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>

consideration to the practicalities of the process to be used to identify, select and appoint a mediator other than the National Native Title Tribunal (the Tribunal) or a Registrar of the Court. What follows is a brief outline of the approach taken by the Court in creating the list and the approach the Court is likely to adopt in the appointment of a mediator.

The Court decided to call for expressions of interest (EOI) from suitably qualified mediators for inclusion on a list of names to be made available to the parties and the Court when considering the referral of a matter or part of a matter to a mediator (other than a member of the Tribunal or a Registrar). The list is best described as one that identifies mediators who would be willing and interested to work within the native title jurisdiction and who have satisfied certain criteria.

The Judges of the Court's Native Title Practice Committee (the Committee) agreed that it was desirable to require the mediator to advise the Court of their capabilities and experience and that the Court would be most interested in expressions of interest from mediators who hold special knowledge or have demonstrated experience in relation to:

- Aboriginal or Torres Strait Islander societies;
- land management;
- dispute resolution; and
- any other class of matters considered by the Chief Justice to have substantial relevance to the nature of the referral.

The Committee took the view that the Court would not assess the individual merits of each potential mediator but would include their stated areas of expertise in the list. Inclusion on the list does not amount to an endorsement of any particular mediator by the Court and for this reason, inclusion on the list should not be used by mediators as a means of self promotion. The EOI confirmed that inclusion on the list does not, of itself, create a contract between the mediator and the Court nor does it guarantee that the mediator will be appointed to a matter.

It is intended the list be reviewed annually to ensure currency however practitioners are invited to express an interest to be included on the list at any time. While satisfying one or more of the criteria was considered to be very important for inclusion in the list, the selection of the person to mediate a particular dispute is a matter preferably decided by the parties having regard to all the features of that dispute. In particular circumstances, it is possible that a person who is not on the Court's list and does not appear to meet the usual criteria concerning capabilities and experience may be appointed if the parties agree. In a situation where the parties cannot agree, the Court may nominate mediators from which the parties are to select or simply appoint a mediator.

The fees paid to a mediator and the contract type will be determined by the nature of the matter and length of commitment involved. For long term management of a matter a mediator will generally be appointed as an acting Registrar via an intermittent contract. If appointed for a particular issue or event, the mediator may be paid at a rate referable to the per diem rate of a member of the Tribunal. Where a prominent person is appointed for, say, evaluation of a claim or a particular legal or factual issue, the Court will generally award an amount up to the daily fee of an acting Supreme Court Judge.

The Court is excited by this initiative and the opportunity it presents to Indigenous Australians, the parties and the Court to achieve the effective resolution of native title cases.

The list is available for viewing on the Federal Court website: http://www.fedcourt.gov.au/litigants/native/litigants_nt_mediator.html. If you have an interest in being included on the list it is recommended you download the expression of interest document for further information, also available at the above address.

If you would like further information about this initiative please email Rebecca Shepherd at rebecca.shepherd@fedcourt.gov.au