2024 Year in Review: Native Title law and policy

November 2024

Introduction

Native title law and policy in 2024 has seen the introduction of new legislation and significant judgements. This article will explore the status of a First Nations Voice in each state and territory following last year's unsuccessful Voice to Parliament referendum. Key cases will be summarised and the introduction of new legislation and updates to native title regulations will be discussed.

Key National Statistics (as at October 2024)

- 180 native title claims, including 6 compensation claims and 2 revised native title determinations;
- 508 determinations by consent, and 57 litigated determinations; and
- 1499 registered ILUAs around Australia.[1]

Contents

1 National Native Title Tribunal, Statistics < https://www.nntt.gov.au/Pages/Statistics.aspx>.

The Status of the Voice, Treaty and Truth

Since the defeat of the Commonwealth Voice to Parliament referendum, Prime Minister Anthony Albanese noted in February 2024 that treaty and truth making processes will remain the responsibility of each Australian State and Territory. Below summarises the position of each State and Territory in relation to the status of treaty making following the referendum last year:

South Australia	In 2023, South Australia introduced *the First Nations Voice Act 2023* (SA) which was a positive step forward to implement a voice for First Nations. Earlier this year, 46 representatives were elected to the SA Voice, including representatives for regional areas. The advisory body will enable First Nations people to raise issues in Aboriginal communities and ensure decision making is transparent.[2]
Queensland	The Path to Treaty Act 2023 was passed by the Queensland Parliament in May 2023 and became law upon proclamation on 26 April 2024. In July 2024, the Truth Telling and Healing Inquiry began in Queensland, with hearings designed to seek evidence, facts and information about the effects of colonisation in Queensland as a first step on the path to Treaty. The future of the Inquiry, and the Path to Treaty Act, is currently uncertain following the recent Queensland State election, with the incoming liberal government committing to repeal the legislation.
New South Wales	Positive progress towards treaty making has been made with the NSW government currently seeking commissioners to complete a 12-month consultation process with Aboriginal communities. This framework will assist in forming an agreement or treaty, similar to that of the SA model.[3]
Tasmania	In 2023, Tasmania formed the Aboriginal Advisory Group. Little progress has since been made.

2 ABC News, SA First Nations Voice to give Aboriginal people 'a seat at the table', commissioner says <https://www.abc.net.au/news/2024-03-02/sa-voice-to-give-aboriginal-people-a-seat-at-the-table/103532690>.

3 Ashurst, Path to Treaty is less clear in wake of failed Voice referendum <https://www.ashurst.com/en/insights/path-to-treaty-is-less-clear-in-wake-of-failed-voice-referendum/>.

ACT	In 2023, ACT announced a panel for truth telling which has not yet been established.
Victoria	Victoria has progressed with the formation of an 'Assembly' that incorporates 30 members to represent First Nations people to assist in negotiating a treaty. Victoria has also progressed with the Yoorrook Justice Commission – a truth telling inquiry where in April of 2024, the Victorian Government accepted and considered recommendations from the Commission's 2023 report on child protection and criminal justice.
Western Australia	WA has not committed to, nor made any progress in implementing a treaty or voice structure.
Northern Territory	The NT has progressed with a treaty and truth telling. A treaty unit is progressing within the Office of Aboriginal Affairs and a grant program has been implemented to support truth telling activities.[4]

4 Antar, Treaty in the Northern Territory <https://antar.org.au/issues/treaty/states-territories/northern-territory/>.

Recent Native Title Decisions

Kum Sing on behalf of the Mitakoodi and Mayi People #5 v State of Queensland (No 3) [2024] FCA 935

On 22 August 2024, the Mitakoodi and Mayi People were recognised by consent as native title holders over 25,700 square kilometres of land and water in central Queensland, including the town of Cloncurry and an area along the Cloncurry River. While this Application was filed in 2015, it follows previous applications over the same area, the first of which was lodged in 1998. After a long twenty-eight-year battle, Part A of the claim was resolved by consent, with native title recognised over a large part of the claim area. This included recognition of exclusive native title over a large number of parcels pursuant to sections 47A and 47B of the Native Title Act 1993 (Qld).

A small area in the south of the claim, covering a portion of two pastoral leases, remains to be resolved (Part B).

While the journey to achieve recognition of native title was long and difficult, the determination provides significant legal recognition of the enduring rights and interests which the Mitakoodi and Mayi people hold in the area. The consent determination was handed down by Justice Perry at a special sitting of the Federal Court in Cloncurry, which was attended by several hundred Mitakoodi and Mayi people.

The Court made the Orders under s87A of the Native Title Act 1993 (Cth), which provides an important mechanism for achieving a key objective of the Act – the resolution of native title claims by agreement.

The Applicant nominated the Mitakoodi and Mayi People Native Title Aboriginal Corporation to be the prescribed body corporate and to hold the native title on trust. MPS Law, as legal representatives of the Mitakoodi and Mayi People at the time of the consent determination, were privileged to be a part of the journey towards consent determination and congratulate the Mitakoodi and Mayi native title holders on the significant legal recognition they now hold.

Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4) [2024] FCA 425

In Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4) [2024] FCA 425, the Federal Court made a determination that native title does not exist (a negative determination) over part of the Gaangalu claim area.

This followed findings made in 2023, after a contested hearing, that native title did not exist in the whole of the claim area. The applicants' case was that native title rights and interests in the claim area were held under the traditional laws and customs of a pre-sovereignty regional society, of which the Gaangalu were a part of.

The Court found that at the time of sovereignty the Gaangalu had rights and interests in parts of the claim area (the western part) but not in the whole of the claim area. The Court found however, that the applicant had not proved that the rights and interests were held under the laws and customs of the regional society or that the regional society continued to exist. Accordingly, the Court concluded that native title no longer existed.

While the applicant asked that the claim be dismissed (leaving it open for a further claim or claims to be brought in the future) two respondent parties, Woorabinda Aboriginal Shire Council and Woorabinda Pastoral Company, asked the Court to make a negative determination in the western part of the claim area. The State of Queensland did not take a position.

The Court confirmed that where an applicant fails to prove the existence of native title, the Court has a discretion to make a negative determination, even where this is not sought by the State. However, that discretion only arises where the Court is satisfied on the balance of probabilities that native title does not exist.[5] The Court found that the conditions for making a negative determination did not arise in the east of the claim area as the Court had not been asked to make findings as to which group held native title in that area at sovereignty (having found that the Gaangalu did not).

However, in the west of the claim area, the Court was satisfied on the balance of probabilities that:

- The Gaangalu did hold rights and interests in that area at sovereignty;
- Those rights and interests were no longer held under the laws and customs of the relevant society and, therefore could not be recognised under the Native Title Act.

In making a negative determination over the western part of the claim area, the Court found that:

- Respondents were entitled to make submissions for a negative determination over an area beyond the land and waters which they hold an interest in;
- It was not relevant that the State did not take a position;
- There is significant public interest in having the certainty of a determination over an area once the court has found that native title does not exist and in avoiding further costly legal claims.

Overall, this case draws upon interesting insights of negative determinations, mainly being:

- no compensation is payable under the Native Title Act, and
- no further native title claims can be made over the area where a negative determination has been made; and
- the future act processes under the Native Title Act will not apply to the area where a negative determination was made. Although, heritage protection laws will still apply.

The Gaangalu have lodged an appeal against the decision.

5 CG (Deceased) on behalf of the Badimia People v State of Western Australia [2016] 204 FCAFC 67 .

Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v Western Australia [2024] FCA 1114

In September of this year, a landmark court decision was made allowing five senior Karajarri community leaders to have their evidence recorded for use in a future compensation claim. The applicant, Karajarri Traditional Lands Association RNTBC, holds native title on trust and intends to bring a compensation claim under the NTA. However, no claim had been filed at the time of the request for preservation of evidence. Kimberly Land Council lawyers argued for early evidence in light of the elder's health and age. The Court explored its jurisdiction, power and discretion in determining the application for the taking of preservation of evidence prior to the commencement of the foreshadowed compensation claim. Justice Mortimer reasoned that the application was well prepared, the compensation claim was well established and the evidence of the five elders would be less reliable in the future. The Karajarri expect that this decision will assist other communities and claims facing similar obstacles.

Lockyer for and on behalf of the Robe River Kuruma People v Citic Pacific Mining Management Pty Ltd (No 2) [2024] FCA 154

In this case, the Court considered the doctrine of frustration with regards to a native title agreement.

An ILUA and compensation deeds (the Agreements) were entered into between Sino Iron project and three native title parties, two of whom had overlapping claims within the agreement area.

Over the next 10 years the native title parties resolved their overlapping claims, with the result that one of the three groups, the Kuruma Marthudunera People (KM People), reduce their claim so that it only covers a very small part of the agreement area. In 2019, the KM People were determined to hold native title over an area which included only about 1% of the agreement area, which was some distance away from the core mining area.
The company ceased making payments to the KM People under the compensation deed following the determination, arguing that the reduction of the claim by the KM People meant that the compensation deed had been frustrated and no longer applied to the KM People.

Considering the terms of the Compensation Deed and the ILUA, the Court found that those documents showed an intention that compensation would still be paid despite the outcome of the KM People native title claim.

The Court therefore found in favour of the KM People, requiring the company to continue to make compensation payments under the Deed.

This case highlights the importance of being clear when drafting an agreement of the intent of the parties if the native title landscape changes during the life of the agreement. It also emphasises that native title agreements operate with the same effect as any other contract, including application of the doctrine of frustration.

Other updates

Hydrogen and Renewable Energy Regulations 2024

In South Australia, the Hydrogen and Renewable Energy Act 2023 (SA) (the HRE Act) and the Hydrogen and Renewable Energy Regulations 2024 (SA) came into effect in July 2024.

The Act establishes the first legislative framework for large-scale commercial hydrogen and renewable projects in Australia.

Significantly, the Act brings issues including land access, development and planning approval, environmental impacts and native title rights into a single regulatory framework. The Act is important in that it ensures that native title is addressed up front and early in the approvals process. The Aboriginal Heritage Act 1988 will still apply to Hydrogen and Renewable Energy projects.

The HRE Act establishes a competitive tender process for the right to develop large areas of Crown land (called designated land), much of which is also native title land, for renewables projects. The Minister can declare certain designated land as a release area. Once a release area is declared, the government can call for tenders from companies wanting to get a licence to undertake feasibility studies over the area.

The South Australian government has committed to working closely with native title groups in identifying release areas for renewable energy development. The Government has identified two initial release areas – the Gawler Ranges East proposed release area and the Whyalla West proposed release area. Public consultation on those release areas closed at the end of October. A decision on the release areas is expected late 2024 or early 2025, with the tender process expected to commence after that.

While the Minister determines who is successful in the tender process (the successful tenderer has an exclusive right to apply for a feasibility licence within a release area) a licence cannot be granted over native title land unless a native title agreement is in place which consents to the grant of the licence. In most cases this will likely need to be in the form of an Indigenous Land Use Agreement (ILUA).

The HRE Act encourages early engagement between the government and companies wanting to develop renewable projects on native title land and native title holders. Both native title holders and proponents will want some confidence that a company who is successful in the tender process will be able to secure the required native title agreement.[6]

6 Government of South Australia, Hydrogen and Renewable Energy Regulations 2024 < https://www.legislation.sa.gov.au/lz?path=%2FC%2FR%2FHydrogen%20and%20Renewable%20Energy%20Regulations%202024>.

Changes to Native Title Regulations

On 1 October 2024, new native title regulations commenced:[7]

Native Title (Tribunal) Regulations 2024 (Cth)
Expedited procedure application fees and forms have changed. Application fees will no longer apply and two new user-friendly forms are to be used for expedited procedure objection and future act determination applications.

Native Title (Indigenous Land Use Agreements) Regulations 2024 (Cth)
This regulation aims to simplify the application process for ILUA's with updated application forms, consolidating regulations and simplifying definitions. Further key changes to the regulation can be found here.

Native Title (Notices) Determinations 2024 (Cth) and Native Title (Federal Court) Regulations 2024 (Cth) had minor amendments, including the update of s 61 application forms.

Review of the future acts regime

Earlier this year, it was announced that over $500,000 has been allocated to review the future acts regime in the Native Title Act 1993 (Cth). The Australian Law Reform Commission has been tasked with the review in which they seek to consult native title holders, government departments and future act proponents. In doing so, the review will aim to improve the time and cost involved with future act regimes, how future act regimes can be more collaborative for all parties and explore the opportunity of native title groups to lead or partly lead developments relating to future acts.[8] The review hopes to improve unfairness or weaknesses in the regime. The Australian Law Reform Commission aims to have a report detailing the review in the next year.[9]

First Nation voices to pave the way towards a future of renewable energy

The Indigenous Land and Sea Corporation (ILSC) has noted its support for clean energy initiatives with First Nations people in the hopes of eventually having indigenous communities powered by affordable and efficient energy. The ILSC has commented on the current conditions of indigenous communities, with some communities lacking or without electricity.[10] Thousands of First Nations homes are powered by diesel generators and those with power are suffering from high household power costs and system outages.

It has been found that the contribution of First Nations People to renewable energy strategies is limited. There are currently 15 clean energy partnerships in Australia with First Nations people, compared to over 200 partnerships in Canada.[11]

7 National Native Title Tribunal, Native Title Regulations changes on 1 October 2024 <https://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Native-Title-Regulations.aspx>.

8 Australian Law Reform Commission, Review of the Future Acts Regime <https://www.alrc.gov.au/inquiry/review-of-the-future-acts-regime/>.

9 Attorney-General's Department, Australian Law Reform Commission to inquire into future acts regime in the Native Title Act 1993 <https://ministers.ag.gov.au/media-centre/australian-law-reform-commission-inquire-future-acts-regime-native-title-act-1993-04-06-2024>.

10 National Indigenous Times, ILSC says First Nations voices are needed to reach clean energy targets <https://nit.com.au/07-05-2024/11244/ilsc-says-first-nations-voices-are-needed-to-reach-clean-energy-targets>.

11 National Indigenous Times, Clean energy rollout must address 'historic injustice' <https://nit.com.au/09-05-2024/11295/clean-energy-rollout-must-address-historic-injustice.

In May of this year, the First Nations Clean Energy Symposium took place on Kaurna Country in Adelaide. Industry experts and community members, including First Nations leaders were in attendance and discussed how indigenous voices can be of assistance to providing a cleaner future. The input of First Nations people for small community-based projects or larger projects will be of significant impact in transitioning to renewable energy. This could see positive changes of less greenhouse gas emissions and the inclusion of carbon farming.

With the assistance of ILSC, First Nations Clean Energy Network and the National Native Title Council, there are hopes to see an improvement in the contribution of indigenous communities to achieve a sustainable future and provide opportunities for jobs, wealth and business growth.