

**LEO AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP v COMMONWEALTH OF AUSTRALIA & ORS (B58/2012)**

Court appealed from: Full Court of the Federal Court of Australia  
[2012] FCAFC 25

Date of judgment: 14 March 2012

Date of grant of special leave: 5 October 2012

A native title determination application was filed on 23 November 2001 on behalf of the Torres Strait Regional Seas Claim Group (“the Seas Claim Group”) who are descendants of an extensive list of named ancestors who were themselves Torres Strait Islanders. The principal respondents were the State of Queensland, the Commonwealth of Australia, a large group of people and companies collectively described as “The Commercial Fishing Parties” and a small number of parties from Papua New Guinea. The application sought a determination of native title rights and interests in a large part of the sea area of the Torres Strait. The occupation of the region by the Seas Claim Group and their ancestors was of an essentially maritime character. The sea is an integral presence in the lives and livelihood of the Islander communities which comprise the Seas Claim Group.

At trial the Seas Claim Group contended that at sovereignty the members of the Seas Claim Group and their ancestors were members of one “society” for the purposes of the *Native Title Act 1993* (Cth) (“the Act”). This contention was disputed by the Commonwealth and the State of Queensland. Finn J concluded that there was indeed a single Torres Strait Islander society and that it was the only relevant society.

The Seas Claim Group contended that their native title rights included the taking of fish and other marine resources for sale or trade and that this right had not been extinguished by legislation of the State of Queensland or the Commonwealth of Australia. Finn J accepted this contention, holding that the Seas Claim Group members enjoyed a non-exclusive right “... to access, to remain in and to use their own marine territories or territories shared with another, or other communities ...[and] to access resources and to take for any purpose resources in those territories.” His Honour determined that the Seas Claim Group held native title over the claim area.

The Commonwealth of Australia, the State of Queensland and the Commercial Fishing Parties, appealed against Finn J’s decision, contending that any native title right to fish for trade or exchange (commercial purposes) had long ago been extinguished by controls placed upon commercial fishing in the Torres Strait by State and Commonwealth legislation.

The Full Federal Court (Keane CJ, Mansfield and Dowsett JJ), by majority (Keane CJ and Dowsett J) allowed the appeal. All agreed that a cross-appeal by the Seas Claim Group should be dismissed.

By summons filed on 12 December 2012 the Attorney-General for Western Australia seeks leave to intervene in this matter. Biddy Bunwarrie on behalf of the Warrarn People also seeks leave to intervene, by summons filed on 23 January 2013.

The grounds of appeal include:

- The majority of the Full Court erred in holding that the native title right to take fish and other aquatic life for trade or sale is extinguished in all or any part of the native title area by applicable Queensland and Commonwealth fisheries legislation.
- The Full Court erred in holding that rights held under traditional laws and customs on the basis of a 'reciprocal relationship' with a holder of 'occupation based rights' are not native title rights or interests within the meaning of s 223(1) of the Act.