power which undermines any sense of 'shared' possession.

The Judge submitted that if he were in error in relation to the loss of connection, an appropriate determination would recognise no more than access to the claim area for hunting, gathering, use of water and natural resources for shelter and cultural or hunting artefacts, as well as the right to hold meetings and religious ceremonies including the right to invite others to participate, but that those rights would be subject to the discretion of the pastoral leaseholder. In effect, native title would provide less rights and interests than those protected under legislation.

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Mediation of Native Title in Queensland – A Torres Strait Experience

by Terry Waia, Chairperson of Torres Strait Regional Authority

The Torres Strait Regional Authority is the native title representative body in the Torres Strait region. Stretching approximately 150 km between the northern most tip of Australia and the south coast of Papua New Guinea, the waters of the Torres Strait are dotted with over 100 islands as well as coral cays, exposed sandbanks and reefs. The Strait's population of approximately 8,000 people is dispersed over 19 small island communities. The communities are all remote, approximately 1000 km from the nearest city and have a population of between 50 and 800 people.

With the exception of Murray Island (Mer), Horn Island and Thursday Island, each of the outer community islands in the Torres Strait are held under Deed of Grant in Trust (DOGIT). DOGIT is a form of inalienable freehold held in trust for the benefit of the Torres Strait Islander inhabitants.

Beginning with the historic *Mabo* decision in 1992, the Torres Strait has led the way in native title in Australia. There have now been 15 successful native title determinations in the Torres Strait, 14 of which have been made by the Federal Court with the consent of all parties, including the State government. One of the earliest consent determinations to be made under the *Native Title Act 1993* (Cth) was in the Torres Strait in 1999, over my home island of Saibai.

In September 2002, six further claims were listed for consent determination by the Federal Court, including over the community Islands of Yam (Iama), Badu, Boigu, Darnley (Erub) and Stephen (Ugar). These determinations would have seen native title recognised over all of the outer community islands in the Torres Strait.

To the shock and disappointment of the communities involved, these court dates were vacated just three weeks before the Federal Court was due to sit in the Torres Strait after the State of Queensland wrote to the Federal Court advising that it was no longer prepared to consent to the determinations in the terms that had been agreed.

The abandoning of these determinations at the eleventh hour has been devestating for those communities affected, most of whom lodged their claims in the Court back in 1996 and have been preparing for the Federal Court hearings and subsequent celebrations for the past six months.

On Darnley Island, the Erub community had put so much work into preparing for the native title celebrations that they decided to go ahead anyway and celebrate their traditional land ownership of their Island despite the court proceedings being abandoned. Senior native title holders, while expressing their disappointment and dissatisfaction with the State Government's handling of their native title claim, affirmed their knowledge that the land of Erub was the 'birthright' of the Erubam Le, and that the day was to celebrate this knowledge, and the fight of Erubam Le past and present to have this ownership acknowledged by Australia. Similar celebrations are being planned by Iama people.

Given the successful record of achieving native title determinations in the Torres Strait with the consent of the State government, it has come as a great disappointment to the Torres Strait community that the latest determinations had to be cancelled at the last minute as a result of the actions of that government.

Torres Strait Islanders have been very concerned at the Queensland government's handling of these native title matters for some time. These concerns were conveyed to the Premier in 2001, who responded to the effect that the State would make the Torres Strait matters a priority so that they could be determined by the Court in the first half of 2002.

Despite this assurance Court dates set for mid June this year had to be abandoned as a result of lack of progress by the State Government in finalising the claims. Torres Strait Islanders thought things were back on track after a press release by Premier Peter Beattie on 3 June 2002, the 10th anniversary of Mabo Day. The Premier announced that he had signed off on the draft consent determinations for each of the claims, giving his in principal approval for the determinations to go ahead.

Shortly afterwards, further dates were set by the Court with the consent of all parties, including the State, listing the matters for consent determinations to take place on each of the community islands over a week in September 2002. The complex logistical arrangements needed to transport the Court and parties to such remote locations and the significant preparations for the Court hearings on each of the islands (including in some cases the construction of an appropriate venue) were commenced in earnest.

But again the people of the Torres Strait were to be bitterly disappointed when only three weeks before the determinations were set to take place, the Federal Court was forced to abandon the dates following a change in position by the Queensland government which advised the Court that it now required the determinations to contain a finding that native title does not exist over land on which public works are situated.

Only two weeks earlier the State had consented to the Court's proposal for a form of order that excluded from the determination area land or waters on which valid public works have been constructed,[8] and advised the Court that the exclusion of public works, as opposed to a statement of extinguishment, was "part of a negotiated outcome between the parties".

The key issue between the native title holders and the State centres around the operation of s47A of the Native Title Act, and in particular whether that section extends to overcome any extinguishment resulting from the existence of public works on land which is the subject of that section.

No previous consent determination over DOGIT land in the Torres Strait has excluded public works, or contained a finding that native title is extinguished over land or waters on which public works have been constructed. These public works for the most part take the form of community infrastructure built by or on behalf of Island Community Councils for the benefit of the native title holders. Similar consent determinations have been made in Western Australia where the State Government has not sought to exclude public works or to assert that native title is extinguished by them.

The State's changed position on public works has ramifications far beyond the current Federal Court proceedings. It places native title on a collision course with public administration and community development on these remote islands. If correct it means that infrastructure such as housing, sport and recreation facilities and water and sewerage facilities built on Torres Strait Islander land for the benefit of the native title holders will extinguish native title rights and interests on that land.

[8] These public works were to be identified in a schedule to be prepared by the State government and filed in the Court 12 months from the date of these orders being made.

To date, proponents of infrastructure works on the islands, including the Trustee Community Councils, have obtained the consent of the traditional landowners for infrastrucure works to proceed by entering into agreements with the native title claimants, which provide that native title is not extinguished by the works. State government departments and agencies have participated in many of these negotiations and have also constructed infrastructure pursuant to agreements providing that native title would not be extinguished.

The State's changed position has the potential to throw development in the Torres Strait into turmoil. Landowners will be unlikely to agree to Community Councils, government departments or statutory authorities building housing or other infrastructure on their land if that will extinguish their native title. This will lead to significant problems for these communities and will jeopardise progress that has been made in recent years to improve infrastructure and associated services to the community islands.

Up until this time the TSRA has worked closely with the State government to improve the lives of people living in the Torres Strait and is very keen to ensure this continues. We are however dismayed and disappointed at their actions, and unsure of their motivations.

Discussions continue as to how these issues might be resolved. In the meantime, with every day that these matters are delayed by the State Government, our elders are passing away and our community leaders are diverted away from the many other challenges that are facing our region. If the State government does not address their handling of these matters and take a more strategic approach to the resolution of native title matters in Queensland, the future of mediated native title outcomes in this state is looking very bleak indeed.

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Wilson v Anderson **[2002] HCA 29 (8 August 2002)**

by Lisa Strelein, NTRU

The proceedings

Michael Anderson, on behalf of the Euahlay-i Dixon Clan, sought a determination of native title over their traditional country in New South Wales.[9] The application covered areas subject to grants under the *Western Lands Act 1901* (NSW) (WLA). The claimed rights and interests were expressed as a right as against the whole world to the use possession and enjoyment of their country including all waters and land within the area of the application subject to and in accordance with the customs and laws of the Euahlay-i Dixon clans.

The current proceedings were brought by Mr Wilson, a current lessee of a Western Lands Lease. The lease was granted 'in perpetuity' under s23 of the WLA. It was first registered on 16 March 1955. The leased land was within an area that had previously been granted under the *Crown Lands Act 1884* (NSW) as a pastoral lease.

Mr Wilson sought clarification whether the Western Lands Lease conferred a right of exclusive possession and, if yes, were any native title rights and interests which may involve presence on the land extinguished or suspended by the grant. In effect, a finding in favour of Mr Wilson would exclude the lease from the claim area.

This was the conclusion of the High Court in *Fejo* in relation to freehold.[10] Common law leases, since *Mabo*[11] are thought to also fall into this category; and acts that satisfy the criteria of 'previous exclusive possession acts' under s23B of the *Native Title Act 1993*

[9] The application has since been amended to include additional applicants and refine the native title group definition. Amendments were also made to expressly exclude exclusive possession leases, as defined by the NTA as amended in 1998.

[10] *Fejo v NT* (1998) 195 CLR 96.

[11] *Mabo v Qld* (1992) 175 CLR 1, at 69.