includes benefit-sharing. The Commission says benefit-sharing and remedies are distinct: Indigenous Peoples have an entitlement to share in benefits from activities on their traditional territories, separate from any compensation entitlement for damages. For “redress” to be effective, it must be timely – provided within a reasonable time of the adverse effects being experienced.

This is reflected in the Report’s recommendations in the following ways:

- **Timely redress:** NNTT can determine conditions that apply to a limited impact or low impact future act providing “timely, fair, and just redress” for the adverse effect of a future act.
- **Upfront payment:** NNTT would set upfront redress conditions for limited impact and low impact future acts. Part 2 Division 5 compensation applications would remain available to adjust the extent of upfront redress.
- **Validity and enforcement:** The conditions would attach to the future act and be enforceable against the proponent or government party doing the act.
- **Pass through:** Enable pass-through for all future acts, with residual government liability where recovery from the proponent is not reasonably practicable.

# Statutory obligations, compliance, and enforcement

The Report recommends measures to address gaps in compliance and enforcement, as follows:

- **Express statutory obligations:** each procedural right and entitlement has a corresponding obligation. Non-compliance with obligations will be subject to the recommended new civil remedy regime.
- **Invalidity:** a future act will be invalid if there is failure to comply with certain statutory procedures or a “validating” condition and can also be declared invalid in some circumstances.
- **Civil enforcement regime:** designed to address non-compliance with *Native Title* Act obligations. Remedial and compliance powers would include injunctive relief on an interlocutory or final basis, declarations that a future act has been done invalidly, orders rectifying invalidity, compensation awards, and pecuniary penalties. The civil remedy regime would apply to the enforcement of the procedural rights of the future acts regime, conditions in regulations relating to the categorisation of future acts under the impact-based scheme, conditions placed upon the doing of a future act by a determination of an arbitral body, entitlements and obligations in future act agreements, and determinations made pursuant to a dispute resolution clause in a future act agreement.



## Key insights

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These recommendations, if implemented, 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.

The recommended replacement of the existing “batting order” with an impact-based regime could create unworkable complexity and uncertainty about the categorisation of future acts, leading to delays, legal challenges, and increased costs.

Several recommendations will particularly affect the energy and resources industry, including the repeal of the expedited procedure, the removal of the existing protection for renewals and the additional requirements for the RTN process. These changes would substantially increase native title parties’ bargaining power and heavily promote agreement-making.

Even on the alternative model, the additional consultation requirements and expanded application of the right to negotiate process would have a major impact on state and local government development, public infrastructure, and primary production future acts. By contrast, the impact on major energy and resources projects (which already commonly reach agreements with native title holders) is likely to be less significant.

The Commonwealth has committed to “consider the report’s 86 recommendations and ... to working with First Nations communities and key sectors”, but has not responded to the recommendations in the Report in any detail. This will be an area to monitor.

*Native Title Act* reform presents significant complexity given the range of stakeholders and the need to balance diverse interests. The Government must consider the Commission’s recommendations alongside other concurrent reforms, including the proposed National Environment Standard for First Nations Engagement under the reformed EPBC Act and possible amendments to the ATSIHP Act. The timing and scope of any *Native Title Act* reform will depend on the Government’s broader legislative priorities.



**Authors:** Tony Denholder, Partner and  
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# \$54M for cultural loss in McArthur River Mine native title compensation claim

## What you need to know

- 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.

## What you need to do

- Consider whether the benefits provided under existing agreements with Traditional Owner groups are likely to be considered as a set off in the calculation of cultural loss associated with any relevant project.
- Consider the Court's findings in the context of the later decision in [\*Yindjibarndi Ngurra Aboriginal Corporation RNTBC v State of Western Australia \(No 2\)\* \[2026\] FCA 585](#) (Yindjibarndi) and monitor the appeal in that matter.
- Consider the Court's findings in both decisions about the matters affecting the calculation of economic loss and cultural loss for future negotiations with Traditional Owners about the benefits payable in relation to particular projects. Traditional Owner groups will no doubt do the same.

# The compensation claim and the development of the McArthur River Mine

The Northern Territory Government and Mount Isa Mines Limited (MIM) entered into the McArthur River Project Agreement in 1992 to facilitate the development, construction and operation of the McArthur River Project, which was ratified by the *McArthur River Project Agreement Ratification Act 1992* (NT) (*Project Act*).

The McArthur River Project includes an open-cut zinc-lead-silver mine, a road and a coastal port at Bing Bong.

The Gudanji, Yanyuwa and Yanyuwa-Marra Peoples hold non-exclusive native title rights and interests over the McArthur River pastoral lease, which includes the project area ([Ngajapa v Northern Territory of Australia \[2015\] FCA 1249](#)).

In 2020, the Claim Group brought a claim for compensation from the Northern Territory for the extinguishment or diminution of their native title rights and interests as a result of various acts that facilitated the development of the McArthur River Project including the Bing Bong Port. Those acts included the grant of mineral leases, 2007 legislation validating the conversion from underground mining to open-cut mining, the grant of permits for dredge spoil storage at the port, construction of a connecting road and the grant of a pipeline licence.

The *Project Act* was enacted before the *Native Title Act* and did not expressly deal with the rights and interests of native title holders. However, it did provide that the Territory was liable to pay compensation to remedy any acquisition of property on other than “just terms”.



## The Federal Court's compensation order

The Federal Court ordered that the Claim Group was entitled to compensation under the *Project Act* in relation to the grant, validation and regrant of several mining leases, the grant of non-pastoral use permits at the Port, the construction of a road from the mine to the Port and the grant of a pipeline licence.

The compensation amounts were as follows:

- Economic loss = \$743,408
- Pre-judgment interest on compensation for economic loss from the date of the compensable acts, in accordance with s 51A of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) = \$1,947,316.65
- Cultural loss = \$54 million (\$60 million reduced by 10% to reflect the December 2025 ILUA between the Claim Group and the mining company)

The compensation claim was made under the *Project Act*. However, in resolving this claim, the Court was guided by and applied the principles established by the High Court in *Timber Creek*.

## Statutory entitlement to compensation

The Court first considered the Claim Group's statutory entitlement to compensation, which arose under section 4B(1) of the *Project Act*. It provides:

To the extent that a relevant legislative or administrative act results in the acquisition of property on terms that would not (apart from this section) be just, the Territory is liable to pay compensation sufficient to remedy the injustice.

“Acquisition of property” is defined under the *Project Act* as including the extinguishment or diminution of an interest in or right in relation to land and any effect on such an interest or right, being an effect of a kind referred to in section 174B or 174D of the *Northern Territory Mining Act* in relation to private land.

The Claim Group and Northern Territory Government were in dispute about a number of liability issues under this compensation regime. The Court made several findings about whether particular dealings were “acquisitions of property” that provide useful guidance when considering whether a dealing is a “future act” under the *Native Title Act*. This is because the definition of “acquisition of property” in the *Project Act* is similar to the definition of a “future act” (ie an act that affects native title). We do not consider those issues in this article.

# Assessment of compensation for economic loss

The Court applied the unencumbered freehold value comparator approach endorsed by the High Court in *Timber Creek* and assessed economic loss (generally as at 30 June 1993) at \$743,408, with an entitlement to interest.

The Court rejected the Claim Group's primary case on economic loss. They argued that economic loss is measured by the loss of what the Claim Group could fairly and justly have demanded, in a hypothetical voluntary bargain, for their agreement to the infringement of their native title rights by the grant of the mineral leases. This might be, for example, a revenue sharing arrangement negotiated between the Claim Group and the Northern Territory.

The Court rejected this case on a number of grounds. The Court noted that the economic loss component of native title compensation is for an infringement of the Claim Group's native title rights and interests. It is not directed at a bargain encompassing access to minerals or royalties in which the native title holders have no interest, or compensation for loss of a process of negotiation. It is not concerned with compensation for the loss of any opportunity that a native title holder may have had to engage in a statutory process (eg the right to negotiate under the *Native Title Act*) about the grant of a compensable act because statutory rights do not form part of the bundle of native title rights and interests.

The Court said (at [566] and [567]):

The approach endorsed by the High Court in *Griffiths HC* is workable, based on orthodox principles and open to consistent application. The plurality's encouragement of the need for efficiency and simplicity in the approach to economic loss valuation (at [92]) in such native title compensation claims must be respected and embraced.

Consistency in an approach to compensation is also more likely to provide workable parameters for consensual negotiations, empowering and assisting claim groups and other parties to agree compensation without the uncertainty of expensive, divisive and time-consuming litigation.

The Court ultimately found that the freehold value of the claim areas the subject of the established compensable acts as at 30 June 1993 was \$1,369,500. This encompassed the freehold valuations in relation to each of MLNs 1121-1126, the pre-1996 non-pastoral use permits, the relevant part of the Road and the relevant part of the Pipeline Licence area.

The Court then considered what percentage reduction should be applied to the freehold value to take into account the nature of the native title rights and interests in this case. It said that this required an evaluative judgment of the comparative limitations on the non-exclusive title relative to a full exclusive native title and noted that the value of the non-exclusive rights in *Timber Creek* was 50% of freehold value.

The Claim Group's native title rights and interests are non-exclusive because the right to exclude others was extinguished by the grant of historical pastoral leases prior to the time of the compensable acts (which was also the case in *Timber Creek*).

However, unlike the situation in *Timber Creek*, under their native title determination it was open to the Claim Group to be accompanied by others onto the land as required by traditional laws and customs, and so there was a limited right to allow others onto the land. Further, the Determination recognised that the exercise of rights to use the natural resources of the land was not limited to domestic or traditional subsistence purposes but could include commercial purposes.

The Court held that the percentage reduction should be slightly less than that applied in *Timber Creek* because of these differences in the non-exclusive native title rights and interests in each case. It said at [806]:

To do otherwise is to pay insufficient regard to the great care taken by claim groups and the courts in assessing and recording the nature of native title rights and interests in consent determinations and contested determinations of native title. I do not consider the distinctions are significant, but I wish to reflect them in the assessment.

The Court assessed the economic value of the native title rights and interests at 55% of the freehold value. For the non-pastoral use permits, the Court applied a further 35% discount to reflect the short term nature of these interests.

Ultimately, this resulted in an assessment of compensation for economic loss for the compensable acts at **\$743,408**.

# Assessment of compensation for cultural loss

The Court found that, subject to the qualification below, the Northern Territory would be liable for \$60 million compensation for cultural loss.

The Court began its consideration of cultural loss by noting that, in light of the High Court's decision in *Timber Creek*, it was not in issue that compensation for cultural loss was to be assessed as a monetary figure arrived at from a social judgment about what the Australian community, at this time, would consider to be an appropriate award for what has been done.

The Court's task was to address what figure was appropriate, fair or just.

The parties agreed that the guiding principles relevant to the assessment of cultural loss under s 51(1) of the *Native Title Act* provided by the High Court in *Timber Creek* should apply in relation to compensation for cultural loss payable under s 4B of the *Project Act*. This was so despite textual differences between the respective provisions.

Over 90 pages of the judgment, the Court took into account the following in assessing cultural loss:

- the nature of the Claim Group's connection to country;
- the effect of compensable acts on connection to country;
- prior diminution of native title rights and interests;
- environmental impact;
- temporal limits – ie the extent to which there should be a reduction in compensation to reflect the finite nature of some of the compensable acts and the effect of the non-extinguishment principle (eg for the mineral leases);
- geographical issues (eg only part of the project area was fenced off to prevent access);
- protection of sacred sites and AAPA-conducted consultations;
- the relevance of agreed benefits as informing the assessment; and
- the risk of double recovery ie because compensation would be payable for future mining leases.

## Calculating the dollar figure for cultural loss

The Court's task was not assisted by the disparity in the parties' submissions about the appropriate amount. The Claim Group submitted that the amount should be no less than \$225 million and the Northern Territory submitted that the amount should be no more than \$10 million.

The Claim Group put forward a mathematical comparison with the figure awarded in *Timber Creek*. On their methodology, on relative areas of affected country, an equivalent amount for cultural loss in this case would be in the order of \$133.79 million. They then submitted that the cultural loss was greater in this case because of the greater

impact on Dreamings, the landscape and ability to access sacred sites.

The Court accepted that the exercise undertaken of applying a rate per hectare provides a form of check on parameters, but it must be approached with caution. It held that cultural loss is not dependent upon size. Size is relevant in that substantive infrastructure is likely to be undertaken on larger tracts of land. However, if there had already been development in the area, there may already have been a diminution in the sense of connection. On the other hand, land may be remote with a strong sense of uninterrupted connection maintained.

Depending on location, there may be more sacred sites and Dreaming paths affected on larger tracts of land, and other more far-ranging impacts. On the other hand, there may be a concentration of sacred sites and cultural law associated with a small area, and minimal connection with a large area. The focus must remain on the compensable acts and their effects on the particular native title rights and interests, and the task of recognising such effects in terms of compensation.

The Court ultimately assessed cultural loss **at \$60 million** (subject to the effect of the ILUA – see below) for the following key reasons:

- The Australian community would readily accept that the impact of the compensable acts in this case greatly exceeds that considered in *Timber Creek*.
- The quantum must reflect and recognise the very real impact of the compensable acts on the Claim Group over a long period of time. The effects have been ongoing, and in some regards escalating, since 1993. Their effect has not dissipated over time. The impact will continue.
- The nature of the Claim Group's connection to country is complex and founded in Dreamings. There is a wealth of sacred sites and Dreamings centred around those areas.
- The compensable acts that give rise to the most significant cultural loss are the grants of the mineral leases that facilitated the development of the mine and the port.
- The Court took into account the presence of the cattle station and the limited drilling and mining initiatives in the mine area prior to the compensable acts. However, the diminution of native title rights and interests prior to the compensable acts was limited, particularly in the mine area, where Claim Group members were still able to move around freely and exercise their custom and law.
- The effect of the compensable acts is significant and ongoing. The Court said (at [1405]):

The impact in the mine area is striking. It is not only the irreversible cutting of the Snake and the disturbance of its home and route that has caused cultural loss, but the inability of the Claim Group

to stop that course or to continue to protect the Dreamings by accessing the sites along their routes. It is the inability to access those areas in a manner that permits the continuation of knowledge and customs between generations. It is the inability to access the fenced sacred sites, albeit that they may be protected from physical harm by the fencing. It is the limitation on caring for country and attenuation of such knowledge and customs over time, and the cultural sensitivities that flow from what is regarded as a failure to undertake these obligations. It is the ongoing impact of anticipating harm and sanctions from failure to look after country.

- Even though supervised access to certain areas within the mine fence is permitted by the mining company from time to time, it is not possible to properly exercise aspects of culture when being watched, and because the area has changed. Even where access was permitted, there was a sense of failure or an inability to speak for country.
- Witnesses felt shame and a sense of guilt about what had happened to country and its impact, both spiritual and physical. Even though it was the mining company that built the mine, some of the members of the Claim Group feel blamed by others for what has happened.

## Impact of earlier agreements and the 2025 ILUA

In December 2025, the Claim Group and the mining company entered into an ILUA that provided for certain benefits to be paid to the Claim Group. The Court held that some of the benefits under the ILUA affected the assessment of cultural loss for which the Northern Territory is liable and applied a 10% reduction to the sum of \$60 million.

Accordingly, the **final cultural loss was assessed at \$54 million.**

This is the first time that a court has been required to consider the extent to which there should be a reduction in compensation to reflect benefits already received by a Claim Group in relation to the compensable acts.

This is an important issue for both:

- Governments, who are generally liable for native title compensation under the *Native Title Act*; and
- Proponents, who are generally the entity that has provided the relevant benefits under project agreements. Proponents are also exposed if the Government's liability is passed on to them contractually or by legislation.

The Northern Territory submitted that the compensation award should be reduced to take into account benefits

already received in relation to the compensable acts. The rationale was that benefits received inform the loss that remains to be compensated. It assumes that the benefits are directed towards the same loss that is said to be payable by the Northern Territory.

The Court considered the legal principles governing double compensation and the appropriate approach in this case. The Court held that this was not a standard case of double compensation - the circumstances are specific. Only the Northern Territory has a statutory liability to pay compensation to the Claim Group for the diminution of native title rights and interests caused by the compensable acts. There was no suggestion by the Claim Group, nor the Northern Territory, that the Claim Group had a cause of action against the Commonwealth or the mining company for such loss.

The Court considered three agreements that provided benefits to Traditional Owners in relation to the Project but found that only the December 2025 ILUA was relevant to cultural loss.

The ILUA provides for the Claim Group to support the Project (including consent to mining rights) and for the mining company to create a benefits trust. The ILUA provides that the benefits payable under it are in full and final satisfaction of the mining company's compensation liability, but that nothing in the ILUA limits the Claim Group's rights to seek compensation or damages from the NT Government or the Commonwealth, including in this compensation claim.

The Court held that the commercial purpose of the ILUA was to facilitate the future of the project by cooperation between the mining company and the Claim Group, and to discharge the mining company's liability in respect of acts or activities that are undertaken on or after the date of the ILUA. It said that "whilst there is no doubt the Claim Group stand to receive significant funds in the future under the ILUA, the particular benefits referred to in this section that are sufficiently connected to amelioration of the effects of the compensable acts on cultural loss are the payments relating to the keeping place and establishment and support of the Gudanji Rangers." On this basis, the amount for cultural loss was reduced by 10% to acknowledge these benefits.

The Court considered the purpose and beneficiaries of the other two agreements and found that the benefits provided were not relevant to cultural loss for the compensable acts.

## Key insights

The McArthur River \$54 million cultural loss award dwarfs the \$1.3 million awarded for cultural loss in the High Court's landmark *Timber Creek* decision. It reflects the very significant impacts of the mine (including the deviation of the McArthur River) and port on the native title holders' connection to country and the irreversible disturbance of Dreaming sites and routes. It also reflects the fact that the native title holders' ability to exercise their native title rights and interests was relatively undisturbed until the Project began in 1993 (notwithstanding the history of pastoral leases and exploration in the area). Although this scenario is by no means unique, the award is not necessarily a benchmark for cultural loss in other parts of the country.

The Federal Court applied the *Timber Creek* principles to calculate the economic loss and interest component of the award, and these amounts are not surprising or controversial. The Court's careful consideration of the non-exclusive native title rights and interests in this case to award 55% of freehold value (instead of *Timber Creek*'s 50%) shows that each claim will be considered on its merits.

This was the first time that a court has been required to consider the extent to which compensation should be reduced to reflect the finite nature of the compensable acts and the effect of the non-extinguishment principle. The Court's refusal to consider anything other than a "small reduction" acknowledged that the compensable acts (particularly the mineral leases) had in part, but not fully, permanently suppressed the exercise of native title rights and interests. This will not be the case for all acts to which the non-extinguishment principle applies but will likely be the case for many other long-term mining projects.

This was also the first time that a court has considered environmental issues in assessing cultural loss. Their impact was outweighed in this case by other issues, but this issue is likely to be raised again in other cases.

The Court's reasoning on economic and cultural loss was very similar to the reasoning in *Yindjibarndi*, which was decided shortly after *McArthur River*. See our *Native Title Year in Review 2025-2026* article "[Federal Court creates more precedent for native title compensation](#)", for more information about that decision.

The Court's reasoning for its rejection of the Claim Group's hypothetical voluntary bargain argument was compelling, and based on similar reasoning to that in *Yindjibarndi*. However, appeals have been filed in *Yindjibarndi* so the Full Federal Court will ultimately determine the correct method of assessing economic and cultural loss.

The Court's consideration of the extent to which there should be a reduction in compensation to reflect benefits already received in relation to the compensable acts is highly significant. It is clear that the Courts are willing to look into the details of existing agreements (including the beneficiaries) to determine whether they are truly designed to provide compensation for economic or cultural loss. This issue will become even more relevant in circumstances where the State has passed on compensation liability to proponents.

**Authors:** Tony Denholder, Partner and Leonie Flynn, Expertise Counsel

# Federal Court creates more precedent for native title compensation





## What you need to know

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- 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 the High Court's landmark *Timber Creek* decision in 2019 and the Federal Court's *McArthur River* decision earlier this year). This award dwarfs the \$2.5 million awarded in *Timber Creek* and more than doubles the approximately \$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* (which has not been appealed).
- This is the first case to consider the compensation pass through in section 125A of the *Mining Act 1978* (WA) (*WA Mining Act*). 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.

## What you need to do

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- Each of Yindjibarndi, the State and Fortescue have appealed aspects of the judgment to the Full Federal Court.
- Maintain a watching brief of the appeal proceedings to understand its ramifications.

## The compensation claim and the Solomon Hub Project

This judgment concerns a claim for compensation brought by the Yindjibarndi Ngurra Aboriginal Corporation RNTBC (YNAC), a registered native title body corporate for the Yindjibarndi People, under the Native Title Act for the effects of 36 mining tenements the State of Western Australia granted to Fortescue companies in the Pilbara region. Those tenements facilitated the development of the Solomon Hub Project in 2012.

The Solomon Hub Project occupies approximately 135 km<sup>2</sup> of land within the Yindjibarndi People's native title determination area and includes four major open-pit mines. The infrastructure within the project includes conveyor belts, a railway connecting to Port Hedland, waste dumps, a tailings dam, a stockpile area, power infrastructure, and water pipelines. The mine has an expected operational life until 2045, but the company does not expect to complete rehabilitation and relinquish the land until 2100. Beyond the Solomon Hub itself, the total compensation claim area extends across approximately 563 km<sup>2</sup> of the native title determination area, including an additional 427 km<sup>2</sup> covered by exploration and prospecting licences not subject to active mining.

This claim was a test case for a number of issues relating to the assessment of native title compensation and who is responsible for paying it.



### The Federal Court's compensation order

The Federal Court ordered that the Yindjibarndi People were entitled to compensation from Fortescue pursuant to section 51 of the *Native Title Act* and section 125A of the *WA Mining Act*. The compensation amounts were as follows:

- Economic loss = \$136,757
- Compound interest on the economic loss amount = \$217,152
- Cultural loss = \$150 million

## Preliminary issues relating to the interaction between the Native Title Act and WA Mining Act

The Court rejected the State and Fortescue's submission that the Yindjibarndi People were not entitled to compensation under section 51 of the *Native Title Act* and that any claim should instead be brought in the WA Mining Warden's Court under section 123 of the *WA Mining Act*.

## Assessment of compensation for economic loss

The Court held that it must determine economic loss by reference to the freehold value of the land within the compensation claim area, with various allowances addressing how much the mining tenements diminished the native title rights and interests and for how long (having regard to the non-extinguishment principle and the exclusive or non-exclusive nature of the native title rights).

Justice Burley rejected the Claim Group's approach to economic loss and held that the "exchange value" case was not available, having regard to the reasoning in *Timber Creek* and the structure and terms of the *Native Title Act*.

### Rejection of the "exchange value case"

The Yindjibarndi People's principal claim was that the economic value of the native title rights and interests lost or suppressed by the compensable acts should be calculated by reference to the negotiation or exchange value of those interests. They said that this should be calculated by reference to what miners in the Pilbara commonly agree to pay native title parties for their agreement to mining on their country pursuant to negotiations conducted under the right to negotiate provisions of the *Native Title Act*.

The Claim Group submitted that this should be assessed at 1% of the free on board (FOB) revenue (ie the sale value of goods at the point the seller's responsibilities and ownership end) from the Solomon Hub Project, relying on evidence that Pilbara iron ore agreements typically include royalty payments in the range of 0.5% to 0.6%. They doubled the proposed rate to 1% to reflect the Yindjibarndi People's exclusive native title rights over a substantial portion of the Solomon Hub Project.

The Court comprehensively rejected the "exchange value" approach because it was not supported by the correct application of section 51(1) of the *Native Title Act* or *Timber Creek*. The reasons included:

- The High Court in *Timber Creek* repeatedly emphasised that the objective economic value of native title rights

and interests equates to the objective economic value of the freehold estate in land.

- The Yindjibarndi People's native title rights and interests do not include a right to the minerals, which have belonged to the State since 1899.
- Relying on right to negotiate agreements fixes attention on the benefit to the miner (or the State) from the grant of the future acts, rather than on the value of the native title rights and interests.
- The compensation for the suspension of native title rights and interests under this approach would "far exceed – by a multiplier of over 100,000 – the compensation for economic loss arising had there been a compulsory acquisition and extinguishment" of those rights.
- The approach would introduce a "complex and difficult metric" for compensation, contrary to the High Court's encouragement of simplicity in *Timber Creek*.
- Section 51(3) requires the Court to apply the *WA Mining Act's* principles for determining compensation, "whether or not on just terms". By section 123(1), compensation cannot be based on the value of any mineral or by reference to any rent, royalty or other amount assessed in respect of mining.

The Court also held that, even if it wrongly rejected the exchange value case, the evidence did not establish it. Justice Burley said that "much is concealed in the seductive simplicity" of the Claim Group's submission that a standard Pilbara royalty rate exists.

## Calculation of economic loss on established principles

The Court adopted a lot-by-lot approach to economic loss, assessing the freehold value of the land affected by each of the 36 tenements at its grant date, consistent with *Timber Creek*. His Honour made the following relevant findings:

- **Discount for non-exclusive rights:** Exclusive native title rights were equated to full freehold value, and non-exclusive rights to 50% of freehold value. The Court noted that in *McArthur River*, the Court adopted a 55% figure for non-exclusive rights because those holders had a right to share or exchange resources for commercial purposes but found that the same did not apply in this case.
- **Overlapping tenements:** The Court avoided double compensation where tenements overlap because if a mining lease has already wholly suppressed native title rights over a parcel, an overlapping exploration licence causes no additional effect and warrants no further compensation. His Honour identified a hierarchy of impact: mining leases were most significant (wholly suppressing rights within the Solomon Hub area), followed by miscellaneous licences, exploration licences and then prospecting licences. The Court

valued any parcel of overlapping land by reference to the tenement with the greatest impact.

- **Discount for duration and degree of impairment where native title not extinguished:** For land within the Solomon Hub Project, where the impact was most severe and the land would not be returned until as late as 2100, the Court applied only a 2% discount. Discounts of 80% and 90% applied for exploration licences and prospecting licences outside the Solomon Hub Project, reflecting the shorter duration and lesser impact on native title rights and interests. This alone is material, as no judgment has before considered the question of discounts as they might apply to different types of mining tenure.

The Court rejected three other heads of claim for economic loss:

- loss of opportunity to secure commercial benefits through the right to negotiate under the *Native Title Act*;
- loss of or damage to country and to ancient occupation, cultural and Dreaming sites and Dreaming tracks; and
- estimated cost of psychological and other services required to treat the social disruption/division and related psychological trauma within the Yindjibarndi community.

The Court did not originally stipulate the final economic loss figure due to the complexity of the lot-by-lot calculations and directed the parties to confer and supply short minutes of order giving effect to the reasoning. The Court's final orders made on 1 July 2026 fixed economic loss at \$136,757.

## Compound interest awarded for the first time

For the first time, the Court found that compound (not simple) interest was payable on the economic loss component of the award from the date of the compensable acts, in the sum of \$217,152.

The Court found that *Timber Creek* had not settled the law on this point, and that the evidence demonstrated the Claim Group would have used the funds to the most beneficial effect open to them and would not simply have applied them to an interest-bearing account. Justice Burley was accordingly satisfied that they were entitled to compound interest on the economic loss compensation amount, calculated from the date of each of the future acts.

# Assessment of compensation for cultural loss

Justice Burley assessed cultural loss at \$150 million. This was vastly less than the \$1 billion claimed by YNAC but substantially more than the \$5–10 million proposed by the State or the \$8 million proposed by Fortescue.

The Court assessed cultural loss by reference to the principles in *Timber Creek*, which required a “social judgment” of “what, in the Australian community, at this time, is an appropriate award for what has been done”. The assessment involved “a complex balance of different factors” going to the Yindjibarndi People’s spiritual relationship with their country and the harm the compensable acts caused.

In calculating the dollar figure, the Court began by discussing the relevance of *Timber Creek* and *McArthur River* because it would be unwise to ignore what courts have decided in relation to similar cases when forming a view as to an appropriate amount. However, Justice Burley agreed with Justice Banks-Smith in *McArthur River* that, while applying a rate per hectare provides a form of check on parameters, one must approach it with considerable caution. At best, prior cases provide a point of comparison that may provide some normative standard when quantifying cultural loss, but they cannot go further.

The following factors were considered in assessing cultural loss:

- **The compensation claim area is not the only area where the Yindjibarndi People may exercise their traditional customs and gain spiritual nourishment.** However, for the Yindjibarndi People, “harm to one part of their country is not easily cauterised”. It is like “a limb of a body coming off, leaving the whole weakened and damaged”. Further, although Yindjibarndi People no longer live within the compensation claim area, this only disconnected them from the land in physical terms, not in spiritual or cultural terms.
- **Scale of physical disturbance:** The Solomon Hub Project occupies 135.48 km<sup>2</sup> of the compensation claim area, with the total claim area extending to 563 km<sup>2</sup>. Over 135 km<sup>2</sup> has been fenced off and secured from entry, including by the Yindjibarndi People. Four open-pit mines operate within this area.
- **The Court made only a very slight allowance for the non-extinguishment principle within the Solomon Hub Project:** Although native title rights and interests have not been extinguished and will revive when the future acts cease, Justice Burley could not perceive that much would remain of the original landscape within the mine’s footprint. Within the Solomon Hub Project, the Court held that native title has been wholly suppressed for an unknown duration. Even with physical access restored, the effects on other rights and interests will be felt permanently.
- **The Court made a significant allowance for the non-extinguishment principle outside the Solomon Hub Project:** Justice Burley noted that the level of infrastructure pales in comparison to that of an open-cut mine and the land is likely to be returned to the Yindjibarndi People much earlier than the land within the area of the Solomon Hub Project.
- **The claim area was largely untouched before the Solomon Hub Project:** The loss of connection to country was made all the greater because, prior to the 2012 commencement of mining, the determination area was largely untouched other than pastoral leases and various exploration licences which did not materially affect the Yindjibarndi People’s activities.
- **Spiritual hurt caused by the physical impact of the mine:** Justice Burley identified specific aspects of harm suffered within the Solomon Hub Project. These are: severing of connection to aspects of songlines that run through the land; destruction of substantial parts of cultural sites at creeks and other areas; destruction of numerous rock caves and shelters where the spirits of Yindjibarndi ancestors dwell; “salvage” of numerous sites which has severed the connection of artefacts and ceremonial objects from the land; reduced ability to receive songlines through dreams; spiritual displacement leading to spirits becoming antagonistic; removal and remote storage of artefacts without the Yindjibarndi People’s approval; and disturbance of the amenity of important ceremony places.
- **Destruction of culturally significant sites:** More than 100 heritage sites have been destroyed, and many more severely compromised. The evidence supports the conclusion that the Yindjibarndi People regard these places as sacred as the homes of the spirits of their ancestors or of other spiritual and religious significance.
- **Impact on groundwater and groundwater-dependent ecosystems:** The Court considered the impact of dewatering at the mine site on groundwater and groundwater-dependent ecosystems both within and outside the Solomon Hub Project. It was irrelevant that the native title determination did not confer exclusive rights in relation to water. Compensation was payable for the Yindjibarndi People’s spiritual group harm arising from damage to the flow of groundwater into two creeks outside the mine site and harm caused to country arising from the reduction in water for vegetation. However, the impact of dewatering outside the mine footprint was somewhat lesser than the impacts within the mine site and did not factor significantly into the cultural loss assessment.
- **Loss of spiritual connection:** A consequence of the damage done by the Solomon Hub Project is the loss of spiritual connection to country. The land is now a “hostile environment to them”. To the Yindjibarndi People, the loss of the land is “like the death of a child”.

- **Loss of rights and duties of ownership:** Within the Solomon Hub Project, the Yindjibarndi People are precluded from accessing the land, teaching younger generations about country, managing, and reviving their country through sacred ritual, and fulfilling their role as custodians of the land. They experience “shame, loss, frustration and extreme hurt as a result of being unable to protect their country”. They have lost the right and duty to be asked when strangers come onto the land, and the right and duty to ensure their safety.

The Court held that no compensation was payable for the social disruption between members of the Yindjibarndi community allegedly arising from the development of the Solomon Hub Project. This was because the *Native Title Act* does not allow the negotiation process to form part of the “future acts” in respect of which compensation may be claimed. Even if this was compensable, Justice Burley was not satisfied that Fortescue’s conduct and the social division were sufficiently causally connected.

The Court also swiftly rejected the Yindjibarndi People’s claim for a separate head of cultural loss founded on psychological harm caused by the social disruption from constructing and establishing mining infrastructure and conducting mining activities. The general consideration of cultural loss was sufficient to address this.

## Key insights

After three major decisions there are common principles starting to emerge. *Yindjibarndi* is the first material precedent for major mining projects in Western Australia, and for iron ore projects in particular. It will start to significantly impact agreement-making in Western Australia and beyond. Despite the Court’s caution about doing so, stakeholders will inevitably extrapolate from the amounts awarded in the two recent decisions to other projects, using the assessment criteria emerging from the 2026 cases.

The Court in *Yindjibarndi* made very few references to the *McArthur River* decision but reasoned very similarly on both economic and cultural loss. Both judgments confirm that the *Timber Creek* freehold value methodology remains the applicable approach for assessing economic loss. Neither Court accepted royalty-based calculations. We now have a rough formula, of sorts, for calculating economic loss and determining the various discounts that apply in particular circumstances.

Although the award for cultural loss was far greater in *Yindjibarndi* than *McArthur River*, there was an important distinguishing feature. In *Yindjibarndi*, approximately 70% of the land within the Solomon Hub Project was subject to exclusive native title rights, whereas *McArthur River* involved only non-exclusive rights. Although the Solomon Hub Project footprint was comparable to the *McArthur River* principal mine and port area, the total Yindjibarndi compensation claim area was substantially larger.

Whether the Court in *Yindjibarndi* placed greater weight on the impact on archaeological and cultural sites than the Court in *McArthur River* gave to the disturbance of Dreaming sites and routes is unclear. What is clear from both decisions, however, is that the courts will consider how cultural heritage protection and management practices are conducted when assessing cultural loss, notwithstanding that parties have complied with relevant State and Territory legislation.

How the Solomon Hub Project affected groundwater both within and outside the mine site was a significant aspect of the case and the first time a court has considered this issue in the context of a native title compensation claim. Whether the findings can be extrapolated to allow a separate group of Native Title Holders to claim compensation for impacts outside a determination area, or indeed whether a “future act” can also have an impact in this manner, remains to be seen.

The Court awarded compound interest on economic loss for the first time. *Timber Creek* had left this possibility open where the evidence supported it. That the Yindjibarndi People were able to demonstrate their corporate structure, investment strategy, and successful business activities satisfied this threshold was no surprise. Although the compound interest amount of \$217,152 was not large in this case (because the compensable acts were relatively recent and the economic loss award was relatively low), compound interest could be significantly larger in other cases where there is a long time between the compensable acts and the compensation award and/or where the freehold values are much higher.

The Court’s decision on the constitutional validity of the pass-through provision in section 125A of the *WA Mining Act* may not be the last word on this issue. In the meantime, WA and NSW remain the only States to legislatively pass on future act compensation to proponents.

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

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# Inching forward: native title compensation in 2025-2026

## What you need to know

- 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 *Yindjibarndi* and *McArthur River* compensation decisions are the most significant judicial developments in native title compensation since the High Court's 2019 decision in *Timber Creek*. Together, they provide substantial guidance on the assessment of compensation for major mining and resource extraction projects.
- 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.

## What you need to do

- Review the *Yindjibarndi* and *McArthur River* decisions carefully. They 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 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.

## Summary of developments in the last 12 months

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

The last 12 months have been headlined by the handing down of two significant compensation decisions: the Federal Court's determination of the *Yindjibarndi* compensation claim over Fortescue's Solomon Hub mine in Western Australia, and the *McArthur River* decision (see our *Native Title Year in Review 2025-2026* articles, "[Federal Court creates more precedent for native title compensation](#)" and "[\\$54M for cultural loss in McArthur River Mine native title compensation claim](#)").

Together, these are the most substantial judicial developments in native title compensation since the High Court's 2019 decision in *Timber Creek*, and will shape how future claims are run and assessed.

Beyond these decisions, the compensation claims we have been following continue to inch forward through mediation and case management. We summarise their current status below.

The Australian Law Reform Commission's March 2026 report ([Fulfilling the Promise of Mabo: Reforming the Future Acts Regime in the Native Title Act 1993 \(Cth\)](#) (ALRC Report 144)) contains significant recommendations relating to "redress" and the payment of up-front compensation

in relation to future acts. It does not address how such compensation should be calculated (or by whom) and clarifies that Part 2 Division 5 compensation applications would remain available to adjust the extent of upfront payments. It is not likely that these recommendations will have any impact on current compensation claims. See our *Native Title Year in Review 2025-2026* article, "[ALRC recommends sweeping Native Title Act changes](#)" for more information about the Report.

In January 2026, the NSW Government published a [draft consultation paper](#) about a proposed state-based policy approach to proactively settling all aspects of NSW native title claims under the *Native Title Act 1993* (Cth). The draft policy includes a compensation component, in conjunction with a consent determination and ILUA. The proposal wraps up corporate and benefits management structuring and is directed towards ensuring sustainable PBC arrangements. Consultation with native title groups occurred between February and May 2026. The NSW Government has not yet announced the next steps.

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

# Active compensation claims

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

**Recap:** The Pitta Pitta compensation claim relates to hundreds of compensable acts spread across three million hectares of land and waters in western Queensland.

The original compensation application was filed in 2020 by five individual Pitta Pitta native title holders. In early 2024, the Pitta Pitta Aboriginal Corporation RNTBC filed a fresh compensation claim over the same area covered by the original claim. The compensable acts claimed in each proceeding were also the same. Given the overlap, the Federal Court [ordered](#) that the claims be consolidated into a single proceeding.

Following Court supervised mediation, the State, applicant and RNTBC reached an “in principle agreement” for the settlement of the consolidated proceeding by way of lump sum payment for all compensable acts.

**What's new:** In our *Native Title Year in Review 2024-2025* article, “[Glacial progress of developments in native title compensation](#)”, we reported a number of unresolved issues between the applicant and the RNTBC, including how the applicant’s former and current legal advisers would be paid out of the compensation sum. Those issues appear to remain unresolved, with the Court granting third party claimants leave to intervene in the proceeding to establish the existence, scope and quantum of their asserted claims for costs.

On 25 June 2026, the Court [directed](#) the Pitta Pitta People and the State of Queensland to attend a mediation. The aim of this mediation was to organise a public meeting where the Pitta Pitta People can receive legal advice about the third party claims, and to arrange an authorisation meeting. To help move matters forward, the State agreed to pay for an independent facilitator to run an advice meeting for the Pitta Pitta People.

This claim is slowly progressing, although the parties remain in case management, with no substantive hearing dates listed.



## Gumatj and related Compensation Claim – Northern Territory (NTD42/2019, NTD43/2019, NTD15/2025, NTD16/2025, NTD17/2025, NTD23/2025 and NTD24/2025)

**Recap:** In early 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](#).

The High Court upheld the Full Federal Court's finding that Commonwealth actions undertaken prior to 1975 were capable of giving rise to compensation under the *Native Title Act* on the basis that such actions constituted invalid acquisitions of property in breach of the just terms guarantee imposed by section 51(xxxi) of the Australian Constitution.

This decision marked a significant step for the Gumatj Clan, who are seeking compensation under the *Native Title Act* for the 1939 vesting of minerals in the Crown and the grant of certain leases between the 1930s-1960s.

For the Gumatj Clan's compensation claim to succeed, they must first prove that they hold native title in the Gove Peninsula area. The Federal Court is currently assessing that claim, though a final determination remains some years away with the question of who holds native title over the Gove Peninsula being contested by a number of other clans.

**What's new:** In our *Native Title Year in Review 2024-2025* article, "[Glacial progress of developments in native title compensation](#)", we reported that four overlapping native title claims and one overlapping compensation claim had been filed over the Gove Peninsula. The Federal Court directed that these claims be case managed alongside the Gumatj claims and referred the combined proceedings to mediation to encourage the Indigenous parties to agree on who holds native title in the area.

The first stage of mediation concluded earlier this year, and a mediation report has been provided to the parties. It appears that the parties were unable to agree on who holds native title, with the Court directing the parties to attend a further mediation before a retired Judge with a background in native title and a Registrar. This second mediation was to be completed by 30 September 2026.

The combined proceedings have been [provisionally listed](#) for hearing in 2027, with dates set down from 21 June to 9 July and 30 August to 17 September. Ahead of the trial, the Court had been expected to conduct a preservation of evidence hearing in the Gumatj claims. That hearing was vacated but affidavit evidence has been received by the Court.

With no agreement between the Indigenous parties about who holds native title in the Gove Peninsula, resolution of the Gumatj compensation claim remains some years away.

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

**Recap:** The Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC (AMYAC) is seeking compensation for over 1,000 compensable acts across more than 60,000 km<sup>2</sup> of land in central South Australia. These acts include freehold grants, pastoral leases, Crown leases, mining tenements and the construction of public works and roads. The claim was filed in April 2022 and immediately referred to mediation between AMYAC and the State of South Australia. A hearing to preserve evidence was scheduled for June 2023 but was called off due to the declining health of a key witness. The parties have been in regular mediation since 2023.

**What's new:** This matter remains in mediation, with no significant developments to report over the past 12 months.

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# Native title "connection": what courts said in 2025-2026

## What you need to know

- 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 (Gaangalu FC), 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 later decisions.
- In [Richards v State of South Australia \(Far West Coast Sea Claim\)](#) [2026] FCAFC 97 (Richards FC), 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 led to some surprising outcomes for the parties.

## What you need to do

- 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.
- Watch for further judicial guidance around the distinction between estate groups and broader native title holding communities.

## Further legal developments on questions of connection

We write about legal developments relating to issues of “connection” under section 223(1)(b) of the *Native Title Act* 1993 (Cth) regularly in our annual *Native Title Year in Review*. Our *Native Title Year in Review* 2024-2025 article, [“High Court confirms Native Title Act connection can be met by spiritual connection”](#), considered the High Court decision in [Stuart v South Australia](#) [2025] HCA 12 (Stuart HC) and a number of Federal Court decisions.

There were consistent themes arising from the 2025-2026 decisions relating to:

- **Permissibility of adaptation of traditional laws and customs** – Full Court in *Gaangalu FC* and decisions applying *Gaangalu FC*;
- **Overemphasis on the concept of “society”** – Full Court in *Gaangalu FC* and decisions applying *Gaangalu FC*;
- **Spiritual connection** - 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;
- **Relevance of neighbouring determinations of native title** – in both an evidentiary sense and in the resolution of disputes about boundary areas;
- **Boundary disputes between neighbouring determined native title holders can be very complicated to resolve** – several decisions highlighted how fraught this process can be. The Federal Court reminds us of the need for rigour – previous determinations needed to be respected and new claims needed to be tested.

# Gaangalu: Full Federal Court overturns decision that native title did not exist and finds that adaptation of traditional laws and customs is permissible

In *Gaangalu FC*, 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*. We wrote about the first instance decision in our *Native Title Year in Review 2023-2024* article, [“Federal Court makes negative determination of native title”](#).

## Permissibility of adaptations of traditional laws and customs

Applying *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, the Full Court confirmed that a society is simply a group united by a body of laws and customs that its members acknowledge and observe. It does not need a regional structure. The primary judge erred because he asked whether a Gaangalu regional society still existed, rather than whether the Gaangalu continued as a society in the *Yorta Yorta* sense, and when he found that the regional society had not continued, treated that as fatal to the claim.

The Full Court also held that continuity should not be assessed by weighing present-day laws and customs against those that have been lost. The question is whether the laws and customs observed today have their origin in the pre-sovereignty system.

The Full Court found that the primary judge erred in treating two changes as new practices adopted after colonisation, rather than adaptations of the traditional system. The first was a move from a patrilineal-based system of inheriting primary rights in land to a cognatic system, where rights pass through either parent. The second was a move from landholding by small clan groups to communal holding by the broader Gaangalu language group. The anthropologists retained by both parties agreed that each change was an adaptation rooted in tradition. The primary judge had wrongly required the Gaangalu to explain how traditional law allowed these adaptations. As the Full Court observed, a society has no reason to have rules ready for the catastrophic disruption caused by colonisation.

Because the primary judge had erroneously identified the relevant laws and customs by reference to the regional society, he could not properly decide whether the Gaangalu had a

connection with the claim area by those laws and customs. He had found that several laws and customs continued: inalienability of land, communal ownership, spiritual connection with the land and customary use of natural resources (at [94]), but did not ask whether those laws and customs connected the Gaangalu to the land and waters. The Full Court found that this omission was a further error of law.

## Spiritual connection

Applying *Stuart HC*, the Court observed that connection does not require regular physical activity on country. A continuing spiritual or cultural relationship can be enough. This evidence therefore had to be assessed on its own terms, not dismissed because a regional structure had changed.

## Result and implications

The Full Court allowed the appeal and set aside the primary judge's negative determination. On 12 March 2026, the Full Court ordered that:

- the State pay the Gaangalu People's costs of the appeal;
- the order of Rangiah J dismissing the claim in *Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4)* [2024] FCA 425 be set aside;
- the National Native Title Registrar reinstate the Gaangalu claim (QUD33/2019) on the Register of Native Title Claims in full; and
- the proceeding be remitted to a single judge of the Federal Court.

The State sought special leave to appeal to the High Court. Special leave was refused, with costs against the State. For more about the costs decision, see our *Native Title Year in Review 2025-2026* article, [“Costs at the crossroads: native title and section 85A”](#).

Had the negative determination stood, it would have permanently barred recognition of native title by any group. Instead, the claim (QUD33/2019) has been reinstated and the Gaangalu must again be treated as registered native title claimants in future act processes. This reversal is a significant change for all parties, most particularly the Gaangalu People.



## Marlinyu Ghoorlie: Federal Court applies Stuart HC and Gaangalu FC to recognise Karlamaya Kapurn native title (overlap dispute)

This is the first of a number of decisions in the last 12 months dealing with the resolution of disputes about overlap or boundary areas.

In [\*Dimer on behalf of the Marlinyu Ghoorlie Claim Group v State of Western Australia \(No.6\)\*](#) [2025] FCA 1641 (Marlinyu Ghoorlie), the Federal Court conducted a joint trial of overlapping native title determination applications for a large area in the Western Goldfields region of Western Australia. The Marlinyu Ghoorlie applicant claimed native title on behalf of the Karlamaya Kapurn People. A competing application was brought by the Karratjibbin claim group, whose claim area was largely within the Marlinyu Ghoorlie claim area. Additionally, the Cooper respondents claimed an interest in the eastern part of the trial area through descent from a Western Desert ancestor.

In a trial of separate questions, the Court found that, subject to any question of extinguishment, native title exists over the whole of the area and is held by the Karlamaya Kapurn People. The decision draws directly on *Stuart HC* and *Gaangalu FC* and explores several of the same themes.

### Spiritual connection

Relying on *Stuart HC*, the Court accepted that connection can continue at a spiritual or cultural level even where claimants have not kept up a physical presence across large parts of their country. Knowledge passed between generations supported the connection. This included knowledge of water sources, sites, plants, place names and how to find food. The Court found the connection to be both physical and spiritual. The physical side lies in the rights to occupy, hunt, hold ceremonies and use resources. The spiritual side lies in the belief that ancestral spirits reside in country, the creation stories still known, and the duty to care for country.

### Adaptation: Court applied Gaangalu FC in considering permissible adaptations of traditional laws and customs

As in *Gaangalu FC*, European settlement had brought about two significant adaptations in the Karlamaya Kapurn People's traditional laws and customs.

Rights that once passed through the father now pass through either parent. Small clan group "patriclan" estates have also been absorbed into communal rights over Karlamaya Kapurn country as a whole. Drawing on *Gaangalu FC*, the Court held that both changes were

permissible adaptations of traditional laws and customs. The change to descent through either parent left the core principles intact, being descent grounded in a spiritual connection with the ancestral dead, and rights that are communal and inalienable. The Court cautioned that the analysis may go wrong if it focuses too heavily on what has been lost.

## Gingirana #3: Court refuses to make consent determination over disputed area acknowledging both neighbouring native title holding groups (boundary dispute)

This was a boundary dispute between the holders of two neighbouring determinations (the Nharnuwangga, Wajarri and Ngarla (NWN) People and the Gingirana #3 People), who, following mediation, were able to reach agreement and proposed a single consent determination of "two different native titles" over the boundary area between the two existing determinations. They proposed that a newly established prescribed body corporate would hold native title on trust for both groups.

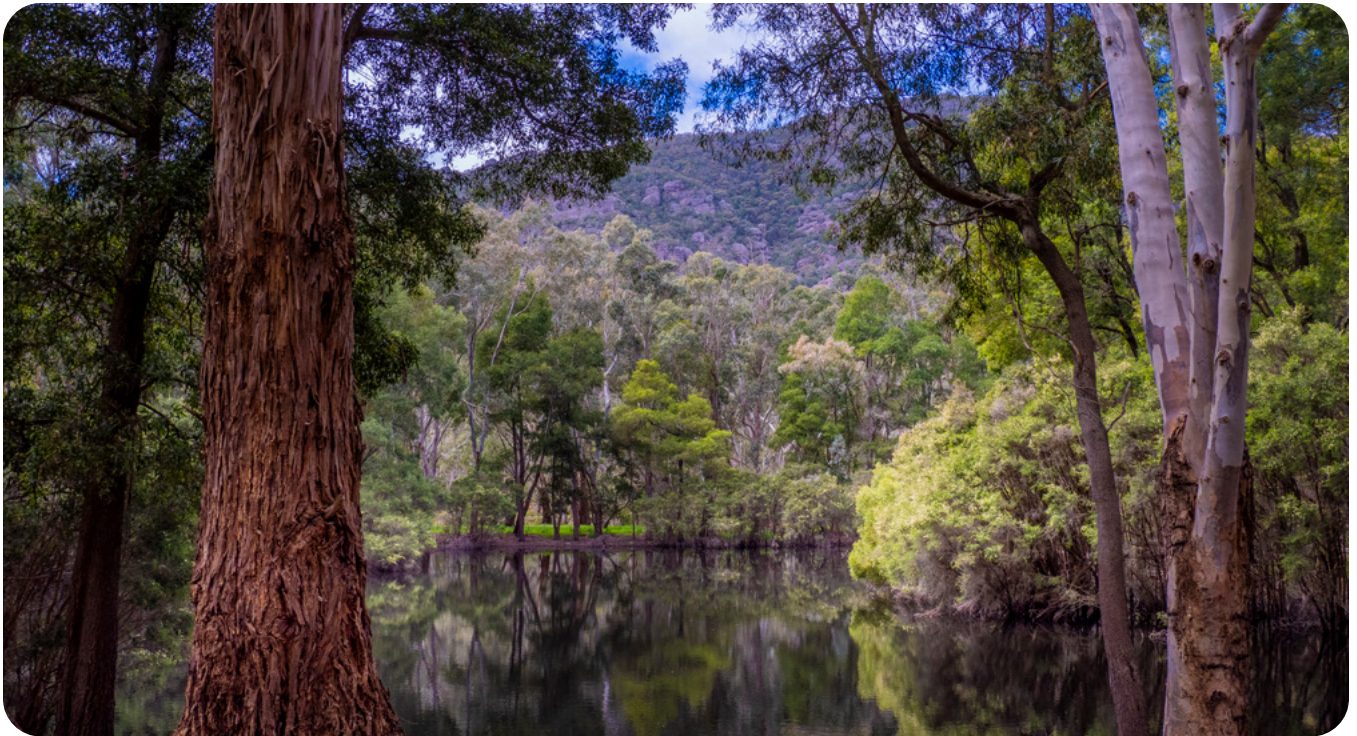
However, the Court refused to make the consent determination ([\*Williams on behalf of the Gingirana #3 Native Title Claim Group v State of Western Australia\*](#) [2026] FCA 279 (Gingirana #3)).

The Court accepted it has power to make two determinations of native title in relation to the same area or in relation to two areas that overlap, and said it had heard no submissions to suggest that "two distinct native titles" was any different. However, the Court was not satisfied that:

- the rights respectively claimed by the parties were native title rights within the meaning of section 223(1) of the *Native Title Act*; and
- it had the power to appoint a different prescribed body corporate where the native title is the same as a prior determination.

On the first point, the limited rights claimed by the Gingirana and the characterisation of the area as a "transitional zone" for the Gingirana (as opposed to their "ancestral core country") raised a question about whether the Gingirana's rights were rights "in relation to land" as required by section 223(1) of the *Native Title Act*, or whether they were "reciprocal rights", dependent on interpersonal relationships with the NWN People.

The Court considered a well-established line of authority which distinguished native title rights in a group's "own" country from rights based on reciprocal personal



relationships with other native title holders, and was ultimately not satisfied that the Gingirana's rights were native title rights. It was therefore not satisfied that the Court had power to make a native title determination in the terms sought by the proposed consent determination.

On the second point, applying [\*Drury on behalf of the Nanda People v State of Western Australia\* \[2020\] FCAFC 69](#), the Court found that because native title involves a common and collective connection between a group of people and an area of land, manifested by acknowledgment and observance of a single normative body of laws and customs, there can be only one prescribed body corporate for the one native title. The Court found that the materials provided no basis to conclude that the native title held by the NWN People over the boundary area was distinct from that held under the adjoining NWN People determination. If a nomination has been made under an earlier determination, and the Court thereafter proposes to make a further determination recognising that the same native title extends to additional land, the Court is required to give effect to the earlier nomination.

These matters have been in case management since this decision, with an interlocutory application by the NWN People listed for hearing in late November 2026. We will report on the progress of this dispute in our *Native Title Year in Review 2026-2027*.

## Ross: Court finds neither neighbouring native title holding group holds native title to disputed area and instead finds descendants of some apical ancestors from each group hold native title (boundary dispute)

Like *Gingirana* #3, the context of this decision was a contested boundary dispute between two groups of determined native title holders.

The Court noted that the disputed area is an artificial creation of the native title system, bounded by three consent determinations. This matter arose within a much larger proceeding, known as the Cape York United #1 Claim (CYU#1 Claim). In the CYU#1 Claim, most boundary disputes between neighbouring groups have been resolved by negotiation, resulting in consent determinations of native title. However, the Umpila and Lama Lama Peoples were not able to reach agreement and asked the Court to resolve the dispute by way of separate question. Both groups claimed native title to the disputed area to the exclusion of the other. The State of Queensland was also an active participant in the hearing and submitted that native title was held by both groups.

In [\*Ross on behalf of the Cape York United #1 Claim Group v State of Queensland \(No 40\)\*](#) [2026] FCA 980 (Ross), the Court found that neither the Umpila nor the Lama Lama People were the native title holders of the disputed area. Instead, the Court found that native title was held by the descendants of some of the apical ancestors referred to in each of the Lama Lama and Umpila consent determinations.

### Relevance of the neighbouring consent determinations

The Court cautioned against over-reliance on the Umpila and Lama Lama consent determinations. For example, some submissions referred to “findings” in the reasons accompanying the determinations as if they were findings of fact, or inferences, drawn in a contested proceeding after an adversarial process. The Court said that the observations made in the reasons accompanying consent determinations do not bear that character and cannot be used in the current adversarial contest. However, the orders made, and the content and effect of those orders, are highly relevant, especially in relation to apical ancestors.

### Court follows Gaangalu FC on concepts of “society”

Referring to *Gaangalu FC*, the Court said that “too ready a focus on the society concept tends to distract from the questions asked by the *Native Title Act*” (at [299]). Therefore, although some submissions encouraged the Court to make findings about whether the Umpila and Lama Lama Peoples were part of the same “society”, the Court said this would not assist the resolution of the separate question.

### Post-colonial identities did not reliably reflect pre-sovereignty landholding

The Court accepted expert evidence that “Lama Lama” and “Umpila” labels were post-colonial identities that did not reliably reflect pre-sovereignty landholding. It found that colonisation, removals and population movements had brought people from different local estate groups together under modern labels, and that language and contemporary affiliation could not substitute for the historical inquiry into which people held country under the traditional system.

The Court observed that while the occupation of land by the Lama Lama since 2000 was genuine and culturally significant, it was a product of post-colonial history and did not determine native title. The relevant inquiry is the position at sovereignty and the continuity of the traditional system, not which contemporary group has been most visible or dominant in the area in recent decades.

The Court said that it was clear on the balance of probabilities that there were landholding groups occupying the disputed area at effective sovereignty and that native title existed in relation to the disputed area. However, the Court found that it was held by neither the Umpila nor the Lama Lama People as described in the neighbouring consent determinations, but instead by the descendants of some of the apical ancestors referred to in each of the Lama Lama and Umpila consent determinations.

Given the native title holders were the descendants of both Umpila and Lama Lama identifying people, the Court queried whether the disputed area was held communally by all Umpila and Lama Lama People. This was the State’s contention, but the Court rejected it because of a lack of evidence. Instead, the Court held that native title was held communally only by the descendants of five named apical ancestors, including descendants recognised through traditional adoption.

The Court noted that this would require a new registered native title body corporate because the native title is distinct from the Umpila and Lama Lama determinations.

## Eastern Maar: neighbouring determination cannot be contradicted but is not enough without probative evidence of connection to the new claim area (boundary dispute)

In [\*Austin on behalf of the Eastern Maar People v State of Victoria \(No 3\)\*](#) [2026] FCA 1054 (Eastern Maar), the Federal Court determined a separate question in competing native title claims between the Gunditjmara People and the Eastern Maar Peoples over an area of land in south-western Victoria. Both groups had previously been recognised as holding native title in adjacent areas. It was uncontested that the Eastern Maar People held native title over the claim area. The separate question related to whether the Gunditjmara People also held native title over the area and the Court ultimately held that they did not. In this sense, the outcome differed from Ross.

### Relevance of neighbouring determination

The Court said that the Gunditjmara submissions overstated the impact of the neighbouring Gunditjmara determinations.

The earlier Gunditjmara and Eastern Maar consent determinations over the adjacent areas were decisions *in rem* that both groups descend from the Maar-speaking society and have separately continued to acknowledge and observe traditional laws and customs in relation to those adjacent areas. However, the question remained whether the Gunditjmara could establish the necessary connection to the claim area itself.

The Court further held that it was not open to the Gunditjmara to lead evidence or make submissions about the nature of the native title holding group on a different basis to that recognised in the previous determinations. In the previous determinations, the Gunditjmara advanced a native title claim on the basis that the Maar-speaking society had adapted under pressure of colonisation into two interrelated but distinct eastern and western communities or domains, of which the Gunditjmara People comprised the western domain and the Eastern Maar Peoples the eastern domain. That claim was accepted by the parties and the Court, and a consent determination was made which recognised the separate, coexistent native title rights and interests of the Gunditjmara People and the Eastern Maar Peoples in relation to the land and waters of the adjoining determination areas. The Court said (at [514]):

They cannot take the benefit of the consent determination in relation to [the adjoining area], which recognised rights *in rem* in their favour, and now seek to disavow the basis of that determination because it is inconvenient to their native title claim in respect to an adjacent area.

### **Court applied Gaangalu FC and cautioned against oversized emphasis on concept of society**

The Court said that “as too often happens in native title cases, the focus on ‘society’ has a tendency to distract” (at [469]). In *Gaangalu FC*, the Full Court explained that it is not the society *per se* that produces rights and interests. The core question is identifying whether the claim group can identify a traditional normative system that gave the group rights and interests in a particular area of land.

The Court accepted that the Gunditjmara and Eastern Maar descended from a broader Maar-speaking society, and were bound by the same normative system of traditional laws and customs derived from that society. However, it held that membership of that society did not itself establish connection to the claim area, cautioning against an “oversized emphasis” on the concept of society.

To establish that the Gunditjmara People have a connection to the claim area, it was necessary for the Gunditjmara applicant to put on probative evidence about the continued observance and acknowledgement of traditional laws and customs by members of the Gunditjmara People in relation to **that area**. It was not sufficient for it to merely put on such evidence about Gunditjmara country in respect of the adjoining determination areas.

The Gunditjmara evidence was described as scant and unpersuasive in relation to the claim area. The Eastern Maar evidence, by contrast, addressed specific sites, spiritual significance, resources and continuing responsibilities in the relevant area.

### **Result and next steps**

The Court held that the Gunditjmara People do not hold native title over the claim area.

The Gunditjmara People [have filed an appeal](#). We will monitor developments in the appeal and provide a further update in our *Native Title Year in Review 2026-2027*.

## Yugunga-nya: Like Ross, Court finds neither neighbouring native title holding group holds native title to disputed area and instead finds descendants of some apical ancestors from each group hold native title (boundary dispute)

In [\*Gilla on behalf of the Yugunga-nya People v State of Western Australia \(No 5\) \[2026\] FCA 1255\*](#) (Yugunga-nya), the Federal Court determined competing claims by the Yugunga-nya and Gingirana claim groups to an area in the Western Desert region of Western Australia. The circumstances were very similar to *Ross*, in that the determined native title holders of the lands adjacent to the boundary area both asserted native title to the area to the exclusion of the other group. The State submitted that a determination could recognise that descendants of identified apical ancestors from both claim groups hold native title.

Ultimately, the Court agreed with the State and determined that the descendants of certain identified apical ancestors of both groups hold native title in the boundary area. This was a similar outcome to *Ross*.

This matter was decided approximately one month after *Richards FC* (see below), and does not refer to it. This is likely because *Yugunga-nya* was heard in 2022 and 2023. The Court does refer to *Gingirana #3* but determined that the outcome in *Gingirana #3* was not relevant to this dispute.

### Relevance of previous determinations

Applying *Stuart HC*, the Court held that it was entitled to take into account that the neighbouring consent determinations have recognised that each of the Yugunga-nya and Gingirana claim groups have a normative system of traditional laws and customs which has the capacity to confer native title. However, the Court must determine the position in relation to the boundary area. We note there seems to be a different emphasis on the significance of neighbouring determinations in this decision than in *Richards FC*.

The parties agreed that, subject to extinguishment, native title rights and interests exist in the whole of the boundary area, and are held by members of the Western Desert society. The issue for the Court to resolve was which members of the Western Desert society have native title interests in the boundary area - the Gingirana, the Yugunganya or both.

### Spiritual connection

Applying *Stuart HC*, the Court was satisfied that the Yugunga-nya have a physical and spiritual connection with the boundary area that has been maintained by the descendants of the apical ancestors. Because the Yugunganya have not lived in the boundary area, evidence of physical connection was of a more limited nature than may be the case in other determinations, but the Court held it was sufficient. It is not necessary that a claim group establish that each member has continued to acknowledge and observe laws and customs in precisely the same way or understands them in precisely the same way. It is sufficient to have regard to the conduct of the relevant claim group as a whole. It is not necessary to establish physical connection over each and every part of the relevant land within the boundary area.

### Risks associated with overlap/boundary disputes

The Court noted that the principal claims of each of the Yugunga-nya and the Gingirana are binary in nature. Neither recognises the claims of the other. In such circumstances, there is always a prospect that either claim might fail. For example, in *Marlinyu Ghoorlie*, the Court recognised the native title of the Marlinyu Ghoorlie over the whole claim area and rejected a competing claim by the *Karratjibbin*. In *Ross*, both competing binary claims failed and it was determined that native title was held communally by the descendants of named apical ancestors, a group embracing both sets of claimants.

### Outcome – descendants of certain identified apical ancestors of both groups hold native title in the boundary area

The Court determined that certain apical ancestors from each group had rights and interests in the boundary area at the time of effective sovereignty, and that their descendants had continuing physical and spiritual connection with the area and now hold native title communally.

Because of the mutually exclusive nature of their claims, neither the Yugunga-nya nor the Gingirana gave attention to how native title might be held together. The Court said that the parties would need to consider these reasons and address a number of matters before any determination of native title could be made. This includes how native title is to be held under a single determination. The Court did not express a view, but it seems likely that a new registered native title body corporate would be required, as the Court expressly noted in *Ross*.

# Far West Coast Sea Claim: Full Court upholds finding that native title in sea claim area limited to physically accessible waters but overturns trial judge on identity of native title holders

In *Richards FC*, the Full Federal Court considered an appeal from [Miller v State of South Australia \(Far West Coast Sea Claim\) \(No 4\)](#) [2025] FCA 388, which we discussed in our *Native Title Year in Review 2024-2025* article, "[High Court confirms Native Title Act connection can be met by spiritual connection](#)". *Richards FC* was, therefore, the consideration of an appeal against the decision of a trial judge in respect of preliminary questions going to the existence of native title and, if relevant, the identity of the native title holders.

This native title claim relates to a long and narrow sea area off the far west coast of South Australia incorporating sea waters up to 300 metres from the low water mark. The claim group are the determined native title holders of the land 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.

## Spiritual connection: Statements that country extended "as far as the eye can see" were not enough to establish connection to waters beyond that area

The claim group appealed the primary 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, which the Court defined by reference to distances (usually 30 metres) from the low water mark. The findings were based on physical access because that was what the evidence demonstrated and the evidence was not sufficient to justify an inference that the claim group had the requisite connection with the sea claim area beyond the accessible area.

The Full Court upheld the primary judge's finding that native title in the sea claim was confined to waters physically accessible from the coast at sovereignty. Statements that country extended "as far as the eye can see" were not enough to establish connection to waters beyond that area. Such evidence may represent "a beginning, not a beginning and an end" to the inquiry.

The Full Court did not diminish the role of spiritual evidence, but held that the evidence must identify the content of the traditional laws and customs and show how they operate in relation to the particular waters in issue. The Court also held that stories and responsibilities

connected mainly with the adjacent land determination could not, without more, establish rights and connection throughout the offshore claim area.

## Relevance of the adjoining determination

The Full Court was required to determine the legal effect, if any, of the adjoining Far West Coast Determination in respect of the sea claim area.

The Full Court began by noting that it was uncontroversial that a native title determination is a determination *in rem*, with the consequence that a person may not, in later proceedings, seek to contradict a determination of native title, or the findings which were essential to that determination. However, as the High Court recognised in *Stuart HC*, the findings which are essential to the determination can have relevance to a native title claim area beyond the land and waters that are the subject of the determination.

The Full Court said that *Stuart HC* confirmed that an earlier native title determination (in respect of one area) may have evidentiary significance in a later native title determination (in respect of another area) on two bases:

- First, the earlier determination has significance as an *in rem* decision, which establishes where native title exists, who holds it and its nature, and the findings which are essential to the matters that are determined.
- Second, the Court may receive into evidence the transcript of evidence in the earlier native title proceeding and may adopt any finding made in the earlier proceeding.

The Full Court held that the Far West Coast Determination, and the reasons for making that Determination, were highly relevant to the sea claim because, to the extent that native title rights and interests are held in the sea claim area, those rights and interests would necessarily be held by Aboriginal people holding rights and interests in the land adjacent to the sea claim area.

The Full Court was not willing to overturn the primary judge's decision not to adopt any of the findings made in the Far West Coast Determination. However, the Full Court said that:

If and to the extent her Honour considered that the findings made in the land determination had less inherent probative value because they were made in the context of a consent determination, we would respectfully disagree with that view. The fact that all parties to the land determination accepted the evidence and supported the determination being made does not diminish the probative value of findings made on the basis of that evidence.

## Full Court overturned finding that native title for the Far West Coast sea claim was held by a subgroup of the Far West Coast land determination native title holders, rather than the group as a whole

The dispute about the legal effect of the Far West Coast Land Determination was relevant because of a challenge to the primary judge's finding that native title for the Far West Coast sea claim was held by a subgroup of the Far West Coast Determination native title holders, rather than the group as a whole.

The Full Court upheld this ground of appeal. The issue turned on whether the native title rights and interests in the Far West Coast Determination were held communally. The Full Court held that they were, and that the primary judge erred in making findings that contradicted this determination.

After considering all the authorities on this issue, the Full Court noted that there was a difference between:

- communal native title, that may include an intramural allocation of rights and interests amongst the native title holding group, such that some have particular privileges (eg, to speak for an area) and others particular restrictions (eg, gender-based restrictions on access); and
- two separate societies for a determination area under which there are two separate, but overlapping, native title holding groups. Where the native title holding group comprises multiple groups, each group holding native title rights and interests in a distinct area of land and waters under the laws and customs of a single society, that is to be recognised in multiple determinations: one for each native title holding group.

The Full Court held that the Far West Coast Determination must be construed as recognising a single communal title under which all the native title holders recognised hold native title rights and interests in the determination area as a whole, albeit that there may be an intramural allocation of those rights and interests amongst particular groups (eg, Kokatha, Mirning or Wirangu) including in particular parts of the determination area.

## Adaptation

The Full Court noted that:

- What was determined by the Far West Coast Determination was the existence, as at the date of the determination in 2013, of a single society that includes descendants of Kokatha, Mirning and Wirangu people.
- The Far West Coast Determination does not necessarily require a conclusion that the same society existed at sovereignty. The concept of "traditional" laws and customs is one which accommodates necessary adaptation of laws and customs in response to European settlement of the claim area.
- It is conceivable that, at sovereignty, Kokatha, Mirning and Wirangu people acknowledged and observed laws and customs under which they held rights and interests in discrete areas of land (often referred to as estates), and it is conceivable that, at sovereignty, they may not have been regarded as a single society. Those possibilities are not inconsistent with the Far West Coast Determination.
- There is no legal requirement that the character and scope of the present-day Aboriginal society, the laws and customs acknowledged and observed, and the rights and interests held, be identical to the pre-sovereignty society. What is required under the *Native Title Act* is that the origins of the content of the present-day laws and customs are to be found in the normative rules of the Aboriginal society that occupied the claim area prior to the assertion of British sovereignty, and that the laws and customs have had a continuous existence and vitality since sovereignty.
- It has been recognised in many cases that a necessary adaptation of traditional laws and customs to the impacts of European settlement is the amalgamation of local estates into a single larger estate.

Ultimately, the Full Court ordered that the matter be remitted to a single judge to determine the question of who holds native title in the sea claim area, in light of the totality of the lay and expert evidence, and based upon a correct understanding of the Far West Coast Determination.

## Key insights

The Full Federal Court in *Gaangalu FC* and *Richards FC* has provided significant guidance on a number of issues.

*Gaangalu FC* warned against overemphasis on concepts of "society" and explained how adaptation of traditional laws and customs is permissible. These findings were followed in *Marlinyu Ghoorlie*, *Ross* and *Eastern Maar* and then developed further by the Full Court in *Richards FC*.

*Richards FC* built on the High Court's observations in *Stuart HC* about the relevance of neighbouring determinations of native title in determining claims to adjacent areas. We first wrote about the uncertainties regarding reliance on neighbouring determinations in our *Native Title Year in Review 2021-2022* (in relation to the *Clermont-Belyando* and *Jangga #3* native title claims) and our *Native Title Year in Review 2023-2024* article, "[Full Court considers test for connection, but High Court to have the final word](#)" (in relation to the appeals from these decisions and *Stuart*). Post *Richards FC*, these issues are now resolved and parties have clear guidance about how neighbouring determinations, whether by consent or litigated, may be utilised.

That spiritual connection to country can found native title is also uncontroversial following *Stuart HC*. However, the Full Court in *Richards FC* held that evidence must identify the content of the traditional laws and customs and show how they operate in

relation to the particular waters in issue. Statements that country extends "as far as the eye can see" were not enough to establish connection to waters that were not physically accessible from the land. The Full Court's refusal to overturn the trial judge on this issue is likely to be relevant in the context of offshore infrastructure projects around Australia.

In researching this article, we were struck by the number of decisions in the last 12 months dealing with the resolution of disputes between native title holding groups about boundary areas between already determined native title land areas. These disputes represent an aspect of "next generation" native title connection issues. Primary claims have been made and resolved, leaving less straightforward areas to be tackled later.

*Richards FC* is now the definitive word on the relevance of previous determinations, so the various trial judges' observations about these issues are to be understood in this context. What is clear is that the primary judges in *Gingirana #3*, *Eastern Maar* and *Ross* were grappling with essentially the same issue, but were faced with a number of different strategies adopted by the claim groups in terms of whether to argue a binary case excluding the other group. Although it would seem less risky for disputing groups to attempt some compromise over boundary areas to reach a consent determination, we saw in *Gingirana #3* that the Court will not accept a determination that does not meet the requirements of the *Native Title Act*.

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# Extinguishment and validity of tenure still being litigated in 2026

## What you need to know

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- 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.

## What you need to do

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- 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.
- Be aware that the law is still developing. The outcome of the Redland City Council non-claimant application may provide detailed consideration of Queensland tenures and public works.

# Decisions relating to extinguishment of native title and/or validity of tenure in 2025-2026

Resolution of native title claims and compliance with the *Native Title Act* requires an assessment of whether native title has been extinguished as a result of the history of land dealings. The principles are well settled and confirmation of extinguishment in respect of “previous exclusive possession acts” under the *Native Title Act* and corresponding State legislation has underpinned such assessments for decades. Nevertheless, more than 30 years after the commencement of the *Native Title Act*, there is still some room for lively debate.

The last 12 months have seen a number of Federal Court decisions addressing contested extinguishment issues in the context of claimant and non-claimant applications. We provide some insight into the most interesting below.

## Compulsory acquisition and registration of Torrens title considered in NSW non-claimant applications

[\*Metropolitan Local Aboriginal Land Council \(No 3\) v Attorney-General of NSW\* \[2026\] FCA 595](#) (Metropolitan LALC (No 3)) was a non-claimant application relating to seven parcels in Sydney’s Northern Beaches. The Court determined that native title does not exist over all seven parcels. Four parcels were uncontroversial, but extinguishment was contested in relation to three Crown land parcels that had been compulsorily acquired in April 1996 by the NSW Land and Housing Corporation (NSWLHC) under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

Kennett J considered general law validity, the effect of Torrens title registration and the operation of the *Native Title Act*, both as it was in April 1996 before the *Wik* amendments and in its current form, which includes the confirmation of past extinguishment regime.

### General law validity

Kennett J found that the compulsory acquisition was valid under NSW law, notwithstanding the absence of evidence that notice was given to native title holders. His Honour held at [61]:

Proof of some invalidating feature is required before the Court will proceed on the basis that an administrative act which appears valid on its face was invalid ... Absent any evidence that there were native title holders at all, let alone that they were in occupation of the land or known to NSWLHC, the absence of evidence that notice was given to such persons is therefore not fatal to the validity of the compulsory acquisition. The same is true of holders of any other kinds of interest in the land.

### Torrens title registration under the 1996 Native Title Act

Kennett J then considered whether the compulsory acquisition was valid in so far as it affected native title. His Honour first looked to the *Native Title Act* as it was in force in April 1996 and found that it was a valid “permissible future act” under former section 23 of the *Native Title Act*, but that the non-extinguishment principle applied to the acquisition under former section 23(2)(a).

The Land Council and the State sought to overcome this by reliance on former section 23(3)(b) of the *Native Title Act*, which said that “nothing in this Act prevents any act that is done in giving effect to the purpose of the acquisition from extinguishing the native title rights and interests”. They submitted that the Torrens title registration of NSWLHC’s interest as registered proprietor on 16 June 1996 was a further “act” that extinguished any remaining native title as an act “giving effect to the purpose of the acquisition”.

Notably, in considering this issue, Kennett J appeared to depart from the line of authority beginning with *Hayes v Northern Territory* [1999] FCA 1248 and endorsed in *Daniel v Western Australia* [2003] FCA 666 and *Allen v Western Australia (Nyamal Palyku Proceeding) (No 2)* [2020] FCA 788, which discussed the impact of Torrens registration on native title.

His Honour said that the Torrens system is one of “title by registration” (not “registration of title”), such that registration confers a “new title” as if there were a “new Crown grant”, and that registration of an interest in land under Torrens title legislation is capable of extinguishing native title (where such extinguishment has not already occurred by reason of the grant of that interest). On that reasoning, the registration of the NSWLHC’s interest was a separate “act giving effect to the purpose of the acquisition” within section 23(3)(b) of the *Native Title Act* and therefore extinguished any native title that had survived the acquisition.

Having appeared to take a definitive position, His Honour ultimately decided the case on other grounds.

## Consideration of “confirmation of past extinguishment” regime in current Native Title Act

Kennett J then turned to the current legislation and noted that the High Court had confirmed that any overlap between the two extinguishment regimes must be resolved in favour of the new regime. Accordingly, if the compulsory acquisition constitutes a “previous exclusive possession act” (PEPA) under current section 23B, the result is that former section 23(2)(a) is excluded and native title is extinguished by virtue of the new regime.

Kennett J held that it was a PEPA. In his Honour’s view, the vesting effected by the acquisition notice amounted to the vesting of “a freehold estate” and the exception in section 23B(9C) for “Crown to Crown grants” did not apply for the reasons set out in *Tweed Byron Local Aboriginal Land Council v Attorney General of New South Wales* [2019] FCA 936 at [29]-[33].

## Analysis of registration of title “irrelevant”

Kennett J concluded that, as a PEPA, the compulsory acquisition extinguished native title by operation of section 23E of the *Native Title Act* and section 20(1) of the *Native Title (New South Wales) Act 1994* (NSW). His Honour said that, if this conclusion was correct, it displaced the earlier effect of former sections 23(2) and (3) of the *Native Title Act* (discussed above), rendering the analysis of the registration of title “irrelevant”.

## Key insights

The Torrens registration analysis is a notable feature of this decision. Although his Honour noted that this analysis was not determinative once the PEPA conclusion was reached, the reasoning may open an additional avenue for establishing extinguishment in future cases.

In an earlier decision, *Metropolitan Local Aboriginal Land Council v Attorney General of New South Wales* [2025] FCA 1183, McDonald J briefly mentioned the “interesting” issue of extinguishment by Torrens title registration (and the arguments for and against) but found that it was not necessary to resolve it. The Court found that the *David Berry Hospital Act 1906* (NSW) vested certain land in the Crown “free from all estates and interests”, language the Court held was sufficiently broad to demonstrate a legislative intention to vest an estate equivalent to fee simple (notwithstanding the absence of the words “fee simple”), thereby extinguishing native title. As to general law validity, the parties could not rely on an 1825 grant of freehold because there was insufficient evidence that it was valid at general law. Questions were also raised about the validity of a 1967 special lease.

## Resumption of land under the Land Act 1962 (Qld) extinguished native title

In *Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 39)* [2026] FCA 670, the Federal Court considered whether proclamations by the Governor in Council in the 1980s resuming two parcels of land in the Cooktown area under section 306 of the *Land Act 1962* (Qld) extinguished native title rights and interests held by the Guugu Yimidhirr People.

The applicant contended that “land” in section 308 referred only to legal or equitable rights in land – that is, the leasehold interest – rather than the physical land itself. On this reading, the resumptions merely terminated the leases without extinguishing native title, analogous to the form of resumption under the WA *Land Act* considered in *Western Australia v Ward* (2002) 213 CLR 1.

Stewart J rejected that construction. His Honour held that “land” in section 308 includes the physical land itself, not merely incorporeal rights and interests. Accordingly, the Court held that the resumptions vested the land in the Crown freed of all interests, including native title. Stewart J found that the *Land Act 1962* resumption regime was analogous to the *Public Works Act 1902* (WA) provisions held in *Ward* to extinguish native title, rather than the *Land Act 1933* (WA) provisions which did not.

The applicant also advanced an alternative case based on procedural fairness. On this alternative case, the applicant contended that the power to make a resumption proclamation was subject to a statutory implication of procedural fairness owed to those who would be affected by the proclamation, including any native title holders. The applicant argued that as procedural fairness was not afforded to the applicant, the proclamations are affected by jurisdictional error.

The Federal Court rejected this argument on the basis that, at the time of the 1980s resumptions, there was no evidence available on which a conclusion could have been reached that native title holders had an interest in the proposed resumptions and should have been given notice in advance. Stewart J found therefore that there was no obligation to take any steps, such as to notify native title holders, in relation to procedural fairness.

## Extinguishment by scheduled interests and public works in NSW non-claimant applications

In [\*Coffs Harbour and District Local Aboriginal Land Council v Attorney-General of New South Wales\* \[2025\] FCA 1492](#), a contested non-claimant application turned on whether a 1910 special lease for “residence, grazing and agriculture” was a PEPA. The list of purposes for a special lease under section 90 of the *Crown Lands Act 1884* (NSW) (CL Act 1884) to qualify as a *Native Title Act* scheduled interest does not include grazing while the equivalent list for a special lease under section 75 of the [\*Crown Lands Consolidation Act 1913\* \(NSW\) \(CLC Act 1913\)](#) includes both “residence” and “agriculture (or any similar purpose) and grazing combined”.

Viewed as special lease granted under CL Act 1884, the Court found that it could not be a scheduled interest. The lease required bona fide use for all three purposes, and “grazing” was not a scheduled category. However, the CLC Act 1913 deemed special leases granted under section 90 of the CL Act 1884 as having been granted under section 75 of the later act. The Court considered at length whether the legal fiction of the deeming provision could be applied to allow the re-characterisation of the special lease for the purposes of the *Native Title Act*. Concluding that it could, the Court found it was appropriate to view the CL Act 1884 special lease as also granted under the CLC Act 1913. With each of “residence”, “grazing” and “agriculture” listed in the *Native Title Act* as purposes for a CLC Act 1913 special lease to qualify as a scheduled interest, the Court found the deemed grant extinguished native title.

In [\*Hay Local Aboriginal Land Council v Attorney General of New South Wales\* \[2025\] FCA 1581](#), the Court determined that native title had been extinguished by public works, including a residence constructed around 1898 for the Hay Courthouse caretaker and the Hay Courthouse itself. The Court rejected the primary submission that the whole parcel was one public work. Instead, section 251D of the *Native Title Act* extended the footprint of each public work to adjacent land necessary for or incidental to its operation. While the Court was ultimately satisfied that native title was extinguished across the whole parcel, evidence of use was required to establish this. The decision illustrates the functional reach of section 251D.

## Extinguishment not to be disregarded – operation of section 47B of the Native Title Act

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*, such that historical extinguishment cannot be disregarded (*Gilla on behalf of the Yugunganya 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). This issue has been unresolved since the High Court decision in *Tjungarrayi v Western Australia* (2019) 269 CLR 150.

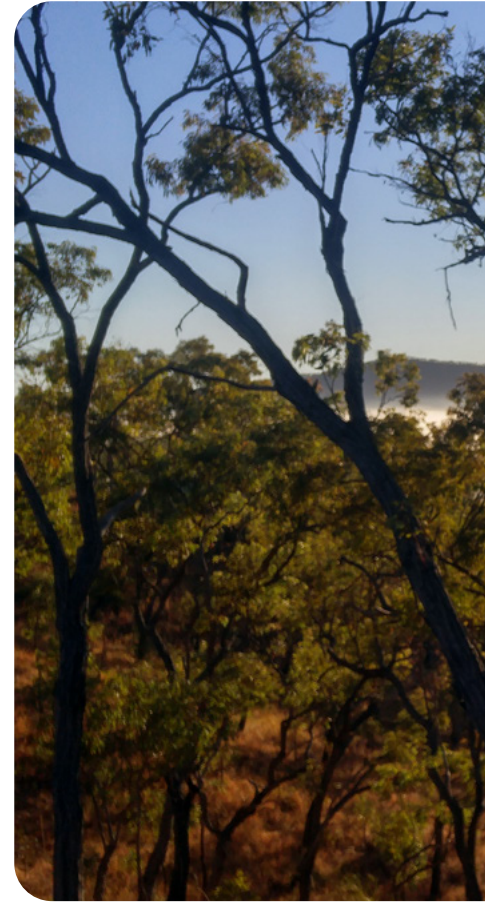
For more information about these decisions, see our *Native Title Year in Review 2025-2026* article, [“Mining and petroleum leases prevent section 47B applying”](#).

## Future Queensland extinguishment decision to monitor in 2026-2027

We wrote about Redland City Council’s three non-claimant applications in South East Queensland in our 9 September 2025 alert, [“Full Court upholds negative determination in contested non-claimant application”](#). [According to Council](#), these were filed to obtain certainty in respect of extinguishment of native title in the context of the 530km<sup>2</sup> Quandamooka Coast Claim. The Quandamooka Coast Claim and Council’s first two non-claimant applications were partly heard in September and December 2025, with judgment reserved. Council’s third non-claimant application (filed in June 2025) is progressing towards hearing separately. We expect a decision in these proceedings to consider the impact of a range of Queensland tenures and Council public works on native title.

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# Mining and petroleum leases prevent section 47B applying



## What you need to know

- 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](#) (Yugunga-nya) and [\*Doyle on behalf of the Iman People #4 v State of Queensland \(No 2\)\* \[2026\] FCA 1334](#) (Iman)).
- This issue has been unresolved since the High Court decision in *Tjungarrayi v Western Australia* (2019) 269 CLR 150 (Tjungarrayi).
- 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.

## What you need to do

- Consider whether any mining or petroleum leases may prevent the application of section 47B in other pending and future native title claims around the country.
- Watch for an appeal from either decision.



**Refresher: Section 47B allows historical extinguishment to be disregarded in certain circumstances**

Section 47B of the *Native Title Act* is part of a small suite of provisions that allow historical extinguishment of native title to be disregarded in certain circumstances. It is a beneficial provision that creates an exception to the principle that once extinguished, native title cannot be revived.

Section 47B(1)(b)(i) and (ii) set out two categories of historical acts that prevent the operation of the beneficial provision. They state that section 47B does not apply if, when the claimant application is made, the area is:

- covered by a freehold estate or a lease; or
- covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose.

The interpretation of this suite of provisions was much litigated in the early days of the *Native Title Act* and its 1998 amendments, but Full Court and High Court decisions almost a decade ago settled authority on many issues. We wrote about these decisions in our 2015-2018 editions of *Native Title Year in Review*.

However, the question of whether the extinguishing effect of mining and petroleum leases could be disregarded under these provisions had been left open. In *Tjungarrayi*, the High Court held that exploration licences and petroleum exploration permits were not "leases" for the purpose of section 47B(1)(b)(i). The High Court expressly left open whether a mining lease is a "lease" for the purpose of the provision.

Two recent decisions have now addressed that question. They found that mining leases and petroleum leases fall within the exception and prevent the operation of section 47B.

## Mining leases in Western Australia (Yugunga-nya)

In *Yugunga-nya*, Banks-Smith J heard overlapping claims by the Yugunga-nya and Gingirana claim groups. Part of the overlap area included unallocated Crown land (UCL) subject to three mining leases. The Gingirana argued that “lease” in section 47B(1)(b)(i) of the *Native Title Act* should be read as “lease (other than a mining lease)”.

Her Honour held that “lease” in section 47B(1)(b)(i) includes the mining leases, so that the claim group could not rely on section 47B in relation to the mining lease land. Her Honour’s starting point was that nothing in the text of section 47B(1)(b)(i) displaces the section 242(1) definition of “lease”, and [Western Australia v Ward \(2002\) \[2002\] HCA; 213 CLR 1](#) established that mining leases fall within it.

In the alternative, her Honour would have found that the mining leases fell within section 47B(1)(b)(ii). The Gingirana conceded that mining was a “particular purpose”, but argued that “is to be used” means “is required to be used”. Her Honour rejected that argument and held that the task is to identify, objectively, an intention to use the land, on a spectrum between permission and requirement. Given the covenants in section 82 of the Mining Act 1978 (WA), the forfeiture regime and the mining proposal requirements, an intention that the land “is to be used” for mining was apparent, even if mining might never in fact occur.

## Petroleum leases and paper roads in Queensland (Iman)

A few weeks after *Yugunga-nya*, in *Iman*, Rangiah J considered section 47B in relation to Queensland petroleum leases.

The Court was asked to resolve separate questions in a claimant application. These included whether section 47B required prior extinguishment to be disregarded over land subject to petroleum leases granted under section 120 of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (P&G Act). There was also a question about whether, if section 47B did apply, a paper road (an established road that was never constructed) was a “prior interest” to be disregarded under section 47B(2).

The claim group conceded that a petroleum lease under the P&G Act is a “mining lease” within section 245(1) of the *Native Title Act*, but argued it is not a “lease” for the purpose of section 47B(1)(b)(i).

Rangiah J considered the High Court decision in *Tjungarrayi* in detail. His Honour noted that the issue posed a “difficult constructional choice”, but ultimately held that the meaning of “lease” in section 47B(1)(b)(i) derives from the definition of “lease” in section 242(1), which

includes a mining lease under section 245(1). Accordingly, section 47B(1)(b)(i) encompasses a “mining lease” within the meaning of section 245(1), and section 47B therefore does not apply.

His Honour’s reasons were similar to those expressed by Banks-Smith J in *Yugunga-nya*, and his Honour stated that he became aware of that decision only after having written his reasons in draft. His Honour expressly agreed with Banks-Smith J’s reasons for finding that a “lease” in section 47B(1)(b)(i) includes a mining lease.

In the alternative, his Honour held that the exception in section 47B(1)(b)(ii) applied because the petroleum leases are “permissions or authorities” under which “the whole or a part of the land ... is to be used ... for a particular purpose”.

The claim group submitted that the activities authorised by the grant of a petroleum lease (including conducting geological surveys, constructing and operating pipelines and constructing roads) are so broad that they are not a “particular purpose”. The Court rejected this and held that the range of activities a petroleum lease holder is authorised to undertake is directed to the ultimate purpose of producing petroleum, and that the production of petroleum is a “particular purpose” within section 47B(1)(b)(ii).

The claim group also submitted that no part of the lease area was “required to be used”. The Court rejected the submission that the phrase “is to be used” should be read this way. His Honour held (at [118]):

The phrase “is to be used” in section 47B(1)(b)(ii) imports the need to identify an *intention* that the subject land be used for public purposes or a particular purpose. The intention is the Crown’s intention. In many statutory contexts, the Crown’s intention will be indicated by the intention of the relevant Minister. The intention must be demonstrated on an objective basis, by reference to the relevant legislation and the reservation ... If a reservation ... expressly requires land to be used for public purposes or a particular purpose, that provides a powerful indication of the Crown’s intention, but an express requirement is not essential. On the other hand, a mere permission or authority to use land will not, without more, demonstrate the necessary intention. Between these positions, the statutory language or the terms of the reservation ... may provide an indication that the Crown’s intention is that the land is to be used for a public or particular purpose. Each case turns upon its own facts and statutory context.

In this case, the terms of the petroleum leases and the provisions of the *P&G Act* showed the Minister’s intention that the land be used to produce petroleum. Whether that intention was carried out, and whether infrastructure had been constructed on the particular parcels, was not relevant.

## Paper roads question

*Iman* also considered whether the extinguishing effect of a road that was established but not constructed (a paper road) could be set aside under section 47B. This turned on the meaning of “prior interest” in section 47B(2).

Section 47B(2) provides that “for all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the **creation of any prior interest** in relation to the area must be disregarded” (emphasis added).

The parties agreed that establishing the road was a public work that extinguished native title. The Court noted that the extinguishing effect of a paper road had been confirmed by the Full Federal Court in 1998 ([\*Fourmile v Selpam Pty Ltd\* \[1998\] FCA 67; \(1998\) 80 FCR 151](#)).

However, the claim group argued that establishing the road created a “prior interest”, with the consequence that such extinguishment must be disregarded. They sought to distinguish the 2003 Full Federal Court decision in [\*Erubam Le \(Darnley Islanders\) #1 v State of Queensland\* \[2003\] FCAFC 227; \(2003\) 134 FCR 155](#) (*Erubam Le*), that the construction or establishment of a public work is not “the creation of a prior interest in the land”. They argued that the Full Court did not consider paper roads, and that establishing a road gives members of the public an enforceable right of free passage over the land.

Rangiah J considered that *Erubam Le*, which establishes that the construction or establishment of public works does not create a “prior interest in relation to the area”, is not distinguishable and must be followed. Accordingly, the extinguishing effect of the establishment of the paper road would not be disregarded under section 47B.

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# Second mining lease renewals and the right to negotiate

## What you need to know

- 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.

## What you need to do

- Seek legal advice regarding potential *Native Title Act* implications, particularly in advance of upcoming renewals.



### Refresher: section 26D of the *Native Title Act*

The grant or renewal of mining tenure under the *WA Mining Act* must comply with the right to negotiate process under Subdivision P of the *Native Title Act* to be valid to the extent it affects native title.

However, section 26D disapplies this requirement where a right to mine is created by the renewal, re-grant or re-making of an earlier right to mine.

## Full Federal Court affirms plural construction of section 26D

In our *Native Title Year in Review 2024-2025* article, "[Second mining lease renewals to trigger the right to negotiate: WA guidance causes uncertainty for proponents](#)", we reported on the decision of Jackson J 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). That case concerned the grant of a single mining lease to consolidate an area covered by 31 previously held mining leases, on the same terms, duration and total area.

The primary judge held that the consolidation was a "re-making" under section 26D(1)(a) of the *Native Title Act*, and that section 23(b) of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) applied such that "an earlier right to mine" could be read in the plural. The exemption from the right to negotiate therefore applied.

The Full Federal Court heard an appeal in March 2025 and dismissed it on 24 November 2025.



## Decision of the Full Federal Court

On appeal, the applicant contended the *Native Title Act* displaces the presumption in section 23(b) of the Acts Interpretation Act that singular words include the plural, principally by way of an *expressio unius* inference, where section 24IC(2A) expressly deems consolidations to be renewals, whereas section 26D is silent, suggesting Parliament intended to confine section 26D to the singular.

The Full Court acknowledged the *expressio unius* argument carried “considerable force”, particularly as sections 24IC and 26D were introduced simultaneously and employ similar structure. However, the Court found that the applicant could not identify a substantive policy reason for why consolidations should be excluded from section 26D but permitted under section 24IC. The criteria in section 26D(1)(b)-(e) protect native title holders regardless of whether one or multiple earlier leases are involved, and a contrary reading would produce the anomaly of a consolidated lease being a valid “renewal” under section 24IC(2A) but still requiring the right to negotiate under section 26D.

Although describing the issue as “finely balanced”, the Full Court ultimately held that no contrary intention displaced the section 23(b) presumption, and that reading “earlier right to mine” to include the plural best achieves the purpose of section 26D.

## Guidance update

In 2024, the WA Department of Energy, Mines, Industry Regulation and Safety issued a guidance note, [Applying for a second renewal of a mining lease made in accordance with the Mining Act 1978](#), which confirmed the position that the second renewal of a mining lease under the *WA Mining Act* is not exempt from the right to negotiate process.

This remains the State’s interpretation.

## Key insights

The dismissal of the appeal affirms that “earlier right to mine” in section 26D of the *Native Title Act* can be interpreted in both the singular and plural, to best achieve the purpose of the *Native Title Act*.

However, WA guidance indicates that any mining lease approaching a second or subsequent renewal must proceed through the right to negotiate process, unless otherwise exempt from the future act provisions of the *Native Title Act*. Proponents that do not comply risk refusal of the renewal application and, ultimately, losing land access at the expiry of the current term.

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# Expedited procedure challenge heads to the High Court

## What you need to know

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- The Full Federal Court in [\*Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia\* \[2026\] FCAFC 7](#) (Yanunijarra) 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.

## What you need to do

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- Native title parties should treat an objection to the NNTT within four months as the only way to challenge an expedited procedure statement. If no objection is lodged, the government party may do the act.
- Watch out for the High Court appeal. The Full Court warned that the appellants' approach could allow the validity of a grant to be challenged after the event, even where no objection was lodged.



### Refresher: section 26D of the Native Title Act

The expedited procedure is a fast-track process for certain future acts otherwise attracting the RTN process 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 RTN 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.

## Where we left off

In our *Native Title Year in Review 2024–2025* article, [“Native Title Act’s expedited procedure under challenge”](#), we reported on [Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia \[2025\] FCA 490](#). In that case, the Federal Court held that the State of Western Australia’s decision to include an expedited procedure statement in a section 29 notice could not be judicially reviewed. The Court found that a native title party should instead lodge an objection with the NNTT under section 32 of the *Native Title Act*. This decision was not unexpected and confirmed authorities dating back to 2021.

The native title parties appealed. On 12 February 2026, the Full Federal Court dismissed the appeal. On 11 June 2026, the High Court granted special leave.

## The appeal

The *Yanunijarra* appellants (three registered native title bodies corporate (RNTBCs) and the Kimberley Land Council) argued that section 29(7) of the *Native Title Act* requires a government party to consider and apply the criteria in section 237 before including an expedited procedure statement. Section 237 sets out when an act attracts the expedited procedure. In particular, the act must not be likely to interfere with areas or sites of particular significance.

The appellants argued that including the statement has apparent legal effect, because it switches off the normal negotiation procedure. If no objection is lodged, the government party can grant the tenement without negotiating. They also relied on the word “considers” in section 29(7) and argued that the RTN is a special measure, so any qualification on it should be construed narrowly. In their view, a statement included without that consideration would have no legal effect, and the NNTT would have no jurisdiction to determine an objection.

By the time of the appeal, the exploration licence applications which were the subject of the original notices had been withdrawn. The case continued because of a later notice that the native title parties had not objected to within the four-month period. That made the question squarely about whether a government party’s decision can be challenged in court after the objection window has closed.

## Full Court: a procedural step, not a substantive decision

The Full Court (Moshinsky, Sarah C Derrington and Hill JJ) dismissed the appeal. The Court accepted that a government party makes “a decision of some kind” when it includes the statement. However, the Court held at [62]:

A close analysis of the statutory scheme ... demonstrates that the inclusion of an expedited procedure statement in a s 29 notice is a procedural step that triggers certain statutory consequences, and does not involve or depend on a substantive determination of whether the proposed act is one that attracts the expedited procedure.

The Court reached this view for three key reasons:

- section 29(7) uses the word “considers”, while section 32(4) requires the NNTT to “determine” whether the act attracts the expedited procedure. This contrast shows that the substantive decision belongs to the NNTT;
- the related provisions depend on the fact that a notice “includes a statement”, not on any opinion formed by the government party; and
- the appellants’ construction would create two parallel avenues of review, one in the courts and one in the NNTT. That would cause fragmentation and uncertainty about whether future acts are valid.

The Court accepted that the RTN provisions constitute a special measure and that the expedited procedure represents a qualification on the right to negotiate but found this was of no “real assistance” in resolving the question.

For the same reasons, the Court held that the appellants could not obtain certiorari or declaratory relief under the general law. It left open whether an expedited procedure statement could ever be judicially reviewed under general law.

Each party was ordered to bear its own costs, because the appellants had not acted unreasonably and there was a public interest in resolving the issue at an appellate level.

## High Court to have the final word

On 11 June 2026, the High Court [granted](#) the native title parties special leave to appeal. It has not yet been heard.

With the Full Court describing the question as “an important issue of statutory construction” with “practical ramifications for the operation of the future act regime”, the High Court’s decision will settle whether a 25-year line of authority still stands.

## ALRC recommends repealing the expedited procedure

The Australian Law Reform Commission’s final report, [\*Fulfilling the Promise of Mabo: Reforming the Future Acts Regime in the Native Title Act 1993 \(Cth\)\*](#), recommends repealing the expedited procedure because it concluded that the procedure does not operate effectively, efficiently, or fairly. Instead, exploration would be treated the same way as other future acts. In the alternative, the Report recommends amendments including requiring consultation with native title parties and changes to the section 237 criteria.

The repeal of the expedited procedure would likely see the full RTN process applying to many exploration tenements. The costs and timeframes of this process may be prohibitive for many explorers.

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# Costs at the crossroads: native title and section 85A



## What you need to know

- 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 FCA Act 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.

## What you need to do

- Ensure that any native title claim is filed in a timely manner, with proper authorisation and a reasonable evidentiary basis, to minimise the risk of an adverse costs order for unreasonable conduct or abuse of process.
- Understand the funding arrangements of all parties before pursuing or defending a costs application. Where representative body funding removes personal liability, a threshold objection to the Court's power to award costs may now be available.
- Consider the statutory basis on which proceedings are resolved, as it may determine whether the *Native Title Act* costs regime or the general section 43 discretion applies.
- Treat Calderbank offers with caution in native title proceedings. While relevant, they may carry less weight given the section 85A(1) starting point and the Court's reluctance to equate rejection of an offer with unreasonable conduct.

## Section 85A is only the starting point for native title costs

Courts continue to grapple with costs in native title proceedings. The starting point under section 85A(1) of the *Native Title Act* (that each party bears its own costs unless the Court orders otherwise) is well established, yet the boundaries of that default position remain actively contested. Parties continue to litigate the circumstances that warrant departing from it. In our *Native Title Year in Review 2024–2025* article, "[Native title costs decisions: trends and recent developments](#)", we identified a growing body of authority on unreasonable conduct under section 85A(2) and the limits of section 85A more broadly. The 2025 to 2026 period has only reinforced and extended those themes.

This year's review draws on four Federal Court costs decisions and a High Court special leave refusal. Read together, they illuminate the current judicial approach to section 85A, including the threshold for "unreasonable conduct" under section 85A(2), the relevance of representative body funding to the power to award costs, and the interaction between the *Native Title Act* costs regime and the general discretion under section 43 of the FCA Act.

## Section 85A default upheld despite discontinuance

[\*Kimberley Land Council Aboriginal Corporation v Ngarrawanji Aboriginal Corporation RNTBC\*](#) [2026] FCA 2 concerned a dispute between the Kimberley Land Council Aboriginal Corporation (KLC) and Ngarrawanji Aboriginal Corporation RNTBC regarding the engagement of lawyers for native title and heritage matters. The KLC had commenced proceedings seeking declarations that the respondent's termination of its retainer was ineffective and that its engagement of alternative lawyers exceeded its authority under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

Before the listed two-day trial, a meeting of 44 Ngarrawanji common law holders at Halls Creek on 22 November 2025 passed a resolution unanimously (with one abstention) authorising the PBC to engage lawyers of its choosing. Events overtook the proceedings, and the KLC sought to discontinue with no order as to costs. The respondent opposed this, seeking its costs.

Perry J held that the default position under section 85A(1) of the *Native Title Act* applied. Her Honour noted that the "spirit" of section 85A(1) extended even to proceedings not strictly instituted under the *Native Title Act*, relying on [\*Cheedy on behalf of the Yindjibarndi People v State of Western Australia \(No 2\)\*](#) [2011] FCAFC 163 and [\*Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia\*](#) [2025] FCA 490. The respondent's arguments were rejected for three reasons (at [10]–[14]):

- the applicant's discontinuance was a reasonable response to events;
- the respondent had refused six offers to hold a meeting of common law holders between March 2024 and March 2025; and
- the respondent's submissions impermissibly sought to re-litigate the merits through the costs question.

Each party was ordered to bear its own costs.

## Representative body funding and costs

[\*Fagan on behalf of the Wadawurrung Native Title Claim v State of Victoria \(No 2\)\*](#) [2026] FCA 11 (Fagan (No 2)) raised a novel question about the power of the Court to make costs orders under section 85A where both parties are funded by the same native title representative body. The substantive proceeding involved a separate question about the biological descent of certain ancestors within the Wadawurrung native title claim. The respondents to the separate question (Mr Clarke and Dr Couzens) were successful and sought their costs on a party and party basis, and on an indemnity basis after the date of two rejected Calderbank offers.

Critically, both sides were funded by First Nations Legal & Research Services, and Mr Clarke and Dr Couzens conceded that they were “not personally liable for costs” (at [8]). The applicant argued that any costs order would be futile, as the same representative body would ultimately bear the costs on both sides.

Justice Longbottom undertook a detailed analysis of the relevant authorities, including [\*Far West Coast Native Title Claim v State of South Australia \(No 8\)\*](#) [2014] FCA 635 (Far West Coast) and the Full Court’s decision in [\*Oil Basins Limited v Watson\*](#) [2017] FCAFC 103 (at [19]-[26]). Her Honour concluded that the finding in Far West Coast – that section 85A contemplates that a lawyer funded by a representative body may seek costs – was premised on the existence of a liability (or at least an expectation of liability) on the part of the represented party to pay for their legal costs. Where, as here, the parties conceded they were not personally liable, Far West Coast did not provide a basis for the costs order sought (at [25]).

In the alternative, Longbottom J held that even if the Court had power to award costs, the applicant’s conduct was not sufficiently unreasonable to warrant such an order. Her Honour emphasised the importance of oral history evidence in native title cases, observing that the applicant’s resistance to the separate question was informed by oral history which, while ultimately unsuccessful, was not advanced for an ulterior purpose. The relatively short period between the lay evidence hearing and closing submissions also weighed against a finding of unreasonableness (at [27]-[33]). The Court made no order as to costs.

## Unreasonable conduct and overlapping claims can trigger costs

In our *Native Title Year in Review 2024–2025* article, [“Native title costs decisions: trends and recent developments”](#), we flagged the reserved costs question in [\*Sandow on behalf of the Bigambul People #5 v State of Queensland\*](#) [2025] FCA 53. The costs question was determined in [\*Sandow on behalf of the Bigambul People #5 v State of Queensland \(No 2\)\*](#) [2026] FCA 727 (*Sandow (No 2)*).

The Bigambul People had previously had their Bigambul #2 claim struck out in [\*Mann on behalf of the Bigambul People #2 v State of Queensland\*](#) [2023] FCA 450 (Mann), with costs ordered against them. Notwithstanding that earlier outcome, they subsequently filed the Bigambul #5 claim (QUD 344 of 2024), which overlapped with the Gamilaraay People’s claim. The timing was critical, as the Bigambul #5 claim was filed just three days after the Gamilaraay claim was listed for consent determination. The Gamilaraay applicant was forced to bring an interlocutory application to strike out the Bigambul #5 claim, which was successful at first instance and upheld on appeal by the Full Court.

Collier J found that the conduct of the Bigambul #5 applicant in filing the claim was “unquestionably” unreasonable within the meaning of section 85A(2) (at [15]). Key factors included:

- the claim replicated flaws found fatal in the earlier Mann proceeding;
- it was filed at a critically late stage in the Gamilaraay consent determination process;
- no satisfactory explanation was given for the delay; and
- the claim constituted an abuse of process.

The Court ordered the Bigambul #5 applicant to pay the Gamilaraay applicant’s costs of the interlocutory application.

The decision also addressed and rejected several arguments commonly raised by applicants resisting costs orders: that the applicants were of limited financial means, that the party seeking costs had no intention of enforcing orders, and that the Gamilaraay applicant’s public funding meant it would not be financially disadvantaged (at [16]). Collier J held that none of these matters provided a basis for declining to exercise the discretion under section 85A(2).

## General costs principles apply outside section 85A

[\*Wanambi for himself and on behalf of the Marranji People of East Arnhem Land v Wanambi \(No 2\)\*](#)

[2026] FCA 926 concerned the more conventional application of costs principles under section 43 of the FCA Act, rather than the *Native Title Act* costs regime.

The applicant's proceeding had been dismissed under section 31A of the FCA Act. The first respondent, Mary Wanambi, sought her costs. Although her initial submission referenced indemnity costs, the form of order sought and the substance of her submissions were directed to party/party costs, and the Court treated the application accordingly. The applicant did not file any submissions in opposition.

Justice O'Bryan applied the established principles governing costs discretion under section 43, including that costs ordinarily follow the event but that a successful party may be deprived of costs if they succeeded only on a portion of their claim or pursued issues unreasonably (at [6]-[7]). Although Mrs Wanambi was unsuccessful on her principal argument (that the proceeding was an abuse of process or was subject to estoppel), she was successful overall in her defence. O'Bryan J held that the arguments on which she failed did not add significantly to the length or complexity of the proceedings, and awarded her costs on a party/party basis.

## High Court special leave refused in the Gaangalu Nation proceedings

In [\*State of Queensland v Blucher & Ors on behalf of the Gaangalu Nation People & Ors\*](#) [2026] HCADisp 168 (*Blucher*), the State of Queensland and the State Minister for the State of Queensland sought special leave to appeal from Full Court judgments that had set aside a negative determination of native title by Rangiah J and ordered the state to pay the appellant's costs of the appeal. The applicants also sought to raise a ground of appeal concerning the application of section 85A of the *Native Title Act* to the award of costs on appeal.

The High Court (Gageler CJ, Gordon, Edelman, Steward, Jagot and Beech-Jones JJ) refused special leave, finding that the proposed grounds concerning the Full Court's substantive orders did

not have sufficient prospects of success to warrant a grant of special leave. The Court observed that, in those circumstances, an appeal from the Full Court's costs orders "would not be a suitable vehicle" to consider the proposed section 85A ground. Special leave was refused with costs.

Although the High Court did not engage substantively with the section 85A issue, the refusal of special leave is significant. It means the Full Court's costs order, which apparently departed from the usual section 85A(1) starting point to award costs on appeal, stands. This may encourage parties who succeed on appeal in native title proceedings to seek costs orders, at least where the appeal concerns the reversal of a negative determination at first instance.

### Key insights

The 2025 costs decisions advance the law on costs in native title proceedings. Section 85A(1) of the *Native Title Act* continues to provide significant protection from adverse costs orders, but the protection is not absolute. The Court has shown it will award costs under section 85A(2) in cases of clear abuse of process. It has also scrutinised more closely whether costs can be awarded where representative body funding removes any personal liability.

The High Court's refusal of special leave in *Blucher* leaves standing a costs order that departed from the section 85A(1) default on appeal, potentially opening the door for successful appellants to seek their costs in future proceedings. Practitioners and parties should be alert to both the opportunities and constraints these decisions present when managing costs risk in native title proceedings.

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

## What you need to know

- 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 – as Queensland’s reversal in the Cape York United #1 claim shows.

## What you need to do

- Consider how the future act regime under the *Native Title Act* applies to dealings on public land now the claim is registered.
- While the notification period is over, the claim is in its early stages. Consider whether you might be affected by the outcome such that joinder as a respondent would be useful.
- Watch the result of the Victorian election on 28 November 2026 and any change in the government’s approach to settling native title claims.
- Draft agreements and plan projects in the claim area to account for the full range of possible outcomes.

## New claim over Melbourne

On 30 October 2025, the Wurundjeri Woi-Wurrong People filed a native title claim (VID1466/2025) over Melbourne and the surrounding region. The claim is registered and has been publicly notified. The Federal Court held the first case management hearing on 11 February 2026.

There have been native title claims over four other Australian capital cities – Adelaide, Perth, Darwin and Brisbane – and the last of those was determined in 2021. Though some time has passed since then, the claims shed some light on the range of potential outcomes in the Wurundjeri Woi-Wurrong claim, as well as changing attitudes to native title as a co-existing interest.



### Refresher: How do native title claims work?

Native title is a bundle of rights and interests held by First Nations People in respect of land and waters, based on continued observance of traditional laws and customs since sovereignty.

Broadly speaking, there are typically two phases to a native title claim:

**Phase one:** Connection – claimants must first establish that they are a continuing society that has maintained traditional laws and customs through successive generations from sovereignty to the present day.

If the State accepts there is a connection, or the Federal Court determines connection exists at trial, the claim moves to phase two.

**Phase two:** Tenure – once connection has been established, the claim proceeds to the tenure phase. In this phase, the State (and other respondents) identifies whether native title has been extinguished by grants of freehold and other inconsistent tenure or public works.

## Outcomes in past capital city claims

A review of past capital city native title claims indicates three different outcomes:

- at trial, determination that native title does not exist because connection was not satisfied;
- a consent determination that there is native title in parts of the claim area; or
- a consent determination that native title does not exist as part of a broader settlement agreement.

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Adelaide</b><br><i>Agius v State of South Australia (No 6)</i> [2018] FCA 358                                                                                                                                                                                                                                                       | <p><b>Outcome:</b> consent determination that there is native title in parts of the claim area.</p> <p><b>Case summary:</b> the Kurna People filed a claim over Adelaide and surrounds in October 2000, and a determination by consent was made in March 2018. As part of the determination, the State accepted the Kurna People had a continuing connection to the claim area. The State and the Kurna People agreed not to undertake a comprehensive tenure history analysis, instead conducting a targeted assessment of land where native title was unlikely to have been extinguished. Native title was determined to exist over 17 Crown land parcels agreed between the State and Kurna People.</p>                                                                                                                                                                                                                                                                             |
| <b>Perth</b><br><i>Bennell v State of Western Australia</i> [2021] FCA 1508                                                                                                                                                                                                                                                            | <p><b>Outcome:</b> consent determination that native title does not exist as part of a broader settlement agreement.</p> <p><b>Case summary:</b> Eleven separate claims by the Noongar Peoples in south-west WA (including the Whadjuk group, whose traditional lands cover Perth) were addressed as part of the <a href="#">South West Native Title Settlement</a> reached between the Noongar Peoples and the WA State Government. The agreement provides a package of benefits to the Noongar Peoples, and in exchange the parties agreed to seek determination by consent that no native title exists over the settlement agreement area. This determination was made on 1 December 2021.</p>                                                                                                                                                                                                                                                                                      |
| <b>Darwin</b><br><i>Risk on behalf of the Larrakia v Northern Territory of Australia</i> [2006] FCA 404<br><i>Risk v Northern Territory of Australia</i> [2007] FCAFC 46; (2007) 240 ALR 75                                                                                                                                            | <p><b>Outcome:</b> at trial, determination that native title does not exist because connection was not satisfied.</p> <p><b>Case summary:</b> Eighteen claims by the Larrakia People and the Danggalaba and Kulumbiringin Clans over Darwin, Palmerston and surrounds were filed between 1994 and 2001. Those claims were consolidated, and on 13 April 2006 Mansfield J held that native title did not exist over the claim area because there was not continuous practice of traditional rights and observance of traditional customs.</p> <p>These findings were upheld on appeal.</p>                                                                                                                                                                                                                                                                                                                                                                                              |
| <b>Brisbane</b><br><i>Sandy on behalf of the Yugara People v State of Queensland (No 2)</i> [2015] FCA 15; (2015) 325 ALR 583<br><i>Sandy on behalf of the Yugara People v State of Queensland (No 3)</i> (2015) 325 ALR 668<br><i>Sandy on behalf of the Yugara People v State of Queensland</i> [2017] FCAFC 108; (2017) 254 FCR 107 | <p><b>Outcome:</b> at trial, determination that native title does not exist because connection was not satisfied.</p> <p><b>Case summary:</b> the Turrbal People made an application for native title over Brisbane and surrounds in September 1998, and the Yugara / Yugarapul People made an overlapping application for native title in December 2011. The claims were heard together and proceeded to trial on connection.</p> <p>On 27 January 2015, Jessup J held that native title did not exist over the claim area for both the Yugara / Yugarapul and Turrbal Peoples, because the connection requirement was not satisfied. His Honour found that there was insufficient evidence that, despite physical displacement of the original inhabitants, their descendants continued to acknowledge the laws and customs giving rise to rights and interests in land and waters from which those inhabitants had been displaced.</p> <p>These findings were upheld on appeal.</p> |

## How does the Traditional Owner Settlement Act 2010 (Vic) impact outcomes?

The TOS Act provides the framework for Recognition and Settlement Agreements (RSAs) between the State of Victoria and a Traditional Owner group. RSAs recognise Traditional Owners' rights over land and often form part of a wider package that may grant rights to use natural resources for traditional, non-commercial purposes, grant Aboriginal title over public land for joint management with the State, regulate land use activities or provide funding. It was originally conceived as a means of recognising Traditional Ownership without the burden and complexity of native title claim litigation. In this context, it is interesting that the Wurundjeri Woi-Wurrong chose to seek recognition as native title holders rather than as a Traditional Owner group through the TOS Act. With the claim a long way from resolution, those pathways may yet intertwine.

## The Victorian election

On Saturday 28 November 2026, Victorians will go to the polls and decide whether to retain the current Labor Government or vote in a new Liberal-National (and potentially One Nation) Coalition as Government. Both the [Coalition](#) and [One Nation](#) have committed to repealing Victoria's *Statewide Treaty Act 2025* (Vic) and abolishing Gellung Warl, Victoria's permanent representative and deliberative body for First Peoples in Victoria. For more on Treaty, see our *Native Title Year in Review 2025-2026* article, "[Treaty update – Victoria's Treaty and other jurisdictions](#)". This attitude may impact the future government's approach to settling ongoing native title claims.

## Where to from here?

At a case management hearing on 28 July 2026, the Wurundjeri Woi-Wurrong claimants indicated they were pursuing a consent determination with the Victorian and Commonwealth Governments. The case is still in its early stages, and we will watch the claim closely to see how it progresses.

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# Cultural heritage law reform around Australia



## What you need to know

- Reform to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (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.
- 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).

## What you need to do

- Continue to monitor developments relating to ATSIHP Act reform, particularly as the FNES progresses.
- Monitor the release of the FNES for consultation. Once finalised, it may establish minimum First Nations engagement requirements for projects requiring EPBC Act approval.
- In Western Australia, prepare for the introduction of enforceable minimum requirements for expedited procedure tenure and engage with the proposed Task Force process.
- Consider the impact of Tasmania's proposed Aboriginal Heritage Bill on project approvals, including the new permit and management plan regime and increased penalties for non-compliance.

## Introduction

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

Developments have continued across Australian jurisdictions over the past 12 months. At a Federal level, reform has been foreshadowed but not yet realised. Amongst the States, results vary. The Tasmanian Government has introduced a Bill to modernise its ageing Aboriginal heritage legislation. The NNTT's report into Western Australia's Aboriginal cultural heritage regime has prompted the Government to support several recommendations. Elsewhere, States have maintained the status quo, or implemented incremental changes.

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

## Federal reform

The Commonwealth Government's reforms to the EPBC Act allow it to prescribe First Nations engagement standards for projects referred under the EPBC Act. We discuss this in more detail in our *Native Title Year in Review 2025-2026* article, "[First Nations Engagement under the EPBC Act reforms](#)".

While a FNES has not yet been released for consultation, we expect it to establish minimum engagement standards and requirements for obtaining environmental approvals for referred projects.

Reform to the ATSIHP Act remains unresolved. We understand that the Commonwealth Government intends to progress this in tandem with the FNES.

We may also see further consideration of Aboriginal cultural heritage following the recommendations made by the Australian Law Reform Commission in its [Fulfilling the Promise of Mabo: Reforming the Future Acts Regime in the Native Title Act 1993 \(Cth\) Final Report](#) which was tabled in June 2026. Amongst other things, the Report recommended that the *Native Title Act* be amended to render void clauses that restrict a native title party from exercising rights and remedies under cultural heritage legislation. Read more about the proposed reforms in our *Native Title Year in Review 2025-2026* article, "[ALRC recommends sweeping Native Title Act changes](#)".

The Commonwealth has committed to "consider the report's 86 recommendations and ... to working with First Nations communities and key sectors". To date, the Commonwealth has not responded to the recommendations in the Report; this will be an area to monitor.

Aboriginal parties continue to use the ATSIHP Act to seek interim and ongoing protection declarations. We write about the increasing use of the ATSIHP Act in our *Native Title Year in Review 2025-2026* article, "[Commonwealth cultural heritage protection applications are on the rise](#)".

# State and Territory reform

## Western Australia

In Western Australia, a review of the State Government's native title and Aboriginal cultural heritage processes, commissioned in February 2025 and conducted by the NNTT, has produced 25 recommendations targeting administrative and policy reform of the intersection between the *WA Mining Act*, the *Aboriginal Heritage Act 1972* (WA) (1972 Act) and the *Native Title Act* (Kelly Review). The Kelly Review was tabled in Parliament on 9 June 2026.

The review found WA's current framework operates as a "lowest common denominator" system, lacking the enforceable minimum requirements and duty-of-care frameworks in Queensland and the Northern Territory. This has driven high objection rates to the expedited procedure for exploration and prospecting tenure, pushing disputes into costly Heritage Protection Agreement negotiations and straining relationships between Traditional Owners and industry.

The centrepiece recommendation is developing and implementing enforceable minimum requirements for all tenure granted under the expedited procedure. An independently chaired Task Force with equal PBC (the entity holding native title on trust for the native title party) and industry representation would design these requirements.

The requirements may address notice obligations, heritage assessment standards, baseline expectations for consultation and risk management, cost provisions, and dispute resolution pathways. The Government has supported the establishment of minimum standards, and supported the Task Force in principle.

Other key proposals include:

- the retirement of the Regional Standard Heritage Agreement as a tenure condition – supported by the State;
- publication of technical guidance on sections 5 and 17 of the 1972 Act, addressing longstanding confusion around site significance thresholds – supported by the State; and
- expansion of the DPLH Heritage Survey Program with targeted consultation to address cultural sensitivity concerns – which the State has noted and is considering further.

The review also recommends a PBC funding support program to address chronic under-resourcing, a consultant code of conduct and certification scheme, and cross-government coordination to reduce duplicated consultation requirements.

Longer term, the review urges a state-wide program to negotiate ILUAs for future act processes governing the grant of mining, petroleum, and other tenures. The Government supports this in principle with a 24-month timeframe for implementation.

The Government declined to support a mandatory Proponent Code of Conduct or published compensation guidelines. It also declined several recommendations on Task Force and enforcement resourcing.

The reforms represent the most significant proposed overhaul of WA's Aboriginal heritage framework since the repeal of the *Aboriginal Cultural Heritage Act 2021* (WA), but are not yet focussed on law reform per se. They are (consistent with the scope of the review) focussed on policy and process reform to improve the administration of the framework in the State.

## Tasmania

The Tasmanian Government has delivered on its commitment to develop Aboriginal cultural heritage laws. In March 2026, the draft *Aboriginal Heritage Bill* was released for public consultation. If passed, it will replace the dated *Aboriginal Heritage Act 1975* (Tas).

The Bill centres on four principles of Aboriginal decision making: control; voice; custodianship; and protection. The table below outlines how the key principles are to be delivered.

### Establishment of the Aboriginal Heritage Council

The Council will be responsible for assessing, considering, determining, approving or refusing permits, management plans and agreements relating to Aboriginal heritage. It also has a general advisory role, including advising on the significance of Aboriginal heritage, developing guidance materials, supporting public education and awareness, and advising the Minister on registration, audits, protection orders and any other matter under the Bill.

### Implementation of an Aboriginal heritage permit and Aboriginal heritage management plan regime

The regime is mandatory and the different pathways apply depending on the nature and impact of the proposed activity. The Council is responsible for approving permits and management plans.

### Increased offence provisions with significant penalties

These include:

- where a person harms an object or area that the person knows, or ought reasonably to know, is Aboriginal heritage (being broadly defined);
- acting recklessly or negligently as to whether an object or area is Aboriginal heritage; and
- performing an action the person knows or ought reasonably to know is likely to harm Aboriginal heritage.
- There are several defences to these offences which align with other jurisdictions. For example, acting in accordance with an Aboriginal heritage permit or approved management plan, responding to an emergency, or acting in accordance with Ministerial guidelines.

### Introduction of interim and enduring protection orders for Aboriginal heritage

These orders operate similarly to those under the ATSIHP Act, although an enduring protection order may only be made where the Aboriginal heritage is "exceptional".

### Ministerial powers

The power for the Minister to audit activities carried out under permits or management plans, and issue stop orders where an activity is harming or is likely to harm Aboriginal heritage.

Public consultation on the Bill closed in July 2026, with the Government now reviewing feedback. The Bill is scheduled to be tabled in Parliament in late 2026.

## Northern Territory

The *Heritage Amendment Bill 2026* (NT) was passed on 14 May 2026 to amend the *Heritage Act 2011* (NT).

The amendments refine criteria for archaeological places, objects, and relics, and distinguish Aboriginal and Macassan archaeological places based on physical and historical evidence rather than overlapping with sites protected by the Northern Territory Aboriginal Sacred Sites Act 1989 (NT) (*Sacred Sites Act*). We expect these amendments to provide greater certainty to proponents and First Nations groups on the applicable protection legislation and processes.

## Queensland

In *Tobane & Ors v Vena Energy Pty Ltd* (2026) QLC 8, the Land Court of Queensland confirmed that a proponent is entitled to rely on the registers maintained by the NNTT in determining the Aboriginal party for an area. We expect this decision will provide greater certainty for proponents in discharging the Aboriginal cultural heritage obligations where there are competing or disputed native title claims.

## New South Wales

The NSW Government remains committed to progressing its decade-old reform plans, building on the draft *Aboriginal 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). And with \$600,000 allocated to Aboriginal cultural heritage reforms in the 2026-2027 budget, it is possible that legislative action will gain momentum.

## Victoria

Like last year, 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.

## South Australia

The [Aboriginal Heritage \(Miscellaneous\) Amendment Act 2024](#) (SA) commenced on 1 January 2025. We wrote about these reforms in our *Native Title Year in Review 2024-2025* article, [“Little progress in cultural heritage reform around Australia in 2024-2025”](#).

Since then, South Australia’s cultural heritage legislation has seen little reform.

## Australian Capital Territory

The ACT Government has issued a [“Statement of Heritage Priorities”](#) which outlines the Government’s commitments to the preservation of heritage.

Priority 5 is to “strengthen the role of First Nation peoples in their role as Traditional Custodians of their cultural heritage and enhance protection for First Nations’ cultural heritage”. To achieve this, “traditional Custodians must play a significant role in the conservation and management of their cultural heritage, the preservation and conservation of their cultural places and objects, and in the planning and development of their traditional land”. How this translates into practice remains to be seen.

## Key insights

Across Australia, the pace and ambition of Aboriginal cultural heritage reform varies, but the direction of travel is clear: stronger First Nations engagement, broader agreement-making obligations, and greater Traditional Owner decision-making authority and autonomy.

Proponents should prepare for an evolving regulatory landscape by building robust engagement processes and monitoring developments in each jurisdiction where they operate.

**Authors:** Tony Denholder, Partner and Will Simons, Lawyer

# Commonwealth cultural heritage protection applications are on the rise



## What you need to know

- The number of applications under sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (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.
- The Federal Government remains publicly committed to reforming this legislation, though progress continues to be slow.

## 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 or otherwise seek to prevent the carrying out of a project or activity.
- Recognise that these applications can take some years to resolve and require significant effort from proponents to properly engage with the process.



### 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. The parties have until 27 October 2026 to file written submissions on the appropriate form of orders.

## Protection applications back on the rise

In our *Native Title Year in Review 2024-2025* article, “[Commonwealth cultural heritage protection applications: still top of mind for First Nations Groups](#)”, we reported that only one new protection application under the ATSIHP Act had been publicly notified in the previous 12 months. Twelve months on, that trend has markedly reversed.

Since then, 12 new section 10 applications have been notified, spanning five jurisdictions, with lodgements now outpacing resolutions. We summarise each below, by state.

# Applications notified in the last 12 months

## Queensland

**Selwyn Range (near Cloncurry):** A Yalarrnga (Yullana) Traditional Owner made a [section 10 application](#) to protect the area known as Selwyn Range, near Cloncurry. The applicant claims the area is associated with Sacred Lost Boys Dreaming, and includes ceremonial sites, a male initiation site, and sacred paintings. The applicant attributes the threat to ongoing mining activities in the area.

**Monastery Creek, Kolar Creek and Monument (near Cloncurry):** A Yalarrnga (Yullana) Traditional Owner made a [section 10 application](#) to protect the area known as Monastery Creek, Kolar Creek and Monument, approximately 100 km south of Cloncurry. The applicant claims the area contains ceremonial sites, increase sites, a fertility site, bora grounds, songlines, Dreaming stories and a massacre site. The applicant attributes the threat to proposed mine expansion activities.

**Barrambin (Victoria Park):** Indigenous parties (see the gazette notices for the [first](#), [second](#) and [third](#) applications) have each made separate section 10 application to protect the area known as Barrambin (Victoria Park) in Queensland. The applicants claim the area holds cultural, spiritual and ancestral significance to First Nations People and is under threat from a stadium development.

**Magazine Hill:** An applicant has made a [section 10 application](#) on behalf of the Waanyi Elders Council Pty Ltd to protect the area known as Magazine Hill, near Mount Isa. The applicant claims the area contains a wide range of culturally significant sites, including burials, paintings, quarries, artefact scatters, stone arrangements, scarred trees, and other cultural features. The applicant attributes the threat to mining and mining exploration.

## Western Australia

**Wadjemup (Rottnest Island):** A Nyungar Traditional Owner has made a [section 10 application to protect the island](#) and surrounding waters of Wadjemup, west of Fremantle. The applicant claims the area is significant due to the Quod (the former Aboriginal prison), the Boys Reformatory, artefact scatters, and infrastructure built by Aboriginal ancestors. The applicant attributes the threat to a proposed tourism redevelopment.

**Matilda Bay:** A Noongar custodian of the Whadjuk/Boorloo lands has made a [section 10 application](#) to protect the area known as Matilda Bay, Crawley (near Perth), including the waters and adjoining banks. The applicant claims the area includes traditional birthing grounds, women's business areas, marriage ceremony sites, and forms part of the Waugal creation story. The applicant attributes the threat to a proposed expansion of ferry infrastructure.

**Portion of the Hamersley Range Region:** The Yindjibarndi Ngurra Aboriginal Corporation and the Yindjibarndi Aboriginal Corporation have jointly made a [section 10 application](#) to protect a portion of the Hamersley Range, near Tom Price. The applicants claim the area contains 13 Ngurra (traditional areas) with sacred resources, increase sites, ochre quarries, and caves/rock shelters. The applicants attribute the threat to ongoing mining practices.

## Victoria

**Lake Boort:** An applicant has made a [section 10 application](#) on behalf of the Yung Balug Peoples of the Dja Dja Wurrung First Nations to protect the area known as Lake Boort, near Boort, Victoria. The applicant claims the area contains burials, scarred trees, middens and cooking mounds. The applicant attributes the threat to the 2026 duck hunting season, including damage to cultural heritage sites by duck hunters.

## New South Wales

**Wallum Development Site:** An applicant has made a [section 10 application](#) on behalf of a Minyungbul Mulanjali person of the Bundjalung Nation to protect the Wallum development site at Brunswick Heads, New South Wales. The applicant claims the area is significant due to its role in the creation story of the Three Brothers, as a meeting place and camp site, and for the presence of spiritually significant trees and stones. The applicant attributes the threat to a proposed residential development.

## South Australia

**Koonalda Cave:** A Mirning Elder has made a [section 10 application](#) on behalf of the Mirning people to protect Koonalda Cave on the Nullarbor Plain, South Australia. The applicant claims the area is a sacred place containing spiritually significant artwork linked to Mirning ancestors and the Whale Dreaming, and some of the earliest known cave art in the world. The applicant attributes the threat to vandalism, unauthorised entry, the exclusion of Traditional Elders from decision-making, and the installation of tourist infrastructure over a sacred site without consent.

## Applications already decided

Publicly available information from DCCEEW confirms that, since August 2025:

- the Minister declined to make declarations in response to three separate section 9 applications seeking to halt a stadium development at Barrambin (Victoria Park), Queensland;
- the Minister declined to make a declaration in response to a section 9 application concerning Wahluu / Mount Panorama in Bathurst, NSW; and
- an authorised officer declined to make a declaration under section 18 in response to an application concerning the Orange Regional Sporting Precinct.

Under the ATSIHP Act, only section 10 applications require public notification, and even then, that notification does not occur immediately upon receipt of an application. Declarations themselves must be publicly notified, but a decision not to make a section 9 or 10 declaration only needs to be notified to the applicant, not the public. As a result, there may be additional applications currently under Ministerial (or, in the case of section 18 emergency applications, Departmental) consideration, and decisions declining to make a declaration, that have not been publicly disclosed.

## Murujuga declaration

On 12 September 2025, the Hon Murray Watt MP, Minister for the Environment and Water, made the [\*Aboriginal and Torres Strait Islander Heritage Protection \(Murujuga\) Declaration 2025\*](#). It is the only declaration made since 13 August 2024, when the Hon Tanya Plibersek MP, then Minister for the Environment and Water, [declared an area](#) forming part of the McPhillamys Gold Project site a significant Aboriginal area to be preserved and protected from injury or desecration.

Last year, we also reported that the McPhillamys proponent had commenced Federal Court proceedings seeking judicial review of that declaration. The Federal Court heard the case over three days in December 2025, and judgment remains reserved as at the date of this article.

The two declarations differ in several notable respects, set out in the table below.

| Aspect                       | McPhillamys declaration                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Murujuga declaration                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Scope</b>                 | Broader drafting. The declaration prohibits conduct that “will, or is likely to, injure or desecrate the declared area”. It also lists, non-exhaustively, prohibited activities, including mining, bulk earthworks, sealing, drilling, clearing, disturbing vegetation, and altering a landform or watercourse. This broader drafting was argued by the McPhillamys proponent in the Federal Court proceedings to be so uncertain that the declaration was legally invalid. | Narrower drafting. A person must not “move, damage, deface, or otherwise disturb an Aboriginal site or Aboriginal object” in the declared area (noting each of “Aboriginal site” and “Aboriginal object” are defined by the declaration).<br><br>The scope of the prohibition in this regard is subject to a carve-out which states that an Aboriginal site or an Aboriginal object is taken not to be moved, damaged, defaced or otherwise disturbed by, or as a result of, industrial gaseous emissions. |
| <b>Nature of restriction</b> | The declaration provides no exemptions.                                                                                                                                                                                                                                                                                                                                                                                                                                     | The declaration provides three express exemptions:<br>(a) Traditional Owners and Custodians who act in accordance with Ngarda-Ngarli tradition;<br>(b) emergency services personnel who act in the course of their duties; and<br>(c) any person who has prior written agreement from the Murujuga Aboriginal Corporation (MAC) to move, damage, deface or otherwise disturb an Aboriginal site or an Aboriginal object.                                                                                   |
| <b>Duration</b>              | The declaration has no time limit specified. The McPhillamys proponent in the Federal Court proceedings argued that the declaration was invalid for its failure to specify a time limit or for the Minister’s failure to consider whether to impose such a time limit.                                                                                                                                                                                                      | The declaration has effect for 10 years from registration, with an automatic repeal the day after that period ends.                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Commencement</b>          | The declaration commenced the day after registration.                                                                                                                                                                                                                                                                                                                                                                                                                       | The declaration takes effect 12 months after registration.                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

As is evident from the table above, the Murujuga declaration adds features that did not appear in the earlier McPhillamys declaration, which may suggest that Minister Watt had regard to the grounds of challenge run by the McPhillamys proponent in the Federal Court proceedings when making the Murujuga Declaration.

## Legislative reform still lags

We discuss progress on cultural heritage reform in our *Native Title Year in Review 2025-2026* article [“Aboriginal cultural heritage law reform around Australia”](#). As we noted in last year’s update, the long awaited modernisation of Commonwealth cultural heritage protection legislation still has a long way to go, and, 12 months on, that assessment continues to hold true.

While cultural heritage reform remains awaited, the ATSIHP Act continues to provide First Nations People with a powerful means of seeking protection from threatened injury or desecration, where such First Nations People consider that adequate protection is not otherwise provided at a State or Territory level or to otherwise prevent the carrying out of a project or activity.

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# First Nations engagement under the EPBC Act reforms



## What you need to know

- The FNES was announced as a national environmental standard under the reformed EPBC Act, but has not yet been released for public consultation.
- Development of the FNES is linked to parallel reforms to Federal cultural heritage protection laws.
- The FNES is expected to establish minimum requirements for First Nations engagement in EPBC Act assessment and approval processes.

## What you need to do

- Monitor announcements for the FNES exposure draft and consider whether you wish to make a submission during the consultation period.
- Review existing Traditional Owner engagement practices against anticipated FNES principles.
- Consider how FNES obligations may inform engagement obligations and EPBC referral criteria for future projects.

## Introduction

The long-anticipated reforms to the EPBC Act passed both houses of Parliament on 28 November 2025. Since then, the Federal Government has progressively implemented and announced the content of its reform, including the introduction of national environmental standards (NES). The NES prescribe principles that must be met when projects are assessed under the EPBC Act. Once in effect, a project referral can only be approved if it is consistent with the NES, unless an exception applies. These new approval tests will apply from no later than 1 December 2026.

To date, four NES have been made: Matters of National Environmental Significance Standard; Environmental Offsets Standard; Community Engagement Standard; and Data and Information Standard.

However, the FNES has not been released and no exposure draft has circulated.

## The EPBC Act and First Nations engagement

In October 2020, the [“Independent Review of the EPBC Act – Final Report”](#) prepared by Professor Samuel AC criticised how the EPBC Act interacts with “the role of Indigenous Australians in protecting and conserving biodiversity and heritage and promoting the respectful use of their knowledge.”

The Samuel Review recommended that the Federal Government develop a:

National Environmental Standard for Indigenous engagement and participation in decision-making. The purpose of this Standard is to ensure that Indigenous Australians who speak for and have traditional knowledge of Country are empowered to participate in decision-making, and their views and knowledge are respectfully and transparently considered in the operation of the EPBC Act.

Following the Samuel Review, the Federal Government committed in the December 2022 [Nature Positive Plan](#) to implementing a FNES “as a priority to enable First Nations views and knowledge to be considered in all project approvals and planning decisions under national environmental law.” In the [Second Reading Speech](#) for the Environment Protection Reform Bill 2025, Minister Burke recommitted to the FNES but foreshadowed it would follow other “priority” NES. Almost a year later, Minister Burke’s prediction has proved correct.

## Development of the FNES since November 2025

While four NES were made on 19 August 2026, little detail has emerged on the FNES since the EPBC Act amendments passed. The Government has not released the FNES in exposure draft or final form. The Department of Climate Change, Energy, the Environment and Water (DCCEEW) states only that development is under way and that it will [release the draft for public consultation when ready](#).

This delay is linked to parallel reforms to Federal cultural heritage protection laws. Senator Watt (as Minister administering the EPBC Act) [advised Senate Estimates](#) in May 2026 that timing for consultation on the FNES is linked to ongoing reforms to the ATSIHP Act. Senator Watt recognised the FNES would not be finalised “as quickly as we had initially hoped” as the Government intends for the FNES to “line up” with cultural heritage reform more broadly as the “two issues are tied”.

Without recent announcements on ATSIHP Act amendments or clarity on how the ATSIHP Act will interact with FNES, the timeframe for the FNES release remains unclear. However, the FNES must be available for public consultation for at least 20 business days before the standard is made. This consultation requirement informed the four current NES, including the Community Engagement Standard discussed below.

## What can we expect the FNES to require?

Although the FNES has not yet been released for consultation, the Samuel Review suggests the FNES will establish outcomes and minimum requirements for First Nations engagement in relevant EPBC Act assessment and approval processes. The standard will likely ensure First Nations People who speak for affected Country receive meaningful and accessible information, participate early in project development, and have their views and knowledge considered respectfully and transparently.

Building on statements made in the Nature Positive Plan and [DCCEEW's interim guidance for First Nations engagement](#), we anticipate the FNES could address direct engagement with relevant Traditional Owners and cultural authorities. This may include culturally safe and appropriate engagement methods, support for participation, protection of Indigenous Cultural and Intellectual Property, and record keeping obligations to document how engagement occurred and informed the project. This record keeping component will be necessary for proponents to demonstrate the steps taken satisfy the FNES when referring a project.

Consistent with [DCCEEW's guidance on Free, Prior and Informed Consent](#) (FPIC), the FNES may also draw on FPIC principles, particularly by requiring engagement to be free from coercion, undertaken before decisions are settled, and supported by complete, objective and comprehensible information. Consent may be relevant to particular aspects of engagement, such as participation in the process, access to Country, and the collection, disclosure or use of First Nations knowledge.

We anticipate the FNES will deal directly with First Nations engagement as distinct from the more general community engagement required by the Community Engagement Standard. This distinction would explain amendments to the Community Engagement Standard following public submissions, where reference to engagement with Indigenous persons was removed from the exposure draft. Instead, proponents are now expected to engage with affected “members of the public”. This amendment may be designed to delineate between a proponent’s general engagement with the public, and their specific obligations for consultation with First Nations Peoples. Despite this, it is possible a proponent’s obligations for First Nations engagement under the FNES will overlap with these more general community engagement obligations.

While the FNES content remains unknown, if made, the standard will shape the engagement and consultation landscape between proponents and Traditional Owners in the years to come. Proponents should closely monitor the FNES development, particularly the opportunity to make public submissions, and consider how FNES principles may apply to future projects.

**Authors:** Tony Denholder, Partner and Will Simons, Lawyer



# Treaty update – what is Victoria's Treaty and where are other jurisdictions up to?

## What you need to know

- 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 *Traditional Owner Settlement Act 2010* (Vic) 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.

## What you need to do

- Engage early with Traditional Owners. The direction of travel in Victoria and elsewhere is towards earlier, more meaningful involvement of First Peoples in decisions affecting land, water and cultural values. Early, respectful engagement is increasingly expected by government and the community, and produces better project outcomes.
- Build cultural capability. Invest in cultural competency training and education within your organisation. The public sector is already required to do so following the Victorian Treaty, and organisations that engage with the Victorian Government or operate on Country will increasingly be expected to demonstrate cultural capability.
- Watch for the outcome of the Victorian State election. In October 2025, the Victorian Coalition pledged to repeal the *Statewide Treaty Act* within 100 days if it wins in November 2026. Treaty has not been a prominent election issue, but with the Coalition performing strongly, the durability of the Victorian Treaty may well be tested.

# Victoria's Treaty

On 13 November 2025, Victoria became the first Australian jurisdiction to sign a Treaty with First Peoples, called the Statewide Treaty.

## What does the Treaty say?

The [Statewide Treaty](#) is divided into two parts.

Part one acknowledges that Victoria was colonised without consent, negotiation or recognition of Traditional Owners of the land and waters. It recognises the enduring connection between First Peoples and Country, and the deep and continuing injustices endured by First Peoples, brought into the open during the Yoorrook Justice Commission.

The State further acknowledges First Peoples' inherent right to self-determination in accordance with Aboriginal Law and Customs, that Traditional Owners belong to, speak for and carry responsibility for Country, and that this can never be extinguished.

In part two, the State and First Peoples agree to substantive commitments, which include:

- the introduction of the *Statewide Treaty Act 2025 (Vic)* (*Statewide Treaty Act*) and its objectives;
- establishing Gellung Warl and commitments relating to data sharing and resource support;
- respect for, and engaging in good faith with, Aboriginal Lore, Law and Cultural Authority;
- an agreement to negotiate an official apology from the State to First Peoples, which will be made in the Victorian Parliament;
- inclusion of Truth-telling in the Victorian curriculum, based on the [Yoorrook Justice Commission Official Public Record](#); and
- provision for the agreement of further Statewide Treaties on specific topics.

## What is the Statewide Treaty Act?

The *Statewide Treaty Act* commenced on 12 December 2025. The Act gives legal effect to the Statewide Treaty and implements many of the substantive commitments in part two of the Statewide Treaty, including Gellung Warl. It also aims to:

- provide the foundations for ongoing Treaty-making between Gellung Warl and the State;
- advance the inherent rights and self-determination of First Peoples; and
- address the unacceptable disadvantage inflicted on First Peoples by the historic wrongs and ongoing injustices of colonisation.

The *Statewide Treaty Act* also imposes a mutual obligation on Gellung Warl and the State to engage with each other in good faith, and requires all bills introduced to Parliament to include a statement of compatibility with Treaty principles.

The *Statewide Treaty Act* does not change the Victorian Constitution or any tax laws, and it does not provide individual financial reparations.

## What is Gellung Warl?

Gellung Warl is a permanent representative and deliberative body for First Peoples in Victoria. The name is a Gunaikurnai word pronounced "Gullungwarl" ("g" as in "good", "u" as in "put"), and means "tip of the spear" or "pointed spear".

Gellung Warl's purpose is to:

- exercise decision-making powers by representing First Peoples in Victoria and making decisions in relation to First Peoples in Victoria;
- represent First Peoples in Statewide Treaty negotiations with the State, including undertaking ongoing Statewide Treaty negotiations;
- provide for ongoing Truth-telling and healing;
- advise the Parliament and the State Government in relation to matters that affect First Peoples; and
- hold the State Government to account in relation to its commitments to, and the impact of its actions on, First Peoples.

Gellung Warl [consists of three “arms”](#), and each arm is independent from the other arms of Gellung Warl.

| Arm                                                                  | Function                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>First Peoples’ Assembly of Victoria</b>                           | <p>The First Peoples’ Assembly was first established in 2019 and has now been brought under Gellung Warl. The Assembly is the central decision-making arm, with 22 elected general members and 12 reserved seats held by representatives of recognised Traditional Owner groups. The most recent election was held on 24 April 2026.</p> <p>The Assembly is responsible for representing Victorian First Peoples and informing Parliament and the Victorian Government on matters that affect First Peoples. It will also make decisions about First Peoples matters, for example by making guidelines and standards to guide State entities when interacting with First Peoples.</p>                                                              |
| <b>Nginma Ngainga Wara (Outcomes and Justice Commission)</b>         | <p>Nginma Ngainga Wara is a Wadi Wadi word, pronounced “Ng-in-ma Ng-eye-nga Wa-ra” (“ng” as in “sing”, “a” as in “car”). Its role is to hold the State accountable for any commitments it makes to First Peoples (including the recommendations of the Yoorrook Justice Commission), and it will evaluate and monitor how effective the State is in achieving better outcomes for First Peoples. Nginma Ngainga Wara will also make recommendations to the First Peoples’ Assembly on practical and feasible measures that can be taken to improve outcomes for First Peoples.</p> <p>Nginma Ngainga Wara also meets the State’s commitment to create an independent accountability mechanism under the National Agreement on Closing the Gap.</p> |
| <b>Nyerna Yoorrook Telkuna (Office of Truth-telling and Healing)</b> | <p>Nyerna Yoorrook Telkuna will continue the work of the Yoorrook Justice Commission in Truth-telling and healing. The office will establish Truth-telling in local communities and support ongoing education and reconciliation.</p> <p>Nyerna Yoorrook Telkuna is a Wamba Wamba word and is pronounced “Nyern-ah Yoo-rrook Terl-kun-ah”.</p>                                                                                                                                                                                                                                                                                                                                                                                                     |

Gellung Warl is not subject to the direction or control of the State Government in respect of how it performs its functions or exercises its powers. This keeps Gellung Warl independent from government. The arms of Gellung Warl also have the power to do all things necessary or convenient to be done in connection with the performance of their functions, including:

- making rules on how Gellung Warl operates;
- regulating how First Peoples organisations provide certificates evidencing that a person is accepted as an Aboriginal or Torres Strait Islander person;
- deciding who will be members of Nginma Ngainga Wara and Nyerna Yoorrook Telkuna;
- making guidelines and standards on a range of matters, for example on how water entitlements held by First Peoples organisations should be shared or traded and how cultural safety can be implemented in organisations;
- conducting inquiries; and
- referring matters to other bodies.

However, Gellung Warl cannot make laws or overrule Parliament, and it is not a “third chamber” of Parliament. Gellung Warl also does not have any coercive powers, and cannot compel people to attend hearings or inquiries.

# How does Treaty fit into Victoria's existing land access framework?

## Planning and environment decisions

The First Peoples' Assembly is empowered to give advice or consult on decisions it considers will affect First Peoples, and this extends to planning and environment decisions.

Under the *Statewide Treaty Act*, Victorian Government Department Secretaries, Victoria Police and the First Peoples' Assembly must develop guidelines to support this consultation, including specific guidelines for providing advice on First Nations issues and impacts to panels and advisory committees appointed under the *Planning and Environment Act 1987* (Vic). So far, no such guidelines have been released.

Failure to consider any submission, advice or information given by the First Peoples' Assembly, or to respond to submissions or questions, does not of itself affect the validity of any act or decision or provide grounds for review of a planning decision. Similarly, a failure to develop or comply with consultation guidelines does not affect the validity of any planning act or decision.

## Access to land where First Peoples' rights and interests are concerned

Victoria's Indigenous land access framework consists of the following key legislative frameworks:

- the *Native Title Act*, which provides for the recognition and protection of native title rights and interests;
- the *Traditional Owner Settlement Act 2010* (Vic), which provides an alternative to the Native Title Act, via settlement processes and agreement making between the State and native title claimants; and
- the *Aboriginal Heritage Act 2006* (Vic), which protects Aboriginal cultural heritage and requires approvals such as cultural heritage management plans in certain circumstances.

The *Statewide Treaty* and *Statewide Treaty Act* do not affect the *Native Title Act* or *Traditional Owner Settlement Act*. However, some parts of the *Aboriginal Heritage Act* have been amended to substitute powers that were previously given to the Minister for Treaty and First Peoples, with powers conferred on the First Peoples' Assembly. For example, the First Peoples' Assembly will now determine who is a member of the Aboriginal Heritage Council.

# Treaty in other jurisdictions

Since our *Native Title Year in Review 2024-2025* article, [“Treaty update – full steam ahead in some jurisdictions, while others wind back progress”](#), other jurisdictions have progressed as follows:

|                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|--------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Commonwealth</b>      | <p>There has been no progress on Treaty or establishing a Makarrata “Truth-telling” Commission since the re-election of the Labor government in May 2025, and the \$5.8 million originally set aside for establishing the Commission has been reallocated to Closing the Gap measures. It appears the Commission is no longer a priority for the Commonwealth Government.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>New South Wales</b>   | <p>The NSW Statewide Treaty consultation process began in August 2025, led by the NSW Treaty Commissioners (former senator Aden Ridgeway and Koori Mail newspaper CEO Naomi Moran). The Commissioners are travelling around NSW to listen to Aboriginal People across metropolitan, regional and remote communities, and will report back on two questions:</p> <ul style="list-style-type: none"><li>• do Aboriginal People want a Treaty or other kind of formal agreement in NSW?</li><li>• if so, what should that agreement include?</li></ul> <p>The consultation process runs for 12 months, after which the Commissioners will prepare a report and recommendations to be presented to the NSW Government. As at the date of this article, the consultation period appears to be nearing conclusion, and no report has been issued yet.</p> <p>NSW Premier Chris Minns says that the Labor government will consider all recommendations, but will not progress beyond consultation until after the State election in early 2027. Meanwhile, the Opposition remains committed to its position that it would not support a State Voice to Parliament.</p> |
| <b>Queensland</b>        | <p>The Queensland Liberal National government has maintained its commitment not to pursue any formal Treaty, Truth-telling or Voice process.</p> <p>However, in October 2025, the government signed a First Nations Council Accord with Queensland’s 17 First Nations councils, which provides for annual meetings between cabinet ministers and the First Nations councils. Commentators have likened the Accord to a kind of “Voice”, but the government rejected those suggestions – Minister for Aboriginal and Torres Strait Islander Partnerships Fiona Simpson said the Accord was the “complete and utter opposite” of the Commonwealth’s proposed Voice to Parliament.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <b>Western Australia</b> | <p>The Western Australian Government continues to prefer targeted agreements and schemes rather than Statewide Treaty, Truth-telling or Voice – for example, through its Stolen Generations Redress Scheme, Yokai Healing Our Spirit <a href="#">Truth-telling projects</a> and the Wadjemup Project (<a href="#">targeted</a> at Truth-telling and reconciling Aboriginal prison history on Wadjemup).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

|                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>South Australia</b>              | <p>South Australia continues to progress Treaty, Truth-telling and Voice. The Joint Presiding Member of the First Nations Voice to Parliament, Ms Danni Smith, gave her second annual address to a joint parliamentary sitting. In her address and in the <a href="#">Voice's 2025 Annual Report</a>, Ms Smith renewed calls for a Commission for Truth-telling and Treaty.</p> <p>The SA Government appears to have heard those calls – in its 2026-2027 budget the <a href="#">government announced</a> \$8.5 million in funding for a Commission to undertake Truth-telling and progress Treaty activities. The Commission will be headed by First Nations leaders, but neither the appointments nor the Commission's structure have been announced.</p> <p>The second Voice election was also held on 21 March 2026, and voter participation increased by 25%. However, overall First Nations voter turnout remained low, at 10% of the State's First Nations People.</p> |
| <b>Tasmania</b>                     | <p>Tasmania is not progressing Treaty, and there has been slow progress on Truth-telling. Since the Tasmanian Government announced funding for independent commissioners to facilitate the Truth-telling process in May 2025, there have been no appointments or further work towards Truth-telling.</p> <p>The government has <a href="#">confirmed</a> Truth-telling is likely to focus on actions that prioritise education, story-telling, knowledge sharing and strengthening relationships between Tasmanian First Nations People and the broader Tasmanian community. Community organisations continue to advocate for Treaty as an essential outcome of the Truth-telling process.</p>                                                                                                                                                                                                                                                                                |
| <b>Australian Capital Territory</b> | <p>There continues to be no progress on Treaty in the ACT, though the government has reiterated its commitment to starting Treaty conversations, noting that the Treaty process "is complex and will take time". The ACT instead appears to be focused on Closing the Gap measures, and is <a href="#">the first jurisdiction to legislate its commitments</a> in the <i>Public Sector (Closing the Gap) Legislation Amendment Act 2025</i> (ACT).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Northern Territory</b>           | <p>The Northern Territory government is not pursuing Treaty, Truth-telling or Voice.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

## Key insights

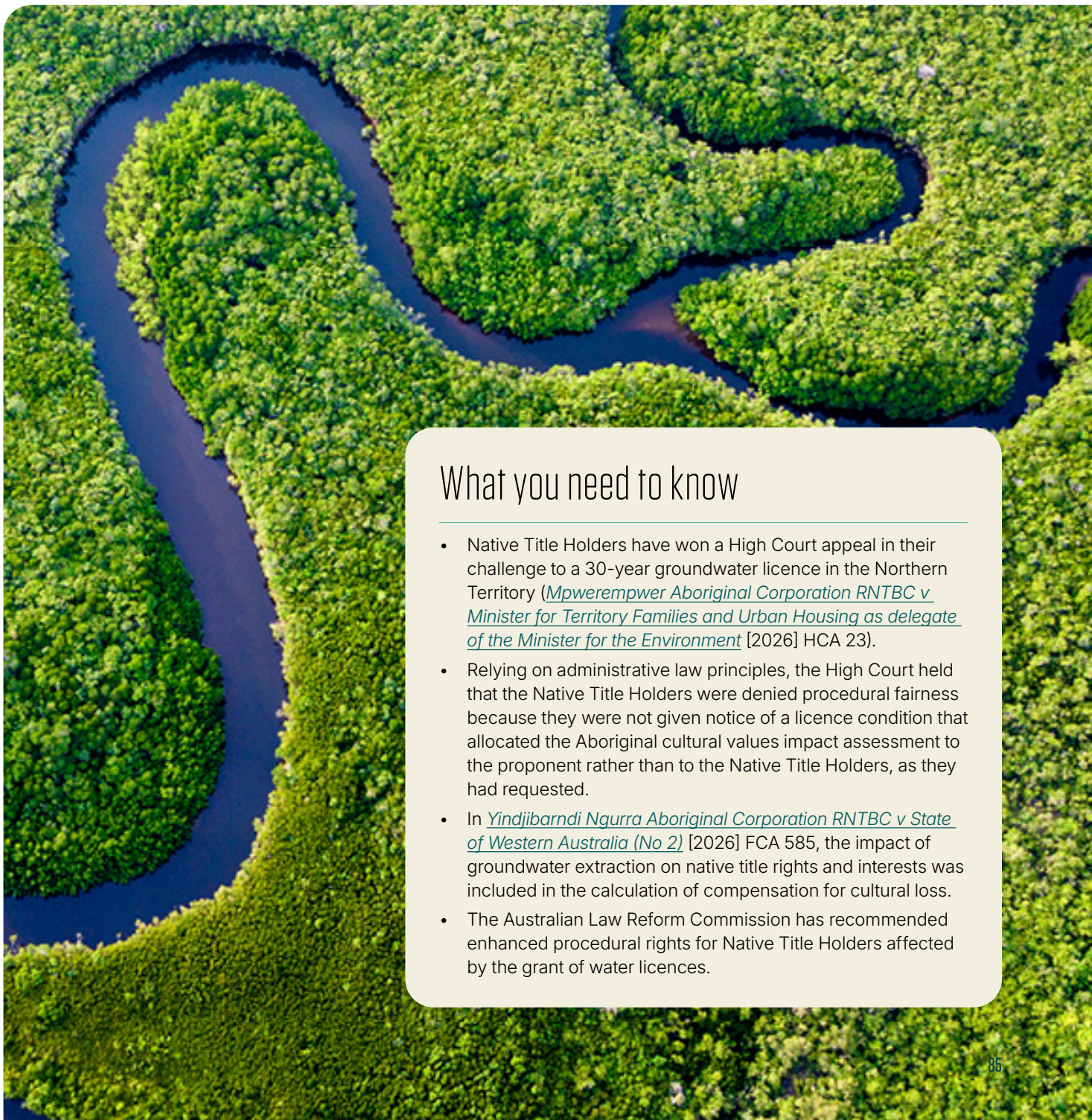
Victoria's Treaty is a living document that provides the framework for ongoing Treaty-making across different topics. The next focus of Treaty-making will be health, housing and education, with the Yoorrook Justice Commission recommendations informing these discussions. The newly elected First Peoples' Assembly is pressing ahead with its mandate, and at the local level Traditional Owner Treaties will be negotiated with the Victorian State in the coming years, with several Traditional Owner groups having already entered the Treaty Negotiations Register.

Victoria's executive government and Parliament will be influenced by the Treaty and the empowerment of Victoria's First Peoples. Expect to see increased consultation with the First Peoples' Assembly on legislative proposals and policies affecting First Peoples, and new guidelines for consultation requirements for government departments.

The future of Victoria's Treaty is not without challenge. In October 2025, the Victorian Coalition pledged to repeal the *Statewide Treaty Act* within 100 days if it wins the November 2026 State election, replacing the Treaty framework with a new department called "First Nations Victoria" and an unelected advisory body. Regardless of changes of government, the underlying issues that gave rise to Victoria's Treaty – self-determination, Truth-telling and systemic disadvantage – will remain on the national agenda. We will continue to monitor developments closely.

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# Native title and cultural rights to water rise to the surface in 2026



## What you need to know

- Native Title Holders have won a High Court appeal in their challenge to a 30-year groundwater licence in the Northern Territory ([\*Mpowerempwer 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 Ngurra Aboriginal Corporation RNTBC v State of Western Australia \(No 2\)\*](#) [2026] FCA 585, 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.

## What you need to do

- Be aware that large water take is a considerable concern for Traditional Owners and legal structures enabling this to be articulated are increasingly available.
- Be alert to the possibility that a decision-maker's errors can undermine approvals – and watch the process carefully.
- Consider how things might have played out differently with the Northern Territory groundwater licence had there been an agreement between the proponent and the Native Title Holders.

## Native Title Holders win High Court appeal in challenge to 30-year groundwater licence in Northern Territory

### Grant of the water licence, legislative regime and history of challenges

The *Mpwerempwer* case was an administrative law challenge brought by the Mpwerempwer Aboriginal Corporation (MAC) against the NT Minister for Territory Families and Urban Housing, and concerned the largest groundwater licence ever granted in the Northern Territory.

Fortune Agribusiness Funds Management Pty Ltd (Fortune) holds a perpetual pastoral lease over Singleton Station, located in the Western Davenport region of the NT between Alice Springs and Tennant Creek. Fortune sought a 30-year licence to extract 40,000 megalitres of water per year for its proposed irrigated horticulture business.

Singleton Station is also native title land ([\*Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia \[2010\] FCA 911\*](#)). MAC is the registered native title body corporate for the Native Title Holders, who hold non-exclusive native title rights and interests in relation to the land. Those interests include the right to access land and waters to maintain and protect places of cultural importance and the right to take and use the natural resources of the land and waters.

Singleton Station is subject to the Western Davenport Water Allocation Plan (Water Plan). Relevantly:

- one of the Water Plan's objectives is to "protect Aboriginal cultural values associated with water and provide access to water resources to support local Aboriginal economic development"; and
- one of the Water Plan's implementation activities is a "cultural values protection program" to be completed by the relevant NT Government department in partnership with Traditional Owners and with the assistance of the Central Land Council (CLC).

In August 2020, Fortune applied to the NT Controller of Water Resources under section 60 of the *Water Act 1992* (NT) for a 30-year licence to take and use groundwater.

Ordinarily, NT groundwater licences can only be granted for a maximum of 10 years. However, section 60(4) of the *Water Act* contains an exception which allows longer licences in special circumstances. This issue was litigated in detail in the lower courts and the High Court, but is beyond the scope of this article.

In April 2021, the Controller granted the licence for a period of 30 years under the exception. MAC sought a review of the Controller's decision under the *Water Act's* review mechanism.

The NT Minister for the Environment referred the matter to the Review Panel. The CLC (acting on behalf of MAC and various other parties) provided written submissions to the Review Panel, made representations at the hearing and provided an Aboriginal Cultural Values Assessment prepared by an anthropologist.

The Review Panel's advisory report concluded that a licence term of greater than 10 years, with suitable conditions, was appropriate for a large-scale development such as that proposed. The Review Panel also recommended that a comprehensive cultural impact assessment be required prior to the extraction of groundwater.

On 15 November 2021, the Minister granted Fortune a revised licence under the exception. The revised licence maintained the 30-year term but imposed two additional conditions precedent (CPs). Relevantly, CP 10 required Fortune to develop a groundwater dependent Aboriginal cultural values impact assessment and submit it to the Controller. The assessment was to be conducted by Fortune's expert and did not require consultation with MAC. MAC and the CLC were not notified of, or invited to comment on, CP 10 before the licence was granted.

MAC unsuccessfully challenged the Minister's decision to grant the revised licence in both the NT Supreme Court and Court of Appeal, but was granted special leave to appeal to the High Court.

## High Court decision

The High Court's decision to quash the grant of the water licence was unanimous. It considered three issues.

MAC's principal ground of appeal challenged the Court of Appeal's finding that the Minister had formed the requisite state of satisfaction that "special circumstances" existed to justify the 30-year licence term. The High Court upheld this ground, holding that the Minister had failed to discharge this statutory function under the exception.

MAC argued that the Minister failed to properly consider a mandatory consideration under section 90(1) of the *Water Act*, namely the protection of Aboriginal cultural values, but was unsuccessful on this ground of appeal because:

- there was evidence in the Minister's reasons that she had taken cultural values into account; and
- the legislation did not require the Minister to consider cultural values in a particular way – it only required that the Minister consider them.

MAC's third ground of appeal was that the Minister failed to provide MAC with the opportunity to be properly heard before imposing CP 10 and therefore denied MAC procedural fairness. The High Court also upheld this ground.

The High Court found that, where a decision-maker reaches an adverse conclusion that would not have been obviously open on the known material, that conclusion should be disclosed to the affected person before the decision is made.

Applying that principle to this case, the High Court held that CP 10 should have been disclosed to MAC before it was imposed as a condition of the groundwater licence, because:

|                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|----------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>there was an adverse conclusion</b>                                     | In its submissions to the Review Panel (made through the CLC), MAC had raised the importance of performing a cultural values assessment in respect of groundwater impacts. CP 10 responded directly to those submissions.<br><br>The Minister therefore reached an adverse conclusion because she addressed MAC's concerns by requiring Fortune to have its own expert assess groundwater impacts on cultural values, without involving MAC or the CLC. |
| <b>the adverse conclusion was not obviously open on the known material</b> | MAC was aware that a cultural values assessment may be a condition of the licence, but it had no knowledge that Fortune would be chosen to undertake that assessment. This was unexpected because the Water Plan contemplated that cultural values work would be carried out by the relevant NT Government department with MAC and the CLC.                                                                                                             |

Accordingly, MAC should have been given a reasonable opportunity to make a submission in respect of the possible imposition of CP 10.

The High Court ordered that the decision of the NT Court of Appeal be set aside, the licence be quashed and the matter remitted to the Minister to be decided according to law.

This is not likely to be the end of this long-running dispute about Fortune's irrigation plans at Singleton Station.

## Insights

A notable feature of this case is that MAC's challenge did not rely on the *Native Title Act*, sacred sites legislation, human rights or international law instruments. The High Court did not need to express a view about MAC's status (as the registered native title body corporate) or examine the special nature of native title interests. Instead, it was confined to "ordinary" administrative law principles governing decision-making under the NT *Water Act*. This is similar to the Barngarla Native Title Holders' success with an "ordinary" administrative law challenge to the Federal Government's decision to declare part of their country a nuclear waste dump ([Barngarla Determination Aboriginal Corporation RNTBC v Minister for Resources](#) [2023] FCA 809).

## Yindjibarndi compensation award includes impact of water licences

The Federal Court's recent compensation decision in *Yindjibarndi* included the impacts of groundwater extraction in the calculation of cultural loss.

The Court considered the impact of dewatering at the mine site on groundwater and groundwater-dependent ecosystems both within and outside the mine site. It was irrelevant that the native title determination did not confer exclusive rights in relation to water. Compensation was payable for the Yindjibarndi People's spiritual group harm arising from damage to the flow of groundwater into two creeks outside the mine site and harm caused to country arising from the reduction in water for vegetation.

This is the first time a court has considered water licences in the context of a native title compensation claim. It remains to be seen whether the findings can be extrapolated to allow a separate group of Native Title Holders to claim compensation for impacts outside a determination area, or whether a "future act" can also have an impact in this manner.

For more information about this decision, see our *Native Title Year in Review 2025-2026* article "[Federal Court creates more precedent for native title compensation](#)".

## Australian Law Reform Commission recommendations about water licences

The Australian Law Reform Commission's (ALRC) final report, [Fulfilling the promise of Mabo: reforming the future act regime in the Native Title Act 1993 \(Cth\) \(Report\)](#), recommends enhancing the procedural rights that must be afforded to Native Title Holders in relation to the conferral of rights to take or use water. It recommends that the right to negotiate apply to the taking of significant amounts of water, and that Native Title Holders have the opportunity to be consulted about all other water-related future acts.

The Report also acknowledges that some water licences may affect native title rights over vast areas, including downstream areas far from the physical point of water extraction, but that procedural rights are commonly only afforded to Native Title Holders in the immediate footprint of the licence. The Report questions whether this common

practice is supported by the current requirements of the *Native Title Act*. It suggests that if the recommended reforms are implemented, they will need to specify the persons to whom the procedural rights are afforded under the proposed new regime (see paragraphs [6.177] to [6.184]).

This has a practical compensation consequence: affected native title parties should not necessarily be identified only by the licence area, extraction point or immediate works footprint, because the actual effect on native title rights may travel with the water system. The ALRC does not resolve how all downstream affected parties should be identified, and says the issue is complex and requires further consideration.

For more information about this Report, see our *Native Title Year in Review 2025-2026* article "[ALRC recommends sweeping Native Title Act changes](#)".

## NSW Water Management Act incorporates cultural values in enforcement proceedings

Recent reforms to the *Water Management Act 2000* (NSW) introduce cultural values in an enforcement context. The range of factors a court must consider in imposing a penalty for criminal offences has now been expanded to include:

- the impact, likely impact or potential impact of the offence on the spiritual, social, customary or economic use or value of the land or water by Aboriginal People; and
- the views of the Aboriginal persons impacted or likely to be impacted.

For more information about these amendments, see our *Environment and Planning Year in Review 2025* article, "[A new age of enforcement under the NSW Water Management Act](#)", published on 14 May 2026.

**Authors:** Clare Lawrence, Partner; Leonie Flynn, Expertise Counsel, Romy Keppel, Lawyer and Alison Kemp, Graduate



# First prison sentence imposed under NT Sacred Sites Act

## What you need to know

- On 28 January 2026, the Darwin Local Court handed down the first prison sentence in the 36-year history of the *Sacred Sites Act*.
- 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.

## What you need to do

- Don't believe that this case sets the ceiling for *Sacred Sites Act* offences. A 2027 incident is unlikely to be dealt with so lightly.
- Ensure that all work on or in the vicinity of sacred sites in the Northern Territory is covered by an Authority Certificate. The absence of an Authority Certificate removes the primary statutory defence to an offence under section 34.

# The offence

In June and August 2022, Queensland woman Kimberley Smith hired a 25-tonne excavator and arranged for a team to enter the historical Tosca mine site on Ammaroo Station, a large cattle station approximately 350 kilometres north-east of Alice Springs. The mine sits on the area of the Putyenge Sacred Site, registered under the *Sacred Sites Act*.

Mrs Smith and her husband and business partner, Scott Smith, had a licence to explore the Tosca mine site. The Smiths were also provided with a map showing the Putyenge Sacred Site. However, the couple failed to obtain a mining management plan or express authorisation before conducting works or selling minerals – both of which their licence required them to do.

More than eight tonnes of turquoise ore were dug up, resulting in substantial damage to Putyenge. Mrs Smith then reportedly offered the turquoise for sale in Australia, the United States and China, at \$1,000 per kilogram. The amount sold was unquantified, but Judge Greg Macdonald said even a “conservative estimate” would “well exceed \$100,000”.

## Sentence imposed

In joint proceedings, the Aboriginal Areas Protection Authority (AAPA) and the Department of Mining and Energy prosecuted Mr and Mrs Smith for breaches of the *Sacred Sites Act* and the *Mineral Titles Act*.

Charges were initially also brought against Mr Smith. However, these were withdrawn due to serious health issues.

Mrs Smith pleaded guilty to working on the sacred site. She was convicted and sentenced to four months imprisonment under section 34 of the *Sacred Sites Act*, suspended over 18 months. Mrs Smith was also fined \$28,000 after pleading guilty to two counts of contravening a condition of a mineral title under section 147 of the *Mineral Titles Act*.

The prosecution had urged the court not to impose a period of imprisonment due to Mr Smith’s declining health, noting that imprisonment would have consequences on Mrs Smith’s ability to care for her husband.

## A milestone – but a limited one

The prosecution of Mrs Smith is a significant enforcement milestone, being the first prison sentence imposed for an offence under the *Sacred Sites Act*.

However, the four-month suspended sentence is on the lower end of the scale under the *Sacred Sites Act*. Section 34 carries a maximum penalty, for a natural person, of 400 penalty units (\$75,600 at the time of the sentence) or imprisonment for two years. For a body corporate, the maximum fine is 2,000 penalty units (\$378,000 at the time of the sentence). Mrs Smith’s four-month

suspended sentence was just one-sixth of the maximum custodial term.

Each fine under the *Mineral Titles Act* was only one-seventh of the highest penalty (500 penalty units, \$94,500 at the time of sentence).

The sentence raises questions about the adequacy of the current penalty regime. Mrs Smith’s actions were part of a planned commercial operation, involving heavy machinery, a team of workers, and the extraction of more than eight tonnes of ore. She was aware that she was operating on a registered sacred site. The relatively low sentence suggests the deterrent effect of the offence provisions is limited.

## Broader enforcement context

The prosecution sits alongside a period of change for the *Sacred Sites Act*. As we reported in our *Native Title Year in Review 2024-2025* article, “[Little Progress in Cultural Heritage Reform around Australia in 2024-2025](#)”, the *Northern Territory Aboriginal Sacred Sites Legislation Amendment Act 2025* (NT) introduced several reforms in 2025. This included a new enforceable undertaking regime that allows AAPA to accept written undertakings from persons in connection with alleged contraventions of the Act or Authority Certificate conditions. These undertakings can include requirements for remediation work, publication of notice of the contravention, and compliance with specified terms, monitored by AAPA. If breached, AAPA may apply to the Supreme Court for enforcement orders.

At an [Estimates Committee hearing](#) on 15 June 2026, Mrs Smith’s prosecution was discussed in the context of the recent reform. AAPA’s Chief Executive Officer, Robert Pocock, noted that the offence provisions under the Act had not changed, but that a policy on the new enforceable undertaking provisions was nearing finalisation. Mr Pocock emphasised that enforceable undertakings must be requested by someone who may have committed an offence: AAPA cannot make the request itself. AAPA will then undertake an investigation, consider issues relating to the offending, and receive legal advice about the prospects of success of a prosecution, before seeking board endorsement of whether or not to proceed.

Mr Pocock separately noted that significant development activity across the Northern Territory has created sustained demand for authority certificates and engagement with AAPA processes. This demand may draw increased attention to compliance with authority certificates, and potential enforcement measures.

Mrs Smith’s case is a reminder that the sacred site protection framework carries real criminal sanctions, even if the penalty imposed on this occasion may appear modest relative to the scale of the harm and commercial benefit gained.

**Authors:** Clare Lawrence, Partner and Brigid Horneman-Wren, Lawyer

# Cultural harm now a factor in environmental sentencing



## What you need to know

- 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 Peoples 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*.

## What you need to do

- Operators authorised to undertake activities on Country should be aware that cultural harm to First Nations Peoples may be taken into account as a relevant sentencing factor for environmental offences.
- Consider your existing approaches and practices for engagement with First Nations communities about activities on Country as appropriate in light of the decision.
- Monitor the growing trend in legislation across Australian jurisdictions to require courts to consider harm to First Nations Peoples' spiritual, social, customary and economic connections to land and water when imposing penalties for environmental offences.

## Background to this sentencing decision

The Forestry Corporation of New South Wales (FCNSW) pleaded guilty to four strict liability offences under section 69SA(1) of the *Forestry Act 2012* (NSW) for failing to carry out harvesting operations in Wild Cattle Creek State Forest in accordance with conditions of the Coastal Integrated Forestry Operations Approval. One offence involved the cutting down of six giant trees and three offences each involved the cutting down of one hollow-bearing tree in mid-2020.

## Cultural harm to the Gumbaynggirr Nation

A notable feature of the sentencing was the Court's consideration of cultural harm to the Gumbaynggirr Nation under section 13.12(2) of the *Biodiversity Conservation Act 2016* (NSW) (BC Act) which permits the Court to take into account matters it considers relevant (apart from those listed in section 13.12(1) of the BC Act) in sentencing for offences under the BC Act.

The EPA read affidavits from three Gumbaynggirr representatives: Dr Marshall (traditional owner, knowledge holder and cultural ecologist), Mr Kelly (CEO of the Yurruungga Aboriginal Corporation) and Ms Buchanan (senior lore woman and medicine woman). Their evidence described the cultural significance of the trees and the harm caused by their unlawful felling to Gumbaynggirr culture, emotional wellbeing, spiritual wellbeing and identity.

Dr Marshall described the loss of the giant trees as part of the "death by 1,000 cuts" of Gumbaynggirr culture. Giant and large old trees hold significant cultural value and their loss permanently affects connection with ancestry and culture. Mr Kelly stated that the unlawful removal severed ancestral ties, disrupted symbiotic relationships and caused irreparable cultural loss. He called for recognition and understanding of the profound impact of the felling of these trees, described at [168] as "a wound that will continue to affect his community for generations."

Pain J accepted this evidence, finding at [172]:

Substantial cultural harm arising from the offences as provided in the evidence of Mr Kelly, Ms Buchanan and Dr Marshall will be considered as part of sentencing for these offences.

## Restorative justice process and orders

The EPA and FCNSW voluntarily committed to a restorative justice process prior to the sentencing hearing. The restorative justice conference was held over two days in April 2025 and included 26 participants. The participants comprised three Gumbaynggirr representatives, 11 FCNSW officers, 10 EPA officers, the facilitator and a professor from the Australian National University's restorative justice unit. FCNSW funded the process at a total cost of \$148,744.35.

Rather than imposing a conventional fine payable to the State, the Court ordered that the \$450,000 penalty equivalent be paid to the Yurruungga Aboriginal Corporation to undertake restorative justice activities agreed during the conference, pursuant to section 13.25(2) of the BC Act. Pain J explained her approach at [226]:

While I do not consider the restorative justice process and its outcome is a substitution for the sentencing process for which the FCNSW is before the Court, given the scale of the orders to be made in addition to the restorative justice activity order, on this occasion I will not impose penalties. I will order payment by the FCNSW of the equivalent of the penalties I would have imposed to the Yurruungga Aboriginal Corporation to assist in achieving the restorative justice activity order specified in Annexure B.

The activities, set out in Annexure B to the judgment, include:

- Facilitating a healing ceremony on Gumbaynggirr Country;
- Developing and implementing a biocultural repair plan in consultation with Gumbaynggirr representatives;
- Facilitating the involvement of Gumbaynggirr People in a Working Group for future harvesting plans on Gumbaynggirr Country;
- Undertaking cultural mapping for the Indigenous Protected Area Proposal for the Bellinger Valley; and
- Establishing the Gumbaynggirr Guardians ranger program.

Her Honour noted that both parties agreed to follow principles of Free, Prior and Informed Consent and to respect and care for Indigenous Cultural Intellectual Property shared during the process, as outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

# A clear trend: cultural harm in environmental sentencing across Australia

This decision is part of a broader legislative trend to recognise cultural harm to First Nations Peoples as a relevant factor in environmental enforcement and to provide courts with the tools to mobilise penalties for the benefit of affected communities.

## Reforms to the Protection of the Environment Operations Act 1997 (NSW) (POEO Act)

The POEO Act contains equivalent provisions. Introduced in late 2025, section 241(1)(e1) requires a court sentencing for an offence under that Act to consider (to the extent relevant) “the impact of the offence on Aboriginal cultural values and practices, including impacts on lands, skies, waters, plant and animal species and seas, having regard to the spiritual and cultural significance of the impact of the offence.” Section 250(1A) empowers the Land and Environment Court to order the carrying out of a restorative justice activity for the restoration of the environment or for the public benefit, such an activity being defined as “any social or community activity for the benefit of the community or persons that are adversely affected by the offence” that the offender has agreed to carry out.

## Reforms to the Water Management Act 2000 (NSW)

Reforms enacted in the *Water Management Legislation Amendment (Stronger Enforcement and Penalties) Act 2025* (NSW) now also require courts, when sentencing for offences under the Water Management Act 2000 (NSW), to consider (to the extent relevant) “the impact, likely impact or potential impact of the offence on the spiritual, social, customary or economic use or value of land and water by or for Aboriginal people” and, where any such impact arises, “the views of Aboriginal persons impacted or likely to be impacted” (section 364A(1)(b1) and (b2)). We discuss these reforms in our 14 May 2026 article, [“A new age of enforcement under the NSW Water Management Act”](#).

## Similar options at the Commonwealth level under the EPBC Act

At the Commonwealth level, the EPBC Act does not include a mandatory sentencing factor requiring courts to consider cultural harm to First Nations peoples like those provisions in the aforementioned Acts in NSW. However, that is not to say that the type of orders Pain J made in *Forestry Corporation* cannot possibly find life in Federal Courts applying the EPBC Act. The EPBC Act already provides the Federal Courts with the power to make remediation orders under section 480A which could potentially be used to achieve similar outcomes.

While the recent reforms in December 2025 did not introduce any express sentencing provisions to this effect, they did significantly expand First Nations engagement in environmental governance and decision-making by codifying a greater role for the Indigenous Advisory Committee in the development of National Environmental Standards, species listings and conservation planning. While the EPBC Act offers a less clear path toward redressing cultural harm and achieving restorative justice in the context of enforcement / sentencing provisions than in NSW, there still appears to be a clear policy trajectory toward improving First Nations’ involvement in environmental decision-making at the Commonwealth level. We discuss the EPBC Act reforms in more detail in our 14 May 2026 article [“EPBC Act reforms: most significant change to Australia’s environmental law in decades”](#).

## Key insights

Taken together, these developments make it clear that proponents operating on Country should expect that harm to First Nations cultural values will continue to be front of mind for both policymakers and the courts they have vested these sentencing powers with.



# Meaning of Claimable Crown Lands in NSW Aboriginal Land Rights Act

## What you need to know

- 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* (CLM Act). 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”.

## What you need to do

- Occupiers of Crown land should audit their occupation arrangements to confirm legal authority exists for their actual use and occupation of Crown land.
- Developers with interests in Crown land — particularly reserved land, Crown roads and land in informal government use — should factor land claim risk into due diligence and project approval processes.
- Lessees of Crown Land should consider if their holdings may be subject to the new validation and variation framework introduced by the CLM Act amendments.



### Refresher on the meaning of “claimable Crown lands” under the ALR Act

Section 36(1) 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 –

- are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under Crown land legislation;
- are not lawfully used or occupied;
- are not needed, nor likely to be needed, for an essential public purpose;
- do not comprise lands that are the subject of a registered application for a determination of native title (other than a non-claimant application that is an unopposed application).

We have reported on the evolving case law on the meaning of “claimable Crown lands” in our previous editions of *Native Title Year in Review* (see our 9 September 2025 alert [“Claimable Crown lands” under NSW Aboriginal Land Rights Act – new law after 40+ years](#)).

This article summarises the key findings in three recent decisions of the Land and Environment Court and identifies practical implications for landholders, government agencies and developers arising from these decisions.

## Brunswick River Claim

In *New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act (Brunswick River Claim)* [2025] NSWLEC 144, the NSW Aboriginal Land Council (NSWALC) appealed the Minister’s refusal of two land claims in the Brunswick River area of northern NSW: one related to part of Lot 50 in DP 1067782 (Central Land Portion) and the other related to part of Lot 2 in DP 728659 (Riverfront Portion). Three issues arose under the definition of “claimable Crown lands”.

### Native title issue: Central Land Portion

The Central Land Portion fell within the external boundary of the Bundjalung native title determination application. The Minister argued the Central Land Portion was excluded from “claimable Crown land” because it was “the subject of a native title determination application” under s 36(1)(d).

At first instance, Pepper J held that the Minister can take at face value what appears on the Register of Native Title Claims. A descriptive formula excluding areas subject to previous exclusive possession acts does not remove land from the application area. Whether extinguishment occurred remains a question for the Federal Court – not the Minister. Pepper J determined that the Central Land Portion was not claimable Crown lands.

This finding was the subject of a successful appeal by NSWALC to the NSW Court of Appeal in *New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act* [2026] NSWCA 183. The NSW Court of Appeal found that land is only the subject of a native title determination application if it can validly be the subject of such an application under the *Native Title Act*, and that because the grant of Scheduled interest leases over Lot 50 constituted “previous exclusive possession acts” which completely extinguished native title, a claimant application could not validly be made in respect of that land. Accordingly, the Court held that the Minister had failed to discharge the onus under s 36(7) of satisfying the Court that Lot 50 was not claimable Crown land, and the appeal was upheld with an order that Lot 50 be transferred to the Council.

### Crown road issue: Riverfront Portion

The Riverfront Portion was both a Crown road under the *Roads Act 1993* (NSW) and part of Crown Reserve R69040 for future public requirements. The Minister argued the land could not be lawfully sold or leased pursuant to Crown land legislation because it was reserved under separate legislation (ie the Roads Act) and therefore fell outside section 36(1)(a).

The Court held that “or” in section 36(1)(a) carries its ordinary disjunctive meaning. Two alternative categories exist: (1) land able to be lawfully sold or leased under Crown land legislation; or (2) land reserved or dedicated for any purpose under Crown land legislation. The Court found the Crown reserve engaged section 36(1)(a), and the Riverfront Portion was claimable Crown lands.

## Essential public purpose issue

The Minister contended both the Central Land Portion and the Riverfront Portion were needed for nature conservation. Applying principles from the Court of Appeal's decision in *Jannali* (discussed in [our previous update](#)), the Court required: (a) a need or likely need for an essential public purpose existing at the claim date; (b) an actual decision by Cabinet or Executive Council as to that need or likely need; (c) more than a mere possibility of use; and (d) more than a departmental desire or bureaucratic process.

The Court rejected the Minister's reliance on 1998–2002 Cabinet decisions and regional forest agreements. No decision specifically identified the Central Land Portion as required for nature conservation. For the Riverfront Portion, the extensive passage of time (no steps since April 2010) and the Minister's 2019 ILUA providing for third-party management were inconsistent with any continuing intention to add the land to the National Parks and Wildlife Service estate.

**Result:** Following the Court of Appeal's decision on the native title issue, the end result was that both the Central Land Portion and the Riverfront Portion were claimable Crown lands.

## Narooma Claim (Golf Course)

*New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act ("Narooma Claim")* [2026] NSWLEC 39 concerned the eastern portion of Lots 613 and 833 in DP 752155 in Narooma, occupied by the Narooma Golf Club under a Crown lease as part of its eighteen-hole golf course. The Minister refused NSWALC's land claims on the basis the land was "lawfully used". Four claims lodged between July 2006 and December 2016 were in dispute. The Court answered two questions.

### Was the Golf Club's use lawful?

The Court confirmed the principle from prior authority that, for reserved Crown land, use must further or be incidental to the reserve purpose (here, public recreation). The Court found the Minister failed to prove:

- The land was open to the public generally as of right – a substantial proportion of playing time was reserved for members and visitors.
- Most golf played was by non-members, rather than members.
- The Golf Club was not using the land as a source of private profit – green fees, membership income and average annual profits of \$100,000 indicated otherwise.
- The lease was not in furtherance of the public recreation purpose.

### Was public use independently lawful?

No. Because the Golf Club had no lawful right to occupy, it could not confer a valid licence on the public. The reservation alone did not create a right for the public to use the land.

**Result:** The land was claimable Crown land. The Court ordered transfer to Wagonga Local Aboriginal Land Council in fee simple.

## Leeton Courthouse Claim

*New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act ("Leeton Courthouse claim")* [2026] NSWLEC 69 concerned the Minister's refusal to grant the NSWALC's claim over Lot 1, Section 42 in DP 758606 in Leeton.

### Factual background

In 1925, Lots 1, 2 and 3 were resumed under the *Public Works Act 1912* (NSW) for the authorised work of erecting a courthouse. Although the courthouse was built on what became Lot 2, the claimed land was Lot 1. In May 2010, a folio conversion resulted in Folio 1/42/758606 being created in the name of the State of New South Wales under the *Real Property Act 1900* (NSW), and the State remained the registered proprietor as at the date of claim.

At the date of claim, Lot 1 was being used as a carpark. The users included the New South Wales Police Force, an employee of Corrective Services NSW, the Registrar of the Leeton courthouse, a visiting Magistrate, and members of the public. The Minister relied on this use to argue that the land was lawfully used or occupied and therefore was not claimable Crown land.

### Was the land lawfully used or occupied?

No. The CLM Act supplied the governing framework for lawful use of the land. The power to authorise use rested with the Minister or a Crown land manager. No authorisation existed. The Minister's reliance on the *Court Security Act 2005* (NSW) (arguing the carpark formed "court premises") failed. Public use also failed because it depended on the same unauthorised availability.

**Result:** The land was claimable Crown land. The Court ordered transfer to Leeton and District Local Aboriginal Land Council in fee simple.

# Crown Land Management Amendment (Statutory Review) Bill 2026: implications for Aboriginal land claims

On 16 September 2026, the *Crown Land Management Amendment (Statutory Review) Bill 2026* was passed by the NSW Parliament following a statutory review. The Bill contains amendments to the CLM Act that are relevant to the operation of the ALR Act.

One of the provisions contained in the first version of the Bill was proposed section 5.20B(4), which would have deemed the granting of a lease under the CLM Act to constitute a “lawful use” for the purposes of another Act, including the ALR Act. This was [considered by the NSW Aboriginal Land Council](#) as a legislative override of the High Court’s decision in *La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd* (discussed in [our previous update](#)), which confirmed that issuing a lease over Crown land is not itself a “use” of the land and that land must be physically used or occupied to defeat a claim under section 36. Combined with the Minister’s power under proposed section 5.20B(1)– (3), proposed section 5.20B(4) would have allowed the Minister to retrospectively validate invalid holdings by Gazette notice if reasonably satisfied that it was in the public interest.

An amended version of the Bill was reintroduced to parliament on 15 September 2026 following a period of further consultation. The Act as passed establishes a new framework for the validation and variation of holdings under the CLM Act. The Minister may declare a holding to be valid where reasonably satisfied that the declaration is in the public interest and there is a community benefit, but must first consider, amongst other things, the impact on existing Aboriginal land claims and consult with each relevant person (including affected Aboriginal Land Councils), with a minimum 28-day consultation period where the land is subject to an undetermined Aboriginal land claim. The Minister may also vary a holding to correct minor errors. Declarations and variations are made by Gazette notice and may take effect retrospectively. The Minister’s powers under Division 5.5A cannot be delegated, and the Minister must report annually on declarations or variations affecting land the subject of an Aboriginal land claim.

Notably, the Act as passed does not include the previously proposed section 5.20B(4), which would have deemed the granting of a lease under the CLM Act to constitute a “lawful use” for the purposes of another Act, including the ALR Act. That provision has been removed from the final form of the legislation. However, the power for the Minister to make declarations which validate or vary a holding and operate retrospectively remains.

## Key insights

These decisions reinforce several themes for landholders, government agencies and developers:

- **The “lawfully used or occupied” threshold remains high.** Actual, long-standing use or occupation of Crown land does not defeat a claim unless formal legal authority for that actual use or occupation exists under the applicable statutory framework.
- **Informal or tolerated use or occupation is likely insufficient.** Government agencies likely cannot rely on historic, assumed or administrative arrangements. They must point to specific statutory authority to support lawful use and occupation, in addition to actual use or occupation.
- **The “essential public purpose” defence demands rigour.** *Brunswick River* reaffirms that the Minister must show an actual decision by Cabinet or Executive Council that the specific land was needed for the nominated purpose, at the claim date. Departmental aspirations, regional processes and lengthy inaction will not suffice.
- **Disjunctive reading of s 36(1)(a) broadens claimability.** Land reserved or dedicated for any purpose under Crown lands legislation is independently claimable regardless of whether it can be sold or leased. Developers and government agencies holding Crown road interests should reassess exposure.
- **Whether land is the subject of a native title application requires analysis.** Land is only the subject of a native title determination application for the purposes of the definition of “claimable Crown lands” under the ALR Act if it can validly be the subject of such an application under the *Native Title Act*. This may require analysis of historical tenure.

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