



National
Native Title
Tribunal



29 October 2009

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Attention: Dr Kathleen Dermody

Dear Dr Dermody

Inquiry into matters relating to the Torres Strait region

I refer to your letter of 17 September 2009.

Thank you for providing the National Native Title Tribunal with an opportunity to make a submission to the inquiry into matters relating to the Torres Strait region.

Enclosed is a brief submission which provides background information in relation to native title issues.

The Tribunal has no specific recommendations to make to the Committee. However, with regard to the effect of the *Torres Strait Treaty* and associated administrative arrangements between Australia and Papua New Guinea, it is suggested that the Committee note that there are presently PNG respondent parties to the Torres Strait Regional Sea Claim under the *Native Title Act 1993*. A number of those respondent parties have asserted before the Federal Court of Australia that they have traditional ties with the people and areas of Torres Strait, yet they understand that they are not entitled to benefit from the freedom of movement privileges under the *Torres Strait Treaty*.

It is hoped that the enclosed brief submission is of some assistance to the Inquiry. The Tribunal would be pleased to assist the Committee further. If you have any questions in relation to this submission or would like to request additional information, please contact Mr Gary Lui, Regional Manager, Cairns, on 07 40481519 or at gary.lui@nntt.gov.au

Yours sincerely

Graeme Neate
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Submission to the 'Inquiry into matters relating to the Torres Strait region' by the Senate Standing Committee on Foreign Affairs, Defence and Trade

29 October 2009

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Introduction

The National Native Title Tribunal (the Tribunal) was established under the *Native Title Act 1993* (Cwlth) (NTA). It is involved, among other things, in facilitating the resolution of native title issues, and the provision of assistance with regard to native title, in the Torres Strait region.

Drawing on that experience, the Tribunal wishes to assist the Inquiry into the matters relating to the Torres Strait Region referred to in the letter from the Committee Secretary to the President of the Tribunal dated 17 September 2009.

The Tribunal does not wish to make any recommendations to the Committee, but provides the following as background information to inform the Committee's deliberations.

Native title in the Torres Strait

Native title was first recognised at Mer (Murray Island) in the Torres Strait as a consequence of the High Court of Australia's decision in *Mabo v Queensland (No 2)*¹. Native title determinations have since been made over all community islands in the Torres Strait. All determinations made in relation to land in the Torres Strait subsequent to the *Mabo* judgment have been made under the NTA and have been made with the consent of all parties.

Native title is an important consideration in all aspects of public policy planning and implementation in the Torres Strait. Native title holders in the Torres Strait have specific procedural rights under the NTA that need to be considered where certain dealings in relation to land or waters in the Torres Strait are contemplated by non-native title holders.

The Tribunal can provide more detailed information regarding the recognition of native title in the Torres Strait. The Tribunal maintains the Register of Native Title Claims, the Register of Indigenous Land Use Agreements and the Register of Native Title Determinations. Each of these registers can be searched and extracts can be provided if required. The Tribunal also provides a geospatial or mapping service to aid parties and the general public in understanding the relationship between native title and the land, waters or seas over which it exists.

Matters relevant to the Inquiry

The Tribunal notes that the Inquiry is particularly concerned with matters relevant to the administration of the *Torres Strait Treaty*, and border protection and security issues concerning the border between Australia and Papua New Guinea (PNG).

¹ *Mabo v Queensland (No 2)* [\(1992\) 175 CLR 1](#)

The *Torres Strait Treaty* provides for the administration of certain matters in the Torres Strait. In the course of mediation of the Torres Strait Regional Sea Claim, the Tribunal has become aware of these matters and some of the issues associated with them.

The Tribunal has conducted mediation, both in the Torres Strait and on mainland Australia, in respect of native title matters in the Torres Strait. The Tribunal has also met with PNG nationals, who are respondent parties to the Torres Strait Regional Sea Claim, on Daru Island and at Massingara Village in the Western Province of the PNG mainland.

Where determinations of native title have been made over areas of land in the Torres Strait, they have included, among the provisions about the 'nature and extent of other interests in relation to the determination area', statements to the following effect:

The interests recognised under 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* signed at Sydney on 18 December 1978 as in force at the date of this order including the interests of indigenous Papua New Guinea persons in having access to the determination area for traditional purposes.

It is in this context and as a result of this experience that the following comments are made.

Torres Strait Regional Sea Claim (the Sea Claim)

Overview: The Sea Claim was filed in the Federal Court on 23 November 2001. It was accepted for registration and details were entered onto the Register of Native Title Claims on 5 July 2002. The claim covers an area of approximately 34,800 square kilometres and is brought by Mr Leo Akiba and Mr George Mye on behalf of the Torres Strait Regional Sea Claim Group.

To assist the Inquiry, a map of the Sea Claim is attached to this submission. More detailed information in relation to the Sea Claim can be provided by the Tribunal upon request.

The claimants do not assert exclusive native title rights over the entire claim area. Considerations in relation to the international law of the sea are relevant, particularly as the Sea Claim incorporates tracts of sea beyond the Australian territorial sea. The Sea Claim also incorporates the 'Top Hat' area established under the *Torres Strait Treaty*.

Because the Sea Claim was not resolved by agreement, it went to a hearing by the Federal Court of Australia. Commencing in September 2008 and continuing from time to time through until 24 July 2009, His Honour Justice Finn heard evidence in this matter. PNG respondent parties were entitled to attend and be heard at these hearings and it is understood that some gave evidence. His Honour's judgement is presently reserved.

PNG respondent parties: The Sea Claim is unique in that non-resident, foreign nationals are respondent parties to the proceeding. Public notification of the application by the Tribunal was

completed on 3 December 2002 and over the course of the notification period a number of PNG citizens were joined as respondent parties to the proceeding. Some appeared to join to represent their individual interests whilst others represent larger groups of people. There are presently seven (7) PNG respondent parties to the application.

In seeking to be joined as respondent parties during the notification period in late 2002, some of the reasons provided were as follows²:

“Some of our traditional rights in the claim area are acknowledged in the Treaty between Australia and PNG, however traditionally we have rights in the claim area that are not recognised in the Treaty - we wish to bring these to the attention of the court.”

“We are of Torres Strait Island descent living in PNG”

“As traditional inhabitants at the region, with rights recognised by the treaty between Australia and PNG, we claim traditional right and interests in the area.”

In the conduct of native title mediation, the Tribunal is empowered to deal with issues which relate to native title and the native title process under the NTA. The issues alluded to in these statements from PNG respondent parties reflect to a large degree the nature of the issues which PNG respondent parties sought, at first, to have addressed through the native title process. In large part, those issues were beyond the scope of mediation under the NTA. The Tribunal could only note these issues and where appropriate, suggest alternative avenues whereby these respondents could pursue their specific concerns further.

Status and standing: The Federal Court has also addressed issues of standing in relation to joinder applications, and relevance with regard to issues and concerns brought before it by PNG respondent parties.

To date, the Tribunal’s most significant engagement with PNG respondent parties arose in response to the orders of His Honour Justice French of the Federal Court (as he then was) made on 20 July 2007. The Tribunal travelled to PNG to conduct meetings with interested PNG nationals. The Tribunal met with various representatives of the PNG respondents in PNG on 20 and 21 August 2007. The objective was to assist the Court to identify the interests or issues of concern to the PNG respondents, and to record current contact details to assist the Court in its communications with these respondents.

On 16 November 2007, His Honour made further orders in relation to the involvement of PNG parties in the proceedings. Order 4 is reproduced below.

² In applying for respondent party status within the notification period to the Federal Court, prospective parties have the option of providing information in the relevant Court form about the basis of their application.

4. A PNG party may **not** raise any question, or make any contention in the sea claim proceeding which relates to the treaty, including, but without being limited to, any question which relates to:
- (a) the basis for formalising the process of the inclusion and non-inclusion of PNG villages in the exchange of notes, in relation to which persons have been or should be acknowledged by the governments of Australia and PNG as taking part, and being accepted, in free movement, to the Torres Strait protected zone for the purposes of the treaty;
 - (b) the absence of reference to any person or village in the exchange of notes;
 - (c) the reference to any person or village in the exchange of notes;
 - (d) whether or not any persons are, or should be acknowledged as being traditional inhabitants, including whether any villages are villages from which traditional inhabitants come;
 - (e) the nature or content of any rights or obligations arising under the treaty; or
 - (f) the meaning or application of any of the articles of the treaty.(emphasis added)

Several other matters have been before the Court concerning the standing of PNG nationals and their desire to become respondent parties to the Sea Claim. Each of these matters addressed the issues associated with the interests of PNG nationals under the *Torres Strait Treaty* and the relevance or otherwise of those issues to the objective of resolving the Sea Claim.

In *Gamogab v Akiba* (2007) 159 FCR 578 a Full Federal Court upheld an appeal by Mr Gamogab against the decision of French J in *Akiba & Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No 2)* (2006) 154 FCR 513, whereby His Honour had exercised his discretion to not allow the application by Mr Gamogab to be joined as a respondent at first instance. Mr Gamogab is presently a respondent party.

In *Akiba and Ors v State of Queensland (No 3)* [2007] FCA 1940 (7 December 2007) Pastor G Dorogori sought to be joined a respondent party. He asserted ownership of certain reefs, seas and waters, however the basis of these assertions and the location of the relevant areas were not clear. In the result the motion to be joined was dismissed on its merits.

Non-native title matters: Over the course of mediation in the Torres Strait, the Tribunal has become aware of the effect of the *Torres Strait Treaty* with regard to management of an array of cross border issues. These issues have been regarded as non-native title issues because they could not and should not be dealt with as part of the native title resolution process.

Having regard to the matters before the Inquiry, the most significant issues raised before the Tribunal relate to the administrative arrangements which permit traditional inhabitants of 13 named PNG villages to have freedom of movement privileges under the Torres Strait Treaty.

The Tribunal advised the Court of the issue noting that the native title process will not resolve the matter of which villages should have the benefit of the *Torres Strait Treaty*. However, a distinction was clear between those PNG respondents who were from villages or areas covered by the administrative arrangements associated with the Treaty, and those who were not.

The Tribunal also advised the Court that at least five of the PNG respondent parties were concerned that they were not regarded as *treaty villages* as a consequence of the exchange of letters between the governments of Australia and Papua New Guinea.

Conclusion

The Tribunal has no specific recommendations to make to the Committee. However, with regard to the effect of the *Torres Strait Treaty* and associated administrative arrangements between Australia and Papua New Guinea, it is suggested that the Committee note that there are presently PNG respondent parties to the Torres Strait Regional Sea Claim. Further, a number of those respondent parties have asserted before the Federal Court of Australia that they have traditional ties with the people and areas of Torres Strait, yet they understand that they are not entitled to benefit from the freedom of movement privileges under the *Torres Strait Treaty*.

It is hoped that this brief submission is of some assistance to the Inquiry. The Tribunal would be pleased to assist the Committee further. If you have any questions in relation to this submission or would like to request additional information, please contact Mr Gary Lui, Regional Manager, Cairns, on 07 40481519 or at gary.lui@nntt.gov.au

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