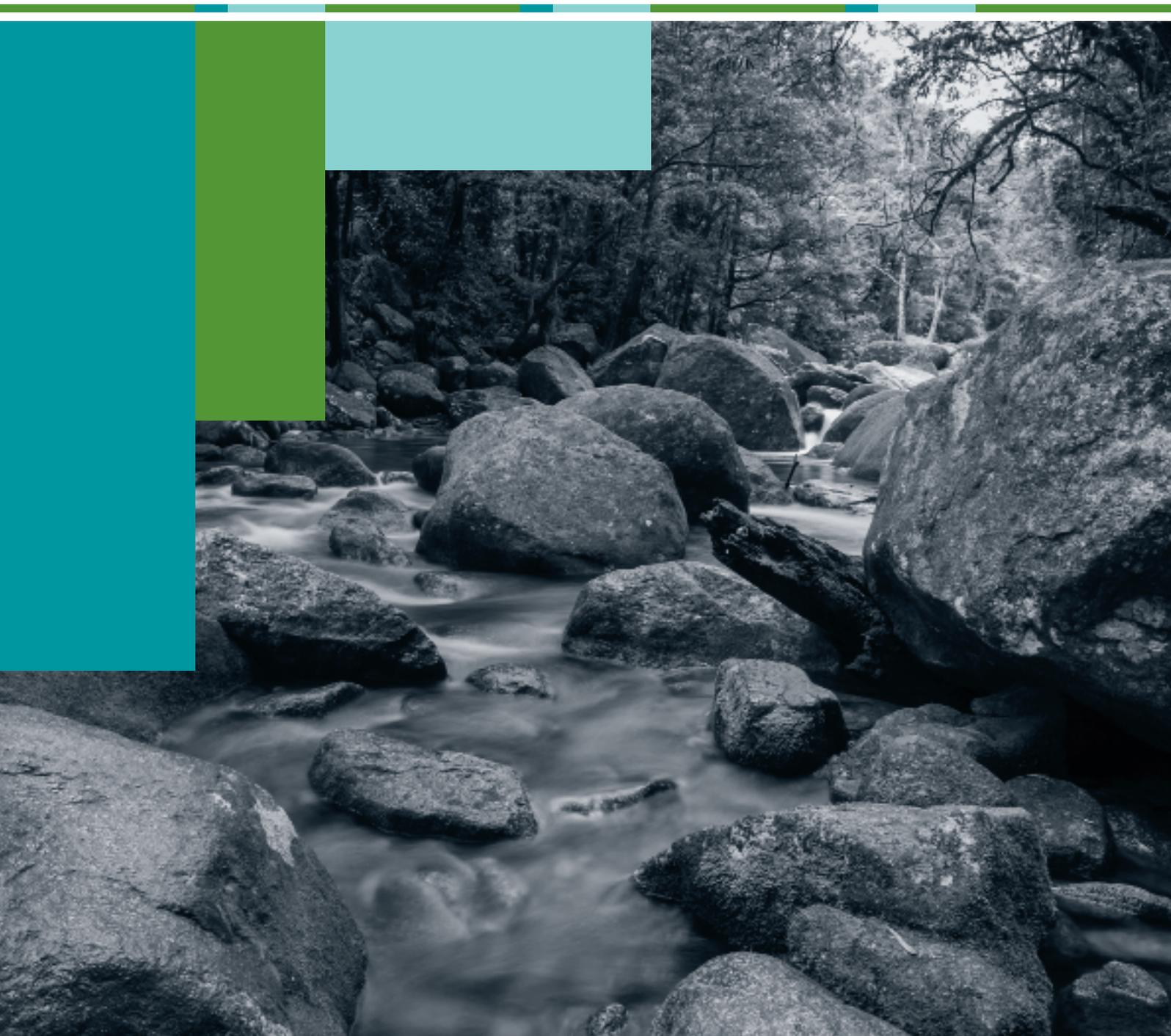


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## Native Title

YEAR IN REVIEW 2017

April 2018





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CHAMBERS ASIA-PACIFIC, 2018

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at [aus.marketing@ashurst.com](mailto:aus.marketing@ashurst.com).

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# Foreword

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

2017 was a momentous year for native title. It was both the 25th anniversary of the High Court's *Mabo* decision and the 50th anniversary of the 1967 referendum which saw the Constitution amended to recognise Indigenous people.

In a legal sense, the past 12 months have seen:

- the Full Federal Court's July 2017 decision in the Timber Creek compensation claim, and the High Court's February 2018 decision granting special leave to appeal on all issues. The final decision of the High Court will, we hope, deliver much needed certainty, and likely trigger many more compensation applications around Australia;
- a number of decisions on section 47B of the Native Title Act, and whether historical extinguishment can be disregarded where exploration titles existed at the time a claim is made;
- the Full Federal Court resolving the uncertainty created by the trial judge's 2016 decision in *Tjiwarl*, by confirming that failure to comply with the procedural requirements in certain provisions of the Native Title Act in granting tenure and interests will not affect the validity of those grants (*BHP Billiton Nickel West Pty Ltd v KN (Deceased) & Ors (Tjiwarl And Tjiwarl #2) & Ors* [2018] FCAFC 8). However, an application has been made for special leave to appeal to the High Court;
- the release by the Commonwealth Attorney-General of an Options Paper setting out proposals for Native Title Act (and CATSI Act) reform; and
- a number of other decisions covering a diverse range of issues affecting almost every aspect of native title law and practice.

From an Ashurst perspective, our national team has remained at the forefront of these developments.

We have been practising in the area since *Mabo*, we were involved in the *Wik* appeal to the High Court, and we remain involved in the country's most complex native title matters. We remain the only firm in Australia ranked in Band 1 in native title in Chambers Asia-Pacific and have maintained this ranking since 2007.

We expect 2018 to be another eventful year in native title law. We encourage you to reach out to us if you would like to discuss any aspect of this publication.



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# 2017 Fast Facts

**31**   
DETERMINATIONS  
THAT NATIVE  
TITLE EXISTS

**5** DETERMINATIONS  
THAT NATIVE TITLE  
DOES NOT EXIST

**246**  
ACTIVE NATIVE  
TITLE CLAIMS\*

**6**   
ACTIVE  
COMPENSATION  
CLAIMS\*

**54**   
ILUAS  
REGISTERED

**144**  
ACTIVE  
NON-CLAIMANT  
APPLICATIONS\*

Source: National Native Title Tribunal, 13 February 2018  
\* Active claims as at 31 December 2017

*Band 1 in Native Title*

CHAMBERS ASIA-PACIFIC, 2007 - 2018

# Compensation

High Court to decide on native title compensation

SPECIAL LEAVE TO APPEAL GRANTED IN TIMBER CREEK CASE



The High Court has granted special leave to appeal in the Timber Creek compensation case. The Northern Territory, Commonwealth and native title holders were each granted leave to appeal on all three of the major issues in the case (economic loss, non-economic loss and interest).

## THE TRIAL JUDGE'S DECISION- \$3.3 MILLION COMPENSATION

In a landmark decision in August 2016, the Federal Court determined that \$3,300,261 compensation was payable to the Ngaliwurru and Nungali Peoples for the impact of land grants and public works on their native title rights and interests (*Alan Griffiths and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory of Australia* [2016] FCA 900) (**Timber Creek**).

This was the first ever judicial assessment of native title compensation in Australia.

A detailed analysis of the trial judge's decision is contained in our [2016 Native Title Year in Review](#).

The decision was appealed to the Full Federal Court and almost all issues were re-agitated in the appeal.

## FULL COURT UPHELD MOST OF THE TRIAL JUDGE'S FINDINGS

In July 2017, the Full Court upheld most of the trial judge's findings (*Northern Territory v Griffiths* [2017] FCAFC 106).

The Full Court upheld the \$1.3 million award for hurt feelings and loss of spiritual attachment (awarded as non-economic loss or solatium) and rejected the Commonwealth and Northern Territory's arguments that the award was manifestly excessive.

However, the Full Court held that the trial judge had overvalued the economic aspects of the native title rights and interests and reduced the award from 80% to 65% of the freehold value of the relevant land at the time of the compensable acts.

The Full Court agreed with the trial judge that only simple interest was payable on the economic loss component of the award and rejected the native title holders' claim for compound interest.

You can read more about the Full Court decision in our 21 July 2017 Native Title Alert [Still a long way to go on native title compensation: Insights from the Timber Creek Appeal](#).



## THE HIGH COURT WILL HEAR AN APPEAL FROM THE FULL COURT'S DECISION

Not surprisingly, applications for special leave to appeal to the High Court were filed by the native title holders, the Northern Territory and the Commonwealth. The applications were heard by Justices Nettle and Gordon on 16 February 2018 and special leave to appeal was granted on all three issues in the case.

The High Court will ultimately decide on the following issues:

- **Economic loss:** The native title holders argue that there should be no discount from 100% of freehold value. The Commonwealth and the Northern Territory argue for a reduction to 50% of freehold value.
- **Interest:** The native title holders argue for compound interest at the risk free rate of yields on long term government bonds.
- **Non-economic loss:** The Commonwealth argues that the award should be reduced from \$1.3 million to \$230,000. The Northern Territory argues the award should be 10% of the economic loss award (\$130,000).

No hearing date has yet been set.

## THE HIGH COURT MAY CONSIDER NEW ISSUES

**Should the Commonwealth (and not the Northern Territory) have been liable for the \$1.3 million compensation for hurt feelings and loss of spiritual attachment (awarded as non-economic loss or solatium)?**

Western Australia has intervened in the High Court appeal and has indicated that it will make submissions about the interpretation of section 51A and 53 of the *Native Title Act 1993* (Cth).

Section 51A of the Native Title Act provides a limit on compensation to the total amount that would be payable for the compulsory acquisition of the freehold estate in the land. Section 51A is subject to section 53, which applies if the amount awarded under section 51A does not amount to "just terms". Section 53 provides that a person is entitled to further compensation to ensure that any "section 51(xxxi) of the Constitution acquisition of a person's property" is made on "just terms". In the Timber Creek case, any section 53 compensation would be payable by the Commonwealth.

Western Australia has indicated that it will argue that the total compensation payable by the Northern Territory should have been limited to the economic loss component of the award and that the Commonwealth should have been liable to pay the amount for non-economic loss (ie the hurt feelings and loss of spiritual attachment which are unique to the extinguishment of native title).

These arguments were not considered by the Full Court because it refused to grant Western Australia leave to intervene in that appeal. This was because the Northern Territory had already agreed to pay the compensation and the trial judge had already rejected the native title holders' claims for additional compensation from the Commonwealth under section 53 of the Native Title Act.

## SHOULD THE ASSESSMENT OF COMPENSATION BE MORE HOLISTIC THAN THE ECONOMIC/NON-ECONOMIC LOSS APPROACH?

The Full Court questioned the parties' economic/non-economic loss approach to compensation and said that the Native Title Act in fact contemplates compensation of a more holistic nature. The Full Court queried the value of applying the principles of Australian land law to assessing native title compensation. The Court said [at 144]:

"The problem concerning the use of such provisions, even with adaptation, is that they are designed to address the value of land as a material object traded in a market for a like or analogous commodity. Native title rights and interests are of such a different type and significance to the holders that **it may well be appropriate to loose the assessment from the shackles of Australian land law and approach the compensation exercise without dividing value into economic and non-economic components.** It might rather be more appropriate to seek to place a money value as best as can be done on the one indissoluble whole."

The High Court's approach to these issues is not yet known.

## KEY POINTS TO NOTE

- The High Court's enthusiasm to consider the Timber Creek appeals was apparent during the hearing of the special leave applications. The High Court rejected the Northern Territory's arguments that some of the native title holder's grounds for appeal were not appropriate because they had insufficient prospects of success.
- Although the grounds for appeal are limited to the calculation of economic loss, non-economic loss and interest, the High Court may follow the Full Court and suggest a more holistic approach to the assessment of compensation.
- If the High Court accepts Western Australia's arguments about the Commonwealth being responsible for the non-economic loss component of any compensation award, then the High Court decision will have significant implications. Not only would the Commonwealth pick up significant liability, the States and Territories would have greater certainty as to their compensation exposure because the calculation of economic loss and interest is far less subjective than the non-economic loss component.
- There are only a handful of native title compensation applications currently on foot and only one has been resolved (by consent) since the Timber Creek decision in August 2016 (*Tjayuwara Unmuru Native Title Compensation Claim* [2017] FCA 1561). It is likely native title holders have been waiting for the High Court decision so that their compensation claims can be formulated to reflect the High Court's findings about the assessment of compensation.
- Regardless of the outcome, the High Court's decision will deliver certainty and likely trigger more compensation applications around Australia. Certainty in relation to the assessment of compensation and liability as between the States and the Commonwealth should lead to the settlement of many of such claims by negotiation rather than litigation.

# Validity of grants

Full Court resolves recent uncertainty surrounding the validity of grants under the Native Title Act, but High Court may yet hear the issue

## *BHP BILLITON NICKEL WEST PTY LTD V KN (DECEASED) (TJIWARL AND TJIWARL #2) [2018] FCFA 8*

The Full Federal Court has confirmed that failure to comply with the procedural requirements in certain provisions of the Native Title Act in granting tenure and interests will not affect the validity of those grants (*BHP Billiton Nickel West Pty Ltd v KN (Deceased) & Ors (Tjiwarl And Tjiwarl #2) & Ors* [2018] FCAFC 8). However, an application has been made for special leave to appeal to the High Court.

## TRIAL JUDGE'S DECISION IN TJIWARL

During the trial of their native title claim in 2016, the Tjiwarl people challenged the validity of a number of mining tenures on the grounds that the State's failure to comply with certain future act procedures in the Native Title Act rendered the grant of those tenures invalid.

This required the Court to decide whether compliance with the relevant future act procedural requirements in the Native Title Act is a pre-condition to a grant being valid for native title purposes. This issue goes to the core of the native title system in Australia and affected the grant of hundreds of interests over almost 20 years.

In the first instance decision (*Narrier v State of Western Australia* [2016] FCA 1519), the trial judge held that an act will only be covered by the validating provisions of the Native Title Act if it meets the relevant description of acts to which the provisions can apply and all of the relevant procedures relating to those acts are complied with. Accordingly, a number of licences (for roads, pipelines and power lines) were held to be invalid because of the State's failure to follow the applicable procedural requirements in the Native Title Act in granting those licences.

The trial judge also found that miscellaneous licences granted under the *Mining Act 1978* (WA) to search for water were invalid because they were incorrectly granted by the State in reliance upon section 24HA of the Native Title Act, which applies to grants relating to water management and regulation.

We reported on the trial judge's decision in our [2016 Native Title Year in Review](#).

## FULL COURT NARROWS CIRCUMSTANCES IN WHICH PRIOR EXTINGUISHMENT CAN BE DISREGARDED

On 1 February 2018, the Full Court (*BHP Billiton Nickel West Pty Ltd v KN (Deceased) & Ors (Tjiwarl And Tjiwarl #2) & ors* [2018] FCAFC 8) upheld BHP's appeal of the trial judge's decision.

The Full Court held that:

- failure to comply with *certain* procedural requirements of the Native Title Act in granting an interest or tenure will not affect the validity of that grant; and
- section 24HA of the Native Title Act has a wide operation and applies provided the legislative provision under which the grant is made *relates* to the management or regulation of water (it does not matter if the statute as a whole relates to other topics, such as mining).

The Full Court also made findings about the operation of section 47B of the Native Title Act, which we report on in our article *Full Court narrows the operation of section 47B of the Native Title Act* below.

### Operation of the Native Title Act: certainty is returned - it was as we thought after all

The Full Court provided a number of reasons why failure to comply with the procedural requirements in certain provisions of the Native Title Act will not affect the validity of a grant, including:

- the relevant Native Title Act provisions are generally expressed to the effect that if an act (eg the grant of a tenement or licence) is “covered” by the provision, then it will be valid. They do not say “complies with” or “satisfies” the provision. The procedural requirements are then imposed in relation to those valid acts;
- the right to negotiate provisions are expressed quite differently. They provide that “if the procedures in this Subdivision are not complied with, the act will be invalid to the extent that it affects native title”. Those provisions expressly impose conditions for validity;
- the Explanatory Memorandum for the *Native Title Amendment Bill 1997* (Cth), which introduced the procedural requirements, states that failure to notify under one of the relevant provisions “will not affect the validity of the future act”; and
- the text, structure and context of the Native Title Act do not support the trial judge’s conclusions about the consequences of non-compliance with the procedural requirements. In fact, there is nothing in the statutory scheme to support this construction other than perceived unfairness. The consequences of a breach of a statutory requirement must be dictated by legislative purpose alone determined by reference to the language of the relevant provision and the scope and object of the whole statute.

The Full Court was also critical of the trial judge for not following the *obiter* comments made by an earlier Full Court in 2001 in *Lardil Peoples v Queensland* [2001] FCA 414. The Full Court emphasised the importance of the doctrine of precedent and noted that the decision should not have been departed from unless it could be distinguished or was plainly wrong. The Full Court did not find any basis upon which *Lardil* could be distinguished and, moreover, agreed with the construction in *Lardil*.

### Full Court confirms wide application of section 24HA Native Title Act

The Full Court also overturned the trial judge’s finding that the Mining Act is not legislation that relates to the regulation or management of water.

The Full Court disagreed with the trial judge’s characterisation of the Mining Act as legislation relating to mining, rather than water. In fact, the Full Court was critical of any attempt to identify a single, unified purpose of a statute as a whole. Instead, the Full Court said the focus should be on whether the specific provision under which the future act is done relates to the management or regulation of water.

### High Court appeal

The native title holders filed applications for special leave to appeal to the High Court on the significance of procedural rights and whether exploration tenements prevent the application of the provision that would otherwise allow prior extinguishment to be disregarded. The special leave application will be heard later this year.

## KEY POINTS TO NOTE

- The Full Court confirmed a long held understanding about the operation of the Native Title Act that was challenged by the trial judge's decision in 2016.
- The High Court's decision on the special leave applications will be highly anticipated by all stakeholders. A decision not to grant special leave would be a strong signal that the High Court agrees with the Full Court's analysis. This would deliver certainty to the holders of hundreds of interests granted around Australia over many years. Importantly, the reverse is not true. A grant of special leave to appeal does not suggest the High Court will overturn the Full Court. However, it will mean that stakeholders will have to live with the uncertainty for another 12 months or more until the appeals can be heard and resolved.
- The issue is not that States and Territories disregard the procedural requirements of the Native Title Act and want to continue to do so. Rather, working out whether native may potentially exist is often difficult, as is the assessment of which of the various of future act validation procedures applies in the circumstances. The Lardil analysis provided room for error. If the Tjiwarl first instance position prevails, the States and Territories will need to give an additional level of vigour to their assessments.
- Applicants for interests relating to water (eg bores) can continue to rely on the less onerous procedures in section 24HA of the Native Title Act, provided the specific legislative provision under which the tenure is granted relates to water, even if the statute as a whole relates to other topics such as mining. In Western Australia, this includes miscellaneous licences under the Mining Act. The native title holders did not apply for special leave to appeal on this issue.

# Determination of claims

## Full Court narrows the circumstances in which prior extinguishment can be disregarded: s47B gets the squeeze

In February and March 2018, the Full Federal Court handed down two decisions that narrowed the operation of section 47B of the Native Title Act. The Full Court in *Tjiwarl and Attorney General v Helicopter-Tjungarrayi (Ngurra Kayanta and Ngurra Kayanta #2)* [2018] FCAFC 35 found that exploration licences and petroleum exploration permits were “leases” for the purposes of section 47B, so that section 47B would therefore not apply to disregard prior extinguishment.

### SECTION 47B OF THE NATIVE TITLE ACT

Section 47B of the Native Title Act provides that historical extinguishment of native title can be disregarded if, at the time the native title claim is lodged, that area is occupied by the claim group and certain exclusions do not apply.

Those exclusions are:

- the area is covered by a freehold estate or a lease (section 47B(1)(b)(i)); or
- the area is covered by a reservation, proclamation, dedication, condition, permission or authority under which the whole or a part of the land or waters in the area is to be used for a public purpose or for a particular purpose (section 47B(1)(b)(ii)).

Until recently, the Federal Court’s approach had been that neither of these exclusions applied to exploration tenements in Western Australia. This meant that section 47B of the Native Title Act **could** operate on land that was the subject of an exploration licence or petroleum exploration permit at the time the claim was made, so that the prior extinguishment of native title effected by the grant of these tenements could be disregarded. This would allow exclusive native title to be determined to exist.

### TJIWARL

#### Trial Judge finds “exploration licence” not a “lease” so and exclusion doesn’t apply

Consistent with earlier authority, the Tjiwarl trial judge had found that a “lease” in section 47B(1)(b)(i) of the Native Title Act included a mining lease, but not an exploration licence.

We report on the Tjiwarl decision in our article above *Full Court resolves recent uncertainty surrounding the validity of grants under the Native Title Act, but High Court may yet hear the issue*.

#### Full Court overturns Trial Judge – section 47B(1)(b)(i) exclusion applies

The Full Court disagreed and said that the definition of “mine” in the Native Title Act, which includes to “explore or prospect for things that may be mined”, meant that the term “lease” would also include an exploration licence. The exclusion in section 47B(1)(b)(i) of the Native Title Act therefore applies in the case of an exploration licence.

As a result, section 47B will **not** apply and the historical extinguishment of native title in areas covered by an exploration licence at the time a native title claim is lodged **cannot** be disregarded.

#### High Court appeal

The native title holders filed an application for special leave to appeal to the High Court on the section 47B issue. The special leave application will be heard later this year.

## KEY POINTS TO NOTE

- The application of section 47B of the Native Title Act has been broadly litigated in Western Australia. As noted, if section 47B operates to disregard historical extinguishment, there is often a finding of exclusive native title rights and interests over the relevant area.
- Subject to the special leave applications in *Tjiwarl* (and any *Ngurra Kayanta* appeal), the Full Court's findings on the impact of mining and petroleum exploration tenements on section 47B may have significant consequences. There would be fewer determinations of exclusive native title going forward. It also raises the possibility that respondent parties may seek to reopen existing determinations to reflect the change in law. We discuss the impact of these decisions on the variation of determinations further below in our article *Federal Court varies determination of native title for the first time – is this the tip of the iceberg?*.

## ATTORNEY GENERAL v HELICOPTER-TJUNGARRAYI (NGURRA KAYANTA AND NGURRA KAYANTA #2) (NGURRA KAYANTA)

### Trial Judge finds that neither of the exclusions in section 47B(1)(b) applied

This was a test case on the application of both limbs of section 47B(1)(b) of the Native Title Act.

In relation to the first limb, the State of Western Australia argued that petroleum exploration permits were “leases” and thereby excluded the operation of section 47B under the first limb in section 47B(1)(b)(i). The State invited the Court to not follow the decision of the *Tjiwarl* trial judge on the ground that it was clearly wrong.

The Court rejected the State's argument and followed *Tjiwarl*. The Court held that an exploration permit is for exploration only and does not constitute a “mining lease” under the Native Title Act and is therefore not a “lease” for the purposes of section 47B(1)(b)(i) of the Native Title Act.

In relation to the second limb, the Commonwealth intervened in the proceedings and argued that the second exclusion in section 47B(1)(b)(ii) applied, ie that the petroleum exploration permits were permissions or authorities under which the land was to be used for a particular purpose.

This argument was in direct contradiction of the Full Court decision in *Banjima People v Western Australia* [2015] FCAFC 171 (which we reported on in our [2016 Native Title Year in Review](#) and [2015 Native Title Year in Review](#)).

The Commonwealth contended that the permits were different from those considered by the Full Court in *Banjima* and did in fact comprise permissions or authorities granted for a particular purpose (namely petroleum exploration).

The Court rejected this argument and held that the permits were indistinguishable from the *Banjima* permits and that the exclusion in section 47B(1)(b)(ii) did not apply.

### Full Court overturned trial judge on first limb but not second

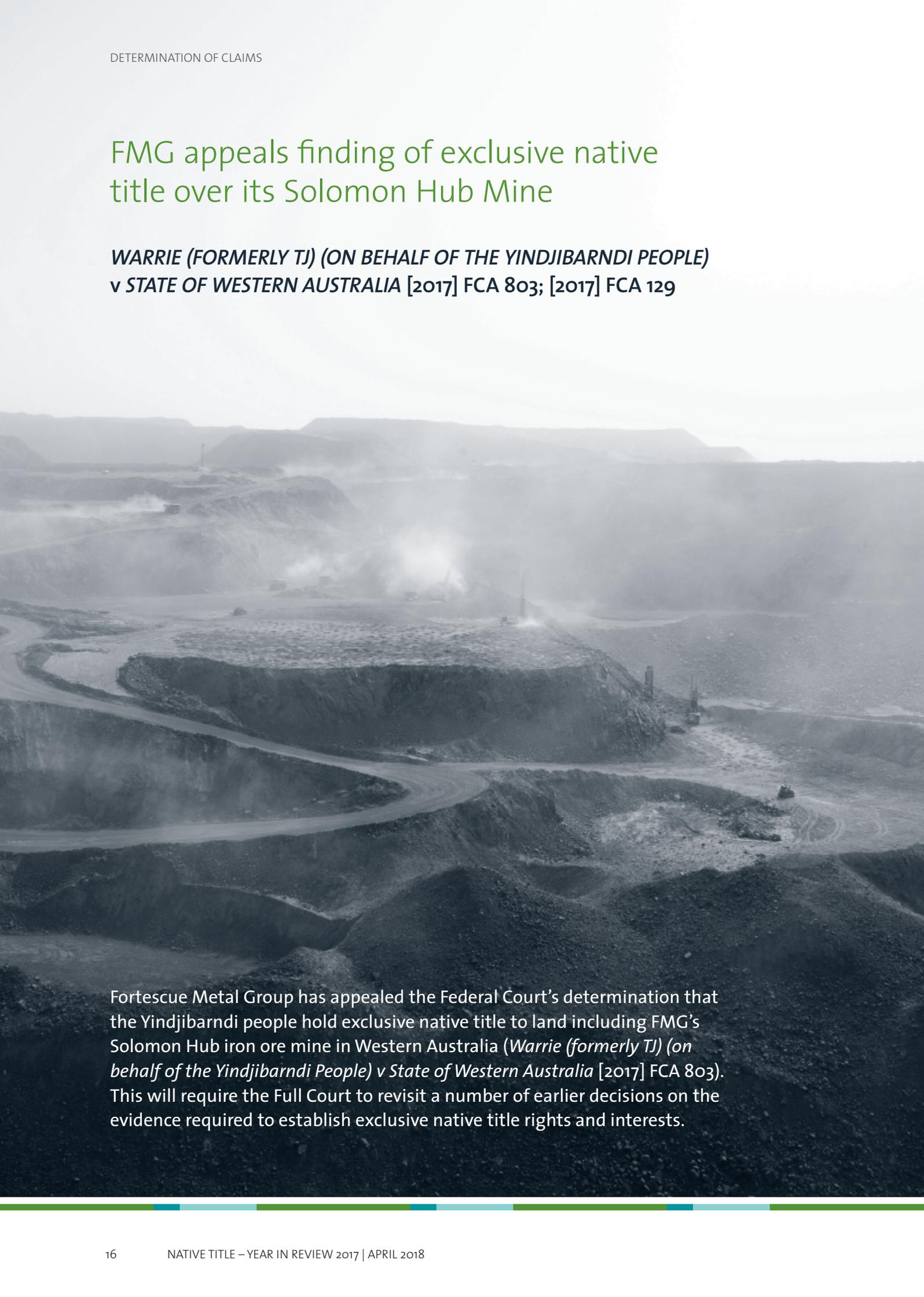
The State and the Commonwealth both appealed to the Full Court. The Full Court heard the *Ngurra Kayanta* appeal on 12 February 2018 and therefore was able to take into account the Full Court's decision on 1 February 2018 in *Tjiwarl*.

Consistent with the Full Court in *Tjiwarl*, the Full Court in the *Ngurra Kayanta* appeal found that petroleum exploration permits were “leases” that excluded the operation of section 47B.

The Commonwealth's appeal on the operation of the second limb of section 47B(1)(b) was dismissed.

## FMG appeals finding of exclusive native title over its Solomon Hub Mine

***WARRIE (FORMERLY TJ) (ON BEHALF OF THE YINDJIBARNDI PEOPLE) v STATE OF WESTERN AUSTRALIA*** [2017] FCA 803; [2017] FCA 129



Fortescue Metal Group has appealed the Federal Court's determination that the Yindjibarndi people hold exclusive native title to land including FMG's Solomon Hub iron ore mine in Western Australia (*Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803). This will require the Full Court to revisit a number of earlier decisions on the evidence required to establish exclusive native title rights and interests.

## TRIAL JUDGE FOUND EXCLUSIVE NATIVE TITLE OVER SOLOMON HUB MINE

In July 2017, the Federal Court held that the Yindjibarndi people hold exclusive native title to land including Fortescue Metal Group's Solomon Hub iron ore mine in Western Australia (*Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803).

The Yindjibarndi People already held non-exclusive native title rights and interests to a large area north of the claim area, which was recognised after a contested hearing. The Full Court in that matter (*Moses v Western Australia* [2007] FCAFC 78) held the Yindjibarndi did not hold exclusive native title because, although there remained a practice of seeking permission to enter Yindjibarndi land, this occurred as a matter of respect not in recognition of a right to control access.

However, since the Moses decision, the Full Court has held that a traditional custom by which persons were expected to seek permission before entering land (so as to gain spiritual protection) gives rise to exclusive native title (*Griffiths v Northern Territory* [2007] FCAFC 178 (**Griffiths**) and *Banjima People v Western Australia (No.2)* [2015] FCAFC 171 (**Banjima**)).

The Yindjibarndi People successfully relied upon these principles to claim exclusive native title in these proceedings. The Court rejected arguments from the State and FMG asking the Court to find only non-exclusive native title.

As the holders of exclusive native title right and interests, the Yindjibarndi people have the right to exclude any person who is not a Yindjibarndi person from those parts of the determination area where exclusive native title was found to exist.

## FMG'S APPEAL

FMG filed a notice of appeal in December 2017 appealing the findings on exclusive native title (WAD611/2017). The matter will be set down for hearing in 2018.

### KEY POINTS TO NOTE

- Exclusive native title being determined to exist in relation to project land does not present any particular risk to proponents (other than in relation to compensation). Valid non-native title interests prevail over the native title rights and interests, regardless of whether the native title rights and interests are exclusive or non-exclusive in nature. They suppress the native title for the life of the interests. The native title continues to exist in its entirety, and effectively revives when the non-native title interests expire.
- FMG's appeal will require the Full Court to revisit its earlier decisions in Griffiths and Banjima on the evidence required to establish exclusive native title rights and interests.
- Like other significant judgements in the last 12 months, the outcome of this appeal is likely to lead to a series of applications to vary existing determinations by parties keen to ensure they benefit from the changes in the law. In fact, the Yindjibarndi PBC already has such an application on foot (in relation to their 2007 determination covering an area to the north of their current claim, the subject of appeal). We discuss this further below in our article *Federal Court varies determination of native title for the first time – is this the tip of the iceberg?*.

# Federal Court varies determination of native title for the first time – is this the tip of the iceberg?

## TARLKA MATUWA PIARKU (ABORIGINAL CORPORATION) RNTBC v WESTERN AUSTRALIA [2017] FCA 40

For the first time, the Federal Court has varied an approved determination of native title in *Tarlka Matuwa Piarku (Aboriginal Corporation) RNTBC v Western Australia* [2017] FCA 40. The variation was made by consent to confirm that native title exists in relation to areas of pastoral improvements which had been excluded from the original determination area on the authority of a Full Court decision that was overturned by the High Court.

## TARLKA MATUWA PIARKU (ABORIGINAL CORPORATION) RNTBC v WESTERN AUSTRALIA

### Original determination – pastoral improvements excluded from determination area

The Federal Court made a consent determination of native title in July 2013 finding that the Wiluna claim group and the Tarlka claim group held native title rights and interests in relation to certain pastoral land in Western Australia (*WF (Deceased) on behalf of the Wiluna People v State of Western Australia* [2013] FCA 755).

Justice McKerracher made orders on the terms set out in a Minute of Proposed Consent Orders signed by the Applicant and all respondent parties. The consent orders provided the Determination, as it relates to pastoral improvements, could be varied if, on appeal from the decision in *Brown (on behalf of the Ngarla People) v State of Western Australia* (2012) 203 FCR 505, the High Court overturned, set aside or otherwise found to be incorrect the ruling in *De Rose v South Australia (No 2)* (2005) 145 FCR 290 concerning pastoral improvements. In *De Rose* it was held that pastoral improvements had the effect of extinguishing native title.

### Application to vary determination of native title to add pastoral improvements to determination area

As was widely anticipated, the High Court held in *Western Australia v Brown* [2014] HCA 8 that the Full Court decision in *De Rose* concerning pastoral improvements was incorrect and that pastoral improvements do not extinguish native title.

After the High Court's decision in *Brown*, the Tarlka Matuwa Piarku (Aboriginal Corporation) RNTBC (as the registered native title body corporate for the native title holders in Wiluna) (**Tarlka**) filed an application to vary the determination of native title pursuant to section 13 of the Native Title Act.

Section 13(5) of the Native Title Act states that the grounds for variation or revocation of an approved determination of native title are:

- “(a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or
- (b) that the interests of justice require the variation or revocation of the determination.”

The determination was made by consent in February 2017 (*Tarlka Matuwa Piarku (Aboriginal Corporation) RNTBC v Western Australia* ([2017] FCA 40).

The Court was satisfied that both grounds in section 13(5) of the Native Title Act had been met. The High Court's decision in *Brown* was an event that had taken place that caused the determination to no longer be correct, as it incorrectly determined areas of pastoral improvements as areas where native title did not exist. It was in the interests of justice to give effect to the agreement recorded in the minute of consent orders – the determination expressly provided for this change in law. The variation application had the consent of all parties and was supported by a joint submission.

## WAS THE TARLKA VARIATION THE TIP OF THE ICEBERG?

### Pre-Tarlka

This was the first time that the Federal Court has varied a determination of native title. The Federal Court has been asked to consider two earlier applications to vary a determination of native title and both were unsuccessful for reasons relating to the capacity of the applicant to bring the application such that the Court was not required to consider section 13(5) of the Native Title Act.

In one of those applications (*Wintawari Guruma Aboriginal Corporation RNTBC v State of Western Australia* [2015] FCA 1053) Justice Rares referred to how the ordinary principles applicable to varying an order made by consent would apply in the context of section 13(5) of the Native Title Act. Justice Rares referred to these comments by the High Court (in the 1956 decision of *Harvey v Phillips* (1956) 95 CLR 235 at 243-244):

“The question whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like.”

These comments suggest that the Court may not readily vary a consent determination of native title, but may be confined to the circumstances of the case.

### Consent determinations that flag a variation application

In both *BP (Deceased) on behalf of the Birriliburu People v State of Western Australia* [2016] FCA 671 (**Birriliburu**) and *Taylor v Western Australia* [2017] FCA 1255 (**Taylor**), consent determinations of native title recognised exclusive native title over the area of exploration tenements relying in the earlier interpretation of section 47B(1)(b) of the Native Title Act before the Full Court decisions in *Tjiwarl* and *Ngurra Kayanta*.

Recognising the legal uncertainty surrounding the application of section 47B of the Native Title Act in this context, the parties in *Taylor* adopted the same approach as the parties in *Tarlka*. They expressly agreed in the minute of consent orders that the Commonwealth could make an application to vary the determination if the High Court (or the Full Court if special leave is refused or an application for special leave is not made) overturns *Ngurra Kayanta*. The parties in *Birriliburu* adopted a similar approach.

The parties were prudent to record their agreement in the consent determination. It should greatly assist to progress any application under section 13 of the Native Title Act to vary the *Taylor* and *Birriliburu* determinations.

### Mandandanji Court flags section 13(2) application

In *Weribone on behalf of the Mandandanji people v State of Queensland* [2018] FCA 247 the Federal Court made a consent determination of native title recording that native title does not exist in relation to the claim area comprising approximately 20,000 square kilometres in southern Queensland. We discuss this decision further below in our article below *Federal Court makes more negative determinations delivering certainty for all stakeholders*.

Justice Rares noted that the determination was subject to the possibility of a future application to vary the determination under section 13(2) of the Native Title Act if events occur that cause the determination to no longer be correct or the interests of justice require it.

### Yindjibarndi Aboriginal Corporation RNTBC v WA

In May 2017, the Yindjibarndi Aboriginal Corporation RNTBC filed an application to vary the determination of native title made by the Full Federal Court in *Moses v Western Australia* [2007] FCAFC 78 on the grounds that the law relating to the nature of exclusive possession of native title has fundamentally changed.

The application states that the events that have taken place since the determination are the Full Court decisions in *Griffiths* and *Banjima* both of which recognise spirituality as being capable of supporting a right of exclusive possession. Previously, the law required that an applicant for exclusive possession native title must prove a right to control access that existed in a usufructuary or proprietary sense.

The Yindjibarndi RNTBC will submit that the native title holders would be entitled to exclusive possession on the Full Court's new approach to this issue and that the interests of justice favour the variation be made.

The Court has made orders for the filing of pleadings and a case management conference in May 2018. The application is opposed by the State of Western Australia and FMG.

## KEY POINTS TO NOTE

- Tarlka was the first time that the Federal Court has varied a determination of native title. The facts of that case neatly fit within the grounds for variation in section 13(5) of the Native Title Act and provided little controversy for the Court.
- Subject to the High Court's findings on this issue, State Governments (or the Commonwealth) may apply to vary determinations of native title made on the basis that section 47B of the Native Title Act operated to disregard prior extinguishment by the grant of exploration tenements. We know of a number of determinations made on this basis, including the Taylor and Birriliburu determinations in Western Australia and the Gunai Kurnai determination in Victoria.
- The Yindjibarndi variation application will be more complicated for the Court to consider because it arises because of a change in the law relating to connection issues rather than extinguishment. Applications on these grounds will present far greater evidentiary hurdles than applications on extinguishment grounds which can rely on documentary evidence and are reasonably straightforward.



Federal Court makes more  
negative determinations  
delivering certainty for  
all stakeholders

The Federal Court has made a number of negative determinations of native title in 2017-2018, including by consent. These include *Sandy on behalf of the Yugara People v State of Queensland* [2017] FCFCA 108 over the Brisbane area, *Yirendali People v State Of Queensland* [2017] FCA 273 after a surrender of native title, *Weribone on behalf of the Mandandanji people v State of Queensland* [2018] FCA 247 and *Agius v State of South Australia (No.6)* [2018] FCA 359 covering the majority of the Kurna claim area over Adelaide.

## TURRBAL AND YUGARA – NO NATIVE TITLE OVER BRISBANE AREA

The proceedings involved competing native title claims made by the Turrbal People and Yugara People over a large part of the greater Brisbane area, including the Brisbane CBD. The proceedings had a long history, with the Turrbal claim first lodged in 1998.

In 2015, the Federal Court rejected both claims on the basis that the claim groups were unable to prove a continued and substantially uninterrupted system under which traditional laws and customs were acknowledged and observed (*Sandy on behalf of the Yugara People v State of Queensland (No.2)* [2015] FCA 15). The Court held that neither claim group possessed the necessary communal, group or individual rights and interests required to prove native title in the claim area.

In March 2015 the Federal Court made a determination that native title does not exist in relation to the claim areas (*Sandy on behalf of the Yugara People v State of Queensland (No.3)* [2015] FCA 210).

Both groups appealed to the Full Court and the appeals were heard together in November 2016.

On 25 July 2017, the Full Federal Court dismissed the appeals from the Federal Court's decision and confirmed that native title does not exist (*Sandy on behalf of the Yugara People v State of Queensland* [2017] FCFCA 108). The Full Court agreed with the trial judge that neither the Turrbal or Yugara applicants were able to establish a continuity of laws and customs. Put simply, the Turrbal or Yugara groups had lost their traditional connection to the land.

The Full Court followed their earlier decision in *Bodney v Bennell* (2008) 167 FCR 84 (in relation to the Perth CBD native title claim) and noted at [221] that:

“A substantial interruption of the connection of a people to a claim area by the traditional laws and customs is not to be mitigated by reference to white settlement. The continuity inquiry does not involve consideration of why acknowledgment and observance ceased.”

The Full Court said the case of the Turrbal applicants was not relevantly different from that of the claimants in *Risk (on behalf of the Larrakia People) v Northern Territory* (2007) 240 ALR 75 (in relation to the Darwin CBD native title claim) in which the Full Court concluded that, by reason of dispossession of much of their traditional lands, they were precluded from exercising many of their traditional rights.

The Yugara applicants also appealed the trial judge's separate determination that native title did not exist.

The Full Court confirmed that the trial judge had the discretionary power to make a negative determination of native title (see *CG v Western Australia* (2016) 240 FCR 466 (**Badimia**) (see the discussion of this case in our [2016 Native Title Year in Review](#)). It dismissed the appeal and found that the discretion was properly exercised, taking into account the long history of the competing claims and the need for finality in the proceedings.

## YIRENDALI CLAIM – NO NATIVE TITLE OVER LARGE AREA IN WESTERN QUEENSLAND

In *Hill on behalf of the Yirendali People v State Of Queensland* [2017] FCA 273 the Federal Court made a consent determination of native title recording that native title does not exist in relation to a large area in Western Queensland.

In this case, the consent determination followed the registration of an ILUA providing for the surrender of native title in relation to the whole of the claim area in exchange for certain benefits from the State, including land exchange and revenue sharing. The negotiation of the ILUA followed the State notifying the claim group that it did not accept that they could establish the necessary connection to the claim area under the Native Title Act.

The Court considered the principles governing the exercise of its discretion to make a negative determination set out in *Badimia* and held it was appropriate to make the negative determination.

## MANDANDANJI CLAIM – NO NATIVE TITLE OVER LARGE AREA IN SOUTHERN QUEENSLAND

In *Weribone on behalf of the Mandandanji people v State of Queensland* [2018] FCA 247 the Federal Court made a consent determination of native title recording that native title does not exist in relation to the claim area comprising approximately 20,000 square kilometres in southern Queensland.

The parties had agreed that native title had been extinguished in all but 5% or 6% of the claim area and their experts disagreed about whether the claim group were in fact descendants of the persons who held native title at sovereignty. Unlike Yirendali, the consent determination was not underpinned by an ILUA in favour of the claim group.

The Court said at [25] – [26]:

“The sad reality appears to be that there is no longer any claim group that can prove that it has native title rights and interests in the originally very large claim area, or even the smaller scattered portions of over 115,000 hectares that could have been made the subject of a positive determination that native title rights and interests still existed ...

In that context, I am satisfied that it is unlikely that any other claim group exists that could make a case for a positive determination in respect of the limited portions in the claim area that have not experienced acts of extinguishment of native title.”

Interestingly, Justice Rares noted that the determination was subject to the possibility of a future application to vary the determination under section 13(2) of the Native Title Act if events occur that cause the determination to no longer be correct or the interests of justice require it.

## KAURNA CLAIM – MIXED RESULTS OVER ADELAIDE AREA

The Kurna People’s native title claim over 7000 square kilometres in the Adelaide area was also resolved in a manner that included a negative determination of native title, but the consent determination in this case recognised the Kurna People as native title holders of the determination area and the Kurna People had the benefit of a settlement ILUA with the State of South Australia (*Agius v State of South Australia (No.6)* [2018] FCA 358).

The State accepted that the Kurna People were descendants of the Adelaide tribe who held native title at sovereignty and for the purposes of a consent determination were prepared to accept that there had been sufficient ongoing connection since sovereignty.

The Federal Court made the following orders by consent:

- a determination that non-exclusive native title rights and interests exist in relation to only 17 parcels of land within the determination area;
- a determination that native title does not exist in relation to the majority of the determination area;
- dismissing the claim (without any finding of extinguishments) in relation to approximately half the claim area to the north and south of the determination area, with an acknowledgement that future claims over both areas could be filed by a different native title claim group.

## KEY POINTS TO NOTE

- The Kurna Determination is the first time that there has been a positive determination of native title over any area within an Australian capital city. The Turrbal/Yugara claim was the third urban native title claim to fail. In May 2006, the Larrakia People could not prove connection over Darwin. The Noongar community failed on appeal in their claim over Perth, following success at trial (*Bennell v State of Western Australia* [2006] FCA 1243). The Yugara appeal decision demonstrates the difficulties faced by native title claim groups in proving native title in urban areas.
- The key consequences of a negative determination of native title are:
  - there can be **no further native title claims** made over the determination area;
  - for **existing grants and interests**: no claim of invalidity, as against native title, can arise;
  - for **new grants**: the procedures in the Native Title Act will not apply;
  - for **existing agreements**:
    - proponents may have termination rights if the agreement contains “contrary determination” clauses contemplating a negative determination; or
- the agreement may be frustrated - similar issues arising from the dismissal of a claim and the effect of an agreement were dealt with in the *Bidjara People Claim Group and Ors v PAPL (Upstream Pty Ltd) and Ors* [2017] QLC 44 (we discuss this case below in our article *Remember - native title agreements are contracts!*).
- A negative determination of native title does not preclude future compensation claims being made under the Native Title Act for any loss, diminution, impairment or other effect of an act on native title rights and interests. However, the compensation claim group would first need to establish that native title existed at the time of the relevant “compensable acts”. The Turrbal, Yugara, Yirendali and Mandandanji People would be unlikely to satisfy this test. Further, the Yirendali and Kurna People both entered into settlement ILUAs with the State Government which were likely to have dealt with compensation in any case (although this is not revealed in the judgement in either case).
- Although these cases signal an increased willingness by the Federal Court to make a negative determination of native title when the circumstances warrant it, native title claim proceedings are just as regularly dismissed with no determination that native title has been extinguished. For example, the Federal Court dismissed all claims in the Lake Torrens Overlap Proceedings (*Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899). The Full Court recently dismissed the appeals in that case (*Starkey on behalf of the Kokatha People v State of South Australia* [2018] FCAFC 36), but there is nothing to prevent a the lodgement of new native title claims over this land in the future.
- Importantly, a negative determination does not affect any obligations imposed on a proponent by State and Territory Indigenous cultural heritage legislation.
- A recent decision of the Queensland Supreme Court in *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 may have implications for cultural heritage management in the Turrbal, Yugara, Yirendali and Mandandanji areas in light of the Supreme Court’s findings about the definition of “native title party” under the *Aboriginal Cultural Heritage Act 2003* (Qld).

# Native title claims finally being resolved in NSW

After many years of lagging behind the other States when it comes to resolving native title claims, NSW saw three landmark determinations of native title in 2017 (*Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993, *Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales* [2017] FCA 971 and *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992). This represents a 50% increase in the number of consent determinations of native title in that State in only 12 months.

## FIRST DETERMINATION OF NATIVE TITLE OVER SEA IN NSW

History was made when the Federal Court determined for the first time that native title exists over the seas of NSW.

In a consent determination made on 31 August 2017 (*Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993), the Federal Court recognised that the Yaegl People hold native title to the seas within 200 metres from the mean low water mark between Woody Head and Wooli, extending out to 350 metres in a buffer zone around the culturally significant area of Durrungun Rocks at the mouth of the Clarence River at Yamba.

The Yaegl People's native title rights and interests include the right to take, use, share, offer and exchange resources in the determination area for non-commercial purposes (except in the buffer zone around Durrungun Rocks), and the right to maintain and to protect places, objects and areas of importance or significance under traditional laws and customs.

The decision means that the native title holders cannot be restricted from fishing or gathering resources from the area for personal, domestic or non-commercial communal needs. It does **not**, however, confer a right to control access to or use of the determination area or affect the rights of other people to access and use the area.

## SECOND CONSENT DETERMINATION FOR BARKANDJI PEOPLE

On 22 August 2017, the Federal Court determined by consent for the second time that the Barkandji and Malyangapa People hold native title to land and waters in south-west NSW (*Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales* [2017] FCA 971). The Barkandji determination has the largest external boundary of any determination in NSW, covering 128,000 square kilometres.

The recent determination addressed approximately 50 parcels of land for which consensus could not be reached in time for the earlier consent determination in June 2015 (plus an additional 21 parcels that had not been previously formally described).

There were several reasons for the lack of consensus. Most notably, the local government parties were not satisfied with the State's assessment of the native title status of about 40 parcels of reserved Crown lands in which they had an interest. The State had opted not to undertake a comprehensive tenure history for approximately 3,500 Crown land parcels reserved for public purposes, and on that basis, accepted the existence of non-exclusive native title.

The August 2017 determination identifies native title as having been extinguished to 40 parcels of reserved Crown land, which had, presumably, been originally assessed by the State as subject to native title.

## KEY POINTS TO NOTE

- With more determined native title land and large areas subject to registered native title claims, compliance with the Native Title Act should be a key focus for project development in NSW and for the numerous small activities impacting these areas.
- In addition, as claims are determined, native title compensation liability moves from theoretical to real for at least some land users and certainly for government.
- The “current level tenure” approach adopted by the State in the Barkandji claim settlement and encouraged by Federal Court judges in NSW and Queensland also creates some challenges. Where land users have relied on historical extinguishment to conclude that Native Title Act compliance is unnecessary, it will be important for them to participate in native title claims to advocate for an extinguishment outcome consistent with the assumed position.
- Time will tell whether Justice Jagot’s comments in Western Bundjalung will trigger an improvement in the State’s approach to the resolution of native title claims in NSW.

## WESTERN BUNDJALUNG PEOPLE HOLD NATIVE TITLE IN NORTHERN NSW

On 29 August 2017, the Federal Court determined by consent that the Western Bundjalung People hold native title to numerous areas of land and water situated between Casino, Grafton and Tenterfield in northern NSW (*Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992).

The determination is contingent upon the registration of an indigenous land use agreement between the Western Bundjalung People and State, negotiated as part of the claim resolution process, which is expected to occur before 28 May 2018.

The decision recognises the non-exclusive native title rights and interests of the Western Bundjalung People, which include the rights to gather and use the traditional natural resources of the area and the right to take and use water for personal, domestic and communal purposes (including cultural purposes).

The determination also provides that native title has been extinguished to much of the claim area, and in doing so provides a greater degree of certainty to land users than the common practice in Queensland of simply not referring in the determination to land where native title has been extinguished.

## Justice Jagot criticises systemic issues with NSW native title claims process

Justice Jagot described the six year process as “swift” compared to other NSW claims but stated that “*six years is not swift or even acceptable compared to any proper standard for litigation in this country*” particularly in the context of the injustices the Native Title Act seeks to rectify. Justice Jagot listed various factors that contributed to the systemic issues infecting the State’s processes for the resolution of claims, including routinely disregarding Court orders, dysfunctional interagency communication and lack of clear guidelines regarding the State’s approach to determining whether applicants had a “credible basis” for connection before negotiations can commence.

Justice Jagot questioned whether unnecessary delays were being caused by the State imposing higher standards for establishing connection under section 223 of the Native Title Act than would be required by the Court. Her Honour noted that the disparity of power and resources meant that the State must be acutely sensitive to the requirements of good faith, reasonableness and the avoidance of conduct which may be oppressive. The fact that the State has no published guidelines explaining what it requires in respect of connection and no guidelines or templates about the kinds of ILUAs that may be appropriate contributed to the State’s systemic issues.

# Full Court confirms decision to dismiss claims notwithstanding it would mean loss of RTN rights

## *HENWOOD v NORTHERN TERRITORY OF AUSTRALIA* [2017] FCAFC 182

The Full Federal Court has dismissed an appeal from a trial judge’s decision to dismiss claims that are not being prosecuted with reasonable diligence in circumstances where the dismissal resulted in a loss of the right to negotiate under the Native Title Act. The test is whether the dismissal will result in a “practical prejudice” to the claimants’ legal rights (*Henwood v Northern Territory of Australia* [2017] FCAFC 188).

### TRIAL JUDGE DISMISSED THE CLAIMS FOR WANT OF PROSECUTION

The nine native title applications subject to this appeal were “polygon” claims, so-called because their boundaries mirrored the irregular shapes of mining tenures. These polygon claims had been made in the late 1990s and early 2000s following section 29 notices under the right to negotiate provisions of the Native Title Act. The boundaries of the polygon claims did not correlate either with the areas over which native title rights and interests may exist or with the boundaries of the pastoral leases which they partially covered. The Northern Land Council (**NLC**) was the representative body and the solicitor on the record for each of the claims.

The Court acted on its own motion to dismiss the claims, on account of the failure of the applicants to prosecute the proceedings with reasonable diligence. In doing so, the trial judge noted several earlier cases in which the Court had exercised the power to dismiss proceedings for want of prosecution in the native title context and that several related to “prolonger inactivity by applicants in pursuing their claims”. The Court considered the procedural background, including the Court’s attempts since 2008 to progress the claims in a timely way and its many steps since 2014 to press the NLC to prosecute the claims more diligently.

The principal basis upon which the NLC, on behalf of the applicants, resisted the dismissal of the proceedings was that, while current, the applications provided the claimants with standing in the right to negotiate process under the Native Title Act. The NLC emphasised that part of the policy of the Native Title Act was to vest in registered claimants the right to negotiate in respect of future acts, and that these are valuable rights. The NLC contended that it would be inappropriate for the Court to dismiss matters in which there are current future act negotiations or in which there is some prospect of negotiations occurring in the future.

The trial judge said (at [48]):

“In my opinion, it is inappropriate for applications which are not being prosecuted with reasonable diligence to remain on foot because of the possibility that, at some time, some future act may be proposed in relation to the claim area or an agreement may be negotiated. The Court should be more concerned with situations in which the evidence discloses that the dismissal would, or is likely to, have some practical effect on the claimants.”

## FULL COURT DISMISSES APPEAL AND UPHOLDS DISMISSAL OF CLAIMS

The appeal raised important issues concerning the interaction between the power of the Court to dismiss proceedings that are not being diligently prosecuted and the operation of the Native Title Act, in particular the right to negotiate provisions.

The Full Court upheld the findings of the trial judge, that the central consideration was not the possibility that a future act might be proposed or an agreement negotiated, but rather whether the claimants would, or are likely to, suffer any “practical prejudice” or “practical effect” on their rights. If there is no practical prejudice, then it would be appropriate (and was appropriate in this instance) for the Court to dismiss claims that are not being prosecuted with reasonable diligence.

The assessment of whether any practical prejudice arose should be made in respect of each of the claims. What it will look like will vary according to the circumstances, but in this matter the existence of a moratorium on fracking in the Northern Territory was an appropriate basis on which to find that there would be no practical prejudice to the applicants in one claim. It is worth noting that, at first instance, the trial judge had chosen not to dismiss three claims not the subject of the appeal, because he had been satisfied in those cases the evidence disclosed that the claimants may suffer some practical prejudice.

In this case, both the trial judge and the Full Court were extremely critical of the failure of the NLC to progress the claims in question in accordance with the court timetable. The NLC’s submission that it did not have sufficient staff or financial resources to progress the matters fell on deaf ears, with the Court referring to the long history of failure to comply with deadlines and the numerous warnings from the Court itself.

The appeal was dismissed.

### KEY POINTS TO NOTE

- Where a native title claim is not being diligently prosecuted, the mere loss of RTN rights will not be sufficient to prevent its dismissal by the Court. In considering whether or not to dismiss a claim, the Court will look at the practical prejudice to the claimants.
- The trial judge made it clear that the dismissal of the claims was not a decision about their merits.
- The dismissal of native title claim proceedings does not prevent future claims being made over the same area. Nor does it mean that activities can be carried out in relation to the area without regard to the Native Title Act. The Native Title Act continues to govern the validity of acts which affect native title after the dismissal of a claim (although the right to negotiate process will not apply unless there is a registered native title claim). This can be contrasted with the consequences of a negative determination of native title, which we discuss in our article *Federal Court makes more negative determinations delivering certainty for all stakeholders*.

# Agreement making

## Full Court overturns long held view on “negotiation in good faith” in the RTN context

### *CHARLES, ON BEHALF OF MOUNT JOWLAENGA POLYGON #2 v SHEFFIELD RESOURCES* [2017] FCAFC 218

In a majority decision handed down on 20 December 2017, the Full Federal Court found that the obligation to negotiate in good faith continues to apply to negotiations conducted after a future act determination application has been made. In doing so, the Court overturned the long held view that the good faith obligation ceases to apply once an arbitration application has been made.

### BACKGROUND

On 24 October 2016, after almost 18 months of negotiations with the Mount Jowlaenga Polygon #2 claimants (**traditional owners**), Sheffield Resources Limited (**Sheffield**) made an application to the National Native Title Tribunal (**NNTT**) under section 35 of the Native Title Act (**arbitration application**) for a determination that the future act, being the grant of a mining lease, might be done.

Initially, the parties had established a negotiation protocol whereby Sheffield had agreed to negotiate only with the native title party's legal representatives. However, after Sheffield made its arbitration application, Sheffield departed from that protocol and began contacting the traditional owners directly. In response, the traditional owners argued that Sheffield had failed to meet its obligation to negotiate in good faith under section 31 of the Native Title Act and, accordingly, that the NNTT was prevented from making a determination of Sheffield's application.

The NNTT followed earlier NNTT decisions and held that there was no legal obligation to negotiate in good faith once an arbitration application was made, and that Sheffield had negotiated in good faith (*Sheffield Resources Limited v Charles, on behalf of Mount Jowlaenga Polygon #2* [2017] NNTTA 25 (22 May 2017)). It went on to find that the mining lease may be granted ([2017] NNTTA 34 (14 June 2017)).

The traditional owners appealed the NNTT's decision on good faith to the Federal Court. Justice Barker dismissed the appeal. The Court held that the conventional understanding reflected in the earlier NNTT decisions, that there was no obligation to negotiate in good faith after the making of the arbitration application, was correct (*Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited* ([2017] FCA 1126)).

The traditional owners appealed to the Full Court.

## FULL COURT'S DECISION ON APPEAL

The central issue in the appeal was whether the obligation to negotiate in good faith only applies to negotiations preceding the making of an arbitration application.

The Full Court held that the good faith obligation imposed by section 31 of the Native Title Act continues to apply to negotiations conducted after an arbitration application has been made.

In their majority judgment, Justices North and Griffiths found that the obligation to negotiate in good faith “is not explicitly subject to any particular point in time or cut-off date” (at [50]), and that “merely because there is no obligation on the Government party or a grantee party to continue to negotiate once a s 35 arbitral determination has been made does not necessarily mean that the obligation to negotiate in good faith...does not apply as a matter of implication where the parties do agree to continue to negotiate” (at [59]).

The Full Court held that the primary judge’s decision did not promote the purposes and objects of the Native Title Act. Justices North and Griffiths at [64] asked:

“In short, given that the possibility of voluntary ongoing negotiations occurring after the making of a s 35 application, what purpose is served by freeing such negotiations from the constraints and requirements (or standards) which apply to negotiations conducted in the period before the making of the s 35 application? Why should the native title parties in particular lose the protections which they enjoy in respect of negotiations carried out in that earlier period?”

The Full Court allowed the appeal and ordered that Sheffield (and the State of Western Australia) pay the traditional owners’ costs of the appeal. It set aside the decisions of the primary judge and the NNTT on the good faith issue, and ordered that the good faith issue be remitted back to the NNTT for re-hearing. The Full Court also stayed the implementation and operation of the NNTT’s decision that the mining lease may be granted.

Sheffield has announced that it continues to actively engage with the representatives of the traditional owners in seeking a mutually acceptable native title agreement (see [14 February 2018 media release](#)). The good faith challenge has been sent back to the NNTT for re-hearing.

## IMPLICATIONS OF THE FULL COURT'S FINDINGS

The Full Court’s decision resolves any speculation that the good faith obligation ends once an arbitration application is made. While there is no obligation to continue to negotiate after an arbitration application has been made, any negotiations voluntarily conducted after the arbitration application must be conducted in good faith.

The primary judge was concerned that a continuing obligation to engage in good faith negotiations post the making of an arbitration application could “complicate” and “possibly muddy” the decision-making process in respect of an arbitral determination (ie, by requiring the decision maker to consider conduct up to the point of making the determination). The majority of the Full Court dismissed that concern, noting that under the primary judge’s preferred construction, a negotiation party’s post-arbitration application conduct is already relevant to the assessment of its pre-application conduct.

Accordingly, while not obliged to continue negotiations, the grantee party is still held to the good faith standard in respect of any voluntary negotiations. If the grantee party does not intend to continue to negotiate after making the application, perhaps the most prudent course of action is to ensure that position is clearly communicated to the other parties.

### KEY POINTS TO NOTE

- Negotiating parties are not obliged to continue negotiations after an arbitration application has been made. However, if the parties choose to continue to negotiate, the parties must engage in good faith until an agreement is reached or a determination is made. Any conduct prior to the making of a determination that constitutes bad faith may affect the NNTT’s power to make the determination.
- Although this decision overturns a long held understanding by all stakeholders about the operation of the RTN regime in the Native Title Act, it is unlikely to have a significant impact for the resources industry. Most resource companies have an extremely high standard of negotiating behaviour and would continue to apply those standards regardless of whether or not an application to the NNTT needed to be made in a particular case. In fact, a significant majority of RTN matters result in successful agreements with traditional owners and never require applications to the NNTT for determination. In more than 20 years since the commencement of the Native Title Act, there have been only 54 good faith challenges heard by the NNTT and many hundreds of agreements reached.

# Remember - native title agreements are contracts!

Two recent decisions serve to remind stakeholders that agreements with native title parties are subject to the same rules of interpretation as ordinary contracts. In *Bidjara People Claim Group v PAPL (Upstream Pty Ltd)* [2017] QLC 44 the Queensland Land Court held that the dismissal of the relevant native title claim frustrated a right to negotiate agreement with the native title claimants. In *Buurabalayi Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240 the Court was required to consider a stay of proceedings for failure to comply with a dispute resolution clause in a native title agreement.

## RTN AGREEMENT FRUSTRATED WHEN BIDJARA CLAIM DISMISSED

Although hundreds of agreements have been reached through the Native Title Act right to negotiate process over the last 20 years, the effect of the dismissal of the relevant native title claim on right to negotiate agreements has had little judicial consideration.

In *Bidjara People Claim Group and Ors v PAPL (Upstream Pty Ltd) and Ors* [2017] QLC 44, the Queensland Land Court confirmed that the issue is simply one of contractual interpretation.

The Bidjara Claimants and Santos entered into a right to negotiate agreement pursuant to which Santos was required to pay \$1,250,000 to the native title parties over a five year period. Subsequent to the agreement, the Bidjara Claimants' native title claims were dismissed, and their appeal rights exhausted.

Santos said the dismissal of the native title claim frustrated the agreement, effectively relieving it from any obligation to make the remaining payments. The Bidjara Claimants argued the dismissal of their claim was irrelevant to the continued operation of the agreement.

In approaching the issue, the Land Court found that the Bidjara Claimants' status as Registered Native Title Claimants and the Claim Group's formal status under the Native Title Act were central to the agreement because of the context in which the agreement was negotiated and the particular features of the agreement itself.

The agreement was negotiated and entered into in accordance with the right to negotiate provisions of the Native Title Act. The fundamental purpose of the agreement was to compensate the claim group for the impact valid future acts would have on the group's native title rights and interests. The compensation agreed involved compensation for ongoing obligations relating to the coexistence of Santos' activities with the group's native title rights and interests. It was the Bidjara Claimants' status as Registered Native Title Claimant that allowed them to provide consideration for the compensation offered by Santos. The dismissal of the native title claim, and its subsequent impact on the claimants' status as a Registered Native Title Claimant under the Native Title Act, meant there was a fundamentally different situation to that contemplated by the agreement. This was sufficient for the court to find that the agreement was frustrated.

The case serves as a reminder that like ordinary contracts, native title agreements can include provisions contemplating changed or unexpected circumstances. Indeed, given the shifting of native title landscape, they probably should.



## FEDERAL COURT REQUIRED TO CONSIDER WHETHER TO STAY PROCEEDINGS BY ABORIGINAL CORPORATION FOR FAILURE TO COMPLY WITH DISPUTE RESOLUTION CLAUSE IN NATIVE TITLE AGREEMENT

The Buurabalayji Thalanyji Aboriginal Corporation (BTAC) commenced proceedings on various grounds against Onslow Salt Pty Ltd and the State of Western Australia relating to the Onslow Salt Mine in the Pilbara (*Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240). The mine is located beside Chevron's Wheatstone LNG Project.

BTAC claimed that excavation agreements (for fill material) entered into between Onslow Salt and Chevron were "sham agreements". They allege that Onslow Salt drafted the agreements and sought the State's approval for the works on the basis that they were for flood water mitigation purposes and for no consideration. They allege that the true purpose of the agreements was for Chevron to remove 10 million cubic metres of fill material from the salt mining area in return for payment of \$75 million to Onslow Salt.

BTAC claimed that these arrangements amounted to a "future act" which required compliance with Native Title Act procedures. Failure to comply resulted in the native title holders suffering loss and damage, being the loss of a chance to negotiate with Onslow Salt and enter into an ILUA to consent to the "future act". BTAC claimed it would have received approximately \$12 million had such an agreement been negotiated.

However, in 1996 Onslow Salt entered into the Development Deed with the native title claimants (who are now represented by BTAC). Onslow Salt sought a stay of BTAC's proceedings because it failed to comply with the requirements of a dispute resolution clause within the Deed.

BTAC argued that the nature of the dispute was not one to which the clause was directed and further that it would be impossible on any realistic assessment for an expert to resolve the issues raised in the dispute (as required by the clause).

Ultimately, the Court agreed and refused to grant the stay of proceedings. Costs were ordered against Onslow Salt.

The Court acknowledged that "contracting parties should be held to the terms of their bargain". In *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587 it was held that if parties to a commercial contract agree on a particular dispute resolution method, that method must be adhered to unless the Court can be convinced there is good cause to abandon it.

The Court observed that a dispute resolution method is an "entirely commendable process" which has and should be recognised and respected by the Courts except in exceptional circumstances. This case was deemed to fall within the exceptional category as the lengthy pleadings were of an extremely complex nature that involved third parties and questions of both law and fact.

### KEY POINTS TO NOTE

- Parties entering into agreements with native title claim groups need to consider the impact on the agreement as the claim progresses. In particular, parties need to consider (and deal with) the implications should the claim be determined (successfully or unsuccessfully), dismissed or withdrawn. They should similarly address the implications of a change in the Applicant group.
- Both cases are a timely reminder that native title agreements are contracts and the Courts will apply the ordinary rules when interpreting them.
- BTAC's proceedings against Onslow Salt and the State are continuing.



# Claimant ordered to repay \$370,000 to claim group

## *GEBADI v WOOSUP* [2017] FCA 1467

In the first case of its kind, the Federal Court in *Gebadi v Woosup* [2017] FCA 1467 has ordered a native title claimant to repay \$370,000 of misappropriated payments to the claim group on whose behalf he received the benefits under a native title agreement.

### THE PAYMENTS OF MONEY UNDER THE NATIVE TITLE AGREEMENT

The proceeding was brought by seven members of the Ankamuthi native title claim group (now determined native title holders) (**Current Applicants**) against Mr Larry Woosup and Ms Beverly Tamwoy.

On 4 December 2013, Mr Woosup and Ms Tamwoy entered into a right to negotiate agreement under section 31(1)(b) of the Native Title Act with Gulf Alumina Limited on their own behalf and on behalf of the Ankamuthi People. The Agreement permitted Gulf to conduct the Skardon River Bauxite Mining Project and provided for royalty payments to the Ankamuthi People.

At that time, Mr Woosup and Ms Tamwoy were two of the original members of the Applicants authorised to prosecute the native title determination application on behalf of the Ankamuthi People. The Current Applicants were joined as members of the applicant a year later in December 2014.

Between November 2013 and July 2014, Gulf Alumina Limited paid \$371,267 under the Agreement. The money was paid into the account of the Ankamuthi Western Cape Community Trust which was operated by Mr Woosup. Mr Woosup withdrew the money from this account by way of cash withdrawals and made transfers into his personal bank account.

The Current Applicants sought to recover the full amount from Mr Woosup.

### FEDERAL COURT ORDERS THE MONEY TO BE REPAYED

Following a forensic review of bank records, the Court determined that Mr Woosup had misappropriated all of the money paid under the Agreement and used it in furtherance of his own interests in derogation and disregard of the interests of the Ankamuthi claim group.

The Court determined that where an agreement under section 31(1)(b) of the Native Title Act confers a right, benefit or entitlement on a native title party, the right or benefit is enjoyed by all persons who hold the common law group rights and interests comprising the particular native title as claimed.

The Court ordered that Mr Woosup:

- account for the misappropriated money to the Ankamuthi native title holders;
- be prohibited from exercising any power or authority to effect transactions on accounts held by the trustee for the Ankamuthi native title holders; and
- and Ms Tamwoy pay the Applicants' legal costs.

## KEY POINTS TO NOTE

- *Gebadi v Woosup* signals the Court's willingness to order the repayment of misappropriated funds where a claim group member breaches the fiduciary obligations owed to the claim group.
- Although it is unlikely that the Ankamuthi people will ever receive any money from Mr Woosup, this decision may encourage other groups to bring similar proceedings if funds are not being properly accounted for by their representatives.
- Although reform to the Native Title Act would be welcome in this space, it is unlikely to have a significant impact on the ground. Changes are more likely to come from increased education and training for native title claim groups around issues such as governance, financial management and accountability.

### Fiduciary obligations owed to claim group

Justice Greenwood found that Mr Woosup and Ms Tamwoy were in a fiduciary relationship (ie a relationship of trust or confidence) with the members of the Ankamuthi claim group, thereby owing fiduciary obligations to the claim group not to:

- place themselves in a position where their private or personal interests conflict with the interests of the claim group;
- pursue and secure a personal benefit for themselves;
- profit from their position of trust without the express informed consent of the claim group; and
- place themselves in a position where their personal interests or duties conflict with the duties owed to the claim group.

### Establishing a breach

The Court held that Mr Woosup and Ms Tamwoy breached their fiduciary duties by negotiating and entering into the Agreement without holding a community authorisation meeting to obtain the authority of the Ankamuthi claim group and furthermore, by failing to inform members of the Ankamuthi claim group of the existence of the Agreement.

Mr Woosup also breached his fiduciary obligations to the group when he misappropriated the royalty payments, essentially "treating his people's money, benefits and compensation, as his own."

### Funds held on constructive trust

Justice Greenwood declared that, from the moment the benefits were paid to Mr Woosup under the Agreement, the funds were held on constructive trust for and on behalf of the Ankamuthi native title claim group, who were beneficially entitled to the funds. As it was unclear whether Mr Woosup still controlled the funds, a declaration of a constructive trust was held to be the most appropriate remedy. As a consequence of the declaration of constructive trust, Mr Woosup is personally liable for the breach of trust (and must account to the Ankamuthi native title claim group for the financial benefits he derived), and proprietary remedies may be available in respect of the trust property even if it is in third party hands.

## LAW REFORM PROPOSED

The Federal Government's November 2017 *Options Paper for reforms to the Native Title Act 1993 (Cth)* proposes that the Native Title Act should be amended to expressly provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders. This recommendation repeats similar recommendations made in the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Report published in 2013, the Forrest Review of the Roles and Functions of Native Title Organisations Report published in 2014 and the Australian Law Reform Commission June 2015 Report *Connection to Country: Review of the Native Title Act 1993 (Cth)*. We discuss native title law reform further below.

# Other issues

## Authorisation under the spotlight

### KEY POINTS TO NOTE

- In the context of authorisation for section 66B applications, the Court is willing to overlook defects in the process if the cumulative effect is that such defects make no material difference to the outcome.
- Regardless of these decisions, the replacement of applicants on native title claims continues to cause significant problems for claim groups because of the complicated, time consuming and expensive process required by the Native Title Act.
- This issue has been flagged for reform for many years (see eg the Australia Law Reform Commission's 2015 report *Connection to Country: Review of the Native Title Act 1993*) but has not progressed. There has been renewed exposure to the issue since the McGlade amendments to the Native Title Act (see our *2016 Native Title Year in Review*). It is in the interests of all stakeholders that the current reform proposals are implemented.
- It is not known how many of the 246 unresolved native title claims around Australia are hampered by authorisation issues but there is no doubt that authorisation law reform would assist in speeding up the progress of some of these claims.

In *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464 and *Kum Sing on behalf of the Mitakoodi & Mayi People #5 v State of Queensland* [2017] FCA 860 a replacement applicant brought an interlocutory application pursuant to section 66B of the Native Title Act for an order to replace the current applicant. In both cases the validity of the authorisation meetings were challenged by the applicants who were sought to be replaced. However, the Federal Court found that the new applicants were properly authorised despite some defects in the authorisation process.

## GOMEROI PEOPLE V ATTORNEY GENERAL OF NEW SOUTH WALES

In *Gomeroi People v Attorney General of New South Wales*, the current applicant challenged the section 66B application arguing that it should be dismissed on a number of grounds relating to the authorisation process, including:

- the meeting notice was inadequate and was not adequately advertised;
- the conduct of the meeting was irregular and/or unfair;
- the composition of persons that attended the meeting was not appropriately representative of the Gomeroi Claim Group; and
- the replacement applicant is not representative of the Gomeroi Claim Group.

The Federal Court said that the requirement to “authorise” does not require an authorisation meeting to be held. Justice Rangiah noted that, as a matter of practicality, questions of authorisation are usually dealt with by holding a meeting but the Native Title Act confers no particular status on such a meeting, nor does the Native Title Act prescribe rules for conduct, nor conditions for validity.

Justice Rangiah identified five reasons that notification and conduct of claim group meetings are more problematic than other types of meetings commonly encountered by the Courts, as:

- identification of all the members of the claim group can be difficult;
- where there is a meeting of a large number of people, the counting of votes can be difficult;
- there are administrative, record-keeping and logistical difficulties associated with large claim group meetings;
- there is no fixed set of rules that must be adhered to in the conduct of an authorisation meeting; and
- a meeting to consider a replacement applicant produces emotional responses which can overflow.

The Court found that there were defects in the meeting notice, the participant registration process, record keeping and general conduct of the meeting. However, it concluded that individually and cumulatively these defects made no material difference to the outcome. The Court held that the replacement applicant was authorised by the claim group.

## MITAKOODI & MAYI PEOPLE #5 V STATE OF QUEENSLAND

Similarly, in *Mitakoodi & Mayi People #5 v State Of Queensland*, the current applicant and the State challenged the section 66B application by replacement applicants on a number of grounds, including:

- lack of opportunity afforded to certain members to participate in the meeting; and
- that the meeting was not representative of the whole of the Mitakoodi claim group.

Despite these challenges, Justice Reeves considered that it was appropriate for him to exercise his discretion to make the order sought by the replacement applicants.

## NATIVE TITLE ACT REFORMS ADDRESS AUTHORISATION ISSUES

The Federal Government's *Options Paper for Reform to the Native Title Act 1993* deals with the issues regarding authorisation and replacing applicants through the section 66B process.

A proposal raised in the Options Paper is to allow the composition of the applicant to be changed in circumstances where a member is unwilling or unable to continue acting, or where the terms of an agreement provide for it, through an application to the Federal Court without going through the further authorisation process required by section 66B.

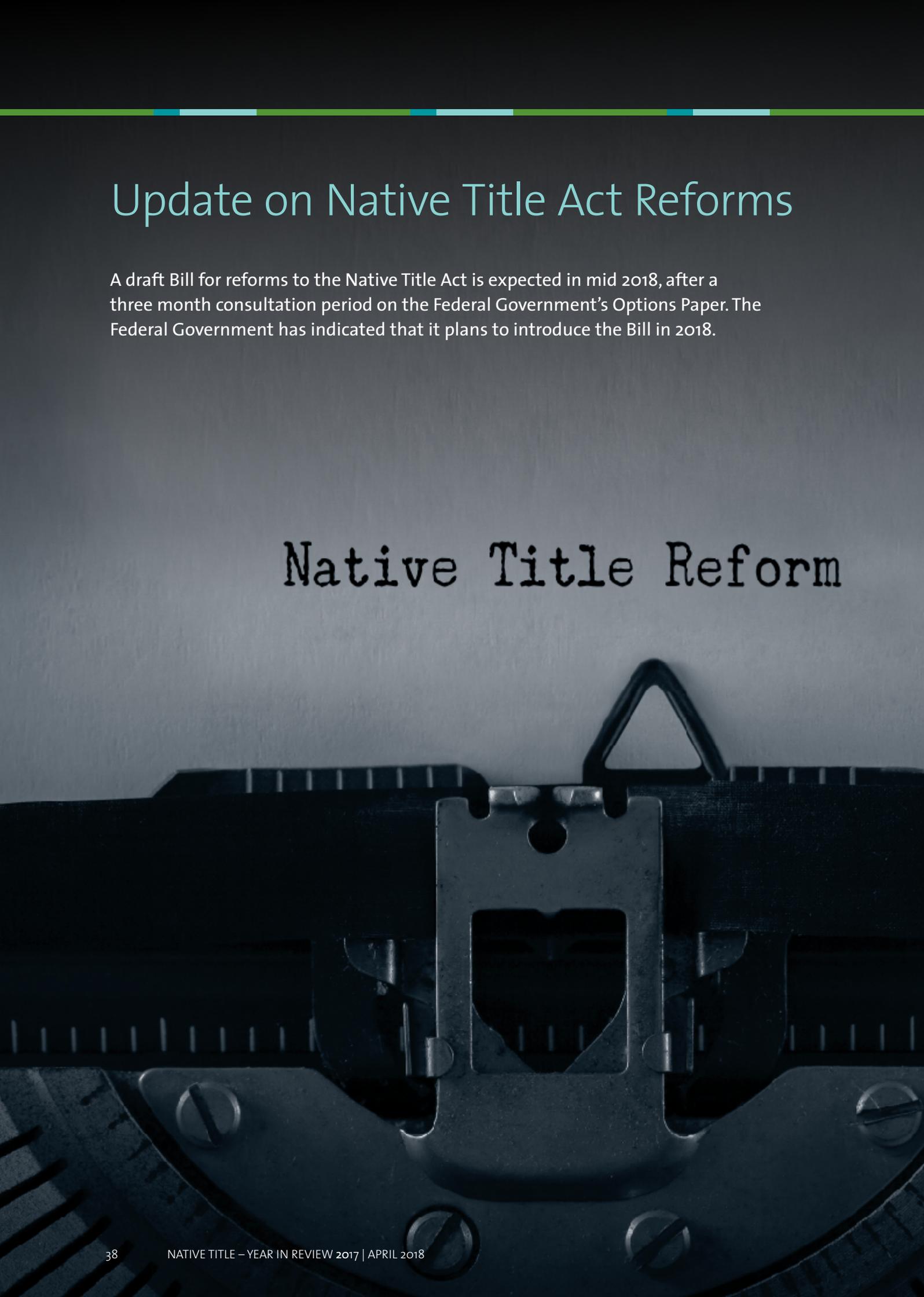
For more information on the Options Paper, see our article below *Update on Native Title Act Reforms*.

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# Update on Native Title Act Reforms

A draft Bill for reforms to the Native Title Act is expected in mid 2018, after a three month consultation period on the Federal Government's Options Paper. The Federal Government has indicated that it plans to introduce the Bill in 2018.

Native Title Reform



## REFORM TIMETABLE

The Federal Government released its *Options Paper for reforms to the Native Title Act 1993 (Cth)* on 29 November 2017. This was one of the outcomes promised after the Native Title Minister's meeting between Federal, State and Territory Governments in October 2017.

Consultation on the reforms occurred via an Expert Technical Advisory Group comprising Indigenous, government and industry representatives and public consultation. Submissions on the Options Paper were sought until the end of February 2018.

Over 45 submissions were received from a range of stakeholders including Indigenous bodies, land councils, representative bodies, State Governments, industry bodies (mining, exploration, energy, pastoralists and infrastructure providers).

The Attorney General's Department has indicated that an exposure draft of a reform bill is planned for release in mid 2018. Consultation will follow for 3-4 weeks, after which a final bill will be prepared for introduction to Parliament in 2018.

## SECTION 31 AGREEMENTS ARE INCLUDED IN THE PROPOSALS

The first issue covered in the Options Paper is the need for amendments to address the implications of the Full Federal Court's decision in *McGlade v Registrar National Native Title Tribunal* [2017] FCAFC 10 for right to negotiate agreements under section 31 of the Native Title Act. As discussed in our *2016 Native Title Year in Review*, the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth)* does not address this issue and leaves doubt over hundreds of tenements granted in reliance on these agreements.

## WHAT ELSE IS COVERED IN THE OPTIONS PAPER?

In addition to Section 31 Agreements, the Options Paper canvasses reforms in the areas of:

- Authorisation
- Agreement making
- Indigenous decision making
- Claims resolution and process
- Post-determination decision making.

The suggested reforms are mainly derived from recommendations made by the following earlier reviews:

- the ALRC report 'Connection to Country: Review of the Native Title Act' 2015 (**ALRC Report**);

- the COAG report 'Investigation into Indigenous Land Administration and Use' 2015 (**COAG Investigation**);
- the Office of the Registrar of Aboriginal Corporations 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act Review)*.

Notably, the Options Paper also includes a number of proposed reforms suggested by State and Territory governments. In particular, the calls by the Western Australian government to amend the Native Title Act to allow for mining legislation amendments that will validate current invalid mining tenure (following the High Court decision in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30).

The Government has not included earlier suggested reforms that proposed significant changes to key legal concepts. Instead, the focus is on operational issues - claims resolution, agreement making and dispute resolution.

## KEY POINTS TO NOTE

- We know from previous reform proposals how difficult it is to progress native title reform in our current political climate. For this reason, the Minerals Council of Australia, Chamber of Minerals and Energy of Western Australia, Queensland Resources Council and South Australian Chamber of Mines and Energy have submitted that the RTN agreement/section 31 issue should be separated from wider reform and be the subject of urgent legislation to allow swift passage through parliament. The Minerals Council of Australia has also called for any separate bill to address the need for mining legislation reform in Western Australia to validate invalid mining tenure following the High Court's *Forrest & Forrest* decision.
- That industry proposal to pass an initial/separate amendment Bill has been strongly opposed by the National Native Title Council.
- The Attorney-General remains committed to circulating an exposure draft Bill in 2018.
- The draft Bill will require detailed consideration when it is released. The express language of each provision will need to be carefully considered both to confirm that it will operate as intended by the Federal Government and to understand its impact on a stakeholder's existing and future operations.
- While it is comforting to see the Federal Government progressing its reform agenda, the release of a draft Bill (and even the introduction of a Bill to parliament) is a long way from the finish line. The passage of a Bill through both chambers of Parliament is unlikely to be smooth.

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