



# Federal Court of Australia

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## **Akiba & Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No 1) [2006] FCA 1102 (18 August 2006)**

Last Updated: 21 August 2006

### **FEDERAL COURT OF AUSTRALIA**

**Akiba & Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland  
(No 1) [2006] FCA 1102**

**NATIVE TITLE – parties – joinder – local government body – Torres Regional Sea Claim – local government area covering intertidal zones – joinder based on ‘interests’ of Shire Council in relation to exercise of its powers and operational activities – no evidence of infrastructure or activities within the claim area – application for joinder two and a half years after close of notification – adequacy of State Government representation – joinder application refused on discretionary grounds**

*Native Title Act 1993* (Cth)

[Local Government Act 1993](#) (Qld) [s 15](#), [s 18](#), [s 20](#), [s 25](#)

[Community Services \(Torres Strait\) Act 1984](#) (Qld) [s 37](#), [s 38](#)

Local Government (Areas) Regulation 2005

**LEO AKIBA, JOSEPH TABITII, GEORGE MYE AND NAPOLEON WARRIA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM PEOPLE v STATE OF QUEENSLAND AND OTHERS**

**[QUD 6040 OF 2001](#)**

**FRENCH J**  
**18 AUGUST 2006**  
**MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA**  
**QUEENSLAND DISTRICT REGISTRY**

**QUD 6040 OF 2001**

**BETWEEN:**                **LEO AKIBA, JOSEPH TABITII, GEORGE MYE AND  
NAPOLEON WARRIA ON BEHALF OF THE TORRES  
STRAIT REGIONAL SEAS CLAIM PEOPLE**  
                                 **Applicant**

**AND:**                      **STATE OF QUEENSLAND AND OTHERS**  
                                 **Respondent**

**JUDGE:**                 **FRENCH J**  
**DATE OF ORDER:**    **18 AUGUST 2006**  
**WHERE MADE:**        **MELBOURNE**

**THE COURT ORDERS THAT:**

The motion filed 22 June 2005 by the Torres Shire Council is dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA**  
**QUEENSLAND DISTRICT REGISTRY**

**QUD 6040 OF 2001**

**BETWEEN:**

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**AND:**

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**JUDGE:**                 **FRENCH J**  
**DATE:**                 **18 AUGUST 2006**  
**PLACE:**                **MELBOURNE**

**REASONS FOR JUDGMENT**

## Introduction and background

1 On 23 November 2001 a native title determination application was filed in the Brisbane Registry of the Federal Court in the name of four persons representing communities of Islanders in the Torres Strait. The four named applicants and the Island groups they represented were described as follows:

1. *Leo Akiba representing the Top Western Islands.*
2. *Tabitai Joseph representing the Western Islands.*
3. *George Mye representing the Eastern Islands.*
4. *Father Napoleon Warriia representing the Central Islands.'*

The applicants referred to the claim as the 'Torres Strait Regional Seas Claim'. The Torres Strait Island communities, on whose behalf the application is brought, comprise the native title claim group and were collectively designated the Torres Strait Regional Seas Claim Group. The area covered by the application is approximately 44,000 square kilometres in the Torres Strait and the Coral Sea seaward of the high water mark around islands in the Torres Strait. It includes beaches, reclaimed areas and inter-tidal zones.

- 2 For the purposes of defining parts of the Torres Strait which are the subject of the application, the land and waters are divided into two parts, Part A and Part B. Part A claims 'all of the lands, waters, reefs, sandbanks, shoals, seabeds and subsoil on the seaward side of the high water mark contained within' described external boundaries which include the outer limit of the territorial sea of the islands of Aubusi, Boigu, Moimi, Dauan, Kaumag, Saibai; of Anchor Cay and East Cay; of Black Rocks and Bramble Cay; of Deliverance Island and Kerr Islet; of Pearce Cay; of Turnagain Island and of Turu Cay. Part B claims 'the waters on the seaward side of the high water mark, but not the seabed or subsoil, exclusive of the territorial seas, of Aubusi, Boigu, Moimi, Dauan, Kaumag and Saibai', contained within the external boundary so described.
- 3 The native title rights and interests claimed are divided into two parts. The first part covers areas not subject to certain types of 'public rights' or 'previous acts'. In those parts the claim is for exclusive possession. In relation to other areas the native title rights and interests claimed include rights to 'control the access to, and use and enjoyment of, the land and waters and the taking of resources by others' subject to various exceptions.
- 4 Following its public notification, pursuant to the provisions of the [Native Title Act 1993](#) (Cth) (the NTA), the application was referred by the Court to the National Native Title Tribunal (the Tribunal) for mediation on 4 February 2003. At that time a number of parties had been joined as respondents. The State of Queensland was named as a respondent. Other respondents included the Commonwealth of Australia, the Australian Maritime Safety Authority and indigenous interests comprising the Apudaham Land Trust and representatives of the Kaurareg People. The Torres Strait Regional Authority, which is the representative body for the area was joined as a respondent. Also joined were a large number of fishermen, the Queensland Rock Lobster Association and some nationals of Papua New Guinea.
- 5 The matter was allocated to Cooper J as docket judge. On 18 September 2003 Cooper J convened a directions hearing on Thursday Island. His Honour gave directions requiring the applicants, in conjunction with the Tribunal and the State, to prepare and file a program for the mediation of the application by 18 March 2004.

6 On 20 May 2004 his Honour again held a directions hearing on Thursday Island. The applicants were directed to consider any amendments to their application and to file any proposed amended application by 30 November 2004. That order was amended by his Honour on 9 November 2004 and the time limited for amending the application was extended to 29 April 2005.

7 Sadly, his Honour died early in 2005. The matter next came before Deputy District Registrar Connard on 27 June 2005 when the applicants were granted leave to amend their application in terms of a proposed amended application previously filed in 26 May 2005. Also before Deputy District Registrar Connard on that date was a motion, filed on 22 June 2005, by the Torres Shire Council (the Council) seeking its joinder as a party to the proceedings. That motion was adjourned to 27 July 2005. Further directions were given for the filing of affidavits and submissions in relation to the motion. It came on for hearing on 7 July 2006 as an aspect of a general case management directions hearing convened on Thursday Island. The joinder was opposed and after hearing argument, judgment was reserved.

## Statutory framework

8 Section 61 of the NTA makes provision for applications to be made to the Federal Court for native title determination. [Section 63](#) provides that an application filed under [s 61](#) must, as soon as practicable, be given, by the Registrar of the Federal Court to the Native Title Registrar. [Section 66](#) sets out the obligations of the Registrar to give notice of the application. The Registrar is required to give copies of the application to the relevant Minister of a State or Territory where any of the area covered by the application is within the jurisdictional limits of that State or Territory. A copy of the application must also be given to representative bodies for areas which it covered. In addition the Registrar is to give notice containing details of the application to the various classes of persons or bodies set out in [s 66\(3\)](#) which include 'any local government body for any of the area covered by the application ...' (s 66(3)(a)(vi)). The Registrar is required to 'notify the public in the determined way of the application' (s 66(3)(d)).

9 In the case of a claimant application the notice requirements imposed by [s 66\(3\)](#) are not to be complied with until the Registrar has decided, under [s 190A](#), whether or not to accept for registration the claim made in the application (s 66(6)). The notice given under [s 66\(3\)\(a\)\(d\)](#) must specify a date known as the 'notification day' (s 66(8)).

10 The notification provisions are to be read with [s 84](#) of [the Act](#) which deals with parties to proceedings in relation to applications to which [s 61](#) applies. [Section 84](#) provides, inter alia:

*'(1) This section applies to proceedings in relation to applications to which [section 61](#) applies.*

Applicant

*(2) The applicant is a party to the proceedings.*

Affected Persons

*(3) Another person is a party to the proceedings if:*

*(a) any of the following applies:*

*(i) the person is covered by paragraph 66(3)(a);*

*(ii) the person claims to hold native title in relation to land or waters in the area covered by the application;*

*(iii) the person's interests may be affected by a determination in the proceedings; and*

*(b) the person notifies the Federal Court, in writing, within the period specified in the notice under [s 66](#), that the person wants to be a party to the proceeding.*

...

*(5) The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings.*

...

#### Dismissing Parties

*(8) The Federal Court may at any time order that a person, other than the applicant, cease to be a party to the proceedings.*

#### Court to consider dismissing parties

*(9) The Federal Court is to consider making an order under subsection (8) in respect of a person who is a party to the proceedings if the Court is satisfied that:*

*(a) the following apply:*

*(i) the person's interests may be affected by a determination in the proceedings merely because the person has a public right of interest over, or use of, any of the area covered by the application; and*

*(ii) the person's interests are properly represented in the proceedings by another party; or*

*(b) the person never had, or no longer has, interests that may be affected by a determination in the proceedings.'*

### Statutory framework – The Torres Shire Council

11 The Council is a Queensland local government established under the [Local Government Act 1993](#) (Qld) (the LGA). Relevantly that Act provides:

*'15. The local government area is the fundamental geographical basis of Queensland's local government system.*

*16(1) A regulation may declare a part of the State to be a local government area.*

*(2) The regulations may not declare more than 1 local government area for a part of the State.*

17. *There must be a local government for each local government area.*

18(1) *A regulation may declare the class of a local government area.*

(2) *The class of a local government area may be 1 of the following -*

- . city*
- . town*
- . shire.'*

12 [Section 20](#) defines the roles of local government:

*'In exercising its jurisdiction of local government, a local government has –*

*(a) a law-making role for local laws; and*

*(b) an executive role for –*

- (i) adoption and implementation of policy; and*
- (ii) administration of local government; and*
- (iii) enforcement of its local laws.'*

13 Section 25 provides:

*'Each local government has jurisdiction (the "**jurisdiction of local government**") to make local laws for, and otherwise ensure, the good rule and government of, its territorial unit.'*

14 The law-making power of a local government extends to any matter required or permitted to be prescribed under the LGA or another Act or necessary or convenient to be prescribed or exercised for the carrying out or giving effect to, its local laws (s 26 (1)). General powers are conferred on local governments by [s 36](#). They have all the powers of individuals and the powers given to them under the LGA or another Act. Not only may a local government exercise its powers ‘.. inside and outside its territorial unit’ but also, rather surprisingly, ‘... outside the State and outside Australia’ (s 36(4) and (5)).

15 Part 4 of the LGA deals with marine and aquatic matters. A local government may construct, maintain, manage and regulate the use of jetties, breakwaters and ramps in or over tidal waters (s 934(1)(b)). It may also occupy and use foreshore, tidal land or waters to undertake work in exercising those powers (s 934(3)). While a local government occupies or uses foreshore, tidal land or tidal waters they are taken to be in its area (s 934(4)).

16 The Governor in Council is empowered by gazette notice to place a foreshore under the control of the local government of the local government area adjoining the foreshore or, if there be no local government area adjoining it, the local government of a local government area convenient to the foreshore. In such an event the local government may manage and regulate the use of the foreshore and while under its control the foreshore is taken to be in its area (s 936).

17 Under the Local Government (Areas) Regulation 2005 there is a defined local

government called 'Torres' in the Shire class covering an area set out in a map designated LGB123 edition 4. A copy of the plan was before the Court. The external boundary of the Shire of Torres is shown in red. It is sufficient to say for present purposes that the external boundary encompasses a substantial part of the sea comprised in the Torres Strait Regional Seas Claim. The principal northern boundary of the main local government area of the Torres Shire is defined by the seabed jurisdiction line. The eastern boundary is defined by the outer limits of the Great Barrier Reef. The western boundary follows the line of longitude 141deg.00'04'E until it intersects the 'seabed jurisdiction line'. North of the 'seabed jurisdiction line' the local government area includes waters around Australian cays and islands. The map notes that 'the local government area comprises the mainland and all islands above their respective sea-shores within the encompassed area' and that it '... includes the Australian islands above their respective lowest astronomical tides north of the seabed jurisdiction line'. The local government area is stated to be 'exclusive of any Islander Area excluded under the [Community Services \(Torres Strait\) Act](#)'.

- 18 In an affidavit sworn on 10 October 2005 David Brown, the Acting Chief Executive Officer of the Council, said that above the 'seabed jurisdiction line' the Council's local government area extends to the 'lowest astronomical tide. Below that line, it extends to the high water mark'. Because the Torres Strait Regional Seas Claim covers land and water seaward of the high water mark, the Council's local government area overlaps the claim area above the 'seabed jurisdiction line' and is adjacent to it below that line. Below that line the Council is said to exercise powers in respect of the intertidal areas including the construction and maintenance of breakwaters, boat ramps and beach protection.

### **Torres Shire Council Local Law Number 9 (Jetties, barge loading ramps and boat ramps)**

- 19 The Torres Shire Council has enacted a local law relating to jetties, barge loading ramps and boat ramps. Its objects are to regulate the use of jetties, barge loading ramps and boat ramps and the vessels and vehicles using them and to regulate the conduct of persons on such structures (reg 2). Regulation 6 relates to the use of such facilities by private vessels, the maximum vertical loads that can be applied to a jetty (reg 7), the use of vehicles on such structures (reg 8) and the behaviour of individuals on such structures (reg 9).

### **Statutory framework – Island councils**

- 20 Various of the islands in the Torres Strait have a form of local government authority on the island established as Island Councils pursuant to the [Community Services \(Torres Strait\) Act 1984](#) (Qld). [Sections 37](#) and [38](#) of that Act provide:

*'37(1) A regulation may declare a part of the State to be a council area.*

*(2) However, a regulation may not-*

*(a) declare more than 1 council area for a part of the State; or*

*(b) declare a council area for a part of the State that is, or is included in –*

*(i) a local government area under the [Local Government Act](#)*

[1993](#); or  
(ii) the area of the City of Brisbane under the [City of Brisbane Act 1924](#).

38. *There must be an Island Council for each council area.*'

21 The Community Services (Torres Strait) Regulation 1998 declares council areas for the various islands. This is effected by regs 64A read with Schedule 1A. Schedule 1A sets out in column 1 the relevant part of the State. In column 2 it sets out the name of the designated council area. In each case the part of the State is defined by reference to a Deed of Grant of the land in the island to the relevant Island Council, effected in each case under a Deed of Grant in Trust. By way of example, the Saibai Island Council which is declared under the Community Services (Torres Strait) Regulation 1998 holds an estate in fee simple under the relevant Deed of Grant in Trust described as 'Lot 3, Crown Plan TS157'.

### **Whether the Torres Shire Council should be joined as a party to the Torres Strait Regional Seas Claim**

22 The motion filed by the Council was supported by an affidavit sworn on 22 June 2005 by its solicitor, Mr Andrew Kerr of MacDonnells Solicitors, a supplementary affidavit sworn on 20 July 2005 and the affidavit sworn by Mr Brown and mentioned earlier. Mr Kerr asserted, in paragraph 8 of his affidavit, that the Council has interests within the application area that may be affected by a determination of native title. These interests were said to include:

- (a) existing Council infrastructure;
- (b) operational interests including foreshore maintenance;
- (c) community recreation and access issues – particularly in relation to beaches and the inter tidal zone;
- (d) the operation and enforcement of Council's local laws which restrict and regulate activities within its local government area;
- (e) the operation of the Council's planning instruments which restrict and regulate activities within its area;
- (f) the authority of Council officers and contractors to access, operate and maintain Council infrastructure within the claimed area.

As appears from Mr Brown's affidavit, the Council had not identified any infrastructure located within the area of the Torres Strait Regional Seas Claim.

23 The operational interests referred to in Mr Kerr's affidavit were said to include activities such as drainage and foreshore management and control, erosion control and access and enforcement responsibilities in the intertidal zone. Research and development of the aquaculture industry throughout Torres Strait was also mentioned. As to the community recreation and access issues mentioned in Mr Kerr's affidavit, Mr Brown said that the Council had always been concerned to ensure that residents and visitors to the Shire could access some islands in the Torres Strait including the

intertidal zone and some land masses within the claim area. He referred to the Council's general statutory responsibilities which include a general responsibility for the good rule and government of the Shire. He asserted:

*'Important to the wellbeing of residents, particularly given the Shire's geographical composition as a series of Islands surrounded by seas is their ability to access areas below the high water mark for recreational and other outdoor pursuits.'*

Mr Brown also asserted that the Shire's residents use the seas and intertidal zones extensively and regularly for a wide range of recreational activities. Their interests in ensuring adequate ongoing access to such areas was heightened by the limited amount of space on the inhabited islands of the Shire and the growing importance of tourism and outdoor related tourism activities to the Shire's economy. Reference was also made to Local Laws applicable to the claim area.

24 On the question of the delay in bringing this motion for joinder, Mr Brown said that the claim was notified between 4 September 2002 and 3 December 2002 by the Native Title Registrar. He was not appointed as Chief Executive Officer until 10 November 2002. Prior to his appointment he did not know whether the issue of joinder had been raised with, or considered by, the previous Council. He understood the previous Council's position was that it did not intend joining claims involving uninhabited islands above the high water mark. It was generally supportive of land claims. As to claims over the seas, Council was not adequately briefed in those matters and therefore could not, at the time of notification, fully appreciate the current and future impact of the Torres Strait Regional Seas Claim on its interest.

25 For the most part Mr Brown's affidavit was drawn at a level of some abstraction addressing 'interests' which seemed to have little relationship to any existing or proposed structures or any activity actually carried out, or proposed to be carried out, in the claim area.

26 In its written submissions, the Council argued that its interests which might be affected by a native title determination under the Torres Strait Regional Seas Claim, were sufficient to justify its joinder pursuant to [s 84\(5\)](#) of the NTA. The submissions repeated much of what was set out in Mr Brown's affidavit. They concluded by saying that, having regard to the nature of the Council's interests, powers and function in the area of the claim, it was important that it had the right to participate in the process of the application.

27 The applicants opposed the motion. They argued that it had not been shown that any relevant interest of the Council would be affected if a determination were made. The applicants also submitted that the Court should decline, in the exercise of its discretion under [s 84\(5\)](#) of the NTA, to allow its joinder. The applicants argued that:

- (a) the local government area of the Council if it were shown to overlap the claim area at all, would overlap it only in relation to narrow tidal strips around a limited number of remote islands on which the Council has no property or infrastructure and no operational activity and where it is not shown to have exercised any power or function;
- (b) the Council had not sought to be a party to a number of native title claims that had been made and resolved over islands of the Torres Strait which were within its local government area and jurisdiction;
- (c) despite the fact that it had not been a party to the claims mentioned, its interests had been identified as 'other interests' in the determinations of native title made over those

islands;

(d) any interests of the Council in relation to the present proceedings would be similarly identified without it becoming a party;

(e) the Court is bound to identify all interests of the kind mentioned in s 225(c) of the NTA in any event whether or not the holder of such interests is a party to the proceeding;

(f) in any event, whether or not any interests of the Council or its powers and functions are expressly referred to as 'other interests' in a determination, the existence of valid and enforceable interests is not affected by the existence of native title and may continue to be enjoyed.

28 I have regard to the provisions of [s 66](#) of the NTA which require, inter alia, that the Registrar must give notice containing details of an application which has been filed to the various classes or persons or bodies set out in [s 66\(3\)](#). This includes any local government body for any of the area covered by the application. It appears not to be in dispute that notice of the application would have been given to the Council. It seems likely, based on Mr Brown's evidence, that that application was treated in the same way as applications in respect of the islands.

29 I assume in favour of the Council, that the interests which have been described in its submissions and in the affidavit of Mr Brown would be sufficient interests for the purposes of [s 84](#). In my opinion, however, those 'interests' do not reflect any actual or proposed engagement or activity of the Shire Council in the area of the claim. As a local government authority the Council would have received notice from the Tribunal Registrar of the application. This express requirement under [s 66](#) to give notice to a local government body in the claim area, indicates a parliamentary view that the powers and responsibilities of local government bodies are sufficient to amount to interests for the purposes of joinder. In the present case, however, I have regard to the following factors:

1. The theoretical and abstract and limited character of the interests relied upon.
2. The very significant and largely unexplained delay in bringing the motion for joinder.
3. The State of Queensland, as the ultimate supervisor through its executive of the Council's conduct and as the progenitor of the laws under which the Council has its existence and exercises its powers, can be expected adequately to represent the kinds of interests which have been identified and relied upon in this case.
4. Any native title determination will inevitably be expressed as subject to the valid laws and delegated laws of the State of Queensland and its authorities. Given that protection it is difficult to see any further practical basis for the Council's involvement.

30 In the circumstances, I propose to exercise my discretion against the joinder of the Council and dismiss its motion.

## Conclusion

31 For the above reasons the motion of the Torres Shire Council filed 22 June 2005 is dismissed.

I certify that the preceding thirty one  
(31) numbered paragraphs are a true

copy of the Reasons for Judgment  
herein of the Honourable Justice  
French.

Associate:  
Dated: 18 August 2006

Counsel for the Applicant: Mr R Blowes SC and Mr D Saylor

Solicitor for the Applicant: Torres Strait Regional Authority

Counsel for the Torres Strait  
Shire Council: Mr G Moloney

Solicitor for the Torres Strait  
Shire Council: MacDonnells Solicitors

Date of Hearing: 7 July 2006

Date of Judgment: 18 August 2006