
EATTS V GUNDY AND TORRES STRAIT ISLANDER TRADITIONAL ADOPTIONS

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INTRODUCTION

Torres Strait Islander traditional adoption has been the subject of political and legal debate for decades. While the law has given consideration and limited recognition to Torres Strait Islander adoption, the case of *Eatts v Gundy*¹ (*Eatts*) in Queensland raises once more the unresolved conflict between state law and Aboriginal and Torres Strait Islander laws (traditions). In *Eatts*, the primary issue was whether a child traditionally adopted in accordance with Aboriginal law² could be viewed as an 'issue' or 'child' under the *Succession Act 1981* (Qld).³ Although *Eatts* involved Aboriginal law, the Queensland Court of Appeal's treatment of traditional adoption in *Eatts* acts as a precedent for the consideration of Torres Strait Islander traditional adoptions by Queensland's succession law. Critically, the decision sits in direct contrast to the efforts of the Family Court of Australia in recognising Torres Strait Islander traditional adoption. A recent example is the case of *Beck v Whitby*⁴ (*Beck*).

This article will discuss in three parts the legal issues for Torres Strait Islander traditional adoption in light of the recent Queensland Court of Appeal judgment in *Eatts*. The first part will outline the challenges that exist in respect of reconciling such traditional adoptions with state and Commonwealth laws with reference to the case of *Beck* in the Family Court of Australia: a case involving a Torres Strait Islander traditional adoption. The second part will consider the decision in *Eatts* and the key aspects of the judgment and in the third part the role of the *Convention on the Rights of the Child*⁵ will be explored as an important but further complicating aspect of the legal status of Torres Strait Islander traditional adoption in Australia.

TORRES STRAIT ISLANDER TRADITIONAL ADOPTION

There is a long history of the courts and governments considering where the Torres Strait Islander practice of traditional adoption can or should sit within Australia's legal framework.⁶ While the practice itself is not widely known in the broader community, many lawyers and students of the law will have knowledge of the practice from the *Mabo v Queensland (No 2)*⁷ (*Mabo*) decision. Eddie Koiki Mabo was himself a traditionally adopted child.⁸

Torres Strait Islander traditional adoption is not explicitly legislated for at either the state or Commonwealth level. Currently, a key challenge in the recognition of traditional adoptions is that while the states deal with the birth and passing of a person, the Commonwealth deals with the day-to-day parenting responsibilities of children. The case of *Beck* succinctly captures this legal dilemma. *Beck* involved the traditional adoption of a Torres Strait Islander child. The adopting parents made the application—Mr Beck, a Torres Straits Islander man, and Mrs Beck, an Aboriginal and Torres Strait Islander woman. Ms Marlow (the biological mother of the child), who identified as Torres Strait Islander, was also a blood-relative of Mrs Beck. Following conversations between the two women over a period of years, a traditional adoption agreement was made between Ms Marlow and Mrs Beck. Of particular note is a conversation between them about the difficulties Mr and Mrs Beck were experiencing in conceiving a child. Ms Marlow became pregnant and a traditional adoption arrangement was made between the Becks, Ms Marlow and Mr Whitby (the biological father of the child). To legally formalise their agreement, and in the absence of a process for legal recognition of traditional adoptions in the *Adoption Act 2009* (Qld), Mr Beck, Mrs Beck, Ms Marlow and Mr Whitby applied to the Family Court of Australia for consent orders to govern the parental responsibilities of the parties in respect of the child. In his commentary, Watts J reflected:

As I have already mentioned, the first Respondent is recorded on the birth certificate as the child's father and the second Respondent is recorded on the birth certificate as the child's mother. There is currently no power under the *Family Law Act* to make any order that would rectify that situation. Notwithstanding the orders I make today, under the *Family Law Act*, the Respondents remain the child's parents and the Applicants do not become the child's parents. The difficulty with the birth certificate is an example of a practical problem that flows from that lack of formal recognition of the Applicants as the parents of the child.⁹

In his article 'Would a Formal Treaty Help Torres Strait Islanders Achieve Legal Recognition of their Customary Adoption Practice?'

Paul Ban outlines that a further complicating factor is that Torres Strait Islander adoptions are not limited to the Torres Strait, as Torres Strait Islanders live in all states and territories.¹⁰ As such, a regional agreement covering the Torres Strait could not adequately address Torres Strait Islander adoption across jurisdictions.¹¹

There has been about 30 years of ‘consultation’ and pondering by governments about the legal recognition of Torres Strait Islander traditional adoptions, a history which was acknowledged in *Beck* and in the Queensland government’s parliamentary investigation into the decriminalisation and regulation of altruistic surrogacy in Queensland.¹² *Beck* illustrates the Family Court of Australia’s use of its own procedure as well as the limits of the Commonwealth’s jurisdiction. To date, a coordinated strategy across state and Commonwealth has not been adopted.

TRADITIONAL ADOPTION IN THE *EATTS* CASE

Eatts was an appeal heard in first instance as a result of an application brought by Gundy, who was successful in the Supreme Court of Queensland.¹³ The deceased testator, Ms Doreen Eatts, passed away intestate without leaving a will. Ms Eatts had no biological children but was survived by her mother, Ms Joslin Eatts, who became the administrator of the estate. Mr Bradley Gundy, the biological son of Doreen’s sister, argued that he was the adopted child of the deceased according to Aboriginal law and was therefore entitled to part, or the whole, of the estate under Parts 3 and/or 4 of the *Succession Act 1981* (Qld) (‘the *Succession Act*). The decision was successfully appealed by Ms Joslin Eatts in the Queensland Court of Appeal (‘the Court’), with Fraser JA delivering the Court’s decision.

Because adoption under Aboriginal law was not expressly provided for in the *Succession Act*, Mr Gundy was left to argue his case within the meaning of ‘issue’ or ‘child’. For the purposes of this paper, the main issues before the Court were:

- whether Gundy was an ‘issue’ of the deceased and thereby entitled to the whole of the estate as the surviving ‘child’ of the intestate pursuant to s 36A(3) of the *Succession Act*; and
- whether Gundy was a ‘child’ for the purposes of Part 4 of the *Succession Act*, which deals with family provision claims.

Schedule 2 of the *Succession Act* outlines the framework for the distribution of the residuary estate where the testator dies intestate. As Ms Doreen Eatts died without a spouse, Part 2 of Sch 2 directs the whole of the estate to be distributed to the ‘issue’ of the testator in accordance with s 36A of the *Succession Act*. If, however, the Court decided that Mr Gundy was not an issue of the deceased, then the estate is wholly distributed to the testator’s surviving parent, Ms Joslin Eatts.¹⁴

Alternatively, Mr Gundy argued he should be considered a child for the purposes of a family provision claim under Part 4 of the *Succession Act*. This would allow Mr Gundy to claim that no adequate provision was made from the estate for his proper maintenance and support as the deceased’s child.¹⁵ If he could overcome that threshold, Part 4 then allows the Court, at its discretion, to order such provision for Mr Gundy, from the estate, as the Court thinks fit.¹⁶

As the term ‘issue’ is not defined in either the *Succession Act*¹⁷ nor the *Acts Interpretation Act 1954* (Qld),¹⁸ the primary judge in the Supreme Court of Queensland accepted the meaning to encompass ‘children and descendants’.¹⁹ In the Court of Appeal, Fraser JA started from the position that the legal meaning of ‘issue’ is ‘descendants or progeny’ while the term ‘child’ indicates a ‘first generation descendant’.²⁰ Relying heavily on the appeal judges’ opinions in the Victorian succession case of *Popple v Rowe*,²¹ Fraser JA accepted that the meaning of ‘child’ and ‘issue’ was the ‘first generation’ of ‘children of blood’ or ‘natural children’.²² His Honour further reasoned that it had ‘a fixed, rather than protean, meaning’²³ and while ‘a more liberal construction of the word “child” may be adopted in the construction [interpretation] of a will or other instrument, it does not follow that such a construction may be applied to the word “child” in a statute of general application such as the *Succession Act*’.²⁴

The Court further decided that adoption for the purposes of the *Succession Act* refers to an adoption in accordance with Queensland state law.²⁵ While Mr Gundy argued that the *Acts Interpretation Act 1954*²⁶ and *Legislative Standards Act 1992*²⁷ of Queensland could and ought to be used in the interpretation of ‘issue’ and ‘child’ in the *Succession Act*, Fraser JA disagreed with such an interpretation and allowed the appeal.

His Honour noted that an ‘adopted child’ as defined in the *Succession Act* does not include a child adopted under Aboriginal or Torres Strait Islander laws and that an ‘adopted child’ for the purposes of the *Succession Act* is a child whose adoption is in accordance with the state adoption laws.²⁸

His Honour explained this decision by showing that the legislative history of these Acts made it clear that ‘[t]he potential for injustice resulting from the non-recognition of Aboriginal and Torres Strait Islander tradition in the definition of “issue” and “child” in the *Succession Act* was ... clearly drawn to the attention of Parliament’ and it was not ‘a purpose of the *Legislative Standards Act* to effect any amendment to the relevant provisions of the *Succession Act*’.²⁹ Fraser JA referred to Queensland Hansard for the meaning of ‘adopted child’ in the *Succession Act*, concluding that addressing

any disadvantage suffered by Aboriginal and Torres Strait Islander people is matter of policy for the government and not the court.³⁰ Fraser JA, with Muir JA and Martin J agreeing, summed up his decision by stating:

In my respectful opinion, in the absence of any definition or even any reference in that Act to Aboriginal tradition, the well-understood terms 'child' and 'issue' are not open to a construction which comprehends a biological nephew of an intestate on the basis that, in accordance with an Aboriginal tradition, the nephew is treated as a child of the deceased. Assuming in the respondent's favour that the tradition which he invoked was relevant to succession of property upon intestacy (a topic which was not touched upon in the evidence), the tradition obviously differs radically from the scheme established by the *Succession Act*.³¹

Several implications for Torres Strait Islander traditional adoptions arise out of *Eatts*. First, a confirmation that the view of the Court is that the current law of Queensland does not recognise the practice of Torres Strait Islander traditional adoptions. Second, a traditionally adopted Torres Strait Islander child will not be recognised as the 'issue' or 'child' of a Torres Strait Islander person who dies intestate for the purposes of the *Succession Act*. Third, a traditionally adopted Torres Strait Islander child would be able to make a successful claim against the estate of a biological parent under the *Succession Act* even where it is contrary to Torres Strait Islander law.

Article 21 specifically relates to legal adoptions only and does not include traditional adoptions.

OTHER STATE AND TERRITORY JURISDICTIONS

Comparatively, the outcome for Mr Gundy may have been different had the laws of New South Wales or the Northern Territory been applicable. Section 133 of the *Succession Act 2006* (NSW) allows for an application to be made to the court in respect of the estate of an Indigenous person who has died intestate 'for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged'.³² Section 71B of the *Administration and Probate Act (1969)* (NT) provides that an application can be made to the court in respect of the estate of an Aboriginal person who has died intestate for 'distribution of the intestate estate prepared in accordance with the traditions of the community or group to which the intestate Aboriginal belonged'.³³ These Acts are important in the broader landscape of the recognition of traditional adoptions and issues around Aboriginal and Torres Strait Islander people who die intestate. They form a legal basis upon which an Aboriginal

and Torres Strait Islander person's estate can be administered in a culturally appropriate way.

INTERNATIONAL LAW AND THE RIGHTS OF THE CHILD

In comparing the courts' approaches to traditional adoption in *Eatts* and *Beck*, the jurisdictional issues facing traditionally adopted Torres Strait Islander people are highlighted. While the Commonwealth jurisdiction paved the way for recognition through providing parenting orders pursuant to the *Family Law Act 1975* (Cth), the Queensland jurisdiction has not followed the same trajectory. While such differences exist, the legal status of Torres Strait Islander traditional adoptees and their parents remains in limbo.

The approach taken by the Family Court of Australia would seem to be in accordance with Australia's wider international obligations as a signatory to the *Convention on the Rights of the Child* ('the *CRC*').³⁴ However, it is fair to say that even the *CRC* has struggled with conceptualising and recognising traditional adoption. Article 21 of the *CRC* provides that: 'States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.' However, as Sonia Harris-Short outlines in her article 'Listening to "The Other"? The Convention of the Rights of the Child', art 21 specifically relates to legal adoptions only and does not include traditional adoptions. This is because there is concern that where courts and governments are not involved in traditional adoptions, there can be no certainty that the best interests of the child are the paramount consideration in accordance with the requirements of art 21 of the *CRC*.³⁵

This argument seems to be in direct contradiction to art 8(1) of the *CRC*, which seeks to preserve the right of the child to their identity and arts 29 and 30, which provide protection regarding the right to cultural identity and to enjoy culture within the community. These articles denote that the 'original cultural identity' of a child is of high significance and should be protected.³⁶ As such, one would assume that as Torres Strait Islander traditional adoption has been recognised as integral to the culture of Torres Strait Islanders, it could be argued that the best interests of the child are served by formalising the customary act. This is an argument that has been made by other countries also seeking recognition for traditional adoptions that are not formalised in law, however it has not been accepted by the members of the *CRC*.³⁷

The *CRC* has consistently encouraged countries to legislate for traditional adoption to ensure that the requirements of art 21 are met.³⁸ For Australia to do so, cooperation between the states, territories and Commonwealth would be required to establish how best to legislate for recognition. Despite adoption usually being

regulated by states and territories, it may be a better outcome for traditional adoptions to be formalised by the Commonwealth government. This would allow a differentiation between the states' usual requirements for standard adoptions, and the Commonwealth's ability to recognise the traditional practice. Ultimately, this would provide formalisation for the children and parents involved in traditional adoption and also bring Australia in line with our international obligations under the CRC.

CONCLUSION

This article has demonstrated that there is a mass of legal issues that need to be worked through if traditionally adopted children are to enjoy the same rights and protections as 'legally' adopted children. As the law currently stands, this is not the situation. To address this inequity, the states and Commonwealth must work together to resolve each of their jurisdictional limits and create consistency and certainty for parties to Torres Strait Islander traditional adoptions. Without this, traditionally adopted children will continue to be left out with no legal recourse. And, in the words of Watts J which concur, '[m]aybe one day the law will be changed'.³⁹ On this, the authors agree.

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1 *Eatts v Gundy* [2014] QCA 309.

2 It is acknowledged by the authors that adoption is not a term or practice associated with all Aboriginal peoples. The authors use this term strictly in the context of the *Eatts v Gundy* cases. Its use is intended only to reflect the terminology used by the courts in the case and is not intended to be a determination of the practice of adoption in respect of Aboriginal peoples.

3 *Eatts* did not require a determination of whether an adoption had occurred as the preliminary issue to be determined was a technical one; that is, whether a child adopted under Aboriginal custom could be recognised as a 'child' or 'issue' for the purposes of the *Succession Act 1981* (Qld).

4 *Beck and Anor & Whitby and Anor* [2012] FamCA 129.

5 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1588 UNTS 530 (entered into force 16 January 1991).

6 See, for example, Paul Ban, 'Slow Progress: the Legal Recognition of Torres Strait Islander Customary Adoption Practice' (1997) 4(7) *Indigenous Law Bulletin* 11.

7 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

8 *Ibid.* Despite the *Mabo* decision being the source of most lawyers' knowledge of traditional adoption, in *Eatts* the possibility of relief pursuant to the common law doctrine of native title or the *Native Title Act 1993* (Cth) was expressly rejected at para [36].

9 *Beck and Anor & Whitby and Anor* [2012] FamCA 129, [75].

10 Paul Ban, 'Would a Formal Treaty Help Torres Strait Islanders Achieve Legal Recognition of their Customary Adoption Practice?' (2006) 6(19) *Indigenous Law Bulletin* 7, 13.

11 *Ibid.*

12 Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008), 97.

13 *Gundy v Eatts* [2013] QSC 297.

14 *Succession Act 1981* (Qld), Sch 2 Pt 2 item 2.

15 *Ibid* s 41.

16 *Ibid.*

17 A definition of child is set out in s 40 of the *Succession Act 1981* (Qld), where it states a child means any child, stepchild or adopted child of the deceased. This section is simply about clarifying that adopted and stepchildren come within the definition of child.

18 *Acts Interpretation Act 1954* (Qld).

19 *Matthews v Williams* (1941) 65 CLR 639 at 650 (Rich ACJ, Dixon and McTiernan JJ).

20 *Eatts v Gundy* [2014] QCA 309 [16]; *Sidle v Queensland Trustees Ltd* (1915) 20 CLR 557 at 560 (Isaacs and Powers JJ).

21 *Popple v Rowe* [1998] 1 VR 651.

22 *Eatts v Gundy* [2014] QCA 309, [18].

23 *Ibid.*

24 *Ibid.*

25 *Succession Act 1981* (Qld) s 5; *Eatts v Gundy* [2014] QCA 309, [20].

26 *Acts Interpretation Act 1954* (Qld); *Eatts v Gundy* [2014] QCA 309, [22]–[24].

27 *Legislative Standards Act 1992* (Qld).

28 *Eatts v Gundy* [2014] QCA 309, [19].

29 *Ibid* [27].

30 *Ibid* [27].

31 *Ibid* [36].

32 *Succession Act 2006* (NSW) s 133(2).

33 *Administration and Probate Act (1969)* (NT) s 71B(1). The division does not apply where the intestate was a party to a valid marriage pursuant to the *Marriage Act 1961* (Cth).

34 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1588 UNTS 530 (entered into force 16 January 1991).

35 Sonia Harris-Short, 'Listening to "The Other"? The Convention of the Rights of the Child' (2001) 2(2) *Melbourne Journal of International Law* 304.

36 Mark Anderson, 'Protecting the rights of Indigenous and Multicultural children and preserving their cultures in fostering and adoption' (2014) 52(1) *Family Law Review* 6, 7.

37 Harris-Short, above n 35.

38 See for example CRC, *Concluding Observations of the Committee on the Rights of the Child: Lao People's Democratic Republic*, UN Doc CRC/C/15/Add.78 (19 October 1997) 22 and CRC, *Summary Record of the 350th Meeting: Ethiopia*, UN Doc CRC/C/SR.350 (17 January 1997) 37, 50, 56.

39 *Beck and Anor & Whitby and Anor* [2012] FamCA 129 [75].