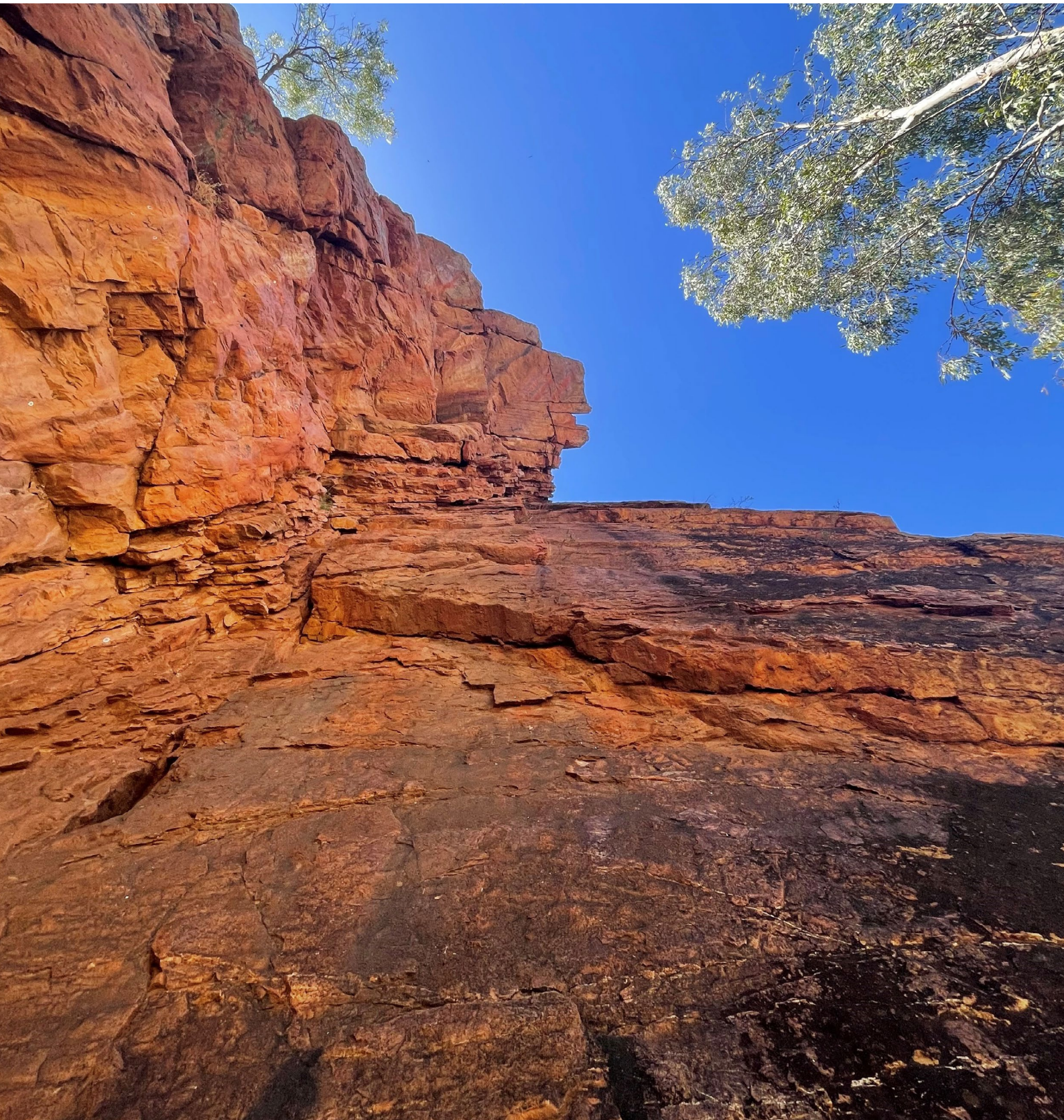
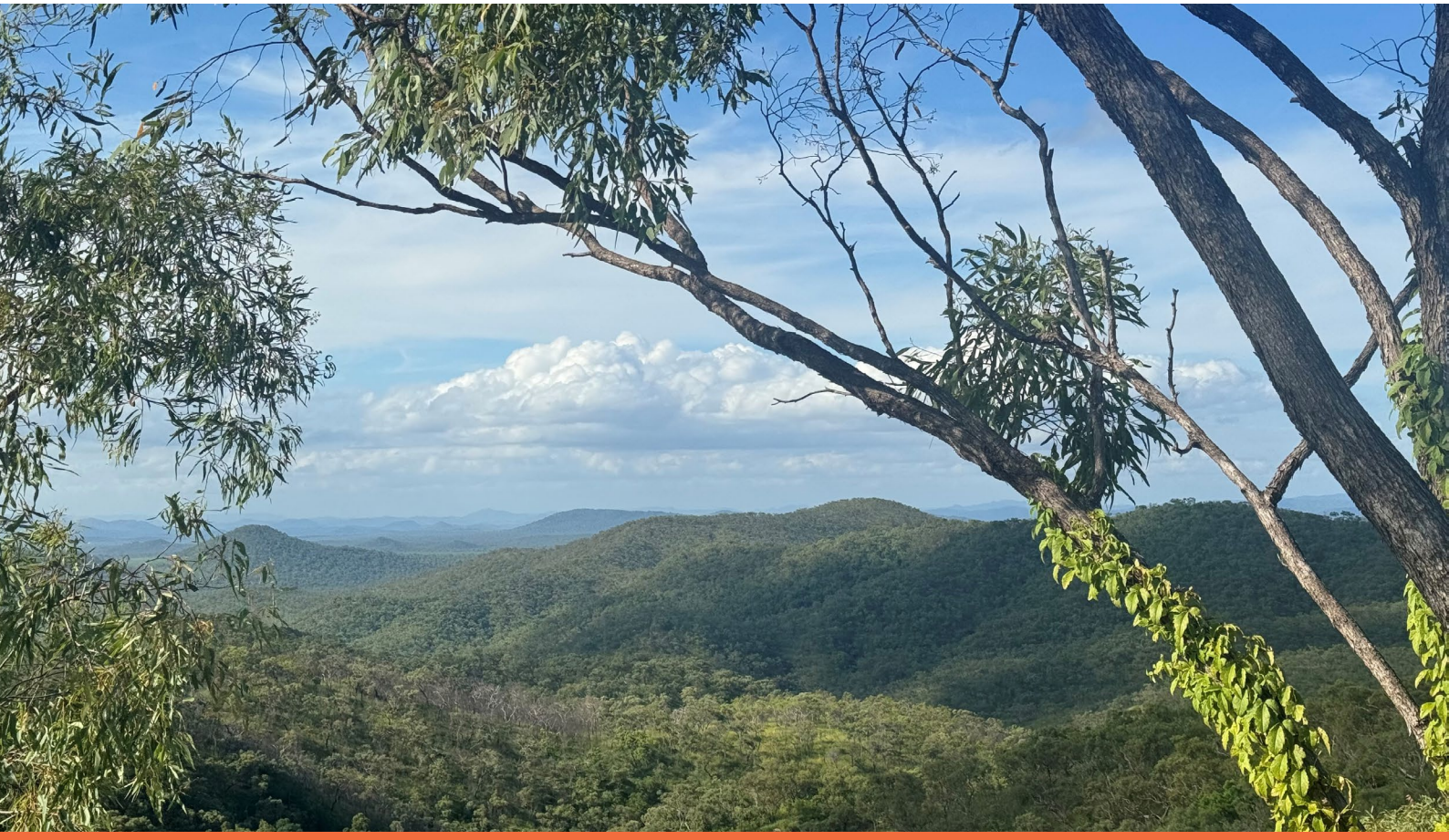
AIATSIS

Native Title NEWSLETTER

Issue 1 | 2024



WELCOME
to the Native Title Newsletter Issue 1, 2024



For the past 30 years, the AIATSIS Native Title Research Unit (NTRU) has focused on maximising the recognition of native title through improving information and coordination, actively engaging in law and policy reform and strengthening the voice of native title holders.

The Native Title Research Unit has been renamed the Indigenous Country and Governance Unit (**ICG**) in recognition of the support that we can provide native title organisations in the post-determination environment.

Stay in the loop by subscribing to the online Newsletter. If you would like to make a contribution, please contact us at nativetitleresearchunit@aiatsis.gov.au

Above: Far North Queensland

Cover: Mpartnwe (Alice Springs), Arrente Country

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Aboriginal and Torres Strait Islander people are respectfully advised that this publication may contain names and images of deceased persons, and culturally sensitive material. AIATSIS apologises for any distress this may cause.

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Meet the team

Felicity Thiessen (Director)

Indigenous Country and Governance

Felicity was appointed the Director of the Indigenous Country and Governance Unit in 2022. She holds degrees in law and anthropology. Felicity has spent 12 years working in the native title sector including as a lawyer in a native title representative body and with a number of Commonwealth entities including the National Native Title Tribunal.

Tony Eales (Assistant Director)

Indigenous Country and Governance

Tony Eales is the Assistant Director of the Indigenous Country and Governance Unit. He grew up in Queensland and spent ten years doing cultural heritage management in the Bowen Basin west of Rockhampton and in the Hunter Valley, NSW. He then spent 14 years as an in-house anthropological expert at Queensland South Native Title Services working on many successful claims. Tony is now based in Canberra, ACT.

Clare Sayers (Assistant Director)

Indigenous Country and Governance

Originally from Toowoomba, Queensland, Clare now lives and works on Yarun (Bribie Island), Kabi Kabi Country. She has a Bachelor of Laws and a Bachelor of Government and International Relations and is currently studying a Master of International Law. Prior to joining AIATSIS, Clare worked as a lawyer and paralegal for approximately six years, with the majority of her career spent in the native title and resources team at King & Wood Mallesons.

Lilly-Rae Jones (Research Officer)

Indigenous Country and Governance

Lilly-Rae is a proud Wiradjuri woman who has lived on Ngunnawal Country for most of her life. She has been a Research Officer in the ICGU since April 2023 and joined the Australian Public Service in 2020. Prior to working in the ICGU Lilly-Rae has studied a Diploma in Governance, as well as Youth Work, Alcohol and Other Drugs, Mental Health and Community Services. Lilly-Rae provides valuable support across all ICGU projects and oversees the development and facilitation of the Youth Forum with Toya.

Latoya-Sharnae (Toya) Jones (Legal Intern)

Indigenous Country and Governance

Toya is a Balardong, Whadjuk Nyungar and Yamatji woman from Whadjuk Nyungar boodja in Perth (WA). At AIATSIS, Toya works on various projects including the PBC Survey and Youth Forum. She is also a current student at the Australian National University studying a double bachelor's degree in Psychological Sciences and Law (Honours).

Charlie Nott (Administration Officer)

Indigenous Country and Governance

Charlie is a proud Wiradjuri man; he has lived in and around central and southwest NSW. Charlie is an administration officer based in Canberra, working on projects like the PBC Survey, Youth Forum, Native Title Newsletter and general administration work.

Tegan Barrett-McGuin (Assistant Director)

Indigenous Country and Governance

Tegan was born on Larrakia Country in Darwin, Northern Territory. She studied law, politics and philosophy at the University of Queensland. Tegan worked for six years as a lawyer and paralegal at a native title service provider in South-East Queensland before joining the ICGU. In her role at AIATSIS Tegan has been focusing on the PBC Survey and refreshing online resources.

Zane Lindblom (Research Assistant)

Indigenous Country and Governance

Zane is a proud Ngiyampaa man, who grew up in Adelaide on Kaurna land. He recently completed his second year of a double degree in Law (Honours) and Economics at the Australian National University. He works as a Research Assistant on various projects, and the majority of his time is spent updating the Native Title Law Database.

Ya Maulidin (Research Assistant)

Indigenous Country and Governance

Ya was born in Indonesia and moved to Australia in 2017. He is a Research Officer and manages Native Title Access Requests in the ICGU. He is an Applied Anthropology and Participatory Development graduate from the Australian National University. Prior to working at AIATSIS, Ya was a research assistant for the Development Policy Centre at ANU.

First Nations Clean Energy Network

By Chris Croker, Co-Chair, First Nations Clean Energy Network

Australia's energy sector is undergoing a once-in-a-lifetime transformation as renewable energy sources replace our ageing fleet of fossil fuel power plants, including coal and gas; and over 3 ½ million households embrace the benefits on residential solar.

This transformation is coupled with calls for Australia to leverage its plentiful wind and solar resources, and other natural endowments, to become a 'clean energy superpower', exporting 'clean' and 'green' goods to the globe.

Modelling by Net Zero Australia estimates that for Australia to achieve its clean energy aspirations, almost 45% of all major clean energy infrastructure will need to be situated on land where First Nations have legally enforceable rights and interests.

Enabling and empowering First Nations to play a key and central role in Australia's energy transition goes well beyond just social licence issues – it presents a unique opportunity for Australia to design an economic system around its energy transformation that has the potential to result in other positive social, cultural, environmental and economic impacts for First Nations.

Of course there are numerous risks to manage too, and with many of our First Nations communities impacted by the devastating impacts of climate change including more extreme weather events while struggling with unreliable and expensive power, we want Free, Prior and Informed Consent, equity and genuine beneficial partnerships in projects, economic benefits, job opportunities including in our communities, and ready access to clean, lower-cost and reliable power.

Working towards these goals, and with a vision to address climate change, protect Country and culture for generations to come, elevating community-led solutions and ensuring First Nations have a 'seat at the table', the First Nations Clean Energy Network was launched on Arrente Country in Mparntwe (Alice Springs) just over two years ago.

The First Nations Clean Energy Network (**Network**) represents our First Nations people, groups, community organisations and land councils' members from around the county, with the support of unions, academics, industry groups, technical advisors, legal experts, renewable companies and others – working in partnership to ensure First Nations share in the benefits of Australia's energy transition. With guidance from our Steering Committee and numerous conversations and engagements with First Nations groups around the country, the Network has worked hard since our launch to be a trusted source of information, advocacy and support for First Nations communities.

With close to 700 First Nations members (individuals and organisations), we are working to elevate First Nations in the energy transition and have had many achievements in the short period since our launch.

We jump started by advocating for the government to lift significant federal and state regulatory barriers to renewable energy development, resulting in Energy Ministers in 2022 agreeing to develop a First Nations Clean Energy Strategy as a priority action under the National Energy Transformation Partnership.

Our two Best Practice Network Guides launched soon after continue to be held up as a blueprint for First Nations communities, industry and government, and were followed up by the launch of an implementation guide for the Network's Best Practice Principles in February 2024.

We co-developed, funded and delivered to 32 First Nations leaders our inaugural PowerMakers capacity building program in partnership with Canada's Indigenous Clean Energy, which was such a success we're planning for the next PowerMakers in 2024.

On 8 and 9 May 2024, we held our second First Nations Clean Energy Symposium in Tarntanya (Adelaide) in partnership with the Indigenous Land and Sea Corporation and the National Native Title Council.

First Nations Clean Energy Network and representatives from Wujal Wujal at the Queensland Energy Development Conference

Over 350 First Nations leaders and community members, industry heads, union, academics and government representatives were in attendance.

We've been collaborating as part of a core team of organisations working on the Australian Renewable Industry Package – to ensure that Australia's response to the US Inflation Reduction Act is built on principles of Free, Prior and Informed Consent and a package of incentives and policy arrangements to ensure First Nations participation and benefit.

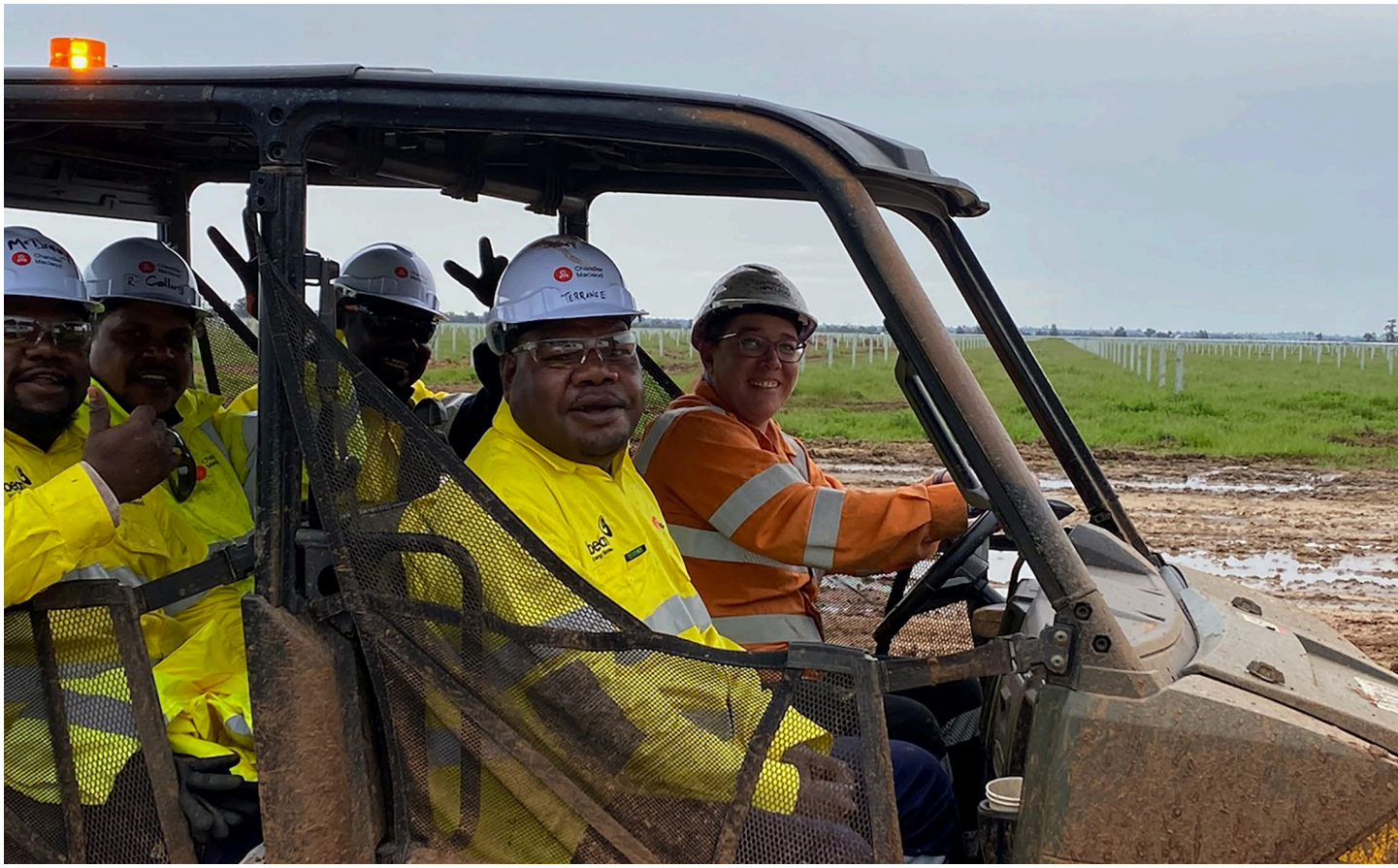
Our First Nations Jobs Pathways Initiative is identifying clear pathways for quality jobs and careers for First Nations Australians in the clean energy sector.

Our online First Nations Project Tracker was developed to highlight First Nations participation and/or equity in new clean energy projects around Australia, to demonstrate the transformative potential of a First Nations-led clean energy transition. We now count 15 such projects.

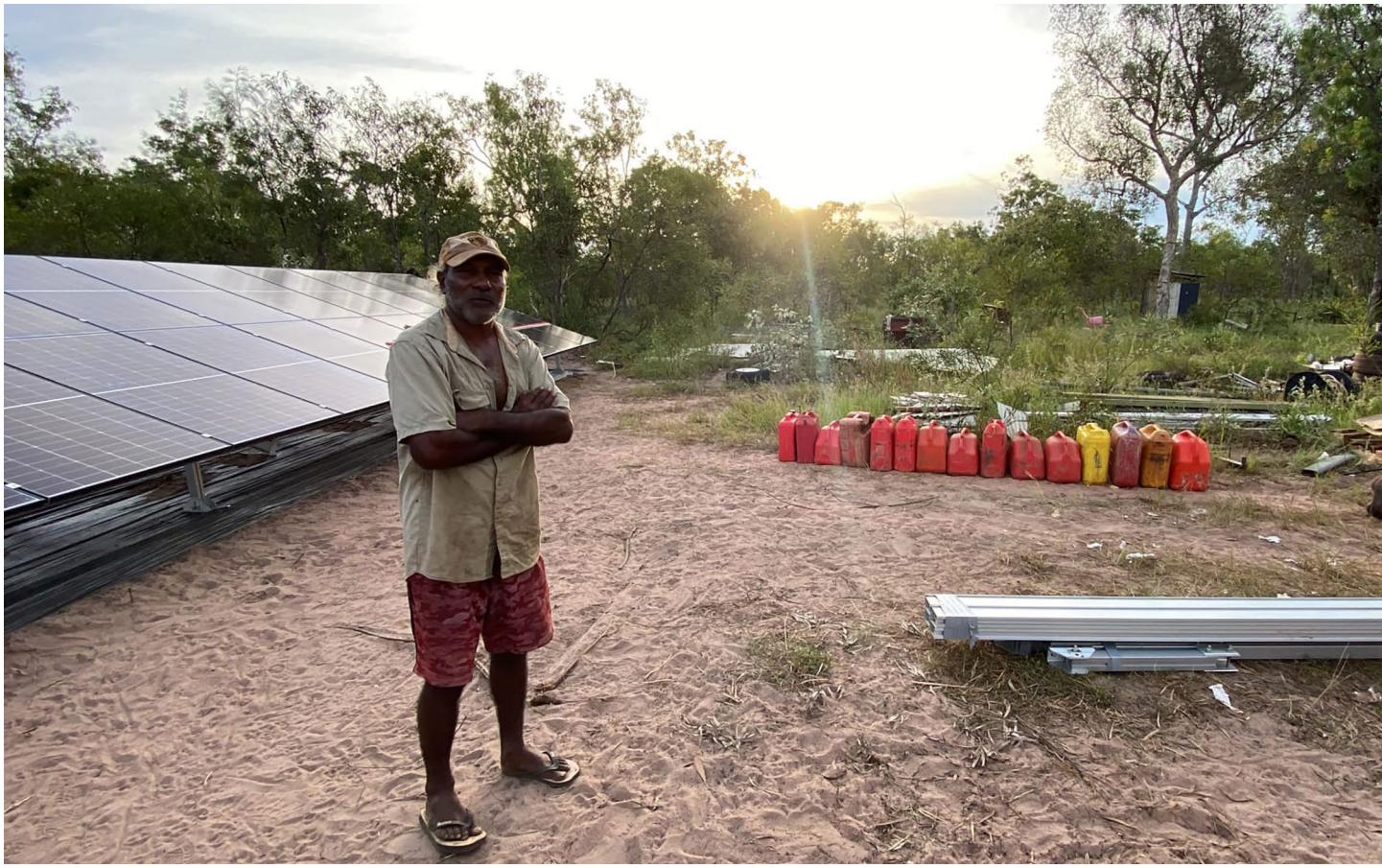
The Community Energy Planning Toolkit was recently developed for First Nations groups to assist in planning and developing community-led renewable energy projects.

And we have constantly provided new and relevant information tools on our website, including finance and funding opportunities for First Nations, policy barriers and opportunities around the country, and a new First Nations Members Only Hub which has a growing number of clean energy video case studies with First Nations people talking about what worked, tools and short films for learning about renewable energy and associated technologies, a page with information about agreements and settlements, and other resources.

We also know there is so much work to be done. Seemingly every day, major government funding and policy announcements are being made to facilitate Australia's energy transformation: from the $20 billion Rewiring the Nation Fund, to $4 billion for the expansion of critical minerals mining, $2 billion in Hydrogen Headstart, and $67 billion for the Capacity Investment Scheme (just at the Commonwealth level). States and Territories likewise are moving fast, making regular policy, project and funding announcements to progress the energy transformation within their jurisdictions. Additionally, Australia's Industrial and Resources sectors, and the Clean Energy industry, continue to develop industry-led projects across Australia, with $6.4 billion invested in large scale generation and electricity storage projects in 2023 alone, with a further $21.23 billion under consideration as of December 2023.[1]



First Nations Clean Energy Network and representatives from Wujal Wujal at the Queensland Energy Development Conference



Replacing dirty diesel generators with clean, reliable energy from solar on homelands in the Northern Territory

We want to make sure that all of these legislative, funding and policy announcements support First Nations self-determination and opportunity.

Australia's energy transition – the bedrock of Australia's economic future – will only happen at the pace and scale required when our First Nations voices, interests and aspirations are a genuine part of development and planning systems.

We want to see economic and policy systems that include and embed First Nations culture, rights and interests, and priorities. We don't want to see a repeat of the mistakes of the past, where First Nations' Free, Prior and Informed Consent has been ignored.

Membership of the Network is free and open to First Nations individuals and groups. Jump on our website to sign up and to learn more: https://www.firstnationscleanenergy.org.au/.

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[1] Clean Energy Council, *Clean Energy Australia* (2024). Available here: https://assets.cleanenergycouncil.org.au/documents/resources/reports/clean-energy-australia/Clean-Energy-Australia-2024.pdf.

Tracking clean energy projects

By Clare Sayers and Lilly-Rae Jones
Indigenous Country and Governance Unit

The First Nations Clean Energy Network has developed a Project Tracker to track projects where First Nations groups are engaged in partnerships in clean energy projects based on equity and participation involvement.

The Project Tracker can be found at: https://www.firstnationscleanenergy.org.au/energy-projects#map-column.

Fifteen projects are currently featured on the tracker on the basis that they are projects which have been negotiated through partnerships agreements. Three of the projects are featured below:

- the East Kimberley Clean Energy Project;
- the Marlinja Community Solar Project; and
- the Yoorndoo Solar Project.

East Kimberley Clean Energy Project[1]

In July 2023, the East Kimberley Clean Energy Project was announced by clean energy investor, Pollination, who has partnered with three Indigenous organisations of the East Kimberley region: the Balanggarra Venture Corporation; the Yawoorroong Miriuwung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation (**MG Corporation**) and the Kimberley Land Council. Together, the four corporations comprise the Aboriginal Clean Energy Partnership, in which each partner has an equal share.

The East Kimberley Clean Energy Project is intended to produce green hydrogen using solar energy. Expected to cost approximately $3 billion to develop, the project will see a 2,000-hectare solar farm established near Kununurra on land owned by MG Corporation.

The power generated by the solar farm will be combined with hydrogen currently being produced by the Ord River Hydro Power Station at Lake Argyle, creating 'green hydrogen'. The hydrogen will then be transported by pipeline to Wyndham, in Balanggarra Country, where it will be converted to green ammonia to be sold locally and overseas.[2]

Phase one of this project involves a feasibility study that commenced in March this year and is expected to be completed by August 2024. If proven feasible, construction is set to begin in late 2025 and, once constructed, the facility will be one of the largest renewable hydrogen and ammonia production facilities in Australia. All going well, first production is expected in late 2028.[2]

Marlinja Community Solar Project[3]

The Marlinja community in the Northern Territory is located on the traditional lands of the Mudburra and Jingili people and is home to approximately sixty residents who face regular power outages and inflated costs associated with using diesel for power.[4]

The Marlinja Solar Community Centre has partnered with Original Power[5] for the Marlinja Community Solar Project which began in December 2023 with the connection of solar panels to the community centre. Intended to ensure residents have more reliable access to energy, particularly in wet season with extremely high temperatures and poorly designed houses, Original Power hopes this project is just the beginning of the Marlinja community moving towards 100% renewable energy.

In phase one of this project, a number of residents received training in electrical technology and carpentry, whose feedback on that training is being used to design a Certificate II in Renewable Energy Pathways.[6] Residents also participated in the project planning and installation of the solar panels as part of this project. Local school students learnt about how solar power will work for their community in a 'Solar Schools Day'.

Phase two of the project consists of the transition from the community relying on a diesel-gas hybrid power station to the locally produced solar power (with the help of a 100-kilowatt battery). The solar power is intended to be able to provide the majority of residents' electrical needs.

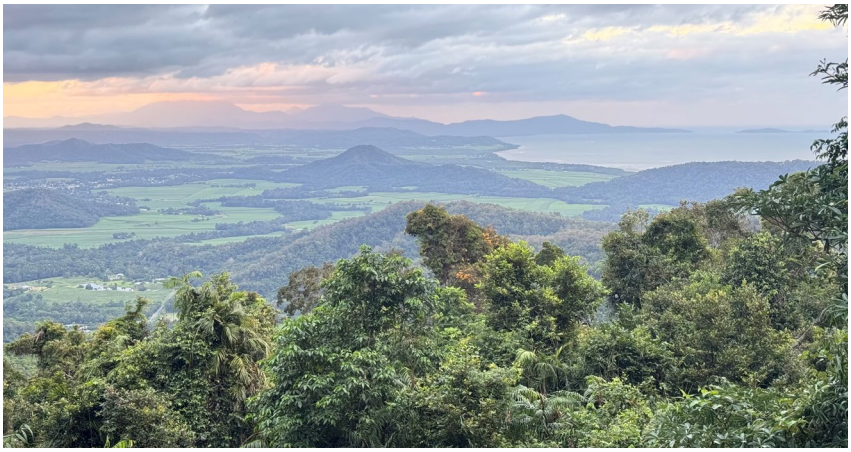
The Marlinja Community Solar project is set to be the Northern Territory's first grid-connected, First Nations' community-owned renewable energy project and will hopefully see the Marlinja community using 100% renewable energy from their own power supply in the near future.

Yoorndoo Ilga Solar Project[7]

The Yoorndoo Ilga Solar project is a partnership between the Barngarla People and Yoorndoo Ilga Solar. Located 13 kilometres north of Whyalla in South Australia, on freehold land owned by the Barngarla Determination Aboriginal Corporation (**BDAC**), the project will be spread over 665 hectares and will include battery storage in addition to the 300-megawatt solar system. Yoordnoo Ilga Solar will lease the required land from BDAC.

Power produced by the solar farm will connect to the South Australian and National Electricity Market.[8] The project will generate enough electricity each year to power over 115,000 South Australian homes. Additionally, the project will create considerable employment for the entire Whyalla region, not only during the construction and operational phases, but beyond. The project will also encourage further investment in the area.[9]

Yoorndoo Ilga was chosen by the Barngarla People as the name of the project, and it means 'having or possessing' the sun in Barngarla language.



Mountains in Far North Queensland

Where to next?

With the increasing global interest in renewable energy, it is vital that First Nations be involved in the development and management of such projects. A 2022 study found that approximately 54% of Australia's renewable energy projects will take place on or near land subject to native title or Aboriginal freehold title.[10]

Such projects must provide benefits to communities through opportunities for investment, employment and contracting, as well as the chance to have a say in what development is occurring on Country. Clean energy corporations need to be aware of their cultural, environmental, social and governance impacts, especially where those impacts are felt most by the people on whose lands the projects are occurring. Partnering with Indigenous communities and corporations is one way to ensure that renewable energy projects are being carried out responsibly.

If you are interested in learning more about these or other renewable energy projects, please visit: www.firstnationscleanenergy.org.au.

1 First Nations Clean Energy Network, 'East Kimberley Clean Energy Project', (webpage) https://www.firstnationscleanenergy.org.au/East_Kimberley_Clean_Energy_Project.

2 Pollination, 'World-first partnership to deliver Australia's first clean energy export hub' (webpage) https://pollinationgroup.com/media_post/world-first-partnership-to-deliver-australias-first-clean-energy-export-hub/.

3 Original Power, 'Marlinja Community Solar Power' (webpage) https://www.originalpower.org.au/marlinja_community_solar_project.

4 First Nations Clean Energy Network, 'Marlinja Community Solar' (webpage) https://www.firstnationscleanenergy.org.au/marlinja_community_solar.

5 As above n 4.

6 Clean Energy Council, 'Building the clean energy workforce of the future' (webpage, 10 August 2023) https://www.cleanenergycouncil.org.au/news/building-the-clean-energy-workforce-of-the-future.

7 First Nations Clean Energy Network, 'Yoorndoo Ilga Solar' (webpage) https://www.firstnationscleanenergy.org.au/Yoorndoo_Ilga_Solar.

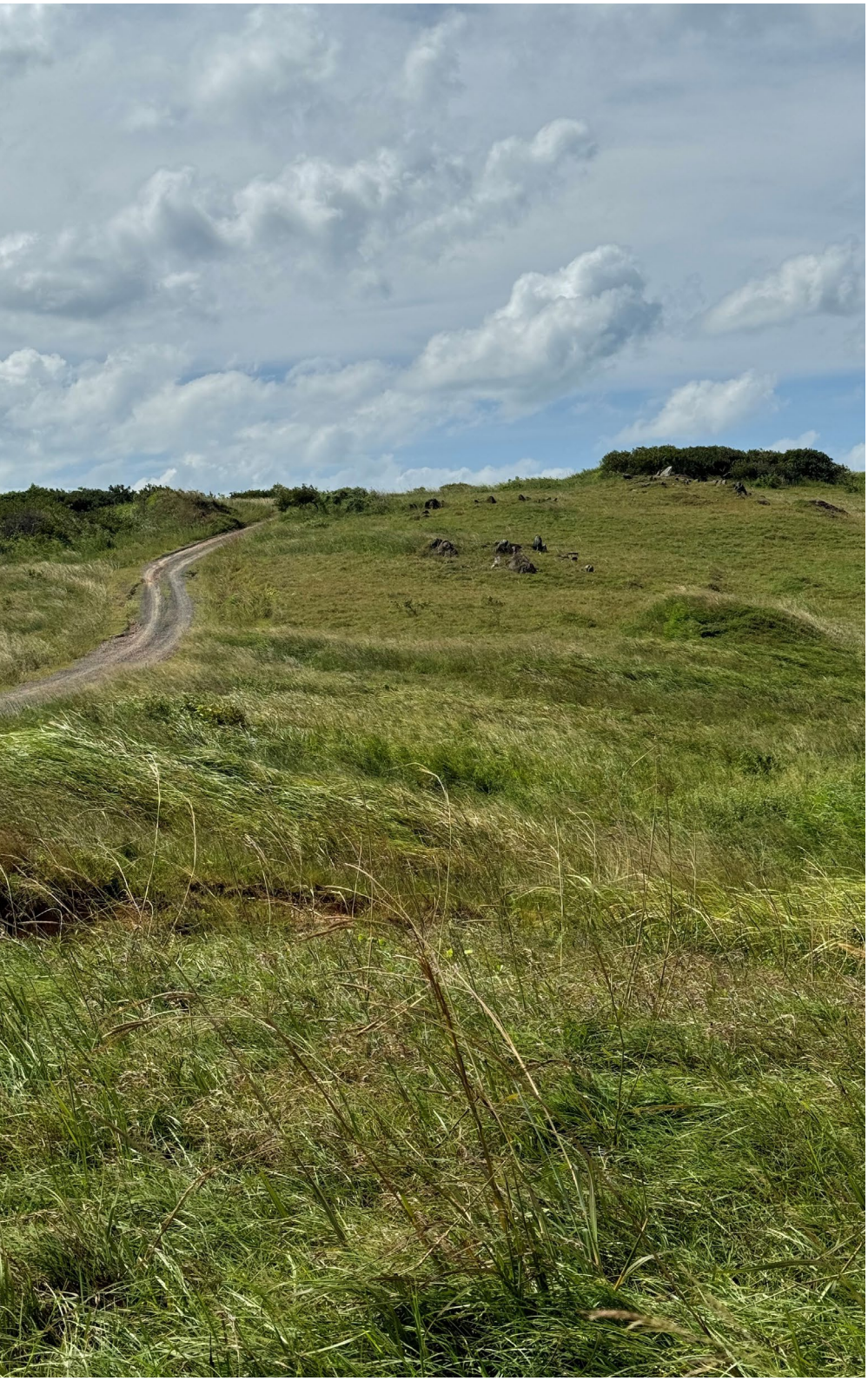
8 As above n 7.

9 Yoorndoo Ilga Solar, 'Welcome to Yoorndoo Ilga Solar' (webpage) https://www.yoorndooilgasolar.com.au/.

10 Deanna Kemp, Jown Owen and Kado Muir, '54% of projects extracting clean energy minerals overlap with Indigenous land, research reveals' (webpage, 5 December 2022) https://smi.uq.edu.au/article/2022/12/54-per-cent-projects-extracting-clean-energy-minerals-overlap-indigenous-lands.

Law reform: *Environment Protection and Biodiversity Act 1999* (Cth)

By Tegan Barrett-McGuin



Archer Point, Yuku-Baja-Muliku Country, Queensland

As climate change continues to exacerbate environmental management challenges, the Australian Government in 2021 committed to a 'nature positive' approach to environmental management, with significant changes expected to be made to the Environmental Protection and Biodiversity Conservation Act 2000 (Cth) (**EPBC Act**) in 2024. Better inclusion of First Nations peoples and knowledge is an important objective in the Australian Government's reform. However, the Commonwealth Government has since announced that the draft laws, which were supposed to go before Parliament in 2023, will not be presented in Parliament until late 2024.

As with most legislative regimes across Australia, the environmental law framework is complex and multi-layered. While all States and Territories have their own laws to protect and manage the natural environment, the Commonwealth Government also plays a significant role.

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)

The primary legislation for protection of the environment and threatened species is the EPBC Act. The EPBC Act's primary protection mechanism is a three-stage approval process for activities that are likely to have a significant impact on 'Matters of National Environmental

Significance' or the natural environment on Commonwealth-owned land. Matters of National Environmental Significance (**MNES**) are defined within the EPBC Act and include things such as: world heritage places, national heritage places, certain threatened and migratory species, and the Great Barrier Reef Marine Park.[1]

MNES – especially world heritage or national heritage places – can include culturally significant First Nations places such as the Budj Bim Cultural Landscape (Gunditjamara Country, Victoria) and K'Gari (Butchulla Country, Queensland). However, having a site listed is a complex process and does not prevent development activities on Country if they receive approval under the EPBC Act.

As well as protecting MNES, the EPBC Act creates a framework for joint management of Commonwealth Parks with Traditional Owners. This framework has been used to establish joint management arrangements for Kakadu, Uluṟu-Kata Tjuṯa and Booderee National Parks. The EPBC Act also establishes an Indigenous Advisory Committee which provides advice to the Minister on matters under the EPBC Act as requested.[2]

Independent Review of the EPBC Act

Professor Graeme Samuel AC of the Australian National University conducted a review of the Act in 2020[3], finding that the EPBC Act is outdated and ineffective. Regarding First Nations peoples, Professor Samuel stressed that First Nations engagement is tokenistic and that First Nations knowledge and views are not properly valued in decision-making.[4]

On the subject of land management, Professor Samuel's report highlighted that the EPBC Act does not support First Nations' aspirations for management of national parks as it creates an unequal power balance between First Nations managers and the Director of National Parks (**DNP**).[5] Essentially, the DNP can override or ignore Traditional Owner management decisions.[6] In Kakadu National Park, sacred sites were damaged when the DNP conducted work in 2019 without appropriate consultation of Traditional Owners.[7] Traditional Owners are still awaiting the High Court's decision on whether the DNP can rely on Crown immunity to avoid prosecution in this instance.[8]

The Australian Government's 'Nature Positive Plan' for change

In 2022, the Australian Government released its 'Nature Positive Plan'[9] (**the Plan**), in response to Professor Samuel's 2020 report, which declared an intention to improve partnerships with First Nations peoples,[10] among other things. In the Plan, the Government acknowledges the dire state of the environment and that swift and dramatic change is needed. The Plan promises to amend the EPBC Act with the draft legislation originally intended to be introduced to Parliament in 2023[11].

In April 2024, Environmental Minister Tanya Plibersek announced that amendments to the EPBC Act will be introduced to Parliament in the coming weeks to establish an independent body known as Environment Protection Australia and the proposed entity called Environment Information Australia (EIA). The EIA has been established so that high quality and authoritative environmental data and information is available for national decision-making, allowing faster, clearer actions.[12] However, the Minister also announced that other promised amendments – including those that purport to include First Nations Peoples in decision-making – will be further delayed, to an unknown date[13].

First Nations engagement and participation in decision-making

The proposed mechanism for better involving First Nations peoples in decisions under the EPBC Act will be the 'National Standard for Indigenous engagement and decision-making'. The Government is developing these standards as a priority, with help from the Indigenous Advisory Committee.[14] In his report, Professor Samuels developed a draft standard[15] based on input from a number of peak First Nations bodies but it is unclear whether this has been used as a starting point.

The Government has also promised to work with First Nations people to review the role, function and purpose of the Director of National Parks (regarding joint management arrangements) and take immediate steps to develop the cultural capability of government staff.[16] The long-awaited cultural heritage legislation reform – in partnership with the First Nations Heritage Protection Alliance – has also been cited as part of the plan to strengthen First Nations people's rights as they relate to environmental protection.[17]

What's next?

Draft legislation is expected to be presented to Parliament in May 2024 to establish the Environmental Information Agency and Environment Protection Australia. However, beyond that – since the Environment Minister's press conference in April 2024 – there is no commitment to further action by the current Australian Government in this term of Parliament.

The Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) has advised there will be an opportunity for public comment on the National Environmental Standards (including the Indigenous Engagement standard) when they are drafted and before they are introduced to Parliament.[18] However, there is no indication as to when this may occur.

DCCEEW are currently accepting submissions on the proposed reforms. To have your say, visit: https://consult.dcceew.gov.au/australias-new-nature-positive-laws.

1 Department of Climate Change, Energy, the Environment and Water (DCCEEW) (Cth), *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) (Web Page) https://www.dcceew.gov.au/environment/epbc

2 Department of Climate Change, Energy, the Environment and Water, 'Indigenous Advisory Commitee operating under the EPBC Act', (Web Page, 7 November 2023) https://www.dcceew.gov.au/environment/epbc/our-role/advisory-committees/iac#members_2.

3 Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October. CC BY 4.0. https://epbcactreview.environment.gov.au/. (Samuel)

4 Samuel (n 3) 6, 57. 59.

5 Samuel (n 3) 57, 71.

6 Samuel (n 3) 70-71.

7 Giovanni Torre, 'Aboriginal Areas Protection Authority, Traditional Owners launch High Court action against Director of National Parks', *National Indigenous Times* (Online, 11 December 2023) https://nit.com.au/11-12-2023/8997/aboriginal-areas-protection-authority-v-director-of-national-parks-in-high-court.

8 Giovanni Torre, '*Aboriginal Areas Protection Authority*', *National Indigenous Times* (Web Page), 11 December 2011) https://nit.com.au/11-12-2023/8997/aboriginal-areas-protection-authority-v-director-of-national-parks-in-high-court.

9 DCCEEW 2022, ***Nature Positive Plan***: *better for the environment, better for business,* Department of Climate Change, Energy, the Environment and Water, Canberra, December. CC BY 4.0. https://www.dcceew.gov.au/environment/epbc/publications/nature-positive-plan.

10 Nature Positive Plan (n 9) 1.

11 Nature Positive Plan (n 9) 5.

12 https://www.dcceew.gov.au/environment/environmental-information-data/environment-information-australia#:~:text=Environment%20Information%20Australia%20(EIA)%20has,%2C%20allowing%20faster%2C%20clearer%20actions.

13 Minister for the Environment and Water Tanya Plibersek (Cth), *Press Conference in Sydney* (16 April 2024). Transcript available at: https://www.tanyaplibersek.com/media/transcripts/press-conference-in-sydney-with-the-minister-for-the-environment-and-water-tanya-plibersek/.

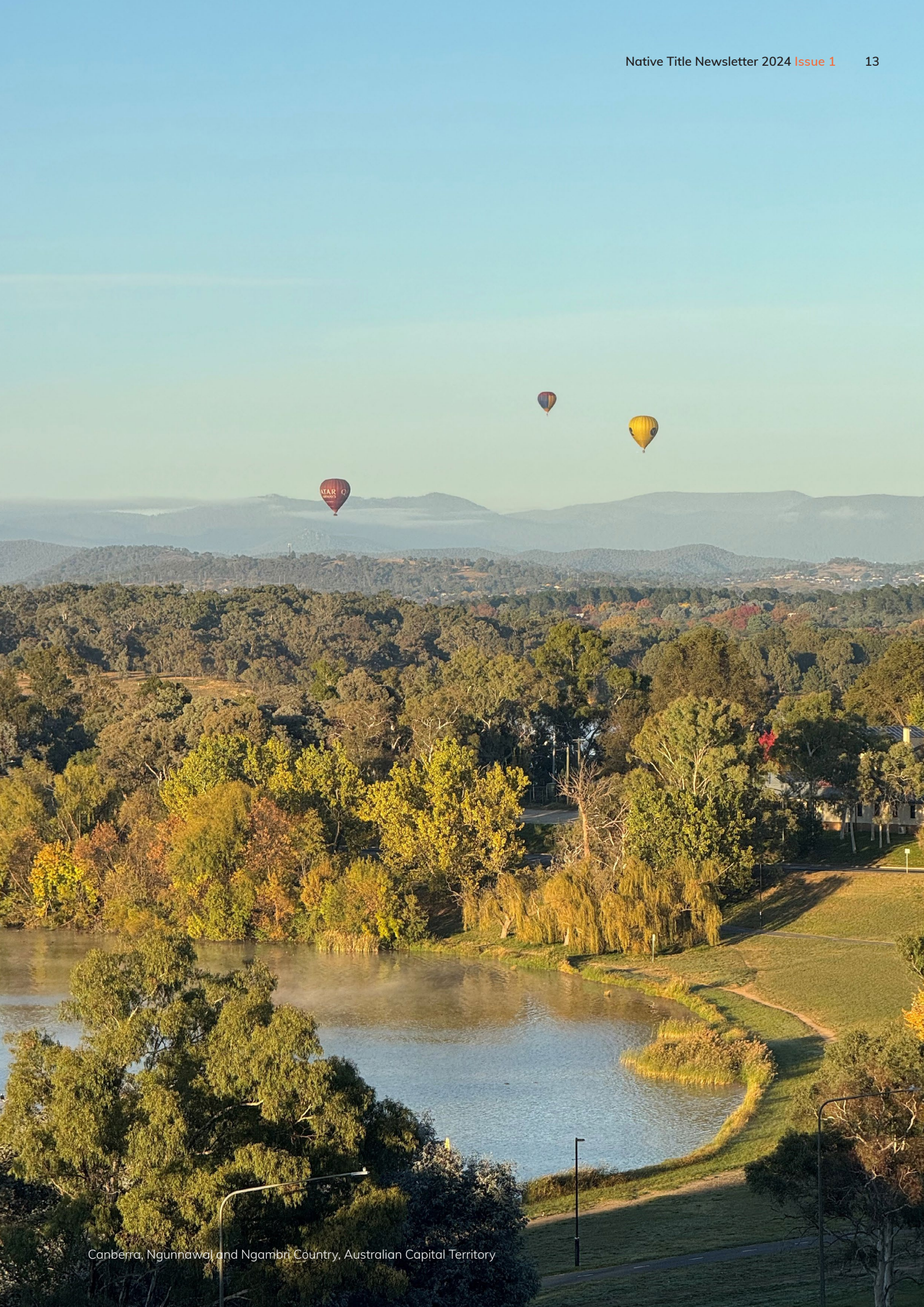
14 Nature Positive Plan (n 9) 38.

15 Samuel (n 3) 225 and 226.

16 Nature Positive Plan (n 9) 38.

17 Nature Positive Plan (n 9) 2.

18 Nature Positive Plan (n 9) 11; Mahani Taylor and James Tregurtha, 'Australia's new Nature Positive laws: Webinar 28 November 2023' (**Transcript**, Department of Climate Change, Energy, the Environment and Water, 28 November 2023) 4. Available at: https://consult.dcceew.gov.au/australias-new-nature-positive-laws/public-webinars.



Canberra, Ngunnawal and Ngambri Country, Australian Capital Territory

National Water Reform

By Tegan Barrett-McGuin

In 2024, the Australian Government hopes to finalise a new National Water Initiative (**NWI**) policy agreement which will guide the future of water law reform across the nation. One of the key reform agendas is increasing First Nations' involvement in water management.[1] At the same time, the Australian Government is also working towards increasing water-holding, and designing new water-holding arrangements, for First Nations peoples.

In Australia, water management is primarily the responsibility of state and territory governments. However, the Coalition of Australian Governments came together in 1994 to create a nationally consistent framework for water management. In 2004, governments signed the NWI Agreement, which sets out sets out objectives, actions and outcomes that all state and territory governments will work towards, including by amending their own legislation as appropriate. A new NWI is currently being designed, which the Australian Government anticipates state and territory governments will sign up to later this year.[2]

What does the NWI say about First Nations' rights?

Under the current NWI, governments should involve First Nations peoples in planning processes, consider customarypurposes and allocate water for native title rights in water plans 'wherever possible'.[3] However, state and territory governments have generally been slow to implement this aspect of the NWI[4] and the discretionary nature of the commitment means most state and territory legislation fails to mandate consultation or inclusion of First Nations peoples.

This exclusion from water markets and planning reinforces a legacy of 'aqua nullius'[5] – 'no one's water'[6] – which denies First Nations peoples' inherent rights and relationship with water and excludes Traditional Owners from the water market. Recent research indicates that today, almost 20 years on from the signing of the NWI, First Nations peoples in Australia hold less than 0.2% of entitlements to inland water across the country.[7]

Dr Virginia Marshall, a Wiradjuri Nyemba woman and author of 'Overturning Aqua Nullius: Securing Aboriginal Water Rights' criticises the discretionary nature of engagement of Aboriginal peoples under the NWI and points out that the framework is inconsistent with Aboriginal

Gungardie (Cooktown), Eastern Kuku Yulanji Country, Queensland

laws, beliefs and values which are based on the principle that water cannot be separated from land.[8] She further highlights that the NWI does not address Indigenous ownership of water, and ultimately sees the NWI in its current form as a barrier to Indigenous water rights.[9]

What kind of water rights do First Nations people have in Australia?

In Australia, the exclusive rights to own, control and allocate water are vested by legislation in the state and territory governments.[10] Aboriginal or Torres Strait Islander freehold does not include the right to control or allocate water on the land, as water rights are treated as separate to land rights in Australia.

Native title rights 'to take and use' water are commonly limited to 'domestic, cultural or non-commercial communal purposes'. Ultimately this means that native title holders do not have any advantage over the general public regarding water use, as using water for domestic or stock purposes are generally permitted without a licence under water legislation. In terms of procedural rights under the future act regime of the Native Title Act 1993 (Cth), only a 'right to comment' is recognised for water management activities on land subject to native title.

While native title itself may not provide secure water entitlements, native title settlements have supported water outcomes. For example, in Western Australia, both the Yamatji Nation and the Tjiwarl People negotiated native title settlements which secured their involvement in water management on their Country.[11] Management rights may also arise out of other voluntary agreements, such as those which establish Indigenous Protected Areas or joint management agreements for national parks. However, the ability to enter into these types of agreements is not recognised as a legal 'right' of First Nations peoples in Australia.

Some jurisdictions have included 'Indigenous water reserves' in water allocation plans. There has been little investigation into the effectiveness of water reserves but they have been critiqued for not transferring any decision-making power to Indigenous peoples.[12] Further, Indigenous water reserves are necessarily not the same as actual water entitlements; 'eligible' Indigenous people must still apply to access water from a water reserve.[13] In some cases, the reserve is 'notional', so there might not even be any water in the reserve to access if the water system is already over-allocated.[14] Further, while there is no overarching framework or rules for Indigenous water reserves the water typically cannot be used for environmental, spiritual or cultural purposes.[15]

The Australian Government's water reform commitments

In 2023, an inland waters target was added to the Closing the Gap Implementation Plan as a priority action.[16] The target is to increase First Nations water holding to 3% of the national water entitlements, over the next ten years.[17] To this end, the Australian Government committed $9.2 billion towards designing 'an enduring arrangement for First Nations peoples to own, access and manage water in Australia'.[18] A media release in April 2023 declared that the Government:

> **...will do this in close partnership with First Nations groups, to ensure that communities are leading discussions around what the arrangements will look like, where they will sit and how they will work.[19]**

Specifically, the Government stated it will work with the Coalition of Peaks, the Indigenous Land and Sea Corporation, the Committee on Aboriginal and Torres Strait Islander Water Interests (**CAWI**) and 'other stakeholders' to design and deliver water holding arrangements.[20] CAWI also advises the Government's National Water Reform Committee on the development of the new NWI.[21]

Separate to the NWI refresh, the Government committed $150 million from the National Water Grid Fund to fund infrastructure projects to improve water quality and services in regional and remote Aboriginal communities, some of which do not have access to clean drinking water. Projects are forecast to be delivered by 2026, according to the Closing the Gap Implementation Plan 2023.

What might reform look like?

CAWI have been consulting First Nations people and organisations around Australia since 2023 and have produced and published an insights paper which 'presents a set of Aboriginal and Torres Strait Islander water values, principles, and actions that the Committee wants recognised and reflected within national water reform initiatives.'[22] The values identified in the paper, upon which the recommended principles and actions are built, are:

1. Water and land, in all their forms, are interconnected living entities;
2. Self-determination is protected, defined, and realised in water management;
3. Protection of Indigenous Cultural Intellectual Property and knowledge;
4. Recognition of water rights and interests; and
5. Enduring access to healthy, quality water.

Also in 2023, the National Native Title Council (**NNTC**), the Indigenous Land and Sea Council (ILSC) and the Australian National University's First Nations Portfolio (**ANU FNP**) organised the Mayiny-galang-ngadyang (Peoples' Water) National First Nations Water Roundtable (**the Roundtable**). Delegates at the Roundtable produced 13 recommendations to government calling for the recognition of First Nations peoples' water rights in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.[23] The recommendations highlighted that water rights must be supported by First Nations-designed governance structures, institutions and research; and that the inequity between First Nations' and non-Indigenous peoples in their ability to access and hold water entitlements must be addressed.

A First Nations Working Group is to be convened to facilitate the development of a First Nations-led, nationally consistent approach to First Nations' water rights. The intention was that the Working Group will engage directly with government on the topic of First Nations water rights. At the time of writing, the working group is yet to be established.

What's next?

The Productivity Commission is currently undertaking another review of the government's progress against the existing NWI agreement, with a particular focus on water security.[24] The final report is due to be provided to Government in May 2024. At the same time, the Australian Government anticipates the new NWI will be presented to state and territory ministers to seek their agreement later this year. Public engagement on how the new NWI will be actioned is forecast to begin before the year is over.[25]

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1 Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) (Cth), *National Water Initiative* (Web Page) https://www.dcceew.gov.au/water/policy/policy/nwi.

2 DCCEEW Web Page (n1).

3 Intergovernmental Agreement on a National Water Initiative (**NWI Agreement**), cl 52-54. Available at: https://www.dcceew.gov.au/water/policy/policy/nwi.

4 Productivity Commission, Australian Government, *National Water Reform 2020 Inquiry Report* (Inquiry Report No 96, May 2021), 1-2. Available at: https://www.pc.gov.au/inquiries/completed/water-reform-2020/report/water-reform-2020.pdf.

5 Virginia Marshall, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017). (**Marshall**)

6 See e.g. Kat Taylor, Anne Poelina and Quentin Grafton, 'The lie of aqua nullius, 'nobody's water', prevails in Australia. Indigenous water reserves are not enough to deliver justice (2022) *The Conversation*, https://theconversation.com/the-lie-of-aqua-nullius-nobodys-water-prevails-in-australia-indigenous-water-reserves-are-not-enough-to-deliver-justice-195557.

7 Department of Climate Change, Energy, the Environment and Water (Cth), *Consultation on First Nations water holding arrangements* (Web Page) https://www.dcceew.gov.au/water/policy/first-nations/consultation-water-holding-arrangements.

8 Marshall (n 5) 119.

9 Ibid.

10 *Water Act 2000* (Qld), s26; *Water Management Act 2000* (NSW), s 392; *Water Resources Act 2007* (ACT), s 7; Water Act 1989 (Vic), s 7; *Water Management Act 1999* (Tas), s 7; *Landscape South Australia Act 2019* (SA); *Rights in Water and Irrigation Act 1914* (WA), s 5A; *Water Act 1992* (NT), s 9.

11 See Yamatji Southern Regional Corporation, *Water* (Web Page) https://ysrc.com.au/country/water/; National Native Title Council, *NNTC celebrates historic agreement achieved by the Tjiwarl people of the Goldfields region, Western Australia* (Web Page) https://nntc.com.au/media_releases/nntc-celebrates-historic-agreement-achieved-by-the-tjiwarl-people-of-the-goldfields-region-western-australia/. Read the full agreement at https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/tjiwarl-palyakuwa-agreement-indigenous-land-use-agreement-tjiwarl-palyakuwa-tiiwa-kuwarri-yampa-ngula

12 Kat Taylor, Anne Poelina, William Nikolakis, Libby Larsen, and R. Quentin Grafton, 2022, *Indigenous water reserves in Australia: 2022 policy brief*, version 1.0. Water Justice Hub and Martuwarra Fitzroy River Council, 24. Available at http://hdl.handle.net/1885/280411.

13 Ibid, 10.

14 Taylor et al (n16) 8, 14-15.

15 Taylor et al (n16) 6.

16 Commonwealth, *Closing the Gap Implementation Plan 2023*, 107. Available at https://www.niaa.gov.au/sites/default/files/publications/closing-the-gap-implementation-plan-2023.pdf

17 National Native Title Council, *Closing the Gap - Inland Waters Target Framework* (Web Page) https://nntc.com.au/our-agenda/closing-the-gap/.

18 Department of the Prime Minister and Cabinet (Cth), 'Delivering water ownership for First Nations' (Media Release, 27 April 2023) https://ministers.pmc.gov.au/burney/2023/delivering-water-ownership-first-nations.

19 Ibid.

20 Department of Prime Minister and Cabinet (n22).

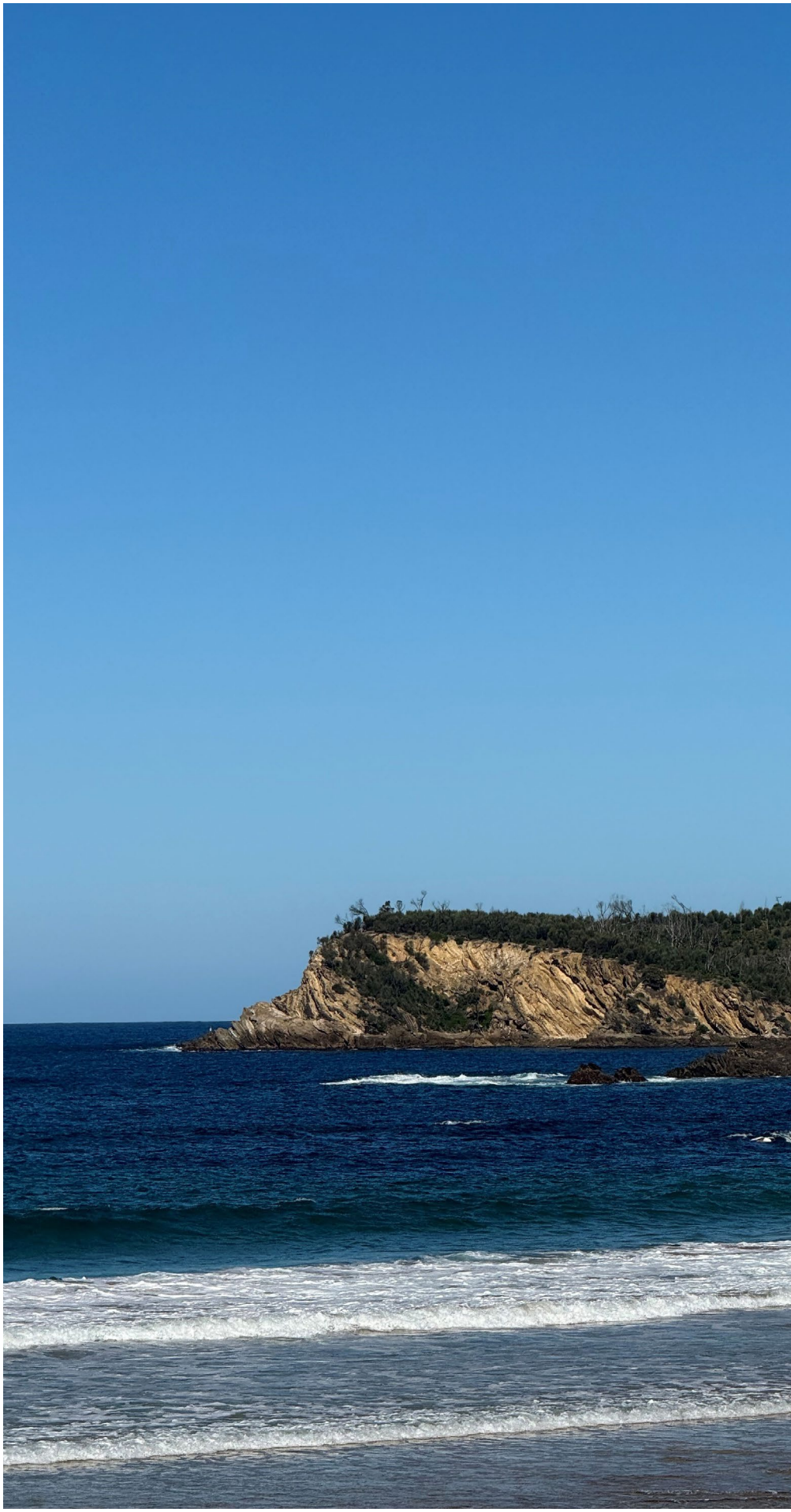
21 Department of Climate Change, Energy, the Environment and Water (Cth), *Committee on Aboriginal and Torres Strait Islander Water Interests* (Web Page) https://www.dcceew.gov.au/water/policy/first-nations/cawi.

22 Committee on Aboriginal and Torres Strait Islander Water Interests, *Pathway to enduring recognition of Aboriginal and Torres Strait Islander Peoples' water interests in national water reform initiatives* (Insights Paper, December 2023). Available at https://www.dcceew.gov.au/water/policy/first-nations/cawi.

23 ANU, ILSC & NNTC, *Outcomes Report on the National First Nations Water Roundtable,* 16-17 May 2023, Canberra, the Australian National University, 22.

24 National Water Reform 2024 - Public inquiry - Productivity Commission (pc.gov.au)

25 Seeking views on a future national water agreement - Climate (dcceew.gov.au)



Malua Bay, Yuin Nation Country, New South Wales

A new Alliance of Sea Country rightsholders is seeking administrative and regulatory reforms to afford recognition of their rights

By Gareth Ogilvie

Several recent decisions in the Federal Court have highlighted deficiencies in the way Traditional Owners' interests in Commonwealth offshore areas have been considered in the context of offshore energy projects. This jurisprudence has highlighted the need to ensure that Traditional Owner interests are given due recognition in the development and operation of offshore energy projects.

The decisions have also highlighted the fact that, to date, this has not occurred and also that the current regulatory framework supporting this legislation is not apt to facilitate this outcome.

The regulation of energy projects (gas and offshore wind) in Commonwealth waters is managed under several pieces of legislation and associated regulation:

- *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*
- *Offshore Electricity Infrastructure Act 2021 (Cth)*
- *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

As a result of this awareness, over the course of 2023 there were discussions held amongst a broad range of Traditional Owner Representative Institutions (**TORIs**). The National Sea Country Alliance Summit (**Summit**) held in Darwin in November 2023, and the subsequent establishment of the Sea Country Alliance (**Alliance**) as a new Traditional Owner peak organisation, is an illustration of work being undertaken by Traditional Owners to have their rights over Sea Country recognised.

All coastal state and territories of Australia are represented on the 55 member Alliance, ensuring that the complexity of our diverse seas, oceans and coastal areas is recognised. The Alliance has 46 Traditional Owner member corporations with statutory recognised responsibilities for Sea Country and 9 associate members which are Traditional Owner organisations with an interest in Sea Country issues.

Alliance members have statutory and cultural responsibilities over or adjacent to Commonwealth waters in addition to their other interests. The impact of offshore infrastructure and its necessary relationship to onshore infrastructure is therefore much broader, relating to both tangible and intangible Cultural Heritage.

Injudiciously considered offshore infrastructure poses a significant threat to Traditional Owner rights to live their cultural connections to this Country. Potential impacts are far more diverse than damage to submerged physical sites, they also include the visual interference on the cultural landscape and effect on cultural species.

To further their work, the Alliance has held discussions with industry and government representatives, aimed at developing an appropriate proposal for policy and regulatory reform. As a result of these discussions, several key outcomes have been identified that would:

- achieve practical streamlined processes;
- provide all parties with certainty and confidence;
- ensure appropriate recognition of TORIs; and
- recognise as legitimate the aspirations of Traditional Owners regarding Sea Country resources.

The Alliance has proposed workable administrative and regulatory reforms to afford recognition of Traditional Owner rights over Sea Country and overcome uncertainty that has arisen from recent decisions in the Federal Court.

In summary, these are:

- The regulatory recognition of the role and function of TORIs such as Prescribed Bodies Corporate (**PBCs**) and Northern Territory Aboriginal Land Council.
- Reform necessary to make the point of the grant of title the point of negotiation and not the multiple subsequent operational approvals.
- The adoption of an "agreement-based" based approach with respect to Traditional Owners communities, through the relevant TORI directly affected by a proponent's intended activities. This agreement-based approach would, similarly to the Native Title Act 1993 (Cth), make provision for the relevant statutory decision maker to be able to finally determine.
- The continuation of an effective consultation mechanism, but through the relevant TORI, in respect of Traditional Owner communities within the 'environment that may be affected' (**EMBA**).
- The establishment of an aggregated fund for the benefit of Traditional Owner communities within all EMBA areas.
- The resourcing of the TORIs to undertake these functions through a combination of government and proponent funding. In this model government would support the standing capacity of a TORI whereas a proponent would bear the project related costs incurred by the TORI.
- To commence the process of implementing these reforms, it is essential that there is immediate establishment of a Working Group by the relevant Ministers. The Working Group would comprise of appropriately senior representatives of Traditional Owner organisations, relevant industry bodies (gas and wind) and relevant government agency representatives.

Disappointingly, industry and government have failed to yet enact any of the Alliance's recommendations for development of an appropriate regulatory and policy reform process that could achieve these outcomes.

Traditional Owners and their representative institutions fully accept that the realisation of their expectations in a practical operational, commercial and policy environment will require some adaptation and flexibility. Traditional Owners expect that the goodwill displayed in accepting the need for some flexibility will be reciprocated by the other parties in any forthcoming discussions.

The reforms proposed recognise the Commonwealth Government's commitment to enact the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international law.

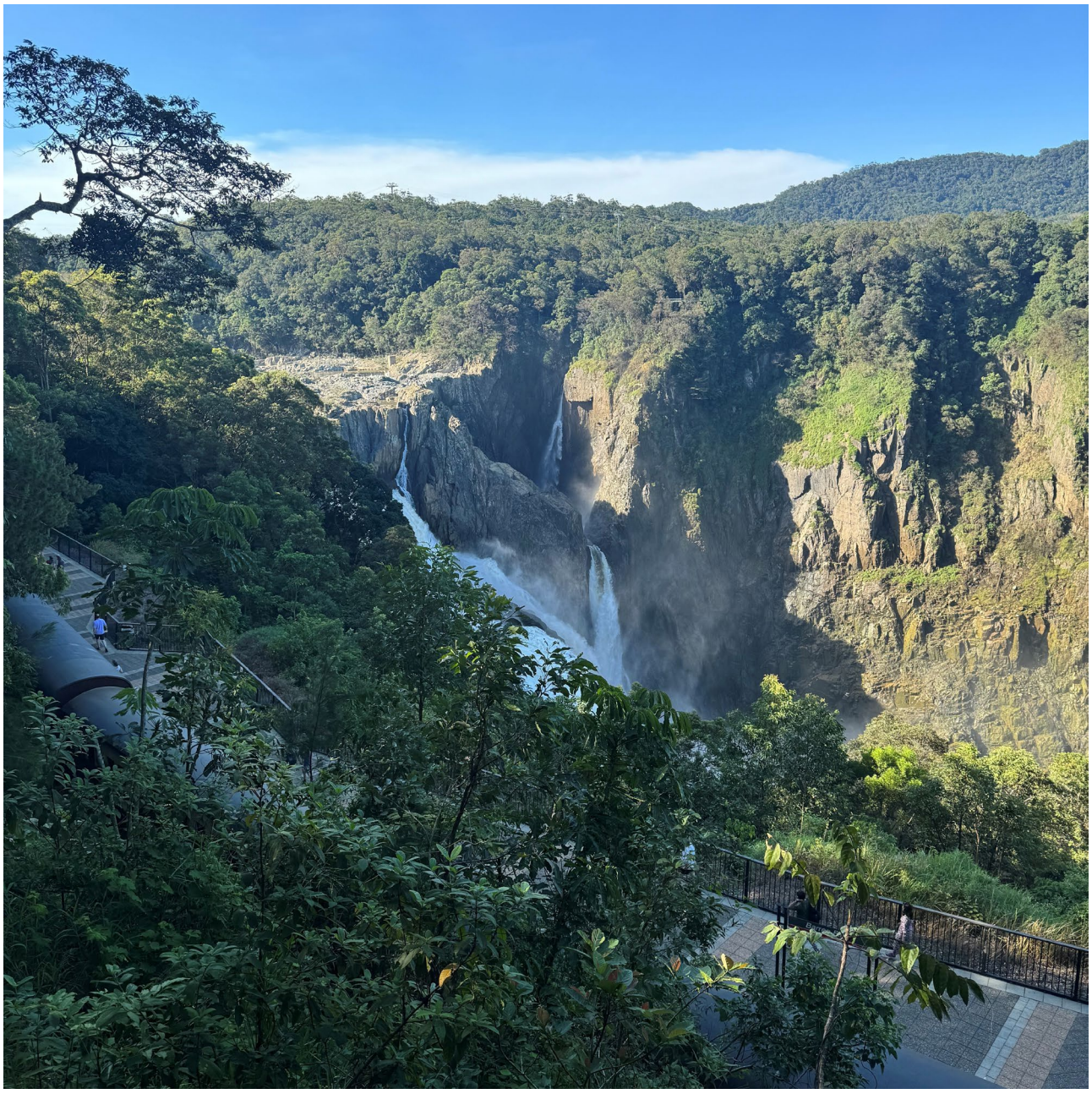
As such, they are a legitimate expression of Traditional Owner expectations based on international legal norms, the application of which the Commonwealth Government has accepted. Therefore, neither should the proposals be seen as an ambit bid in a negotiation process or as an ultimatum. They are a statement of Traditional Owner ambitions for a workable way forward for protection of cultural heritage offshore and legitimate activities for the betterment of all Australians.

Working in native title

In this section, we feature profiles of people working in native title organisations.

Here, you can read about their roles and experiences in native title and what inspires them to continue in this space, as well as their advice to people considering a career in native title.

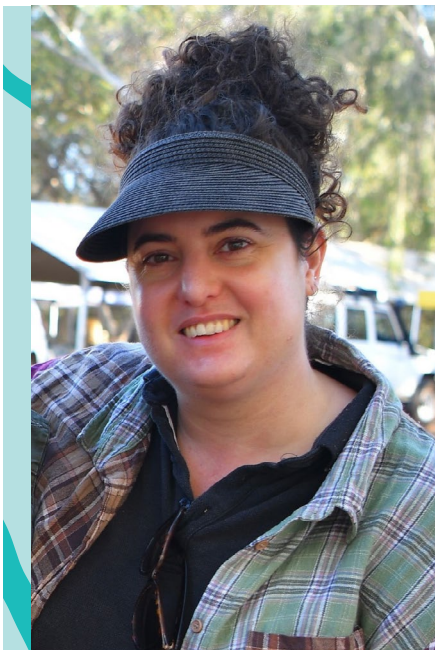
If you work at a native title representative body/service provider or a prescribed body corporate, and would like to contribute a profile, please contact the ICG team at nativetitleresearchunit@aiatsis.gov.au.



Din Din (Barron Falls), Djabugay Country, Queensland

Working in native title

Amy Usher



Amy Usher

What is your name?

Amy Usher

What organisation do you work with?

Yamatji Marlpa Aboriginal Corporation (YMAC), the Native Title Representative Body (NTRB) for the Pilbara, Murchison, Gascoyne and Mid West regions of Western Australia.

Briefly describe your role.

My current role is as the Research, Country and Culture Services Manager. I have oversight of the Heritage and Land Sea Management teams, which provide a range of services to Prescribed Bodies Corporate and native title groups in our regions (e.g. heritage service provision, assistance with ranger programs, securing funding for on-Country programs, and so on). And I also manage the Research team, comprised of anthropologists who work on-Country with Traditional Owners to research and support native title claims and return of materials projects.

How long have you worked in native title?

12 years!

What are some of the highlights of your career in native title so far?

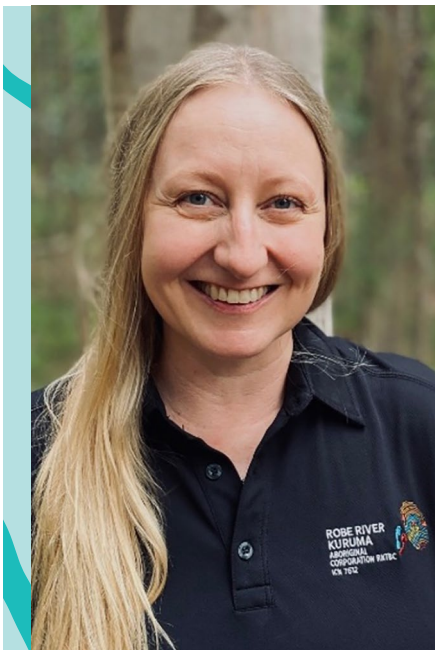
Honestly, there have been so many. One of my favourite memories is when I was an Anthro working in the Pilbara, and I was taken to some amazing rock formations on Kariyarra Country. We traipsed across what were really small boulders, and I was shown the most spectacular petroglyphs by some of the senior Elders from the group. They were depicting pregnancy and birth. There was such emotion in the carvings. I felt a sense of great awe that I got to see such beautiful depictions of life on such amazing Country, and that I had the opportunity to be taken there. That experience has definitely stayed with me all these years.

What advice would you give someone who is considering a career in native title?

Do it! Whilst it has its challenges (like any career), the things you will see and the people you will meet will stay with you for many years to come. If you want to work as a research anthropologist, get out on-Country, learn about the oldest living culture in the world and be exposed to so many different ideas and individuals – then come and work in an NTRB!

Working in native title

Sanna Nalder



Sanna Nalder

What is your name?

Sanna Nalder

What organisation do you work with?

Robe River Kuruma Aboriginal Corporation (RRKAC)

Briefly describe your role.

I work as a Senior Anthropologist in RRKAC's Country and Culture Team. My role is varied and includes activities such as trips on country with the aim of protecting heritage, recording cultural knowledge and facilitating caring for country, anthropological research and advice, editing reports and looking after a repatriation program. It has been wonderful to return to work with Kuruma Marthudunera people after initially working on the connection report 16 years ago.

How long have you worked in native title?

I have worked in native title related roles since 2007.

What are some of the highlights of your career in native title so far?

I have always been grateful for the opportunity to work with Elders and learn about the country and culture on country. It has been a long and arduous way to determinations, but seeing them happen and witnessing groups successfully moving on to the post-determination space has been rewarding. My previous roles at Yamatji Marlpa Aboriginal Corporation (YMAC), Queensland South Native Title Services (QSNTS) and Community and Personal Histories as well as working in multi-disciplinary teams along the way, have given me not only a varied skill set, but also a deeper understanding of Australian history and society.

What advice would you give someone who is considering a career in native title?

I am happy to state that in all my years of working in native title, I am yet to have a boring day! The work can be demanding, challenging and plans often change at a short notice, so flexibility and creativity are the key to avoid stress. Working in native title is a meaningful way to contribute to the communities you work with.

Working in native title

Jamie Parriman

Jamie Parriman

What is your name?

Jaime Parriman

What organisation do you work with?

I am the Native Title Services Unit Manager at the Kimberley Land Council (KLC) based in Broome Western Australia

Briefly describe your role.

My current role as Unit Manager is an executive position where I manage, in conjunction with the PLO, the Native Title Program for the entire Kimberley Region.

How long have you worked in native title?

I have been employed with the KLC since 2013, originally commencing in the role of team leader and being promoted to Unit Manager in 2019.

What are some of the highlights of your career in native title so far?

Highlights of my career are working with my team in getting native title determined for Kimberley Aboriginal people, and seeing the Traditional Owners, especially our elders, at a determination hearing receiving the acknowledgement and recognition they deserve, that Aboriginal Australians were here first and that our connection to country is imperative to our identity.

What advice would you give someone who is considering a career in native title?

My advice to someone considering a career in native title is to understand what native title really means to Aboriginal people, that is not just a piece of paper saying we have rights and interests in the land but it is our culture and our responsibility.

Working in native title

Rainer Mathews

Rainer Mathews

What is your name?

Rainer Mathews

What organisation do you work with?

First Nations Legal and Research Services

Briefly describe your role.

Principal Legal Officer

How long have you worked in native title?

I started working in native title in 2006

What are some of the highlights of your career in native title so far?

Working for First Peoples as a native title lawyer has been the most rewarding job I can imagine. I've represented and advised many extraordinary people, many of whom have re-shaped the way I look at work and the world in general. Every week as a native title lawyer brings new cutting-edge legal issues to grapple with, always in the context of a complex political, social and inter-cultural environment. It's been an absolute privilege and honour to do this work.

Since beginning in native title I've worked on many native title claims, each one wholly unique. I've helped First Nations in their community, business and Country planning, represented them in negotiations with some of the largest mining and mining infrastructure project proponents in Australia, helped set up indigenous enterprises, negotiated joint management plans for conservation reserves, advised on cultural and community development projects, governance issues and so much more.

Right now in Victoria native title is being reshaped by the emergence of the Victorian Voice, Truth, and Treaty processes. The new Victorian Treaty framework has the potential to shine a light on and at least in part address the inadequacies of the native title system. This could help to reset Victoria's and the Nation's relationship with its First People. It's important, exciting and consequential work.

What advice would you give someone who is considering a career in native title?

There is increasing need and demand for native tile professionals across Australia. Many native title claims remain unresolved, three decades after the Native Title Act came into force. A big wave of native title compensation applications is coming, and will play out over coming years and decades. Seeking reparation from government and industry for cultural loss flowing from extinguishment of native title is difficult, sensitive but profoundly meaningful and rewarding work.

The rollout of renewable energy infrastructure is likely to impact First Peoples to an unprecedented degree, and we need people on the ground to make sure they are properly engaged and their rights respected. If you're a person who is excited at the prospect of doing important and intellectually challenging work in a politically, socially and culturally complex environment, then I don't think you can go past a career in native title.

Case notes

Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd [2024] FCAFC 26

By Tegan Barrett-McGuin

In early 2024, the Gomeroi People were successful in challenging the National Native Title Tribunal's (**Tribunal**) dismissal of evidence regarding climate change concerns in the hearing of a Future Acts Determination Application (**FADA**). In this groundbreaking decision, the Court held that the Native Title Act 1993 (Cth) (**NTA**) does allow for climate change concerns to be considered in determining a FADA. However, it remains to be seen whether the Tribunal will ultimately consider climate change implications as compelling enough to determine that mining tenements cannot be granted.

Background

On 1 May 2014, Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (together, **Santos**) applied for four petroleum production leases (**PPLs**) as part of the **Narrabri Gas Project**. The PPLs covered an area of 92,400 hectares that fell completely with the claim area of the Gomeroi People's registered native title claim in northern New South Wales.

In accordance with section 31(1) of the NTA, Santos negotiated with the Gomeroi People's native title Applicant (**Gomeroi**) with a view to obtaining their agreement to the grant of the PPLs. The **negotiation period** lasted about seven years, from 2015 until 2022. Santos made their final offer in March 2021, which was rejected by Gomeroi.

In 2020, during the negotiation period, the Independent Planning Commission of New South Wales granted development consent for the Narrabri Gas Project, subject to 134 conditions. This decision was unsuccessfully challenged by an entity known as the Mullaley Gas and Pipeline Accord in the Land and Environment Court of New South Wales. The relevant Commonwealth Minister also granted the necessary approval.

In May 2021, Santos lodged a FADA with the Tribunal seeking a determination that the PPLs could be granted, despite Gomeroi's lack of consent (per section 35(1) of the NTA). Gomeroi argued that according to section 35(2) of the NTA, the Tribunal did not have jurisdiction to make the determination because Santos had not negotiated in good faith as required by section 31(1) of the NTA.

Gas Project would make to climate change was against the public interest (**the climate change argument**). In support of this argument, Gomeroi engaged climate change and earth scientist Professor William Steffen as an expert witness. Professor Steffen gave evidence on matters such as global warming generally and methods for predicting impacts of climate change in the Narrabri region. His evidence included the assertion that in order to achieve net zero emissions by 2050 as agreed in the Paris Agreement, there must be no new oil and gas fields, no new mines and no extension of mines approved, starting immediately. This is supported by findings in peak energy body the International Energy Agency's 2021 report.

On 19 March 2022, the Tribunal made a determination that the PPLs could be granted, subject to one condition which is immaterial for the purposes of this summary. Gomeroi appealed the Tribunal's determination to the Full Court of the Federal Court of Australia (**the Court**).

The Tribunal's Decision

The Tribunal found that Santos' conduct at all times demonstrated a genuine intention to seek agreement with Gomeroi. Contrary to Gomeroi's submissions, the Tribunal considered the duty to negotiate in good faith did not require Santos to make a 'reasonable' offer. Further, the Tribunal did not consider Gomeroi's expert evidence on the market value of Santos' offer to be probative and found no evidence that Santos had not negotiated in good faith. Therefore, the Tribunal had jurisdiction to determine the FADA.

Regarding the climate change argument, the Tribunal considered the 1998 amendments to the NTA had removed environmental impacts from the list of mandatory considerations under section 39(1) of the NTA, except for where it could be shown particular environmental concerns would impact the relevant native title rights and interests in that instance. That being so, the Tribunal concluded it was not their role to 'second-guess' the state and Commonwealth agencies who had approved the project in the face of similar climate change arguments. In so finding, the Tribunal gave little weight to Professor Steffen's evidence and determined the PPLs could be granted.

Unsuccessful arguments on appeal

Gomeroi appealed on six questions of law. The Court dismissed five of these issues, finding:

1. The Tribunal had correctly identified and applied the existing law on what constituted 'good faith negotiations'.
2. The Tribunal's reasons did not suggest they had conflated the terms 'payment' and 'compensation' under the NTA.
3. Gomeroi was not denied procedural fairness by the Tribunal considering the definition of 'market' under the Competition and Consumer Act 2010 (Cth) in their reasons, without the parties' submissions on that definition. The Tribunal is entitled to undertake their own research for the purpose of performing their functions (per section 108(2) of the NTA), so long as they act fairly (section 109(1) of the NTA), and by doing so the Tribunal had not denied Gomeroi a reasonable opportunity to present its case or address information relied on by the Tribunal.
4. It was legally reasonable for the Tribunal to prefer Santos' expert evidence on the good faith question over Gomeroi's, because the Tribunal had found Gomeroi's expert evidence on that point lacked probative value.
5. The Tribunal was correct to conclude that Santos was not acting in 'bad faith' by negotiating with the Applicant whose name appeared on **the Register** of Native Title Claims, despite knowing that a new Applicant had been authorised. The Court considered where the authorised Applicant had not yet been confirmed by the Court under section 66B of the NTA, the former Applicant (whose name is on the Register) is still the relevant Applicant.

Successful argument on appeal: the climate change argument

Regarding the Climate Change Argument, Gomeroi claimed the Tribunal had erred by incorrectly interpreting section 39(1)(e) of the NTA – that the Tribunal must consider 'any public interest in the doing of the act' – as excluding general environmental matters and requiring particular evidence of the impact on native title rights. Consequently, Gomeroi argued, the Tribunal made an error by declining to consider Professor Steffen's evidence. The Court upheld Gomeroi's appeal on this point, by a 2:1 majority.

Mortimer CJ and O'Bryan J found the Tribunal had misconstrued the effect of the 1998 amendments. Their Honours agreed the 1998 amendments removed from section 39(1)(a) and (b) of the NTA a mandatory requirement for the Tribunal to consider environmental impacts on native title in every FADA. However, they did not consider this prevented the Tribunal considering environmental matters, if and when they were relevant, under section 39(1)(e).

Mortimer CJ (O'Bryan J concurring) further pointed out that section 39(1)(e) was not changed by the 1998 amendments and there was nothing in the 1998 explanatory memorandum to suggest the scope of this subsection was to be limited. On this point, Mortimer CJ highlighted that the existing authority is clear that use of the phrase 'any public interest' confers wide discretion as to the subject matters that may be included. Their Honours considered that the discretion afforded by section 39(1)(e) (as well as section 39(1)(f) – 'any other matter that the arbitral body considers relevant') was wide enough to include consideration of relevant environmental concerns that were a matter of public interest.

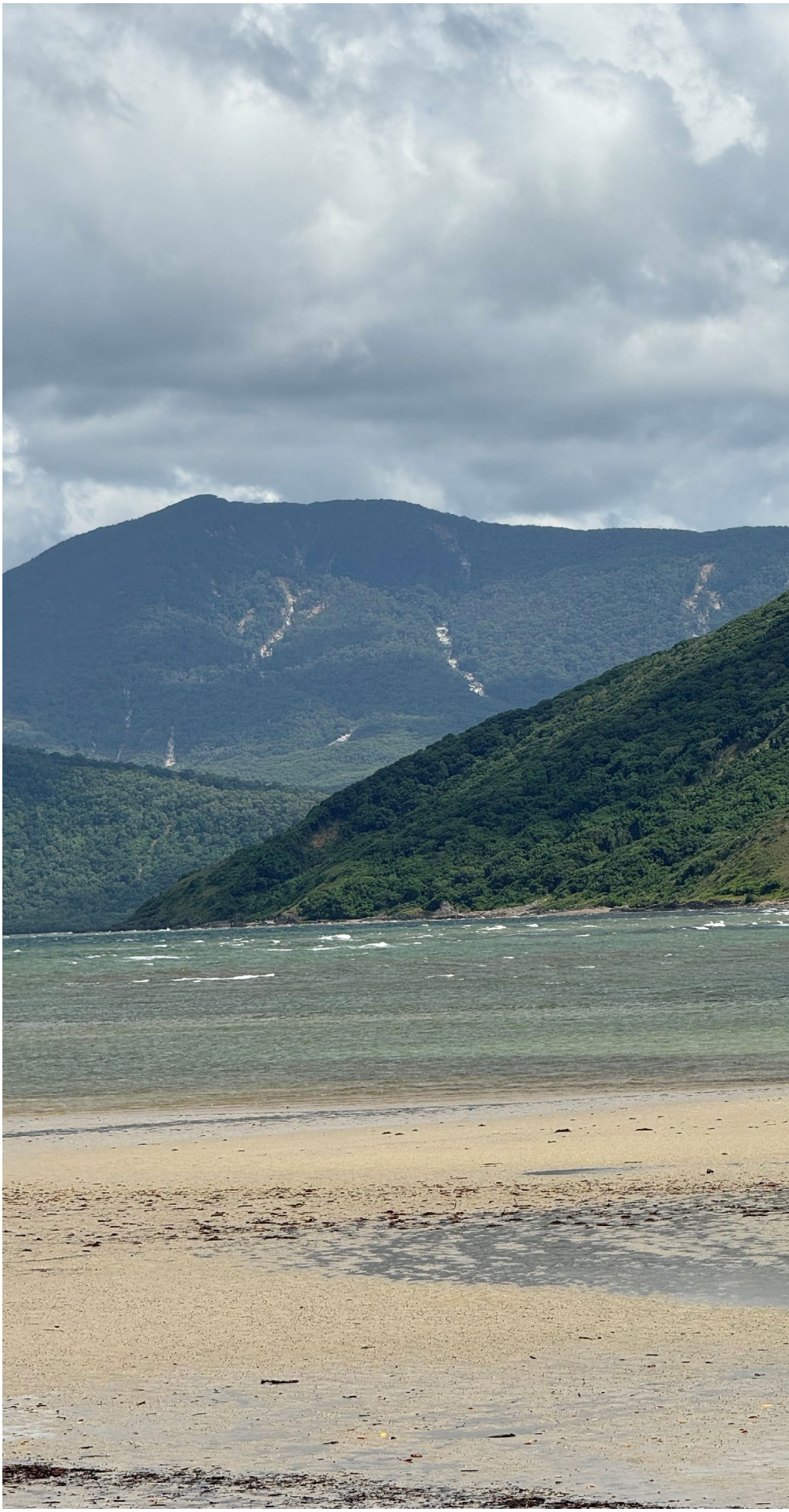
Rangiah J reached a different conclusion. By preferring a strictly grammatical interpretation of section 39(1)(e), his Honour considered that the phrasing of the subsection 'any public interest in the doing of the Act' limited the Tribunal's considerations to public interest that favoured the act. It did not permit consideration of public interest in the act not being done. O'Bryan J agreed with Rangiah J's construction of section 39(1)(e) but concluded that the Tribunal could not reasonably

have considered that there was any public interest in the act being done if the public harm outweighed the public good. In this case, O'Bryan J considered Professor Steffen's evidence was relevant to that balancing exercise and should have been considered.

The majority of the Court found that the Tribunal's reasons indicated the Tribunal had clearly chosen not to consider Professor Steffen's evidence based on the mistaken conclusion that climate change concerns are not within the Tribunal's remit. Therefore, the Tribunal's decision to allow the PPLs to be granted was affected by an error of law in that they did not consider relevant evidence presented by Gomeroi.

Relief

The usual course would be to refer the matter back to the Tribunal to reconsider the original determination having regard to Professor Steffen's evidence. However, in this instance, the Court invited the parties to make submissions as to the preferred orders for next steps. At the time of writing, the Court has yet to make their final orders.



Archer Point, Yuku-Baja-Muliku Country, Queensland

Case notes

Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor; and Arid Lands Environment Centre Inc v Minister for Environment & Anor [2024] NTSC 4 (Singleton Water Licence Appeal)

By Tegan Barrett-McGuin

On 31 January 2024, Justice Barr dismissed two separate challenges to the Minister for the Environment's approval of a water extraction licence in the Northern Territory. The water extraction licence allows **Fortune** Agribusiness – the lessee of Singleton Station located approximately 380 kilometres north of Alice Springs – to take up to 40,000 megalitres of groundwater per year from Singleton Station for up to 30 years (**the Singleton water licence**). The approved water extraction exceeds the groundwater extraction limits contained in the water allocation plan for the relevant area, being the Western Davenport Water Allocation Plan (**WDWAP**).

Administrative review applications were brought in the Supreme Court of the Northern Territory by the Mpwerempwer Aboriginal Corporation RNTBC (**MAC**) and the Arid Lands Environment Centre Inc (**ALEC**) (together, **the plaintiffs**). The plaintiffs were concerned about the impact the water extraction would have on Groundwater Dependent Ecosystems (**GDEs**) and the 93 Aboriginal sacred sites in the drawdown area.

MAC is the registered native title body corporate for native title holders of Country that includes Singleton Station. ALEC is a Central Australian environmental organisation whose purpose is 'to protect the environment and ensure healthy futures for arid lands and peoples'.

The Minister's decision

The Singleton water licence was first granted by **the Controller** of Water Resources in 2021 under section 60 of ***the Water Act*** 1992 (NT). It was granted subject to a number of conditions, some of which required the Controller to receive and assess various impact and monitoring reports, and grant approval before Fortune could move to the next stage of the project.

The plaintiffs applied to the Minister for the Environment to review the Controller's decision under section 30 (application for review) of the Water Act. After referring the matter to the Water Resources **Review Panel** and receiving their recommendations, the Minister for the Environment delegated her power under section 30 of the Water Act to the Minister for Territory Families and Urban Housing (**the delegate Minister**) to make the final decision. The delegate Minister approved the licence with slightly amended versions of the Controller's conditions, plus two extra conditions (**the Minister's decision**). The extra conditions required Fortune to prepare and submit assessments on the likely impact on groundwater-dependent Aboriginal cultural values and GDEs prior to water extraction beginning.

The Supreme Court's decision

In January 2022, the plaintiffs filed administrative review applications, challenging the Minister's decision on a number of grounds. The Court addressed each plaintiff's case separately, although there was some overlap between them. Justice Barr ultimately dismissed all grounds, finding the delegate Minister's reasons demonstrated:

- the delegate Minister had considered all relevant factors, including the GDE and Aboriginal cultural values, which was apparent from her imposition of

Batehaven, Yuin Nation Country, New South Wales

- the delegate Minister had engaged in the 'requisite mental process' in considering the issues, despite making the decision within a short timeframe. Justice Barr highlighted a Minister is not required to actually read all of the relevant material for herself; she is entitled to have it filtered through departmental briefings, the Controller's decision and the Review Panel's report, which is what occurred here.
- the delegate Minister's impugned decision regarding the length of each 'stage' of the project was supported by evidence and numerous considerations.

Further, Barr J held that ALEC did not establish that the Minister's decision was legally unreasonable according to relevant case law, as it was not shown to be an abuse of power, acting outside the scope of the Act or in disregard of mandatory considerations, or that it lacked an evident and intelligible justification.

Nor did Barr J consider the Minister failed to afford MAC procedural fairness by inviting only Fortune's comments on the proposed changed conditions and not MACs, or by failing to provide MAC the digital files underlying the relevant groundwater models relied on by the Minister. Justice Barr considered that MAC would not have presented any additional or different evidence or arguments on these points; they had their opportunity to make their point, and they had made their point.

Did the Minister fail to make a decision by deferring certain assessments back to the Controller?

Justice Barr also rejected ALEC's and MAC's contentions that requiring the Controller to assess and determine certain matters at a later was an impermissible delegation of decision-making authority vested in the delegate Minister by her role as reviewer. ALEC argued the Minister had offended the 'principle of finality' and ultimately failed to make a decision, but his Honour held

the principle of finality related to planning law and did not apply in the case of water allocations.

His Honour also noted there were bound to be uncertainties, given the unpredictability inherent in water management and availability. Further, the Water Act allows for conditions to be imposed upon water allocation licences. Therefore, ongoing monitoring and reviewing of the impacts and management of the water licence - as required by conditions – was appropriate. His Honour further found it was commensurate with the Controller's existing responsibilities under the Water Act, appropriate and 'arguably desirable' to defer such decisions to the Controller.

Did the Minister's decision breach the Water Act by not complying with the water allocation plan?

Justice Barr rejected ALEC's argument that sections 22B(4) and 90(1) of the Water Act require any water allocation under the Act to be in accordance with any relevant Water Allocation Plan. Section 90(1) lists factors to be considered in decisions to grant water licences. His Honour held that although the Minister had an obligation to consider the relevant water allocation plan per section 90(1)(ab) – which she did - she did not have an obligation to comply with it.

Regarding section 22B(4), which provides water management must be in accordance with any water allocation plan declared for the district, Justice Barr held that 'water management' does not include water allocation and this section does not operate to limit the wide discretion afforded under section 90(1). In addition, Barr J highlighted that the WDWAP used language consistent with guidance and recommendation rather than requirements. Therefore, the Minister did not breach the Water Act by not complying with the recommended limits to water extraction contained in the WDWAP.

The Court also rejected MAC's argument that the Minister had failed to consider whether special circumstances existed which justified the granting of the licence for longer than ten years, as required by section 60(4)(b) of the Water Act. Justice Barr found that the actual Minister's signature on a document which set out the special circumstances evidenced that the actual Minister had considered and been satisfied that such circumstances existed. His Honour considered this is what was required by section 60(4)(b) at the time the Controller made the initial decision.

On this point, Justice Barr considered the wording of section 30, which enables the Minister on review to 'make the decision the Controller should have made', meant that the Minister had to apply the law as it stood at the time of the Controller's decision. To apply later (amended) law would not be the decision the Controller should (or could) have made. Relevantly, section 60(4)(b) had been amended between the Controller's decision and the delegate Minister's decision, and Justice Barr chose to apply the earlier version.

Justice Barr included a judgment in the alternative, in case his Honour was incorrect in applying the law as it stood at the time of the Controller's decision. His Honour considered the current (amended) section 60(4)(b) would require either the Controller or the delegate Minister in her role as reviewer to consider the circumstances themselves, instead of relying on the actual Minister's opinion. As neither did, his Honour concluded that MAC's Ground 9 would stand if this was the correct interpretation of the law. Further, if that were the case, Justice Barr considered the whole licence would be invalid because the licence term was granted as 2021-2054, being an indivisible period incapable of being split into separate 'valid' and 'invalid' components.

Conclusion

Both plaintiffs' cases were dismissed as Justice Barr found that none of the grounds were made out. This decision makes it clear that, in the context of the Water Act 1992 (NT), Water Allocation Plans do not necessarily bind decision-makers and it is permissible or even inevitable for water extraction licences to be granted before the full impact of the licence is known. Further, the Water Act 1992 (NT) grants decision-makers a wide discretion as to the factors they consider in the grant of water licences.

MAC, represented by the Central Land Council, has since filed an appeal against Justice Barr's decision in the Northern Territory Court of Appeal.

Case notes

Right to mine: *Harvey v Minister for Primary Industry and Resources* [2024] HCA 1

By Clare Sayers and Charlie Nott

Summary

Harvey v Minister for Primary Industry and Resources [2024] HCA 1 concerned an appeal made to the High Court of Australia (**High Court**) by two native title holders, David Harvey and Thomas Simon, on behalf of the Ngajapa People (**appellants**). The respondents to this appeal were the Northern Territory's Department of Primary Industries and Resources (**DPIR**) and Mount Isa Mines Limited (**MIM**) (together, the **respondents**).

The matter involved a dispute between the appellants and the respondents in relation to the DPIR's decision to grant a mineral lease to MIM in connection with the McArthur River Mine project in the Northern Territory. The appellants argued that the grant of the mineral lease (**ML29881**) was invalid to the extent it affected native title because the DPIR did not follow the correct future acts procedure under the Native Title Act 1993 (Cth) (**Native Title Act**). The parties disagreed about which notification process was required: the notification process under section 24MD(6A) or section 24MD(6B).

The DPIR stated that section 24MD(6A) of the Native Title Act applied. Under section 24MD(6A), native title holders are to be granted the same rights that owners of ordinary title would have in the circumstances (including being notified, but without the right to object to the proposed act).

On the contrary, the appellants argued that section 24MD(6B) applied. Section 24MD(6B) provides additional rights to native title holders in certain situations, including the right to object to the proposed act where that act is the creation or variation of a 'right to mine'.

The DPIR argued that the grant of ML29881 was not a right to mine, so section 24MD(6B) did not apply. Further, because the DPIR had complied with section 24MD(6A), it had satisfied the applicable native title requirements. The appellants disagreed, stating that ML29881 did constitute a right to mine under section 24MD(6B), and, therefore, the grant of ML29881 was invalid.

The dispute was first heard by the Federal Court of Australia (**Federal Court**) and subsequently the Full Court of the Federal Court of Australia (**Full Court**), both of which found that ML29881 was not a right to mine, and, therefore, the appellants were not entitled to the right to object under section 24MD(6B) of the Native Title Act. The appellants appealed the decision of the Full Court to the High Court, which overturned the previous decisions and found that ML29881 did constitute a right to mine for the purposes of section 24MD(6B).

Background

MIM owns and operates the McArthur River Mine project within the Borroloola Perpetual Pastoral Lease, located 60 kilometres southwest of Borroloola in the Northern Territory. The mining operations are located on land subject to non-exclusive native title held by the Ngajapa People.

In 2013, MIM applied for ML29881 to construct a dredge spoilage emplacement area (**DSEA**). The purpose of the DSEA was to hold silt and sediment removed from a navigation channel connecting the mine's loading facility to the Gulf of Carpentaria for the purpose of transporting mineral ore. The removal of spoilage from the channel would ensure unencumbered access for vessels transporting ore between the mine and the loading facility on the coast. The DSEA activities would entail pumping waste from the navigation channel to a new, improved and enlarged emplacement area. The DSEA was proposed to be located on a parcel of land subject to the

Ngajapa People's non-exclusive native title.

Notice of the application for ML29881 was given by the DPIR to the appellants' lawyers in 2016 pursuant to section 24MD(6A) of the Native Title Act. The appellants argued that notice should have been given pursuant to section 24MB(6B) because the DSEA was mining infrastructure. The appellants appealed the DPIR's decision to grant ML29881 to the Federal Court, submitting the grant of the mineral lease was invalid because the DPIR did not follow the correct future acts procedure.

Sections 24MD(6A) and 24MD(6B) of the NTA

Section 24MD is part of the 'future acts regime' of the Native Title Act and is applicable to acts that pass 'the freehold test'. The freehold test means that, if an act can be done on land subject to ordinary title (that is, freehold, otherwise known as an estate in fee simple), then it can be done on land subject to native title. If section 24MD applies to a future act (such as the grant of a mineral lease), the native title holders must be afforded the same rights as holders of ordinary title would have in that situation.

Section 24MD(6B) provides additional rights to those provided under section 24MD(6A). Section 24MD(6B) permits objections to mining activities that involve the creation or variation of a right to mine for the sole purpose of constructing mining infrastructure facilities.

Initial decisions of the Federal Court and Full Court

The Federal Court and the Full Court held that the DSEA did not satisfy the meaning of 'infrastructure facility' under section 253 of the Native Title Act as the construction of such a facility was deemed 'too remote from mining activities' to be considered a right to mine. Further, the right to construct the DSEA under ML29881 was not a right to mine because the DSEA could not 'be regarded as necessary for the meaningful exercise of a right to mine'.

The appellants appealed the Federal Court's Decision to the High Court, the hearing for which took place on 5 September 2023.

Decision of the High Court

Before the High Court, the parties' key arguments were as follows:

a) **The appellants:** The appellants argued that granting of ML29881 by the DPIR was invalid because the correct future acts process under the Native Title Act was not followed. The appellants submitted that ML29881 did constitute a right to mine, and that the DPIR should have complied with section 24MD(6B). As the DPIR failed to do so, the grant of the mineral lease was invalid.

b) **The respondents:** The DPIR's position was that ML29881 did not meet the criteria of a right to mine under the Native Title Act because it only provided rights related to mining infrastructure, rather than allowing for actual mining operations like mineral extraction. Further, the government also held that the DSEA did not constitute an 'infrastructure facility' as defined in section 253 of the Native Title Act. Therefore, the government contended that the applicable future acts procedure was section 24MD(6A).

In its analysis of the parties' arguments, the High Court focused on the meanings of two key concepts: the 'right to mine' and 'infrastructure facility'.

In relation to the right to mine, the High Court took a broader interpretation than that of the Federal Court and Full Court, stating that:

> the phrase "right to mine" should be construed as a composite term used to denote all those mining tenements which are capable of being issued under State and Territory natural resource laws. (See [66].)

According to the High Court's interpretation of the right to mine, any mineral lease granted under statute relating to mineral rights could constitute a right to mine. Despite ML29881 being granted only for the purpose of infrastructure, the High Court held it constituted a 'right to mine' because it was a right granted pursuant to the Mineral Titles Act 2010 (NT).

Regarding the interpretation of 'infrastructure facility', the High Court found that the term was not contained to the definition of 'infrastructure facility' as per section 253 of the Native Title Act. Instead, the High Court held that that 'infrastructure facility' kept its ordinary meaning. The High Court noted that the use of the word 'includes' in the definition of 'infrastructure facility' indicates that the definition is not intended to be exhaustive, and rather includes those things without limiting the inclusion of others.

The High Court's decision to allow the appeal was unanimous, and its finding that the proposed

DSEA was an infrastructure facility for the purposes of the Native Title Act overturned the previous decisions. On this basis, it was found that the DPIR should have notified the appellants in accordance with section 24MD(6B), not section 24MD(6A).

The High Court restricted the DPIR from making a decision about the grant of the mineral lease until such time as it has complied with the requirements of section 24MD(6B).

What is the practical impact of this decision?

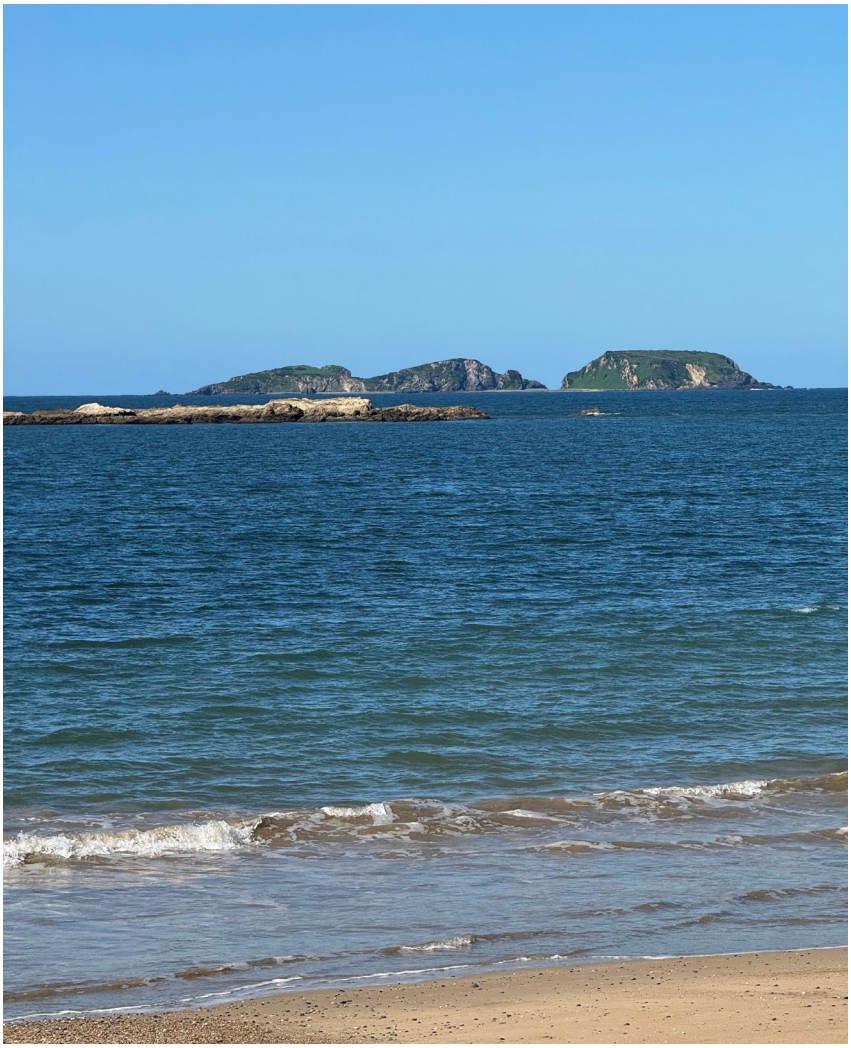
The High Court's decision demonstrates not only the need for parties to be cognisant of properly and carefully interpreting legislation, but also the importance of statutory interpretation in general. Legislation as complex and as impactful as the Native Title Act must be carefully considered, especially in circumstances such as the present case where people's rights have the potential to be unjustly restricted.

The appellants' persistence in pursuing the matter through to the High Court ultimately led to a favourable outcome for the wider native title group. The decision has provided important precedent that will give insight into similar situations which undoubtedly occur around the country, and will also provide much needed clarity on which future acts process must be followed in similar circumstances in order for the act to be validly done. This is an important decision for native title parties and proponents alike, and we would encourage readers to refer to the High Court's judgment for further detail.

1 *Harvey v Minister for Primary Industry and Resources* [2022] FCAFC 66 (29 April 2022), [130].

2 Ibid [130].

3 Section 253 of the Native Title Act includes the following things as an 'infrastructure facility': a road, railway, bridge or other transport facility; a jetty or port; an airport or landing strip; an electricity generation, transmission or distribution facility; a storage, distribution or gathering or other transmission facility for (i) oil or gas, or (ii) derivatives of oil or gas; a storage or transportation facility for coal, any other mineral or any mineral concentrate; a dam, pipeline, channel or other water management, distribution or reticulation facility; a cable, antenna, tower or other communication facility; or, any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (b) and that the Commonwealth Minister determines, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph. Available here: https://eresources.hcourt.gov.au/showCase/2024/HCA/1.



Snapper Islands, Yuin Nation Country, New South Wales

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