

# Determination of native title—Torres Strait

## *Nona and Manas v Queensland* [2006] FCA 412

### Issue

These 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

Victor Nona and John Manas applied on behalf of the Badualgal and Mualgal Peoples for a determination of native title over numerous uninhabited small islands, islets and rocks located south of Badu Island and south-west of Mua Island in the Torres Strait in the State of Queensland—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 - Nona at [7] to [8] and Manas [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.

### 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 that native title exists in the area concerned:

The evidence demonstrates that the claim group members are descendents of people who have lived on their respective islands for a very long time. They were, and are, seafarers who would almost certainly have visited neighbouring islands, islets and rocks, searching for food. It is probable that over the centuries, they have come to regard the determination area as being theirs. The anthropological evidence supports this view, but it is really based on observations of human nature. This connection pre-dates the first assertion of British sovereignty—at [19].

**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 areas 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).