

Determination of native title – Torres Strait

Nona on behalf of the Saibai, Dauan, Mabuiag, Badu and Boigu Peoples v Queensland [2005] FCA 1118

Black CJ, 15 August 2005

Issue

This case deals with a determination under the *Native Title Act 1993* (Cwlth) (NTA) recognising native title to islands in the Torres Strait.

Power of the court – s. 87

The parties sought consent determinations recognising native title. Chief Justice Black found that:

- the discretion to make a consent determination found in s. 87(1) must be exercised judicially;
- both the matters to be taken into account in the exercise of the discretion and the weight to be given to those matters may vary according to the particular circumstances of each case;
- in these cases, the 'technical' preconditions had been complied with and it was 'appropriate' to make the orders;
- it was clear that the parties had independent and competent legal advice and that the agreements were freely entered into;
- the proposed orders were unambiguous and appropriate in the circumstances—at [5] to [9].

The evidence in each case included an affidavit of one member of the native title claim group and an anthropological report from a consultant anthropologist with extensive experience in the Torres Strait region.

Maintenance of traditional law and traditional custom

The claimants were settled on nearby islands. However, the evidence indicated they had maintained a continuous 'physical, cultural and spiritual connection' with the determination area by:

- maintaining regular, uninterrupted visits to the islands for camping, hunting, fishing, foraging and gardening in accordance with traditional law and custom;
- regarding the islands as being of spiritual significance;
- transmitting rights and interests in the islands according to traditional law and custom;
- asserting a right to grant and withhold permission to visit;
- using and sharing the resources of the determination area in traditional ways – at [11] to [13].

This was proof of a normative system which:

- has force on the peoples' lives;

- regulates their access to, and use of, the islands; and
- has been in existence since before the assertion of sovereignty – at [13].

Determination area

The native title rights and interests recognised were confined to the area landward of the 'high water mark' as defined in the *Land Act 1994* (Qld).

Rights and interests recognised

Subject both to certain qualifications and the other rights and interests in the area, native title was recognised as a right to possession, occupation, use and enjoyment of the determination areas to the exclusion of all others. Black CJ emphasised that 'the order does not *grant* native title ...; it recognises what they have long held' – at [16], emphasis in original.

Note that the native title in relation to 'water' was found to be a non-exclusive 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.