monograph based on the workshop presentations and discussions; and establishment of an ongoing supportive email network and website for anthropologists working on native title. Possibilities for further workshops were also explored.

The papers and proceedings of the Turning the Tide workshop will hopefully be published as a Special Edition of *Anthropological Forum* in late 2011.

Case Note: *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland*

Federal Court of Australia, Cairns
2 July 2010
Finn J

By Zoe Scanlon, Research Officer, NTRU

Introduction

The Torres Strait Sea Claim was handed down by Finn J in the Federal Court of Australia in Cairns on 2 July 2010. This was a distinctive case as the native title claimants sought a determination of native title rights and interests over a large part of the sea area of the Torres Strait.

Justice Finn held that the claim group held non-exclusive native title rights and interests over approximately 37,800 square kilometres of sea between the Cape York Peninsula and Papua New Guinea.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda stated, 'Today's result is the end of a long process for the people of the Torres Strait and is testament to their resilience and determination'[1] and Torres Shire Councillor, Mr Phillemon Mosby said, 'We've got a special kinship with that water…this is a very significant thing for the people of the Torres Strait….and I know that our ancestors would be very proud of us today.'[2]

Background

Native title was first recognised over the Murray Islands in the Torres Strait in the historic decision of *Mabo v Queensland [No 2]* (1992) 175 CLR 1. Since that time, twenty-two native title consent determinations have been made in relation to the Torres Strait area. This has resulted in native title being recognised over all the inhabited islands and the majority of the uninhabited islands in the region.

In the current proceeding, a group of people constituted by living descendents of a long list of Torres Strait Island Elders sought a determination of native title rights and interests over a large area of sea in the Torres Strait region, between the islands over which native title is already held. The claim was divided into parts A and B. This decision covers part A, which encompasses a larger part of the claim area. Part B is yet to be determined and is constituted by areas over which overlapping native title sea claims exist.

The number of societies

The applicant argued that the members of the native title claim group comprise – as their ancestors at the time of sovereignty comprised – one single society which exists across the Torres Strait. The State argued that there are thirteen societies in the area – each one containing one island community and the Commonwealth argued that four separate societies exist— made up of regional cluster groups of islands.

Justice Finn considered the laws and customs of the Torres Strait Island people, particularly in relation to descent, reciprocity and exchange, the emplacement of social identity by original occupation and subsequent inheritance, territorial

[1] M Gooda, Australian Human Rights Commission, 2 July 2010, http://www.humanrights.gov.au/about/media/media_releases/2010/65_10.html, viewed 15 September, 2010.

[2] S Elks & N Lim, 'Torres Strait ruling a first: native title to cover vast expanse', *The Australian*, 3 July 2010.

control and the right to livelihood, elders, life stages, celebrations and feasts, funerals and mortuary rites, songs, dances and games, totems and clans, *gud pasin* and *ailan pasin* and other laws and customs.

It was found that the evidence supported a conclusion that the Torres Strait Islanders made up one single society before sovereignty, as they acknowledge a single set of traditional laws and customs. Justice Finn found that the communities are linked to each other by common 'domestic' laws and customs in relation to the sea but also by laws and customs that govern the relationships of each community's members with members of another. He acknowledged that the Islanders did not act as an 'integrated polity' but that this was not required. Each island observed and acknowledged a body of traditional laws and customs; that body, however, was a single one. Although there were some local differences in content and applicable laws, Finn J considered that these variances in practices and understanding over time are to be expected where local autonomy is in place.

Justice Finn was critical of the State and Commonwealth in relation to this aspect of the decision, which took up a great deal of argument and evidence before the Court. Justice Finn highlighted the 'irony' here, stating that his conclusion in relation to the native title rights and interests would have been the same, regardless of the number of societies found to exist in the region.

Native title rights and interests

Justice Finn was satisfied that the island communities held the following non-exclusive traditional native title rights to the claim area: the right to access, remain in and use those areas and the right to access resources and take resources for any purpose in those areas. He commented that the claim group is expected to respect their marine territories and the resources within them.

However, following the High Court decision in *Yarmirr*, the common law will not recognise these rights as conferring possession, occupation or use of the waters to the exclusion of others. They do not confer the right to control the conduct of others in the area. This indicates that the right of commercial and non-commercial fishermen to fish in the area continues.

Justice Finn emphasised that the claim group members hold the native title rights and interests 'in aggregate'; they do not hold those rights 'communally'. He clarified that the laws and customs he had found determine which 'sub-sets' of the wider society have a connection to and interests in individual respective parts of the wider claim area.

The right to take resources for commercial purposes

The State suggested that the right to take resources for commercial purposes is an integral part of exclusive possession and cannot be sustained in the absence of a right to occupy an area to the exclusion of all others. Justice Finn did not consider that that rule could be universally applied or that, without a contrary legislative regime, that it was apparent that the marine resources may not be exploited despite lacking an exclusive right to possession of the area. Further, the State couldn't demonstrate a characteristic of the Islanders' laws and customs that required exclusive possession before group members could take resources for commercial purposes. He therefore ruled that the common law recognises the right to take for trading or commercial purposes.

The State and Commonwealth also argued that the legislative regimes of the governments concerning fisheries show a clear and plain intention to extinguish native title. Justice Finn found that the Acts in question were regulatory but not prohibitive and did not demonstrate an intention to extinguish. The regime of control was consistent with the continued enjoyment of native title rights. Justice Finn acknowledged that his view on this issue differed from the views of other judges before him, but considered that he had had the advantage of systematic and extensive submissions on the matter.

Responding to the Courts determination, Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda stated, 'Commercial fishing rights are essential to Indigenous peoples of Australia… Not only are they traditional rights but they are also integral to the economic development of Indigenous communities.'[3]

The right to take water

The State contended that sea water, as with all flowing water, is not capable of being owned at common law and therefore, the right to take such water is inconsistent with the common law and cannot be recognised. Justice Finn found that this position was flawed and noted that much of the jurisprudence on taking water refers to inland water in the context of protecting the rights of riparian owners. He stated that complications like this don't exist in the present matter and found that the right to take water is not inconsistent with the common law.

Spiritual connection

Justice Finn commented that the laws and customs of the Torres Strait Islander communities do not reflect an overarching spiritual connection with the waters, although there are some spiritual beliefs relating to the area. The laws and customs in relation to the seas are, to a large degree, based on considerations of utility and practicality. This fact is notable, as in previous native title decisions, the Court has often focused on the claim group's spiritual connection to the land they were claiming, despite the fact that such connection is not required by the law.

Exclusive economic zone

The rights will also be recognised in Australia's territorial seas in its Exclusive Economic Zone. In some parts of this area, the native title rights and interests are qualified by Australia's treaty with Papua New Guinea which settles the Seabed Boundary Lines between the two countries and provides for Australia's fisheries jurisdiction.

The authorisation issue

When the claim was originally filed, four individuals made up the applicant; each representing the inhabitants of one of the four regional cluster groups in the Torres Strait. At present, only two of those individuals are still alive. Finn J noted that the purpose of the representatives of the claim group was to bring the claim of the native title holders to Court and that their claim had successfully been determined to all but finality. Despite a possible defect in authorisation, Finn J found that it was clearly in the interest of justice that the application be determined and the recognition of the native title holders' rights and interests be acknowledged. The Court was able to make this order through s. 84D(4)(a) of the NTA.

PNG parties

Five parties from Papua New Guinea had been joined as respondents to the application. Satisfied that these parties did not have interests that would be affected by the proceeding, because the native title group only held non-exclusive possession, Finn J ordered, under s. 84(4) of the NTA, that they be removed as parties to the proceeding.

Federal Court of Australia Native Title List of Mediators

By the Federal Court of Australia

The 2009 amendments to the *Native Title Act 1993* (Cth) empowered the Federal Court to consider and apply new approaches to the mediation of native title cases. One fundamental way in which the amendments achieved this was by providing the Court with a discretion as to whom it refers applications for mediation. The presumption that matters should be referred to mediation as soon as practicable after the end of the date of the notification period remains in place.

The Court welcomed this opportunity to expand the range of possible mediators and gave much

[3] M Gooda, Australian Human Rights Commission, 2 July 2010, <http://www.humanrights.gov.au/about/media/media_releases/2010/65_10.html>