

AKIBA ON BEHALF OF THE TORRES STRAIT ISLANDERS OF THE REGIONAL SEAS CLAIM GROUP V QUEENSLAND (NO 2)

Federal Court of Australia (Finn J)
2 July 2010
[2010] FCA 643

Native Title – Torres Strait Islands – Sea claim – *Native Title Act 1993* (Cth) – Society – Customs – Rights – Geography – Sovereignty – Extinguishment – Fisheries – Native Title and the Exclusive Economic Zone – Determination – Papua New Guinea (PNG) – Authorisation

Facts:

This case concerned a Native Title Determination over a major part of the sea waters in the Torres Strait. The Applicant was made up of four persons, two of whom passed away before the conclusion of the case; they represented the Central, Eastern, Top Western and Western Island clusters. The Respondents comprised of the State of Queensland, the Commonwealth, a group described collectively as the Commercial Fishing Parties and a number of parties from Papua New Guinea ('PNG').

This case was distinct from other native title claims for several reasons. Firstly, it was a claim over sea waters, not land. Secondly, Torres Strait Islander communities were in the unique position of having an ongoing and well-documented connection to the land and waters in European records dating back as far as 1606. Finally, the claim covered areas not within Australia's territorial seas and non-Australian citizens from PNG were adjoined to the case.

The main issues that the Federal Court of Australia had to decide were whether the claim group could be conceived of as a single society observing common laws and customs for the purposes of s 223(1)(a) of the *Native Title Act 1993* (Cth) ('the Act'), and whether reciprocity based rights, which were rights based on personal ties with other community members where expectations of exchange, respect, generosity and sharing arose, constituted native title rights and interests under the Act.

The Court also had to determine the precise geography of the claim area, whether there was an ongoing 'connection' to the sea waters, and whether at any stage in history Commonwealth sovereignty had extinguished native title rights over the claim area. Of particular concern was whether Australia had acquired 'sovereign rights' in its Exclusive Economic Zone under the *Seas and Submerged Lands Act 1973* (Cth) in July 1994. Finally, the Court had to consider whether the determination application had been made by a person or persons *authorised* pursuant to 61 of the Act.

Held, establishing the native title claim:

1. The Applicant has, for the most part, established its claim, and holds native title rights and interests in the waters of Torres Strait: [9].
2. The claim recognises the rights of group members to: access, traverse and use their own marine territory. The right to access resources and take for any purpose has also been recognised. It is important to add that none of these rights confer possession, occupation or use of the waters to the exclusion of others nor do they confer rights to control the conduct of others: [540].

Held, supporting that the claim group belong to a single society:

3. The native title claim group belongs to a single society. '[T]he relevant society in this matter can appropriately be analogised to a quilt of united parts. While each island

community appears to be largely autonomous, they belong to a larger whole': [170].

4. For the purposes of s 223(1)(a) of the Act, the society's traditional laws and traditional customs establish that the claim group in aggregate holds native title rights and interests in the waters of the Torres Strait. 'The communities themselves are each linked one to the others not only by these largely common "domestic" laws and customs, but also by common laws and customs which govern the relationship of one community's members to the members of another, both within and beyond the former's own land and waters': [170].

Held, rejecting the Applicant's claim that reciprocity based rights and interests constitute native title rights for the purposes of s 223(1) of the Act.

5. These reciprocity based rights are considered to validly exist, however they are rights in relation to personal relationships rather than rights and interests in land or water: [508].

Held, that native title could be found beyond Australia's territorial seas in its Exclusive Economic Zone:

6. Section 6 of the Act and the Explanatory Memorandum expressly considered extending the provisions of the Act 'to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*', under which the Exclusive Economic Zone was created: [715].

Held, rejecting the respondent's claim that fisheries legislation extinguished native title rights

7. The Fisheries legislation introduced by State and Commonwealth governments since 1877 does not evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes. The native title holders are still subject to the laws of the land as are any other Australian citizens, however, these laws only qualify, not extinguish native title rights: [861].

Held, that in the interest of justice the case should be heard and determined despite defects in the authorisation of the determination.

8. The proceedings are longstanding, covering a considerable number of land determinations of which almost all are fully prosecuted, widely publicised and partly conducted in the Torres Strait. Given these circumstances any failures in the authorisation process should be set aside to allow the case to be heard and determined as allowed by s 84D of the Act: [932].

Held, rejecting the claims or interests of the PNG parties

9. Each party lacked either the necessary interest to be adjoined to the claim and/or failed to establish that it had customary rights and interests in the claim area: [954]–[986].