Determination of native title

Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2) [2010] FCA 643

Finn J, 2 July 2010

Issue

The main issue before the Federal Court in this case was whether native title rights and interests should be recognised over an area of regional seas within the Torres Strait. Among others, this involved addressing the following questions:

- what is the society under whose laws and customs native title rights and interests are possessed?
- what is the geographic reach of the rights claimed or conceded?
- can native title be recognised in the Exclusive Economic Zone (EEZ)?
- can new rights, duties and interests be created in areas not yet subject to Imperial or Commonwealth sovereignty but which subsequently came under that sovereignty?
- could rights to take or trade for commercial purposes and take the water of the sea be recognised?
- had any commercial right to fish that existed at sovereignty been extinguished by fisheries legislation?
- was the claimant application under consideration duly authorised and, if not, how did that impact on the proceedings?

Justice Finn found that:

> There is a single Torres Strait Islander society to which the native title claim group belongs. Under that society's traditional laws acknowledged and traditional customs observed, the claim group holds native title rights and interests in the waters of Torres Strait with which I am presently concerned, save in those parts specified in my reasons.
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> The native title rights I have found are the non-exclusive rights of the group members of the respective inhabited island communities first, to access, to remain in and to use their own marine territories or territories shared with another, or other, communities; and, secondly; to access resources and to take for any purpose resources in those territories. In exercising these rights the group members are expected to respect their marine territories and what is in them. Importantly, and this requires emphasis, none of these rights confer possession, occupation, or use of the waters to the exclusion of others. Nor do they confer any right to control the conduct of others—at [9] and [11].

Background

The Torres Strait Regional Sea Claim was filed on 23 November 2001. The area covered by the application excluded both the Prince of Wales group of islands and islands and reefs off the immediate east coast of northern Cape York. In 2008, both the Kaurareg and Gudang peoples filed separate native title claims, each of which

overlapped the original application area. Finn J ordered the original application be split into Parts A and B, the latter consisting of the overlap area. This decision relates only to Part A. Please note that, due to the length of the decision, not all aspects of the court's reasons are summarised here.

What was the relevant society?

The court was asked to consider three different contentions as to the identifiable society defined by the traditional laws and traditional customs of the people of the Torres Strait. The State of Queensland contended there were 13 separate societies, each constituted by the islanders of an inhabited island. The Commonwealth contended there were four societies, each made up of a regional cluster group of islands. The applicant contended that there was a single Torres Strait Islander society to which the native title claim group belonged.

Finn J held that:

- the evidence supported the conclusion that there was a single society before sovereignty;
- the people of the Torres Strait 'did not act as an "integrated polity" ... but had no need to';
- what they did, 'island by island, was to observe and acknowledge a body of traditional laws and customs;
- this single body of traditional laws and customs 'admitted of some local difference' but these differences were not 'in the scheme of things, of real moment for present purposes';
- laws and customs 'had, and have, local application' and the 'exercise of local autonomy ought to be expected to have produced some variances in practices and understanding over time'—at [488].

The court emphasised that it was not only local applications of the body of laws and customs that were observed by the Islanders:

> The observance of those [laws and customs] that had inter-island applications has been well established. The two enduring symbols of the recognition of the bodies of laws and customs as such were the seeking of permission to take from another's land or marine territory and the practice of *ailan pasin* [Island fashion, island custom, the way Islanders have long done things]—at [489].

Prior to reaching these conclusions, Finn J made the following findings on the evidence:

- the laws and customs acknowledged and observed in Torres Strait 'are not wholly uniform' but have discernible differences in content or 'in understandings thereof';
- 'the precise manner in which rights and interests in land and waters (particularly near shore) are distributed varies across the islands of the Strait';
- the Islanders 'are not unified by a common mythology, a creation myth, or for that matter, a common traditional language';
- they 'self identify, and differentiate between themselves, by reference to their local communities'; and

- there was 'no traditional overarching authority or institution for the governance of the Strait as a whole';
- traditional governance 'is a local community matter'—at [441].

Finn J made (among others) the following observations in relation to law and custom:

- where there are dispersed groups who claim to make up a society, a 'significant extent of localised difference' should not only be tolerated, 'it should ... be expected';
- even though the laws and customs 'ordinarily' only have local application, 'most are common to the island communities of the Torres Strait', e.g. 'importantly, [those relating to] elders';
- where there were 'discernible differences' (mostly laws and customs relating to kinship, marriage and affinal relations and totems), they were 'not destructive of the one society case';
- there was 'an obvious commonality' in the laws and customs which regulated an Islander's rights and obligations *outside* of his or her own land or marine territory, e.g. those in relation to inter-island marriage and affinal relationships, hereditary friendships and *tebud* (trading relations), permission and *ailan pasin*;
- the evidence on shared land and marine areas was 'consistent only with common laws across the Strait applying principles of continued acknowledgment of prior occupation by ancestors and of descent and inheritance';
- it should be emphasised that the laws and customs accommodating sharing 'are not simply ones of individual island communities or of a cluster group'—at [456], [458] to [459], [463] to [464].

The court did not regard the basis upon which Islanders identify self and others, namely by island, as 'a useful indicator of a society' in this matter:

> [A] local community based "society" fails to accommodate the phenomenon of sharing island land and waters by two or more island communities. Further, accepting that infra-Island matters are characteristically settled by laws and customs having purely local application, the severing of Island communities for reason of identity ignores those laws and customs dealing with relationships between, and reciprocal obligations of, persons on different Islands. Such laws and customs ... are replicated across Torres Strait. Similarly it attributes no significance to laws and customs which, though local in operation (eg in relation to elders), are characteristic of all of the Island communities. Importantly, to use identity as the State proposes disregards context in a variety of ways—at [474].

The court held that to 'rend' close relationships between particular cluster groups islands for '*Yorta Yorta* purposes' would be to 'disregard shared histories, inter-connections of descent, marriage and, in the Eastern Islands, clans, and most importantly, the practical commonality of their respective laws and customs'. Finn J considered that 'the unities in Torres Strait were more pervasive than simply between the Islanders of the individual cluster groups'. Further, 'the laws and customs of each cluster group' were 'inadequate to describe the system of laws and customs in the Strait'—at [475] and [477], referring to *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

Territorial control

The applicant claimed traditional laws and customs existed which gave, and give, the claimants control of the relevant marine areas. There was some evidence of members of Island communities taking 'reasonable, measured and lawful steps' to protect their community's interests 'from the potentially adverse or, to the Islanders, objectionable conduct of others, be they outsiders, or Torres Strait Islanders from distant communities'. The applicant's submission was that territorial control was:

> [T]he 'ownership' law and custom which is the counterpart of the 'emplacement' law and custom. It is what permits the group of emplacement based rights holders to say "it is our, it belongs to us". That is what the territorial control law and custom is about.

If characterised in this way, the court was satisfied that 'territorial control' was 'an accepted consequential attribute of an area's being acknowledged as belonging to a community or a number of communities' but, in the circumstances, it was 'unnecessary to deal further with this matter' because the applicant 'has not deemed it necessary to elaborate [this aspect of its case] in an ordered way'—at [286].

Language differences no barrier

On the issue of language differences, Finn J said that:

> Given the volume of evidence about trade, visits, cult connections, intermarriage, alliances, cultural exchanges etc between the two Island groups, language may have been a "difference" between East and West. I do not consider it constituted a pre-annexation barrier between them such as sharply to differentiate them despite their "great similarity in culture". The East's relationship with the Central Islanders was too close and too encompassing to justify such a conclusion simply on the basis of language. ... [T]here was considerable sharing of marine areas by Eastern and Central islands—at [486].

Totems and clans

In this case:

- reference to a totem is a reference to 'an animal or natural object with which a group of persons acknowledge a definite relationship'; and
- a 'totemic clan (or tribe) is a clan (or tribe) whose members possess in common a particular totem or set of totems'—at [320].

His Honour commented on 'the unsatisfactory way in which the issues here have come forward for resolution' but thought it 'fair to say' that:

> [T]otems were a small aspect of the Applicant's case and, to the extent that it was relied upon to illustrate the pleaded point, it satisfied that purpose. The most that the Applicant wished to derive additionally from it was ... that the situation today in relation to totemism has not changed its roots or origin and what remains visible is a set of customs and laws about totems that "are meaningful in accordance with the present state of their regional variations and which remain acknowledged and observed as such". The success enjoyed in demonstrating this was mixed to say the least—at [322].

However, totems and clans were significant to the 'one society' issue and drew 'considerable attention' from the state and the Commonwealth—at [323].

After a brief review of the evidence, Finn J found that:

- while the Eastern Islands had, and have, a system of tribal totems, the 'real issue is whether there is one or more systems of clan (or tribe) totemism in the Strait';
- if totemism was once 'a key system of social referencing', the Islander evidence 'now reveals clan totemism in varying states of degeneration and decay across the Strait';
- there was 'almost a complete absence ... of evidence of actual contemporary use of totems as a means to connect Islanders from different communities';
- the evidence did not permit 'a positive finding ... that there is today a shared and vital body of laws and customs relating to totem clans which are [sic] acknowledged and observed by the claim group';
- the lack of evidence also precluded 'a positive finding that there were differing systems of laws and customs relating to totems amongst the island communities ... that were so significant ... in the social organisation of each ... community as to negate any reasonable finding that there was one society ';
- what the evidence did demonstrate was 'a cultural orientation towards the sea'—at [330] to [331], [337], [356] to [357].

Permission requirement

Although the applicant made no specific submissions on this issue, his Honour thought it significant:

> [I]f only because, commercial activity apart, the receiving of "permission" when taking resources from another Island community's land or waters is the accepted commonplace for Islanders across Torres Strait—at [295].

Two 'rationales' for the permission requirement were identified:

- 'a community has the right to deny access to their marine territory'; or
- it is 'an expression of *gud pasin* – of courtesy and respect'—at [297].

It was noted that recognition of the permission requirement had been negatively impacted by the commercial marine industries in the area. However, Finn J was satisfied that:

- the requirement 'still has purchase in relation to non-commercial takings by Islanders';
- seeking permission 'can properly be seen as acknowledging laws and customs that relate to another's land and marine territories';
- the permission requirement did not cease 'to be embodied in the Islanders' laws and customs because it is disregarded by, and cannot be enforced against, strangers to their society'—at [299].

Elders

On the evidence, the court was satisfied that: '[T]here is a body of traditional laws and customs relating to elders. It is common across Torres Strait. And ... it supports the Applicant's case'. Among other things, it was noted that:

- the 'phenomenon of "elders" was, and is to be found on each inhabited island community' and 'elderhood is a status' which is esteemed;
- it did not necessarily mean specifically elder but, rather, 'big or great person', i.e. 'social importance and individual strength of character were also determining factors';
- authority structures for each island depended 'on two cross-cutting aspects of social organisation', i.e. family identities and elders;
- the evidence overwhelmingly established that elders are the authorities who, to the extent necessary, interpret, apply and give effect to the laws and customs of their particular communities—at [303] to [305] and [309].

Geography – the reach of the marine territories

According to Finn J:

> The great difficulty in dealing with the Applicant's case is that it has been over-conceptualised and divorced from the environment to which it relates. What needs to be emphasised is that the issue of ownership and inheritance concerns marine areas not simply land. Notions of occupation and use have to accommodate themselves appropriately to that environment. Equally, the Islander relationship with their respective marine areas is not, and need not be, "primarily a spiritual affair" ... . Yet it has no less a reality to them for that, as the Islander evidence attests. The Islanders clearly have a deep and historically laden knowledge of their respective marine environments. These permeate their songs and dances. The Applicant in oral submissions contends that "occupation" in Torres Strait ties up a people's history and locates their identity as well as simply reflecting present use by a present generation. It entails a "cultural occupation". There is justice in this characterisation. Distinctly, the Islanders actual use and occupation of their areas has in very large measure been purposeful – to hunt, gather etc. It has varied, and I anticipate will continue to vary, over time ... . It has to be seen and evaluated in that light. Equally their need to roam distantly has been tempered by what was available close to hand. So, for example, when Sophie Luffman from Mabuiag was asked whether she had ever needed to go to Gebar to fish, she replied she did not: "[b]ecause our reefs are plentiful"—at [251].

The court also noted that:

- the depth of the marine knowledge of the Islanders 'cannot be understated particularly in respect of areas falling within a particular Island community's own marine territory and, often, its cluster group's territory'; and
- it was appreciated that the Islanders' knowledge of the sea, along with their long and continuing occupation and use of islands and the sea, represented what they would say were their 'credentials of ownership'—at [380].

In a 'précises' of the 'geography issue', Finn J noted that:

- 'each island community has rights over resources that occur in its specific reef and water areas';
- Islander claims to traditional marine territories 'are founded on their long term occupation and use (referred to in evidence as 'prior occupation of ancestors') of the islands and waters of the Strait;
- in 'delimiting the traditional marine areas of a community (and of its members), pragmatic rules and compromises have been employed', e.g. principles of

'adjacency and proximity' or 'spatial projection' as an explanation of 'ownership rights extending from the shore';
- while 'historic placenames attached to particular islands, reefs, cays and rocks do not of themselves prove ownership of a place', there was evidence suggesting 'they may well in their context confirm ancestral connections with such places';
- there was 'both a large body of historical evidence of traditional Islander use ... and occupation of the marine areas ... and the continuation, albeit diminished, of such use and occupation in modern times'—at [253].

Finn J was satisfied that 'the territorial extent of native title ... was, and is, determined both through the Islanders' laws and customs and by criteria and indicia which emanate from, and effectuate, those laws'. It was found that the 'fundamental criteria of ownership of a place' is 'ancestral occupation and use of that place and subsequent continuing Islander acceptance thereof'—at [598] and [611].

The following matters were said to be 'beyond serious question', including:
- the 'primary holding groups of marine estates are the group members of the individual island communities';
- these estates 'are held severally by an island community or, for certain areas, shared' and 'radiate out' from the inhabited islands 'which provide the primary point from which the extent of the estates are respectively measured';
- on the evidence, there is 'no land-sea dichotomy', i.e. the estates are 'spatially projected out from the shores; they do not stop at the edge of fringing reefs or when deep waters are met' and 'deep waters are claimed and used' just as the shallows are;
- 'save for the extremities of the claim area, a "tenure blanket" covers the Torres Strait', i.e. each estate 'extends outwards until it meets the estate of another community in what characteristically is a shared area', there are no 'gaps' between the marine estates and everything 'is considered to be owned';
- there is 'no "commons" open to all' but 'certain areas may be widely shared', either via shared ownership or 'more commonly, shared use by a number of communities';
- the Island communities 'have had, and do have, differential regard for the areas of their marine estates as they radiate outwards', i.e. the nearer to shore, the 'greater the intensity of feeling about defending one's estate' whereas the further from shore, the more easily overlapping or shared rights are accepted—at [638] to [640], [642].

Ancestral occupation

'Emplacement' (or ownership) rights require prior ancestral 'occupation', a concept that gave rise to some obvious difficulties when used in its conventional sense in relation to sea areas. However, Finn J was satisfied that: 'The meaning to be given this term has to be related to the marine context in which it has to do its work'—at [645].

Connection

Finn J found that the requirements of s. 223(1)(b) of the NTA were satisfied because:

> [T]he Islander's have acknowledged and observed their laws and customs since annexation and moreover have substantially used and exploited their respective areas since annexation—at [656].

As was noted:

> Islander knowledge of areas, when coupled with the deep and transmitted sea knowledge that many of them possess, is itself a potent indicator of connection, and continuing connection at that, to their marine estates – the more so because under their laws and customs they have, and do exercise, traditional rights to use and forage there ... , albeit they do not do so in all parts of it. ... . A community's ownership of the resources of its area is limited to what is within, or is caught within, that area. There was much evidence relating to this, to the obligation of *gud pasin* that can arise if a dugong or fish is taken in another's area, and to obligations not to waste, and to conserve, marine resources.
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> Even more compelling, knowledge of the boundaries of one's estate and knowledge of the areas of shared ownership or use with others marks out where one can go as of right and where one needs permission. The laws and customs on permission and, relatedly, on *ailan pasin* in its marine aspects, connect Islanders directly to their own estates and, in the case of permission, constitutes an acknowledgement of what is required if another's community's estate is to be used in accordance with laws and customs. The observance of these laws and customs involves "the continuing internal and external assertion by [the claimant community] of its traditional relationship to the country defined by its laws and customs"—at [649] to [650], referring to *Sampi v Western Australia* [2005] FCA 777 at [1079].

The state's contention that the evidence of use did not address connection to distant areas was rejected, with Finn J finding (among other things) that:

- there was 'a very significant body of evidence of use of areas quite distant from inhabited islands but within what are claimed to be owned or shared areas';
- the Islanders' laws and customs, and the exercise of rights and interests possessed under them, 'are markedly utilitarian in character';
- in this case, the laws and customs are 'premised upon the "essentially maritime character" of the Islander's occupation of their respective marine areas';
- 'in some measure', those laws and customs 'address the Islanders' use and exploitation of their own and others' areas (thus connecting them to their areas)';
- however, the laws and customs do not prescribe the actual places of use for the utilitarian reasons noted, i.e. the Islander's 'sea knowledge, their needs, the marine technology available to them, etc will dictate the patterns of use of their estates from time to time'—at [652] to [655].

Claim area extremities

There was a difficulty in defining the extent of the coverage of the rights and interests at the extremities of the claim and:

> The matter is further complicated ... because some, though not all, of the problem areas lie beyond the Seabed and the Fisheries Jurisdiction Lines agreed in the PNG Treaty. In consequence, I need here to differentiate between the areas in which native title can be

recognised under the NT Act, and the relevant island communities' marine estates under their laws and customs—at [660].

[The 'PNG Treaty' is the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*.]

The second issue (i.e. the relevant island communities' marine estates under their laws and customs) was dealt with first on a region by region basis. After dealing with these 'problem areas' at the perimeter of the claim, his Honour created a map (Attachment 8 to the reasons for judgment) to identify, in a 'necessarily' inexact manner, 'the exclusive and shared marine estates of the individual island communities', with 'the balance of the locations of the claim area's perimeters is indicated there'. The court conducted the exercise to ensure the 'tenure blanket' covering the Strait was 'intact'—at [641], [659] to [685].

Sovereignty and recognition of native title

In relation to 'the factual foundation of this issue', it was noted that:

- British sovereignty was acquired over all islands lying within 60 miles of the coasts of Queensland and over their respective three nautical mile territorial seas in 1872 and then, in 1879, sovereignty was acquired over the remaining islands relevant to this case and the territorial waters of those islands;
- sovereignty over the territorial seas passed to the Commonwealth on federation;
- the baselines from which the territorial seas surrounding the islands is measured were extended by the Commonwealth in 1983 and again in 2006;
- in 1990, the territorial sea was extended from three nautical miles to 12 nautical miles;
- therefore, there were five separate dates spanning over 130 years in which British (then Australian) sovereignty was 'acquired over distinct areas of territorial seas, the airspace over them and their respective seabeds and subsoil';
- in 1985, the PNG Treaty came into effect, thereby 'settling the seabed boundary lines between the two countries' and (among other things) providing for Australian fisheries jurisdiction;
- in July 1994 a proclamation under the *Seas and Submerged Lands Act 1973* (Cwlth) (SSL Act) set the outer limits of the EEZ—at [686] to [698].

It was also noted (among other things) that:

- the SSL Act and the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS), 'articles of which are implemented or otherwise given effect in the SSL Act', recognise and regulate Australia's sovereignty over its territorial seas, along with its sovereign rights and rights of control 'beyond those seas';
- by s. 10A of the SSL Act, 'the rights and jurisdiction' of Australia in its EEZ are 'vested in and exercisable by the Crown in right of the Commonwealth';
- sections 223 and 225 of the NTA indicate it is 'predicated' on 'the possibility that native title rights and interests may subsist in "waters"';
- section 253 of the NTA defines 'waters' to include 'the sea' and 'the bed or subsoil under, or airspace over, any waters' and 'coastal sea' to include 'the

territorial sea of Australia ... and includes the airspace over, and the sea-bed and subsoil beneath, any such sea'—at [690], [694] and [702].

As a result of the 'progressive extension' of Australia's territorial seas and then the assertion of sovereign rights over the EEZ, the Commonwealth submitted that two issues were raised that were not 'covered directly by binding authority':

- whether the common law of Australia 'will only recognise native title rights and interests in water to the limits of the Territorial waters as they exist from time to time' and 'cannot recognise such rights and interests beyond that limit in the adjacent EEZ' (Issue 1);
- whether, when sovereignty was acquired over the Torres Strait Islands, the Islanders' traditional law-making system could thereafter 'validly create new rights, duties or interests in areas not yet subject to Imperial or Commonwealth sovereignty but which subsequently came under such sovereignty'(Issue 2)—at [703] to [705].

On the facts, it had been found that Islander marine estates extended into the Exclusive Economic Zone (EEZ) in two areas—at [712].

Issue 1 – territorial seas limitation

His Honour considered this question at length, noting (among other things):

- the sovereignty acquired over the territorial seas 'was the right and power to govern that part of the globe', an acquisition 'that occurred by operation of international law and was subject to such qualifications as were necessitated by evolving international law (in particular in relation to the right of innocent passage)';
- it was clear from the provisions of the NTA that Parliament contemplated native title might be recognised in the EEZ by the common law;
- this was reflected in (among other things) s. 6, which extended the provisions of the NTA 'to any waters over which Australia asserts sovereign rights' under the SSL Act, which in turn followed from the rights in the EEZ vested in the Commonwealth by s. 10A of the SSL Act, which UNCLOS described as 'sovereign rights'—at [714] to [716].

In relation to the EEZ:

- it is well-accepted that the EEZ regime is *sui generis*, i.e. it is not an extension of the territorial sea, full sovereignty was not given to the coastal States and it is not 'a modified version of the high seas regime';
- as a result, UNCLOS indicates that the EEZ is subject to 'the specific legal regime' established in Part V of that convention, the complexity of which has been noted;
- while there is some tension in relation to that regime, what was important 'for present purposes' is that it has led to almost exclusive access to resources and regulation being based on coastal State jurisdiction—at [719].

In particular, the fact that whether or not the costal State jurisdiction was attracted depended largely on the particular maritime activity involved under the regime

established in Part V of UNCLOS was emphasised by Finn J, with his Honour going on to say that:

> [T]he native title rights and interests ... are for presently relevant purposes, rights to access and take marine resources. That activity falls squarely within one of the forms of marine activity which are the subject of Australia's sovereign rights under Art 56(1)(a) of ... [UNCLOS], ie "exploiting ... the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil"—at [721].

It was then noted that 'international law has not devolved .... the authority for regulating' the EEZ 'entirely to coastal States'. Unlike the sovereignty acquired over the territorial seas, this was not 'the right and power to govern' the EEZ and UNCLOS reflected a balancing of interests and a qualification of power in relation to the EEZ—at [722].

Were it not for the fact that s. 6 of the NTA 'extended explicitly to any waters over which Australia asserted 'sovereign rights' under the SSL Act, Finn J thought there might have been 'some ground for saying that the EEZ regime did not provide a welcoming environment for the recognition of native title rights'—at [723].

However:

> While the clear legislative intent of s 6 was to make such rights [i.e. the sovereign rights vested in the Commonwealth by s. 10A of the SSL Act] susceptible to a claim of native title rights and interests – at least to the extent that the [native title] rights claimed fell within the ambit of, and were consistent with, the sovereign rights acquired – a claim to native title still had to satisfy the requirements of s 223(1) of the NT Act and, in particular, common law recognition. To reiterate, native title rights find their origin in pre-sovereignty law and custom which are recognised by the common law, not rights and interests which are the creature of the Act—at [724].

It was found that:

- the Islander society's laws and customs were, and are, acknowledged and observed in areas of the EEZ;
- Australia's acquisition of sovereign rights in those parts of the claim area brought about 'an intersection of traditional laws and customs with the common law';
- no less so 'than on a change of sovereignty ... native title rights and interests in the claim area will not be recognised by the common law if inconsistent with the sovereign rights acquired' in the EEZ—at [725], referring to *Fejo v Northern Territory* (1998) 195 CLR 96.

In relation to the parts of the three marine estates that are within the EEZ, the non-exclusive native title rights to 'access, use and take the marine resources of an island community claim group's own and shared areas' are 'acknowledged by the common law ... in Australian territorial waters'. His Honour found that those rights could also be 'acknowledged in relation to the EEZ'. As was noted in coming to this conclusion, rights to use not involving the right to take raised no issue because they 'are not inconsistent with Australia's sovereign rights'. The right to access and take resources, while 'possibly more problematic', was not exclusive and therefore 'not inconsistent

with Australia's sovereign rights'. It also involved 'maritime activities' that fell 'within the ambit of' the sovereign rights already noted—at [727] to [728] and [731].

According to Finn J, the 'potential complication' arose because, while Art 56(1) of UNCLOS gave 'sovereign rights to exploit the natural resources both of the superjacent waters and of the seabed and its subsoil', Art 56(3) required that 'the rights with respect to the seabed and subsoil be exercised in accordance with the Part VI', which relates to the continental shelf. 'Significantly', UNCLOS makes the right to exploit the natural resources of the shelf exclusive 'in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State'. In this context, 'natural resources' includes:

> [N]on-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil—at [728] .

It was found that taking marine resources 'from the superjacent waters of a community's estate in the EEZ would raise no issue of inconsistency for the common law'. Taking resources from the seabed or subsoil might appear to be beyond the scope of recognisable rights and interests because of the 'apparently "exclusive right"' given to the Commonwealth by UNCLOS. However, that provision was 'in the nature of an emphatic affirmation of the extent of a coastal State's rights of control over its continental shelf'. It was intended 'to affirm the extent of' the Commonwealth's sovereign power. 'It does not address property rights as such. Hence it does not raise any issue of inconsistency of rights'. Nor did it 'extinguish native title rights to take from the sea bed and subsoil of the continental shelf'—at [730] to [731].

His Honour concluded that:

> [N]ative title rights and interests can properly be found to exist in waters over which Australia asserts sovereign rights under the SSL Act. This may be a consequence not contemplated by the Convention [UNCLOS]. It was contemplated by the Australian Parliament—at [732].

Issue 2 – Progressive sovereignty and the creation of new rights

The court considered whether it was possible for new native title rights to be created in areas beyond the territorial sovereignty of Australia from time to time. Finn J held that is was possible, noting that:

- in *Yorta Yorta*, it was held that the new native title rights could not be recognised over areas where 'territorial sovereignty had previously been acquired';
- that case did not address the 'capability of a system of laws and customs' that subsisted prior to the assertion of sovereignty 'to create new rights and interests in areas beyond the territorial sovereignty of Australia from time to time'—at [735] and [737].

His Honour went on to say that:

> It would be anomalous and unprincipled ... for the common law to require an Aboriginal or Islander society to be faithful to their laws and customs from the time sovereignty was first acquired over some part of their territory if they are to be found today to have rights and interests under those laws and customs in that part, but to refuse to acknowledge a subsequent accretion to those rights and interests in an area not hitherto the subject of Australian territorial sovereignty ... . If the existence of native title in that later acquired area has to be determined at the time sovereignty is asserted over it, that determination should be made by reference to the situation existing at that time—at [738].

Rights are not held communally

The court held that:

- 'while all of the claim group members are, *in aggregate*, the holders of all the native title rights in the Part A claim area, they do not communally hold those rights and interests';
- while it was convenient to call this a *communal claim*, it was 'inaccurate and not required' by the NTA to 'describe the rights claimed as the "communal rights" of the claim group';
- an 'inference of communal ownership of rights derived from the Islander society's laws and customs' was 'unsustainable';
- in this case, the laws and customs 'determine which "sub-sets" of the wider Islander society' have interests in particular areas;
- 'by those laws and customs, those "sub-sets" have a connection' to their own respective areas—at [542], referring to *Bodney v Bennell* (2008) 167 FCR 84 and *De Rose v South Australia (No 2)* (2005) 145 FCR 290, emphasis in original.

If it was necessary to classify the nature of the native title rights and interests, Finn J would 'put the matter inexactly' by describing them as group rights and interests, with the group in respect of a particular area being 'comprised of the claim group members of the island community – or communities in the case of shared areas – which has emplacement based [ownership] rights in that area'—at [543].

Rights and interests in 'owned or shared' marine territories

The court held that the group members of the respective individual island communities had the following traditional rights in their owned or shared marine territories:

- the rights to access , remain in and use those areas; and
- the right to access resources and to take for any purpose resources in those areas—at [540].

His Honour held that none of those rights conferred possession, occupation or use of the waters to the exclusion of others, nor any rights to control the conduct of others—at [540].

Reciprocal rights were not rights 'in relation to land or waters'

Finn J was satisfied that there were, under Islander laws and customs, status-based relationships giving rise to rights and obligations that are 'reciprocal in character in

the sense that they would be enjoyed and discharged by one or other of the parties as the situation requires'. However, it was found that these were not rights 'in relation to land or waters' but, rather, 'rights in relation to persons'. Therefore, reciprocity based rights such as these were not native title rights for the purpose of s. 223(1) of the NTA—at [507] to [509].

Right to trade or use for commercial purposes recognised

The Commonwealth contended that any 'right to trade' or 'to use for commercial purposes' could not be recognised by the common law because such a right presupposed exclusive possession of the area concerned.

The Islander evidence was that marine products were and are taken for exchange and sale. His Honour recognised that 'there may be some disagreement about the use of the word "commercial" in this setting'. However, the evidence established 'beyond question' that:

> [T]he Islanders sold marine resources for money – the sea provided their "income" – and after the advent of the marine industries, for some number of the Islanders, this was done regularly and systematically. And it was positively encouraged by the Queensland Government ... . The Islanders were, and are, trading fish.
>
> The point to be emphasised is that the fundamental resource-related right of use ... was the right to take. Use of what was taken was unconstrained, save by considerations of respect, conservation and the avoidance of waste—at [528] to [529].

Finn J was unable to accept that, on principle, the common law would not recognise a right to take for trading or commercial purposes absent a right to exclusive possession 'if it purports to state a rule of universal application'. While it was true that a right to exclusive possession 'may carry with it the right to exploit the area's resources in trade and commerce', it was 'by no means apparent' to his Honour:

> [A]t least in relation to the sea – and particularly in waters with the abundant resources Torres Strait has – ... absent a legislative regime to the contrary, why marine resources may not be exploited by those who care to do so for trading and commercial purposes, though they lack entirely any exclusive right to possession of the area or do not purport to assert any such right—at [752].

The contention that exclusive possession was required to support such a right was 'belied by the common law experience in this country'. Prior to federation, only the Imperial Crown made any assertion of sovereignty over the area beyond low-water mark but, as was noted in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [59]: '[A]t no time before federation did the Imperial authorities assert any claim of ownership to the territorial seas or sea-bed'. Still, 'marine resources of the territorial seas were ... exploited for commercial and trading purposes ... without ... the need to have, exclusive possession of the areas exploited'. Further, no restrictions on the quantity or size of fish that could be take under the common law public right to fish were imposed—at [753] to [754], referring to various authorities.

It was noted that:

> The Islander's laws and customs regard the waters and resources of the marine areas as belonging *in situ* to the respective groups of native title holders. I need not consider here the extent to which the common law would not recognise this claimed ownership as such. No such native title right is claimed here. What is claimed is a non-exclusive right to take—at [756].

On that basis: 'The common law would have recognised the claimed [non-exclusive] right to take' for trading or commercial purposes—at [755].

Right to take resources, as applied to sea water, could be recognised

It was contended that, while taking or using the waters of the sea for domestic, non-commercial purposes may not be problematic, the waters of the sea, like all flowing waters, could not be owned at common law. Finn J held that the Islanders' native title right to take 'resources', as applied to waters, was not inconsistent with the common law because:

- the proposition that flowing waters are 'not the subject of property' was flawed because much of the common law concerned inland waters and so was 'complicated' by riparian rights;
- those complications did not exist here because the Islanders' 'land and marine estates ... are seamlessly joined';
- it was not suggested that, at the time of annexation, the native title holders committed any actionable wrong by taking sea water; and
- the Imperial authorities did not, at the time, assert any claim of ownership to the territorial waters or the seabed—at [759] and [760].

Right to 'enter and remain and to use' recognised

The court upheld the state's objections to the claim of a right to 'enter and remain and to use and enjoy' in part. Finn J held that the use of the composite formula 'use and enjoy' might be taken to signify 'possess and occupy'. However, his Honour held that: 'Shorn of the words "and enjoy"', the description of the right was both 'apt and unobjectionable'—at [522].

Right to a livelihood

Finn J rejected the applicant's claim to a right to a livelihood right based upon accessing and taking marine resources because it was 'no more than a doubtless legitimate hope or expectation founded upon the traditional rights to access and take – rights the fragility of which were exposed by annexation'—at [530].

According to his Honour:

> "Livelihood", [as addressed in the evidence] ... reflects a particular conception of place and being – or, to put it crudely and inexactly, a particular Islander psyche. It is an informing or animating principle for what may on fuller analysis be seen to be laws and customs for Native Title Act purposes. But it is not itself a law or custom. Still less is it a right possessed under laws and customs—at [293].

'Protect rights' inconsistent with common law, incomprehensible in court

The claimed non-exclusive rights to protect resources, protect 'the habitat of resources' and to protect places of importance were found to have 'a predominantly control rationale'. As such, they were inconsistent with public rights at common law and so could not be recognised in a native title determination. However, ultimately, the 'protect rights' had not been 'sufficiently identified as rights possessed under the Islanders' laws and customs, let alone ones that could be translated into terms comprehensible in the courts'—at [279], [535], [539] and [761] to [762].

The 'fundamental' objection to the recognition was that:

> [A] native title right which will not be recognised because of inconsistency with a common law right, cannot be saved by the bare expedient of acknowledging the common law right and by qualifying the native title right by making it subject to the common law right. ... [T]he protect rights, in the broad terms in which they have been cast, still have the purpose of control at their core, notwithstanding that illustrations may be able to be given of their being able to be used in some situations consistently with the common law ... . It is for this reason that the Applicant has not been able to give a coherent account of "the class of non-exclusive protect rights—at [762].

However, his Honour did not want to be misunderstood on this issue:

> It may be .... that, separate from protect rights ... premised upon the exercise of direct or indirect control of access and use by others, there are rights in relation to the marine area which are wholly consistent with the common law public rights, and are ones which could be recognised. The Applicant has not ... sought sufficiently to unbundle the rights possessed under the Islanders' laws and customs and to separate out those which could be so recognised—at [538].

Fisheries legislation merely regulates the native title commercial right to fish

The question here was whether the non-exclusive native title right to take marine resources 'can still be used for commercial purposes'. The respondents argued it was extinguished by the relevant statutory fisheries regime. His Honour disagreed, finding that:

> [T]he legislative regimes of the State since 1877, and of the Commonwealth since 1952, concerning fisheries, while of evolving complexity, were regulatory and not prohibitory in character. They were not directed at the underlying rights of the native title holders who were to comply with the regulatory measures imposed if they were to enjoy their native title rights. The various Acts severally or together did not, and do not, evince a clear and plain intention to extinguish in the Part A claim area native title rights to take fish for commercial purposes. They did not abrogate those rights and create new statutory rights to fish—at [765].

Principles applied

His Honour went on to set out the legal principles in relation to extinguishment.

The first was that relevant principle of statutory interpretation in this case was whether or not the legislation said to extinguish the non-exclusive native title right to

take manifested 'a clear and plain intent to do so ... either by express provision in the statute or by necessary implication'—at [768].

Second, his Honour expressed the view that, in the light of the significance now given to 'context' in statutory interpretation:

> [W]here the extinguishment is said to have resulted directly from legislation itself without, for example, the conferral of inconsistent rights on a third party... the absence in contextual material of any indication of a purpose to override native title rights, could ... be of some significance in the interpretation of a statute enacted after the decision in *Mabo [No 2]*—at [770].

Third, a law that merely regulated the enjoyment of native title rights and interest or established a 'regime of control' consistent with the continued enjoyment of those rights and interests does not manifest the requisite intention. Indeed, the regulation of how a right may be exercised presupposes that the right exists—at [771] to [773], referring to *Yanner v Eaton* (1999) 201 CLR 351.

Fourth, and 'importantly ... for present purposes', s. 211(2) of the NTA did not cover hunting, fishing and gathering for *commercial* purposes in the exercise of native title rights and interests, i.e. a native title holder wanting to undertake commercial activities (whether in exercise of a native title right or not) would be required to hold whatever authority 'as may be statutorily prescribed'—at [775].

Fifth, the inconsistency of incidents test was to be applied to determine whether or not the native title rights are inconsistent with rights conferred by statute. There are 'no degrees of inconsistency'. Where there is inconsistency, native title is extinguished to the extent of that inconsistency—at [776].

Sixth, because the 'common law right of fishing in the sea and in tidal navigable rivers' is a public (rather than a proprietary) right, it is 'freely amenable to abrogation or regulation by a competent legislature—at [777] to [778], referring (among others) to *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 and *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.

The statutory context

Finn J conducted an extensive survey of the 'interlocking and complicated legislative regimes that apply to the Torres Strait' by breaking it into:

- state legislation up until 1994;
- the Commonwealth's legislation from 1952 to 1991, excluding the *Torres Strait Fisheries Act 1984* (Cwlth);
- the Commonwealth's and the state's Torres Strait Fisheries Acts 1984, which 'had its provenance in the PNG Treaty'—at [779] to [842].

His Honour then 'confined' his attention in considering these regimes 'in two respects:

- while the applicant's concept of marine resources was 'more extensive that which is connoted by "fish" ... , the almost exclusive focus' had been on fishing and so

'consideration was limited the legislation' dealing with fishing i.e. 'fishing for commercial purposes is, on the evidence, the matter of present controversy';
- the primary focus was on the Commonwealth's *Fisheries Act 1952* and *Torres Strait Fisheries Act 1984* (1984 Act) because, excluding 'a narrow area of internal water' and 'possibly the coastal waters around the islands to the north of the Seabed Jurisdiction Line' [as defined in the PNG Treaty], the law in relation to fisheries that currently applies to the area in which native title rights were found to exist is the *Torres Strait Fisheries Act*—at [843].

Finn J noted seven matters that *were not* in issue:
- it was not contended that the native title right to take marine resources (leaving aside the commercial issue) had been extinguished;
- it was not contended that native title holders were or had been 'legislatively precluded from applying for licences to fish ... for commercial purposes';
- the court was merely asked to note statutes prohibiting native title holders 'absolutely from taking particular marine resources' and that s. 211 had no application in relation to them;
- it was not contended that native title was extinguished by the grant of leases or licences under Queensland statutes that attached exclusive rights to those grants;
- it was not argued that the right to fish for particular marine species for commercial purposes had been extinguished and replaced by a statutory fishing right;
- it was not argued that Islanders may be able to fish for commercial purposes under the Torres Strait Fisheries Act 'to the extent that such fishing was "traditional fishing"', i.e. that it was 'for use in the course of ... traditional activities', referring to PNG Treaty Art 1(l) and (k);
- it was not disputed that Islanders wanting to fish for commercial purposes in the Protected Zone and 'the declared near adjacent areas ... must secure' the required licences and 'if they fish without such licences, they are liable to prosecution'—at [844].

This left 'a narrow and seemingly barren question', which was:

> Notwithstanding that the Islanders can, by seeking the necessary licences, avail of the present fisheries regime operative in the Part A claim area to fish for commercial purposes, have they nonetheless lost a native title right to fish for commercial purposes because of the extent of the rights of regulation and control the Crown in its State and Commonwealth manifestations has progressively arrogated to itself over a more than 130 year period?—at [845]

Distinction between commercial and non-commercial exercise of right

His Honour found that, while the native title right to access and take marine resources was not 'circumscribed by the use to be made of the resource taken':
- for 'present purposes', it was accepted that 'a right to take resources for trading or commercial purposes – whether exclusive or non-exclusive – is a discrete and severable characteristic of a general right to take resources';
- the 'distinction between engaging in an activity for commercial purposes or for non-commercial, private or other purposes ... was from the outset, and remains, a

characteristic of the fisheries legislation considered in this matter' and it is also 'reflected in the differentiation of purposes' in s. 211 of the NTA—at [847].

Features of fisheries legislation – public interest and ministerial discretion

There two 'very discernible and evolving features of the fisheries legislation over time', which were 'clearly enough', interrelated were:

- the 'expansion of the particular public interests' taken into account in 'the design and implementation of legislative schemes to regulate and control fisheries'; and
- the 'changing character of the discretions given in the grant (or refusal) of leases and licences under such legislation'—at [848].

Over time, the legislation became 'increasingly comprehensive – and ... sophisticated – management regimes which had and have as a principal focus, the control and management of commercial fishing'—at [848].

The 'question of interpretation raised ... was whether ... [these regimes] disclosed a clear and plain intent to extinguish native title'. Alternatively, did these regimes:

> [D]o no more than bring Islander fishing for commercial purposes into an aspect of the regulatory regime applied to commercial fishing – ie was the legislative intent it implemented simply to extend the control of commercial fishing ... and not to define "underlying rights"?—at [850].

Finn J decided that the appropriate 'constructional choice' was the one 'more favourable to the retention of the right to fish for commercial purpose .... , there not being a clear and plain intention to extinguish it' given that:

- the 1984 Act did not, 'of its own force seek directly to deny Islander fishing rights for commercial purposes, hence its creation of the community fishing category (although the Act did envisage such fishing might later be subject to licensing requirements'; and
- one of the objectives of that Act was to 'acknowledge and protect, as a management priority, the traditional way of life and *livelihood* of traditional inhabitants, including their rights in relation to traditional fishing'—at [851], emphasis in original.

Further, 'in the distinctive setting' of 1984 Act and assuming, as his Honour did, that native title rights subsisted in Torres Strait when it was enacted:

> [I]t would require particularly strong indications in the Act itself that existing rights were intended to be extinguished, given the markedly beneficial and protective intent of the PNG Treaty and of this Act—at [851] and [852], referring to the Second Reading Speech on the Bill for the 1984 Act.

For example, the requirement under s. 17 of the 1984 Act that, for the first time, Islander boats used for community fishing had to be licensed for commercial fishing did not abrogate the native title right to fish for commercial purposes. Rather, it was 'a measure taken for reasons of fishery management' and was, according to *Yanner* at [115], 'consistent with the continued existence of that right'—at [853].

As to the Queensland legislation, his Honour was satisfied on the evidence that:

> [F]rom 1877 onwards, Queensland fisheries legislation curtailed ... [the public right to fish in territorial waters] in relation to commercial fishing. What it did not do, is extinguish the "commercial fishing" incident of the native title right, save probably in those instances where grants were authorised to be, *and were*, made of particular types of exclusive lease or licence in particular areas [but] ... I have no evidence of such grants in Torres Strait. Judged against the "clear and plain" intention test, I am satisfied that such exclusive grants apart, the structure and character of the management and control scheme of Queensland's legislation was similar to that of the Torres Strait Fisheries Act, save that it did not have the same beneficial aspiration for the traditional inhabitants of the Strait. The Queensland legislation raised, and raises, the same constructional choices as the Torres Strait Fisheries Act does. That choice should be answered in the same way as for that Act—at [857], emphasis in original.

Further, provisions in the state's legislation creating 'specific purpose water reserves for Islanders' did not have 'any real bearing on the extinguishment question [and] ... within their respective provinces were not inconsistent with the native title rights ... found'—at [858].

Conclusion - commercial right to fish survives subject to regulation

It was found that the legislative regimes of the state and the Commonwealth concerning fisheries 'did not, and do not, severally or together evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes'. However:

> To the extent that those regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders' marine estate, or prohibits qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in that estate ... the native title holders must, in enjoying their native title rights, observe the law of the land. This is their obligations as Australian citizens. But complying with those regimes provides them with the opportunity – qualified it may be – to exercise their native title rights—at [861].

Navigation aids were public works

Finn J considered the impact on native title of fourteen navigation aids. Seven were constructed prior to 23 December 1996 and seven after that date. The applicant contended that none of the aids constructed prior to 23 December 1996 amounted to the construction or establishment of any public work and so were not 'previous exclusive possession acts' under s. 23B(7) of the NTA. The contention was, 'remarkably ... whether any of these structures constitute fixtures for the purposes of the ... definition of "public works"' in s. 253. His Honour noted that there was no indication in the NTA that 'fixture' had anything more that the normal common law meaning and that:

> For present purposes it is sufficient if I say of the common law that its concern is with when material objects, physically attached to land, are regarded as having in law become land by annexation to it—at [875]

Further:

> The term "fixture" ... must be construed purposively paying due regard to the fact that the "structures" to which the s 253 definition refers are public ones; are likely to have some degree of permanence *in situ*; and serve public purposes—at [879].

In determining whether the navigation aids were fixtures, it should (to the extent possible) be borne in mind that they were 'manifestly' intended to 'promote a significant public purpose'—at [880].

It was 'well accepted' that whether an object became a fixture by annexation depended on 'the degree of annexation and the object (or purpose) of the annexation', which turned on 'the particular circumstances of each case'. Finn J acknowledged that this was not always the most helpful of tests. However, this was 'a plain case'. Applying the principles of degree and object of annexation to the navigation aids led 'inevitably to the conclusion' that they 'had the characteristics of fixtures' i.e. each was firmly affixed to rocks, reefs and the like and each was likely to remain in place for 'an indefinite or substantial period'. This, whether they were owned by the Commonwealth or the state, was 'sufficient' to support a finding that they were public works—at [881] to [883].

Extended definition of a public work – s. 251D

The parties were in dispute as to what might constitute 'any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the aids to navigation' pursuant to s. 251D of the NTA. Finn J accepted that a '150 metre' rule espoused by an expert witness for the Commonwealth seemed reasonable for navigation aids constructed on the seaward side of the highest, or where applicable, lowest astronomical tide prior to 24 December 1994—at [891].

However, his Honour was not prepared to apply this approach to those situated above the highest astronomical tide (referred to as the 'dry site' aids) because, while these may have been situated outside the claim area, use of 'adjacent sea areas seaward of the mean high water mark' was required 'for their construction, operation and maintenance' and so 'native title rights were extinguished in nearby sea areas of each site'. However, Finn J was 'in no position to determine those areas' and the matter was 'complicated by the consideration that the seaward-side extinguishment could well have been – and for at least three probably was – an extension of landside extinguishment':

> Yet, I am informed that in the three land consent determinations [adjacent to the dry site aids] no account appears to have been taken of this. For this reason it would seem appropriate that, if the area of seaside extinguishment is to be examined in the future, so also should the landside question, the consent determinations notwithstanding. It may well be the case that the consent determinations extend to areas in which extinguishment

has occurred and which ought not have been included in any claimant application—at [899], referring to ss. 13(4), 13(5) and 61A(2).

Non-extinguishment principle has 'spatial and temporal' dimensions

His Honour noted that the effect of the seven navigation aids constructed or established after 23 December 1996 was governed by the future act regime (i.e. s. 24KA for those on an onshore place and s. 24NA for those on an offshore place). Acts falling within the scope of these provisions are 'deemed to be valid' and the non-extinguishment principle found in s. 238 applies to them—at [901] and [904].

The Commonwealth argued that for the purposes of s. 238, the creation and operation of the navigational aids was 'of necessity' wholly inconsistent with the continued existence, enjoyment or exercise of native title rights and interests in the areas occupied by the navigational aids and so native title would be wholly suppressed—at [907].

Finn J disagreed, finding that: 'Section 238 has both a spatial and a temporal dimension'. In this case, the application of the non-extinguishment principle meant that:

> [T]he native title rights cannot be exercised in the area taken up by the footprint and vertical mass in the water of the ... [navigational aid] itself for as long as it is *in situ*; they cannot be exercised in the area necessarily required for the construction of the ... [navigational aid], but can be after the construction area has been cleared; they will not be able to be used when a vessel is anchored adjacent to the site as part of the ... maintenance/repair program or ad hoc, but can be once it sails on completion of its task—at [909].

It would, in his Honours view, 'be quite inconsistent' with the intention of s. 238 to sterilise native title rights over the operational footprint of the navigations aids 'indefinitely ... because that area is visited for maintenance purposes every two years'. This was 'a quite unreasonable construction' of s. 238 in that it converted 'a transitory inconsistency into an indefinite one'—at [910].

Finn J thought that 'a more sensitively calibrated approach to affection of native title ... should ... be taken to "future acts" for s 24NA purposes' than that expressed in 'public works extinguishment' i.e. the confirmation of extinguishment provisions such as s. 23B—at [[912].

Authorisation defective, s. 84D invoked

The State and the Commonwealth indicated that authorisation was an issue although made plain they did not want the claim fail on that account. The Torres Strait Regional Authority had, under ss. 203B(1)(b) and 203BE(1)(a), certified the application. However, neither the Form 1 nor the accompanying affidavits made it clear which of the two possible authorisation processes set out in s. 251B had been invoked. Finn J held that the applicant was not, on the facts, authorised as required by s. 251B—at [928] to [929].

Earlier, it had been noted that s. 84D was introduced by the *Native Title Amendment (Technical Amendments) Act* 2007 (Cwlth) because:

> While proper authorisation was "very important", there could be circumstances in which it could be in the interests of justice for the Court to continue to hear and determine a defectively authorised application. A relevant factor in deciding so to continue would be that the application had already progressed to trial—at [918].

His Honour was satisfied that this claim 'had been prosecuted to all but finality and successfully so'. In those circumstances: 'Justice would be denied if this matter did not proceed to a determination'. Therefore, while the applicant was not, in fact, authorised as required, for the purposes of s. 84D it was in the interests of justice that the application be determined despite the defect in authorisation—at [15], [926] to [933].

The PNG parties

The court made various findings in relation to the PNG parties, including that some should cease to be parties pursuant to s. 84(8) because they no longer had interests that might be affected by a determination in the proceedings. In other cases, it was found there was no basis to conclude that a particular family had any customary rights and interests in the claim area—at [963], [966], [968] to [970] and [985] to [986].

Orders

Finn J ordered an agreed draft determination giving effect to the reasons of the court should be filed or, absent agreement, a draft determination should be filed by the applicant, with the respondents file submissions. The proceedings were adjourned to 30 July 2010 for the making of final orders.

Postscript

When the matter came before the court on 30 July 2010, no agreed draft determination had been reached. Finn J made directions for further drafting and mapping to be undertaken and provided to the court. A native title determination was eventually made on 23 August 2010.