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Native Title

YEAR IN REVIEW 2020

April 2021

Foreword

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

We are thrilled to publish our Native Title Year in Review– now in its sixth year.

We have, as always, reflected on the legal developments in this dynamic area of law in what has been an incredibly challenging year for all of us. This time last year, the focus of Government and community efforts was to keep remote Indigenous communities virus-free. As vaccines now start to roll out, and with many of us frequently observing how COVID-19 so heavily impacted and slowed the last 12 months of our lives, 2020 still managed to deliver one of the most important years in native title law and Indigenous heritage policy in Australia.

Native Title Act amendments have recently passed through the Federal Parliament, fundamental heritage law reform has ramped up across many States - becoming a legislative priority driven by the tragic heritage impacts in the Pilbara and elsewhere - and numerous significant judgements have continued to provide critical direction in this area of law and its practical application.

In the native title arena, the last 12 months has seen:

- The Joint Standing Committee on Northern Australia's Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report, recommending that the Commonwealth play a far more significant role in ensuring and enforcing standards of heritage protection across Australia.
- The first mining province test cases for native title compensation, following the High Court's 2019 Timber Creek decision, brought by the Gumatj People in the Northern Territory and the Tjiwarl People in the Goldfields region of Western Australia.
- Some long awaited amendments to Native Title Act. Of course, the amendments are just few of the measures advocated in the various calls for reform from the last decade. Important issues, including a validation fix arising from the Forrest & Forrest mining lease invalidity case in Western Australia, still require the attention of governments.
- No progress on Constitutional recognition following the 2017 Uluru Statement from the Heart, however progress towards a national Indigenous Voice to provide advice to the Australian Parliament is encouraging. As a firm, we support constitutional recognition.
- Ongoing Corporations (Aboriginal and Torres Strait Islander) Act reform being undertaking by the National Indigenous Australians Agency, looking to further improve the functions and operation of the growing number of native title body corporates across the country.
- The High Court of Australia refusing FMG's application for special leave to appeal the Yindjibarndi's exclusive determination of native title, upholding the judgement at first instance and paving the way for what we expect will be a considerable compensation application in respect of FMG's Solomon Hub operations.

Our national Ashurst team has remained at the forefront of these developments. Over the course of the year, our highlights have included:

- being recognised as Band 1 in Native Title (Proponents) in Chambers Asia-Pacific, a ranking which we have maintained since 2007. We could not have achieved this recognition without the opportunities and trust our clients place in us;
- having the pleasure of advising the National Indigenous Australians Agency on proposed reforms to the Corporations (Aboriginal and Torres Strait Islander) Act, following the Minister for Indigenous Australians, the Hon Ken Wyatt, announcing a comprehensive review in 2019; and
- assisting clients to navigate the gap between current laws and community standards in relation to Indigenous heritage, exposed this year and explored in three recent reports in relation to the Juukan Gorge incident, the EPBC Act Review and the Productivity Commission Report on resource sector regulation.

With ongoing focus on State and Commonwealth law reform across native title, Indigenous heritage and environmental matters, 2021 is expected to be yet another busy year for legal developments in this space. We look forward to being able to work through these issues together with our proponent, government and Indigenous clients, across the table and in person (and not entirely over video conference!).

We encourage you to reach out to us if you would like to discuss any aspect of this publication.

In the meantime, our best wishes for the year ahead.

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Contents

FAST FACTS 5

1 THE LONG SHADOW OF HERITAGE DESTRUCTION: FUNDAMENTAL RESET OF ABORIGINAL CULTURAL HERITAGE PROTECTION IN AUSTRALIA 6

2 NATIVE TITLE ACT REFORMS FINALLY ENACTED 12

3 CHANGES ABOUND FOR THE GOVERNANCE OF INDIGENOUS CORPORATIONS 18

4 NATIVE TITLE COMPENSATION UPDATE: NO CLAIMS TSUNAMI BUT THE TIDE HAS TURNED 22

5 PROCEDURAL ISSUES LEAD TO STRIKE OUT OF COMPENSATION CLAIMS 26

6 HIGH COURT DISMISSES FMG'S SPECIAL LEAVE APPLICATION IN YINDJIBARNDI PROCEEDINGS – EXCLUSIVE NATIVE TITLE OVER SOLOMON HUB RE-AFFIRMED 32

7 DELEGATION OF THE ILUA CERTIFICATION FUNCTION: THE END OF UNCERTAINTY 36

8 TAUNGURUNG TRADITIONAL OWNERS SETTLEMENT AGREEMENT TEETERING: FEDERAL COURT ORDERS REMOVAL OF UNDERPINNING ILUA FROM THE ILUA REGISTER 40

9 YOU CAN'T JUST RELY ON AN EARLIER AGREEMENT: THE GOOD FAITH STANDARD IN THE RIGHT TO NEGOTIATE PROCESS REQUIRES MORE 44

10 THE ROLE OF THE STATE IN NATIVE TITLE CLAIMS LITIGATION: BALANCING COMPETING INTERESTS AS A MODEL LITIGANT 46

11 EXTINGUISHMENT PRINCIPLES: FEDERAL COURT ZEROS IN ON GENERAL LAW VALIDITY AND CONFIRMS THAT 'MAJOR' EARTHWORKS NEED TO HAVE REAL IMPACT 50

12 COSTS UPDATE: COURT CALLS OUT UNREASONABLE CONDUCT WITH COSTS ORDERS 54

13 THE TREND CONTINUES: MORE PROTECTION APPLICATIONS MADE UNDER THE COMMONWEALTH HERITAGE PROTECTION LEGISLATION 58

14 FREE, PRIOR AND INFORMED CONSENT 62

KEY CONTACTS 70

21

NEW DETERMINATIONS THAT NATIVE TITLE EXISTS

430

TOTAL POSITIVE NATIVE TITLE DETERMINATIONS AROUND AUSTRALIA*

19

NEW CLAIMANT APPLICATIONS FILED

176

TOTAL ACTIVE NATIVE TITLE CLAIMS STILL TO BE RESOLVED AROUND AUSTRALIA*

3.1 M KM²

NATIVE TITLE LAND AROUND AUSTRALIA**

TOTAL ACTIVE COMPENSATION CLAIMS AROUND AUSTRALIA*

13

54

NEW ILUAS REGISTERED

1369

TOTAL REGISTERED ILUAS AROUND AUSTRALIA*

Band 1 in Native Title

CHAMBERS ASIA-PACIFIC, 2007 - 2021

*Source: National Native Title Tribunal as at 22 March 2021
**Source: National Native Title Tribunal as at 1 January 2021

1

The long shadow of heritage destruction: fundamental reset of Aboriginal cultural heritage protection in Australia

*NEVER AGAIN: INQUIRY INTO THE DESTRUCTION OF **46,000** YEAR OLD CAVES AT THE JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA - INTERIM REPORT*

WHAT YOU NEED TO KNOW

- On 9 December 2020, the Joint Standing Committee on Northern Australia released *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report*.
- A final report will be released on 18 October 2021.
- The Interim Report focuses on the Juukan Gorge incident and the protection of cultural heritage in Western Australia, and leaves the broader issues relating to cultural heritage management across Australia to the final report. However, it not hard to see where the Committee is headed on the national issues.
- The Interim Report recommends that the Commonwealth play a far more significant role in ensuring and enforcing standards of heritage protection across Australia, including by urgently reviewing the adequacy of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

WHAT YOU NEED TO DO

- Ensure that systems in relation to the management of Aboriginal heritage are robust – Senior management should be able to explain how it works. It must be clear who has ultimate accountability within an organisation.
- Review existing processes and agreements against 'free prior and informed consent' standard. Take care when relying on heritage agreements which are not with the determined native title holders for the agreement area.
- Be aware of the gap between community expectations and current laws – changed State government policy positions are likely while legislative reform process are underway.
- Watch out for the release of the final report on 18 October 2021

THE INQUIRY

On 9 December 2020, the Joint Standing Committee on Northern Australia released *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report*.

The Committee has indicated that it will release its final report on 18 October 2021.

The terms of reference for the inquiry are far reaching. They extend beyond the incident to:

- the operation of the *Aboriginal Heritage Act 1972 (WA)* and approvals provided under the Act;
- the interaction of state Indigenous heritage regulations with Commonwealth laws;
- the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;
- how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;
- opportunities to improve Indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (the **EPBC Act**); and
- any other related matters.
- Over 140 submissions were made and 11 public hearings were held in Canberra and WA in 2020 with additional submissions taken in 2021.

SUMMARY OF RECOMMENDATIONS IN INTERIM REPORT

The Interim Report focuses on the Juukan Gorge incident and Western Australia heritage laws while leaving the broader issues relevant to cultural heritage management across Australia to the final report.

However, the recommendations provide some guidance about where the Committee is headed on the national issues.

Summary of recommendations in Interim Report	
WA government	• Replace the Aboriginal Heritage Act with stronger legislation which (at a minimum) allows Indigenous groups to have a meaningful role in decision-making affecting their cultural heritage
Mining companies operating in WA	• Review agreements with traditional owners, and commit to ongoing regular review to ensure consistency with best practice standards. • Review final compensation clauses in agreements recognition that free, prior and informed consent requires continuous review and engagement with traditional owners. • Issue public confirmation that they will not rely on "gag clauses" or other clauses preventing Traditional Owners from exercising their legal rights in relation to cultural heritage protection and will remove these clauses from their agreements.
Commonwealth government	• Legislate to prohibit "gag clauses". • Make the Minister for Indigenous Australians responsible for the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (**ATSIHP Act**) and the National Indigenous Australians Agency the administering authority. • Vigorously prosecute breaches of the ATSIHP Act in WA. • Urgently review the adequacy of the ATSIHP Act. • Play a more active role under the ATSIHP Act, rather than deferring to state legislative processes to protect cultural heritage and using the Act as a "last resort".

FINDINGS IN RELATION TO THE WA ABORIGINAL HERITAGE ACT

The Interim Report notes that the WA Aboriginal Heritage Act is, in practice, ineffective. It has evolved to facilitate mining operations, rather than protecting cultural heritage. The Interim Report recommends that the WA Government replace the Aboriginal Heritage Act with stronger heritage protections as a matter of priority, noting the progress already made in consultation on the draft *Aboriginal Cultural Heritage Bill 2020 (WA)*.

It recommends that any new legislation ensure that Aboriginal people have meaningful involvement in and control over heritage decision making, in line with the internationally recognized principle of free, prior and informed consent. It should also include a prohibition on agreements which seek to restrict Traditional Owners from exercising their rights to seek protections under State and Commonwealth laws (i.e. "gag clauses").

THEMES RELATING TO AGREEMENT MAKING WITH INDIGENOUS GROUPS

"FREE, PRIOR AND INFORMED CONSENT" IS THE CORNERSTONE OF THE INTERIM REPORT

The Interim Report repeatedly refers to the concept of "free prior informed consent" (or "**FPIC**") in agreement making with Traditional Owners.

FPIC is a creature of international law and is embodied in several international legal instruments. We discuss the meaning, origins and application of FPIC in our article *Free, Prior and Informed Consent*.

The Interim Report observes that best practice for mining companies involves:

- undertaking comprehensive heritage surveys before entering agreements with Indigenous groups;
- continuously consulting with groups to facilitate free, prior and informed consent; and
- periodically reviewing existing agreements with Indigenous groups.

The concept of FPIC in cultural heritage and native title agreement making creates tension with both the right to negotiate process in the *Native Title Act 1993* (Cth) and some cultural heritage legislation. Expect more on this in the final report.

GAG CLAUSES TO GO

The Interim Report uses the term "gag clauses" to refer to conditions in agreements between mining companies and Traditional Owners that prevent Traditional Owners from exercising their rights under cultural heritage laws.

The Interim Report recommends that mining companies operating in WA publicly confirm that they will not rely on gag clauses and remove these clauses from their agreements. It recommends that the WA and Federal Government legislate to prohibit such clauses in future agreements. It is likely that the final report will make similar recommendations about gag clauses in other jurisdictions.

BEST PRACTICE STANDARDS FOR AGREEMENT MAKING HAVE NOT BEEN DEFINED

The Interim Report refers to agreements needing to meet and implement "best practice standards". The Interim Report provides no guidance about what they have in mind. Stakeholders will have to wait for the final report for further details about this recommendation. There is a risk if the final report recommends a "one size fits all" approach, bearing in mind the significant differences between the subject matter of agreements around the country.

RECOMMENDATIONS ABOUT LEGISLATIVE REFORM

THE ATSIHP ACT AND THE EPBC ACT

The Interim Report recommends that the Commonwealth urgently review the adequacy of the ATSIHP Act and play a more active role under the ATSIHP Act, rather than deferring to state legislative processes to protect cultural heritage and using the Act as a "last resort".

It also supported the findings of the June 2020 Interim Report by Professor Graeme Samuel AC into the EPBC Act as they relate to Indigenous heritage protection. The Samuel Interim Report concluded that the current laws that protect Indigenous cultural heritage in Australia need comprehensive review and highlighted the uneasy interaction between the two pieces of Commonwealth legislation intended to address heritage protection – the EPBC Act and ATSIHP Ac.

SHORTCOMINGS IN THE PROTECTIONS PROVIDED UNDER THE EPBC AND ATSIHP ACTS

Pathway to protection under the Acts is complex and often unsuccessful

There have been very few protection declarations made under the ATSIHP Act, and only a small number of sites added to the National Heritage List under the EPBC Act primarily for their Indigenous values.

This demonstrates how rarely these Acts are used to protect Indigenous cultural heritage in practice.

The ATSIHP Act does not work effectively with the EPBC Act, instead providing "last minute protection" of cultural heritage which is frustrated by confusion among stakeholders about legal and administrative processes.

The inadequacies of the ATSIHP Act have been examined pretty thoroughly in three Commonwealth inquiries in the past few months – the Senate Committee's Interim Report, the EPBC Act Review Final Report and the Productivity Commission's Study Report on Resource Sector Regulation published in December 2020.

STATE AND TERRITORY LEGISLATION

The Interim Report notes that a large number of issues have been raised in relation to State and Territory cultural heritage legislation and states that the Committee will need most of 2021 to address and consider those issues.

SNAPSHOT OF RECOMMENDATIONS OF RELATED REVIEWS

This recommendation is echoed in two additional reports published at similar times to the Interim Report.

FINAL REPORT IN THE INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND *BIODIVERSITY CONSERVATION ACT 1999* (CTH)

The Final Report of Professor Graeme Samuel AC's independent review of the EPBC Act was released to the public on 28 January 2021.

The Final Report identifies fundamental inadequacies in the EPBC Act. The Report's criticism of the Act extended to its operation as regards both the role of Indigenous Australians in protecting and conserving biodiversity, and the protection of Indigenous cultural heritage.

Enforceable National Environmental Standards are recommended, including a standard for Indigenous engagement and participation in decision making.

Immediate and comprehensive law reform in the area of Indigenous cultural heritage protection is flagged as a major priority for reform by the Final Report.

PRODUCTIVITY COMMISSION NOVEMBER 2020 REPORT: RESOURCE SECTOR REGULATION

The Productivity Commission released a report in November 2020 entitled *Resource Sector Regulation*, the day after the Senate Committee released its Interim Report into the Juukan Gorge incident.

It is broadly consistent with both the Senate Interim Report and the recommendations of the Independent Review of the EPBC Act, as it relates to Indigenous cultural heritage and Indigenous stakeholders.

The Report identifies major shortcomings in the current approaches to regulation of Aboriginal heritage protection at a state and national level and recommends a comprehensive review of the role of the Commonwealth in heritage regulation and of the ATSIHP Act.

WHERE TO FROM HERE FOR THE INQUIRY?

The Committee received submissions from most jurisdictions across the country, although its Interim Report focuses largely on Western Australia. Going forward, the Committee intends to expand its consultation to include all other jurisdictions, with a view to creating a consistent approach to cultural heritage protection across Australia.

In its final report, the Committee will review the Native Title Act agreement-making process (with particular focus on the issues of free, prior and informed consent and gag clauses).

Further, the Committee will consider reform options for the ATSIHP and EPBC Acts, including:

- whether state laws should continue to enjoy primacy over Commonwealth legislation; and
- whether federal cultural heritage protection should be dealt with entirely under the EPBC Act; or, alternatively, whether there should be stronger, standalone cultural heritage legislation at the federal level which could support and provide a benchmark for state legislation.

A FUNDAMENTAL RESET OF CULTURAL HERITAGE PROTECTION PRACTICES ACROSS AUSTRALIA

The Interim Report notes that:

> Corporate Australia can no longer ignore the link between its social licence to operate and responsible engagement with Indigenous Australia.

Institutional investors have also begun to take a closer look at how companies manage their relationships with Traditional Owners. The Interim Report finds that there is a clear public expectation that companies will reform their practices and that Governments will enforce higher standards of respect for heritage and culture.

We recommend that resource companies and other businesses which have a major impact on land across Australia:

- review their policies and procedures with regard to cultural heritage protection and management - senior management should be able to explain how it works;
- review existing processes and agreements against 'free prior and informed consent' standard;
- be aware of the gap between community expectations and current laws – simply relying on compliance may not be enough.

KEY INSIGHTS

Many of the matters addressed in the Interim Report go beyond the terms of reference. These matters include further reform of the Native Title Act, the funding for native title prescribed bodies corporates and the idea that mining companies might be required to actively support and fund cultural heritage mapping and truth telling initiatives.

Some of the recommendations in the Interim Report are akin to policy directives, including suggestions to companies about how they should operate, but others will require legislative change at a State and Federal level.

The Interim Report refers to mining companies, but the recommendations can equally apply to other companies that deal with land, e.g. pipeline companies, infrastructure and public utilities providers and Government. The cultural heritage regime in each State does not distinguish between mining companies and other types of land users.

The Interim Report looks at cultural heritage solely through the lens of the Juukan Gorge incident, and does not acknowledge the vastly different types of Aboriginal cultural heritage objects and places around Australia. The Interim Report is silent on intangible cultural heritage, particularly spiritual aspects. It also seems to treat heritage and native title agreements as if they were indistinguishable.

Nevertheless, the Interim Report's recommendations are having a big impact and the final report promise to be at least as influential.

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2

Native Title Act reforms finally enacted

NATIVE TITLE LEGISLATION AMENDMENT ACT 2021 (CTH)
CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 (CTH)

WHAT YOU NEED TO KNOW

- Parliament has finally enacted the long awaited reforms to the *Native Title Act 1993* (Cth), with the Senate passing the *Native Title Legislation Amendment Act 2021* (Cth) on 3 February 2021.
- Section 31 right to negotiate agreements at risk following the Full Federal Court's 2017 decision in *McGlade v Registrar National Native Title Tribunal* [2017] FCAFC 10 have been validated by the Amendments.
- Western Australia should note that Parliament still needs to deal with the native title legislative "fix" required to address the Forrest & Forrest case and associated proposed amendments to the *Mining Act 1978* (WA), affecting mining lease validity in that State.
- The Government's comprehensive review of the *Corporations (Aboriginal and Torres Strait Islander)* Act 2006 (Cth) is ongoing.

WHAT YOU NEED TO DO

- During the right to negotiate process, note that parties to section 31 agreements are now required to notify the National Native Title Tribunal of the existence of any ancillary agreements.
- Consider the impact of the more significant amendments on development scheduling. In particular:
  - section 47C, which allows historical extinguishment to be disregarded on park areas, including extinguishment by public works; and
  - section 24MD(6B)(f), which creates a new 8 month objection period for the creation of a right to mine for the purpose of an infrastructure facility associated with mining and to some compulsory acquisitions of native title.

HISTORY OF THE AMENDMENTS

The *Native Title Legislation Amendment Act 2021* (Cth) (Amendments) was passed on 3 February 2021 and commenced on 25 March 2021.

The Amendments have been a long time coming, with some of the provisions being recommended by the Australia Law Reform Commission's 2015 report *Connection to Country: Review of the Native Title Act 1993*.

After its 2017 Options Paper and 2018 Consultation Paper and exposure drafts of the Bill, the Federal Government introduced the *Native Title Legislation Amendment Bill 2019* on 21 February 2019, but the Bill lapsed in April 2019 when the Federal election was called. The Bill was re-introduced into Parliament in October 2019, and referred to the Senate Legal and Constitutional Affairs Legislation Committee.

The Committee recommended that the Senate pass the *Native Title Legislation Amendment Bill 2019* (Cth) (See the 19 August 2020 Report). The Committee welcomed the amendments proposed in the Bill and did not adopt any stakeholder recommendations to amend any of the Bill's provisions.

Many stakeholders had called for broader reform to the *Native Title Act 1993* (Cth) and may be disappointed that the Committee did not undertake a broad analysis of the legislation. However, the Committee reported that "consideration of further reform should not delay the proposals in the Bill, some of which are urgent."

KEY COMPONENTS OF THE AMENDMENTS

The Amendments are largely directed at improving the efficiency of the native title system for all parties. While many of the Amendments are uncontroversial and implement widely supported recommendations made in previous reviews, there are some provisions that may affect project development quite significantly.

We have written about these details in our 2019 Native Title Year in Review article Slow and Steady: Native Title Legislative reform moves forward and our 2018 Native Title Year in Review article Update on Native Title Act Reform.

Set out below is a brief summary of the key issues for proponents.

SECTION 31 AGREEMENTS VALIDATED

The Amendments confirm the validity of most section 31 right to negotiate agreements which might be invalid because of non-execution by any of the persons comprising the registered native title claimant following the Full Federal Court's decision in *McGlade v Registrar National Native Title Tribunal ([2017]* FCAFC 10). (see Schedule 9, Item 2).

However, agreements where no person comprising the registered native title claimant is a party, are not validated. This is a departure from the amendments introduced to validate Indigenous land use agreements (ILUAs), but is explained on the basis of the significant and binding effect of these agreements and the fact that there is no authorisation process. It is not known how many agreements this exception will affect, but we expect it to be relatively few.

NEW 8 MONTH TIMELINE ADDED TO THE SECTION 24MD(6B) OBJECTION PROCESS

Section 24MD(6B) of the Native Title Act applies to the creation of a right to mine for the purpose of an infrastructure facility associated with mining and to some compulsory acquisitions of native title. It currently includes a 2-month notification and objection process and an option for objections to be heard by an independent person or body. Prior the amendments, an objection could only be referred for hearing by the native title party, leaving many objections potentially unresolved.

The Amendments include a new section 24MD(6B)(f) of the Native Title Act that requires the Government party to refer an objection for hearing, but not until **8 months** after notification (Schedule 6, Part 1).

This is longer than the 6 month period in the right to negotiate process, which was intended to be the more significant procedural right. Section 24MB(6B) was originally intended to be the more streamlined process.

Proponents that may be affected by section 24MD(6B) compliance will need to ensure project timeframes adequately provide for the extended period.

AMENDMENTS STILL DO NOT ADDRESS WA MINING LEASE VALIDATION

The Amendments do not resolve the issue arising from the High Court's decision in *Forrest & Forrest Pty Ltd v Wilson ([2017]* HCA 30) relating to the validity of mining tenements in Western Australia.

The Western Australian government introduced the *Mining Amendment (Procedures and Validation) Bill 2018* in late 2018 to confirm the validity of mining tenements affected by the High Court decision. The State is seeking complementary amendments to the Native Title Act to ensure that its legislation is valid under the Native Title Act.

We understand that discussions are continuing between the Commonwealth, Western Australian Government and native title stakeholders about this matter.

For Western Australia, the uncertainty caused by Forrest & Forrest remains a live issue and one that the State and Commonwealth need to resolve as soon as possible.

AMENDMENTS RELATING TO THE 'RIGHT TO NEGOTIATE' PROCESS

There are number of new provisions to increase transparency around section 31 agreements and the associated ancillary agreements.

New section 41A(1)(f) requires the parties to section 31 agreements to notify the National Native Title Tribunal (NNTT) of the existence of any ancillary agreements when providing copies of section 31 agreements to the Registrar. There is no requirement to provide a copy of the ancillary agreement itself.

The NNTT is required to create a register of section 31 agreements like the ILUA Register (new section 41B). This Register will not have legislative effect like the ILUA Register and the agreements themselves are not be made public. The Register must include a description of the agreement area, the parties and their contact details, the term of the agreement and whether or not there is an ancillary agreement. Parties must also notify the NNTT if any of this information changes (which would include the existence of a new ancillary agreement) and the NNTT must update the Register (new section 41B(3) and (4)).

Information from the Register must be made available to the public upon request, although there is provision for a party to ask that certain information not be made available.

The Amendments also expressly allow a government party to limit its participation in right to negotiate negotiations if the other parties agree, but remain a party to the section 31 agreement (new section 31(1A)). This reflects what regularly happens in practice and reduces the risk that the Government party's lack of participation leads to a good faith challenge by the native title party.

DISREGARDING HISTORICAL EXTINGUISHMENT ON PARK AREAS

The Amendments insert new section 47C of the Native Title Act, which allows for the extinguishment of native title in "park areas" to be disregarded with the written agreement of the State, Territory or Commonwealth that created the "park area" (Schedule 3, Part 1).

> "Park area" is defined in section 47C(3) as
>
> "... an area (such as a national, State or Territory park):
>
> (a) that is set aside; or
>
> (b) over which an interest is granted or vested;
>
> by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, declaration, vesting in trustees or otherwise."

The provision applies on Crown land and freehold land held by the Crown or a statutory authority of the Crown. It is immaterial if the land is subject to a lease or licence; covered by a dedication, reservation, proclamation, condition or declaration; used for a public purpose; or held on trust for the benefit of another person (section (47C(2)). The extinguishment of native title by the creation of the park itself and the creation of any prior interests, is disregarded.

Unlike other similar provisions that allow for historical extinguishment to be disregarded, there is no exception for public works. A section 47C agreement may provide that the extinguishing effect of any "relevant public works" is to be disregarded. A "relevant public work" is a public work constructed or established directly by the Commonwealth, the State or the Territory or constructed or established by another person on behalf of the Commonwealth, the State or the Territory" (section 47C) (11)).

Importantly, the Amendments make it clear that the agreement does not have to include such a provision – this is an agreement based process and the agreement may provide that the extinguishing effect of certain public works is NOT to be disregarded (section 47C(4), (5), (8)(c)(iii) and (9)(a)(iii)).

There is a 3 month notice and opportunity to comment process before a section 47C agreement can be made. The relevant Government must arrange for reasonable public notification of the proposed agreement and give interested persons an opportunity to comment (section 47C(6)).

Any determination of native title over the "park area" would not affect: the validity of the creation of the park area, the validity of any prior interests in the park area; any interest of the Crown in any capacity, or of any statutory authority, or of any other person in public works, or access to the public works; or any existing public access to the agreement area.

Existing determinations of native title can be re-opened and existing claims amended to obtain the benefit of this provision.

Where proponents have tenure or prospective projects on areas that are, or have historically been, "park areas", they will need to consider whether future grants, renewals and operations may require Native Title Act compliance, and whether a section 47C outcome might trigger un-anticipated native title compensation liability.

AMENDMENTS TO IMPROVE WORKABILITY OF THE NATIVE TITLE ACT

The Amendments include a number of relatively uncontroversial amendments relating to the Applicant's authority, the Applicant acting by majority, replacement of the Applicant, the right to negotiate process and technical changes intended to improve the claims resolution and agreement-making processes.

We have written about these details in our 2018 Native Title Year in Review article Update on Native Title Act Reform.

PBC GOVERNANCE, ACCOUNTABILITY AND DISPUTE RESOLUTION

The Amendments include a number of amendments to the Native Title Act and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) which aim to improve the governance and accountability of registered native title body corporates/prescribed body corporates (**PBCs**) and increase dispute resolution pathways.

The Amendments include:

- **Membership:** changes to membership provisions to better protect common law holders of native title by ensuring that a PBC's rule book reflects the relevant native title determination, preventing PBCs from establishing membership criteria, refusing or cancelling membership in a way that disenfranchises a section of a native title group and ensuring a pathway in the PBC rule book for resolution of disputes between common law holders and PBCs (Schedule 8, Amendments).
- **NNTT new function to assist post-Determination:** a new function for the NNTT to assist PBCs and common law holders of native title to promote agreement about native title issues and the operation of the Native Title Act (Schedule 7, Amendments). This complements the proposed new dispute resolution pathway to be included in the PBC's rule book.
- **ORIC Registrar oversight:** adding a new ground for the Registrar to appoint a special administrator to a PBC when there is a serious failure by the PBC to comply with its native title legislation obligations.

REVIEW OF THE CATSI ACT STILL IN PROGRESS

In December 2019, the Minister for Indigenous Australians announced a comprehensive review of the CATSI Act. The review is intended to build on the findings of the 2017 technical review of the CATSI Act, but also include an assessment of the effectiveness of the CATSI Act as a special measure under the *Racial Discrimination Act 1975* (Cth) and whether it can better support economic and community development opportunities for Aboriginal and Torres Strait Islander people. The review will also consider aspects of the CATSI Act that are working effectively, and areas that could be improved.

For more information about the CATSI Act review, see our next article *Changes abound for the governance of Indigenous corporations*.

Author: Leonie Flynn, Expertise Counsel

3

Changes abound for the governance of Indigenous corporations

KEY DEVELOPMENTS ARISING FROM THE ENACTMENT OF THE NATIVE TITLE LEGISLATION AMENDMENT ACT 2021 (CTH) AND THE NIAA'S FINAL REPORT IN ITS REVIEW OF THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 (CTH)

WHAT YOU NEED TO KNOW

- The passage of the *Native Title Legislation Amendment Bill 2020* (Cth) has continued to enhance the governance landscape for native title holders and prescribed body corporates established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
- Further substantial changes are likely to flow from the NIAA's review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). The NIAA's final report was published in February 2021 and legislative amendments are slated for mid-2021.
- The NIAA's final report highlights a number of the key issues relating to RNTBC/PBC governance including greater transparency on accounting for native title monies, a new regulatory role for ORIC, a potential new benefits management structure and greater transparency regarding executive remuneration.

WHAT YOU NEED TO DO

- Familiarise yourself with the important governance changes enacted under the *Native Title Legislation Amendment Act 2021* (Cth), and the changes recommended under the NIAA's final report in its review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
- Take part in the phase 3 consultation process in the NIAA's review.
- Await the Australian Government's response to the NIAA's review including the tabling of any Bill later in 2021 (or beyond) adopting some or all of its recommendations.

NATIVE TITLE ACT AMENDMENTS RELATING TO PBC GOVERNANCE

When native title is determined to exist, a registered native title body corporate (RNTBC) – more commonly referred to as a prescribed body corporate (PBC) – must either hold the interests in trust for the common law holders of native title or manage it as their agent. These PBCs are invariably corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (**CATSI Act**).

There are now hundreds of PBCs around Australia, putting the post-determination landscape in sharp focus.

One of the biggest challenges has been managing the relationship between common law holders and the PBC that holds the native title on their behalf. In particular, some common law holders raise concerns about PBC rules (including those relating to PBC membership) and whether the rules properly reflect the determination of native title. Native title holders have long called for legislative amendments to resolve this.

The *Native Title Legislation Amendment Act 2021* (Cth) goes some of the way to address this issue, through the following amendments:

- a new function for the National Native Title Tribunal to assist PBCs and common law holders of native title to promote agreement about native title issues and the operation of the *Native Title Act 1993* (Cth);
- a new dispute resolution pathway to be included in a PBC's rule book (amendments to the CATSI Act contained in the Amendments); and
- a new power for the ORIC Registrar to appoint a special administrator to a PBC when there is a serious failure by the PBC to comply with its native title legislation obligations (new subsection 487-5(1)(ca) CATSI Act).

The National Native Title Tribunal's focus over the last 20 years has been on the resolution of native title claims. It is hoped that this new role to work with PBCs and common law holders post-determination, will assist in the resolution of these matters, given the considerable mediation expertise and experience of the NNTT and its Members.

FIDUCIARY DUTIES ADDRESSED IN THE RECENT AMENDMENTS TO THE NATIVE TITLE ACT

In our 2018 Year in Review article Further developments on governance and misappropriation of funds under native title agreements, we wrote about the Federal Government's response to *Gebadi v Woosup* [2017] FCA 1467, in which a native title applicant was ordered to repay hundreds of thousands of dollars to the claim group for misappropriated funds. Gebadi confirmed that the native title applicant owes fiduciary duties to, and must act in the best interest of, the claim group in exercising the powers and responsibilities conferred upon them.

The Federal Government proposed amendments to confirm this position, which were finally enacted in February 2021 (see our article Native Title Reforms Finally Enacted).

The *Native Title Legislation Amendment Act 2021* (Cth) inserted new section 62B in the Native Title Act confirming that any obligation of the applicant under the Native Title Act does not relieve or detract from the operation of their duties at common law or in equity to the native title or compensation claim group.

COMPREHENSIVE REVIEW INTO THE CATSI ACT

In December 2019, the Minister for Indigenous Australians announced a comprehensive review of the CATSI Act. The National Indigenous Australians Agency (**NIAA**) published the CATSI Act Review survey – Summary Report in June 2020, which identified governance as the most important issue for respondents.

As part of the second phase of the review, NIAA released the CATSI Act Review: Draft Report on 31 July 2020 which outlined suggested changes to the CATSI Act. Public consultation on the Draft Report closed in October 2020 and the CATSI Act Review: Final Report was published in February 2021 (**Final Report**) as part of the third phase of the review.

The Final Report highlights a number of the key issues with RNTBCs/PBCs with respect to governance, and related matters like the handling of funds and non-monetary benefits derived from native title agreements. These are discussed in more detail below.

GREATER TRANSPARENCY REGARDING USE OF NATIVE TITLE MONIES

The most common feedback received by NIAA about PBCs was the need for greater transparency in decision-making and recording of, and reporting about, the receipt and expenditure of native title monies.

As a practical step towards providing more transparency in this space, the Final Report recommended that the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to require reporting to common law holders on the management and use of native title monies and non-monetary benefits held on trust. It was also recommended that the ORIC Registrar consider reflecting consistent reporting requirements in section 336-5 of the CATSI Act.

REGULATORY ROLE OF ORIC REGARDING USE OF NATIVE TITLE BENEFITS

While PBCs represent only 6.5 per cent of CATSI Act corporations, they generate 22 per cent of complaints received by the Office of the Registrar of Indigenous Corporations (**ORIC**). Many of these complaints concern governance shortcomings, including the use of native title benefits. This highlights the need for improved regulatory infrastructure that supports the transparent and accountable management of monies derived from native title.

Giving ORIC a clear regulatory role in relation to decision-making and reporting about native title benefits aims to achieve increased clarity and transparency for common law holders about the management of those benefits, so that they can more adequately participate in the administration of their benefits.

To assist RNTBCs with understanding their new compliance and reporting obligations following the CATSI Review, the Final Report recommended that NIAA consult with ORIC and stakeholders to develop guidance material on best-practice benefit management structures to support the good governance of native title benefits. It is also recommended that these parties develop and deliver education and information resources outlining the proposed obligations.

POTENTIAL NEW BENEFITS MANAGEMENT STRUCTURE

Proposed benefits management corporate and trust structures are aimed at providing transparency and accountability to common law holders about the use of their native title monies, reducing costs of benefits management administration, maximising tax effectiveness, and simplifying regulatory arrangements.

To address these issues, the Final Report recommended that the current benefits management structures (including for example the use of charitable trusts and discretionary trusts) undergo further review to identify any opportunities to better support economic development for common law holders.

The Final Report also considered the proposal put forth by two institutional stakeholders for a new type of benefit management structure to be created by regulation, namely the "PBC Economic Vehicle Status" proposal (**PBC EVS**), which would allow PBC's to seek an additional statutory designation where the corporation would itself qualify as an appropriate "economic vehicle" to manage native title monies. The suggested design of that PBC EVS would mean that PBC's would be able to 'more directly and effectively utilise their native title monies to support economic development' and would have 'more stringent funds management and reporting obligations'. The Final Report recommended that NIAA consider this option further and consult with the Department of Finance, Treasury, Australian Taxation Office and Australian Charities and Not-for-profits Commission regarding the feasibility of this alternative benefit management structure.

GREATER TRANSPARENCY REGARDING EXECUTIVE REMUNERATION

During consultation by the NIAA, issues were raised in relation to the relative lack of transparency surrounding the remuneration of executives of corporations registered under the CATSI Act. The majority of stakeholders argued that 'there may be a public interest in reporting senior executive remuneration to members, common law holders and other stakeholders', similar to the disclosure requirements for publicly listed companies under the *Corporations Act 2001* (Cth).

Some stakeholders argued that such a requirement may impinge on individual employees' privacy. However, as CATSI Act corporations are often either publicly funded through government grants or resourced through native title benefits, the Final Report notes there may be a degree of public interest in better reporting on officer remuneration. Accordingly, the Final Report made the following recommendations with a view to improving public trust and confidence in the sector:

- including senior executive remuneration information in annual reporting to the ORIC Registrar and having this information available during Annual General Meetings;
- reporting remuneration information of key personnel of associated entities in annual reports to the ORIC Registrar; and
- reporting the amount directors are paid in sitting fees in annual financial reports lodged with the ORIC Registrar.

NEXT STEPS

In addition to the actions arising from the recommendations discussed above, it is expected that phase three of the CATSI Act Review – which kicked off with the release of the Final Report – will involve further consultation with stakeholders to address the concerns raised during phase two. The Final Report forecasts that, subject to the outcome of this further consultation, a Bill will be brought before Parliament and would take effect from 1 July 2021.

It is clear in light of the Native Title Act amendments, the comprehensive NIAA Final Report into the CATSI Act and the other reviews into the CATSI Act in recent years, that substantial reform to the PBC governance regime is upon us – particularly with regards to the management of native title benefits and associated reporting.

Authors: Connor Davies, Lawyer and Leanne Mahly, Lawyer

4

Native title compensation update: no claims tsunami but the tide has turned

NATIVE TITLE COMPENSATION DEVELOPMENTS OVER THE LAST 12 MONTHS

WHAT YOU NEED TO KNOW

- There have been 15 compensation claims filed across Australia during the post Timber Creek era (beginning in 2016) - 4 have been discontinued and 2 struck out.
- There are potentially 2 test cases, addressing:
  - whether pre-1975 acts are compensable and how the Commonwealth Constitution's safeguard against "acquisition of property otherwise than on just terms" applies in the native title context (Galarrwuy Yunupingu (on behalf the Gumatj Clan or Estate Group) v NT);
  - assessment of compensation for the impact of resources interests on native title, and the operation of the compensation "pass on" provision in the Mining Act 1978 (WA) (Tjiwarl (Aboriginal Corporation) RNTBC v WA; Brett Lewis & Ors on behalf of the Tjiwarl Compensation Claim Group v WA).

WHAT YOU NEED TO DO

- Be aware that new native title compensation claims are being lodged all the time – maybe even to a native title area near you. Over 300 determined native title holding groups around Australia are entitled to make compensation claims.
- Consider whether you should join a compensation claim if it specifies or otherwise includes interests granted to you in the claim area (even if those interests are no longer current). This is particularly relevant where Government has made you liable for any compensation payable for that interest or tenure.

DEVELOPMENTS IN EACH STATE AND THE TERRITORY SINCE TIMBER CREEK

We have regularly published outlines of the post-Timber Creek developments in each State and Territory: see our Native Title Year in Review 2019 article Compensation update: What next for native title compensation and our November 2020 Native Title Alert: Compensation Update: Some interesting test cases on the horizon.

TIMBER CREEK RECAP: STILL THE ONLY JUDICIAL CONSIDERATION OF PRINCIPLES RELATED TO CALCULATION OF NATIVE TITLE COMPENSATION

Two years ago (on 19 March 2019), the High Court handed down its first ever decision relating to native title compensation, including how to put a price on intangible spiritual harm, or "cultural loss". The High Court awarded just over $2.5 million to the Ngaliwurru and Nungali Peoples for the effect of land grants and public works on their native title rights. This included an award of $1.3 million for cultural loss (or spiritual attachment to the land) (*Northern Territory v Mr A Griffiths (decd) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* (2019) 364 ALR 208 (Timber Creek)).

A summary of the case was provided in our 2018 Native Title Year in Review article Compensation update: First High Court decision on native title compensation in Timber Creek case.

There have been 15 compensation claims filed across Australia during the post Timber Creek era (beginning in 2016), but 4 have been discontinued and 2 struck out. Our article *Procedural Issues lead to strike out of compensation claims* discusses the Federal Court's recent strike out decisions and the recently discontinued claims.

The status of the remaining active claims is summarised below.

CLAIM	AREA	STATUS (AS AT 25 MARCH 2021)
McArthur River Project Compensation Claim Casey Davey & Ors v NT (NTD25/2020; DP2020/001) Filed 14/12/2020	NT McArthur River Mine and Bing Bong Port	In notification. Claims compensation for the effects of the McArthur River Mine and Bing Bong Port, including the grant of mining and exploration tenements pursuant to the *Mining Act 1980* (NT) and special project legislation passed by the Northern Territory Government, the construction of dredge spoil ponds, the road to the Port, the McArthur River gas pipeline generating power for the project and other acts done pursuant to the McArthur River Project Agreement Ratification Act 1992 (NT).
The Gumatj Compensation Claim Galarrwuy Yunupingu (on behalf the Gumatj Clan or Estate Group) v NT (NTD43/2019; DP2019/001) Filed 28/11/2019	NT Gove Peninsula, Arnhem Land	Case Management. We discussed this claim in our Native Title Year in Review 2019 article and our November 2020 Alert. As anticipated, we understand the applicant is seeking to have the question of law regarding pre-1975 acts (i.e. whether the *Mining Ordinance 1939* (NT) purported to effect an acquisition of property in respect of native title rights to minerals other than on just terms as required by s 51(xxxi) of the Commonwealth Constitution) determined first, before any other aspects of the claims progress. We expect the Government parties will be keen to test the asserted native title right to minerals before moving to the Constitutional question. It may be many years before this compensation claim (and the issues in this "test case") are resolved.
Wati Tjilpi Ku on behalf of the Yilka Sullivan Edwards People Compensation Claim Bruce Smith on behalf of the Wati Tjilpi Ku on behalf of the Yilka Sullivan Edwards People v WA (WAD266/2020; WP2020/004) Filed 28/11/2019	WA Central Desert	Not yet notified. The claim includes a detailed schedule of hundreds of compensable acts including the grant of pastoral leases, mining leases, exploration tenements, miscellaneous licences, prospecting licences, mineral claims, ground water licences and the creation of a stock route and temporary reserve. It also claims compensation for the creation of the Cosmo Newberry Aboriginal Reserve.
Tjiwarl RNTBC Compensation Claim Tjiwarl (Aboriginal Corporation) RNTBC v WA (WAD141/2020; WP2020/001) Filed 17/06/2020 **Tjiwarl Claim Group Compensation Claim** Brett Lewis & Ors on behalf of the Tjiwarl Compensation Claim Group v WA (WAD142/2020; WP2020/002) Filed 17/06/2020	WA Central Desert	Case Management. The Tjiwarl People's compensation claims are the first in WA to cover land the subject of mineral resource interests (WAD141/2020 and WAD142/2020). We discussed these claims in our November 2020 Alert.

CLAIM	AREA	STATUS (AS AT 25 MARCH 2021)
Kapi Tjiwarl Compensation Claim Shirley Wonyabong & Ors on behalf of the Kapi Tjiwarl Compensation Claim Group and State of WA (WAD269/2020; WP2020/005) Filed 26/11/2020	WA Central Desert	In Notification. A further compensation claim was filed in November 2020 in relation to the creating and vesting of a water reserve (*Shirley Wonyabong & Ors on behalf of the Kapi Tjiwarl Compensation Claim Group and State of Western Australia* (WP2020/005)). This claim raises a discrete liability issue.
Gibson Desert Nature Reserve Compensation Claim Daisy Tjuparntarri Ward & Ors on behalf of the Gibson Desert Nature Reserve Compensation Claim Group v WA (WAD222/2020; WP2020/003) Filed 18/09/2020	WA Gibson Desert Nature Reserve	Settlement reached. The parties entered into a settlement agreement on 29 October 2020, which will see the reserve jointly managed by the traditional owners and the State. The agreement allocates $7.5 million to support the joint management activities over the reserve (including to improve infrastructure that will support such activities), over a 10 year period. The agreement will also see the renaming of the Gibson Desert Nature Reserve to the Pila Nature Reserve.
Pitta Pitta Compensation Claim Florence Melville & Ors on behalf of Pitta Pitta People v Qld (QUD327/2020; QP2020/001) Filed 22/10/2020	Qld Notification ended on 29 March 2021.	Central North West Qld The claim relates to hundreds of compensable acts including grants of freehold, leasehold (including pastoral and grazing leases), reserves, water licences, exploration permits held by over 50 named mining companies, authorities to prospect, boreholes, electricity infrastructure and gas pipelines covering almost 3 million hectares of land in the Boulia, Cloncurry, Diamantina and Winton Shire Council areas of Queensland. We discussed this claim in our November 2020 Alert.
Barkandji Malyangapa Compensation Claim Patricia Johnson & Anor on behalf of the Barkandji Malyangapa People v Attorney General of NSW (NSD925/2020; NP2020/001) Filed 21/08/2020	NSW Wanaaring to Wentworth, extending westerly to the NSW and SA border	Not yet notified. This claims has not been brought by the Barkandji Native Title Group Aboriginal Corporation RNTBC, which have now, in fact been joined as a respondent. The State indicated to the Court that it may seek to strike out the proceedings, based on whether the claim has been properly authorised by the common law holders. We discussed this claim in our November 2020 Alert.
Bodney 1 (Burswood) (WAD 6289/1998; WP1998/001) Bodney 2 (Kings Park) (WAD 6290/1998; WP1998/002) Bodney 3 (Bold Park) (WAD 6291/1998; WP1998/003)	WA Burswood, Kings Park and Bold Park	These date from 1998 but have not been notified. They were adjourned in 2018.

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5

Procedural issues lead to strike out of compensation claims

SAUNDERS ON BEHALF OF THE BIGAMBUL PEOPLE V STATE OF QUEENSLAND (NO 2) [2021] FCA 190 AND WHARTON ON BEHALF OF THE KOOMA PEOPLE V STATE OF QUEENSLAND [2021] FCA 191

WHAT YOU NEED TO KNOW

- In March 2021, the Federal Court struck out the Bigambul and Kooma compensation claims in Queensland for failing to identify any particular compensable acts (*Saunders on behalf of the Bigambul People v State of Queensland (No 2)* [2021] FCA 190 and *Wharton on behalf of the Kooma People v State of Queensland* [2021] FCA 191).
- The Court also refused to grant leave to amend the claims to specify the relevant compensable acts because section 64(1) of the *Native Title Act 1993* (Cth) prevents amendments to claims that result in the inclusion of an area of land or waters that was not covered by the original application.
- There have been 15 compensation claims filed across Australia during the post Timber Creek era (beginning in 2016), but 4 have been discontinued and 2 struck out.
- The headline grabbing claims seeking billions of dollars compensation have not got anywhere. Before questions of cultural loss and the assessment of compensation can be considered, the parties need to know in respect of what specific acts compensation is being claimed. What the recent cases have determined, is that it is the applicant's job to identify these (and not that of government).

WHAT YOU NEED TO DO

- Be aware that, unless an act or grant to which you have an interest is specifically included in a compensation claim, your risk of liability is reduced.
- A lot of up front work if you are a native title group planning to bring a compensation claim. The scope of the original application will set the limits of the claim.
- Watch out as State governments and representative bodies' attempt to find a pathway to address native title compensation liability that bypasses the resource intensive and costly Federal Court processes, such as by entering ILUAs.

PROCEDURAL ISSUES AFFECTING NATIVE TITLE COMPENSATION CLAIMS

There have been 15 compensation claims filed across Australia since the first decision on the assessment of native title compensation in 2016 (Timber Creek), but 4 have been discontinued and 2 struck out since that time.

In a procedural sense, the native title compensation claim process is still undeveloped, even though the right to claim compensation has been in the Native Title Act 1993 (Cth) from the outset. The Timber Creek compensation claim was run as a test case. For the most part, potential litigants delayed lodging claims until Timber Creek was determined by the High Court. It is inevitable that there will be teething issues with procedure, just as there was with native title determination applications for many years.

Some early stage compensation claims have had difficulties with claim formulation. The question of who is entitled to bring a compensation claim has also emerged.

A native title compensation claim can be filed by either the registered native title body corporate for the compensation claim area, or by persons authorised by the compensation claim group. Authorisation of compensation claims brought by individuals has the same requirements as authorisation of native title determination applications.

The Native Title Act has reasonably limited guidance about how the compensation claim process should work. The basic mechanics are the same as for a native title determination application. However, in substance, compensations claims are quite different.

Native title determination applications are made in relation to an area of land, and do not require upfront details about tenure (i.e. grants of interests in relation to the claim area). The onus is on the State (and any respondents arguing extinguishment) to produce evidence of extinguishing grants of interests. On the other hand, a compensation application is focussed on particular compensable acts. The onus is on the applicant to identify them and provide details in the compensation application form. The Timber Creek claim was very specific as to the compensable acts it was considering. In contrast, many of the early post-Timber Creek compensation applications were formulated as generic classes of acts within a large area. The expectation was, perhaps, that the State against whom the claim was made would assist with the identification of compensable acts. The Federal Court has been increasingly intolerant of this approach.

Two recent decisions of the Federal Court have made it absolutely clear that the of the identification of compensable acts is the work of the applicant.

BIGAMBUL AND KOOMA COMPENSATION CLAIMS STRUCK OUT FOR FAILING TO IDENTIFY COMPENSABLE ACTS OR THE AREA COVERED BY THE COMPENSATION APPLICATION

The Kooma and Bigambul compensation claims were filed in December 2019, and related to all of the land and waters within the external boundaries of the Bigambul and Kooma determinations of native title in southern Queensland. We wrote about these claims in our Native Title Year in Review 2019 article Compensation update: What next for native title compensation and our November 2020 Native Title Alert: Compensation Update: Some interesting test cases on the horizon.

The applicants sought billions of dollars in compensation from the State of Queensland, but did not specify any particular compensable acts. Instead, the application forms stated that further information would be provided at a later date.

The State filed an interlocutory application seeking orders that the compensation applications be struck out or summarily dismissed on the basis that they failed to contain prescribed information required by the Native Title Act, as they did not identify any "act" founding an entitlement to compensation, nor any "area covered by the application".

The applicants sought leave to amend the compensation applications to identify particular compensable acts, but the State opposed the application on the grounds that the proposed amendments were prohibited under section 64(1) of the Native Title Act as they would result in the inclusion of areas not covered by the original application.

NATIVE TITLE ACT REQUIRES A COMPENSATION APPLICATION TO IDENTIFY COMPENSABLE ACTS AND THE AREA OF THE APPLICATION

The Federal Court examined the native title compensation regime in the Native Title Act in detail. It noted:

- Since a determination of compensation requires identification of an act and an area, an application for a determination of compensation also requires identification of the relevant act and area.
- A compensation application must be in Form 4 and must contain the information and be accompanied by the documents as mentioned in Form 4 (Regulation 5(2) Native Title (Federal Court) Regulations 1998 (Cth)). Schedule I of Form 4 requires, "Details of the act which it is claimed extinguished or affected native title rights and interests for which compensation is claimed…".
- Schedule B requires, "information identifying the boundaries of…[t]he area covered by the application. Schedule C requires, "[a] map of the boundaries of the area covered by the application".

THESE DETAILS ARE REQUIRED SO THAT CLAIMS CAN BE PROPERLY NOTIFIED AND AFFECTED THIRD PARTIES GIVEN THE OPPORTUNITY TO PARTICIPATE IN THE RESOLUTION OF THE CLAIM

The Federal Court goes on to consider the relevance of the information on the compensation application form to the notification provisions of the Native Title Act.

The requirements of the compensation claim application form (Form 4) to identify a compensable act and area covered by the application are designed to allow the Registrar of the National Native Title Tribunal to identify the persons and entities to be notified, and to allow those who are notified to understand whether their interests may be affected and make an informed decision as to whether to become parties.

In this way, the Native Title Act and the Regulations observe a basic requirement of natural justice that a person whose interests may be affected by a legal proceeding should be given a reasonable opportunity to be heard.

NO AMENDMENT ALLOWED BECAUSE IT WOULD ADD AN "AREA" TO THE CLAIMS

The Applicants applied for leave to amend the compensation claims to specify a number of acts that were alleged to affect native title rights and interests and cure the defects of failing to identify any compensable act.

This was opposed by the State on the basis that the proposed amendments would offend section 64(1) of the Native Title Act, which provides: "An amendment of an application must not result in the inclusion of any area of land or waters that was not covered by the original application".

In agreeing with the State that the claims could not be amended, the Federal Court again referred to the notification of affected third parties and said that one of the purposes of the compensation application form is to provide useful information to the persons who are to be provided with the form, or with information drawn from the form.

The Federal Court held:

- In the case of a compensation application, "the area covered by the application", will be the areas in which the application alleges that native title rights and interests have been affected by a compensable act. It is in those areas that the interests of other persons or entities may be affected.
- The identification of an act and its effects upon native title rights and interests in an area are critical to the determination of whether compensation is payable, how much is payable, to whom it is payable and by whom it is payable.
- It is the identified act and the alleged geographical extent of its effects which determine "the area covered by the application", not the mere assertion in the application as to the area covered.

Accordingly, neither the Kooma nor the Bigambul compensation claims covered any land or waters, because they did not identify any compensable acts. As noted, it was not possible for the claim to be amended to specify compensable acts, as this would result in the inclusion of areas not covered by the original application, which is not permitted.

Accordingly, both claims were struck out.

RECENTLY DISCONTINUED SINGLE NOONGAR COMPENSATION CLAIM FACED A NUMBER OF PROCEDURAL ISSUES

In November 2019, a group of Noongar people filed a compensation claim for $290 billion (*Naomi Smith on behalf of the Single Noongar Claim Group v State of Western Australia* [WAD580/209]) (**Single Noongar Compensation Claim**). We discussed this claim in our Native Title Year in Review 2019 article Compensation update: What next for native title compensation and our November 2020 Native Title Alert: Compensation Update: Some interesting test cases on the horizon.

The claim had a number of procedural flaws, including a question about authorisation, the fact that native title had not been recognised to any part of the claim area, and the absence of any specified compensable acts.

The State filed an application for summary dismissal of the claim because of its procedural flaws. This was originally intended to be heard in April 2020, but the progress of the application was affected by COVID-19 related court disruptions. After many adjournments and before the strike out application was actually heard, in March 2021 the Applicants were granted leave to file a notice of discontinuance of the claim, with no order as to costs. With the registration of the South West Area ILUAs, the compensation claim had become pointless. Once the ILUAs were registered, they bound all native title holders to the compensation settlement agreed with the State.

AUTHORISATION ISSUES FLAGGED BY THE FEDERAL COURT IN BARKANDJI MALYANGAPA COMPENSATION CLAIM

In August 2020, a group of Barkandji Malyangapa People of western New South Wales filed a compensation claim seeking compensation for the extinguishment of native title over a large area, spanning from Wanaaring to Wentworth, extending westerly to the New South Wales and South Australia border (Patricia Johnson & Anor on behalf of the Barkandji Malyangapa People v Attorney General of NSW (NSD925/2020)). We discussed this claim in our November 2020 Alert.

This is not a compensation claim brought by the registered native title body corporate. In fact, the relationship between the claimant and the common law holders is not straight forward. It is clear from the orders made in this claim that there are issues with the Applicants' authorisation. The Federal Court ordered the Applicants to produce evidence of their authorisation by 28 January 2021, and also joined the formal representative of the determined native title holders for parts of the compensation claim area, the Barkandji Native Title Group Aboriginal Corporation RNTBC, as a respondent to the claim before the formal notification process commenced.

The State indicated to the Court that it was considering an application to strike out the proceedings, so the Court ordered that notification of the claim be delayed. The State has until 31 March 2021 to notify the Applicant and the Court whether it proposes to file a strike out application.

ONE PROCEDURAL ISSUE FINALLY RESOLVED – RNTBC CAN CLAIM COMPENSATION OVER LAND WHERE NATIVE TITLE HAS BEEN EXTINGUISHED WITHIN THEIR DETERMINATION AREA

One procedural issue that applicants will no longer face is the rule, now removed, that registered native title body corporates (RNTBCs) could not claim compensation in relation to land where native title had been entirely extinguished. This had the effect that native title holders had to bring two parallel compensation claims – one by the RNTBC over land where native title was determined to exist and one over the historically extinguished land within their determination area (e.g. the Tjiwarl compensation claims in WA: *Tjiwarl (Aboriginal Corporation) RNTBC v WA; Brett Lewis & Ors on behalf of the Tjiwarl Compensation Claim Group v WA*).

In addition to the inefficiencies of running two claims, this also added an unnecessary, complex and expensive authorisation process for the second claim, in circumstances where there is already a recognised body that has the authority of relevant native title holders to represent their interests.

The Native Title Legislation Amendment Act 2021 (Cth) contains amendments that expressly allow a RNTBC to make a compensation claim over areas within the external boundary of its determination area where native title has been fully extinguished.

WHERE TO FROM HERE?

The Federal Court's decisions in Kooma and Bigambul were not unexpected. They provide a clear statement about the Court's attitude towards ambit compensation claims that are not properly prepared before lodgement. They also signal the Court's understanding of the impact of compensation claims on third parties who may ultimately be liable to meet the costs of any compensation determined to be paid.

However, the Court's findings about the ability of the claims to be amended to add new compensable acts may have surprised some stakeholders.

Native title holders often rely on the State to provide tenure history materials during the case management phase of a compensation claim and would be likely to identify additional compensable acts from those materials. These decisions suggest that a relevant claim cannot be amended to include those acts if it would result in the inclusion of an area of land or waters that was not covered by the original application. A second claim would need to be lodged in relation to such acts.

Native title holders currently preparing new compensation claims will need to ensure that all compensable acts are included in Schedule I of the Form 4 Compensation Application. This will require additional preparation time and costs and potentially delay the lodgement, but will ultimately lead to a more efficient resolution of the claim.

Before questions of cultural loss and the assessment of compensation can be considered, the parties need to know in respect of what particular acts compensation is being claimed. What the recent cases have determined, is that it is the applicant's job to identify these.

Third parties within interests in the vicinity of a compensation claim can now be confident that, unless an act or grant to which they have an interest is specifically included in a compensation claim, their risk of liability is reduced.

Native title holders will need to do a lot of up front work if they are planning to bring a compensation claim. The scope of the original application will set the limits of the claim.

All stakeholders should watch as State governments and representative bodies' attempt to find a pathway to address native title compensation liability that bypasses the resource intensive and costly Federal Court processes, such as by entering ILUAs.

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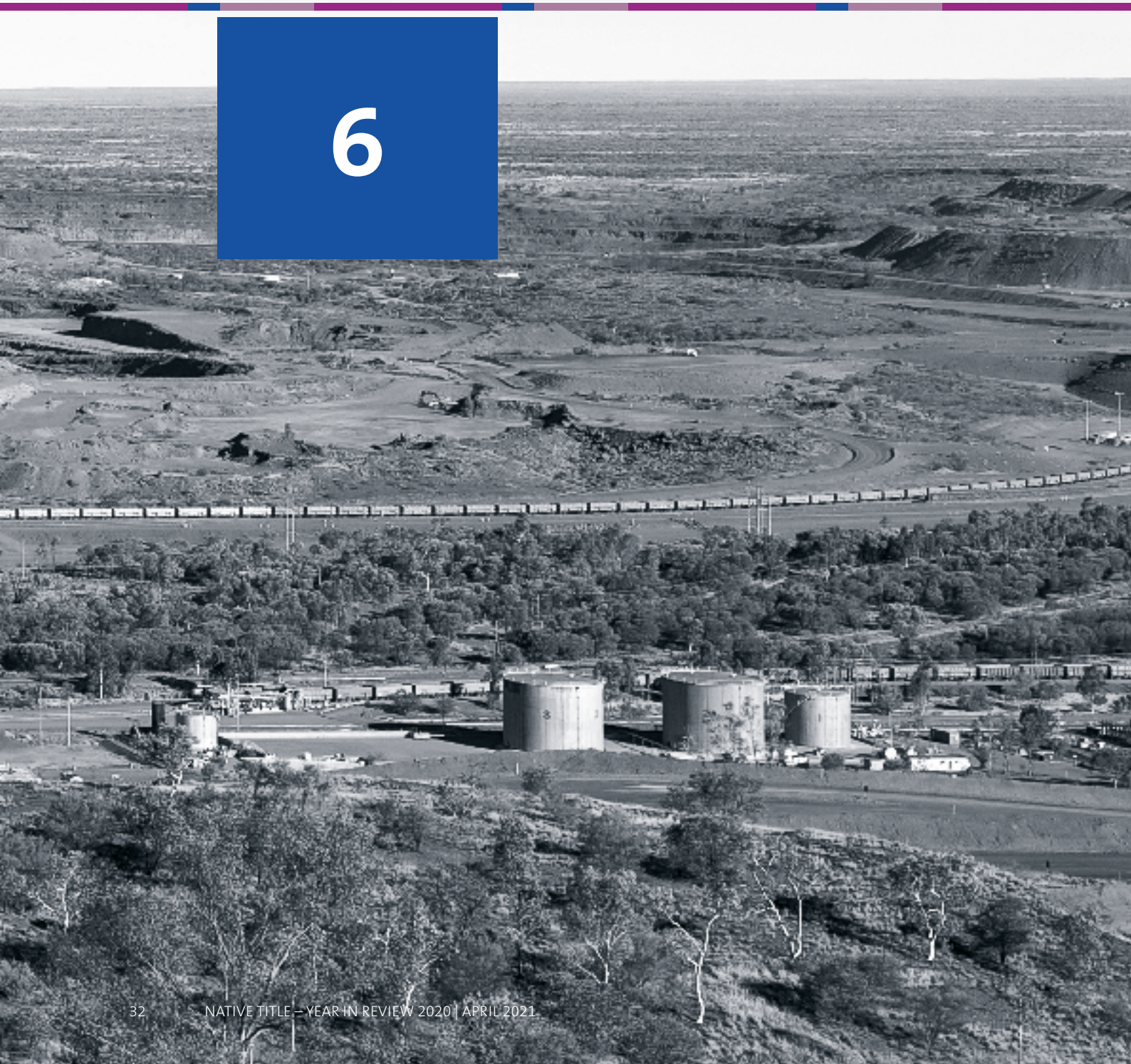
High Court dismisses FMG's special leave application in Yindjibarndi proceedings – exclusive native title over Solomon Hub re-affirmed

FORTESCUE METALS GROUP LTD & ORS V WARRIE & ORS [2020] HCATRANS 65

6



WHAT YOU NEED TO KNOW

- In May 2020, the High Court heard and refused Fortescue Metals Group (**FMG**)'s application for special leave to appeal from the Full Federal Court's decision that the Yindjibarndi People hold exclusive native title over FMG's Solomon Hub mines (*Fortescue Metals Group Ltd & Ors v Warrie & Ors* [2020] HCATrans 65).
- The dismissal reinforces existing native title decisions, and helps to clarify key native title concepts including exclusive possession and enforcement of traditional law.
- Yindjibarndi People can now make a native title compensation claim. On the face of things, there is scope for the Yindjibarndi People's claim to be significant.

WHAT YOU NEED TO DO

- You should ensure you are up to date with developments in the native title compensation space if you have mining operations in WA. This should include the current Tjiwarl compensation claim in the WA's Goldfields region (which was lodged in June 2020), and – if/when it is made in the future – any Yindjibarndi compensation claim.
- You should consider the potential exposure of your business to native title compensation. With test cases on the horizon, theoretical risk is becoming more real.

YINDJIBARNDI EXCLUSIVE NATIVE TITLE – THE STORY SO FAR

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

The Yindjibarndi People successfully relied on principles established in Griffiths v Northern Territory of Australia [2007] FCAFC 178 and Banjima People v State of Western Australia [2015] FCAFC 84 in asserting that a practice of seeking "permission" to enter land could give rise to exclusive native title.

A native title determination in favour of the Yindjibarndi People, recognising exclusive native title over an area including the Solomon Hub, was made in November 2017.

In October 2019, the Full Federal Court dismissed a subsequent appeal by FMG (Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177).

For more information about the Full Federal Court decision, see our April 2020 article Confirmed: Yindjibarndi People have exclusive native title over Fortescue Metals Group's Solomon Hub in our Native Title Year in Review 2019.

THE HIGH COURT'S DECISION – FMG'S SPECIAL LEAVE APPLICATION DISMISSED

ISSUES RAISED BY FMG

FMG lodged an application for special leave to appeal in November 2019.

The issues raised by FMG focused on:

- whether proof of post-sovereignty non-Aboriginal conduct was irrelevant to the continuity of a native title right of exclusive possession;
- whether the Yindjibarndi possessed a native title right of exclusive possession, in circumstances where the traditional law was not enforced and was ineffective in respect of non-Aboriginal persons.

SUBMISSIONS AND OUTCOME

The High Court heard and ultimately dismissed FMG's special leave application on 29 May 2020.

Counsel for each of FMG, the Yindjibarndi and the State made oral submissions before Keane J and Edelman J. FMG's submissions included, among other things:

- The High Court's approach in the earlier Yorta Yorta decision (regarding continuity of connection) could not be reconciled with the approach taken by the Full Court in the Yindjibarndi proceedings. FMG noted that the *"reality on the ground … will produce the devastation and disruption"* of the kind referred to in *Yorta Yorta*, and which *"will factually answer the proposition that there has been continuity of acknowledgement and observance and if that is so, of course, there simply cannot be the* [requisite] *recognition"*.

- While noting that the exercise of native title rights was "extremely vulnerable" to that kind of devastation and disruption, FMG said that was *"no reason … to water down the requirement for the continuity"*. FMG said that in the Full Court putting to one side the effect of non-Aboriginal European settlement, there had been a failure to reflect the proper approach taken in *Yorta Yorta*.
- In relation to the Full Court's finding of exclusive native title rights, FMG referred to the difficulty of such a finding where there was *"a lack of observance of a custom or acknowledgement of a law by reason of a lack of any asserted position of being … entitled to … resist access by the whole world including the settlers"*.

The Yindjibarndi and the State of Western Australia both opposed FMG's special leave application, and made submissions to the contrary.

The Yindjibarndi noted among other things that what was being suggested by FMG would "turn native title on its head", and failed to distinguish between the existence of native title rights and their *exercise*.

The State described the crux of FMG's case as being *"that where traditional law is acknowledged but the traditional means of enforcement are prohibited by Australian law, indigenous people cannot establish continuity and must inevitably lose their native title"*, which the State described as being without merit.

Keane J ultimately concluded:

> The decision of the Full Court of the Federal Court was concerned with the application of settled principle. The application to this Court raises no issue of principle that would warrant the grant of special leave to appeal. The application should be dismissed with costs.

The conclusion of the High Court special leave proceedings has re-affirmed the Yindjibarndi People's native title rights, including exclusive native title over the area of FMG's Solomon Hub.

WHERE TO NEXT?

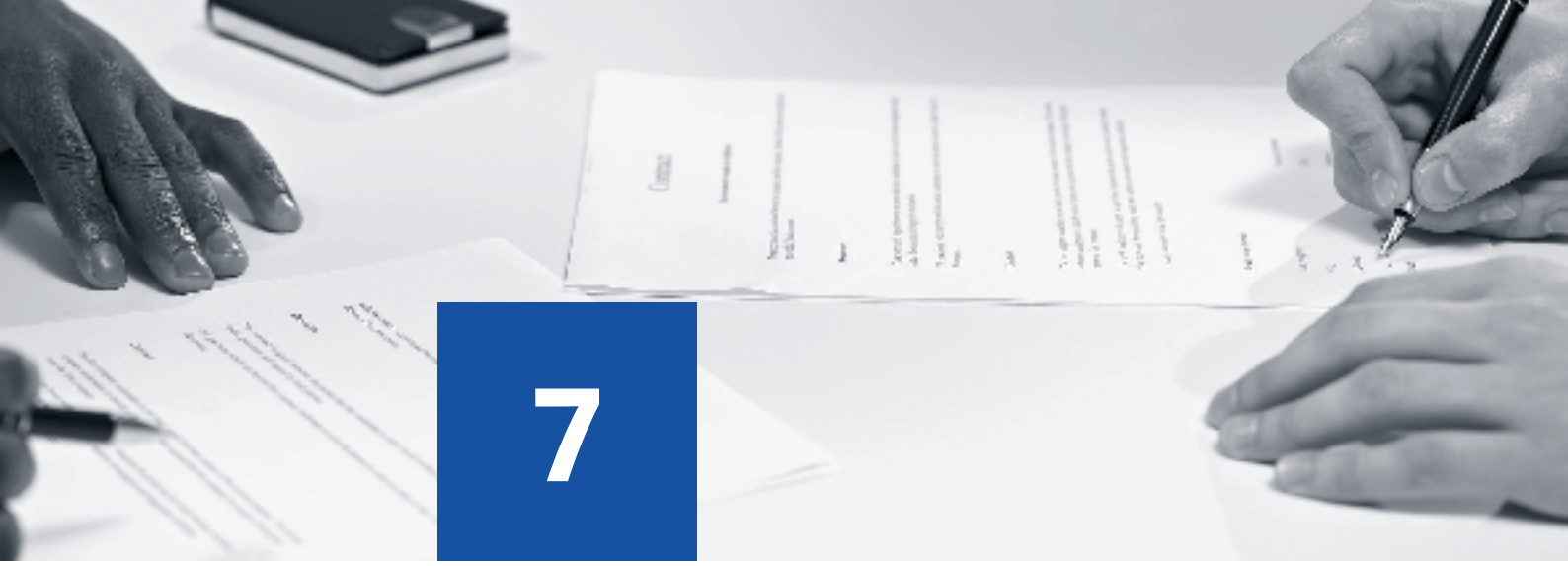
After the dismissal of the special leave application, FMG has publicly reiterated its previous comments that the Full Court's decision (which has now been affirmed) has no impact on its current or future operations or mining tenure at the Solomon Hub, and that it does not anticipate any material financial impact to the business as a result of the decision.

Since the dismissal of the special leave application, in October 2020 the Yindjibarndi People also (separately) achieved a variation by consent to their existing determination (to the north), to recognise exclusive native title over additional areas.

Yindjibarndi representatives have reportedly commented that it will take "a year or two" before the Yindjibarndi People make a compensation application. This has been touted in the media as potentially being a multi-million-dollar compensation payout for economic loss and spiritual harm.

Such an application could potentially be an important test case for the Western Australian mining industry. Unless the ongoing *Tjiwarl* compensation claims get there first, it is likely to be the first claim to consider compensation principles where the non-extinguishment principle applies to mining leases that have been granted over exclusive possession native title.

Authors: Andrew Gay, Partner and Cheyne Jansen, Senior Associate



7

Delegation of the ILUA certification function: the end of uncertainty

NORTHERN LAND COUNCIL & ANOR V. QUALL & ANOR [2020] HCA 33 AND NORTHERN LAND COUNCIL V QUALL (NO 3) [2021] FCAFC 2

WHAT YOU NEED TO KNOW

- In October 2020, the High Court held that the ILUA certification function in the Native Title Act could be delegated by the Northern Land Council as a Representative Body (*Northern Land Council & Anor v Quall & Anor* [2020] HCA 33).
- The High Court overturned the Full Federal Court's decision in *Northern Land Council v Quall* [2019] FCAFC 77. It referred to the Full Federal Court decisions of *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No. 2)* [2019] FCAFC 238 and *Kemppi v Adani Mining Pty Ltd [No 2]* (2019) 271 FCR 423, noting that they illustrate that the certification function performed by a Representative Body that is a company incorporated under the Corporations Act (and presumably by analogy the CATSI Act) might also be delegated.
- Some discrete matters were remitted back to the Full Federal Court. Then, in a final end to this matter, in January 2021 the Full Federal Court found that the delegation of the certification function in this case was valid.

WHAT YOU NEED TO DO

When negotiating ILUAs that are to be certified, parties must turn their attention to the Representative Body's delegation power, and not necessarily assume that all is in order as a matter of course.

THREE YEARS OF LITIGATION ABOUT ILUA AUTHORISATION AND CERTIFICATION

It has been three very litigious years in the ILUA world, as disaffected Indigenous parties have challenged the authorisation or certification of a number of ILUAs around Australia in proceedings that have gone on appeal to the Full Federal Court and High Court.

We wrote about these cases in our 2018 and 2019 Native Title Year in Review in our articles Authorisation and registration of ILUAs and Full Court resolves many uncertainties around ILUA registration and certification but the High Court to review delegation issue.

Although the 2019 Full Court decisions clarified some uncertainties around ILUA authorisation and certification, it was not until the High Court decision in Northern Land Council & Anor v Quall & Anor [2020] HCA 33 in October 2020 that certainty on the issue of delegation of ILUA certification functions was resolved.

ILUA CERTIFICATION AND AUTHORISATION AT A GLANCE

The *Native Title Act 1993* (Cth) requires that an ILUA is registered by the National Native Title Tribunal to deliver validity for the dealings it authorises and to have the other benefits of registration.

The registration process requires an ILUA to be either certified by a Representative Aboriginal or Torres Strait Islander Body or contain certain statements by the parties relating to the identification of the persons who hold or may hold native title and their authorisation of the agreement.

The Native Title Act provides that a Representative Body must not certify an application for registration of an ILUA unless it is of the opinion that:

- all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified; and
- all the persons so identified have authorised the making of the agreement.

If an ILUA is not certified, it is the ILUA parties themselves who must make statements in the above terms relating to identification and authorisation for successful registration.

THE NLC V QUALL ILUA WAS CERTIFIED BY A DELEGATE OF THE NLC

The ILUA in the Quall decision was certified by the CEO of the Northern Land Council (NLC), purporting to act as the NLC's delegate. The certificate expressly provided that the NLC itself was certifying the ILUA, but it was signed by the CEO. It was the CEO who certified that the relevant opinions about authorisation were held.

In *Northern Land Council v Quall [2019] FCAFC 77*, the Full Federal Court held that the NLC's certification function could not be delegated. That is, the NLC itself had to exercise the function.

THE HIGH COURT'S DECISION – THE NLC'S CERTIFICATION FUNCTION CAN BE DELEGATED

The High Court overturned the decision of the Full Federal Court by unanimously allowing the appeal.

The High Court considered two questions:

- Was delegation of the certification function compatible with the scheme of the Native Title Act?
- Did the NLC have power to delegate the certification function?

The High Court answered "yes" to both questions.

The High Court made it clear that the delegation of the certification function is compatible with the scheme of the Native Title Act. The certification function does not exhibit any special feature confining performance of that function to the members or governing body of a Representative Body.

The High Court also held that the NLC has power under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) to delegate the certification function of Representative Bodies under the Native Title Act to the CEO.

However, the High Court clarified that this is only to the extent that such delegation is objectively necessary or convenient to be done for or in connection with the performance of the certification function or other functions of the NLC.

NOT THE END OF THE ROAD – MATTER REMITTED BACK TO FULL COURT, WHO FOUND THAT THE DELEGATION WAS VALID

The High Court remitted the matter back to the Full Court to determine whether the certification function was duly delegated by the NLC to the CEO under the ALRA.

On 31 January 2021, the Full Court found that certification function had in fact been duly delegated, and held that the certification was valid.

CERTIFICATION BY CATSI ACT REPRESENTATIVE BODIES CAN ALSO BE DELEGATED

It is important to note that the NLC was established under different legislation than most other Representative Bodies, i.e. the ALRA not the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) or the *Corporations Act 2001* (Cth). Accordingly, the High Court's consideration of the NLC's power to delegate was focused on the ALRA and has little relevance for most Representative Bodies.

However, the High Court spoke approvingly about the recent Full Federal Court decisions dealing with certification by Corporations Act companies (and by analogy, CATSI Act corporations) – see our 7 October 2020 Native Title Alert: High Court Says "Yes" to delegation of ILUA certification function.

IMPLICATIONS FOR EXISTING AND FUTURE ILUAS

The High Court's clarification on the delegation issue is useful, but was not unexpected, despite the different conclusions reached by the Full Court in Quall and McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No. 2) [2019] FCAFC 238.

It is interesting to recall the context of the ILUA certification litigation, which concerned objections by native title group members who were unhappy about the content of the ILUAs. The Court has been forced to examine closely ostensibly uncontroversial aspects of the process. Now that this chapter has been brought to an end, there will be relief on a number of sides.

The parties to existing registered ILUAs certified by Representative Bodies finally have some certainty around the validity of their ILUAs, and importantly the tenures granted pursuant to them, which has been lacking since the trial judge's 2018 decision in Quall.

This decision will be welcomed by most Representative Bodies, given the significant savings, both in terms of time and resources, that delegation of the ILUA certification function allows.

The High Court's decision means that Representative Bodies can continue to delegate the certification function, however it highlights that they must ensure that they are empowered to do so by their constraining statute.

Authors: Leonie Flynn, Expertise Counsel and Libby McKillop, Senior Associate

8

Taungurung Traditional Owners Settlement Agreement teetering: Federal Court orders removal of underpinning ILUA from the ILUA Register

GARDINER V TAUNGURUNG LAND AND WATERS COUNCIL [2021] FCA 80 AND GARDINER V TAUNGURUNG LAND AND WATERS COUNCIL (NO. 2) [2021] FCA 253

WHAT YOU NEED TO KNOW

- A $34 million settlement agreement between the Victorian Government and the Taungurung People under the *Traditional Owner Settlement Act 2010* (Vic) is under threat as a result of a challenge to the National Native Title Tribunal's decision to register the ILUA that underpins the deal.
- In *Gardiner v Taungurung Land and Waters Council* [2021] FCA 80, the Federal Court held that the delegate made an error in the way she approached the question of whether the representative body certifying the ILUA had made 'all reasonable efforts' to identify 'all persons who hold or may hold native title' in relation to the land and waters covered by the agreement. In circumstances where there was no native title claim and not much research, the efforts required of the representative body were considerable.
- In *Gardiner v Taungurung Land and Waters Council* (No. 2) [2021] FCA 253, the Federal Court ordered that the ILUA be removed from the ILUA Register, and the application for registration be remitted for consideration accordance with the law.

WHAT YOU NEED TO DO

- With the Taungurung ILUA removed from the ILUA Register, the Taungurung Land Use Activity Agreement, which has applied to 11% of Victoria's public land since April 2020, is in limbo. It can no longer operate to replace the *Native Title Act 1993* (Cth)'s future act regime as a means of validating the grant of new interests in the settlement area.
- Watch out for the outcome of the application for registration of the Taungurung ILUA, which is now back before the Registrar. However, don't hold your breath for a speedy re-registration. It will be hard for the Registrar to decide to register the ILUA, given the Federal Court's detailed analysis of the of the certification process.

In Gardiner v Taungurung Land and Waters Council [2021] FCA 80 (**Taungurung Decision**), the Federal Court has once again been asked to consider whether an Indigenous Land Use Agreement (**ILUA**) under the Native Title Act 1993 (Cth) was properly registered, given questions as to its certification by a representative body. This dispute follows a number of similar disputes relating to ILUAs in Queensland, the Northern Territory and Western Australia where disaffected Traditional Owners have argued that ILUAs were not properly authorised by the native title holders for the ILUA Area.

For more information about those earlier cases, see our article Delegation of the ILUA certification function: the end of uncertainty and our April 2020 Native Title Year In Review 2019 article Full Court resolves many uncertainties around ILUA registration and certification but the High Court to review delegation issue.

TAUNGURUNG ILUA UNDERPINNED THE RECOGNITION AND SETTLEMENT AGREEMENT FOR 20,000 KM² ACROSS CENTRAL VICTORIA

In October 2018, the Victorian government entered into an ILUA with the Taungurung Clans Aboriginal Corporation, which represented the Taungurung Traditional Owner group. The ILUA was part of a broader $34 million reconciliation and settlement agreement under the Traditional Owner Settlement Act 2010 (Vic) (**TOS Act**)

The Taungurung ILUA covers an area of more than 20,000 square kilometres consisting of land and waters south of the Murray River from Rochester to Wangaratta to the Great Dividing Range. The Taungurung ILUA included an agreement that the Taungurung people would not exercise their native title rights over the ILUA area in exchange for economic and non-economic benefits. Once registered, the ILUA is binding on all people who hold native title in the ILUA area, irrespective of whether they are parties.

The ILUA was authorised at a meeting of the Taungurung people on 20 October 2018. After this, First Nations Legal and Research Services (First Nations Legal), as the representative body, certified that the requirements which allow an ILUA to be registered had been met.

During the ILUA notification period, there were numerous objections to registration, including by the applicants in these proceedings. The applicants' central assertion was that the Taungurung ILUA extended beyond Taungurung country and that the Dhudhuroa, Waywurru and Ngurai Illum Wurring people hold interests separate from those of the Taungurung in the settlement area, yet they were not included in the TOS Act process nor authorised the ILUA.

Despite these objections, the Tribunal ultimately registered the Taungurung ILUA, on the basis that it was not up to the Registrar to make an assessment of who holds native title in the agreement area.

This is the second set of proceedings by the applicants in respect of the Taungurung settlement agreement. In 2020, they sought judicial review of the Victorian Attorney General's decision under the TOS Act to enter into the Settlement Agreement. That proceeding has been stayed pending the outcome of the Federal Court's decision on ILUA registration discussed in this article.

TRADITIONAL OWNER SETTLEMENT ACT INTENDED TO BE AN ALTERNATIVE TO THE NATIVE TITLE ACT IN VICTORIA

This dispute revolves around the uneasy interrelationship between the TOS Act and the Native Title Act. The TOS Act has its origins in the failure of the Yorta native title claim over land and waters in northern Victoria and southern New South Wales. It was enacted as an alternative to the Native Title Act, with a different threshold for recognition as Traditional Owners. The prospect of using the resources that would otherwise have been consumed by native title litigation to achieve more socially productive outcomes was compelling for the State of Victoria at the time.

Beyond recognition, the TOS Act establishes a mechanism through which Traditional Owner groups can negotiate a settlement which cover covers input into future land use, joint management of parks, funding and land transfers. The Traditional Owner entity will also be recognised as a registered Aboriginal party under the Aboriginal Heritage Act 2006 (Vic).

Because the TOS Act settlement involves the giving up of rights by Traditional Owners and also alters the Native Title Act future act validation processes, the settlement needs to be given effect by an ILUA registered under the Native Title Act. Crucially, once registered on the Tribunal's ILUA Register, an ILUA binds all native title holders.

To be registered, the Tribunal must be satisfied that the people who will be bound by the ILUA have authorised it. For the Taungurung ILUA, that assurance was intended to come through certification by First Nations Legal. To properly certify the ILUA, they must be satisfied that all reasonable efforts had been made to ensure that all persons who hold or may hold native title in the area had been identified and those persons have authorised the ILUA.

THE FEDERAL COURT FOUND THAT THE TAUNGURUNG ILUA SHOULD NOT HAVE BEEN REGISTERED

This was a judicial review application so the key question was whether the delegate of the Registrar of the Tribunal properly understood and applied the law before making her decision to register the ILUA, including whether she appropriately engaged with the material in the many formally made objections.

The Court ultimately found that the delegate made two material and significant errors of law which undermined the decision to register the Taungurung ILUA.

THE "WRONG QUESTION"

The Court found that the delegate had approached the task of assessing whether "all reasonable efforts" had been made by First Nations Legal to identify those who hold or may hold native title in the agreement area, too narrowly.

The Court observed that the delegate did not properly engage with research put before her by the objectors because she did not consider that she needed to form a view as to whether the Taungurung are the right people for the agreement area or to 'weigh the research' of First Nations Legal 'against the contradictory assertions'. However, the Court found that matters as to who may hold native title in the agreement area were capable of going to the reasonableness of the efforts made by First Nations. As such, the delegate should have engaged with the objectors' material in forming a conclusion on the appropriateness of First Nations Legal's certification.

FAILING TO CONSIDER AFFIDAVIT MATERIAL

The applicants also succeeded on a second related ground.

The Court held that the delegate was required to actively consider the affidavit material submitted as part of the formal objection process. Instead, the delegate had relied on First Nations Legal's statements about the thoroughness and accuracy of its research and of its 'obviously deficient' database of interest holders, without sufficiently engaging with the objectors' affidavit evidence.

In fact, those affidavits included informed views that the Taungurung and the Ngurai Illum Wurrung were properly seen as separate and distinct groups. Failure to consider the affidavit material contributed to the 'wrong question' error referred to above. The affidavits included factual matters for the delegate to weigh. However, while her decision referenced the affidavits, the Court concluded that there was no active intellectual engagement with the material. Failure to do this meant she failed to have regard to a mandatory consideration.

CAN THE ILUA BE REMOVED FROM THE ILUA REGISTER?

When handing down the first decision, the Court was unsure whether it could order that the Taungurung ILUA be removed from the ILUA Register, given the limited criteria for removal in the Native Title Act.

In mid-March 2021, the Court handed down its decision on this point. In the end, it was accepted by all parties that the Court's jurisdiction under the Administrative Decisions (Judicial Review) Act 1997 (Cth), under which the application had been brought, was not limited by the terms of the Native Title Act. The Court ordered that the decision of the delegate be set aside and the ILUA removed from the Register until the ILUA registration application is considered once again.

WHERE TO FROM HERE?

The $34 million settlement agreement between the Victorian Government and the Taungurung People under the TOS Act is teetering.

While the Taungurung ILUA was registered, interests granted in accordance the new regime will likely be valid from a Native Title Act perspective. However, it looks like the Victorian Government may need to adopt a more inclusive approach or reduce the settlement area if it wants to proceed with a TOS Act settlement involving the Taungurung people.

More broadly, although playing out as an administrative law issue, at the heart of this proceeding was whether all the right people were involved in the Taungurung settlement. The distinct impression from the Court's review of the evidence was that the State and First Nations Legal may have overlooked a separate Traditional Owner group. With Victoria moving into treaty making, there will be a lot of pressure on First Nations communities and Government to get this right.

Authors: Clare Lawrence, Partner and Samantha Marsh, Lawyer

You can't just rely on an earlier agreement: the good faith standard in the right to negotiate process requires more

NORWEST SAND & GRAVEL PTY LTD V NGARLUMA ABORIGINAL CORPORATION RNTBC [2020] NNTTA 68 AND ATLAS IRON PTY LTD V NYAMAL ABORIGINAL CORPORATION [2020] NNTTA 75

9

WHAT YOU NEED TO KNOW

- In November 2020, the National Native Title Tribunal was required to consider two "negotiation in good faith" challenges by native title parties in the context of a right to negotiate process for the grant of mining leases in WA. In both cases, the grantee party and native title parties had entered into a prior native title agreement that purported to govern the process for future grants.
- One of those challenges was successful (*Norwest Sand & Gravel Pty Ltd v Ngarluma Aboriginal Corporation RNTBC & Another* [2020] NNTTA 68) and the other was not (*Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation* [2020] NNTTA 75).
- The determining factor was the extent to which the mining company sought to rely on the earlier agreement. The agreement provides context, but good faith requires an open mind.

WHAT YOU NEED TO DO

- Remember that every right to negotiate process requires the parties to negotiate in good faith with a view to reaching an agreement about the relevant grant, regardless of the existence of a prior agreement about future grants.
- If relying on a prior agreement, ensure this is not to the exclusion of meaningful engagement with the native title parties after the section 29 notice has been published.
- Be aware that the Senate's Interim Report on the Juukan Gorge incident was critical of the right to negotiate where the overwhelming number of arbitral decisions favour the mining company. Legislative reform is on the agenda.

We have been following "negotiation in good faith" challenges in our Native Title Year in Review for many years.

The National Native Title Tribunal had not needed to determine a good faith challenge for approximately two years, when in November 2020 it was required to consider two challenges by native title parties in relation to WA projects.

Both cases arose in the context of a right to negotiate process for the grant of a mining lease, where the grantee party and native title parties had a long history and a prior agreement that purported to govern the process for future grants.

NORWEST SAND & GRAVEL PTY LTD V NGARLUMA ABORIGINAL CORPORATION RNTBC– NEGOTIATION IN GOOD FAITH CHALLENGE SUCCESSFUL

In Norwest Sand & Gravel Pty Ltd v Ngarluma Aboriginal Corporation RNTBC & Another [2020] NNTTA 68 (**Norwest**) the National Native Title Tribunal found that Norwest had not negotiated in good faith.

Norwest relied on the prior agreement, to the exclusion of meaningful engagement in the negotiations of the mining lease. The Tribunal concluded that "Norwest came to the negotiations ...under the mistaken belief that it was not required to negotiate" because of the prior agreement.

The Tribunal emphasised that, while the prior agreement is not irrelevant, and should be taken into account as part of the context of the negotiations, the relevant negotiations for the grant of the mining lease commence on the date of the section 29 notice. The grantee party's conduct from the date of that notice is what is primarily under consideration by the Tribunal.

In concluding that Norwest did not act in good faith, the Tribunal considered:

- its continued reliance on the prior agreement, without acknowledging the history of disputes and the native title party's concerns about the agreement;
- failure to personally attend or meaningfully engage in the mediations;
- selectively engaging with the outcomes of mediation and only to progress the issues of concern to Norwest; and
- evidencing little intention to resolve the issues raised by the native title party.

ATLAS IRON PTY LTD V NYAMAL ABORIGINAL CORPORATION– GRANTEE PARTY HAD NEGOTIATED IN GOOD FAITH

In contrast, the Tribunal in Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation [2020] NNTTA 75 (**Atlas Iron**), found that the grantee party had acted in good faith.

While the grantee party had relied on a prior agreement, and expressed its view to the native title party that the grant of the mining leases were covered by the terms of the agreement, the Tribunal concluded that this was not in an attempt to disregard the good faith negotiation scheme in the Native Title Act.

Rather, the grantee party was relying on the prior agreement as a reference point for signing a new section 31 agreement which is required to ensure compliance with the Native Title Act processes. The grantee party left it open to the native title party to communicate a different view on the prior agreement, and continued to engage with them through mediation, provision of material requested, joint engagement of Counsel for advice and payment of costs.

Considering the conduct of the parties in this context, the Tribunal concluded that the grantee party's conduct was not unreasonable or unnecessary, but rather reflected a subjective honesty of intention.

KEY INSIGHTS

It is not unusual at the early stage of a resources project for a company to reach agreement with the relevant native title party about how native title and Indigenous cultural heritage issues should be managed for the life of the project, including agreement about future grants in the project area.

These decisions provide a timely reminder that every right to negotiate process requires the parties to negotiate in good faith with a view to reaching an agreement about the relevant grant, regardless of the existence of a prior agreement about future grants. Reliance on a prior agreement must not be to the exclusion of meaningful engagement with the native title party after the section 29 notice has been published.

This is even more relevant in the context of the Senate's Interim Report on the Juukan Gorge Caves incident. The Interim Report highlighted the inequitable negotiating position between native title parties and grantee parties in the right to negotiate process and flagged the possibility of further reforms to the Native Title Act.

Authors: Leonie Flynn, Expertise Counsel and Anna Seddon, Lawyer

10

The role of the State in native title claims litigation: balancing competing interests as a model litigant

MALONE ON BEHALF OF THE WESTERN KANGOULU PEOPLE V STATE OF QUEENSLAND [2020] FCA 1188

WHAT YOU NEED TO KNOW

- The decision in *Malone on behalf of the Western Kangoulu People v State of Queensland* [2020] FCA 1188 provides guidance on the role of the State in native title claim proceedings and how the model litigant principles apply in this context.
- The Model Litigant Principles issued by the Queensland Government require the State to act fairly and firmly in the conduct of litigation. They reflect an understanding that the power of the State is to be used for the public good, with due regard to the proper use of taxpayers money, and not as a means of oppression. The Model Litigant Principles are an internal policy, and do not create rights or causes of action for third parties. In determining whether to agree to a consent determination of native title, the State must be satisfied that there is a credible or cogent basis to conclude that the claim was valid.

WHAT YOU NEED TO DO?

- Note that in native title claim proceedings, the experts are not agents of the parties and cannot make admissions on their behalf. Just because the State's expert agrees with the claim group's expert does not automatically satisfy the State's threshold for a "credible basis" for a native title claim.
- Remember that the State represents the interests of all of the community. In acting firmly and fairly (according to the Model Litigant Principles), the State must appropriately test all claims, particularly given that native title determinations affect proprietary rights.

In *Malone on behalf of the Western Kangoulu People v State of Queensland* [2020] FCA 1188, the Federal Court considered the role of the State in native title claims and how the model litigant principles affect proceedings.

THE MATTER AROSE IN THE CONTEXT OF A DISAGREEMENT ABOUT WHETHER THE CLAIM WAS SUITABLE FOR CONSENT DETERMINATION

This matter considered an interlocutory application made in the native title claim proceeding by the native title claim group seeking to strike out a Response filed by the State to the group's Statement of Facts and Matters. The Federal Court said that the question before it was whether the approach of the State was such that it should be disentitled from participating in the substantive case in opposition to the native title claim.

Two joint reports produced by the parties' experts provide the context for the disagreement In the reports, the experts effectively agreed that native title existed over the claim area. However, the experts did not explain the reasons for their agreement.

The native title claim group wrote to the State, seeking a consent determination of native title, on the basis of the experts' reports. The State replied that, as the experts had not explained their reasoning, it was not satisfied there was a credible basis for a consent determination.

Following orders from the Court, the claim group produced a Statement of Facts and Matters which it sought the State to admit. This document included statements from the experts' reports. The State responded by observing that the experts' opinions were not binding and would still need to be tested at trial.

The claim group applied to strike out this Response.

THE ROLE OF THE STATE IN NATIVE TITLE PROCEEDINGS

It is a well-established principle that, before entering an agreement for a consent determination of native title, the State need only be satisfied that there is a "credible basis" for the determination.

In Malone, the claim group submitted that, because the experts had substantially agreed that native title existed, there was a credible basis for a consent determination. They submitted that the State's refusal to enter an agreement was:

- inconsistent with the overarching purpose of civil litigation stated in Part VB of the *Federal Court of Australia Act 1976* (Cth);
- an abuse of process;
- a failure to act in good faith or consistently with the legislative intention of the *Native Title Act 1993 (Cth)* for the recognition of native title through negotiation and for contested litigation to be a last resort; and
- a breach of the Model Litigant Principles issued by the Queensland Government (discussed separately below).

In considering these arguments, the Court provided very useful guidance about the role of the State in the resolution of native title claims.

The Court referred to its earlier decision in *Western Bundjalung People v New South Wales [2017] FCA 992*, where it said in relation to the operation of Part VB of the Federal Court Act in the native title context (at [17]):

> It is the State party which is subject not only to the duties imposed by the NTA [Native Title Act] and the [Federal] Court Act but also by the obligations of a model litigant. Unless the State party is both vigilant about discharging all of its duties in good faith, recognising the objects of the NTA and its unique role, and committed to taking responsibility for driving sensible and fair outcomes in a timely manner, there is no real prospect of other parties or the Court being able to effectively discharge their and its duties. There is also no prospect of matters being resolved in a manner which is consistent with the objects of the NTA.

The Court held that:

- As a respondent to a native title claim, the State represents the interests of all of the community: *Munn for and on behalf of the Gunggari People v State of Queensland* (2001) 115 FCR 109;
- In determining whether to agree to a consent determination of native title, the State need only be satisfied that there is a credible or cogent basis to conclude that the statutory requirements of a determination of native title under the Native Title Act are satisfied: *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474;
- It would be inconsistent with its obligations under the Native Title Act and Part VB of the Federal Court Act for the State to require an applicant to go further: *Western Bundjalong People at* [21]–[22]; *Widjabul Wia-Bal v Attorney-General of NSW* [2020] FCAFC 34 at [51].

In relation to "good faith", the Court referred to the Full Federal Court decision in *Widjabul Wia-Bal v Attorney-General of NSW* [2020] FCAFC 34. The Full Court held that there is a clear and unambiguous duty on all parties to act in good faith in the conduct of mediation under the Native Title Act. For more information about that case, see our 2019 Year in Review article Think twice before using the carrot of consent to determination as leverage – Full Court reminder about duty of good faith in native title mediation.

The Federal Court held that the State's conduct in not accepting the conclusion of the joint expert report, did not offend these principles, did not establish an absence of good faith and was not an abuse of process. The State's conduct was not unjustifiably oppressive and did not bring the administration of justice into disrepute. Importantly, experts are not agents for their retaining parties, meaning they cannot make admissions on behalf of a party. Therefore, the agreement of experts does not necessarily establish a credible basis for a native title claim.

In this case, the State was concerned that:

- the applicant group and its composition were unclear;
- there was insufficient evidence to support the continuing acknowledgement of the group's laws, customs, and connection with the claim area; and
- there were insufficient facts to support the experts' opinions.

Because of these factors, the Court held that the State had a legitimate basis for refusing to enter into a consent determination and instead testing the experts' opinions at trial.

HOW DO THE STATE'S MODEL LITIGANT PRINCIPLES AFFECT NATIVE TITLE CLAIMS?

The native title claim group submitted that the State's conduct was in breach of the model litigant principles.

The Model Litigant Principles issued by the Queensland Government (revised 4 October 2010), require the State to act fairly and firmly in the conduct of litigation, and to consider methods of alternative dispute resolution prior to commencing court proceedings. Across Australian jurisdictions, governments, including the Commonwealth, are expected to comply with similar model litigant obligations. The model litigant principles reflect an understanding that the power of the State is to be used for the public good, with due regard to the proper use of taxpayers money, and not as a means of oppression.

The native title claim group submitted that the Model Litigant Principles required to State to deal with claims promptly, not cause unnecessary delay, minimise the scope and cost of litigation, and engage in alternative dispute resolution.

In response, the State submitted that it was acting in accordance with its Model Litigant Principles, which require it to litigate according to the principles of fairness and firmness, as follows:

- Fairness requires the State to not force native title applicants to prove facts which the State knows to be true. In this case, the State was not satisfied that there was a credible basis for the claim (as explained above), meaning its conduct was not unfair.
- Firmness requires the State to appropriately test all claims. The State's position was that, because native title litigation involves proprietary rights, it was especially important to properly test their accuracy.

The Court held that the Model Litigant Principles issued by the Queensland Government do not create rights on the part of other litigants. They are directions issued by the Queensland Government to those conducting litigation on behalf of the State. The claim group's application for a strike out of the State's response could not be founded on a breach of the Model Litigant Principles.

Authors: Leonie Flynn, Expertise Counsel and Anna Seddon, Lawyer

Extinguishment principles: Federal Court zeros in on general law validity and confirms that 'major' earthworks need to have real impact

NYAMAL PALYKU PROCEEDING (NO 2) [2020] FCA 788
AND WILSON V STATE OF SOUTH AUSTRALIA (NO.4) [2020] FCA 1805

11

WHAT YOU NEED TO KNOW

- Two recent Federal Court decisions provide a reminder that evidence of the valid grant of interests at general law is the backbone of any argument that native title has been extinguished.
- In *Nyamal Palyku Proceeding (No 2)* [2020] FCA 788, the Federal Court found that the grant of a special lease was not valid at general law, so did not extinguish native title. Importantly, the Court noted that the presumption of regularity will not cure all process defects.
- In *Wilson v State of South Australia (No 4)* [2020] FCA 1805, the Federal Court was not satisfied by patchy evidence of the existence of a lease, so made no extinguishment finding. The Court also held that the construction of a golf course did not extinguish native title on the basis that it was not "major earthworks".

WHAT YOU NEED TO DO

- Be aware that any assessment of whether native title has been extinguished requires evidence of the grant of the inconsistent tenure and its validity at general law. Assembling the evidence can be a painstaking task.
- Do not assume that extensive land use will necessarily amount to extinguishment. For public works to amount to extinguishing major earthworks there needs to be significant disturbance to the land itself.

REMINDER THAT ONLY GRANTS THAT WERE VALIDLY MADE AT GENERAL LAW CAN HAVE THE EFFECT OF EXTINGUISHING NATIVE TITLE

Although "validity" is often glossed over in discussions about extinguishment of native title, general law validity is a precondition to validity under the *Native Title Act 1993* (Cth) and to a finding that native title has been extinguished by a grant of inconsistent tenure.

Two recent decisions of the Federal Court addressed challenges to general law validity by native title parties and highlighted the difficulties of proof.

SUCCESSFUL CHALLENGE TO GENERAL LAW VALIDITY PREVENTS FINDING OF EXTINGUISHMENT - NYAMAL PALYKU PROCEEDING (NO 2)

In *Nyamal Palyku Proceeding (No 2)* [2020] FCA 788 (**Nyamal**), the Federal Court was asked to determine whether the creation and vesting of a reserve and the grant of a special lease were valid at general law.

The Court ultimately found that the grant of the special lease was invalid at general law and therefore could not have any effect on native title. However, the reserve was valid at general law and extinguished native title.

COURT FINDS GRANT OF THE SPECIAL LEASE WAS INVALID AT GENERAL LAW

The Court was required to consider the validity of a special purpose lease (Special Lease) granted in 1957 under section 116 of the *Land Act 1933* (WA) for the purpose of 'use of Natives'.

The native title claim group argued that the Special Lease was not validly granted under the Land Act because:

- 'use of Natives' was not a prescribed purpose in section 116;
- the grant of the Special Lease could not be saved by the Governor's approval in the Government Gazette because the notice requirements had not been complied with;
- there were irregularities in the form of the application for and notice of the grant, which its registration did not rectify; and

- the Minister for Native Welfare did not have power under the *Native Welfare Act 1905* (WA) to acquire the land of the Special Lease other than for the purpose of sale or lease 'to a native' (as opposed to 'for the use of Natives').

The Federal Court held that it was bound to follow the approach of the High Court in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 (**Forrest**). Forrest concerned a mining tenement applicant's failure to comply with the statutory regime in the *Mining Act 1978* (WA). The Court determined that the statutory regime for disposing of Crown lands in Western Australia was broadly similar to that for the disposal of mineral resources in Forrest.

The Court noted that where a public official attempts to act in the course of their duties, a presumption arises that all conditions necessary for that exercise are fulfilled - the presumption of regularity. However, in this instance, there were several deviations from the statutory conditions in section 116.

Specifically, granting the Special Lease:

- before receiving an application in the prescribed form;
- for a purpose, notice of which was not published in the Government Gazette; and
- before any of the four required notices of application for the lease were published in the Government Gazette

The Court held that the presumption of regularity could not regularise the State's acts in these circumstances – the presumption was rebutted by evidence that formal conditions were not followed.

Given that the Special Lease was invalid, it could not extinguish native title.

COURT APPLIES PRINCIPLES OF STATUTORY INTERPRETATION TO FIND CREATION OF RESERVE AND ITS VESTING VALID AT GENERAL LAW

The native title group argued that the reserve was not validly created because the purpose for its creation – 'commonage' – was not a listed purpose under the *Land Regulations 1887* (WA).

The Court was required to consider the terms of the historical legislation and apply principles of statutory interpretation to determine the question. Ultimately, the Court was satisfied that the reserve had been validly created at general law. The Court also rejected the native title group's argument that the reserve had been invalidly vested.

Accordingly, the Court found that the valid vesting of the reserve extinguished native title.

MORE PRINCIPLES GOVERNING EXTINGUISHMENT CONSIDERED – WILSON V STATE OF SOUTH AUSTRALIA (NO.4)

As in *Nyamal*, the Federal Court in *Wilson v State of South Australia (No 4)* [2020] FCA 1805 (**Wilson**) considered whether a lease, on which an extinguishment assertion turned, was in fact valid (or even existed at all).

The Court also considered whether a public golf course was a "major earthworks" "public work". This decision is significant because there has been little judicial consideration of the meaning of "major earthworks" under the public works extinguishment provisions of the Native Title Act.

THERE WAS NOT ENOUGH EVIDENCE TO ESTABLISH THE GRANT OF A LEASE

The golf club argued that it had been granted a "community purpose lease" for the golf course land, which extinguished native title. However, no evidence of the grant of a lease was produced by the golf club or the claimed lessor, the local council.

The definition of "lease" in the Native Title Act is wide and relevantly includes a lease enforceable in equity.

The Court considered whether a lease enforceable in equity may have come into existence in this case. The Court noted that the definition of "lease" contemplates an oral agreement for a lease that the parties intend to be legally binding upon them, whether or not the formalities for a valid transfer of a legal interest in the land have been satisfied.

The definition of "lease" may also contemplate a situation where one party would be required to grant a lease in the absence of a contract in circumstances where a lease has been promised, and it would be unconscionable for that promise to be abandoned.

However, neither the council nor the golf club could produce an executed, unexecuted or even draft lease. Consequently, the Court was not satisfied that a lease had in fact been granted. It concluded that native title had not been extinguished in relation to the golf course by virtue of a lease.

CONSTRUCTION OF A GOLF COURSE DOES NOT COMPRISE "MAJOR EARTHWORKS" AND DOES NOT SATISFY THE DEFINITION OF "PUBLIC WORKS"

The definition of "public works" in the Native Title Act includes "any major earthworks" which is defined as:

> ...earthworks (other than in the course of mining) whose construction causes major disturbance to the land, or to the bed or subsoil under waters.

In this case, there was evidence that the golf course comprised scrapes, tee-off points, bunkers and fairways. The vast majority of the golf course comprised grassed areas that formed the fairways, together with vegetated surrounds.

The Court noted that disturbance to the land is an important element of "major earthworks". The focus should not necessarily be on the erection of fixtures or features directly on the surface of the land. What is required is a disturbance "to the land", and that disturbance must be "major".

The removal of vegetation or the reseeding of the land with grass did not cause "major" disturbance to the land, notwithstanding these works involved some grading with heavy machinery and significant human effort. The Court held that although these works altered the aesthetics of the land, it did not satisfy the legal test because it is necessary to have regard to the impact on the land both qualitatively and quantitively.

The Court referred to the Explanatory Memorandum to the *Native Title Bill 1993* (Cth), as considered by Mansfield J in Margarula v Northern Territory (2016) 257 FCR 226 as being important in characterising the meaning of "major earthworks" in the context of the Native Title Act. In that decision, Mansfield J said the "major earthworks" definition was intended to cover large scale earthworks (e.g. dams) which permanently disturbed the land.

Ultimately, the Court held that construction of fairways and other features of the golf course were not "major earthworks" so did not constitute "public works" and therefore did not extinguish native title.

KEY INSIGHTS

Although these decisions are not ground breaking, they provide a useful reminder that evidence of the valid grant of interests at general law is the backbone of any extinguishment argument. Native title parties continue to challenge general law validity in relation to discrete grants and land parcels in the context of both litigated and negotiated determinations of native title.

The Federal Court's findings about the definition of "major earthworks", which focused on disturbance to the land itself, not fixtures or features directly on the surface of the land, is also useful for parties considering whether native title has been extinguished by "public works".

Authors: Madeleine Noonan, Lawyer and Lucas Spezzacatena, Lawyer

12

Costs Update: Court calls out unreasonable conduct with costs orders

WHAT YOU NEED TO KNOW

- In the native title jurisdiction the general position remains that each party must bear its own costs.
- However, applications for costs orders by and against native title parties are becoming increasingly common.
- Recent case law shows that the Federal Court retains a broad discretion to award costs and will do so where it sees unreasonable conduct and potentially in other circumstances.

WHAT YOU NEED TO DO

- Be reasonable! Courts will respond to grandstanding or pursuit of pointless arguments with costs orders.

For many years we have been following native title costs cases in our Native Title Year in Review to identify new principles and trends.

We reported on a rare exercise of the Federal Court's power to order costs against a solicitor personally in our 28 April 2020 article Costs update – Court extends costs order to solicitor propounding hopeless last minute application.

In previous years, we have also seen an increasing number of costs applications both by and against native title parties, considered most recently in our 10 April 2019 article Costs Update.

In 2020, there have been further costs applications with adverse outcomes for parties pursuing unreasonable positions in litigation.

REMINDER OF THE PROVISIONS GOVERNING COSTS IN NATIVE TITLE PROCEEDINGS

The Federal Court has discretionary power to award costs: section 43 *Federal Court of Australia Act* 1976 (Cth);

In addition, section 85A of the *Native Title Act 1993* (Cth) provides:

1. Unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs.
2. Without limiting the Court's power to make orders under subsection (1), if the Federal Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding, the Court may order the first-mentioned party to pay some or all of those costs.

COSTS – UNREASONABLE OBJECTION TO ACTIONS PROPOSED TO BE TAKEN TO FACILITATE A REMOTE PROCEEDING

In *Alvoen on behalf of the Wakaman People #5 v Queensland (No 2)* [2020] FCA 960 (**Wakaman**), the Court awarded costs against a number of respondents who objected to known and reasonable actions proposed to be taken to facilitate a remote proceeding.

Orders were made which required the preservation evidence of a witness to be obtained using video-conferencing facilities at Kowanyama Aboriginal Shire Council with two support persons in attendance (**May Orders**).

As a result of the Council's inability to provide video-conferencing facilities to the witness, the North Queensland Land Council (**NQLC**) filed an interlocutory application which sought to amend the May Orders to enable the NQLC to provide the video-conferencing facilities to the witness, and to enable a legal representative of the NQLC to attend whilst he gave his evidence.

Several respondents objected to any NQLC legal practitioner being in the room whilst the witness gave his evidence, and opposed the interlocutory application.

CONSIDERATIONS FOR AWARDING COSTS

In considering section 85A(2) of the *Native Title Act 1993* (Cth), the Court held that the respondents' objection to the proposed action was without merit, and seemed to serve little practical purpose other than to impede the progress of the litigation.

The Court noted that the presence of any NQLC legal practitioner was:

- only to provide technical support to an elderly and ill witness who was unlikely familiar with video-conferencing technology;
- in a remote location in Australia;
- in the middle of the public health pandemic caused by COVID-19 where it is necessary for witnesses to appear by such remote access technology; and
- in the context of facilitating compliance with Orders of the Court.

The Court found that the objection by the relevant respondents was on the basis that the applicant had not "explained the need" for that presence, however that "need" was evident as a matter of practical necessity (particularly in light of the fact that the May Orders contemplated support persons to assist, at least partly, given the witness' computer skills).

In light of this, the Court held that the objection was obstructive and unreasonable within the meaning of section 85A(2) of the Native Title Act. As a result, the respondents were ordered to pay the applicant's costs of and incidental to the case management hearing.

INDIGENOUS JOINDER APPLICANTS ORDERED TO PAY COSTS

In *Vea Vea (on behalf of the Wadja People) v State of Queensland* [2020] FCA 405, three Indigenous litigants who were members of the Iman People sought to join the Wadja People native title claim as respondents (**joinder applicants**).

The Court held that it was in the interests of justice to allow the joinder applicants to join the Wadja claim as respondents.

However, the Court was satisfied that the unreasonable delay of the joinder applicants in making their application for joinder had caused the Wadja applicant to incur costs, particularly as lay witnesses would have to be re-interviewed and further conferences of experts may be required.

As a result, the Court ordered that the joinder applicants pay the Wadja applicant's costs of the hearing of the application for joinder and the Wadja applicant's costs thrown away as a result of the joinder.

DENIAL OF COSTS APPLICATION AGAINST THIRD PARTY WHO UNSUCCESSFULLY ATTEMPTED TO BE JOINED AS A PARTY TO AN ILUA

In *Portframe Enterprises ATF Gnaraloo Station Trust v Western Australia* [2020] FCA 1622, the native title party unsuccessfully sought costs against Portframe Enterprises in relation to its unsuccessful application to become a party to an ILUA between the native title party and the State.

The Court did not doubt the significance of Portframe's interest in the ILUA and its desire to be involved in the negotiations, but held that there was no legal right for Portframe to become a party to the ILUA under the Native Title Act. It noted that (at [66]):

If the applicant's circumstances in the present proceeding expose a lacuna in the legislation, that is a matter which is appropriate for Parliamentary consideration with a view to determining whether the legislation should be amended to recognise and protect the rights and interests of a person in the position of the applicant.

The Court held that section 85A applied to the proceeding, which was properly regarded as a proceeding "in relation to applications filed in the Federal Court that relate to native title" within the meaning of section 80 of the Native Title Act. The Court did not consider that Portframe had engaged in any unreasonable conduct which would warrant a costs order being made against it.

STATE SUCCESSFULLY OBTAINS ORDER FOR COSTS AGAINST NATIVE TITLE PARTY AFTER CLAIM STRUCK OUT AS ATTEMPT TO RELITIGATE

In *McNamara (Barngarla Southern Eyre Peninsula Native Title Claim) v South Australia* [2020] FCA 1875, a native title determination application was made on behalf of the Barngarla People in relation to an area south of Port Lincoln on the Eyre Peninsula in South Australia (**Barngarla SEP claim**).

The State sought orders that the Barngarla SEP claim be struck out or summarily dismissed on the basis that the claim was an attempt to relitigate matters that had been finally determined in earlier proceedings (*Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9) (**Croft**).

The Court was satisfied that the Barngarla SEP claim was an attempt to relitigate issues that were finally determined in Croft, and found that the Barngarla SEP claim constituted an abuse of process. Accordingly, the Court ordered that the claim be summarily dismissed.

The State sought an order that the Barngarla applicant pay costs in respect of the application in accordance with section 85A(2) of the Native Title Act. The Court made orders affording the parties an opportunity to file supplementary submissions in respect of that question, with the State's application for costs to be determined on the papers.

In *McNamara (Barngarla Southern Eyre Peninsula Native Title Claim) v State of South Australia (No 2)* [2021] FCA 262, the Court considered the State's application for costs and held that the Barngarla applicant had acted unreasonably within the meaning of section 85A(2) of the Native Title Act in refusing to withdraw the Barngarla SEP claim and in defending the State's application, even after being put on notice that the State intended to seek costs in the event that it was successful. The Court ultimately awarded costs to the State and ordered that the Barngarla applicant bear the State's costs of preparing its application.

In doing so, the Court provided a useful reminder that its discretion to award costs is not limited by section 85A(2) of the Native Title Act. It is not necessary to prove unreasonable conduct as set out in that section, as the Court's discretion under section 43 of the *Federal Court of Australia Act 1976 (Cth)* and section 85A(1) of the Native Title Act is wide enough to award costs. The Court said:

> It may be accepted that the dismissal of an application as an abuse of process may form a sufficient basis for an award of costs against a native title applicant under section 85A of the Native Title Act. However, proof of an unreasonable act or omission is not an essential precondition to the discretionary power to award costs under section 85A(1). Section 85A(2) is not intended to limit the power conferred under either section 85A(1) or under section 43 of the Federal Court of Australia Act.

KEY INSIGHTS

In the native title jurisdiction the general position remains that each party must bear its own costs. However, recent case law shows that the Federal Court retains a broad discretion to award costs and will do so where it sees unreasonable conduct and potentially in other circumstances.

Authors: Roxane Read, Lawyer

The trend continues: more protection applications made under the Commonwealth heritage protection legislation

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984 (CTH)

13

WHAT YOU NEED TO KNOW

- Sections 9, 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) enable the Commonwealth Minister for the Environment to make a declaration for the protection and preservation of significant Aboriginal areas and objects from injury or desecration.
- The Senate's November 2020 Interim Report into the Juukan Gorge incident recommended an urgent review into the adequacy of the ATSIHP Act. These recommendations were echoed in the Independent Review of the Environment *Protection and Biodiversity Conservation Act 1999* (Cth) and the Productivity Commission in its December 2020 report on Resource Sector Regulation.
- Critical comments in these reports about the limited number of declarations under the ATSIHP Act are unlikely to reduce the continuing upward trend in declaration applications being made that began in 2019.
- The Federal Court has also determined two judicial review applications in 2020, challenging decisions under the ATSIHP Act, revealing a willingness by the Court to interpret the words "Aboriginal tradition" in the ATSIHP Act broadly, acknowledging the complexities and nuances inherent in that phrase.

WHAT YOU NEED TO DO

- Be aware that a protection application under the ATSIHP Act is a powerful means by which Traditional Owners can express dissatisfaction with cultural heritage protection outcomes under State or Territory legislation.
- Land users should be prepared for the release of the Senate Committee's final report in October 2021 and the inevitable legislative reform that will follow.

RECAP OF THE ATSIHP ACT DECLARATION APPLICATION PROVISIONS

Sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (**ATSIHP Act**) enable an Aboriginal person or a group of Aboriginal people to make an application to the Minister (in writing or orally) seeking a declaration for the preservation or protection of a specific significant Aboriginal area from injury or desecration.

A critical precondition to a declaration is that the Commonwealth Minister forms the view that the area is not adequately protected under State or Territory legislation.

PROTECTION APPLICATIONS MADE IN 2020 AND 2021

We reported on a number of 2019 ATSIHP Act protection applications in our 2019 Native Title Year in Review article Not so sleepy after all: *Commonwealth gets involved in Aboriginal and Torres Strait Islander Heritage Protection*. As we predicted in that article, this trend has continued in 2020 and 2021. We summarise the current suite of applications below:

- **Apparrlu on Murulag:** This section 10 application was brought on behalf of the Kaurareg People for the purpose of protecting an area known as Apparrlu on Murulag (or Prince of Wales Island), and adjacent waters of the Torres Strait, Queensland. The applicants sought to protect the area from roadworks and harbour works proposed by the Torres Shire Council. In January 2020, the Reporter in this matter allowed an extension of time to make representations. On 9 March 2021, the **ABC** reported that the Torres Shire Council had abandoned its construction plans after obtaining the report prepared in accordance with section 10(4) of the ATSIHP Act.

- **Former Anglican Holy Trinity Church grounds:** A section 10 application was made on behalf of the Jerrinja Local Aboriginal Land Council to protect an area known as the former Anglican Holy Trinity Church grounds in Huskisson, New South Wales. The applicant sought to protect the area from proposed commercial and residential development. More details can be found here.
- **Ravensworth:** A section 10 application was made to protect an area known as the "Ravensworth Estate", and including Bowmans Creek and Glennies Creek in the Hunter Valley, New South Wales. The applicants claimed the area was under threat of injury or desecration from mining activities. More details can be found here.
- **Warragamba Dam:** This section 10 application, made by Aunty Sharyn Halls on behalf of the Gundungurra Aboriginal Heritage Association Inc, seeks to protect an area known as the Burragorang Valley, near Warragamba, New South Wales. The applicant attributes the potential injury or desecration to the proposed raising of the Warragamba Dam walls. More details can be found here.

JUDICIAL REVIEW CHALLENGES TO MINISTERIAL DECISIONS ON PROTECTION APPLICATIONS

THIRD SUCCESSFUL JR CHALLENGE TO ATSIHP ACT DETERMINATION - WESTERN HIGHWAY UPGRADE, VICTORIA

Onus v Minister for the Environment [2020] FCA 1807 involved a challenge to the Minister's decision not to make a declaration to protect six trees, and their surrounding area, near Ararat in Victoria. The applicants in this case had brought the application under sections 10 (protection of significant Aboriginal places) and section 12 (protection of significant Aboriginal objects) of the ATSIHP Act to protect the area and trees from the construction and realignment of the Western Highway.

This matter had a lengthy and complex history. In December 2018, Minister Price declined to make the declarations sought. That decision was quashed by consent by the orders of the Court and remitted for redetermination. Minister Ley then made a July 2019 decision again refusing to make the declarations. That decision was found to be invalid and the application was once again remitted for redetermination (see *Clark v Minister for the Environment* [2019] FCA 2027). Following the Court's order in Clark, Minister Ley made the determination the subject of this decision on 6 August 2020.

In respect of the section 10 application, the applicants argued that the Minister had failed to commission and receive a report under section 10(1)(c) of the ATSIHP Act. They contended that a change in circumstances since the original report was completed meant that it was no longer relevant. In the alternative, the applicants argued that the Minister's failure to obtain an up-to-date report was unreasonable.

The Federal Court rejected the applicants' arguments, noting that there is nothing in the Act requiring the Minister to obtain a further report when there is a significant change in the conduct being assessed.

The applicants also sought a declaration under section 12 of the ATSIHP Act to protect the trees as significant Aboriginal objects.

While the Minister was satisfied that five of the six trees were significant Aboriginal objects, she did not accept that they were under threat of injury or desecration from the highway alignment.

Griffiths J held that the Minister had acted unreasonably and/or on an incorrect understanding of the law. His Honour found that the Minister had committed three reviewable errors. Firstly, the Minister had overlooked some of the material and focused instead on whether the trees would be physically injured. In doing so, she fell into the same reviewable error identified by the Court in Clark. Griffiths J stated that the Minister had failed "to grapple with the complex and nuanced cultural and spiritual heritage associated with the trees and the effect on that heritage by the alignment of the highway in proximity to them" (at [121]).

Secondly, the Minister had concluded that the trees were not under threat of injury or desecration without knowing precisely the physical proximity of the highway alignment to the trees.

Thirdly, the Minister had failed to consider the application in so far as it related to the relationship between the five trees and the area beyond the Specified Area.

Griffiths J found that the Minister's findings and reasonings in relation to the section 10 application could be severed from those relating to the section 12 application. On that basis, his Honour directed that only the section 12 decision be set aside.

Griffiths J ordered Minister Ley to refer the section 12 application for reconsideration and determination by another Minister with responsibility for administering the Act, given this would be the third time Minister Ley had considered the section 12 application, with the previous two attempts having been set aside for jurisdictional error.

MINISTER MAY TAKE INTO ACCOUNT THE SOCIAL AND ECONOMIC IMPACTS OF A DECLARATION ON NON-INDIGENOUS PERSONS – APPLICATION NOT SUCCESSFUL IN RELATION TO SHENHUA WATERMARK COAL MINE IN NSW

In *Talbott v Minister for the Environment* [2020] FCA 1042, the applicant (on behalf of the Gomeroi Traditional Owners) applied for judicial review of the Minister's decision not to make a section 10 declaration over areas located within or close to the proposed Shenhua Watermark Coal Mine near Breeza in New South Wales.

The Minister had determined that the areas were "significant Aboriginal areas" for the purposes of the Act. She was also satisfied that the areas were under threat of injury or desecration. However, the Minister concluded that, on balance, the social and economic benefits of the mine to the local community outweighed the impacts on the applicant's cultural heritage.

The applicant argued that the Minister had taken into account an irrelevant consideration by considering the social and economic impacts of the mine on the local community. It was argued that there is a limitation on the matters the Minister may take into account when determining a section 10 declaration arising from the Act's constitutional source of power in section 51(xxxvi) of the *Constitution* (known as the race power).

The Federal Court rejected this argument, stating at paragraph 91:

> The Heritage Act is a law that operates in connection with the subject matter of s 51(xxvi). It does not cease to operate in connection with that subject matter because it confers a discretion as to whether or not to make the declaration in s 10, which may be exercised by reference to, inter alia, non-racial considerations such as the social and economic impacts on the community of the declaration.

The application for judicial review was therefore dismissed.

On 1 September 2020, the SBS reported that the applicant had lodged a new application to protect the area, however this further application has not yet been notified in the Australian Government gazettes.

CALLS FOR LEGISLATIVE REFORM

The Senate's November 2020 Interim Report into the Juukan Gorge incident recommended an urgent review the adequacy of the ATSIHP Act. These recommendations were echoed in the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and the Productivity Commission in its November 2020 report on Resource Sector Regulation.

The reports were highly critical of the limited number of declarations under the ATSIHP Act. According to the Productivity Commission Report there have been only 7 long term declarations made, out of 500 applications, since the commencement of the Act in 1984. The reports recommended that the Commonwealth Minister play a more active role under the ATSIHP Act to protect cultural heritage, rather than deferring to State legislative processes and using the ATSIHP Act as a last resort.

It is yet to be seen how this recommendation will play out in the Minister's consideration of applications for protection declarations under the ATSIHP Act.

KEY INSIGHTS

The current level of legal, social and political developments in the Aboriginal cultural heritage space is unprecedented. Calls for reform have come not just from the Senate, but from the Independent review of the EPBC Act and the Productivity Commission report on Resource Sector Regulation.

Protection applications under the ATSIHP Act are a powerful means by which Traditional Owners can express their dissatisfaction with cultural heritage protection outcomes under State or Territory legislation.

Land users should be prepared for the release of the Senate Committee's final report into the Juukan Gorge incident in October 2021 and the inevitable legislative reform that will follow.

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Free, prior and informed consent

THE SENATE'S JUUKAN GORGE REPORT HAS EVERYONE TALKING ABOUT FPIC

14

WHAT YOU NEED TO KNOW

- The Senate Committee's Interim Report into the Juukan Gorge incident has catapulted the concept of free, prior and informed consent (**FPIC**) from Indigenous people as a project precondition, onto centre stage.
- Despite the increasing recognition of the need for FPIC in an international context, it is not yet part of Australia's domestic law.
- While many Native Title Act 1993 (Cth) and Indigenous heritage process are structured to achieve FPIC from Traditional Owners, that is not always the case.
- As highlighted by the Senate Committee's Interim Report, a failure by project developers to invest in early, appropriate and considered FPIC processes can create significant commercial and operational risks once operations commence and impacts occur.

WHAT YOU NEED TO DO

- Project developers operating in Australia should consider whether to adopt an FPIC standard in respect of project development, even where not required by domestic law.
- Watch out for legislative change in the Indigenous land law space. Although Government may not impose full FPIC, a greater role for Traditional Owners in decision making about their land will undoubtedly be reflected in changes to our laws as governments attempt to bridge the gap with community expectation.

FPIC AT A GLANCE

In recent years, the concept of FPIC has often been characterised as a best practice process for safeguarding the rights of Indigenous peoples against the backdrop of projects within or near Indigenous territories. More recently, FPIC has come to prominence in Australia through the Interim Report of the Joint Standing Committee on Northern Australia in *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (**Juukan Gorge Report**). It was a constant theme.

WHAT IS FPIC?

Essentially, FPIC refers to a right of Indigenous peoples to consent, on a free and informed basis, to developments that affect them and the lands on which they live. The consent must be given voluntarily without coercion, intimidation or manipulation. Importantly, consent should be sought sufficiently in advance of any authorisation or commencement of activities and respect should be shown to time requirements of any Indigenous consultation or consensus processes. Ensuring the consent is "informed" requires that the information provided covers the full range of issues including nature and scope of the project, purpose, duration, locality, impacts and risks.

Finally, a collective decision must be made by the rights holders and reached through a customary decision-making process of the relevant communities. FPIC does not necessarily require unanimity and may be achieved when individuals or groups within the community disagree however, FPIC requires actual agreement to be reached and not mere consultation.

WHAT ARE THE LEGAL ORIGINS OF FPIC?

The wider Indigenous rights movement sparked the birth of the FPIC concept and the subsequent international legal and policy framework provides for specific rights for indigenous peoples.

The Indigenous and Tribal Populations Convention, 1957 (No. 107) (**Convention 107**), adopted by the International Labour Organisation (**ILO**) in 1957 was the first acknowledgement of FPIC in an international law context. In 1989, Convention 107 was replaced by the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (**Convention 169**). Convention 169 builds on the rights recognised in Convention 107, with Article 16 stating that where "relocation of Indigenous peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent".

Article 7(1) of Convention 169 provides that Indigenous people "shall have the right to decide their own priorities for the process of development as it affects their lives … and the lands they occupy or otherwise use … and to exercise control, to the extent possible, over their own economic, social and cultural development". Contemporary descriptions of FPIC seem to have developed from this principle.

Perhaps the most important and comprehensive document setting out an international standard in relation to FPIC is the 2007 United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), adopted in 2007. UNDRIP expresses the position that governments must obtain the FPIC of Indigenous peoples prior to approving any resource project affecting their lands. Although UNDRIP is a declaration and therefore not formally binding, its importance should not be underestimated. It is being increasingly referred to by human rights organisations and has been endorsed by some 148 nations.

ADOPTION OF FPIC IN CORPORATE CONTEXTS

ICF PERFORMANCE STANDARDS

One of the earliest mentions of FPIC in a corporate context was in the early 2000s by the International Finance Corporation (**IFC**), an extension of the World Bank which lends money predominately for development projects. The IFC released its *Performance Standards on Environmental and Social Sustainability*, supplemented by Guidance Note 7 – Indigenous Peoples (**Performance Standards**) which contains an endorsement of FPIC in Performance Standard 7. The IFC Performance Standards set out an engagement process with relevant Indigenous groups that includes, amongst others, disclosure of information, consultation and participation in a culturally appropriate manner and that provides sufficient time for the decision-making processes of Indigenous peoples with a focus on reaching agreement.

The Performance Standards are widely regarded as industry best practice for the management of social and environmental risk, and have been used as a model for drafting the internal corporate policies and procedures of many large global companies.

EQUATOR PRINCIPLES

Similarly, FPIC has extended its reach to the private international project finance market through the Equator Principles (**EP**). The EPs are a voluntary and industry-governed initiative that adopts the Performance Standards as a risk management framework for large-scale projects in developing countries. Essentially, if adopted, financiers must ensure clients comply with the EPs as a condition of their lending arrangements. The EPs expressly adopt the procedural requirements necessary for borrowers to achieve FPIC as described in the Performance Standards. Currently, there are some 114 financial institutions across 37 countries that have formally adopted the EPs as a guide for determining and assessing environmental and social risk in projects.

Additionally, the International Council on Mining and Metals (**ICMM**), a mining industry association comprised of the world's largest mining and metals companies and associations, amended its Indigenous Peoples and Mining Position Statement in 2013 to include a commitment by its members to operationalise FPIC requirements. Consequently, all ICMM members are expected to have revised their internal policies to reflect this position.

The influence of the principle of FPIC has led the World Bank to recognise that it has outgrown its formal codification in law and stated that it is now "a necessary feature of successful decision making" in relation to projects near or on Indigenous land.

STATUS OF FPIC IN AUSTRALIA

LAW REFORM

Despite the increasing recognition of FPIC in an international context, it is not part of Australia's domestic law. As result, its application is somewhat constrained.

The Australian Law Reform Commission (**ALRC**) in its 2015 report "Connection to Country: Review of the Native Title Act 1993 (Cth)" (Report) observed that while UNDRIP did not have the status of a binding treaty, it was nevertheless a consideration in developing its recommendations.

The Report discussed Australia's historical support of UNDRIP and echoed the words of Former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda who stressed that a key principle of UNDRIP was "participation in decision making, underpinned by free, prior and informed consent and good faith".

However, the ALRC terms of reference were limited to issues of traditional connection, authorisation by the native title groups and joinder to native title claims. The Report did not address the extent to which FPIC was reflected in the Native Title Act 1993 (Cth) more broadly. The most public discussion of occurred in the Juukan Gorge Report.

As discussed above, the Juukan Gorge Report characterised FPIC as a critical concept and urged mining companies to ensure that FPIC is provided and to benchmark agreements against international best practice in FPIC. The Juukan Gorge Report also recommended that:

> any new legislation must, as a minimum, ensure Aboriginal people have meaningful involvement in and control over heritage decision making, in line with the internationally recognised principles of free, prior and informed consent.

FPIC NOT FULLY REFLECTED IN NATIVE TITLE LAW

As discussed above, FPIC has not been codified into the Native Title Act in the terms of UNDRIP, and there remain gaps worth noting.

For example, the Native Title Act sets out the "right to negotiate" process which mandates that companies proposing development which will affect native title must negotiate in good faith with the affected native title parties to reach agreement about the doing of the act. If agreement is not reached after six months, the National Native Title Tribunal can be asked to arbitrate. The Tribunal may determine that the development may proceed without the agreement of the native title party. This highlights the disconnect with the underlying principles of FPIC.

On the other hand, elements of FPIC can be seen within Australia's native title and Indigenous heritage protection regimes. Despite its limitations, the right to negotiate, and associated obligation to negotiate in good faith, means that proponents are sitting down to agree terms with the native title parties all over Australia every day. Further, in Victoria and Queensland, in particular, Traditional Owners are at the centre of heritage decision making. Other States have a way to go.

WHERE TO NEXT FOR FPIC?

It is evident that FPIC brings with it complexity at the domestic level in relation to its practical application. However despite these complexities, there is an increasing sentiment that FPIC will become part of project development in Australia.

The prevailing takeaway for companies moving forward is not whether FPIC should be a consideration, but instead how to grapple with the difficulties in implementing FPIC into corporate procedures in a meaningful way. Given the emphasis on FPIC in the Juukan Gorge Report, we consider it likely that FPIC principles will influence legislative changes in the heritage arena and quite possibly the Native Title Act.

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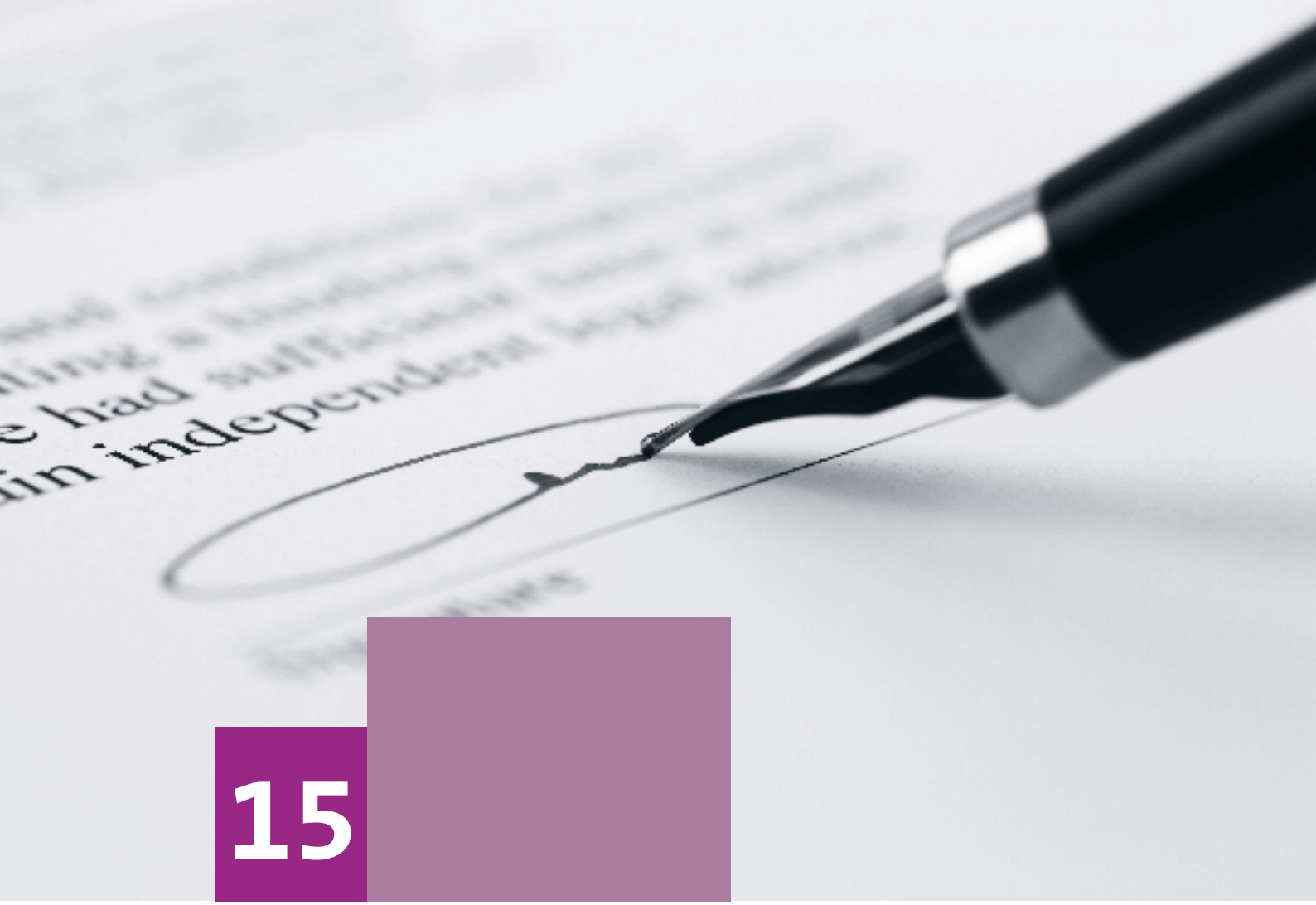

15

Treaty Update: Progress in state based Treaty negotiations and proposals for a national Indigenous Voice

WHAT YOU NEED TO KNOW

- There has been progress over the last 12 months at the Federal level on developing an "Indigenous Voice" to provide advice to the Australian Parliament. The Federal government's position remains that Treaty making is an issue for the States and Territories.
- Momentum is building for Treaty negotiations in Victoria, Queensland, ACT and NT, where government is supportive of the process.

WHAT YOU NEED TO DO

- Land users should be across the progress and scope of any local Treaty/regional settlement agreements.
- Watch out for opportunities to consult with Government on Treaty making and be ready to make submissions.

REMINDER OF BACKGROUND TO TREATY IN AUSTRALIA

Australia continues to be the only Commonwealth country to never have signed a Treaty with its Indigenous people.

In our 28 April 2020 article Treaty making in Australia - Will the pieces of the puzzle come together?, we explained the concept of Treaty and set out how Treaty making was progressing in each State and Territory and at a Federal level.

Since, then, there has been progress at the Federal level on developing an "Indigenous Voice" to provide advice to the Australian Parliament. The Federal government's position remains that Treaty making is an issue for the States and Territories.

PROGRESS TOWARDS A NATIONAL INDIGENOUS VOICE

On 9 January 2021, Minister for Indigenous Australians, the Hon Ken Wyatt AM MP announced the next stage of the Indigenous Voice co-design process, publishing an Interim Report on the co-design process and inviting all Australians, particularly all 800,000 Indigenous Australians, to provide feedback on the Indigenous Voice proposals.

Indigenous Voice is not a new concept, with the Interim Report noting the calls for an Indigenous Voice date back to the 1800s. More recently, calls for Indigenous Voice were reflected in the May 2017 Uluru Statement from the Heart, including enshrining a First Nations Voice in the Australian Constitution.

These proposals were initially dismissed by the Federal Government. However, the 2018 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People (which was set up following the Uluru Statement from the Heart), recommended that the Federal Government commit to a co-design process to develop proposals to give Aboriginal and Torres Strait Islander peoples a say in the laws, policies and programs that affect them.

Consequently, in October 2019, the Federal Government announced the Indigenous Voice co-design process. The Interim Report was prepared by the Senior Advisory Group (chaired by Professor Dr Marcia Langton AO and Professor Tom Calma AO) and co-design groups, in conjunction with the National Indigenous Australians Agency. It has put forward proposals for a "National Voice Design" and a "Local and Regional Voice Design."

Under the current proposals, the National Voice would comprise a national body of up to 20 Aboriginal and Torres Strait Islander members, that could provide advice to the Australian Parliament and Government on relevant laws, policies and programs; and engage early with the Australian Parliament and Government in the development of relevant policies and laws.

Membership of the National Voice could be comprised of members selected from Local and Regional Voices, or alternatively elected directly by Aboriginal and Torres Strait Islander People.

Meanwhile, the Local and Regional Voice would be a regional level government structure, designed and led by communities. It would provide advice to all levels of government about what is important in communities and in the region. The current proposal suggests there would be 25 – 35 Local and Regional Voice regions across Australia, which would be structured differently according to community need.

Key matters that will be the subject of consultation under the Indigenous Voice include native title, race, racial discrimination and matters that significantly affect Aboriginal and Torres Strait Islander People.

However, under the current proposal, the Indigenous Voice will not become enshrined in the Australian Constitution (as called for in the Uluru Statement from the Heart), and will not provide members with any powers to veto laws in Parliament.

TREATY PROGRESS IN VICTORIA

Of all Australian jurisdictions, Victoria is currently the most progressed in its Treaty discussions and provides an example of how Treaty may be developed.

In December 2019, the First Peoples' Assembly of Victoria (**Assembly**) was established to represent Aboriginal people in the development of a framework for Treaty negotiations. The Assembly is comprised of Aboriginal leaders who are all Traditional Owners, elected and appointed by their communities. The Assembly, through six dedicated committees (set out below), is working to establish key elements that will lead to Treaty negotiations:

1. **Treaty Authority and Interim Dispute Resolution Process Committee:** which is responsible for engaging community across the state and leading the creation of a Treaty Authority and Interim Dispute Resolution Process. In February 2021, the Assembly and the State signed the Interim Dispute Resolution Process, which will apply to disputes between the Assembly and the State in the Treaty process, as well as disputes relating to the negotiating of the Treaty Authority, Treaty Negotiation Framework and Self-Determination Fund. The next step for this committee will be to establish the Treaty Authority, which is intended to provide effective and independent oversight of the Treaty process and negotiating parties.
2. **Treaty Negotiating Framework Committee:** which will set the rules for Treaty negotiations, including what should be included and who will negotiate and be represented in the Treaty. It is yet to be determined whether there will be a single state-wide Treaty, or multiple local Treaties, or a combination of both.
3. **Self-Determination Fund Committee:** which will oversee the provision of a financial resource from the State that will support Aboriginal groups to negotiate Treaties on equal standing with the State.
4. **Cultural Governance Committee:** which is tasked with ensuring that the Assembly is culturally robust, culturally safe and driven by cultural protocols of doing business the Aboriginal way.
5. **Elders' Voice Committee:** which will oversee the establishment of the Elders' Voice, ensuring that Aboriginal Elders of Victoria provide guidance, wisdom and cultural oversight to the work of the Assembly.
6. **Truth Telling Committee:** Truth telling is a process of openly sharing historical truths after periods of conflict and is regarded as a necessary precondition for successful Treaties in Victoria (and elsewhere). On 9 March 2021, the Victorian Government, in partnership with the Assembly, announced that it will establish the Yoo-rrook Justice Commission, as part of Australia's first truth-telling process (Yoo-rook is the Wemba Wemba / Wamba Wamba word for Truth).

The Commission, which will be conducted by five Commissioners, will be modelled on other international truth telling commissions and is intended to be established under the *Inquiries Act 2014 (Vic)*, meaning it will have the powers of a Royal Commission. It is anticipated that the Commission will investigate both historical and ongoing injustices against Aboriginal Victorians, and prepare a report of findings, which will serve as an official record of the impact of colonisation and make recommendations for the path forward. The Commission is anticipated to commence in July 2021, with the final report due three years after establishment.

The Victorian Government has stated that it is committed to working with Aboriginal Victorians as equal partners on the path to Treaty. It is understood at this stage that any Victorian Treaties will operate alongside existing agreements, including agreements made under the Traditional Owner Settlement Act 2010 (Vic).

TREATY PROGRESS IN QUEENSLAND

The Queensland Government is also committed to embarking on a path to Treaty with First Nations Queenslanders.

In May 2020, the Eminent Panel, established as part of the 2019 "Tracks to Treaty" initiative and comprised of Aboriginal and Torres Strait Islander and non-Indigenous Queenslanders, released its recommendations in relation to Treaty in Queensland.

In August 2020 the Queensland Government responded to the recommendations, releasing a Treaty Statement of Commitment, which accepted either fully, or in principle, each of the Eminent Panel's recommendations.

Significantly, Queensland will establish a new Treaty Advancement Committee, which will provide independent advice on the implementation of the Eminent Panel's recommendations with a view to putting forward options to establish an independent legislated body to lead the path to Treaty in Queensland.

The Eminent Panel has also recommended that the path to Treaty in Queensland must involve: acknowledgement of First Nations' sovereignty; a framework for Truth telling; capacity building to enable Aboriginal and Torres Strait Islander peoples to participate in the Treaty making process.

TREATY PROGRESS IN THE NT, ACT, TASMANIA AND WA

The **Northern Territory** is currently in Stage Two of its two stage process to devise a Treaty consultation program, with the Treaty Commission having released a public discussion paper in June 2020. A Final Report is due to the Chief Minister no later than March 2022, which will outline key elements for a proposed Treaty in the NT.

In the **ACT**, progress towards Treaty continues in accordance with the ACT Aboriginal and Torres Strait Islander Agreement 2019–2028, which obliges the signatories to work together to enable equitable outcomes for Aboriginal and Torres Strait Islander peoples in the ACT.

In **Tasmania**, Reconciliation Tasmania continues to actively pursue Treaty, and in November 2020, the Tasmanian Aboriginal Affairs Minister Roger Jaensch advised that the Tasmanian Government was open to having discussions on Treaty with Aboriginal Communities.

Western Australia is not engaged in a formal Treaty process, however recent settlement agreements including the South West Settlement and the Geraldton Settlement have some of the key elements of Treaties.

NO PROGRESS AT THE FEDERAL LEVEL, OR IN NSW OR SA

To date, there has been no commitment to Treaty from the **New South Wales** Liberal Government, or the **South Australian** Liberal Government, which chose not to pursue Treaty discussions commenced by the previous South Australian Labor Government.

As noted above, the Federal Government is committed to establishing an Indigenous Voice, but continues to maintain that Treaties are best addressed at the State and Territory level. Interestingly, the concept of Truth telling has made its way into the December 2020 Interim Report "Never Again" on the inquiry into the destruction of Juukan Gorge. One of the key recommendations of the Interim Report is that the Western Australian and Federal Governments undertake Truth telling in relation to destroyed or damaged cultural heritage sites. With Truth telling considered by many to be an essential pre-condition for Treaty, it may be that reforms in other areas help pave the way for Federal Treaty in the future.

WHERE TO FROM HERE?

The past 12 months have demonstrated that progress towards Treaty is likely to be slow, given negotiation frameworks must be established before negotiations can even commence. However, what is clear is that demand for Treaty and associated processes such as an Indigenous Voice to Parliament and Truth telling are growing.

It is not clear what specific rights successfully negotiated Treaties will provide. The South West Settlement provides the Noongar People with recognition as a distinct nation that has suffered past wrongs, and was reached via negotiations involving a surrender of native title rights and interests in exchange for land rights and financial benefits. It is considered by many to be a Treaty, despite the fact it does not involve any rights to self-governance.

Further, it is also not clear how any successfully negotiated Treaties may be given legal effect, including whether via symbolic agreement, contract, legislation or via Constitutional amendment.

At this stage, it seems most likely that State based Treaties will be developed prior to any Federal Treaty. While this may mean that Treaty is implemented faster, State based Treaties alone have limitations. State borders often do not reflect First Nations community boundaries, Treaties in different jurisdictions may vary greatly in what they are able to provide and they may ultimately be overridden by the Commonwealth.

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