

Determination of native title — Torres Strait

Manas v Queensland [2006] FCA 413

Dowsett J, 13 April 2006

Issue

This case deals with a determination made under the *Native Title Act 1993* (Cwlth) (NTA) recognising the existence of native title. The parties reached agreement and asked the Federal Court to make orders in, or consistent with, the terms of their agreement under s. 87 of the NTA.

Background

In this case, Father John Manas, on behalf of the Mualgal People, applied for a determination recognising the existence of native title in relation to numerous small uninhabited islands, islets and rocks in the vicinity of Mua Island in the Torres Strait—at [1].

Power of the court under s. 87

Justice Dowsett noted the relevant provisions of the NTA including:

- section 87, which empowers the court to make an order in, or consistent with, the terms of the parties' written agreement without holding a full hearing if it is satisfied that such an order is within its power;
- section 94A, which requires that an order containing a determination of native title must include details of the matters set out in s. 225—at [6] to [7].

Material before the court

The material before the court included an affidavit of a member of the native title claim group and an anthropological report prepared by Dr Garrick Hitchcock, an anthropologist employed by the Torres Strait Regional Authority. Dr Hitchcock's report was based on his own studies and discussions with elders of the native title claim groups. In addition, Dr Hitchcock relied on reports prepared by other anthropologists, one of which was prepared for an earlier claimant application made on behalf of the Mualgal people. The court noted that, in 1999, Justice Drummond made a determination recognising native title to the area claimed in that application, the Mualgal people's 'home' island of Mua.

Dowsett J quoted at length from Dr Hitchcock's report, noting that it:

- described organised Torres Strait Islander occupation and possession of the determination area since some time prior to the establishment of British sovereignty over the area in 1872;
- confirmed the continuity of an identifiable society of Torres Strait Islander people (the Mualgal) having a connection with the proposed determination area in accordance with traditional laws acknowledged and traditional customs observed by them, which appeared to be recognised by other Torres Strait Islander groups—at [7] to [8].

Maintenance of traditional law and traditional custom

Dowsett J drew an inference that the State of Queensland had taken such advice as it considered 'appropriate' and had chosen to agree to a determination recognising native title. His Honour was satisfied 'in any event' that:

[T]he objective facts of the case demonstrate the probability of continued connection between the people resident on Mua and the various islands, islets and rocks in the determination area. The Mua people were, and are, seafarers, able to travel to these features and further afield. There was, and is, good reason for them to visit them on a regular basis. Food is available there. It would be inconsistent with one's experience of human nature if, over the centuries, successive generations had not come to view these islands, islets and rocks as their own. No doubt, over those same centuries, there have been challenges to their claims, but any such challenges must have been resolved in favour of those of whom the claim group are successors. I accept the anthropological evidence to the extent necessary to find that native title exists in relation to the ... [proposed determination area]—at [14].

Determination area

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

Rights and interests recognised

In relation to the area of land covered by the determination, native title is recognised as a right to possession, occupation, use and enjoyment to the exclusion of all others. In relation to water, the native title right recognised is limited to the 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.

The right to water is subject to a proviso that it does not confer any right to possession, use or enjoyment of the water to the exclusion of others.

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

- the laws of the Commonwealth and the state, including the common law;
- traditional laws acknowledged, and traditional customs observed, by the native title holders; and
- other interests in relation to the determination area, with the relationship between native title and the other interests being that the other interests:
 - continue to have effect and related rights may be exercised, notwithstanding the existence of the native title; and
 - prevail over the native title and any exercise of the native title (including any activity done in exercise of related rights).