

Party status—PNG national refused

Akiba v Queensland (No 2) [2006] FCA 1173

French J, 8 September 2006

Issue

The issue before the Federal Court was whether a Papua New Guinean national should be joined as a party to a claimant application.

Background

The applicant for joinder, Pende Gamogab, submitted that he, as part of a group called the Dangkaloub-Gizra, enjoyed traditional rights of movement, ownership and use of resources in the Torres Strait region, parts of which are subject to a claimant application referred to as the Torres Strait Regional Seas Claim.

The Papuan New Guinean village of Kupere, where Mr Gamogab lived, was not one of the 14 ‘treaty villages’ whose inhabitants are accepted, under an exchange of notes between Australia and Papua New Guinea (PNG), as beneficiaries of a treaty entered into in 1978 by Australia and PNG concerning sovereignty and maritime boundaries in the area between the two countries, including the Torres Strait. This meant that he was not recognised as a ‘traditional inhabitant’ with traditional customary rights under the treaty.

Whether the applicant should be joined as a party

Justice French listed the relevant elements of s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA) for the purpose of joining a party to the proceedings as being:

- whether the person has an interest and whether that interest may be affected by a determination in the proceedings;
- whether, in the exercise of its discretion, the court should join the person as a party—at [32].

PNG national could have requisite interest

French J was of the view that:

- it was possible that a PNG national living in PNG who is a traditional inhabitant of the claim area may have rights and interests capable of recognition by the common law;
- however, the definition of ‘native title’ and ‘native title rights and interests’ in s. 223(1) is, relevantly, ‘the ... rights and interests of ... Torres Strait Islanders’ and ‘Torres Strait Islanders’ is defined in s. 253 as: ‘A descendant of an indigenous inhabitant of the Torres Strait Islands’;
- this meant that a determination of native title could not be obtained under the NTA by PNG nationals on the strength of rights and interests possessed within Australian waters under the traditional laws acknowledged and the traditional customs observed by the society of which they are part;

- nonetheless, the rights and interests of such persons might limit or qualify the native title rights and interests of Torres Strait Islanders (e.g. as an element of traditional law and custom observed by the Islanders) and, on that basis, the applicant would be eligible to be joined as a party — at [35].

Interest may be affected by a determination in the proceedings

His Honour held the interests of traditional inhabitants of the Torres Strait regional claim area from PNG may be affected by a native title determination because such a determination: '[C]ould render enforceable and protected at Australian law, rights and interests which accord no recognition to the rights and interests asserted by Mr Gamogab and his community' — at [36].

Court should not exercise discretion to join

Having found that the first element of s. 84(5) was met (i.e. an interest that may be affected by a determination in the proceeding), the court considered whether or not to exercise its discretion to join Mr Gamogab. French J noted a number of relevant factors, including that:

- a consideration of the traditional rights and interests of PNG nationals who are traditional inhabitants of the claim area would lead to a more accurate definition of the native title rights and interests claimed;
- a native title determination under the NTA could protect the rights and interests of traditional inhabitants from PNG by limiting the scope of the rights and interests of the Torres Strait Regional Seas Claim applicant and their communities — at [37] to [45].

His Honour was of the view that:

[I]t is reasonable [sic] arguable that the Commonwealth has an obligation under the Treaty to ensure that the traditional activities of traditional inhabitants in the Torres Strait which are protected by the Treaty are taken into account to the extent that it is proper to do so in the native title determination process — at [46].

It was held that:

- the question of whether a PNG village whose members are not treated as 'traditional inhabitants' by the executive governments of PNG and Australia under the treaty should also be so treated for the purpose of these proceedings was a matter for those executive governments;
- the joinder of Mr Gamogab may open the proceedings to debates between village communities in PNG about their respective interests in the Torres Strait Region Seas Claim area;
- these matters were best left to the courts of PNG or its executive government to resolve by agreement with the Australian Government under the treaty — at [47] to [48].

Decision

French J declined to exercise the discretion available to join Mr Gamogab and dismissed his motion for joinder.