

**IN THE FEDERAL COURT OF AUSTRALIA**

**QUEENSLAND DISTRICT REGISTRY**

**QG6023 OF 1998**

**BETWEEN:** MR BILLY WASAGA AND OTHERS ON BEHALF OF THE  
KAURAREG PEOPLE

**AND:** APPLICANTS  
STATE OF QUEENSLAND  
ERGON ENERGY CORPORATION LIMITED  
GEOFFREY DONALD MCKENZIE  
MICHAEL J CLINCH  
NORMAN A CLINCH  
PETER GRAEME WARD  
TELSTRA CORPORATION LIMITED  
TORRES SHIRE COUNCIL  
TORRES STRAIT REGIONAL AUTHORITY  
RESPONDENTS

**QG6024 OF 1998**

**BETWEEN:** MR BILLY WASAGA AND OTHERS ON BEHALF OF THE  
KAURAREG PEOPLE

**AND:** APPLICANTS  
STATE OF QUEENSLAND  
DOUGLAS D NUTLEY  
ERGON ENERGY CORPORATION LIMITED  
GEOFFREY DONALD MCKENZIE  
MICHAEL J CLINCH  
NORMAN A CLINCH  
TELSTRA CORPORATION LIMITED  
TORRES SHIRE COUNCIL  
TORRES STRAIT REGIONAL AUTHORITY  
RESPONDENTS

**QG6025 OF 1998**

**BETWEEN:** MR BILLY WASAGA AND OTHERS ON BEHALF OF THE  
KAURAREG PEOPLE

**AND:** APPLICANTS  
STATE OF QUEENSLAND  
GEOFFREY DONALD MCKENZIE  
MICHAEL J CLINCH

NORMAN A CLINCH  
ROBERT CHARLES LACAZE  
TELSTRA CORPORATION LIMITED  
TORRES SHIRE COUNCIL  
TORRES STRAIT REGIONAL AUTHORITY  
RESPONDENTS

**QG6026 OF 1998**

**BETWEEN:** MR BILLY WASAGA AND OTHERS ON BEHALF OF THE  
KAURAREG PEOPLE

**AND:** APPLICANTS  
STATE OF QUEENSLAND  
GEOFFREY DONALD MCKENZIE  
MICHAEL J CLINCH  
NORMAN A CLINCH  
ROGER GREEN  
TELSTRA CORPORATION LIMITED  
TORRES SHIRE COUNCIL  
TORRES STRAIT REGIONAL AUTHORITY  
RESPONDENTS

**QG6027 OF 1998**

**BETWEEN:** MR BILLY WASAGA AND OTHERS ON BEHALF OF THE  
KAURAREG PEOPLE

**AND:** APPLICANTS  
STATE OF QUEENSLAND  
DOUGLAS D NUTLEY  
GEOFFREY DONALD MCKENZIE  
MICHAEL J CLINCH  
NORMAN A CLINCH  
THOMAS V LEE & DORETTA HEWLETT  
TORRES SHIRE COUNCIL  
TORRES STRAIT REGIONAL AUTHORITY  
RESPONDENTS

**JUDGE:** DRUMMOND J  
**DATE:** 23 MAY 2001  
**PLACE:** BRISBANE

**REASONS FOR JUDGMENT**

1 I have before me five applications for consent determinations of native title over seven of the islands in the Torres Strait. The applicants in each case make these claims on behalf of the Kaurareg People. They claim the rights to use these islands as the traditional lands of the Kaurareg for customary subsistence, cultural, spiritual and

economic purposes. Although the proposed determinations of native title that I have before me in exhibits 1 to 5 are each consented to by all the parties, it is necessary for the Court to be satisfied, by reason of the provisions of the *Native Title Act 1993* (Cth), that it is proper for the Court to make determinations along the lines proposed.

2 On the material available to the Court, the claims of the Kaurareg to be recognised as the traditional owners of these seven islands is well established. That there has long been identified in the historical records of Australia the existence of a separate people known as Kaurareg is demonstrated by the evidence available to me. These records show that the Kaurareg were the original inhabitants of the islands of the Kaurareg Archipelago prior to and at the time of the claim of sovereignty made on behalf of the English Crown in 1770 by Captain Cook and thereafter. It is enough to refer to a few of these records.

3 Two hundred and thirty one years ago on 22 August 1770, Captain Cook with a party of his men landed on Bedanug, which he called Possession Island and:

*"... hoisted English colours, and in the name of His Majesty King George III, took possession of the whole eastern coast from the above latitude of 38° south, down to this place by the name of New Wales."*

4 As he sailed south and west from Possession Island past the islands of Zuna or Entrance, Mipa or Turtle, Yeta or Port Lihou and Dumaralag, he wrote in his log:

*"We saw upon all the adjacent lands and islands a great number of smokes - a certain sign that they are inhabited."*

5 And then, as he sailed closer to the point on Muralag Island itself, which he named Cape Cornwall, there were on a beach a number of people, men and women. "Some of the men," Cook noted, "had on pretty large breast plates, which we supposed were made of pearl oyster shells; this was a thing, as well as the bows and arrows, we had not seen before", ie, that Cook had not seen on the entire voyage up the eastern coast of the continent. This is the first recorded European observation of the Kaurareg. It was only in 1872 that Captain Cook's claim for British sovereignty of the east coast of Australia was extended to the islands in the Kaurareg Archipelago.

6 The most comprehensive information in the early records about the Kaurareg and their traditional laws and customs, material culture, occupancy of the Kaurareg Archipelago and their relations with peoples on the Australian mainland, the other Torres Strait Islands and the peoples of New Guinea dates from 1849, when an officer on HMS *Rattlesnake*, Oswald Brierly, wrote down the account of a Mrs Barbara Thompson, a Scottish woman who had been shipwrecked in the Torres Strait and had lived with the Kaurareg on Muralag for several years.

7 Brierly's account and the account of John MacGillivray, the member of another Royal Naval expedition to the area published in 1852, provide much evidence for the connection of the Kaurareg People to their traditional country. It is worthy of note that the Kaurareg, in addition to the close cultural and spiritual connection they have with the islands, have traditionally played an important part in the complex trade and customary exchange networks that have long linked Australia, the various Torres Strait Islands and New Guinea.

8 European commercial activity and expanding settlement in the Torres Strait that increased from the last third of the nineteenth century, placed great pressures on the Kaurareg. Much hardship has been endured by them in consequence. Those hardships that extended well into the twentieth century. Armed conflict took place in the late nineteenth century between the Kaurareg in defence of their islands against European and other commercial interests and against the Queensland authorities. Imported

diseases took a heavy toll of the Kaurareg. The great measles epidemic of 1875 took many of them. Their numbers steadily declined.

9 In 1881, in response to the pressures imposed on the Kaurareg by increasing European activity in their area, a reserve was established on the northern end of Kirriri, where the Kaurareg continued what has been described as a precarious existence until 1922. Mr Wasaga has spoken today of what took place then. The Queensland Government forcibly removed the remaining Kaurareg from Muralag to exile on Moa. The Kaurareg strongly opposed this removal. They sought to have it reversed. An article relating to the Government's action appeared in the *Queensland Newspaper* on 11 March 1922 under the heading "Evicted native protests - We want to stop on our own place," the report read. The present Kaurareg claimants are descended, as I understand it, from three Kaurareg who actively took part in the protests and who were forcibly removed to Moa on 8 February 1922, some time before the remaining Kaurareg were similarly removed there.

10 There they remained as a group, although their traditional links with the homelands remained strong. The forced removal of 1922 was not able to prevent various Kaurareg from time to time going back to their islands. They were all taken back to Moa. The war brought great changes in the Torres Strait. One of the consequences of the upheavals that then occurred was that a number of Kaurareg left Moa and returned to Ngurupai (Horn Island) in 1946. They established what is now the Wasaga Township there and gradual recognition came to them.

11 By 1949 the settlement contained thirty-three Kaurareg and, with the encouragement of the Anglican Bishop, the Department of Native Affairs was urged to declare Ngurupai a reserve to give the Kaurareg some security of tenure where previously they had not been recognised as having any. There was a proposal soon afterwards by the Government to move the Kaurareg to Red Island Point on the mainland. That was rejected by them. Though ultimately the recommendation for a reserve on Ngurupai was not accepted by the Government, the Kaurareg who had come back to settle there from 1946 were not removed. The numbers steadily increased. Some recognition of the demands of the Kaurareg to live on their traditional lands came in February 1969 when the Government established the Horn Island Village Council.

12 That process of return to the islands, after the 1922 removal, has culminated today in the applications to this Court for the five consent determinations.

13 The law which came to this country in the wake of Captain Cook, the common law of England, now the law of Australia, today by order of the Court acknowledges that the Kaurareg claimants, as the descendants of the men and women who lived on these islands when Captain Cook sailed these waters, are the traditional owners.

14 It is important to note that the Court does not seek today to impose a decision on the parties to the case. The hearing today is being held instead to give effect to an agreement between the Kaurareg People, the Government of Queensland and other organisations including the Torres Shire Council, Ergon Energy Corporation Limited, Telstra Corporation Limited and various commercial fishing interests, who each has an interest in these islands.

15 By this agreement, the parties to the case recognise the Kaurareg as the traditional owners of the islands. The Kaurareg in turn, by this same agreement, recognise that others of the parties have certain rights and interests in respect of the lands.

16 In these circumstances, it is entirely appropriate for the Court to declare in each of the five matters that native title exists in relation to each of the five determination areas set out in exhibits 1 to 5.

17 It is also appropriate for the Court to declare in terms of pars 1 - 15 of each draft determination that native title is held by the Kaurareg People who are the descendants of the Kaurareg, who were the traditional owners of each determination area prior to the assertion of British sovereignty, as common law holders. The Court will in each case make declarations as to the content of the native title rights which are now recognised by Australian law, as enjoyed by the Kaurareg in respect of each of the islands which are set out in each of exhibits 1 to 5. The other orders, proposed in each of the exhibits, identifying the interests of other parties in the various islands, including the interests of the Torres Shire Council and other parties already mentioned will also be made.

18 The Court will therefore make in each of the five matters declarations and orders in conformity with those proposed in the draft determinations in the five exhibits.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Drummond.

Associate:

Dated: 29 May 2001

Solicitor for the Applicant:

Ms M Stinton

Counsel for the State of Queensland:

The Honourable Attorney-General for the State of Queensland Mr R Welford

Solicitor for the State of Queensland:

Crown Law

Solicitor for the Torres Shire Council and Ergon Energy Corporation Limited

MacDonnells

Solicitor for the Queensland Seafood Industry Association:

Gore & Associates

Solicitor for the Torres Strait Regional Authority:

Ms A Murphy

Solicitor for Telstra Corporation Limited:

Blake Dawson Waldron

Date of Hearing:

23 May 2001

Date of Judgment:

23 May 2001