

Party status under s. 84(5) — no interest that may be affected

***Buru and Warul Kawa People v Queensland* [2003] FCA 1435**

Cooper J, 10 December 2003

Issue

This case deals with a notice of motion seeking joinder of a party under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA). As it was found that the person seeking to be joined did not have an interest that may be affected by a determination of native title in this case, the application under s. 84(5) was dismissed.

Background

The application for determination of native title in this matter related to islands in the Torres Strait. All but one of the islands were reserved for departmental purposes, and vested in and placed under the control of the Corporation of the Director of Aboriginal and Islanders Advancement as trustee. The remaining island was unallocated state land.

Dennis Fritz filed a notice of motion seeking to be joined as an interested party to the claimant application, with an affidavit in support stating:

- he had been a party to an earlier claimant application in respect of two of the islands, which had been discontinued;
- he had an interest in the area of sacred ground where his ancestor was buried and by virtue of an ancestor's share in a coconut and pearl lease on one of the islands and that those interests were acknowledged by traditional elders of the region; and
- documents filed in the Federal Court on 6 October 1998 supported that interest. (It was later revealed that the documents were filed in relation to the Torres Strait Regional Sea Claim.)

During the hearing of this matter, Mr Fritz raised additional interests stating that he had fishing interests in the area and also a legal interest to reside permanently on one of the islands given to him by certain elders under s. 12(2) of the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act 1978* (Cwlth) (Commonwealth Act). Mr Fritz also claimed an interest via recreational use—at [8] to [25].

The evidence indicated that in the period 1985 to 1998 Mr Fritz was not in the Torres Strait—at [26].

Justice Cooper noted that Mr Fritz had previously sought to claim proprietary rights based on personal and customary attachment to two of the islands as either a non-Indigenous person or by succession from a German national who lived on one of them. Those claims were dismissed by Cooper J and that decision was upheld on

appeal—at [7], referring to *Fritz v Torres Strait Regional Authority* [1999] FCA 183 and *Fritz v Torres Strait Regional Authority* [2000] FCA 1461.

Requisite interest for purposes of s. 84(5)

Citing the decision of the Full Court in *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1, Cooper J made the following observations as to the requisite interest for the purposes of s. 84(5):

- it does not have to be legal or proprietary in nature;
- it must have a cogent and rational connection with the subject land which is capable of clear definition and which is genuine and not indirect or lacking substance;
- it must have such a character that it may be affected in a demonstrable way by a determination of native title;
- interests which are merely intellectual or emotional considerations in relations to a claimed area are not sufficient;
- the question of a sufficient interest for the purposes of s. 84(5) is to be determined by reference to, and will turn on, the facts of each case having regard to the interests claimed and the effect of any determination of native title on that interest; and
- an occasional, rather than a habitual or regular, user of an area is unlikely to have standing as a party— at [5] and [6].

Cooper J held the islands were not reserves under the *Torres Strait Islanders Act 1971* (Qld), nor ‘trust areas’ under the *Community Services (Torres Strait) Act 1984* (Qld) and at all material times were under the jurisdiction of the Torres Shire Council. It followed that the islands were not ‘islander reserves’ under the Commonwealth Act and the power of a council under s. 12(2) of the Commonwealth Act had no operation in respect of the relevant islands. There was nothing in the circumstances to support a right of Mr Fritz under s. 12(2) of the Commonwealth Act to reside, visit or engage on activities on any of the islands—at [16].

His Honour found that:

- Mr Fritz had made no recreational use of the islands since the 1970s to suggest an identifiable interest in respect of that use;
- Mr Fritz had no interest capable of a clear definition which involves a rational and cogent connection with the islands which will be affected by a determination of native title;
- the issue relating to the presence of the grave of an ancestor was, at best, an emotional one, and not one shown as being affected by any determination of native title;
- Mr Fritz was not a habitual or regular user of the islands for any purpose and, having regard to his past use, any present or past use is now remote and so insubstantial as to be speculative;
- the claim to the interest was not genuine but, rather, an attempt, by exercising a party's right to negotiate a consent determination, to seek to obtain rights for himself in relation to the islands which he does not have, and which he has, through various avenues, sought and failed to obtain; and

- Mr Fritz had no interest personal to himself as a licensed commercial fisherman or otherwise that may be affected by a determination of native title. Further, the Queensland Seafood Industry Association Inc was representing the existing fishermen parties, and if the interest they claim which will be affected is a public right of access over, or use of, any of the area covered by the application, then any like interests of Mr Fritz would be sufficiently represented;
- on that basis, joinder under s. 84(5A) was unnecessary—at [27] to [30].

Decision

The application under s. 84(5) was dismissed.