



whole Act: Am 1994 No 95, Sch 1 (“warden’s court” and “wardens’ courts” omitted wherever occurring, “Warden’s Court” and “Wardens’ Courts” inserted instead).

An Act about native title in relation to land or waters; and for other purposes.

WHEREAS—

- (1)

The High Court of Australia, in *Mabo and ors v. The State of Queensland (No. 2)*(1992) 175 CLR 1, rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement and held that the common law of Australia recognises the native title rights of the indigenous inhabitants of Australia—

- (2)

The Commonwealth Government has enacted the [Native Title Act 1993](#) of the Commonwealth which provides a national scheme for the recognition and protection of native title, the regulation of future dealings with, and claims to, native title and the validation of past State acts invalidated because of the existence of native title—

- (3)

It is the intention of Parliament that New South Wales should participate in the national scheme established by the Commonwealth Government and that the State should validate past State acts invalidated because of the existence of native title.

The Legislature of New South Wales enacts:

Part 1 Preliminary 1 Name of Act

This Act may be cited as the *Native Title (New South Wales) Act 1994*.

Following paragraph cited by:

[Native Title \(New South Wales\) Act 1994 Proclamation re commencement \(1994-605\) \[GG No 156 of 25.11.1994\] \(NSW\) \(01 January 1994\)](#)

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Following paragraph cited by:

[Dungog Shire Council v Attorney General of New South Wales](#) (01 March 2024) (Burley J)

53. Mr Franks submits that the broad and permissive powers conferred upon the Dungog Shire Council under the terms of the [LGA](#) are constrained by the terms of the [CLM Act](#), which establishes a regime for the management of Crown land which is still subject to

native title under the [Native Title Act](#). He submits that the scheme does not specifically empower a council to make an application under the [Native Title Act](#), and that it should be inferred that the legislation contemplates that the only person able to bring such an application is the Minister. This arises, he submits, because all aspects of the role that the council has under the [CLM Act](#) are directed towards the day-to-day management of Crown reserves. The [CLM Act](#) does not in terms confer power on the manager (here, Dungog Shire Council) to address the question of the existence or extinguishment of native title. Indeed, the terms of the [NSW Native Title Act](#) provide that the provisions of the [CLM Act](#) cannot be applied so as to affect native title rights and interests; [s 3](#), [s 104A](#). He submits that the [Native Title Act](#) provides a regime for a preferred outcome of native title claims by conciliation rather than litigation. That Act, when read in conjunction with the [CLM Act](#) confers relevant functions (such as entry into indigenous land use agreements, consent to compulsory acquisition and the issue of native title certificates) upon the Minister. It would be contrary to the object and purposes of the legislative scheme to read into the [CLM Act](#) and the [LGA](#) an implied power on the part of a council manager of Crown land to bring proceedings for a determination that native title has been extinguished. Rather than fragment power to bring such proceedings by placing that ability in the hands of local shire councils, the better way to understand the legislation is that such bodies are not empowered to do so. Conversely, the [CLM Act](#) provides that it is the council that is liable to pay compensation for any compensable act that occurs if native title is not extinguished. It is not consistent with the policy aim of achieving non-litigated outcomes if it is suitable for a council manager to bring an application. By conferring such a power on a council, the scheme sets up a conflict of interest between the rate payers on the one hand, who have a desire to limit liability for compensation and those claiming compensation under the [Native Title Act](#).

### 3 Objects of this Act

The main objects of this Act are—

- (a)  
  
in accordance with the [Commonwealth Native Title Act](#), to validate any past acts, and intermediate period acts, invalidated because of the existence of native title and to confirm certain rights, and
- (b)  
  
to ensure that New South Wales law is consistent with standards set by the [Commonwealth Native Title Act](#) for future dealings affecting native title.
- (c)  
  
(Repealed)

s 3; Am 1998 No 88, Sch 1 [1] [2].

### 4 Definitions (1)

In this Act—

[Commonwealth Native Title Act](#) or NTA means the [Native Title Act 1993](#) of the Commonwealth,

State Compulsory Acquisition Act means any of the following laws—

- .  
  
[Land Acquisition \(Just Terms Compensation\) Act 1991](#) and any enactment that authorises the acquisition of land in accordance with that Act
- .

sections 21 and 22A of the *Pipelines Act 1967*,

- .

any enactment that effects a compulsory acquisition of land and provides compensation as if the acquisition had been effected by an acquisition notice under the *Land Acquisition (Just Terms Compensation) Act 1991*,

- .

Division 2 of Part 12 of the *Roads Act 1993*,

- .

an Act prescribed by the regulations made under this Act,

State Mining Act means any of the following Acts—

- .

*Mining Act 1992*,

- .

*Offshore Minerals Act 1999*,

- .

*Petroleum (Onshore) Act 1991*,

- .

an Act prescribed by the regulations made under this Act.

(2),

In this Act, the expression Aboriginal peoples includes Torres Strait Islanders.

s 4; Am 1998 No 88, Sch 1 [3] [4]; 1999 No 42, Sch 3.13 .

Following paragraph cited by:

Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales (14 April 2021) (Perry J)  
Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales (14 April 2021) (Perry J)

5 Words and expressions used in *Commonwealth Native Title Act* (1)

Words and expressions used in the *Commonwealth Native Title Act* and this Act have the same meanings in this Act as they have in the *Commonwealth Native Title Act* .

(2)

This section applies except so far as the context or subject-matter otherwise indicates or requires,

(3)

However, this section does not apply to a word or expression defined in section 4 (Definitions).

Note—

Section 222 of the [Commonwealth Native Title Act](#) (“NTA”) sets out a list of definitions used in that Act.

## 6 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

## Part 2 Validation and its effects Division 1 General 7 Objects of this Part

The objects of this Part are—

- (a)  
to validate, in accordance with section 19 (State/Territory acts may be validated) of the [Commonwealth Native Title Act](#), past acts attributable to the State, and
- (b)  
to validate, in accordance with section 22F of the [Commonwealth Native Title Act](#), intermediate period acts attributable to the State, and
- (c)  
to provide for the effects of any such validation.

Note—

An act is defined in sec 226 [NTA](#).

A past act is defined in sec 228 [NTA](#).

An intermediate period act is defined in sec 232A [NTA](#) (being certain acts that took place between 1 January 1994 and 23 December 1996).

An act attributable to the State is defined in sec 239 [NTA](#).

s 7: Am 1998 No 88, Sch 1 [5] [6].

Following paragraph cited by:

[Indigenous Land and Sea Corporation v Anderson](#) (07 December 2022) (Griffiths AJ)  
[La Perouse Local Aboriginal Land Council v Attorney General of New South Wales](#) (11 July 2019) (Robertson J)

18. Section 23E provides that if a law of a State contains a provision to the same effect as ss 23D or 23DA, the law of the State may make provision to the same effect as s 23C in respect of all or any previous exclusive possession acts attributable to the State. In this respect I refer to ss 8 (validating past acts attributable to the State), 20 (to the same effect as s 23C), 21 (to the same effect as s 23D) and 22 (to the same effect as s 23DA) of the [Native Title \(New South Wales\) Act 1994](#) (NSW).

[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) (30 August 2018) (Robertson J)  
[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) (30 August 2018) (Robertson J)  
[Dates v Karuah Local Aboriginal Land Council](#) (23 December 2009) (Pain J)

[Wilson v Anderson](#) (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)  
[Wilson v Anderson](#) (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

## 8 Validation of past acts attributable to the State

([NTA](#), sec 19)

Every past act attributable to the State is valid, and is taken always to have been valid.

### 8A Validation of intermediate period acts attributable to the State

([NTA](#), sec 22F)

Every intermediate period act attributable to the State is valid, and is taken always to have been valid.

s 8A: Ins 1998 No 88, Sch 1 [7].

## 9 Application of remaining provisions of this Part (1)

The remaining provisions of this Part apply—

- (a)  
to a past act attributable to the State that is validated by section 8, and
- (b)  
to an intermediate period act attributable to the State that is validated by section 8A.

(2), (3)

(Repealed)

s 9: Am 1998 No 88, Sch 1 [8] [9].

## Division 2 Effect of validation of past acts on native title

pt 2, div 2, hdg: Am 1998 No 88, Sch 1 [10].

pt 2, div 2, note: Ins 1998 No 88, Sch 1 [12].

### 9A Application of this Division

This Division applies to a past act attributable to the State that is validated by section 8.

s 9A: Ins 1998 No 88, Sch 1 [11].

Following paragraph cited by:

[Wagonga Local Aboriginal Land Council v Attorney General of New South Wales](#) (05 August 2020) (Jagot J)  
[Gandangara Local Aboriginal Land Council v Attorney-General of New South Wales](#) (03 July 2013) (Griffiths J)

## 10 Category A past acts that are not public works

( [NTA](#) , secs 19 and 15 (1) (a))

(1)

This section applies if the past act is a category A past act other than a category A past act to which section 229 (4) (which deals with public works) of the [Commonwealth Native Title Act](#) applies.

(2)

The past act extinguishes native title.

Note—

Category A past act is defined in sec [229 NTA](#) . This category covers freehold grants, some leasehold grants (commercial, agricultural, pastoral and residential leases and those parts of certain mining leases (such as lands on which there are city, town or private residences) that are taken to be “dissected” in accordance with sec [245 NTA](#) ) and public works. Lease, permit and various types of leases are defined in secs [242 to 249 NTA](#) . Public work is defined in sec [253 NTA](#) .

## 11 Category A past acts that are public works

( [NTA](#) , secs 19 and 15 (1) (b))

(1)

This section applies if the past act is a category A past act to which section 229 (4) of the [Commonwealth Native Title Act](#) applies.

(2)

The past act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated.

(3)

If section 229 (4) (a) (which deals with public works completed after 1 January 1994) of the [Commonwealth Native Title Act](#) applies to the past act, the extinguishment is taken to have happened on 1 January 1994.

## 12 Inconsistent category B past acts

( [NTA](#) , secs 19 and 15 (1) (c))

(1)

This section applies if the past act is a category B past act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests concerned.

(2)

The past act extinguishes the native title to the extent of the inconsistency.

Note—

Category B past act is defined in sec [230 NTA](#) . This category covers leasehold grants (other than leases that are category A past acts and mining leases).

## 13 Category C and D past acts

( [NTA](#) , secs 19 and 15 (1) (d))

(1)

This section applies if the past act is a category C past act or a category D past act.

(2)

The non-extinguishment principle applies to the past act.

Note—

Category C past act is defined in sec [231 NTA](#). This category deals with the grant of mining leases. Mining lease is defined in sec [245 NTA](#) and mine in sec [253 NTA](#).

Category D past act is defined in sec [232 NTA](#). It is the residual category of past acts.

The effect of the non-extinguishment principle is set out in sec [238 NTA](#).

14 Extinguishment does not confer right to eject or remove [Aboriginal peoples](#).

([NTA](#), secs 15 (2) and 19)

An extinguishment of native title effected by this Part does not by itself confer a right to eject or remove any [Aboriginal peoples](#) who reside on or who exercise access over land or waters covered by a pastoral lease the grant, re-grant or extension of which is validated by section 8 (Validation of past acts attributable to the State).

Note—

Section [20 NTA](#) provides native title holders with an entitlement to compensation from the State in respect of past acts attributable to the State.

Division 2A Effect of validation of intermediate period acts on native title

pt 2, div 2A (ss 14A–14F): Ins 1998 No 88, Sch 1 [13].

14A Application of this Division

This Division applies to an intermediate period act attributable to the State that is validated by section 8A.

pt 2, div 2A (ss 14A–14F): Ins 1998 No 88, Sch 1 [13].

14B Category A intermediate period acts dealing with the granting or vesting of certain interests in land or waters

([NTA](#), secs 22F and 22B (a))

(1)

This section applies to a category A intermediate period act to which section 232B (2), (3) or (4) (which deals with things such as the grant or vesting of freehold estates and certain leases) of the [Commonwealth Native Title Act](#) applies.

(2)

The intermediate period act extinguishes all native title in relation to the land or waters concerned.

pt 2, div 2A (ss 14A–14F): Ins 1998 No 88, Sch 1 [13].

14C Category A intermediate period acts that are public works

([NTA](#), secs 22F and 22B (b))



(1)

This section applies to a category A intermediate period act to which section 232B (7) (which deals with public works) of the [Commonwealth Native Title Act](#) applies.

(2)

The intermediate period act extinguishes the native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated.

(3)

The extinguishment is taken to have happened when the construction or establishment began.

pt 2, div 2A (ss 14A–14F): Ins 1998 No 88, Sch 1 [13].

#### 14D Category B intermediate period acts (1)

This section applies to a category B intermediate period act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests concerned.

(2)

The intermediate period act extinguishes the native title to the extent of the inconsistency.

Note—

Category B intermediate period acts are defined in sec [232C NTA](#).

pt 2, div 2A (ss 14A–14F): Ins 1998 No 88, Sch 1 [13].

#### 14E Category C and D intermediate period acts (1)

This section applies to a category C intermediate period act or a category D intermediate period act.

(2)

The non-extinguishment principle applies to the intermediate period act.

Note—

Category C intermediate period acts are defined in sec [232D NTA](#) and category D intermediate period acts are defined in sec [232E NTA](#).

pt 2, div 2A (ss 14A–14F): Ins 1998 No 88, Sch 1 [13].

#### 14F This Division is subject to registered indigenous land use agreements

Sections 14B–14E apply subject to section 31.

Note—

Section [22G NTA](#) provides native title holders with an entitlement to compensation from the State in respect of the validation of intermediate period acts attributable to the State.

pt 2, div 2A (ss 14A–14F): Ins 1998 No 88, Sch 1 [13].

#### Division 3 Other effects of validation 15 Preservation of beneficial reservations and conditions—past acts

([NTA](#), secs 19 and 16)

(1)

This section applies if—

- (a)  
the past act contains a reservation or condition for the benefit of [Aboriginal peoples](#), or
- (b)  
the doing of the past act would affect rights or interests (other than native title rights and interests) of [Aboriginal peoples](#) (whether arising under legislation, at common law or in equity and whether or not rights of usage),

(2)

Division 2 (Effect of validation of past acts on native title) does not affect a reservation or condition or rights or interests mentioned in this section.

s 15: Am 1998 No 88, Sch 1 [14] [15].

15A Preservation of beneficial reservations and conditions—intermediate period acts

([NTA](#), secs 22F and 22C)

(1)

This section applies if—

- (a)  
an intermediate period act attributable to the State contains a reservation or condition for the benefit of [Aboriginal peoples](#), or
- (b)  
the doing of an intermediate period act attributable to the State would affect rights or interests (other than native title rights and interests) of [Aboriginal peoples](#) (whether arising under legislation, at common law or in equity and whether or not rights of usage),

(2)

Division 2A (Effect of validation of intermediate period acts on native title) does not affect a reservation or condition or rights or interests mentioned in this section.

s 15A: Ins 1998 No 88, Sch 1 [16].

Following paragraph cited by:

[Bandjalang People No 3 v Attorney-General of New South Wales](#) (30 April 2021) (Rares J)  
[Pacey on behalf of the Gumbaynggirr People and Attorney General of New South Wales](#) (26 November 2019) (Robertson J)  
[Kelly on behalf of the Gumbaynggirr People v Attorney General of New South Wales](#) (08 December 2017) (Collier J)  
[Bandjalang People No 1 and No 2 v Attorney General of New South Wales](#) (02 December 2013) (Jagot J)  
[Bandjalang People No 1 and No 2 v Attorney General of New South Wales](#) (02 December 2013) (Jagot J)

### Part 3 Confirmation of certain rights 16 Object of this Part

The object of this Part is to confirm, in accordance with section 212 (Confirmation of ownership of natural resources, access to beaches etc) of the [Commonwealth Native Title Act](#) —

- (a)  
any existing ownership of natural resources and certain water and fishing access rights, and
- (b)  
public access to and enjoyment of beaches and certain other places.

### 17 Confirmation of ownership of natural resources, right to flow of water and fishing access rights

( [NTA](#) , sec 212 (1))

(1)

The existing ownership of all natural resources owned by the State is confirmed.

(2)

All existing rights of the State to use, control and regulate the flow of water are confirmed.

(3)

All existing fishing access rights under State law are confirmed to prevail over any other public or private fishing rights.

#### Following paragraph cited by:

McKellar on behalf of the Wongkumara People v State of Queensland (03 July 2024) (Murphy J)

- (d) So far as is confirmed pursuant to section 18 of the *Native Title (New South Wales) Act 1994 (NSW)* as at the date of the approved determination of native title, any existing public access to and enjoyment of:

Agreement) (19 December 2022) (Rares J)

Williams on behalf of the Gumbaynggirr People and Attorney General of New South Wales (26 November 2019) (Robertson J)

Western Bundjalung People v Attorney General of New South Wales (27 June 2018) (Jagot J)

- (d) So far as is confirmed pursuant to section 18 of the *Native Title (New South Wales) Act* as at the date of this Part B Determination, any existing public access to and enjoyment of:

Yaegl People #2 v Attorney General of New South Wales (31 August 2017) (Jagot J)

- (d) So far as is confirmed pursuant to section 18 of the *Native Title (New South Wales) Act* as at the date of the Determination, any existing public access to and enjoyment of:

Western Bundjalung People v Attorney General of New South Wales (29 August 2017) (Jagot J)

Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales (22 August 2017) (Griffiths J)

- (d) So far as is confirmed pursuant to s 18 of the *Native Title (New South Wales) Act 1994 (NSW)* as at the date of the Part B Determination, any existing public access to and enjoyment of:

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

Lot 8 Sec 18 DP758999

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

Lot 8, [Sec 18 DP758604](#)

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

Lot 5, [Sec 18 DP758604](#)

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

Lot 5, [Sec 18 DP758535](#)

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

Lot 9, [Sec 18 DP758999](#)

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

Lot 9, [Sec 18 DP758604](#)

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

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Yaegl People #1 v Attorney-General of New South Wales (25 June 2015) (Jagot J)

## 18 Confirmation of access to certain areas

([NTA](#), sec 212 (2) and (3))

Existing public access to and enjoyment of the following areas is confirmed—

- (a)  
waterways,
- (b)  
beds and banks or foreshores of waterways,
- (c)  
coastal waters,
- (d)  
beaches,
- (da)  
stock-routes,

- (e)

areas that were public places at the end of 31 December 1993.

Note—

Under section 212 (3) (which deals with the effect of confirmation of ownership of natural resources, the right to flow of water and fishing access rights and with confirmation of access to certain areas) of the [Commonwealth Native Title Act](#), the confirmation made by sections 17 and 18 does not extinguish native title rights and interests and does not affect a conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on [Aboriginal peoples](#).

s 18: Am 1998 No 88, Sch 1 [17] [18].

Following paragraph cited by:

[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) (07 September 2017) (Griffiths J)

[Wilson v Anderson](#) (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

62. As already mentioned, in this Court all parties appeared to accept that Div 2B of Pt 2 of the [NTA](#) and Pt 4 of the [State Act](#) applied. The applicant submitted that the grant of the [Lease](#) under s 23 of the [Western Lands Act](#) conferred a right of exclusive possession and that, therefore, the grant was a "previous exclusive possession act" within the meaning of s 23B of the [NTA](#). This had the result that all native title rights and interests in the [Leased Land](#) were extinguished by operation of s 20 of the [State Act](#).

[Wilson v Anderson](#) (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

[Wilson v Anderson](#) (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

[Wilson v Anderson](#) (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

[Anderson v Wilson](#) (05 April 2000) (Black CJ; Beaumont & Sackville J)

19. Part 4 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) ("[NTA \(NSW\)](#)") was enacted by the Parliament of New South Wales pursuant to the authority conferred by s 23E of the [NTA](#). The objects of Part 4 are, *inter alia*, to confirm the complete extinguishment of native title by previous exclusive possession acts attributable to the State: [NTA \(NSW\)](#), s 19 (1)(a). The confirmation is said to be that contemplated by s 23E of the [NTA](#).

[Anderson v Wilson](#) (05 April 2000) (Black CJ; Beaumont & Sackville J)

Part 4 Confirmation of past extinguishment of native title

pt 4: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Division 1 Objects of this Part

pt 4, div 1: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

19 Objects of this Part (1)

The objects of this Part are—

- (a)

to confirm the complete extinguishment of native title by previous exclusive possession acts attributable to the State, and

- (b)

to confirm the partial extinguishment of native title by previous non-exclusive possession acts attributable to the State,

(2)

The confirmation is as contemplated by sections 23E and 23I of the [Commonwealth Native Title Act](#) .

s 19: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Following paragraph cited by:

[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) (30 August 2018) (Robertson J)  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) (07 September 2017) (Griffiths J)

20. It is also apt to set out relevant provisions of Div 2 of Pt 4 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) :

[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) (07 September 2017) (Griffiths J)  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) (07 September 2017) (Griffiths J)

Division 2 Confirmation of extinguishment of native title by previous exclusive possession acts

pt 4, div 2: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Following paragraph cited by:

[Eden Local Aboriginal Land Council v Attorney General of New South Wales](#) (26 June 2025) (McDonald J)  
[Dungog Shire Council v Attorney General of New South Wales](#) (01 March 2024) (Burley J)

5. The dispute between the parties has been framed by reference to the following five separate questions:

- (1) Does Dungog Shire Council have power, having regard to the terms of the [Local Government Act 1993 \(NSW\)](#) ( [LGA](#) ), the [Crown Land Management Act 2016 \(NSW\)](#) ( [CLM Act](#) ) and/or the [Interpretation Act 1987 \(NSW\)](#) , to make the present application pursuant to s 61 of the [Native Title Act](#) ?
- (2) Were all native title rights and interests that might once have existed in respect of the Land extinguished by the grant of 2,090 acres of land by Governor Thomas Brisbane to James Phillips by the 1823 Deed?
- (3) Was the grant described in question (2) a ‘previous exclusive possession act’ within the meaning of s 23B of the [Native Title Act](#) and s 20 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) ( [NSW Native Title Act](#) )?
- (4) In the alternative to (2) and (3), were all native title rights and interests that might once have existed in respect of the Land extinguished by the sale of land described in the 1880 Deed, for an estate in fee simple conveyed by Stephen Stanbridge and Harriet Stanbridge to Queen Victoria?
- (5) Was the grant described in question (4) a ‘previous exclusive possession act’ within the meaning of s 23B of the [Native Title Act](#) and s 20 of the [NSW Native Title Act](#) ?

[Dungog Shire Council v Attorney General of New South Wales](#) (01 March 2024) (Burley J)

5. The dispute between the parties has been framed by reference to the following five separate questions:

- (1) Does Dungog Shire Council have power, having regard to the terms of the *Local Government Act 1993* (NSW) (LGA), the *Crown Land Management Act 2016* (NSW) (CLM Act) and/or the *Interpretation Act 1987* (NSW), to make the present application pursuant to s 61 of the *Native Title Act*?
- (2) Were all native title rights and interests that might once have existed in respect of the Land extinguished by the grant of 2,090 acres of land by Governor Thomas Brisbane to James Phillips by the 1823 Deed?
- (3) Was the grant described in question (2) a ‘previous exclusive possession act’ within the meaning of s 23B of the *Native Title Act* and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) (NSW Native Title Act)?
- (4) In the alternative to (2) and (3), were all native title rights and interests that might once have existed in respect of the Land extinguished by the sale of land described in the 1880 Deed, for an estate in fee simple conveyed by Stephen Stanbridge and Harriet Stanbridge to Queen Victoria?
- (5) Was the grant described in question (4) a ‘previous exclusive possession act’ within the meaning of s 23B of the *Native Title Act* and s 20 of the *NSW Native Title Act*?

*Dungog Shire Council v Attorney General of New South Wales* (01 March 2024) (Burley J)  
*Dungog Shire Council v Attorney General of New South Wales* (01 March 2024) (Burley J)  
*Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales* (20 July 2023) (Raper J)  
*Darkinjung Local Aboriginal Land Council v Attorney General of New South Wales* (22 December 2022) (Burley J)

9. The applicant submits that there has been total extinguishment of native title in respect of the Land, citing *Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3; 181 FCR 320 at [59] (Moore, Mansfield and Perram JJ) for the proposition that it is not necessary to go behind an act of extinguishment to make good its claim. It submits that each of the Lots in the Land was subject to previous exclusive possession acts (PEPA), which arise under Part 2 Division 2B of the *NT Act*. In this regard it relies on the operation of ss 23C and 23E of the *NT Act* in conjunction with s 20 of the *Native Title (New South Wales) Act 1994* (NSW) (NSW NT Act) for the proposition that a PEPA attributable to the State of New South Wales (other than a public work) wholly extinguishes native title rights and the interests in the area of the act, and that extinguishment is taken to have happened when the act was done. It submits that s 23B(2) of the *NT Act* relevantly provides that an act is a PEPA if it is valid, took place before 23 December 1996 and consists of the granting or vesting of, amongst other things, a “Scheduled interest” within s 249C of the *NT Act*. It submits that each of the Lots within the Land satisfies this description.

*Darkinjung Local Aboriginal Land Council v Attorney General of New South Wales* (22 December 2022) (Burley J)  
*Attorney-General (NSW) v Ohlsen* (16 March 2022) (Bromberg, Mortimer and Jackson JJ)

8. Relevantly here the applicable State legislation is contained in s 20 of the *Native Title (New South Wales) Act 1994* (NSW). It suffices to reproduce [43] of the primary judge’s reasons describing this provision’s effect and extracting the relevant parts:

In the case of New South Wales, s 20 of the [ *Native Title (New South Wales) Act 1994* (NSW) ] picks up acts which are [previous exclusive possession acts] under s 23B of the *NT Act* [i.e., the *Native Title Act*] that are attributable to that State. Reflecting the terms of s 23C of the *NT Act*, s 20(1) of the [ *Native Title (New South Wales) Act 1994* (NSW) ] provides that an act which is a [previous exclusive possession act] extinguishes any native title in relation to the land or waters covered by a freehold estate, a Scheduled interest as defined or a relevant lease and that the extinguishment is taken to have happened when the relevant act was done. Section 20(1) of the [ *Native Title (New South Wales) Act 1994* (NSW) ] provides:

20 Confirmation of extinguishment of native title by previous exclusive possession acts of the State (NTA, secs 23E and 23C)

- (1) Acts other than public works If an act is a previous exclusive possession act under section 23B(2) (including because of section 23B(3)) of the *Commonwealth Native Title Act* and is attributable to the State:



- (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and
- (b) the extinguishment is taken to have happened when the act was done.

*Attorney-General (NSW) v Ohlsen* (16 March 2022) (Bromberg, Mortimer and Jackson JJ)  
*Bandjalang People No 3 v Attorney-General of New South Wales* (30 April 2021) (Rares JJ)  
*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* (05 March 2021) (Griffiths J)

43. In the case of New South Wales, s 20 of the *NSW NT Act* picks up acts which are PEPAs under s 23B of the *NT Act* that are attributable to that State. Reflecting the terms of s 23C of the *NT Act*, s 20(1) of the *NSW NT Act* provides that an act which is a PEPA extinguishes any native title in relation to the land or waters covered by a freehold estate, a Scheduled interest as defined or a relevant lease and that the extinguishment is taken to have happened when the relevant act was done. Section 20(1) of the *NSW NT Act* provides:

**20 Confirmation of extinguishment of native title by previous exclusive possession acts of the State** (NTA, secs 23E and 23C)

- (i) **Acts other than public works** If an act is a previous exclusive possession act under section 23B(2) (including because of section 23B (3)) of the *Commonwealth Native Title Act* and is attributable to the State:
  - (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and
  - (b) the extinguishment is taken to have happened when the act was done.

...

*Lawson v Minister for Environment and Water (SA)* (11 February 2021) (Bathurst CJ, Basten and McCallum JJA)

6. Thereafter the appellant commenced the proceedings the subject of this appeal seeking compensation under the *Public Works Act* for the resumption of the land referred to in [4] above, claiming as descendants of the holders of possessory title which she asserted existed at the time of the resumption. Somewhat inconsistently with the approach taken by them in the Federal Court proceedings, the respondents contended that s 18 of the Act extinguished that title and any other subsisting interest in the land. In these circumstances the following questions were ordered to be answered:

“1. Was the land the subject of the claim filed on 1 April 2015 vested in South Australia for an estate in fee simple under s 18 of the *River Murray Waters Act 1915 (NSW)* (RMW Act) on commencement of that Act on 31 January 1917?

2. If the answer to question 1 is ‘Yes’:

a. is the consequence of the vesting by the RMW Act that any and all interests in the land to which s 18 [of] the RMW Act applied acquired through adverse possession or held as native title rights were extinguished upon the commencement of the RMW Act? And

b. was the vesting of the land by the RMW Act a ‘previous exclusive possession act’ for the purposes of s 23B of the *Native Title Act 1993 (Cth)* and s 20 of the *Native Title (New South Wales) Act 1994 (NSW)*?”

*Lawson v Minister for Environment and Water (SA)* (11 February 2021) (Bathurst CJ, Basten and McCallum JJA)

*Lawson v Minister for Environment and Water (SA)* (11 February 2021) (Bathurst CJ, Basten and McCallum JJA)

*Lawson v Minister for Environment and Water (SA)* (11 February 2021) (Bathurst CJ, Basten and McCallum JJA)

*Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales* (20 October 2020) (Griffiths J)

*Awabakal Local Aboriginal Land Council v Attorney-General of New South Wales* (20 October 2020) (Griffiths J)

*Lawson v Minister for Environment and Water* (10 March 2020) (Ward CJ in Eq)



148. The first respondent argues that the vesting of the land as an estate in fee simple under s 18 of the *River Murray Waters Act* is a “previous exclusive possession act” by virtue of ss 23B(2)(c)(ii) and 23C of the *Native Title Act* and s 20 of the *NSW Native Title Act*. It is noted that the effect of s 20 of the *NSW Native Title Act* with respect to freehold estates was described in *Wilson v Anderson* where Gaudron, Gummow, and Hayne JJ said (at [49]) that s 20 of the *NSW Native Title Act*:

... picks up those acts characterised as ‘previous exclusive possession acts’ under s 23B of the [ *Native Title Act* ] that are attributable to the State. The section then provides, in terms that reflect s 23C of the NTA, that... ‘the act extinguishes any native title in relation to the land or waters covered by the freehold estate...’.

*Lawson v Minister for Environment and Water* (10 March 2020) (Ward CJ in Eq)

139. As has already been set out above, question 2 is as follows:

2. If the answer to question 1 is “Yes”:

a. is the consequence of the vesting by the RMW Act that any and all interests in the land to which s 18 [of] the RMW Act applied acquired through adverse possession or held as native title rights were extinguished upon the commencement of the RMW Act? And

b. was the vesting of the land by the RMW Act a ‘previous exclusive possession act’ for the purposes of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW)?

*Lawson v Minister for Environment and Water* (10 March 2020) (Ward CJ in Eq)

STATUTORY INTERPRETATION – Legislative purpose – whether land vested in South Australia for an estate in fee simple under s 18 *River Murray Waters Act 1915* (NSW) on commencement of that Act on 31 January 1917 – whether, as a consequence of the vesting, any and all interests in the land acquired through adverse possession or held as native title rights were extinguished upon commencement of the Act – was the vesting of the land by the Act a “previous exclusive possession act” for the purposes of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW).

*Lawson v Minister for Environment and Water* (10 March 2020) (Ward CJ in Eq)

4. The questions to be separately determined are as follows:

1. Was the land the subject of the claim filed on 1 April 2015 vested in South Australia for an estate in fee simple under s 18 of the *River Murray Waters Act 1915* (NSW) (RMW Act) on commencement of that Act on 31 January 1917?

2. If the answer to question 1 is “Yes”:

a. is the consequence of the vesting by the RMW Act that any and all interests in the land to which s 18 [of] the RMW Act applied acquired through adverse possession or held as native title rights were extinguished upon the commencement of the RMW Act? and

b. was the vesting of the land by the RMW Act a ‘previous exclusive possession act’ for the purposes of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW)?

*Lawson v Minister for Environment and Water* (10 March 2020) (Ward CJ in Eq)

148. The first respondent argues that the vesting of the land as an estate in fee simple under s 18 of the *River Murray Waters Act* is a “previous exclusive possession act” by virtue of ss 23B(2)(c)(ii) and 23C of the *Native Title Act* and s 20 of the *NSW Native Title Act*. It is noted that the effect of s 20 of the *NSW Native Title Act* with respect to freehold estates was described in *Wilson v Anderson* where Gaudron, Gummow, and Hayne JJ said (at [49]) that s 20 of the *NSW Native Title Act*:

... picks up those acts characterised as ‘previous exclusive possession acts’ under s 23B of the [ *Native Title Act* ] that are attributable to the State. The section then provides, in terms that reflect s 23C of the NTA, that... ‘the act extinguishes any native title in relation to the land or waters covered by the freehold estate...’.

Lawson v Minister for Environment and Water (10 March 2020) (Ward CJ in Eq)  
Lawson v Minister for Environment and Water (10 March 2020) (Ward CJ in Eq)  
Lawson v Minister for Environment and Water (10 March 2020) (Ward CJ in Eq)  
Lawson v Minister for Environment and Water (10 March 2020) (Ward CJ in Eq)  
Lawson v Minister for Environment and Water (10 March 2020) (Ward CJ in Eq)  
La Perouse Local Aboriginal Land Council v Attorney General of New South Wales (11 July 2019) (Robertson J)  
Tweed Byron Local Aboriginal Land Council v Attorney General of New South Wales (19 June 2019) (Perry J)  
Darkinjung Local Aboriginal Land Council v Attorney-General of New South Wales (03 August 2018) (Griffiths J)  
Lawson v Minister Assisting the Minister for Natural Resources (Lands) (19 November 2004) (Wilcox, Sackville and Finn JJ)  
Lawson v Minister Assisting the Minister for Natural Resources (Lands) (19 November 2004) (Wilcox, Sackville and Finn JJ)  
Lawson v Minister for Land & Water Conservation for the State of New South Wales (16 February 2004) (Whitlam J)

9. Question: In respect of each of the listed grants in question 8 – if the answer to question 8 is in terms that:

- (a) a grant of fee simple was made; and
- (b) at least in part, the area granted overlapped with the area covered by the Lake Victoria Compensation Application –

is the grant a ‘previous exclusive possession act’ within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

Answer: This question does not arise.

#### *Effect of grants*

Lawson v Minister for Land & Water Conservation for the State of New South Wales (16 February 2004) (Whitlam J)  
Lawson v Minister for Land & Water Conservation for the State of New South Wales (16 February 2004) (Whitlam J)  
Lawson v Minister for Land & Water Conservation for the State of New South Wales (16 February 2004) (Whitlam J)  
Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

7. Question: If the answer to question 6 is yes – is the act described in question 6 a ‘previous exclusive possession act’ within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

- 1. In these two proceedings under the *Native Title Act 1993* (Cth) (‘the Act’) a series of questions have been formulated for decision in advance of trial. The questions overlap because the area covered by the compensation application in proceeding no. 6167 of 1998 comprises the whole of the area over which the claim is made by the native title determination application in proceeding no. 6070 of 1998. Both applications were made prior to the 1998 amendments to the Act. Not all the applicants in the claimant application are applicants in the compensation claim, but each application states that it is also made on behalf of the Barkandji People. The questions stated raise for consideration, in turn, identification of the precise area of land or waters covered by the applications, the characterisation under the provisions of Div 2B of Pt 2 of the Act of certain ‘acts’ attributable to New South Wales, and the effect of s 20 of the *Native Title (New South Wales) Act 1994* (NSW) (‘the NSW Act’).

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

is the grant a 'previous exclusive possession act' within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

*Answer:* By operation of ss 23B and 23E of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) the vesting of the acquired lands referred to in question 4 extinguished any native title in relation to such lands. Otherwise it is inappropriate to answer this question.

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

is the grant a 'previous exclusive possession act' within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

Lawson v Minister for Land & Water Conservation for the State of New South Wales (17 October 2003) (Whitlam J)

Wilson v Anderson (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

62. As already mentioned, in this Court all parties appeared to accept that Div 2B of Pt 2 of the NTA and Pt 4 of the State Act applied. The applicant submitted that the grant of the Lease under s 23 of the Western Lands Act conferred a right of exclusive possession and that, therefore, the grant was a "previous exclusive possession act" within the meaning of s 23B of the NTA. This had the result that all native title rights and interests in the Leased Land were extinguished by operation of s 20 of the State Act.

Wilson v Anderson (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

192. Division 2B of Pt 2 of the Native Title Act deals with "previous exclusive possession acts" [189]. Section 23B(2) relevantly defines the term as follows:

"(2) An act is a *previous exclusive possession act* if:

- (a) it is valid (including because of Division 2 or 2A of Part 2); and
- (b) it took place on or before 23 December 1996; and
- (c) it consists of the grant or vesting of any of the following:

...

- (iv) an exclusive agricultural lease (see section 247A) or an exclusive pastoral lease (see section 248A);

...

- (viii) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters."

Section 248A defines an exclusive pastoral lease in these terms:

"An *exclusive pastoral lease* is a pastoral lease that:

- (a) confers a right of exclusive possession over the land or waters covered by the lease; or

(b) is a Scheduled interest."

A previous exclusive possession act extinguishes native title in relation to the land or waters covered by the lease, with the extinguishment taken to have happened when the grant was made (s 23C(1)). All parties agreed, and it is correct, that s 23C(1) was mirrored in s 20 of the *Native Title (New South Wales) Act 1994 (NSW)*.

*Wilson v Anderson* (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

Save to say that by operation of ss 23B and 23E of the *Native Title Act 1993 (Cth)* and s 20 of the *Native Title (New South Wales) Act 1994 (NSW)*, the grant of the Lease extinguished any native title in relation to the land covered by the Lease and the extinguishment is to be taken to have happened when the Lease was granted, it is inappropriate to answer this question.

*Wilson v Anderson* (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

49. Part 4 (ss 1925) of the *State Act* was enacted in accordance with the power conferred by ss 23E and 23I of the *NTA*. The objects of Pt 4, as set out in subs (1) of s 19, are:

- "(a) to confirm the complete extinguishment of native title by previous exclusive possession acts attributable to the State, and
- (b) to confirm the partial extinguishment of native title by previous non-exclusive possession acts attributable to the State".

Section 20 of the *State Act* picks up those acts characterised as "previous exclusive possession acts" under s 23B of the *NTA* that are attributable to the State. The section then provides, in terms that reflect s 23C of the *NTA*, that (subs (1)):

- "(a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and
- (b) the extinguishment is taken to have happened when the act was done".

Section 23 of the *State Act* provides, in the same terms as s 23G of the *NTA*, for the partial extinguishment of native title as a result of a "previous non-exclusive possession act" attributable to the State.

*Wilson v Anderson* (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

*Wilson v Anderson* (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

*Wilson v Anderson* (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

*Wilson v Anderson* (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

**MR JACKSON:** That is why this reference is to paragraph A, your Honour. Your Honours, when one comes to question (c), question (c), we would submit, is simply one that one could answer either yes in (c)(i) because of the operation of section 20, but the answer would seem to follow from the answer to question (b). Your Honour, in one sense it may be unnecessary to answer question (c) at all, because the consequences that derive from answering the earlier question, in the way in which we would suggest, would be apparent.

*Wilson v Anderson* (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

**GUMMOW J:** But section 20 is ambulatory, in a sense, is it not? Because if you look at section 20, when it picks up section 23B(2), that then picks up the schedule, does it not?

*Wilson v Anderson* (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

*Wilson v Anderson* (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

*Anderson v Wilson* (05 April 2000) (Black CJ; Beaumont & Sackville J)

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20 Confirmation of extinguishment of native title by previous exclusive possession acts of the State

([NTA](#), secs 23E and 23C)

(1)

If an act is a previous exclusive possession act under section 23B (2) (including because of section 23B (3)) of the [Commonwealth Native Title Act](#) and is attributable to the State—

- (a)  
the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and
- (b)  
the extinguishment is taken to have happened when the act was done,

(2)

If an act is a previous exclusive possession act under section 23B (7) (which deals with public works) of the [Commonwealth Native Title Act](#) and is attributable to the State—

- (a)  
the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated, and
- (b)  
the extinguishment is taken to have happened when the construction or establishment of the public work began,

(3)

If this section applies to the act, Divisions 2 and 2A of Part 2 do not apply to the act.

ss 20–22: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Following paragraph cited by:

[Lightning Ridge Local Aboriginal Land Council v Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993 \(Cth\) \(31 July 2012\) \(Perram J\)](#)

37. Therefore, before s 20(1) can be made operative, State law must protect, broadly speaking, beneficial reservations. [Section 21 of the \*Native Title \(New South Wales\) Act\*](#) provides:

If:

- (a) a previous exclusive possession act attributable to the State contains a reservation or condition for the benefit of Aboriginal peoples, or
- (b) the doing of a previous exclusive possession act attributable to the State would affect rights or interests (other than native title rights and interests) of Aboriginal peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in section 20 affects that reservation or condition or those rights or interests.

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21 Preservation of beneficial reservations and conditions

( [NTA](#), secs 23E and 23D)

If—

- (a)  
  
a previous exclusive possession act attributable to the State contains a reservation or condition for the benefit of [Aboriginal peoples](#), or
- (b)  
  
the doing of a previous exclusive possession act attributable to the State would affect rights or interests (other than native title rights and interests) of [Aboriginal peoples](#) (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in section 20 affects that reservation or condition or those rights or interests.

ss 20–22: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

22 Confirmation of validity of use of certain land held by Crown etc

( [NTA](#), secs 23E and 23DA)

To avoid doubt, if the act is a previous exclusive possession act because of section 23B (9C) (b) (which deals with grants to the Crown etc) of the [Commonwealth Native Title Act](#), the use of the land or waters concerned as mentioned in that paragraph is valid.

ss 20–22: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Division 3 Confirmation of partial extinguishment of native title by previous non-exclusive possession acts

pt 4, div 3, hdg: Ins 1998 No 88, Sch 1 [20].

Following paragraph cited by:

[Wilson v Anderson](#) (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

23 Confirmation of partial extinguishment of native title by previous non-exclusive possession acts of the State

( [NTA](#), secs 23I and 23G)

(1)

Subject to subsection (2), if a previous non-exclusive possession act is attributable to the State—

- (a)  
  
to the extent that the act involves the grant of rights and interests that are not inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned, the rights and interests granted, and the doing of any activity in giving effect to them, prevail over the native title rights and interests but do not extinguish them, and
- (b)

to the extent that the act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned—

- (i)

if, apart from this Act, the act extinguishes the native title rights and interests—the native title rights and interests are extinguished, and

- (ii)

in any other case—the native title rights and interests are suspended while the lease concerned, or the lease as renewed, re-made, re-granted or extended, is in force, and

- (c)

any extinguishment under this subsection is taken to have happened when the act was done,

(2)

If the act is the grant of a pastoral lease or an agricultural lease to which section 10 applies, this section does not apply to the act,

(3)

If this section applies to an act, Divisions 2 and 2A of Part 2 do not apply to the act.

ss 23–25: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

#### 24 Preservation of beneficial reservations and conditions

( [NTA](#), secs 23I and 23H)

If—

- (a)

a previous non-exclusive possession act attributable to the State contains a reservation or condition for the benefit of [Aboriginal peoples](#), or

- (b)

the doing of a previous non-exclusive possession act attributable to the State would affect rights or interests (other than native title rights and interests) of [Aboriginal peoples](#) (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in section 23 affects that reservation or condition or those rights or interests.

ss 23–25: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

#### 25 Notification

( [NTA](#), secs 23I and 23HA)

In the case of a previous non-exclusive possession act to which section 23F (3) (c) (ii) of the [Commonwealth Native Title Act](#) applies—

- (a)

notice must be given, in the way determined in writing by the Commonwealth Minister, to any representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and

registered native title claimants in relation to the land or waters that will be affected by the act about the doing or proposed doing of the act, or acts of that class, in relation to the land or waters concerned, and

- (b)

they must be given an opportunity to comment on the act or class of acts.

Note—

Section 23J [NTA](#) provides native title holders with an entitlement to compensation from the State in respect of certain acts attributable to the State that extinguish native title under this Part.

ss 23–25: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Part 5 Validation of transfers under land rights legislation

pt 5: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [21].

26 Object of this Part (1)

The object of this Part is to validate certain transfers under the [Aboriginal Land Rights Act 1983](#) .

(2)

The validation is as contemplated by sections 22I–22L of the [Commonwealth Native Title Act](#) .

ss 26–28: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [21].

27 Validation of transfers

( [NTA](#) , sec 22J)

If—

- (a)

future acts consist of the transfer of lands under section 36 of the [Aboriginal Land Rights Act 1983](#) , and

- (b)

the claims for the lands were made before 28 November 1994, and

- (c)

the acts took place before or take place after the commencement of section 22J of the [Commonwealth Native Title Act](#) , and

- (d)

the acts are not intermediate period acts, and

- (e)

the acts are invalid to any extent because of Division 3 of Part 2 of the [Commonwealth Native Title Act](#) or for any other reason, but would be valid to that extent if native title did not exist in relation to the lands,

the acts are valid, and are taken always to have been valid.



ss 26–28: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [21].

## 28 Effect of validation on native title

( [NTA](#), sec 22K)

The non-extinguishment principle applies to the acts.

Note—

Section [22L NTA](#) provides native title holders with an entitlement to compensation from the State in respect of acts attributable to the State that are validated under this Part.

ss 26–28: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [21].

## Part 6 Validation of acts covered by indigenous land use agreements

pt 6: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [22].

### 29 Objects of this Part (1)

The objects of this Part are—

- (a)  
to validate certain future acts that are covered by indigenous land use agreements, and
- (b)  
to change the effects of the validation of certain intermediate period acts that are covered by indigenous land use agreements.

(2)

The validation or change is as contemplated by section [24EBA](#) of the [Commonwealth Native Title Act](#) .

ss 29–31: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [22].

### 30 Validation of future acts covered by indigenous land use agreements

( [NTA](#), sec 24EBA (1)–(5))

(1)

The consequences set out in this section apply if—

- (a)  
details are on the Register of Indigenous Land Use Agreements of an agreement that includes a statement to the effect that the parties agree to—
  - (i)  
the validating of a particular future act (other than an intermediate period act), or future acts (other than intermediate period acts) included in classes, that have already been done invalidly, or
  - (ii)

the validating, subject to conditions, of a particular future act (other than an intermediate period act), or future acts (other than intermediate period acts) included in classes, that have already been done invalidly, and

- (b)

the act or class of acts is attributable to the State, and the State is a party to the agreement, and

- (c)

where, whether under the agreement or otherwise, a person other than the Crown in right of the Commonwealth, a State or a Territory is or may become liable to pay compensation in relation to the act or class of acts—that person is a party to the agreement.

(2)

If this section applies, the future act or class of future acts is valid, and is taken always to have been valid.

(3)

If this section applies, the non-extinguishment principle applies to the act or class of acts unless—

- (a)

the act or class of acts is the surrender of native title, and

- (b)

the agreement includes a statement to the effect that the surrender is intended to have extinguished the native title rights and interests.

(4)

If this section applies, the consequences set out in section 24EB (4), (5) or (6) of the [Commonwealth Native Title Act](#), and the consequences set out in section 24EB (7) of that Act, apply to the act or to each of the acts in the class.

ss 29–31: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [22].

31 Change of effects of validation of intermediate period acts covered by indigenous land use agreements

( [NTA](#), sec 24EBA (1) and (6))

(1)

The consequences set out in this section apply if—

- (a)

details are on the Register of Indigenous Land Use Agreements of an agreement that includes a statement to the effect that the parties agree to changing the effects, that are provided for by Division 2A of Part 2, of an intermediate period act or of intermediate period acts included in classes, and

- (b)

the act or class of acts is attributable to the State, and the State is a party to the agreement, and

- (c)

where, whether under the agreement or otherwise, a person other than the Crown in right of the Commonwealth, a State or a Territory is or may become liable to pay compensation in relation to the act or class of acts—that person is a party to the agreement.

(2)

If this section applies, the effects mentioned in subsection (1) (a) are changed in accordance with the agreement.

ss 29–31: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [22].

Following paragraph cited by:

[Civil and Administrative Tribunal Act 2013 \(NSW\)](#) (04 April 2025)

## Part 7 Independent adjudication of certain native title objections under Commonwealth Act

pt 7: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23].

pt 7, div 1, hdg: Rep 1998 No 88, Sch 1 [19].

### 32 Object of this Part (1)

The object of this Part is to meet the State’s obligations under the [Commonwealth Native Title Act](#) to ensure that any of the following objections of registered native title claimants or native title bodies corporate with respect to proposed acts attributable to the State are heard by an independent body or person—

- (a)  
objections duly made under section 24MD (6B) (d) of that Act (relating to certain compulsory acquisitions of native title rights and interests or the creation or variation of certain rights to mine),
- (b)  
objections duly made under section 24MD (6B) (d) of that Act, as applied under section 24ID (4) of that Act (relating to certain renewals and other dealings with non-exclusive agricultural or pastoral leases),

(2)

This Part confers that jurisdiction on the Civil and Administrative Tribunal.

Note—

Section [24MD NTA](#) relates to the validity of future acts that pass the freehold test and section [24ID NTA](#) relate to the validity of future acts that are permissible lease etc renewals.

s 32: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [1].

### 33 Definitions

In this Part—

determination includes recommendation.

relevant authority of the State means the body or person proposing to do the act that is the subject of a relevant native title objection.

relevant native title objection means an objection referred to in section 32.

Tribunal means the Civil and Administrative Tribunal.

s 33: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [2].

#### 34 Referral of objections to NCAT at request of objector (1)

The body or person making a relevant native title objection may request the relevant authority of the State to refer the objection to the Tribunal.

(2)

Any such request—

- (a)  
must be in writing, and
- (b)  
must identify the proposed act, and
- (c)  
must specify the reason for the objection, and
- (d)  
must comply with any other requirements of the regulations.

(3)

Any such request may be made at any time after the completion of the consultation on the matter required by section 24MD (6B) (e) of the [Commonwealth Native Title Act](#) and before the closing date determined by the relevant authority of the State. The closing date is to be a date, notified in writing to the body or person who has made the objection, that is at least 28 days after the completion of that consultation or such later date to which the relevant authority of the State agrees.

(4)

If any such request is duly made under this section, the relevant authority of the State must refer the objection to the Tribunal unless it decides not to proceed with the proposed act the subject of the objection.

s 34: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [3].

#### 35 Parties to proceedings before NCAT (1)

The following are parties to proceedings before the Tribunal under this Part—

- (a)

the relevant authority of the State (the applicant in the proceedings),

- (b)

the objector (the respondent in the proceedings),

- (c)

any other person who is joined as a party to the proceedings under the [Civil and Administrative Tribunal Act 2013](#).

(2)

[The Minister](#) may, on behalf of the State, intervene in proceedings before the Tribunal under this Part.

s 35: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [4].

### 36 Determinations of NCAT (1)

The Tribunal may make one of the following determinations with respect to an objection referred to it under this Part—

- (a)

a determination that the proposed act may be done,

- (b)

a determination that the proposed act may be done, subject to conditions,

- (c)

a determination that the proposed act not be done,

(2)

When making a determination, the Tribunal is to take into account—

- (a)

the likely impact of the proposed act on the objector's registered native title rights and interests, and

- (b)

the measures proposed to be taken to minimise that impact, and

- (c)

the social, economic or other public benefits likely to result from the doing of the proposed act (including in the relevant region or locality of the State).

(3)

The Tribunal may dismiss an objection if it determines that the objection has not been duly made on a ground provided by section 24MD (6B) (d) of the [Commonwealth Native Title Act](#).

s 36: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [3].

### 37 Compliance with determination of NCAT (1)

A determination of the Tribunal under this Part has effect only for the purposes of section 24MD (6B) of the [Commonwealth Native Title Act](#).

Note—

Section 24MD (6B) (g) [NTA](#) requires, in order to ensure the validity of the act, compliance with a determination of the Tribunal upholding an objection, or imposing conditions about the doing of the act that relate to registered native title rights and interests, unless—

- (a)  
the Minister of the State responsible for indigenous affairs is consulted, and
- (b)  
the consultation is taken into account, and
- (c)  
it is in the interests of the State not to comply with the determination.

(2)

A decision under section 24MD (6B) of the [Commonwealth Native Title Act](#) not to comply with a determination of the Tribunal under this Part can only be made by the Minister.

s 37: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [3].

### 38 Other provisions relating to NCAT's jurisdiction (1)

A determination of the Tribunal under this Part may take the form of a recommendation.

Note—

A determination is a general decision of the Tribunal for the purposes of the [Civil and Administrative Tribunal Act 2013](#).

(2)

The Tribunal is required to provide a copy of its determination under this Part to each party to the proceedings and to the Minister.

s 38: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Subst 2013 No 95, Sch 2.105 [5].

### 39 Other statutory requirements not affected

A determination under this Part that a proposed act may be done does not affect the requirements of any other written law that apply to the doing of the act.

s 39: Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23].

40–52

(Repealed)

ss 40–47: Rep 1998 No 88, Sch 1 [19].

pt 7, div 2: Rep 1998 No 88, Sch 1 [19].

pt 7, div 3 (ss 48–52): Rep 1998 No 88, Sch 1 [19].

pt 7, div 3 (ss 48–52): Rep 1998 No 88, Sch 1 [19].

Parts 8, 9 53–95

(Repealed)

pt 8: Rep 1998 No 88, Sch 1 [19].

Parts 9 (ss 53–95): Rep 1998 No 88, Sch 1 [19].

Part 10 Interim provisions Division 1 Object of this Part 96 Objects of this Part

The object of this Part is to make, and permit the making of, various interim provisions, pending a full review of New South Wales law, to ensure—

- (a)  
that New South Wales law is consistent with standards set by the [Commonwealth Native Title Act](#) for future dealings affecting native title, and
- (b)  
that New South Wales law is consistent with the requirements of the [Racial Discrimination Act 1975](#) of the Commonwealth for future dealings affecting native title.

- (c)

(Repealed)

s 96: Am 1998 No 88, Sch 1 [24].

Division 2 Compulsory acquisition 97 Acquisition of native title rights and interests

([NTA](#), sec 23 (3), (5) and (6))

A [State Compulsory Acquisition Act](#) applies to native title with any changes prescribed by regulations made under this Act that, in the Governor's opinion, are necessary or convenient to ensure that—

- (a)  
native title rights and interests may be compulsorily acquired consistently with the [Commonwealth Native Title Act](#), and
- (b)  
if an acquisition is made at someone's request, the person is liable to pay the compensation, and
- (c)  
native title holders have the same procedural rights as the holders of ordinary title, except where special procedural rights apply under the [Commonwealth Native Title Act](#), and

- (d)

(Repealed)

- (e)

a compulsory acquisition under the [State Compulsory Acquisition Act](#) is capable of attracting the expedited procedure under section 32 (Expedited procedure) of the [Commonwealth Native Title Act](#), and

- (f)

(Repealed)

- (g)

the [State Compulsory Acquisition Act](#) is otherwise consistent with and gives effect to the objects and provisions of the [Racial Discrimination Act 1975](#) of the Commonwealth and the [Commonwealth Native Title Act](#).

s 97: Am 1998 No 88, Sch 1 [25]–[27].

Division 3 Mining 98

(Repealed)

s 98: Rep 1998 No 88, Sch 1 [28].

99 State Mining Acts apply with prescribed changes (1)

To ensure that a [State Mining Act](#) is consistent with the objects and provisions of the [Commonwealth Native Title Act](#), the [State Mining Act](#) applies to native title with the changes prescribed by the regulations made under this Act.

(2)

Without limiting this section, the [State Mining Act](#) applies to native title with any changes prescribed by the regulations that, in the Governor's opinion, are necessary or convenient to ensure—

- (a)

(Repealed)

- (b)

that acts which create a right to mine under a [State Mining Act](#) may be excluded from the coverage of Subdivision P of Division 3 of Part 2 (which deals with acts covered by right to negotiate procedures) of the [Commonwealth Native Title Act](#) in appropriate cases, and

- (c)

that the expedited procedure in section 32 (Expedited procedure) of the [Commonwealth Native Title Act](#) is attracted in appropriate cases.

- (d)

(Repealed)

s 99: Am 1998 No 88, Sch 1 [29]–[31].

Division 4 Other interim provisions 100 Native title holders are owners (1)



For the purposes of an Act prescribed by the regulations made under this Act, the owners of land include the holders of native title in relation to the land.

(2)

Without limiting this section, the native title holders are entitled to every right and privilege of other owners of the land.

(3)

This section does not limit by implication the rights or interests of native title holders.

#### 101 Interim regulation making power (1)

The Governor may make regulations containing provisions with respect to a matter necessary or convenient to be prescribed for carrying out or giving effect to the objects and provisions of this Act or the [Commonwealth Native Title Act](#) (with or without changes).

(2)

Without limiting this section, a regulation may declare that it has effect despite any Act, or a particular Act, passed before the commencement of the [Native Title \(New South Wales\) Amendment Act 1998](#).

(3)

A regulation mentioned in subsection (2) expires 1 year after it is made or on the expiry of this Part, whichever is the earlier, unless it is earlier repealed.

s 101: Am 1998 No 88, Sch 1 [32].

#### 102 Expiry of this Part

This Part expires 2 years after the date of assent to the [Native Title \(New South Wales\) Amendment Act 1998](#).

s 102: Subst 1998 No 88, Sch 1 [33].

Following paragraph cited by:

[Roads Act 1993 \(NSW\)](#) (01 July 2025)

Section 103 of the [Native Title \(New South Wales\) Act 1994](#) makes special provision with respect to the service of notices on native title holders where there is no approved determination of native title. Relevant provisions are also made by the [Commonwealth Native Title Act](#).

[Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (05 July 2024)

[Very Fast Train \(Route Investigation\) Act 1989 \(NSW\)](#) (01 August 2018)

[Access to Neighbouring Land Act 2000 \(NSW\)](#) (06 July 2009)

[Statute Law \(Miscellaneous Provisions\) Act 2005 \(NSW\)](#) (01 July 2005)

[Very Fast Train \(Route Investigation\) Regulation 2000 \(NSW\)](#) (11 August 2000)

In the case of land in which there are native title rights and interests but in respect of which there is no approved determination of native title (within the meaning of the [Native Title Act 1993](#) of the Commonwealth), the notice is to be served in accordance with section 103 of the [Native Title \(New South Wales\) Act 1994](#) at least 7 days before the land is first entered under the authority of the permit concerned.

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) (01 January 1998)

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) (01 January 1998)

This section applies if—

- (a)  
because of any law of the Commonwealth or the State, native title holders have a procedural right that requires another person to notify them of an act, and
- (b)  
there has been no approved determination of native title.

(2)

One way in which the person may give the required notice is by notifying in the approved manner the following that the act is to take place—

- (a)  
any representative Aboriginal/Torres Strait Islander bodies for the area concerned,
- (b)  
any registered native title claimants in relation to land or waters in the area concerned.

(3)

The approved manner of notification is—

- (a)  
the manner of notification prescribed by the law of the Commonwealth or the State for notifying the holders of ordinary title of the act concerned, or
- (b)  
if there is no such manner of notification prescribed—by post or in such other manner to which the notified body or person agrees.

Note—

If notification of the act is required for the purposes of complying with section 24KA, 24MD or 24NA NTA, the notification requirements of section 24KA (8), 24MD (7) or 24NA (9) NTA apply.

s 103: Subst 1998 No 88, Sch 1 [34].

#### 103A Satisfying other procedural rights of native title holders (1)

This section applies if—

- (a)  
because of any law of the Commonwealth or the State, native title holders have a procedural right that requires another person to do any thing in relation to the native title holders, and
- (b)

there has been no approved determination of native title.

(2)

One way in which the person may give effect to the requirement is—

- (a)

by doing the thing in relation to any registered native title claimant in relation to land or waters in the area concerned, or

- (b)

if there are no such registered native title claimants in relation to land or waters in the area concerned—by ensuring that any representative Aboriginal/Torres Strait Islander bodies for the area concerned have an opportunity to comment on the doing of the act.

Note—

If the doing of the thing is required for the purposes of complying with section 24KA, 24MD or 24NA NTA, the requirements of section 24KA (9), 24MD (8) or 24NA (10) NTA apply.

s 103A: Ins 1998 No 88, Sch 1 [34].

104 Recovery of compensation paid by the Crown from an authority of the State

( NTA, secs 24MD (4) and 24NA (7))

s 104, hdg: Am 1998 No 88, Sch 1 [35].

If an authority of the State which acquires native title rights and interests in relation to land under a [State Compulsory Acquisition Act](#) is not the Crown in the right of the State, the Crown in the right of the State may recover from the authority any compensation paid by the Crown to the native title holders in relation to the acquisition of the native title rights and interests concerned.

Following paragraph cited by:

Property and Development NSW Act 2006 (NSW) (21 November 2024)  
Crown Land Management Act 2016 (NSW) (21 November 2024)  
Crown Land Management Act 2016 (NSW) (21 November 2024)  
Dungog Shire Council v Attorney General of New South Wales (01 March 2024) (Burley J)  
Santos NSW Pty Ltd v Gomeroi People (19 December 2022) (The Honourable J A Dowsett AM KC)  
Application of Willoughby City Council (as manager of the Talus Reserve Trust) and anor (05 December 2016) (Brereton J)

104A Saving of native title rights and interests with respect to national parks and other reservations, dedications or declarations (1)

This section applies to the following acts—

- (a)

a reservation, dedication or vesting of, or declaration over, land or waters by the operation of the [Brigalow and Nandewar Community Conservation Area Act 2005](#), the [Western Sydney Parklands Act 2006](#), the [Sporting Venues Authorities Act 2008](#), the [Forestry Revocation and National Park Reservation Act 1996](#), the [Forestry and National Park Estate Act 1998](#), the [National Park Estate \(Southern Region Reservations\) Act 2000](#), the [National Park Estate \(Reservations\) Act 2002](#), the [National Park Estate \(Reservations\) Act 2003](#), the [National Park Estate \(Lower Hunter Region Reservations\) Act 2006](#), the [National Park Estate \(Riverina Red Gum](#)

*Reservations) Act 2010* , the *National Park Estate (South-Western Cypress Reservations) Act 2010* , the *National Park Estate (Reservations) Act 2005* , the *National Parks and Wildlife (Adjustment of Areas) Act 2006* or Schedule 2 to the *National Parks and Wildlife Act 1974* ,

- (b)

a proclamation or notice under the *National Parks and Wildlife Act 1974* that reserves or dedicates land or waters with effect on or after 1 January 1994 (including a provision of an Act that is taken to operate as such a proclamation or notice),

- (c)

a notification under the *Wilderness Act 1987* or the *National Parks and Wildlife Act 1974* that declares an area of land or waters to be a wilderness area with effect on or after 1 January 1994 (including a provision of an Act that is taken to operate as such a notification),

- (c1)

a notice under section 188C of the *National Parks and Wildlife Act 1974* that adjusts the boundary of land reserved under that Act, or acquired under Part II of that Act, that adjoins a public road,

- (c2)

an order under section 188D (5) of the *National Parks and Wildlife Act 1974* that operates to reserve land under that Act or vest land for the purposes of Part II of that Act,

- (d)

an order under section 24 of the *Sporting Venues Authorities Act 2008* that vests land in a sporting venues authority,

- (e)

a proclamation under the *Marine Estate Management Act 2014* that declares an area of land or waters to be a marine park or part of a marine park (including a provision of an Act that is taken to operate as such a proclamation),

- (f)

a notice under the *Marine Estate Management Act 2014* that declares an area to be an aquatic reserve or part of an aquatic reserve,

- (g)

an order under the *Property and Development NSW Act 2006* , section 19 that vests property in Property and Development NSW,

- (h)

an order under section 34 of the *Western Sydney Parklands Act 2006* that vests land in the Western Sydney Parklands Trust,

- (i)

the validation of an affected mineral claim under the *Mining Act 1992* , Schedule 6, Part 28 ,

(2)

An act to which this section applies does not operate to extinguish, and is taken never to have operated to extinguish, any native title rights and interests existing in relation to land or waters immediately before the act,

(3)

The relevant provisions of the *National Parks and Wildlife Act 1974*, the *Wilderness Act 1987*, the *Marine Estate Management Act 2014*, the *Crown Lands Act 1989*, the *Crown Land Management Act 2016*, the *Property and Development NSW Act 2006* and the regulations or other instruments made under those Acts (and any related Act or law) do not apply, and cannot be applied, so as to affect those native title rights and interests. The relevant provisions are those provisions that apply because the land or waters concerned are reserved, dedicated, declared or vested under any such Act.

Note—

An act “affects” native title rights and interests if it extinguishes those rights and interests or if it is wholly or partially inconsistent with their continued existence, enjoyment or exercise—see sec 227 NTA and sec 5 of this Act.

(4)

To the extent (if any) that an act to which this section applies was invalid because of those native title rights and interests, an act of the same kind is taken to have effect on the commencement of this section, subject to subsections (2) and (3).

(5)

However, this section does not affect—

- (a)  
any extinguishment of those native title rights and interests, or
- (b)  
any validation of an act, or
- (c)  
any application of the relevant provisions referred to in subsection (3), or
- (d)  
any other effect on those native title rights and interests,

by the operation of, or by anything done under, the *Commonwealth Native Title Act* or the other provisions of this Act.

s 104A: Ins 1998 No 163, Sch 11. Am 2000 No 86, Sch 8 [1] [2]; 2000 No 103, Sch 8.2 [1] [2]; 2000 No 113, Sch 2 [1] [2]; 2002 No 137, Sch 9.2 [1]–[3]; 2003 No 24, sec 13; 2005 No 56, Sch 12.5; 2005 No 84, sec 15; 2006 No 15, sec 6; 2006 No 40, Sch 3.2 [1] [2]; 2006 No 90, sec 14; 2006 No 92, Sch 5.3 [1] [2]; 2008 No 65, Sch 6.2 [1] [2]; 2010 No 22, Sch 10.3; 2010 No 38, Sch 3.11; 2010 No 77, Sch 2; 2010 No 112, Sch 9.3; 2014 No 72, Sch 4.9 [1]–[3]; 2017 No 17, Sch 4.64; 2023 No 29, Sch 2; 2024 No 27, Sch 2.9[1] [2].

105 Notes in the text

Notes included in this Act are explanatory notes and do not form part of this Act.

106 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

107

(Repealed)

s 107: Rep 1999 No 85, Sch 4.

107A Savings, transitional and other provisions

Schedule 2 has effect.

s 107A: Ins 1998 No 88, Sch 1 [36].

108 Review of Act (1)

The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2)

The review is to be undertaken as soon as possible after the period of 5 years after the date of assent to the *Native Title (New South Wales) Amendment Act 1998*.

(3)

A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

s 108: Am 1998 No 88, Sch 1 [37].

Following paragraph cited by:

Mining Act 1992 (NSW) (01 July 2025)

Land and Environment Court Act 1979 (NSW) (02 March 2025)

Petroleum (Onshore) Act 1991 (NSW) (01 March 2023)

Date of commencement of items (1)–(4), (6) and (7) of the provisions of Sch 1 relating to the *Petroleum (Onshore) Act 1991*, 28.11.1994, sec 2 and GG No 156 of 25.11.1994, p 6868; item (5) of those provisions was not commenced and was repealed by the *Native Title (New South Wales) Amendment Act 1998* No 88. Amended by *Statute Law (Miscellaneous Provisions) Act (No 2) 1994* No 95. Assented to 12.12.1994. Date of commencement of the provisions of Sch 1 relating to the *Native Title (New South Wales) Act 1994*, assent, Sch 1.

Minister Administering the Crown Lands Act v NSW Aboriginal Land Council (02 October 2008) (Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

28. What was the reason for excluding the three stated categories mentioned in s 36(1) of the *Land Rights Act* from "claimable Crown lands" [46]? In the context, the applicable reason was to define those categories of land which, alone of the remaining Crown lands in the State, would be placed beyond the land generally available for a claim under the *Land Rights Act*. Thus the beneficial and remedial character of the *Land Rights Act* encourages a narrow or strict interpretation of the exceptions. This feature of the exceptions led the Court of Appeal to introduce the explanation that the "lawful use or occupation" (in s 36(1)(b) of the *Land Rights Act*) must ordinarily be something "more than notional" so that the land is "actually used". In other words, the land must be used in fact and not merely intended to be used or used to a notional degree [47].

via

[46] Section 36(1) of the Land Rights Act has been amended several times to provide further exceptions from the definition of "claimable Crown lands". Most importantly, s 36(1)(b1), as inserted by *Aboriginal Land Rights (Amendment) Act 1986 (NSW)*, Sched 1, item 13, excepts "lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands". See also *Native Title (New South Wales) Act 1994 (NSW)*, Sched 1, item 3, which inserted s 36(1)(d) and (e).

## Schedule 1

(Repealed)

sch 1: Am 1998 No 88, Sch 1 [38]–[40]. Rep 1999 No 85, Sch 4.

## Schedule 2 Savings, transitional and other provisions

(Section 107A)

### 1 Regulations (1)

The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts—

- .

this Act

- .

*Native Title (New South Wales) Amendment Act 1998*

(2)

Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3)

To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as—

- (a)

to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

- (b)

to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### 2 Saving of notifications of native title holders under section 103

The replacement of section 103 by the *Native Title (New South Wales) Amendment Act 1998* does not invalidate or affect any notification of an act made at any time before that replacement in accordance with that section as in force at that time.

### 3 Revival of expired interim provisions of Part 10 of Act

Section 102, as replaced by the [Native Title \(New South Wales\) Amendment Act 1998](#) has the effect of reviving Part 10 of this Act (which expired on 28 November 1996).

sch 2: Ins 1998 No 88, Sch 1 [41].

#### Historical notes Table of amending instruments

*Native Title (New South Wales) Act 1994 No 45*. Assented to 2.6.1994. Date of commencement of Parts 1–3, 10 and 11 and Sch 1 (except the amendments to the [Land and Environment Court Act 1979](#), items (7)–(11) of the amendments to the [Mining Act 1992](#) and item (5) of the amendments to the [Petroleum \(Onshore\) Act 1991](#)), 28.11.1994, sec 2 and GG No 156 of 25.11.1994, p 6868; the remaining provisions were not commenced and were repealed by the [Native Title \(New South Wales\) Amendment Act 1998](#) No 88. This Act has been amended as follows—

- [Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1994](#). Assented to 12.12.1994.
- 1994 No 95 Date of commencement of the provisions of Sch 1 relating to the [Native Title \(New South Wales\) Act 1994](#), assent, Sch 1.
- 1998 No 88 [Native Title \(New South Wales\) Amendment Act 1998](#). Assented to 24.9.1998.
- Date of commencement of Sch 1, 30.9.1998, sec 2 and GG No 142 of 29.9.1998, p 7885.
- No 163 [Forestry and National Park Estate Act 1998](#). Assented to 14.12.1998.
- Date of commencement of Sch 11, 18.12.1998, sec 2 (1) and GG No 176 of 18.12.1998, p 9721.
- 1999 No 42 [Offshore Minerals Act 1999](#). Assented to 8.7.1999.
- Date of commencement, 31.3.2000, sec 2 and GG No 42 of 31.3.2000, p 2490.
- No 85 [Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1999](#). Assented to 3.12.1999.
- Date of commencement of Sch 4, assent, sec 2 (1).
- 2000 No 86 [Fisheries Management and Environmental Assessment Legislation Amendment Act 2000](#). Assented to 6.12.2000.
- Date of commencement of Sch 8, 23.3.2001, sec 2 and GG No 54 of 16.3.2001, p 1227.
- No 103 [National Park Estate \(Southern Region Reservations\) Act 2000](#). Assented to 13.12.2000.
- Date of commencement, 1.1.2001, sec 2.
- [Marine Parks Amendment Act 2000](#). Assented to 20.12.2000.
- No 113 Date of commencement, 2.3.2001, sec 2 and GG No 46 of 2.3.2001, p 1079. The proclamation appointed 1.3.2001 as the date of commencement. Pursuant to section 23 (5) of the [Interpretation Act 1987](#), the proclamation does not fail merely because it was not published in the Gazette until after the day appointed in the proclamation, but section 23 (5) provides, in that event, for the Act to commence on the day on which the proclamation was published in the Gazette.



- 2002 No [National Park Estate \(Reservations\) Act 2002](#) , Assented to 18.12.2002.  
137 Date of commencement, 1.1.2003, sec 2.
- 2003 No [National Park Estate \(Reservations\) Act 2003](#) , Assented to 7.7.2003.  
24 Date of commencement, 1.7.2003, sec 2.
- 2005 No [Brigalow and Nandewar Community Conservation Area Act 2005](#) , Assented to 1.7.2005.  
56 Date of commencement of Sch 12.5, 1.7.2005, sec 2 (2).
- No [National Park Estate \(Reservations\) Act 2005](#) , Assented to 17.11.2005.  
84 Date of commencement, assent, sec 2.
- 2006 No [National Parks and Wildlife \(Adjustment of Areas\) Act 2006](#) , Assented to 11.4.2006.  
15 Date of commencement, 16.2.2007, sec 2 and GG No 32 of 16.2.2007, p 820.
- No [State Property Authority Act 2006](#) , Assented to 8.6.2006.  
40 Date of commencement, 1.9.2006, sec 2 and GG No III of 1.9.2006, p 7063.
- No [National Park Estate \(Lower Hunter Region Reservations\) Act 2006](#) , Assented to 21.11.2006.  
90 Date of commencement of sec 14, 1.7.2007, sec 2 (1).
- No [Western Sydney Parklands Act 2006](#) , Assented to 21.11.2006.  
92 Date of commencement of Sch 5, 1.1.2008, sec 2 and GG No 185 of 21.12.2007, p 9819.
- 2008 No [Sporting Venues Authorities Act 2008](#) , Assented to 1.7.2008.  
65 Date of commencement, 11.7.2008, sec 2 and GG No 87 of 11.7.2008, p 6882.
- 2010 No [National Park Estate \(Riverina Red Gum Reservations\) Act 2010](#) , Assented to 24.5.2010.  
22 Date of commencement, 1.7.2010, sec 2.
- No [National Parks and Wildlife Amendment Act 2010](#) , Assented to 15.6.2010.  
38 Date of commencement of Sch 3.11, 2.7.2010, sec 2 and 2010 (344) LW 2.7.2010.
- No [National Parks and Wildlife Amendment \(Adjustment of Areas\) Act 2010](#) , Assented to 25.10.2010.  
77 Date of commencement, assent, sec 2.

- National Park Estate (South-Western Cypress Reservations) Act 2010* . Assented to 29.II.2010.
- No  
112 Date of commencement, I.I.2011, sec 2.
- 2013 No *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* . Assented to 20.II.2013.  
95 Date of commencement, I.I.2014, sec 2.
- 2014 No *Marine Estate Management Act 2014* . Assented to 11.II.2014.  
72 Date of commencement, 19.I2.2014, sec 2 and 2014 (833) LW 19.I2.2014.
- 2017 No *Crown Land Legislation Amendment Act 2017* . Assented to 17.5.2017.  
17 Date of commencement of Sch 4, 1.7.2018, sec 2 (1) and 2018 (225) LW 1.6.2018.
- 2023 No *Mining Amendment (Mineral Claims—Opal) Act 2023*. Assented to 24.I0.2023.  
29 Date of commencement, 14.2.2023, sec 2.
- 2024 No *Property NSW Amendment Act 2024*. Assented to 31.5.2024.  
27 Date of commencement, assent, sec 2.

#### Table of amendments

Sec 3 Am 1998 No 88, Sch 1 [1] [2].

Sec 4 Am 1998 No 88, Sch 1 [3] [4]; 1999 No 42, Sch 3.13.

Sec 7 Am 1998 No 88, Sch 1 [5] [6].

Sec 8A Ins 1998 No 88, Sch 1 [7].

Sec 9 Am 1998 No 88, Sch 1 [8] [9].

Part 2,  
Div 2, Am 1998 No 88, Sch 1 [10].  
heading

Sec 9A Ins 1998 No 88, Sch 1 [11].

Part 2,  
Div 2, Ins 1998 No 88, Sch 1 [12].  
note

Part 2,  
Div 2A Ins 1998 No 88, Sch 1 [13].  
(secs  
14A–  
14F)

Sec 15 Am 1998 No 88, Sch 1 [14] [15].

Sec 15A Ins 1998 No 88, Sch 1 [16].

Sec 18 Am 1998 No 88, Sch 1 [17] [18].

Part 4 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Part 4,  
Div 1 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Sec 19 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Part 4,  
Div 2 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Secs  
20–22 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Part 4,  
Div 3, Ins 1998 No 88, Sch 1 [20].  
heading

Secs  
23–25 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [20].

Part 5 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [21].

Secs  
26–28 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [21].

Part 6 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [22].

Secs  
29–31 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [22].

Part 7 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23].

Part 7,  
Div 1, Rep 1998 No 88, Sch 1 [19].  
heading

Sec 32 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [1].

Sec 33 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [2].

Sec 34 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [3].

Sec 35 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [4].

Secs 36, Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Am 2013 No 95, Sch 2.105 [3].  
37

Sec 38 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23]. Subst 2013 No 95, Sch 2.105 [5].

Sec 39 Rep 1998 No 88, Sch 1 [19]. Ins 1998 No 88, Sch 1 [23].

Secs  
40–47 Rep 1998 No 88, Sch 1 [19].

Part 7,  
Divs 2, Rep 1998 No 88, Sch 1 [19].  
3 (secs  
48–52)

Parts 8,  
9 (secs Rep 1998 No 88, Sch 1 [19].  
53–95)

Sec 96 Am 1998 No 88, Sch 1 [24].

Sec 97 Am 1998 No 88, Sch 1 [25]–[27].

Sec 98 Rep 1998 No 88, Sch 1 [28].

Sec 99 Am 1998 No 88, Sch 1 [29]–[31].

Sec 101 Am 1998 No 88, Sch 1 [32].

Sec 102 Subst 1998 No 88, Sch 1 [33].

Sec 103 Subst 1998 No 88, Sch 1 [34].

Sec 103A Ins 1998 No 88, Sch 1 [34].

Sec 104, heading Am 1998 No 88, Sch 1 [35].

Sec 104A Ins 1998 No 163, Sch 11. Am 2000 No 86, Sch 8 [1] [2]; 2000 No 103, Sch 8.2 [1] [2]; 2000 No 113, Sch 2 [1] [2]; 2002 No 137, Sch 9.2 [1]–[3]; 2003 No 24, sec 13; 2005 No 56, Sch 12.5; 2005 No 84, sec 15; 2006 No 15, sec 6; 2006 No 40, Sch 3.2 [1] [2]; 2006 No 90, sec 14; 2006 No 92, Sch 5.3 [1] [2]; 2008 No 65, Sch 6.2 [1] [2]; 2010 No 22, Sch 10.3; 2010 No 38, Sch 3.11; 2010 No 77, Sch 2; 2010 No 112, Sch 9.3; 2014 No 72, Sch 4.9 [1]–[3]; 2017 No 17, Sch 4.64; 2023 No 29, Sch 2; 2024 No 27, Sch 2.9[1] [2].

Sec 107 Rep 1999 No 85, Sch 4.

Sec 107A Ins 1998 No 88, Sch 1 [36].

Sec 108 Am 1998 No 88, Sch 1 [37].

Sch 1 Am 1998 No 88, Sch 1 [38]–[40]. Rep 1999 No 85, Sch 4.

Sch 2 Ins 1998 No 88, Sch 1 [41].

The whole Act Am 1994 No 95, Sch 1 (“warden’s court” and “wardens’ courts” omitted wherever occurring, “Warden’s Court” and “Wardens’ Courts” inserted instead).

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## Cited by:

[Mining Act 1992 \(NSW\)](#) [1992] NSWLegAct 29 (01 July 2025)

The operation of clause 197 or 198, to the extent the operation of the clause relates to anything done before the assent date, is taken to be an act to which the [Native Title \(New South Wales\) Act 1994](#), section 104A applies.

[Roads Act 1993 \(NSW\)](#) [1993] NSWLegAct 33 (01 July 2025)

Section 103 of the [Native Title \(New South Wales\) Act 1994](#) makes special provision with respect to the service of notices on native title holders where there is no approved determination of native title. Relevant provisions are also made by the [Commonwealth Native Title Act](#).

[Local Government Act 1993 \(NSW\)](#) [1993] NSWLegAct 30 -

[Mining Act 1992 \(NSW\)](#) [1992] NSWLegAct 29 -

[Transport Administration Act 1988 \(NSW\)](#) [1988] NSWLegAct 109 -

[Roads Act 1993 \(NSW\)](#) [1993] NSWLegAct 33 -

[Mining Act 1992 \(NSW\)](#) [1992] NSWLegAct 29 -

[Biodiversity Conservation Act 2016 \(NSW\)](#) [2016] NSWLegAct 63 -  
[Eden Local Aboriginal Land Council v Attorney General of New South Wales](#) [2025] FCA 688 -  
[Awabakal Local Aboriginal Land Council v Attorney-General of New South Wales](#) [2025] FCA 609 -  
[Administrative Arrangements \(Minns Ministry—Administration of Acts\) Order 2023 \(NSW\)](#) [2023] NSWLegSI 139 (16 May 2025)

[Native Title \(New South Wales\) Act 1994](#) No 45

[Pipelines Act 1967 \(NSW\)](#) [1967] NSWLegAct 90 (09 April 2025)

[Native Title \(New South Wales\) Act 1994](#) . Assented to 2.6.1994.

[Civil and Administrative Tribunal Act 2013 \(NSW\)](#) [2013] NSWLegAct 2 -  
[Land and Environment Court Act 1979 \(NSW\)](#) [1979] NSWLegAct 204 -  
[Land and Environment Court Act 1979 \(NSW\)](#) [1979] NSWLegAct 204 -  
[Aboriginal Land Rights Act 1983 \(NSW\)](#) [1983] NSWLegAct 42 -  
[National Parks and Wildlife Act 1974 \(NSW\)](#) [1974] NSWLegAct 80 (21 November 2024)

The lands reserved as, or as parts of, national parks, nature reserves or state conservation areas, regional parks, historic sites or Aboriginal areas by this Schedule are, for the purposes of this Act and the [Native Title \(New South Wales\) Act 1994](#) , taken to have been so reserved by notice published under Division 1 of Part 4.

[National Parks and Wildlife Act 1974 \(NSW\)](#) [1974] NSWLegAct 80 -  
[Property and Development NSW Act 2006 \(NSW\)](#) [2006] NSWLegAct 40 -  
[National Parks and Wildlife Act 1974 \(NSW\)](#) [1974] NSWLegAct 80 -  
[Crown Land Management Act 2016 \(NSW\)](#) [2016] NSWLegAct 58 -  
[Fisheries Management Act 1994 \(NSW\)](#) [1994] NSWLegAct 38 -  
[Crown Land Management Act 2016 \(NSW\)](#) [2016] NSWLegAct 58 -  
[Crown Land Management Act 2016 \(NSW\)](#) [2016] NSWLegAct 58 -  
[National Parks and Wildlife Act 1974 \(NSW\)](#) [1974] NSWLegAct 80 -  
[Moriarty v Nye](#) [2024] NSWCCA 116 -  
[Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) [1991] NSWLegAct 22 -  
[Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) [1991] NSWLegAct 22 -  
[McKellar on behalf of the Wongkumara People v State of Queensland](#) [2024] FCA 699 (03 July 2024) (Murphy J)

24. If a word or expression is not defined in these orders or this determination of native title, but is defined in the [Native Title Act 1993 \(Cth\)](#) , the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) or the [Interpretation Act 1987 \(NSW\)](#) , then it has the meaning given to it in those statutes, whichever is relevant.

[McKellar on behalf of the Wongkumara People v State of Queensland](#) [2024] FCA 699 (03 July 2024) (Murphy J)

(d) So far as is confirmed pursuant to section 18 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) as at the date of the approved determination of native title, any existing public access to and enjoyment of:

[McKellar on behalf of the Wongkumara People v State of Queensland](#) [2024] FCA 699 -  
[Hunter Water Act 1991 \(NSW\)](#) [1991] NSWLegAct 53 (01 March 2024)

[Native Title \(New South Wales\) Act 1994](#) . Assented to 2.6.1994.

[Dungog Shire Council v Attorney General of New South Wales](#) [2024] FCA 166 (01 March 2024) (Burley J)

5. The dispute between the parties has been framed by reference to the following five separate questions:

(1) Does Dungog Shire Council have power, having regard to the terms of the [Local Government Act 1993 \(NSW\)](#) ( [LGA](#) ), the [Crown Land Management Act 2016 \(NSW\)](#) ( [CLM Act](#) ) and/or the [Interpretation Act 1987 \(NSW\)](#) , to make the present application pursuant to s 61 of the [Native Title Act](#) ?

- (2) Were all native title rights and interests that might once have existed in respect of the Land extinguished by the grant of 2,090 acres of land by Governor Thomas Brisbane to James Phillips by the 1823 Deed?
- (3) Was the grant described in question (2) a 'previous exclusive possession act' within the meaning of s 23B of the *Native Title Act* and s 20 of the *Native Title (New South Wales) Act 1994 (NSW)* (*NSW Native Title Act*)?
- (4) In the alternative to (2) and (3), were all native title rights and interests that might once have existed in respect of the Land extinguished by the sale of land described in the 1880 Deed, for an estate in fee simple conveyed by Stephen Stanbridge and Harriet Stanbridge to Queen Victoria?
- (5) Was the grant described in question (4) a 'previous exclusive possession act' within the meaning of s 23B of the *Native Title Act* and s 20 of the *NSW Native Title Act*?

*Dungog Shire Council v Attorney General of New South Wales* [2024] FCA 166 (01 March 2024) (Burley J)

53. Mr Franks submits that the broad and permissive powers conferred upon the Dungog Shire Council under the terms of the *LGA* are constrained by the terms of the *CLM Act*, which establishes a regime for the management of Crown land which is still subject to native title under the *Native Title Act*. He submits that the scheme does not specifically empower a council to make an application under the *Native Title Act*, and that it should be inferred that the legislation contemplates that the only person able to bring such an application is the Minister. This arises, he submits, because all aspects of the role that the council has under the *CLM Act* are directed towards the day-to-day management of Crown reserves. The *CLM Act* does not in terms confer power on the manager (here, Dungog Shire Council) to address the question of the existence or extinguishment of native title. Indeed, the terms of the *NSW Native Title Act* provide that the provisions of the *CLM Act* cannot be applied so as to affect native title rights and interests; s 3, s 10 4A. He submits that the *Native Title Act* provides a regime for a preferred outcome of native title claims by conciliation rather than litigation. That Act, when read in conjunction with the *CLM Act*, confers relevant functions (such as entry into indigenous land use agreements, consent to compulsory acquisition and the issue of native title certificates) upon the Minister. It would be contrary to the object and purposes of the legislative scheme to read into the *CLM Act* and the *LGA* an implied power on the part of a council manager of Crown land to bring proceedings for a determination that native title has been extinguished. Rather than fragment power to bring such proceedings by placing that ability in the hands of local shire councils, the better way to understand the legislation is that such bodies are not empowered to do so. Conversely, the *CLM Act* provides that it is the council that is liable to pay compensation for any compensable act that occurs if native title is not extinguished. It is not consistent with the policy aim of achieving non-litigated outcomes if it is suitable for a council manager to bring an application. By conferring such a power on a council, the scheme sets up a conflict of interest between the rate payers on the one hand, who have a desire to limit liability for compensation and those claiming compensation under the *Native Title Act*.

*Dungog Shire Council v Attorney General of New South Wales* [2024] FCA 166 (01 March 2024) (Burley J)

5. The dispute between the parties has been framed by reference to the following five separate questions:
  - (1) Does Dungog Shire Council have power, having regard to the terms of the *Local Government Act 1993 (NSW)* (*LGA*), the *Crown Land Management Act 2016 (NSW)* (*CLM Act*) and/or the *Interpretation Act 1987 (NSW)*, to make the present application pursuant to s 61 of the *Native Title Act*?
  - (2) Were all native title rights and interests that might once have existed in respect of the Land extinguished by the grant of 2,090 acres of land by Governor Thomas Brisbane to James Phillips by the 1823 Deed?

(3) Was the grant described in question (2) a ‘previous exclusive possession act’ within the meaning of s 23B of the [Native Title Act](#) and s 20 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) ( [NSW Native Title Act](#) )?

(4) In the alternative to (2) and (3), were all native title rights and interests that might once have existed in respect of the Land extinguished by the sale of land described in the 1880 Deed, for an estate in fee simple conveyed by Stephen Stanbridge and Harriet Stanbridge to Queen Victoria?

(5) Was the grant described in question (4) a ‘previous exclusive possession act’ within the meaning of s 23B of the [Native Title Act](#) and s 20 of the [NSW Native Title Act](#) ?

[Dungog Shire Council v Attorney General of New South Wales](#) [2024] FCA 166 -  
[Dungog Shire Council v Attorney General of New South Wales](#) [2024] FCA 166 -  
[Dungog Shire Council v Attorney General of New South Wales](#) [2024] FCA 166 -  
[Dungog Shire Council v Attorney General of New South Wales](#) [2024] FCA 166 -  
[Dungog Shire Council v Attorney General of New South Wales](#) [2024] FCA 166 -  
[Sethi v Secretary, Department of Communities & Justice](#) [2024] NSWCATAD 35 -  
[Conveyancing Act 1919 \(NSW\)](#) [1919] NSWLegAct 6 -  
[Coonamble Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 938 -  
[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 (20 July 2023) (Raper J)

62. Further, the Land Council contended that the purposes of “agriculture (or any similar purpose) and grazing combined” and “orchard” appear in Sch 1, Pt 1, Item 3(8) of the NTA. As a matter of ordinary meaning, as the Land Council submitted, “agriculture” encompasses the work of an “orchard”. Alternatively, “orchard” is a similar purpose to “agriculture”. The Land Council also made the submission that Special Lease 1930-5 is a Scheduled interest for the purposes of s 23B(2)(c)(i) of the NTA, and is a PEPA, and that s 20(1) of the [NT\(NSW\) Act](#) confirms that Special Lease 1930-5 wholly extinguished any native title rights or interests existing in relation to the application area at the time it was granted.

[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 (20 July 2023) (Raper J)

35. A PEPA attributable to the Commonwealth extinguishes native title rights and interests (s 23C(1)). Section 23E authorises States and Territories to adopt similar provisions in respect of previous exclusive possession acts attributable to them. Such confirmation has been made by the State of New South Wales. The combined effect of s 20 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) ( [NT\(NSW\) Act](#) ) and s 23E of the NTA (read together with s 23C) is that a PEPA attributable to the State of NSW *wholly* extinguishes native title rights and interests.

[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 -  
[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 -  
[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 -  
[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 -  
[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 -  
[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2023] FCA 813 -  
[Administrative Changes Orders \(NSW\)](#) [1977] NSWLegSI 5 (03 March 2023)

[Native Title \(New South Wales\) Act 1994](#) No 45

[Petroleum \(Onshore\) Act 1991 \(NSW\)](#) [1991] NSWLegAct 84 (01 March 2023)

[Native Title \(New South Wales\) Act 1994](#) . Assented to 2.6.1994.

[Petroleum \(Onshore\) Act 1991 \(NSW\)](#) [1991] NSWLegAct 84 (01 March 2023)



Date of commencement of items (1)–(4), (6) and (7) of the provisions of Sch 1 relating to the *Petroleum (Onshore) Act 1991*, 28.11.1994, sec 2 and GG No 156 of 25.11.1994, p 6868; item (5) of those provisions was not commenced and was repealed by the *Native Title (New South Wales) Amendment Act 1998* No 88. Amended by *Statute Law (Miscellaneous Provisions) Act (No 2) 1994* No 95. Assented to 12.12.1994. Date of commencement of the provisions of Sch 1 relating to the *Native Title (New South Wales) Act 1994*, assent, Sch 1.

[Administrative Arrangements \(Second Perrottet Ministry—Allocation of Acts and Agencies\) Order 2021 \(NSW\)](#) [2021] NSWLegSI 789 -  
[Allocation of the Administration of Acts \(NSW\)](#) [2001] NSWLegSI 338 -  
[Game and Feral Animal Control Act 2002 \(NSW\)](#) [2002] NSWLegAct 64 -  
[Darkinjung Local Aboriginal Land Council v Attorney General of New South Wales](#) [2022] FCA 1555 (22 December 2022) (Burley J)

9. The applicant submits that there has been total extinguishment of native title in respect of the Land, citing *Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3; 181 FCR 320 at [59] (Moore, Mansfield and Perram JJ) for the proposition that it is not necessary to go behind an act of extinguishment to make good its claim. It submits that each of the Lots in the Land was subject to previous exclusive possession acts (PEPA), which arise under Part 2 Division 2B of the *NT Act*. In this regard it relies on the operation of ss 23C and 23E of the *NT Act* in conjunction with s 20 of the *Native Title (New South Wales) Act 1994* (NSW) (*NSW NT Act*) for the proposition that a PEPA attributable to the State of New South Wales (other than a public work) wholly extinguishes native title rights and the interests in the area of the act, and that extinguishment is taken to have happened when the act was done. It submits that s 23B(2) of the *NT Act* relevantly provides that an act is a PEPA if it is valid, took place before 23 December 1996 and consists of the granting or vesting of, amongst other things, a “Scheduled interest” within s 249C of the *NT Act*. It submits that each of the Lots within the Land satisfies this description.

[Darkinjung Local Aboriginal Land Council v Attorney General of New South Wales](#) [2022] FCA 1555 (22 December 2022) (Burley J)

9. The applicant submits that there has been total extinguishment of native title in respect of the Land, citing *Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3; 181 FCR 320 at [59] (Moore, Mansfield and Perram JJ) for the proposition that it is not necessary to go behind an act of extinguishment to make good its claim. It submits that each of the Lots in the Land was subject to previous exclusive possession acts (PEPA), which arise under Part 2 Division 2B of the *NT Act*. In this regard it relies on the operation of ss 23C and 23E of the *NT Act* in conjunction with s 20 of the *Native Title (New South Wales) Act 1994* (NSW) (*NSW NT Act*) for the proposition that a PEPA attributable to the State of New South Wales (other than a public work) wholly extinguishes native title rights and the interests in the area of the act, and that extinguishment is taken to have happened when the act was done. It submits that s 23B(2) of the *NT Act* relevantly provides that an act is a PEPA if it is valid, took place before 23 December 1996 and consists of the granting or vesting of, amongst other things, a “Scheduled interest” within s 249C of the *NT Act*. It submits that each of the Lots within the Land satisfies this description.

[Darkinjung Local Aboriginal Land Council v Attorney General of New South Wales](#) [2022] FCA 1555 -  
[Agreement](#) [2022] FCA 1521 (19 December 2022) (Rares J)

23. If a word or expression is not defined in these orders or this determination of native title, but is defined in the *Native Title Act 1993* (Cth), the *Native Title (New South Wales) Act 1994* (NSW) or the *Interpretation Act 1987* (NSW), then it has the meaning given to it in those statutes, whichever is relevant.

[Agreement](#) [2022] FCA 1521 -  
[Santos NSW Pty Ltd v Gomeroi People](#) [2022] NNTTA 74 -  
[Agreement](#) [2022] FCA 1521 -  
[Chen on behalf of the Department of Regional NSW v Ardler; Chen on behalf of the Department of Regional NSW v Reid; Chen on behalf of the Department of Regional NSW v Thomas](#) [2022] NSWDC 630 -  
[Indigenous Land and Sea Corporation v Anderson](#) [2022] NSWSC 1650 -  
[Indigenous Land and Sea Corporation v Anderson](#) [2022] NSWSC 1650 -

[Indigenous Land and Sea Corporation v Anderson](#) [2022] NSWSC 1650 -

[Parramatta Park Trust Act 2001 \(NSW\)](#) [2001] NSWLegAct 17 -

[Attorney-General \(NSW\) v Ohlsen](#) [2022] FCAFC 38 (16 March 2022) (Bromberg, Mortimer and Jackson JJ)

8. Relevantly here the applicable State legislation is contained in s 20 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#). It suffices to reproduce [43] of the primary judge's reasons describing this provision's effect and extracting the relevant parts:

In the case of New South Wales, s 20 of the [ [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) ] picks up acts which are [previous exclusive possession acts] under s 23B of the NT Act [i.e., the [Native Title Act](#) ] that are attributable to that State. Reflecting the terms of s 23C of the NT Act, s 20(1) of the [ [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) ] provides that an act which is a [previous exclusive possession act] extinguishes any native title in relation to the land or waters covered by a freehold estate, a Scheduled interest as defined or a relevant lease and that the extinguishment is taken to have happened when the relevant act was done. Section 20(1) of the [ [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) ] provides:

**20 Confirmation of extinguishment of native title by previous exclusive possession acts of the State (NTA, secs 23E and 23C)**

(1) **Acts other than public works** If an act is a previous exclusive possession act under section 23B(2) (including because of section 23B (3)) of the [Commonwealth Native Title Act](#) and is attributable to the State:

(a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and

(b) the extinguishment is taken to have happened when the act was done.

[Attorney-General \(NSW\) v Ohlsen](#) [2022] FCAFC 38 -

[Attorney-General \(NSW\) v Ohlsen](#) [2022] FCAFC 38 -

[Attorney-General \(NSW\) v Ohlsen](#) [2022] FCAFC 38 -

[Attorney-General \(NSW\) v Ohlsen](#) [2022] FCAFC 38 -

[NSW Department of Industry \(for Fisheries NSW\) v Connolly](#) [2022] NSWLC 8 (04 February 2022) (O'Brien Lcm)

109. Section 287 of the FM Act sets out that the Act does not affect the operation of the NTA and relevantly provides:

**287 Native title rights and interests**

This Act does not affect the operation of the [Native Title Act 1993](#) of the Commonwealth or the [Native Title \(New South Wales\) Act 1994](#) in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect.

[Bandjalang People No 3 v Attorney-General of New South Wales](#) [2021] FCA 386 -

[Bandjalang People No 3 v Attorney-General of New South Wales](#) [2021] FCA 386 -

[Bandjalang People No 3 v Attorney-General of New South Wales](#) [2021] FCA 386 -

[Bandjalang People No 3 v Attorney-General of New South Wales](#) [2021] FCA 386 -

[Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales](#) [2021] FCA 356 (14 April 2021) (Perry J)

41. Adopting the approach illustrated by these cases, I agree that the specified purpose of “grazing and agriculture” in SL 1926-3 is embraced by the purpose of “agriculture (or any similar purpose) and grazing combined” listed in cl 3(8) of Part 1 of Sch 1 to the NTA. It follows that, as SL 1926-3 was a Scheduled interest for the purposes of s 23B(2)(c)(i) of the NTA, any native title is extinguished over Lots 264 and 280: see s 20(1) of the NTA (NSW) read with ss 23C and 23E of the NTA.

*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 (14 April 2021) (Perry J)

25. Section 11 of the NTA provides that native title is not able to be extinguished contrary to the Act. The NTA does not deal exhaustively with the circumstances in which an act may extinguish native title (*Brown v Western Australia* [2012] FCAFC 154; (2012) 208 FCR 505 at [24] (Mansfield J), citing *Brown v Western Australia (No 2)* [2010] FCA 498; (2010) 268 ALR 149 at [58]–[62] (Bennett J)). Relevantly, however, an act other than a public work which falls within the definition of a previous exclusive possession act (PEPA) and is attributable to the State extinguishes native title with effect from the time at which the act was done: see s 20(1), *Native Title (New South Wales) Act 1994* (NSW) (NTA (NSW)) read with ss 23C and 23E of the NTA. In this regard, subject to a contrary indication, s 5(1) of the NTA (NSW) provides that words and expressions used in the NTA (NSW) “have the same meanings in this Act as they have in the *Commonwealth Native Title Act*.”

*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 -  
*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 -  
*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 -  
*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 -  
*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 -  
*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 -  
*Leeton and District Local Aboriginal Land Council v Attorney General of New South Wales* [2021] FCA 356 -  
*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

482. The questions for determination are as follows:

- (a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did the grant of SLT No. 1924/16 Walgett:
- (i) consist of a grant of a “commercial lease that is neither an agricultural lease nor a pastoral lease” within the meaning of s 23B(2)(c)(iii) of the NT Act?; or
- (ii) confer “a right of exclusive possession over particular lands or waters”, within the meaning of section 23B(2)(c)(viii) of the NT Act such that the act of granting or vesting that SLT is a “previous exclusive possession act” within the meaning of s 23B of the NT Act?
- (b) If the answer to either question (a)(i) or (ii) is yes, did SLT No. 1924/16 Walgett have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the NT Act and s 20(1) of the NSW NT Act?
- (c) If the answer to question (a)(i) and (ii) is no, has any one or more legislative or executive act or acts subsequent to the grant of SLT No. 1924/16 Walgett, affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?
- (d) If the answer to question (c) is yes, did SLT No. 1924/16 Walgett have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

498. The questions for determination are as follows:

- (a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did the grant of SLT No. 1964/1 Coonamble confer “a right of exclusive possession over particular lands or waters”, within the meaning of s 23B(2)(c)(viii) of the *NT Act* such that the act of granting or vesting that SLT is a “previous exclusive possession act” within the meaning of s 23B of the *NT Act*?
- (b) If the answer to question (a) is yes, did SLT No. 1964/1 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the *NT Act* and s 20(1) of the *NSW NT Act*?
- (c) If the answer to question (a) is no, has any one or more legislative or executive act or acts subsequent to the grant of SLT No. 1964/1 Coonamble, affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?
- (d) If the answer to question (c) is yes, did SLT No. 1964/1 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

345. The questions for determination are as follows:

- (a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did 18<sup>th</sup> Section Lease No. 15 Coonamble confer “a right of exclusive possession over particular lands or waters”, within the meaning of s 23B(c)(viii) of the *NT Act* such that the act of granting or vesting that 18<sup>th</sup> Section Lease is a “previous exclusive possession act” within the meaning of s 23B of the *NT Act*?
- (b) If the answer to question (a) is yes, did 18<sup>th</sup> Section Lease No. 15 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the *NT Act* and s 20(1) of the *NSW NT Act*?
- (c) If the answer to question (a) is no, has any one or more legislative or executive act or acts subsequent to the grant of 18<sup>th</sup> Section Lease No. 15 Coonamble, affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?
- (d) If the answer to question (c) is yes, did 18<sup>th</sup> Section Lease No. 15 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

147. The Court is asked to determine the following questions in relation to this Settlement Lease:

- (a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did the grant of Settlement Lease No. 1911/2 Nyngan:
  - (i) consist of a grant of a “Scheduled interest” within s 23B(2)(c)(i) of the *NT Act*; or

- (ii) confer “a right of exclusive possession over particular lands or waters”, within the meaning of s 23B(2)(c)(viii) of the *NT Act* such that the act of granting or vesting that Settlement Lease is a “previous exclusive possession act” within the meaning of s 23B of the *NT Act*?
- (b) If the answer to either of question (i) or (ii) is yes, did the grant of Settlement Lease No. 1911/2 Nyngan have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the *NT Act* and s 20(1) of the *NSW NT Act*?
- (c) If the answer to question (a)(i) and (ii) is no, has any one or more legislative or executive act or acts subsequent to the grant of Settlement Lease No. 1911/2 Nyngan, affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?
- (d) If the answer to question (c) is yes, did Settlement Lease No. 1911/2 Nyngan have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

**NATIVE TITLE** – separate questions concerning multiple parcels of land the subject of one of eight different kinds of statutory leases in NSW – statutory leases comprise Scrub Leases, Settlement Leases, Improvement Leases, Homestead Leases, 18<sup>th</sup> Section Leases, Western Lands Leases for a Term, Special Leases for a Term and Special Leases for Grazing – history of Crown Lands legislation in NSW dating back to the *Waste Lands Act 1842* (Imp) and including the *Crown Lands Act 1884* (NSW), *Crown Lands Act 1889* (NSW), *Crown Lands Act 1895* (NSW), *Western Lands Act 1901* (NSW) and the *Crown Lands Consolidation Act 1913* (NSW) – whether statutory leases conferred exclusive possession over the lease areas within the meaning of s 23B(2)(c)(viii) of the *Native Title Act 1993* (Cth) (*NT Act*) – whether statutory leases extinguished any native title in relation to the lands or waters within the lease areas in accordance with s 23E of the *NT Act* and s 20(1) of the *Native Title (New South Wales) Act 1994* (NSW) – whether any one or more legislative or executive act or acts subsequent to the original grant of the statutory leases resulted in the lessee holding a right of exclusive possession – whether any such right of exclusive possession had the effect of wholly extinguishing any native title rights and interests in the lands or waters covered by the leases – whether the Settlement Leases, and certain of the Western Lands Leases for a Term and Special Leases for a Term, consisted of a grant of a “Scheduled interest” within s 23B(2)(c)(i) of the *NT Act* with reference to cl 3(3), 3(5) or 3(8) of Part 1 of Schedule 1 to the *NT Act* – validity of the Settlement Leases – whether two of the Special Leases for a Term are covered by s 23B(2)(c)(iii) of the *NT Act* – whether any native title rights and interests in the leased land have been extinguished by operation of common law principles

*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

656. The questions for determination are as follows:

- (a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did the grant of SLG No. 1908/51 Coonamble confer “a right of exclusive possession over particular lands or waters”, within the meaning of s 23B(2)(c)(viii) of the *NT Act* such that the act of granting or vesting that SLG is a “previous exclusive possession act” within the meaning of s 23B of the *NT Act*?
- (b) If the answer to question (a) is yes, did SLG No. 1908/51 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the *NT Act* and s 20(1) of the *NSW NT Act*?
- (c) If the answer to question (a) is no, has any one or more legislative or executive act or acts subsequent to the grant of SLG No. 1908/51 Coonamble,



affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?

(d) If the answer to question (c) is yes, did SLG No. 1908/51 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

458. The questions for determination are as follows:

(a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did the grant of SLT No. 1939/1 Warren:

(i) consist of a grant of a “Scheduled interest” within the meaning of s 23B(2)(c)(i) of the *NT Act*; or

(ii) confer “a right of exclusive possession over particular lands or waters”, within the meaning of s 23B(2)(c)(viii) of the *NT Act* such that the act of granting or vesting that SLT is a “previous exclusive possession act” within the meaning of s 23B of the *NT Act*?

(b) If the answer to either question (a)(i) or (ii) is yes, did SLT No. 1939/1 Warren have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the *NT Act* and s 20(1) of the *NSW NT Act*?

(c) If the answer to question (a)(i) and (ii) is no, has any one or more legislative or executive act or acts subsequent to the grant of SLT No. 1939/1 Warren, affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?

(d) If the answer to question (c) is yes, did SLT No. 1939/1 Warren have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

*Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales* [2021] FCA 169 (05 March 2021) (Griffiths J)

376. The questions for determination are as follows:

(a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did WLL No. 3469 confer “a right of exclusive possession over particular lands or waters”, within the meaning of s 23B(2)(c)(viii) of the *NT Act* such that the act of granting or vesting WLL No. 3469 is a “previous exclusive possession act” within the meaning of s 23B of the *NT Act*?

(b) If the answer to question (a) is yes, did WLL No. 3469 have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the *NT Act* and s 20(1) of the *NSW NT Act*?

(c) If the answer to question (a) is no, has any one or more legislative or executive act or acts subsequent to the grant of WLL No. 3469, affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?

(d) If the answer to question (c) is yes, did WLL No. 3469 have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

141. The Court is asked to determine the following questions in relation to this Settlement Lease:

- (a) On the basis of the agreed facts and the other matters set out therein and below, and such other evidence as the parties adduce, did the grant of Settlement Lease No. 1895/16 Coonamble:
  - (i) consist of a grant of a “Scheduled interest” within s 23B(2)(c)(i) of the *NT Act*; or
  - (ii) confer “a right of exclusive possession over particular lands or waters”, within the meaning of s 23B(2)(c)(viii) of the *NT Act* such that the act of granting or vesting that Settlement Lease is a “previous exclusive possession act” within the meaning of s 23B of the *NT Act*?
- (b) If the answer to either of question (a)(i) or (ii) is yes, did the grant of Settlement Lease No. 1895/16 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease, in accordance with s 23E of the *NT Act* and s 20(1) of the *NSW NT Act*?
- (c) If the answer to question (a)(i) and (ii) is no, has any one or more legislative or executive act or acts subsequent to the grant of Settlement Lease No. 1895/16 Coonamble, affecting the rights of the lessee, resulted in the lessee holding a right of exclusive possession?
- (d) If the answer to question (c) is yes, did Settlement Lease No. 1895/16 Coonamble have the effect of wholly extinguishing all native title, if any, in relation to the land or waters covered by that lease?

Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales [2021] FCA 169 (05 March 2021) (Griffiths J)

19. As noted above, the Court is also asked to determine whether the relevant tenure was otherwise wholly inconsistent with the continued existence of native title rights and interests under the common law and independently of the *NT Act* or *NSW NT Act* (see *Western Australia v Brown* [2014] HCA 8; 253 CLR 507 ( *Brown High Court* ) at [31] ).

Ohlsen on behalf of the Ngemba/Ngiyampaa People v Attorney General of New South Wales [2021] FCA 169 (05 March 2021) (Griffiths J)

43. In the case of New South Wales, s 20 of the *NSW NT Act* picks up acts which are PEPAs under s 23B of the *NT Act* that are attributable to that State. Reflecting the terms of s 23C of the *NT Act*, s 20(1) of the *NSW NT Act* provides that an act which is a PEPA extinguishes any native title in relation to the land or waters covered by a freehold estate, a Scheduled interest as defined or a relevant lease and that the extinguishment is taken to have happened when the relevant act was done. Section 20(1) of the *NSW NT Act* provides:

**20 Confirmation of extinguishment of native title by previous exclusive possession acts of the State (NTA, secs 23E and 23C)**

- (1) **Acts other than public works** If an act is a previous exclusive possession act under section 23B(2) (including because of section 23B (3)) of the *Commonwealth Native Title Act* and is attributable to the State:
  - (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and

...

6. Thereafter the appellant commenced the proceedings the subject of this appeal seeking compensation under the *Public Works Act* for the resumption of the land referred to in [4] above, claiming as descendants of the holders of possessory title which she asserted existed at the time of the resumption. Somewhat inconsistently with the approach taken by them in the Federal Court proceedings, the respondents contended that s 18 of the Act extinguished that title and any other subsisting interest in the land. In these circumstances the following questions were ordered to be answered:

2. If the answer to question I is 'Yes':

b. was the vesting of the land by the RMW Act a ‘previous exclusive possession act’ for the purposes of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW)?”



[Lawson v Minister for Environment and Water \(SA\)](#) [2021] NSWCA 6 -  
[Lawson v Minister for Environment and Water \(SA\)](#) [2021] NSWCA 6 -  
[Deerubbin Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1506 -  
[Awabakal Local Aboriginal Land Council v Attorney-General of New South Wales](#) [2020] FCA 1507 -  
[Griffith Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1501 (16 October 2020) (Abraham J)

35. Her Honour relevantly concluded at [33]:

...The short point is that on either view, there was no discrimination on the ground of race against the holders of native title and the vesting of the estate in fee simple in the Tourism Commission under s 43 of the [Public Works Act](#) was valid and extinguished any native title in the land in whole at common law, as confirmed by s 20(1) of the [Native Title \(New South Wales\) Act 1994](#) (NSW) read in conjunction with s 23B(2) and (9C) of the NTA.

[Griffith Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1501 (16 October 2020) (Abraham J)

42. As such, s 23B(9C)(a) of the NTA is satisfied such that the vesting of the estate in fee simple in 1912 was a PEPA which extinguished native title pursuant to s 23E of the NTA (read with ss 23B and 23C) and s 20(1)(a) of the NSW NT Act.

[Griffith Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1501 -  
[Wagonga Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1113 -  
[Wagonga Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1113 -  
[Wagonga Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1113 -  
[Wagonga Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1113 -  
[Wagonga Local Aboriginal Land Council v Attorney General of New South Wales](#) [2020] FCA 1113 -  
[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 (10 March 2020) (Ward CJ in Eq)

148. The first respondent argues that the vesting of the land as an estate in fee simple under s 18 of the [River Murray Waters Act](#) is a “previous exclusive possession act” by virtue of ss 23B(2)(c)(ii) and 23C of the [Native Title Act](#) and s 20 of the [NSW Native Title Act](#). It is noted that the effect of s 20 of the [NSW Native Title Act](#) with respect to freehold estates was described in [Wilson v Anderson](#) where Gaudron, Gummow, and Hayne JJ said (at [49]) that s 20 of the [NSW Native Title Act](#):

... picks up those acts characterised as ‘previous exclusive possession acts’ under s 23B of the [ [Native Title Act](#) ] that are attributable to the State. The section then provides, in terms that reflect s 23C of the NTA, that... ‘the act extinguishes any native title in relation to the land or waters covered by the freehold estate...’.

[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 (10 March 2020) (Ward CJ in Eq)

139. As has already been set out above, question 2 is as follows:

2. If the answer to question 1 is “Yes”:

a. is the consequence of the vesting by the RMW Act that any and all interests in the land to which s 18 [of] the RMW Act applied acquired through adverse possession or held as native title rights were extinguished upon the commencement of the RMW Act? And

b. was the vesting of the land by the RMW Act a ‘previous exclusive possession act’ for the purposes of s 23B of the [Native Title Act 1993](#) (Cth) and s 20 of the [Native Title \(New South Wales\) Act 1994](#) (NSW)?

[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 (10 March 2020) (Ward CJ in Eq)

STATUTORY INTERPRETATION – Legislative purpose – whether land vested in South Australia for an estate in fee simple under s 18 [River Murray Waters Act 1915](#) (NSW) on commencement of that Act on 31 January 1917 – whether, as a consequence of the vesting, any and all interests in the land acquired

through adverse possession or held as native title rights were extinguished upon commencement of the Act – was the vesting of the land by the Act a “previous exclusive possession act” for the purposes of s 23B of the [Native Title Act 1993 \(Cth\)](#) and s 20 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#).

[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 (10 March 2020) (Ward CJ in Eq)

4. The questions to be separately determined are as follows:

1. Was the land the subject of the claim filed on 1 April 2015 vested in South Australia for an estate in fee simple under s 18 of the [River Murray Waters Act 1915 \(NSW\)](#) (RMW Act) on commencement of that Act on 31 January 1917?
2. If the answer to question 1 is “Yes”:
  - a. is the consequence of the vesting by the RMW Act that any and all interests in the land to which s 18 [of] the RMW Act applied acquired through adverse possession or held as native title rights were extinguished upon the commencement of the RMW Act? and
  - b. was the vesting of the land by the RMW Act a ‘previous exclusive possession act’ for the purposes of s 23B of the [Native Title Act 1993 \(Cth\)](#) and s 20 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#)?

[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 (10 March 2020) (Ward CJ in Eq)

148. The first respondent argues that the vesting of the land as an estate in fee simple under s 18 of the [River Murray Waters Act](#) is a “previous exclusive possession act” by virtue of ss 23B(2)(c)(ii) and 23C of the [Native Title Act](#) and s 20 of the [NSW Native Title Act](#). It is noted that the effect of s 20 of the [NSW Native Title Act](#) with respect to freehold estates was described in [Wilson v Anderson](#) where Gaudron, Gummow, and Hayne JJ said (at [49]) that s 20 of the [NSW Native Title Act](#):

... picks up those acts characterised as ‘previous exclusive possession acts’ under s 23B of the [ [Native Title Act](#) ] that are attributable to the State. The section then provides, in terms that reflect s 23C of the NTA, that... ‘the act extinguishes any native title in relation to the land or waters covered by the freehold estate...’.

[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 -  
[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 -  
[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 -  
[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 -  
[Lawson v Minister for Environment and Water](#) [2020] NSWSC 186 -  
[Administrative Arrangements \(Administration of Acts-Amendment No 3\) Order 2020 \(NSW\)](#) [2020]  
NSWLegSI 149 -  
[Administrative Arrangements \(Administration of Acts-Amendment No 5\) Order 2020 \(NSW\)](#) [2020]  
NSWLegSI 389 -  
[Pacey on behalf of the Gumbaynggirr People and Attorney General of New South Wales](#) [2019] FCA 1916 -  
[Pacey on behalf of the Gumbaynggirr People and Attorney General of New South Wales](#) [2019] FCA 1916 -  
[Williams on behalf of the Gumbaynggirr People and Attorney General of New South Wales](#) [2019] FCA 1915 -  
[Williams on behalf of the Gumbaynggirr People and Attorney General of New South Wales](#) [2019] FCA 1915 -  
[Williams on behalf of the Gumbaynggirr People and Attorney General of New South Wales](#) [2019] FCA 1915 -  
[Pacey on behalf of the Gumbaynggirr People and Attorney General of New South Wales](#) [2019] FCA 1916 -  
[La Perouse Local Aboriginal Land Council v Attorney General of New South Wales](#) [2019] FCA 1091 (11 July 2019) (Robertson J)

18. Section 23E provides that if a law of a State contains a provision to the same effect as ss 23D or 23DA, the law of the State may make provision to the same effect as s 23C in respect of all or any previous exclusive possession acts attributable to the State. In this respect I refer to ss 8 (validating past acts attributable to the State), 20 (to the same effect as s 23C), 21 (to the same effect as s 23D) and 22 (to the same effect as s 23DA) of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#).

[La Perouse Local Aboriginal Land Council v Attorney General of New South Wales](#) [2019] FCA 1091 -  
[La Perouse Local Aboriginal Land Council v Attorney General of New South Wales](#) [2019] FCA 1091 -  
[La Perouse Local Aboriginal Land Council v Attorney General of New South Wales](#) [2019] FCA 1091 -  
[Tweed Byron Local Aboriginal Land Council v Attorney General of New South Wales](#) [2019] FCA 936 -  
[Tweed Byron Local Aboriginal Land Council v Attorney General of New South Wales](#) [2019] FCA 936 -  
[Tweed Byron Local Aboriginal Land Council v Attorney General of New South Wales](#) [2019] FCA 936 -  
[Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales](#) [2019] FCA 527 (30 April 2019) (Robertson J)

(d) So far as is confirmed pursuant to section 18 of the [Native Title \(New South Wales\) Act 1994](#) (NSW) as at the date of the Determination, any existing public access to and enjoyment of:

[Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales](#) [2019] FCA 527 -  
[Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales](#) [2019] FCA 527 -  
[Administrative Arrangements \(Administration of Acts-General\) Order 2019 \(NSW\)](#) [2019] NSWLegSI 157 (01 January 2019)  
[Native Title \(New South Wales\) Act 1994](#), No 45

[Administrative Arrangements \(Administration of Acts-General\) Order \(No 2\) 2019 \(NSW\)](#) [2019] NSWLegSI 178 -  
[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) [2018] FCA 1329 (30 August 2018) (Robertson J)

72. Pursuant to s 23C of the [Native Title Act](#), native title (to the extent it existed) would be extinguished over land that was the subject of a “previous exclusive possession act” (PEPA) attributable to the Commonwealth. PEPA was defined in s 23B. A PEPA attributable to a State or Territory would have the same effect as a PEPA attributable to the Commonwealth, under s 23E, if a State law was passed to that effect. In New South Wales, that law was s 20(1) of the [Native Title \(New South Wales\) Act](#).

[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) [2018] FCA 1329 -  
[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) [2018] FCA 1329 -  
[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) [2018] FCA 1329 -  
[Worimi Local Aboriginal Land Council v Attorney General of New South Wales](#) [2018] FCA 1329 -  
[Darkinjung Local Aboriginal Land Council v Attorney-General of New South Wales](#) [2018] FCA 1136 -  
[Very Fast Train \(Route Investigation\) Act 1989 \(NSW\)](#) [1989] NSWLegAct 44 -  
[National Park Estate \(Reservations\) Act 2003 \(NSW\)](#) [2003] NSWLegAct 24 -  
[National Park Estate \(Reservations\) Act 2003 \(NSW\)](#) [2003] NSWLegAct 24 -  
[Crown Land Legislation Amendment Act 2017 \(NSW\)](#) [2017] NSWLegAct 17 -  
[Botany Bay National Park \(Helicopter Base Relocation\) Act 2004 \(NSW\)](#) [2004] NSWLegAct 27 -  
[Western Bundjalung People v Attorney General of New South Wales](#) [2018] FCA 970 (27 June 2018) (Jagot J)

16. If a word or expression is not defined in these orders or this Part B Determination, but is defined in the [Native Title Act 1993](#) (Cth) or the [Native Title \(New South Wales\) Act 1994](#) (NSW), then it has the meaning given to it in the [Native Title Act 1993](#) (Cth) or the [Native Title \(New South Wales\) Act 1994](#) (NSW), whichever is relevant.

[Western Bundjalung People v Attorney General of New South Wales](#) [2018] FCA 970 (27 June 2018) (Jagot J)

16. If a word or expression is not defined in these orders or this Part B Determination, but is defined in the [Native Title Act 1993](#) (Cth) or the [Native Title \(New South Wales\) Act 1994](#) (NSW), then it has the meaning given to it in the [Native Title Act 1993](#) (Cth) or the [Native Title \(New South Wales\) Act 1994](#) (NSW), whichever is relevant.

[Western Bundjalung People v Attorney General of New South Wales](#) [2018] FCA 970 (27 June 2018) (Jagot J)

(d) So far as is confirmed pursuant to section 18 of the [Native Title \(New South Wales\) Act](#) as at the date of this Part B Determination, any existing public access to and enjoyment of:

[Kelly on behalf of the Gumbaynggirr People v Attorney General of New South Wales](#) [2017] FCA 1459 -  
[Kelly on behalf of the Gumbaynggirr People v Attorney General of New South Wales](#) [2017] FCA 1459 -  
[Kelly on behalf of the Gumbaynggirr People v Attorney General of New South Wales](#) [2017] FCA 1459 -  
[Griffith Local Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1452 -  
[Michele Melino and three others in their capacity as executors of the Estate of the late Costanzo Melino v Roads and Maritime Services](#) [2017] NSWLEC 118 -  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 (07 September 2017) (Griffiths J)

Note: As at the commencement of this section, acts such as grants before 1 January 1994 that were invalid because of native title have been validated by or under [Division 2](#).

[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 (07 September 2017) (Griffiths J)

20. It is also apt to set out relevant provisions of [Div 2](#) of Pt 4 of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) :

[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 -  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 -  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 -  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 -  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 -  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 -  
[Deerubbin Aboriginal Land Council v Attorney-General of New South Wales](#) [2017] FCA 1067 -  
[Yaegl People #2 v Attorney General of New South Wales](#) [2017] FCA 993 (31 August 2017) (Jagot J)

15. If a word or expression is not defined in these orders or this Determination, but is defined in the [Native Title Act 1993 \(Cth\)](#) or the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) , then it has the meaning given to it in the [Native Title Act 1993 \(Cth\)](#) or the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) , whichever is relevant.

[Yaegl People #2 v Attorney General of New South Wales](#) [2017] FCA 993 (31 August 2017) (Jagot J)

- (d) So far as is confirmed pursuant to [section 18](#) of the [Native Title \(New South Wales\) Act](#) as at the date of the Determination, any existing public access to and enjoyment of:

[Yaegl People #2 v Attorney General of New South Wales](#) [2017] FCA 993 -  
[Western Bundjalung People v Attorney General of New South Wales](#) [2017] FCA 992 -  
[Western Bundjalung People v Attorney General of New South Wales](#) [2017] FCA 992 -  
[Western Bundjalung People v Attorney General of New South Wales](#) [2017] FCA 992 -  
[Barkandji Traditional Owners #8 \(Part B\) v Attorney-General of New South Wales](#) [2017] FCA 971 (22 August 2017) (Griffiths J)

14. If a word or expression is not defined in these orders or this Part B Determination, but is defined in the [Native Title Act 1993 \(Cth\)](#) or the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) , then it has the meaning given to it in the [Native Title Act 1993 \(Cth\)](#) or the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) , whichever is relevant.

[Barkandji Traditional Owners #8 \(Part B\) v Attorney-General of New South Wales](#) [2017] FCA 971 (22 August 2017) (Griffiths J)

- (d) So far as is confirmed pursuant to [s 18](#) of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) as at the date of the Part B Determination, any existing public access to and enjoyment of:

[Barkandji Traditional Owners #8 \(Part B\) v Attorney-General of New South Wales](#) [2017] FCA 971 -  
[Threatened Species Conservation Act 1995 \(NSW\)](#) [1995] NSWLegAct 101 -  
[Administrative Arrangements \(Administration of Acts-General\) Order 2017 \(NSW\)](#) [2017] NSWLegSI 17 -  
[Application of Willoughby City Council \(as manager of the Talus Reserve Trust\) and anor](#) [2016] NSWSC 1717 -  
[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 (25 June 2015) (Jagot J)



[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 (25 June 2015) (Jagot J)

Lot 8 [Sec 18](#) DP758604

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 (25 June 2015) (Jagot J)

Lot 5 [Sec 18](#) DP758604

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 (25 June 2015) (Jagot J)

Lot 5 [Sec 18](#) DP758535

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 (25 June 2015) (Jagot J)

Lot 9 [Sec 18](#) DP758999

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 (25 June 2015) (Jagot J)

Lot 9 [Sec 18](#) DP758604

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Yaegl People #1 v Attorney-General of New South Wales](#) [2015] FCA 647 -

[Administrative Arrangements \(Administration of Acts-General\) Order 2015 \(NSW\)](#) [2015] NSWLegSI 164 -

[Administrative Arrangements \(Administration of Acts-General\) Order 2014 \(NSW\)](#) [2014] NSWLegSI 232 -

[Bandjalang People No 1 and No 2 v Attorney General of New South Wales](#) [2013] FCA 1278 -

[Bandjalang People No 1 and No 2 v Attorney General of New South Wales](#) [2013] FCA 1278 -

[Crown Lands Amendment \(Multiple Land Use\) Act 2013 \(NSW\)](#) [2013] NSWLegAct 101 -

[Civil and Administrative Legislation \(Repeal and Amendment\) Act 2013 \(NSW\)](#) [2013] NSWLegAct 95 -

[Gandangara Local Aboriginal Land Council v Attorney-General of New South Wales](#) [2013] FCA 646 -

[Gandangara Local Aboriginal Land Council v Attorney-General of New South Wales](#) [2013] FCA 646 -

[Gandangara Local Aboriginal Land Council v Attorney-General of New South Wales](#) [2013] FCA 646 -

[Andrews v Ardler & Brown](#) [2013] NSWDC 94 -

[Mortimer v Goldwind Australia Pty Ltd](#) [2013] NSWSC 143 -

[Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 \(NC97/7\),](#)

[Wiray-dyuraa Maying-gu \(NC11/3\), Warrabinga-Wiradjuri People \(NC11/4\)/State of New South Wales](#) [2012]

NNTTA 145 -

[Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 \(NC97/7\),](#)

[Wiray-dyuraa Maying-gu \(NC11/3\), Warrabinga-Wiradjuri People \(NC11/4\)/State of New South Wales](#) [2012]

NNTTA 145 -

[Lightning Ridge Local Aboriginal Land Council v Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993 \(Cth\)](#) [2012] FCA 792 (31 July 2012) (Perram J)

37. Therefore, before s 20(1) can be made operative, State law must protect, broadly speaking, beneficial reservations. Section 21 of the *Native Title (New South Wales) Act* provides:

If:

- (a) a previous exclusive possession act attributable to the State contains a reservation or condition for the benefit of Aboriginal peoples, or
- (b) the doing of a previous exclusive possession act attributable to the State would affect rights or interests (other than native title rights and interests) of Aboriginal peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in section 20 affects that reservation or condition or those rights or interests.

*Lightning Ridge Local Aboriginal Land Council v Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993 (Cth)* [2012] FCA 792 (31 July 2012) (Perram J)

37. Therefore, before s 20(1) can be made operative, State law must protect, broadly speaking, beneficial reservations. Section 21 of the *Native Title (New South Wales) Act* provides:

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nothing in section 20 affects that reservation or condition or those rights or interests.

*Lightning Ridge Local Aboriginal Land Council v Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993 (Cth)* [2012] FCA 792 -  
*National Parks and Wildlife Legislation Amendment (Reservations) Act 2011 (NSW)* [2011] NSWLegAct 55 -  
*National Parks and Wildlife (Adjustment of Areas) Act 2005 (NSW)* [2005] NSWLegAct 27 -  
*Allocation of the Administration of Acts 2011 (No 2-General Allocation) (2011-186) (NSW)* [2011] NSWLegSI 186 (01 January 2011)

*Native Title (New South Wales) Act 1994* No 45

*Allocation of the Administration of Acts 2011 (No 6-Amendment) (2011-555) (NSW)* [2011] NSWLegSI 555 -  
*National Parks and Wildlife Amendment (Adjustment of Areas) Act 2010 (NSW)* [2010] NSWLegAct 77 (25 October 2010)

Schedule 2 Amendment of *Native Title (New South Wales) Act 1994* No 45

*National Parks and Wildlife Amendment (Visitors and Tourists) Act 2010 (NSW)* [2010] NSWLegAct 41 -  
*National Parks and Wildlife (Broken Head Nature Reserve) Act 2010 (NSW)* [2010] NSWLegAct 12 -  
*Dates v Karuah Local Aboriginal Land Council* [2009] NSWLEC 221 -  
*Dates v Karuah Local Aboriginal Land Council* [2009] NSWLEC 221 -  
*Access to Neighbouring Land Act 2000 (NSW)* [2000] NSWLegAct 2 -  
*Allocation of the Administration of Acts 2009 (No 1-General Allocation) (2009-121) (NSW)* [2009] NSWLegSI 121 -  
*Allocation of the Administration of Acts 2009 (No 2-General Allocation) (2009-351) (NSW)* [2009] NSWLegSI 351 -  
*Allocation of the Administration of Acts 2009 (No 4-General Allocation) (2009-565) (NSW)* [2009] NSWLegSI 565 -  
*Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48 (02 October 2008) (Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

28. What was the reason for excluding the three stated categories mentioned in s 36(1) of the [Land Rights Act](#) from "claimable Crown lands" [46]? In the context, the applicable reason was to define those categories of land which, alone of the remaining Crown lands in the State, would be placed beyond the land generally available for a claim under the [Land Rights Act](#). Thus the beneficial and remedial character of the [Land Rights Act](#) encourages a narrow or strict interpretation of the exceptions. This feature of the exceptions led the Court of Appeal to introduce the explanation that the "lawful use or occupation" (in s 36(1)(b) of the [Land Rights Act](#)) must ordinarily be something "more than notional" so that the land is "actually used". In other words, the land must be used in fact and not merely intended to be used or used to a notional degree. [47] ..

via

[46] Section 36(1) of the [Land Rights Act](#) has been amended several times to provide further exceptions from the definition of "claimable Crown lands". Most importantly, s 36(1)(b1), as inserted by [Aboriginal Land Rights \(Amendment\) Act 1986 \(NSW\)](#), Sched 1, item 13, excepts "lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands". See also [Native Title \(New South Wales\) Act 1994 \(NSW\)](#), Sched 1, item 3, which inserted s 36(1)(d) and (e).

[National Parks and Wildlife \(Leacock Regional Park\) Act 2008 \(NSW\)](#) [2008] NSWLegAct 20 -  
[Allocation of Administration of Acts \(September 2008\) \(2008-410\) \(NSW\)](#) [2008] NSWLegSI 410 (01 January 2008)

[Native Title \(New South Wales\) Act 1994](#) No 45

[Allocation of Administration of Acts \(February 2008\) \(2008-43\) \(NSW\)](#) [2008] NSWLegSI 43 -  
[Trevor Close on behalf of the Githabul People v Minister for Lands](#) [2007] FCA 1847 -  
[Allocation of Administration of Acts \(April 2007\) \(2007-160\) \(NSW\)](#) [2007] NSWLegSI 160 -  
[National Parks and Wildlife \(Adjustment of Areas\) Act 2006 \(NSW\)](#) [2006] NSWLegAct 15 -  
[National Parks and Wildlife \(Adjustment of Areas\) Act 2006 \(NSW\)](#) [2006] NSWLegAct 15 -  
[Allocation of Administration of Acts \(February 2006\) \(2006-61\) \(NSW\)](#) [2006] NSWLegSI 61 (01 January 2006)  
[Native Title \(New South Wales\) Act 1994](#) No 45

[National Parks and Wildlife \(Further Adjustment of Areas\) Act 2005 \(NSW\)](#) [2005] NSWLegAct 60 -  
[Statute Law \(Miscellaneous Provisions\) Act 2005 \(NSW\)](#) [2005] NSWLegAct 64 -  
[Allocation of Administration of Acts \(February 2005\) \(2005-54\) \(NSW\)](#) [2005] NSWLegSI 54 (01 January 2005)  
[Native Title \(New South Wales\) Act 1994](#) No 45

[Allocation of Administration of Acts \(August 2005\) \(2005-417\) \(NSW\)](#) [2005] NSWLegSI 417 (01 January 2005)  
[Native Title \(New South Wales\) Act 1994](#) No 45

[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[Lawson v Minister Assisting the Minister for Natural Resources \(Lands\)](#) [2004] FCAFC 308 -  
[National Parks and Wildlife Amendment \(Kosciuszko National Park Roads\) Act 2004 \(NSW\)](#) [2004]  
NSWLegAct 5 -  
[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2004] FCA 165 (16 February 2004) (Whitlam J)

9. *Question:* In respect of each of the listed grants in question 8 – if the answer to question 8 is in terms that:

- (a) a grant of fee simple was made; and

(b) at least in part, the area granted overlapped with the area covered by the Lake Victoria Compensation Application –

is the grant a ‘previous exclusive possession act’ within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

*Answer:* This question does not arise.

*Effect of grants*

*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 165 -  
*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 165 -  
*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 165 -  
*Allocation of Administration of Acts (February 2004) (2004-42) (NSW)* [2004] NSWLegSI 42 (01 January 2004)  
*Native Title (New South Wales) Act 1994* No 45

*Transfer of Administration of Acts (2004-293) (NSW)* [2004] NSWLegSI 293 (01 January 2004)  
*Native Title (New South Wales) Act 1994* No 45

*Allocation of Administration of Acts (September 2004) (2004-619) (NSW)* [2004] NSWLegSI 619 -  
*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2003] FCA 1127 (17 October 2003) (Whitlam J)

7. *Question:* If the answer to question 6 is yes – is the act described in question 6 a ‘previous exclusive possession act’ within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2003] FCA 1127 (17 October 2003) (Whitlam J)

1. In these two proceedings under the *Native Title Act 1993* (Cth) (‘the Act’) a series of questions have been formulated for decision in advance of trial. The questions overlap because the area covered by the compensation application in proceeding no. 6167 of 1998 comprises the whole of the area over which the claim is made by the native title determination application in proceeding no. 6070 of 1998. Both applications were made prior to the 1998 amendments to the Act. Not all the applicants in the claimant application are applicants in the compensation claim, but each application states that it is also made on behalf of the Barkandji People. The questions stated raise for consideration, in turn, identification of the precise area of land or waters covered by the applications, the characterisation under the provisions of Div 2B of Pt 2 of the Act of certain ‘acts’ attributable to New South Wales, and the effect of s 20 of the *Native Title (New South Wales) Act 1994* (NSW) (‘the NSW Act’).

*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2003] FCA 1127 (17 October 2003) (Whitlam J)

is the grant a ‘previous exclusive possession act’ within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2003] FCA 1127 (17 October 2003) (Whitlam J)

*Answer:* By operation of ss 23B and 23E of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) the vesting of the acquired lands referred to in question 4 extinguished any native title in relation to such lands. Otherwise it is inappropriate to answer this question.

*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2003] FCA 1127 (17 October 2003) (Whitlam J)



is the grant a 'previous exclusive possession act' within the meaning of s 23B of the *Native Title Act 1993* (Cth) and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) ?

[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2003] FCA 1127 -  
[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2003] FCA 1127 -  
[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2003] FCA 1127 -  
[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2003] FCA 1127 -  
[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2003] FCA 1127 -  
[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2003] FCA 1127 -  
[Lawson v Minister for Land & Water Conservation for the State of New South Wales](#) [2003] FCA 1127 -  
[Allocation of Administration of Acts \(January 2003\) \(2003-14\) \(NSW\)](#) [2003] NSWLegSI 14 (01 January 2003)

[Native Title \(New South Wales\) Act 1994](#) No 45

[Allocation of Administration of Acts \(April 2003\) \(2003-242\) \(NSW\)](#) [2003] NSWLegSI 242 (01 January 2003)  
[Native Title \(New South Wales\) Act 1994](#) No 45

[Allocation of Administration of Acts \(April 2003\) \(2003-262\) \(NSW\)](#) [2003] NSWLegSI 262 -  
[Allocation of Administration of Acts \(August 2003\) \(2003-588\) \(NSW\)](#) [2003] NSWLegSI 588 -  
[Stockland \(Constructors\) Pty Ltd v Allan Richard Carriage](#) [2002] NSWSC 1179 -  
[Wilson v Anderson](#) [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

83. The present litigation has been so conducted that no question is raised respecting the effect that registration under the *RP Act* (with its consequences about indefeasibility of title) might have had upon any native title rights and interests which may then have been still subsisting. Accordingly, any consequential questions about the operation of the *RDA* and the validation provisions of the *NTA* and the *State Act* that would then arise have not been raised. Rather, the focus is upon the effect of the grant of the *Lease* many years before the commencement of the *RDA* and the changes to the *RP Act*.

[Wilson v Anderson](#) [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

62. As already mentioned, in this Court all parties appeared to accept that Div 2B of Pt 2 of the *NTA* and Pt 4 of the *State Act* applied. The applicant submitted that the grant of the *Lease* under s 23 of the *Western Lands Act* conferred a right of exclusive possession and that, therefore, the grant was a "previous exclusive possession act" within the meaning of s 23B of the *NTA*. This had the result that all native title rights and interests in the *Leased Land* were extinguished by operation of s 20 of the *State Act*.

[Wilson v Anderson](#) [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

62. As already mentioned, in this Court all parties appeared to accept that Div 2B of Pt 2 of the *NTA* and Pt 4 of the *State Act* applied. The applicant submitted that the grant of the *Lease* under s 23 of the *Western Lands Act* conferred a right of exclusive possession and that, therefore, the grant was a "previous exclusive possession act" within the meaning of s 23B of the *NTA*. This had the result that all native title rights and interests in the *Leased Land* were extinguished by operation of s 20 of the *State Act*.

[Wilson v Anderson](#) [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

63. The third respondent submitted that it was inappropriate to answer the separate questions because they were not expressed in terms appropriate to the application of Div 2B of Pt 2. In the alternative, the third respondent, together with the first and second respondents, submitted that the *Lease* did not confer a right of exclusive possession upon the applicant. The respondents accept that, if the grant of the *Lease* is properly characterised as a "previous exclusive possession act" under s 23B of the *NTA*, s 20 of the *State Act* has the effect contended for by the applicant.

**Wilson v Anderson** [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

192. Division 2B of Pt 2 of the **Native Title Act** deals with "previous exclusive possession acts" [189]. Section 23B(2) relevantly defines the term as follows:

"(2) An act is a *previous exclusive possession act* if:

- (a) it is valid (including because of Division 2 or 2A of Part 2); and
- (b) it took place on or before 23 December 1996; and
- (c) it consists of the grant or vesting of any of the following:
  - ...
  - (iv) an exclusive agricultural lease (see section 247A) or an exclusive pastoral lease (see section 248A);
  - ...
  - (viii) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters."

Section 248A defines an exclusive pastoral lease in these terms:

"An *exclusive pastoral lease* is a pastoral lease that:

- (a) confers a right of exclusive possession over the land or waters covered by the lease; or
- (b) is a Scheduled interest."

A previous exclusive possession act extinguishes native title in relation to the land or waters covered by the lease, with the extinguishment taken to have happened when the grant was made (s 23C(1)). All parties agreed, and it is correct, that s 23C(1) was mirrored in s 20 of the **Native Title (New South Wales) Act 1994 (NSW)**.

**Wilson v Anderson** [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

Save to say that by operation of ss 23B and 23E of the **Native Title Act 1993 (Cth)** and s 20 of the **Native Title (New South Wales) Act 1994 (NSW)**, the grant of the **Lease** extinguished any native title in relation to the land covered by the **Lease** and the extinguishment is to be taken to have happened when the **Lease** was granted, it is inappropriate to answer this question.

**Wilson v Anderson** [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

49. Part 4 (ss 1925) of the **State Act** was enacted in accordance with the power conferred by ss 23E and 23I of the **NTA**. The objects of Pt 4, as set out in subs (1) of s 19, are:

- "(a) to confirm the complete extinguishment of native title by previous exclusive possession acts attributable to the State, and
- (b) to confirm the partial extinguishment of native title by previous non-exclusive possession acts attributable to the State".

Section 20 of the State Act picks up those acts characterised as "previous exclusive possession acts" under s 23B of the NTA that are attributable to the State. The section then provides, in terms that reflect s 23C of the NTA, that (subs (1)):

- (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and
- (b) the extinguishment is taken to have happened when the act was done".

Section 23 of the [State Act](#) provides, in the same terms as s 23G of the [NTA](#), for the partial extinguishment of native title as a result of a "previous non-exclusive possession act" attributable to the State.

**Wilson v Anderson** [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

Save to say that by operation of ss 23B and 23E of the Native Title Act 1993 (Cth) and s 20 of the Native Title (New South Wales) Act 1994 (NSW), the grant of the Lease extinguished any native title in relation to the land covered by the Lease and the extinguishment is to be taken to have happened when the Lease was granted, it is inappropriate to answer this question.

**Wilson v Anderson** [2002] HCA 29 (08 August 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

49. Part 4 (ss 1925) of the [State Act](#) was enacted in accordance with the power conferred by ss 23E and 23I of the [NTA](#). The objects of Pt 4, as set out in subs (1) of s 19, are:

- (a) to confirm the complete extinguishment of native title by previous exclusive possession acts attributable to the State, and
- (b) to confirm the partial extinguishment of native title by previous non-exclusive possession acts attributable to the State".

Section 20 of the [State Act](#) picks up those acts characterised as "previous exclusive possession acts" under s 23B of the [NTA](#) that are attributable to the State. The section then provides, in terms that reflect s 23C of the [NTA](#), that (subs (1)):

- (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned, and
- (b) the extinguishment is taken to have happened when the act was done".

Section 23 of the State Act provides, in the same terms as s 23G of the NTA, for the partial extinguishment of native title as a result of a "previous non-exclusive possession act" attributable to the State.

[illegible]

[Wilson v Anderson](#) [2002] HCA 29 -  
[Wilson v Anderson](#) [2002] HCA 29 -  
[Wilson v Anderson](#) [2002] HCA 29 -  
[Wilson v Anderson](#) [2002] HCA 29 -  
[Wilson v Anderson](#) [2002] HCA 29 -  
[Wilson v Anderson](#) [2002] HCA 29 -  
[Wilson v Anderson](#) [2002] HCA 29 -  
[Wilson v Anderson](#) [2002] HCA 29 -  
[Mogo Local Aboriginal Land Council v Eurobodalla Shire Council](#) [2002] NSWCA 12 -  
[Constitution Act 1902 Allocation of Administration of Acts \(August 2002\) \(2002-578\) Gazette No 133 of 23 August 2002, page 6169 \(NSW\)](#) [2002] NSWLegSI 578 (01 January 2002)  
[Native Title \(New South Wales\) Act 1994](#) No 45

[Wilson v Anderson](#) [2001] HCATrans 319 (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

**MR JACKSON:** That is why this reference is to paragraph A, your Honour. Your Honours, when one comes to question (c), question (c), we would submit, is simply one that one could answer either yes in (c) (i) because of the operation of [section 20](#), but the answer would seem to follow from the answer to question (b). Your Honour, in one sense it may be unnecessary to answer question (c) at all, because the consequences that derive from answering the earlier question, in the way in which we would suggest, would be apparent.

[Wilson v Anderson](#) [2001] HCATrans 319 (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

That was a central issue in the case, a central issue which is raised by the questions that are asked which direct one's attention to the very provisions that are involved. Apart from procedurally being an important question in the proceedings, it is also a question which lies at the heart of the proceedings, not only because of section 61A but also substantively because of the provision in [section 20\(1\)\(a\)](#) of the [State Act](#).

[Wilson v Anderson](#) [2001] HCATrans 319 (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

**GUMMOW J:** But [section 20](#) is ambulatory, in a sense, is it not? Because if you look at [section 20](#), when it picks up [section 23B\(2\)](#), that then picks up the schedule, does it not?

[Wilson v Anderson](#) [2001] HCATrans 319 (12 September 2001) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

Your Honours will see from that provision that [section 20\(1\)](#) says that:

[Wilson v Anderson](#) [2001] HCATrans 319 -  
[Wilson v Anderson](#) [2001] HCATrans 319 -  
[Wilson v Anderson](#) [2001] HCATrans 319 -  
[National Parks and Wildlife \(Adjustment of Areas\) Act 2001 \(NSW\)](#) [2001] NSWLegAct 49 -  
[Western Sydney Regional Park \(Revocation for Western Sydney Orbital\) Act 2001 \(NSW\)](#) [2001] NSWLegAct 60 -  
[Deniliquin Local Aboriginal Land Council](#) [2001] FCA 609 -  
[Marine Parks Amendment Act 2000 \(NSW\)](#) [2000] NSWLegAct 113 (20 December 2000)  
Schedule 2 Amendment of [Native Title \(New South Wales\) Act 1994](#).

(Section 4)

[Marine Parks Amendment Act 2000 \(NSW\)](#) [2000] NSWLegAct 113 -  
[Marine Parks Amendment Act 2000 \(NSW\)](#) [2000] NSWLegAct 113 -  
[Fisheries Management and Environmental Assessment Legislation Amendment Act 2000 \(NSW\)](#) [2000] NSWLegAct 86 -  
[Fisheries Management and Environmental Assessment Legislation Amendment Act 2000 \(NSW\)](#) [2000] NSWLegAct 86 -

In the case of land in which there are native title rights and interests but in respect of which there is no approved determination of native title (within the meaning of the [Native Title Act 1993](#) of the Commonwealth), the notice is to be served in accordance with [section 103](#) of the [Native Title \(New South Wales\) Act 1994](#) at least 7 days before the land is first entered under the authority of the permit concerned.

[Anderson v Wilson](#) [2000] FCA 394 (05 April 2000) (Black CJ; Beaumont & Sackville JJ)

19. [Part 4](#) of the [Native Title \(New South Wales\) Act 1994](#) (NSW) (“[NTA \(NSW\)](#)”) was enacted by the Parliament of New South Wales pursuant to the authority conferred by [s 23E](#) of the [NTA](#). The objects of [Part 4](#) are, *inter alia*, to confirm the complete extinguishment of native title by previous exclusive possession acts attributable to the State: [NTA \(NSW\)](#), [s19\(1\)\(a\)](#). The confirmation is said to be that contemplated by [s 23E](#) of the [NTA](#).

[Anderson v Wilson](#) [2000] FCA 394 -

[Anderson v Wilson](#) [2000] FCA 394 -

[Anderson v Wilson](#) [2000] FCA 394 -

[Anderson v Wilson](#) [2000] FCA 394 -

[Anderson v Wilson](#) [2000] FCA 394 -

[Anderson v Wilson](#) [2000] FCA 394 -

[Anderson v Wilson](#) [2000] FCA 394 -

[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1999 \(NSW\)](#) [1999] NSWLegAct 85 -

[Bathurst City Council v PWC Properties Pty Ltd](#) [1998] HCA 59 -

[Application for the Determination of Native Title Made by Metropolitan Local Aboriginal Land Council](#) [1998] FCA 402 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 (01 January 1998)

Amendment of [Native Title \(New South Wales\) Act 1994](#) No 45

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 (01 January 1998)

Amendment of [Native Title \(New South Wales\) Act 1994](#) No 45

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 (01 January 1998)

Omit “or in the native title register kept under the [Native Title \(New South Wales\) Act 1994](#)” from the definition of **registered interest** in [section 4 \(1\)](#).

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Forestry and National Park Estate Act 1998 Proclamation re commencement \(1998-680\)](#) [GG No 176 of 18.12.1998, p 9721] (NSW) [1998] NSWLegSI 680 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[National Parks and Wildlife \(Parramatta Regional Park\) Act 1998 \(NSW\)](#) [1998] NSWLegAct 92 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -

[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -



[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -  
[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -  
[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -  
[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -  
[Native Title \(New South Wales\) Amendment Act 1998 \(NSW\)](#) [1998] NSWLegAct 88 -  
[Environmental Planning and Assessment Amendment Act 1997 \(NSW\)](#) [1997] NSWLegAct 152 -  
[Local Government Act 1993 Local Government \(General\) Amendment \(Diligent Inquiry\) Regulation 1996 \(1996-540\) \[GG No 122 of 1.11.1996\] \(NSW\)](#) [1996] NSWLegSI 540 -  
[Local Government Act 1993 Local Government \(General\) Amendment \(Diligent Inquiry\) Regulation 1996 \(1996-540\) \[GG No 122 of 1.11.1996\] \(NSW\)](#) [1996] NSWLegSI 540 -  
[Local Government Act 1993 Local Government \(General\) Amendment \(Diligent Inquiry\) Regulation 1996 \(1996-540\) \[GG No 122 of 1.11.1996\] \(NSW\)](#) [1996] NSWLegSI 540 -  
[Supreme Court Act 1970 Supreme Court Rules \(Amendment No 293\) 1995 \(1995-309\) \[GG No 88 of 21.7.1995\] \(NSW\)](#) [1995] NSWLegSI 309 -  
[Mason v Tritton](#) 34 NSWLR 572 -  
[Native Title \(New South Wales\) Act 1994 Proclamation re commencement \(1994-605\) \[GG No 156 of 25.11.1994\] \(NSW\)](#) [1994] NSWLegSI 605 (01 January 1994)

#### **NATIVE TITLE (NEW SOUTH WALES) ACT 1994 NO. 45—**

[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1994 \(NSW\)](#) [1994] NSWLegAct 95 -  
[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1994 \(NSW\)](#) [1994] NSWLegAct 95 -  
[Native Title \(New South Wales\) Act 1994 Proclamation re commencement \(1994-605\) \[GG No 156 of 25.11.1994\] \(NSW\)](#) [1994] NSWLegSI 605 -  
[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1994 \(NSW\)](#) [1994] NSWLegAct 95 -  
[Native Title \(New South Wales\) Act 1994 Proclamation re commencement \(1994-605\) \[GG No 156 of 25.11.1994\] \(NSW\)](#) [1994] NSWLegSI 605 -  
[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1994 \(NSW\)](#) [1994] NSWLegAct 95 -  
[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 1994 \(NSW\)](#) [1994] NSWLegAct 95 -