2022 Year in Review: Native Title law and policy

November 2022

Introduction

Native title and other related laws continue to be complex and dynamic. This article summarises key native title claim statistics and then identifies trends from the past twelve months, including in relation to native title compensation and charitable trust laws. Updates to national treaty discussions are also provided. Four key native title decisions from the past year are then explored, including a decision relating to implied Indigenous Land Use Agreement terms. Finally, recent changes to related laws in Western Australia and Northern Territory are explained.

Statistics (as at October 2022)

- 185 outstanding native title claims
- 10 current native title compensation claims
- 1 active revised native title determination application
- 568 determinations of native title, with 467 that native title exists
- 452 determinations by consent, and 55 litigated determinations

Contents

1. Emerging trends

There are several emerging trends relating to native title compensation, authorisation of damage to Aboriginal heritage, the role of international law for First Nations facing climate change, new native title claims and reforms to charitable trust laws.

A broader scope for native title compensation?

The Galarrwuy Yunupingu compensation matter (Gove Peninsula compensation claim) is currently being considered by the Full Federal Court. Importantly, the Gove Peninsula compensation claim will test the current scope of acts which may attract a claim for native title compensation. The bifurcated approach to assessing native title compensation affirmed by the High Court in Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900 (Timber Creek case) limits compensation to those acts since 31 October 1975 (the enactment of the Racial Discrimination Act 1975 (Cth) (RDA)) that has extinguished or otherwise affected native title.

In 2019, an application for native title compensation was filed in the Federal Court of Australia by Dr Galarrwuy Yunupingu on behalf of the Gumatj Clan or Estate Group members. Dr Yunupingu is seeking $700 million in compensation, including compensation sought for acts before the introduction of the RDA. In response to this, the Commonwealth filed a demurrer, otherwise objecting to the whole of Dr Yunupingu's application. The Full Court has ordered for the demurrer to be heard ahead of other matters in the proceeding.

The issue of expanding compensation to be inclusive of acts before the enactment of the RDA was previously raised in the Timber Creek case. The applicants claimed section 51A of the Native Title Act was inconsistent with the requirements under section 51 (xxxi) of the Constitution for compensation on just terms.[2] The Gove Peninsular compensation claim now re-explores this issue.

If the Full Federal Court is in favour of Dr Yunupingu, then compensation may be held to be inclusive of acts before 31 October 1975, resulting in the Commonwealth Government and territories being liable for a broader range of acts that have impacted native title rights.

Key takeaways

- The assessment of compensation in native title law may expand to include acts before the enactment of the RDA.
- As a result, the Commonwealth government and territories may be liable for historical debts to native title holders for acts that pre-date the RDA.

1 Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900; the 'bifurcated approach' divided compensation into economic loss (plus simple interest) and cultural loss

2 See Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900 at [64].

Overturning authorisation for damage to heritage site

The South Australian Supreme Court has set aside a decision by then-Aboriginal Affairs Minister and Premier Steven Marshall (the Minister) to authorise a mining company to conduct mineral exploration on an Aboriginal heritage site (Lake Torrens) in South Australia.

Under section 23 of the Aboriginal Heritage Act 1988 (SA) (the Act), the Minister can authorise the damage, disturbance or interference of any Aboriginal site. The Minister exercised his power under this section to authorise the conduct of mineral exploration on Lake Torrens partly within an area recorded on the Register of Aboriginal Sites and Objects. The Barngarla Determination Aboriginal Corporation sought judicial review of this decision by the Minister on several grounds, one of which was accepted by the judgment of Chief Justice Kourakis in Dare & Ors v Kelaray Pty Ltd & the Minister of South Australia [2022] SASC 91. Namely, the Chief Justice accepted that the Minister had acted ultra vires (beyond his power) by making the decision.

The Minister's authorisation had instead broadly allowed the conduct of mineral exploration on the condition that the explorer comply with its cultural heritage management plan (CHMP). The CHMP had allowed the explorer to interfere with an object or site in accordance with advice of expert anthropologists or Aboriginal representatives of the explorer's choice before the Minister was to be notified. The Chief Justice found that this authorisation was inconsistent with section 20 of the Act, which requires the discovery of an Aboriginal object, site or remains to be reported to the Minister as soon as practicable for the Minister to consider whether and how to protect them. As the Minister does not have the power to exempt a person from the reporting requirement under s 20, the Minister had acted beyond his power by making the authorisation.

Key takeaways

- The Chief Justice's judgment highlights the importance of Aboriginal heritage issues in the application for mining activities. Explorers should be aware of their legislative obligations under the Act when preparing and submitting cultural heritage management plans.
- The Chief Justice has upheld that a person can cause an offence to s 20 of the Act regardless of whether that person knows that the object, site or remains is of Aboriginal cultural or heritage significance.[3]
- The Chief Justice emphasises the interdependency of the different sections of the Act for their effectiveness, including between sections 20 and 23.[4] The Minister's power to authorise damage or interference to an Aboriginal site, object or remains depends on the Minister's ability to consider any necessary protections upon being notified under section 20.

3 Dare & Ors v Kelaray Pty Ltd & the Minister of South Australia [2022] SASC 91, Kourakis CJ at [32].
4 See e.g. Dare & Ors v Kelaray Pty Ltd & the Minister of South Australia [2022] SASC 91, Kourakis CJ at [33].

Relevance of climate change to international human rights law

In a recent decision, the United Nations Human Rights Committee (the Committee) has found the Australian government has violated Torres Strait Islanders' rights to enjoy their land and culture by failing to take sufficient positive measures to protect these rights from the impacts of climate change. The Committee found the Australian government liable for compensation.

Eight adults and six children from four low-lying islands off the northern coast of Australia lodged a complaint against the then Commonwealth government, alleging it had failed to take adequate action to reduce carbon emissions and follow proper adaptation measures. It was argued that an increase in atmospheric greenhouse gas concentrations resulted in changes in weather patterns, causing direct harmful consequences on their culture and traditions. This included reports of the destruction of graves and the dislocation of remains by severe flooding in recent years.

The Committee found that the government had breached its positive obligation under Article 17(2) by failing to adopt measures in time to protect the complainants from the loss of access to food resources and from the flooding of their villages and ancestral burial lands because of climate change. The Committee also found that the government had violated Article 27(1) by failing to adopt measures to protect the complainants from the erosion by climate change of traditional lands and resources necessary for participation in the cultural and ceremonial life of their community.

Key takeaways

- The decision highlights national governments' positive responsibility under human rights law to both mitigate the impact of their greenhouse gas emissions and to set climate policy that adequately protects individuals and groups within their jurisdiction from the adverse effects of climate change.
- The decision reinforces the Committee's finding that climate change is a matter of fundamental human rights. The decision will provide further legal avenue in the context of the rising trend in climate-related litigation, particularly in relation to the cultural and proprietary rights of indigenous people. This litigation will continue to rely on international law principles where domestic remedies are insufficient.[5]
- Following the Committee's decision, there remains a question for the national government of what an effective remedy will look like for damages caused to individuals and groups by a government's failures to positively meet its obligations under international law.
- The Committee emphasised the responsibility of the national government to meaningfully consult with Torres Strait Islander and other indigenous people to ensure indigenous people's rights and needs are upheld in relation to national policy.

5 Note for instance the High Court's previous ruling that states do not owe a duty of care for failing to regulate environmental harm; Graham Barclay Oysters v Ryan [2002] HCA 54.

Changes to charitable trust laws

In October this year, the Western Australian government passed the Charitable Trusts Bill 2022 (WA) (the Bill). The bill comes following the report on the Njamal People's Trust (the Report),[6] tabled in the state parliament earlier this year. The Report follows an investigation commenced by Inquirer Mr Alan Sefton in May 2017 in response to complaints of misconduct and mismanagement of the Njamal People's Trust, a charitable trust established in 2003 with the primary object of reliving poverty, sickness, suffering, distress, misfortune or destitution of members of the Njamal People.

The Bill implements the Report's 21 recommendations for legislative reform to strengthen the regulation and oversight of charitable trusts and to address incidents of misconduct or mismanagement in relation to the management and administration of charitable trusts.

Key regulation reforms from the Bill include:

- Investigatory commission: The Bill establishes the Western Australian Charitable Trusts Commission which will conduct investigations upon complaint of a charitable trust. The commission will have similar investigatory powers to a Royal Commission.
- Powers to remove trustees: In incidents of misconduct or mismanagement in the management and administration of a charitable trust and on application of the Attorney General, the Bill empowers the Supreme Court to give orders in relation to the management and administration of a charitable trust, including to remove or appoint a trustee or to preclude the employment or engagement of a person in the affairs of a charitable trust.

Key takeaways

- The Report and corresponding Bill demonstrate the increased scrutiny of charitable trusts established for the benefit of Aboriginal people.
- The accountability of charitable trusts for the benefit of Aboriginal people continues to emerge as an issue of national relevance.[7]

6 Mr Alan Sefton, Reprot on Njamal People's Trust: https://www.parliament.wa.gov.au/council/tp-2278.pdf.

7 For example, the Adnyamathanha Traditional Lands Association RNTBC continues its legal proceedings against Rangelea Holdings Pty Ltd as trustee of the Adnyamathanha Master Trust: ATLA special administration extended | Office of the Registrar of Indigenous Corporations (oric.gov.au).

2. Status of Treaty Discussions in Australia

In 2017, the Uluru Statement from the Heart called for a Makarrata Commission to conduct a process of agreement-making, ahead of a process of truth-telling and following a constitutionally enshrined First Nations Voice to parliament. The Makarrata Commission would assist in the negotiation of formal agreements between Aboriginal and Torres Strait Islander peoples and Australian governments at both the Federal and state level.

The new Federal Government has committed to the Uluru Statement from the Heart. However, the government has yet to commit to a timeline for a referendum to enshrine a First Nations voice in the Constitution. Indigenous Affairs Minister Linda Burney has nonetheless stated that it could occur as early as May 2023.

At state and territory level, many Treaty discussions have already begun.

Victoria

The First Peoples' Assembly of Victoria (the Assembly) has continued its journey to Treaty in Victoria, following the establishment of the Yoo-rrook Justice Commission (the Commission) in 2021. The Assembly has been working with the government to set out the governance arrangements to facilitate and manage the Treaty negotiation process.

The Assembly approved the draft Treaty Negotiation Framework in October 2021, which sets out the rules and processes for the Treaty negotiations. In June 2022, the Assembly and the Victorian government entered into the Treaty Authority Agreement, and the government in turn introduced the Treaty Authority Bill to establish and give legal force to an independent Treaty Authority to facilitate and oversee Treaty negotiations in the state.

Following a yarning circle with Elders of regional Victoria in March 2022 and beginning the formal Truth Telling hearings in April 2022, the Commission released its initial interim report on 30 June 2022. The report outlines the process so far and summarises the next phase of work to be undertaken by the Commission. The findings of the Commission will provide an important contribution to the Treaty negotiations.

Queensland

Queensland's Path to Treaty journey began with the release of the Statement of Commitment in 2019, and has proceeded by work of an Eminent Panel with support of a Treaty Working Group to conduct public consultations on what Treaty may mean for Queensland.

The Treaty Advancement Committee (the Committee), working with the findings from the Eminent Panel and the Treaty Working Group, provided recommendations to the Queensland Government on the next steps along the Path to Treaty on 12 October 2021.

Key recommendations included:

- the establishment and funding of a First Nations Treaty Institute to facilitate the Treaty-making process;
- a two-stage approach to truth telling, comprising a local truth telling process and then a formal Truth Telling and Healing Inquiry;
- the establishment of a Path to Treaty Office to prepare the Queensland government for the Treaty process; and
- the establishment of an Independent Interim Body to manage the Treaty and truth-telling activities while the Inquiry and the Institute are established.

The Queensland government has accepted 18 of the Committee's recommendations in full and 4 of the recommendations in-principle.

The co-design of the Treaty negotiation process, considering the Committee's recommendation, will necessarily inform the governance framework of the negotiations going forward.

South Australia

In March 2022 a new South Australian Labor Government was elected, announcing that key priorities for the Aboriginal Affairs portfolio include to re-start the Treaty process. A Commissioner for a First Nations voice has also been appointed. A formal announcement has yet to be made regarding a treaty process.

However, in November 2022, the Commissioner for a First Nations Voice announced in November 2022 a proposed, First Nations Voice Bill 2022. The First Nations Voice Bill proposes:

1. The establishment of regions, each with a Local First Nations Voice elected by First Nations people.
2. An election process managed by the Electoral Commission of South Australia.
3. The appointment of presiding members by the Local First Nations Voice. These would be the State Voice.
4. A process of Local First Nations Voice meetings.
5. The creation of a State Voice by Local First Nations Voices
6. A process for the State Voice to present their views on matters of importance to First Nations people to the Parliament, the Government and other bodies.

At the time of writing this article, the First Nations Voice Bill is the subject of consultation.

Northern Territory

In November 2018, the Northern Territory Government and the Aboriginal Land Councils of the Northern Territory entered into the Barunga Agreement, which established a Treaty Commissioner and Treaty Working Group to lead consultations with Aboriginal groups. The Northern Territory Treaty Commission has now developed a framework for a proposed Treaty, and a final report was provided to Treaty Minister Selena Uibo in June 2022. The report, drafted following a comprehensive consultation process, includes recommendations for the development of a Treaty making framework in the Territory.

ACT

In 2018, the Australian Capital Territory (ACT) Minister for Aboriginal and Torres Strait Islander Affairs announced that the ACT Government was open to discussing Treaty with the First Nations of the Canberra region. In the 2021-22 Budget the ACT government provided over $300,000 to facilitate a conversation with Traditional Owners about what treaty means in the ACT and discussing a treaty process. In March 2022, Professor Kerry Arabena was appointed to facilitate those preliminary talks.

In the interim, the ACT Government has focused on developing the ACT Aboriginal and Torres Strait Islander Agreement 2019-28 (the Agreement). The Agreement establishes the long-term direction for Aboriginal and Torres Strait Islander affairs in the ACT and requires the parties of the agreement to work together to improve the social, environment, economic and cultural infrastructures within their communities. The Agreement was signed in February 2019 by the Aboriginal and Torres Strait Islander Elected Body, the ACT Government and the ACT Public Service.

3. Four recent native title decisions

There have been several noteworthy native title decisions in the past twelve months. This article summarises decisions that relate to native title compensation, intramural agreements for native title holders to occupy native title land, succession and implied ILUA terms.

Melville on behalf of the Pitta Pitta People v Queensland [2022] FCA 387

Facts

This case explored whether an application for native title compensation could be brought by the individual native title holders of a registered native title body corporate. Melville on behalf of the Pitta Pitta People v Queensland [2022] FCA 387 concerned[MPS1] a compensation claim lodged by a group of elders on behalf of the Pitta Pitta People. The elders submitted that the claim was authorised through a traditional decision-making process. The State of Queensland and the Pitta Pitta Aboriginal Corporation RNTBC (PPAC) brought an interlocutory application seeking summary dismissal of the compensation claim brought by the group of elders. PPAC claimed that the group of elders were unable to demonstrate a traditional decision-making decision on the grounds of Pitta Pitta law or custom.

Issues

The primary issue regarded whether the group of elders:

- ·were authorised under section 251B (a) of the Native Title Act 1993 (Cth) (the NTA) to lodge the claim on behalf of the Pitta Pitta People (i.e. 'the authorisation issue'); and
- had standing under section 61 (1) of the NTA to lodge the claim on behalf of the Pitta Pitta People (i.e. 'the standing issue').

Decision

Her Honour dismissed the State of Queensland's and the RNTBC's application. Her Honour held that the issue of whether the Pitta Pitta compensation claim lodged by the group of elders satisfied sections 251B (a) and 61 (1) of the NTA involved complex questions of legal constructions that could not be summarily dismissed, and should be heard at trial.

Key takeaways

- The case leaves open the possibility of individual native title holders pursuing a claim for native title compensation, instead of the relevant RNTBC. The necessary standing and authority of those individual native title holders to do so will be questions explored further at trial.
- The case demonstrates the importance for RNTBCs to engage with and collaborate with their respective native title holders in relation to putting forward a claim for native title compensation.[8]

8 For instance, in coming to her Honour's decision, Mortimer J noted the potential disadvantage to native title holders of a dysfunctional RNTBC were ss 61(1) and 251B(a) construed to preclude claims brought by individual native title holders.

Gunggandji-Mandingalbay Yidinji Peoples Prescribed Bodies Corporate Aboriginal Corporation v Murray [2021] FCA 94

Facts

In Gunggandji, the Court heard an application from the Gunggandji-Mandingalbay Yidinji Peoples Prescribed Bodies Corporate Aboriginal Corporation (GMYAC) seeking to gain possession of land from Aboriginal occupants who also claim native title rights.

Mr Robert Murray and his family (the Murray family) occupied an area of land near Yarrabah, Queensland (the Subject Land).The Subject Land was originally owned by the Yarrabah Aboriginal Shire Council (Yarrabah ASC). As part of the GMYAC native title claim, the Yarrabah ASC entered into an Indigenous Land Use Agreement (the Transfer ILUA), where the parties agreed the Subject Land is considered Aboriginal land pursuant to the Aboriginal Land Act 1991 (Qld). Following the GMYAC Determination, in accordance with the Transfer ILUA, a Deed of Grant of Land in Trust was made granting a fee simple interest in the Subject Land to the GMYAC to hold that land in trust for the benefit of Aboriginal People.

The Murray family came to occupy the Subject Land through a submitted expression of interest for a lease, offered 'to people who were Yarrabah born'. The Murray family submitted three separate expressions of interest from 2009 to 2015 but failed to get a response. On 13 May 2015, the Yarrabah ASC agreed to enter into a lease agreement with the Murray family, subject to consent from GMYAC. Prior to this, the Murray family proceeded to build a shed and other infrastructure on the Subject Land without consent. On 28 May 2018, the Murray family received a response letter from the GMYAC, including a notice requiring them to vacate the Subject Land within 60 days. The Murray family refused to vacate, relying on their 'prior consent from traditional owners' in 2009.

On 15 August 2019, GMYAC filed a claim in the District Court of Queensland, seeking a declaration that the Murray family's occupation of the Subject Land was unlawful and order the Murray family to remove the unauthorised improvements constructed by them and to deliver possession of the land to GMYAC.

Issues

The primary issue identified by the Honourable Justice Greeves was whether the Murray family have any rights, native title or otherwise, to lawfully occupy and remain in possession of the Subject Land.

Decision
IThe Honourable Justice Greeves upheld the application. His Honour was satisfied that the title to the Subject Land was held by the Mandingalbay Yidinji-Gunggandji People and that GMYAC had not, in its capacity as the appointed registered native title body corporate, given permission to the Murray family to occupy and possess the Subject Land. His Honour was not satisfied on the evidence that an agreed allocation to the Murray family had occurred within the native title group. His Honour concluded that GMYAC established, on the balance of probabilities, that the members of the Murray family have no rights to lawfully occupy and remain in possession of the Subject Land.

Key takeaways

- The judgment reinforces that native title holders may need the consent of their agent PBC to occupy native title land.
- In his judgment, his Honour did not preclude the possibility of the intramural (i.e. within the native title group) allocation of rights to land without the knowledge of their agent. For the intramural rights to be recognised, the right-holder would need to be able to produce evidence of the existence and terms of those rights.

Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251

Facts
In Rainbow on behalf of the Kurtjar People v State of Queensland (No 2), the Kurtjar People sought determination of non-exclusive native title over 12,000 square kilometres, located southwest of Cape York, including a number of cattle farms.

Issues
The case concerned the following three questions:[9]

1. What the correct description should be for the Kurtjar people's non-exclusive right to access and use resources (the right to take resources question);
2. Whether the Kurtjar people were part of the Rib and Walangama traditional laws and customs, or whether the Kurtjar succeeded or asserted authority over the claim area (the succession question); and
3. Whether eight persons should be included as apical ancestors of the Kurtjar people in the description of the present common law holders of the native title rights and interests of Kurtjar country (the apical ancestor question)?

This note focuses on the succession question.

9 Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251, Rares J at [2]-[4].

Justice Rares identifies two substantive issues for the succession question:

1. Were the traditional laws and customs of the Rib and Walangama part of the overarching laws and customs of a larger society of which the Kurtjar were also a part?
2. If not, have the Kurtjar either:

- succeeded to the lands and waters held by the Rib and Walamgama in accordance with their traditional laws and customs (i.e., 'licit succession'); or
- asserted authority over that area (i.e., 'illicit succession')?

Decision

Justice Rares held that a group at sovereignty that was not part of the extinct society, but rather adopted laws and customs of that society, cannot assert native title rights and interests in land and waters. This finding is on the basis that native title rights can be transmitted in accordance with traditional law and custom after sovereignty, but they cannot be created after sovereignty.[10] As such, his honour made clear that the successor group must succeed to the extinct group's land and waters under laws and customs that both the extinct and successor society observed as a normative system.[11]

His honour concluded that the critical test for licit succession is whether the incoming group is 'confident in its ability to manage spiritual potencies' of the land and waters.[12] This includes actual or postulated spiritual dangers in accordance with traditional law and custom.

In this case, his Honour was satisfied that native title rights of the Walangama and Rib peoples had been transmitted to the Kurtjar people in accordance with the normative pre-sovereignty traditional laws and customs observed by each group.

Key takeaways

- To establish succession, the incoming group will need to demonstrate that the group derives its ability to manage country from the traditional laws and customs shared with the extinct group, even if there is missing knowledge of country from the extinct group.[13] The group will not need to demonstrate succession through evidence of a formal succession event.
- The case leaves open the likely success of a claim for succession where there are opposing native title claimants to the claim area.[14]

10 Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251, Rares J at [146]-[150].
11 Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251, Rares J at [151].
12 Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251, Rares J at [217].
13 See Rainbow on behalf of the Kurtjar People v State of Queensland (No 2) [2021] FCA 1251, Rares J at [221].
14 Note for instance his honour at [228] takes into account that no other First Nations' people opposed or challenged the Kurtjar people's succession claim.

QGC v Alberts (No. 2) [2021] FCA 540

Facts

In QGC v Alberts (No.2) [2021] FCA 540, the Federal Court considered an interpleader action by QGC Pty Ltd in relation to the Barunggam, Cobble Cobble, Jarowair, Western Wakka Wakka, Yiman and QGC indigenous land use agreement (the ILUA). This was the third dispute in relation to the ILUA.

In 2010, the families of the Barunggam, Cobble Cobble, Jarowair, Western Wakka Wakka and Yiman Native Title Party signed the ILUA, nominating the BCJWY Aboriginal Society Ltd (BCJWY) as the entity for receiving compensation payments under the ILUA. QBC paid an initial benefit of $2 million under the ILUA to BCJWY, and subsequently made annual payments.

BCJWY eventually lost the confidence of a majority of the family groups due to incidents of not having acted in a financially transparent or appropriate way. In January 2018, a majority of the family representatives reportedly resolved to nominate Boonyi Downs as the new nominated entity under the ILUA. However, the ILUA did not expressly provide a process to replace BCJWY as the nominated entity.

BCJWY was ultimately placed into liquidation in July 2019, and QGC was left with no entity to whom it was entitled to make compensation payments pursuant to the ILUA.

Decision

Justice Rares found that a term could be implied into the ILUA to permit the appointment of a substitute nominated entity where the nominated entity (in this case BCJWY) is no longer capable of carrying out its functions as the nominated entity (for example by being in administration or liquidation).

His Honour observed that while the ILUA is strictly speaking not a commercial contract, and binds native title holders in addition to the proponent and native title party, the common law rules about implied terms in contracts are still applicable.[15] This includes common law principles of the interpretation of a commercial contract such as giving the contract an interpretation that the parties intended, that produces a commercial result and avoids commercial inconvenience.

His Honour found that the parties could not have intended to a construction of the ILUA that resulted in it being impossible to replace an existing nominated entity, for example in the event of liquidation. Rather, his Honour found that the intention of the parties was that there be at all times a nominated entity that would be able to distribute the financial benefits, that QGC had agreed to pay over the term of 10 years, to, or for the benefit of, the families.

15 QGC v Alberts (No.2) [2021] FCA 540, Rares J at [64].

Key takeaways

- Parties should be careful to draft native title agreements to provide express processes in the event of necessary changes to entities, changes to representatives of the native title group, and other changes to native title.
- Common law principles of interpretation for commercial contracts can apply to native title agreements such as ILUAs. Parties should be aware of these principles of interpretation when drafting future native title agreements.

4. Other law reforms

There have been two other noteworthy law reforms relating to cultural heritage laws in Western Australia and land rights laws in Northern Territory.

Reform of WA Aboriginal Cultural Heritage Legislation

In December of 2021, the Western Australian government assented to the new Aboriginal Cultural Heritage Act 2021 (WA) (the Act), describing it as a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage in Western Australia. Importantly, the Act removes the Section 18 approvals process which was controversially relied on by Rio Tinto in the destruction of sites at Juukan Gorge in the Pilbara in May 2020.

Key features of the Act include:

- a new definition of cultural heritage;
- the establishment of a new Aboriginal Cultural Heritage Council (ACH Council) and the appointment of Local Aboriginal Cultural Heritage Services (LACHS); and
- a new land use and approvals system between traditional owners and land users.

New definition

The Act has widened the definition of Aboriginal cultural heritage to include not only tangible elements such as sites and artifices, but also intangible elements such as cultural landscapes. An Aboriginal place, object, landscape or ancestral remains are recognised through their social, spiritual, historical, scientific or aesthetic values to the traditional owner group.

New structures
The Act provides new management structures which include the establishment of the ACH Council as the government's peak strategic body for Aboriginal cultural heritage matters. The ACH Council's functions include reviewing applications for cultural heritage permits, approval for cultural heritage management plans, and assisting the Minister in the making of protected area declarations. The structure also includes the appointment of LACHS to provide Aboriginal heritage services for particular parts of the state and to serve as a point of contact between traditional owners and proponents.

The intention of the new structure is both to facilitate engagement with traditional owners in matters affecting heritage, as well as to enshrine traditional owners' cultural authority in matters concerning heritage.

New assessment and approval systems
The Act introduced a new tiered assessment and approval system for land use activities. Through the assessment, proponents will complete due diligence assessment to determine the overall impact the proposed land use will have on Aboriginal cultural heritage, and to ultimately notify and consultant and negotiate with traditional owners depending on the level of impact.

Under the Act, there are the following four categories of activities which will inform the due diligence requirements needed for proponents to conduct work:

- Exempt activities: small scale/emergency/recreational (no approval required)
- Tier 1: Minimal ground disturbance activities (no approval required, but reasonable steps to be taken to minimise risk of harm to cultural heritage)
- Tier 2: Low ground disturbance activities (Aboriginal Cultural Heritage Permit required by ACH Council)
- Tier 3: Moderate to high ground disturbing activities (parties to reach an agreement, and ACH Council approves the cultural management plan, OR where parties are unable to reach an agreement, the Minister must decide whether or not to authorise a cultural management plan.

These categories are expected to provide further protection for Aboriginal Heritage, with Aboriginal groups being informed and notified before and during potential work on their land.

Further changes

The above changes are currently in a 12-month transitional period to allow for management plans and to enable parties to co-design the new system. During this transitional period, section 16 authorisations and section 18 consents will remain in force but will be limited to five years and will be subject to additional protective mechanisms, including the requirement to report new information on changes or characteristics of Aboriginal cultural heritage.

The Western Australian government has appointed a reference group with regards to the transitional period to engage and consult with aboriginal people, to ensure they are at the heart of decision making. A co-design process has been implemented, consisting of four members from the Aboriginal community, industry and government to ensure all opinions are heard during the reform of the Act.

Key takeaways

- The legislation changes are stated to centre the importance of consulting with and seeking the free, prior and informed consent of traditional owners. Proponents should take these principles and the new processes into account when developing their projects.
- We are yet to see the development of supporting regulations, guidelines and policies following the co-design process that closed in August this year.
- Although the stated intention of the legislative reforms state is in part to foster the principles of free, prior and informed consent, the reforms do not provide traditional owners the right to withhold consent to harm, damage or destruction to cultural heritage, as was recommended by the final report on the destruction at Juukan Gorge.[16]
- We are yet to see how other states and territories will respond to the findings and recommendations from the final report on the destruction at Juukan Gorge. This will likely be ongoing changes to regulatory space, and new standards of heritage protection and traditional owner engagement.

Amendment of The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (the ALRA) was amended late last year through the passing of the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Act 2021 (Cth) (ALRA).

The ALRA has been amended the following two significant ways:

1. the establishment of the Northern Territory Aboriginal Investment Corporation (the NTAIC); and
2. reforms to exploration and mineral production processes in the Territory.

16 See Joint Standing Committee on Northern Australia. 'A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge', paragraph 7.80: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf

Establishment of the NTAIC

The amendments to the ALRA have established the NTAIC to invest money from the Aboriginals Benefit Account (ABA). The ABA receives and distributes royalties from the mines on Aboriginal land to provide compensation, township leasing and beneficial payments to Aboriginal people. Previously, such funding was approved by the Minister for Indigenous Australians and the ABA advisory committee.

The establishment of the NTAIC is intended to provide a sense of self-sufficiency and self-management through Aboriginal control of the corporation and a board of which eight of the twelve seats will be reserved for Aboriginal representatives from the Northern Territory. The inclusion of Aboriginal people to the NTAI Corporation will take effect on 13 December 2022. Over the next three years, half of the current accumulated balance of the ABA ($1.3 billion) will be transferred to the NTAIC, with an initial $500 million endowment from the ABA.

Reforms to mining processes

The following amendments intend to streamline mining and exploration on Aboriginal land whilst protecting the interests of traditional owners:

- applications can now be amended without the requirement of recommencing a new application process;
- more flexibility is provided to Land Councils, to better determine how Aboriginal owners are consulted; and
- ministerial consent is no longer required for standard exploration licenses that have been approved by traditional owners.

Key takeaways

- The reforms to the ALRA will likely set the benchmark for future changes to native title and heritage legislation across the country.
- The NTAIC will provide opportunities for economic development for Aboriginal businesses and communities. To take advantage of these opportunities, relevant parties should refer to the objectives and functions of the NTAIC.[17]

17 See Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Act 2021 (Cth) (ALRA), ss 65BA, 65BB & 65BC.