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.

(Cth) (NTA) would also make a determination of such separate questions possible.

Applicable Law: NTA Pt 2 Div 2B

In contrast to the Federal Court, the majority of the High Court held that the application of the 'confirmation of extinguishment' provisions of the NTA (Pt 2 Div 2B) should be the starting point for the inquiry.

The High Court phrased the central question as 'whether the lease conferred upon the lessee a right of exclusive possession over the subject land, within the meaning of s23B(2)(viii) and s248A of the NTA'. If it does then by operation of ss23B and 23E of the NTA and s20 of the *Native Title (New South Wales) Act 1994* (NSW) (State Native Title Act), the grant of the lease is a previous exclusive possession act (PEPA). It completely extinguishes native title and the extinguishment is taken to have happened when the act was done.[12]

The lease must fall within one of the eight categories specified in s23B(2)(c). That list includes scheduled interests, freehold estates and exclusive agricultural or pastoral leases or any lease that confers a right of exclusive possession.[13]

Section 242(1) defines a 'lease' for the purposes of s23B(2)(c) to include any equitable lease, any contractual arrangement that is said to be a lease and anything that is described or declared by legislation as a lease. The definition of a lease in the NTA expands the reach of the confirmation provisions beyond the meaning of a 'lease' under general law.

The schedule of extinguishing acts contains some of the Western Land Leases, including those identified for the purposes of agriculture but those limited exclusively to grazing purposes were specifically omitted. Thus, the inclusion of these leases within the categories of PEPA relies upon their status as a 'exclusive pastoral lease' (s23B(2)(c)(iv)) or any lease that confers a right of exclusive possession (s23B(2)(c)(viii)).

The WLA authorises the Minister to grant 'leases in perpetuity'. Such leases therefore fall within the definition in s242(1). If it was shown that the lease confers exclusive possession, the lease would fall within either category (iv) or category (viii) of s23B(2)(c).

Statutory interpretation

Gleeson CJ gave separate reasons, agreeing with the majority joint judgment of Gaudron Gummow and Hayne JJ. The Chief Justice however, made specific comments about the statutory interpretation and the clear and plain intention test. His Honour confirmed that where a law or act creates rights in third parties over land that are inconsistent with the anterior native title rights, native title is extinguished to the extent of the inconsistency. Extinguishment results from the inconsistency. No inquiry is required into any specific intention to extinguish. The only question of intention to be discerned in this case, it was said by Gleeson CJ, was whether there was an intention to grant exclusive possession.

Therefore, the Chief Justice notes that statutory interpretation and matters of intention may be relevant in determining whether an act created rights and interests inconsistent with native title. This appears to have been an important device for the Court in reaching its conclusions as to the construction of the Western Lands Leases. Gleeson appeared to reject the view that any consideration of the impact on Indigenous peoples' native title rights may have a bearing on construction.[14] Rather than reading down the provisions of the interest to ensure no unnecessary trenching upon the rights of native title holders, the Court sought to give effect to the intention of the

[12] Per Gleeson CJ [3] summarising the question as posed by the majority. The provisions also concern previous *non*-exclusive possession acts, which only partially extinguish native title.

[13] The terms pastoral lease and exclusive pastoral lease are defined in the NTA (s.248 and 248A).

[14] Cf Gaudron J in Wik (1996) 187 CLR 1 at 154 per Gaudron J.

legislature to give these leases the 'essence of freehold'.

Western Division Leases in Perpetuity

The WLA s23(1)(a) allowed the Minister to grant Leases of Crown land as a lease in perpetuity or as a lease for a term. The rationale behind the idea of a lease in perpetuity was to strengthen the class of tenure to ensure lessees could obtain adequate finance on the security of their leases. (see discussion [71-73])

A consideration of whether the grant is to be considered an exclusive possession act for the purposes of the NTA, did not require the Court to reach a conclusion as to whether some or all of the different classes of lease in perpetuity were also in law grants of fee simple. The question in this case was whether the extinguishing effect was the same.

However, in aligning the lease in perpetuity so closely with the fee simple, the Court effectively pre-empted the answer to its question. The Court did not distinguish the fact that granting a lease in perpetuity goes to the length of the tenure, not the incident of exclusive possession. The fact that a perpetual tenure provided greater security for financiers is not based on the extent of the tenure but its permanency.

Indeed Callinan J, arguing that perpetuity should not suggest something less than a lease, acknowledged that the arrangement provides certain advantages for the Crown that freehold cannot, in controlling the uses to which the land could be put and securing rents rather than taxes.[204] The development of a lease in perpetuity allowed for an interest that, like freehold would last 'forever', but could remain subject to conditions and reservations. The High Court acknowledged that the number and scope of those incidents had expanded over time.

These reservations had led the Full Federal Court to conclude that the lease was not substantially different from that considered in *Wik*.[15] They found sufficient indicators of the possibility of co-existence of native title rights and the lease. The majority in that Court had held that the WLA specifically provided for leases in perpetuity for limited purposes of grazing. The limited purposes therefore allowed the continued enjoyment of some though not all native title rights and interests.[16][112]

Nevertheless, by aligning the tenure so closely with fee simple rather than other statutory grazing or pastoral leases, the High Court was able to make a presumption of inconsistency in line with freehold rather than looking more closely at the terms and conditions of the grant.

Thus the High Court confirmed that the Western Lands Lease in perpetuity is a lease within the meaning of s242 which upon its proper construction confers upon the lessee the 'essence of a freehold', including the rights of exclusive possession. Section 20 of the State Native Title Act thus mandates complete extinguishment.

Compensation

The High Court drew attention to the compensation implications of s23J of the NTA. [50-51] They highlighted that compensation arises apart from the common law and the operation of the *Racial Discrimination Act 1975* (Cth) (RDA). Section 23J provides for compensation to be payable where extinguishment occurs directly as a result of the operation of the validation and confirmation provisions. That is, compensation is payable where extinguishment by virtue of the operation of the NTA or state acts exceeds that which would have occurred under the general law.

The Full Court of the Federal Court and the High Court reached different outcomes when beginning from two different starting

[15] (2000) 97 FCR 453 at 484.

[16] The lease also contained other reservations to the Crown. Of particular importance, the Court noted the reservation on the lessee's right to take timber and stone.[115-6]

points – the common law versus the statute. This may indicate that the conclusion, that the leases grant exclusive possession, has been influenced by the introduction of the statutory scheme for confirmation of extinguishment. However, as the Western Division Leases were not scheduled interests, the question of exclusive possession remained the substance of the inquiry in both instances.

The process of bringing Western Division Leases within the Torrens titles system was formalised by an amendment to the *Real Property Act 1900* (NSW) in 1980, after the introduction of the RDA. The holders of registered leases were issued with a certificate of title and received the benefits of indefeasibility under the Real Property Act.[17] The impact of the creation of indefeasible title through registration on any persisting native title rights and interests, may therefore have possible compensation implications.[83]

Broader significance

The 'perpetual lease', this paradoxical tenure, as the Court described it, was not unique to NSW. The Court in *Ward* attributed the same reasoning to a permit to occupy and to certain leases in relation to the Keep River National Park.[432] It should be noted however, that in the latter case, the non-extinguishment principle applied as the tenure was one concerned with nature conservation.[448]

The Martu Native Title Determination

by Michael Rynne[18]

"They remain one of the most strongly "tradition-oriented" groups of Aboriginal people in Australia today partly because of the protection that their physical environment gave them against non-Aboriginal intruders. It is not a welcoming environment for those who do not know how to locate and use its resources for survival. Of great importance is the continuing strength of their belief in the Dreaming."[19]

With such a finding the Martu people may well have believed that recognition of their native title rights and interests was well overdue when Justice French made the consent determination at Pungurr rockholes on 27 September 2002. The partial determination was one of exclusive possession over 136,000 kilometres of unallocated Crown land in the West Australian desert; remaining areas are subject to further mediation. The application had not been programmed to trial nor the Court approached to cease mediation. Consequently the incentive for agreement was primarily the will of the parties to resolve relevant issues.

History of Proceedings

The application was lodged on 26 June 1996 for and on behalf of the Martu people who comprised the descendants of groups representing 12 language areas in the western desert of Western Australia. The initial native title representative body (NTRB) was the Western Desert Puntukurnuparna Corporation. Subsequently the Ngaanyatjarra Council assumed NTRB responsibilities for the claim as a consequence of the 1999 NTRB re-recognition process.[20]

Other parties were the State, mining entities with productive mining and exploration interests, local government and Telstra. One claim already existed to part of the area and other overlapping claims were soon lodged; various sub groups of the Martu made claims, the northeastern corner was subject to an overlap with the Ngurrara people and the Ngalia people claiming a small area in the south.

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[17] The Leased Land in question was brought under the RPA and a computer folio (the modern equivalent of certificate of title) was issued in April 1987.

[18] The author is a Barrister who has represented the Martu people since 1998.

[19] French J at para 8 of the Court's reasons for determination.

[20] The application area fell partly within three NTRB areas: Pilbara, Kimberly, and Central Desert.