

# Determination of native title –Torres Strait

## *Mye on behalf of the Erubam Le v Queensland* [2004] FCA 1573

Cooper J, 8 December 2004

### Issue

This case deals with whether the Federal Court should make a determination recognising the existence of native title over Erub Island in the Torres Strait as proposed in a draft determination filed by consent. The court decided it was empowered to do so. The determination will be effective if and when an indigenous land use agreement is registered, subject to any further orders the court may make.

### Background

The making of this consent determination was delayed while the Full Court of the Federal Court considered two separate questions referred under O 29 r 2 of the Federal Court Rules, namely:

- whether native title had been extinguished by the construction or establishment of certain public works on land presently held in fee simple pursuant to a Deed of Grant in Trust (DOGIT); and
- if so, whether that extinguishment had to be disregarded by operation of s. 47A for all purposes under the *Native Title Act 1993* (Cwlth) (NTA).

In *Erubam Le (Darnley Islanders) #1 v Queensland* (2003) 134 FCR 155, it was held that public works constructed or established before 24 December 1996 extinguished all native title to the area affected and that s. 47A of the NTA did not apply: see *Native Title Hot Spots Issue 7*. An application for special leave to appeal to the High Court made on behalf of the Erubam Le (Darnley Islanders) was later withdrawn.

### Power of the court—s. 87

Justice Cooper noted that the parties had reached agreement as to the terms of a proposed consent determination of native title. However, s. 87 of the NTA provides that the court may make an order in or consistent with the terms of the parties' proposed determination without holding a hearing 'if it appears to it to be appropriate to do so'.

Cooper J also noted that s. 94A of the NTA requires that any determination of native title must set out details mentioned in s. 225 of the NTA, namely (in paraphrase):

- whether or not native title exists in relation to a particular area of land or waters (the determination area);
- if it does exist, who holds the common or group rights comprising the native title;
- the nature and extent of the native title rights and interests in relation to the determination area;
- the nature and extent of any other interests in relation to the determination area;
- the relationship between those rights and interests (taking into account the effect of the NTA); and

- to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease-whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

### **Evidence before the court**

The evidence provided to assist the court to determine whether or not s. 87 was satisfied included:

- affidavits from claimants deposing to their use and occupation of the determination area; and
- anthropological reports that included genealogical material and addressed the claim group's association with the relevant determination area, both current and historic, including records that pre-dated the assertion of sovereignty in the 1870s.

### **Maintenance of traditional law and traditional custom**

His Honour was satisfied that:

- native title existed in relation to the determination area identified in the draft determination;
- the members of the claim group are members of a society that is descended from the society that, at the time of the assertion of sovereignty, occupied the lands and waters identified in the draft determination in accordance with traditional laws acknowledged and traditional customs observed by them;
- the laws acknowledged and the customs observed by the relevant society at sovereignty continue to be acknowledged and observed by the members of the relevant claimant group and were acknowledged and observed by their predecessors from the time of the assertion of sovereignty to the present;
- the members of the claim group and their predecessors, through their continued acknowledgement and observance of the traditional laws and traditional customs which existed at the time of the assertion of sovereignty, have maintained a continuous connection to the determination area; and
- the native title rights and interests in the determination area are held by the persons who are, or are entitled to be or become, members of the claim group.

### **Determination area**

The determination area is described as being landward of the 'high water mark', as defined in the *Land Act 1994* (Qld). Certain areas within the external boundary of the determination area were excluded from the area covered by the application and so are specifically excluded from the determination area, e.g. all roads whether declared, notified, constructed, surveyed, or taken under the laws of the Commonwealth or the State of Queensland including the common law, to be a road.

### **Conditional on ILUA registration**

The determination will take effect if and when a particular ILUA is registered on the Register of Indigenous Land Use Agreements. The matter will be listed for further directions if the ILUA is not registered within six months of the date of the orders (or such later time as the court orders).

### **Common law holders**

The people determined to be the common law holders of native title are the Erubam Le People, being the members of certain families who are descended cognatically from one or more of named people. Torres Strait Islanders who have been adopted in accordance with the traditional laws acknowledged and traditional customs observed by the Erubam Le People are also common law holders of native title.

### **Rights and interests recognised**

Subject to the qualifications noted below, and with the exception of native title rights to 'water', the nature and extent of the native title recognised in the determination area is a right to possession, occupation, use and enjoyment to the exclusion of all others. Native title to 'water' does not confer possession, occupation, use and enjoyment to the exclusion of all others. Rather, what is recognised is a non-exclusive native title right to:

- hunt and fish in or on, and gather from, the water for the purpose of satisfying personal, domestic or non-commercial communal needs; and
- take, use and enjoy the water for the purpose of satisfying personal, domestic or non-commercial communal needs.

'Water' in this context has the meaning given to it in the *Water Act 2000* (Qld).

### **Qualifications**

The native title rights and interests recognised are subject to, and exercisable in accordance with:

- the laws of the Commonwealth and the state, including the common law; and
- the traditional laws acknowledged and traditional customs observed by the native title holders.

### **Other rights and interests recognised**

The other interests recognised in the determinations, as required by s. 225(c), included those of the Commonwealth, the Erub Island Council, Ergon Energy Corporation Ltd and Telstra Corporation Ltd and any other interests held by reason of the force or operation of the laws of the Commonwealth or the state, including the common law.

### **Relationship between native title and non-native title interests**

The relationship between the native title rights and interests and the other, non-native title interests recognised in the determination is that:

- the other interests continue to have effect;
- the rights conferred by, or held under, those other interests may be exercised notwithstanding the existence of the native title; and
- the other interests, and any activity done in exercise of the rights conferred by or held under the other interests, prevail over the native title and any exercise of the native title. See also s. 44H of the NTA.

**Prescribed body corporate — trustee**

Once the determination is effective, native title will be held in trust by the Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation. Therefore, once it is registered on the National Native Title Register, the corporation will be the 'native title holder', holding the recognised rights and interests on trust for the benefit of the common law holders: see ss. 56, 57 and 224(a) of the NTA.