GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **QG6204 OF 1998**

BETWEEN:	**ANDREW PASSI ON BEHALF OF THE MERIAM PEOPLE** **APPLICANT**
AND:	**STATE OF QUEENSLAND** **RESPONDENT**
JUDGE:	**CHIEF JUSTICE BLACK**
DATE:	**14 JUNE 2001**
PLACE:	**DAUAR ISLAND** **TORRES STRAIT**

REASONS FOR JUDGMENT

1 This proceeding arises out of an application for a determination of native title made by Mr Andrew Passi on behalf of the Meriam people. The respondent is the State of Queensland. The claim area comprises the land and inland waters of the islands of Dauar and Waier, which together with the island of Mer comprise the Murray Island group in the Eastern Torres Strait.

BACKGROUND OF THE APPLICATION

2 The original application was lodged with the National Native Title Tribunal ("the Tribunal") on 24 June 1998, shortly before the amendments to the *Native Title Act 1993* (Cth) ("the Act") made by the *Native Title Amendment Act 1998* (Cth) came into force. By reason of the transitional provisions contained in Part 3 of Schedule 5 of the Amendment Act, the original application was deemed to have been made to the Federal Court of Australia on 30 September 1998. The original application named the applicants as Sam Wailu, James Rice, Andrew Passi, Fredwin Barsa and Terry Tapim, all of Murray Island, and George Kaddy of Townsville, on behalf of the Dauwereb people who are a subgroup of the Meriam people. The original application was accompanied by maps of the claimed area. Affidavits in support of the original application were sworn by each of the individual applicants and lodged with the Tribunal on the same day that the original application was lodged.

3 The matter first came before the Court on 20 August 1999 for a directions hearing before Dowsett J. No orders were made at that time. On 8 February 2000 the Court granted leave to amend the original application by substituting the current application which names Andrew Passi as the applicant on behalf of the Meriam people. In Schedule A of the current application it is stated that there are within the Meriam group people who have particular interests in the islands of Dauar and Waier and the genealogy of some of those people is set out.

4 On 14 February 2000, an amended certification was received from the Native Title Representative Body, the Torres Strait Regional Authority, which stated that Andrew Passi has authority to make the application on behalf of all other persons in the native title claim group. A further directions hearing was held on 26 October 2000 at which the matter was referred to the Tribunal for mediation in accordance with s 86B of the Act.

5 The mediation was successful and the parties have reached an agreement that recognises that native title exists in relation to the determination area and that the Meriam people are the common law holders of that title. They have prepared a document that sets out the terms of their agreement. The document is signed by the legal representatives of the parties and was filed with the Court on 12 June 2001. The parties have applied to the Court for an order in accordance with the terms set out in the agreement and that is the matter before the Court here on Dauar Island today.

POWER OF THE COURT

6 Section 87 of the Act provides that the Court may, if it is satisfied that such an order is within the power of the Court, make an order in, or consistent with, the terms of the parties' written agreement without holding a hearing. Section 94A requires that the Court set out in such an order details of the matters referred to in s 225 of the Act.

7 In considering whether it is appropriate to make the order that the parties seek, I have had the benefit of an affidavit sworn by Mr Passi on 21 January 2000 in which he swears to his connection with the determination area according to the traditional laws and customs of his people. I have also read a report by Dr Jeremy Beckett, an anthropologist and a recognised expert on the Torres Strait. The report was prepared on behalf of the Dauwereb people and was tendered in evidence by consent. Dr Beckett's expertise in this area is

longstanding. His first contact with the Meriam people was in 1958. He gave expert anthropological evidence before Moynihan J in the trial of facts in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (*"Mabo"*) in 1989. I have also read the affidavit of Mr James Rice filed on 29 May 2001 which contains a request for the hearing to be held here on Dauar Island and the reasons for that request. A further affidavit sworn by Mr Rice was filed in the Court this morning in which he, on behalf of the Meriam people, nominates Mer Gedkem Le (Torres Strait Islanders) Corporation to be the trustee of the native title held by them. The written consent of the Corporation is annexed to that affidavit. I am satisfied on the basis of those documents that the formal requirements of s 56(2)(a) of the Act have been met.

8 For the reasons I am about to give I am also satisfied that the Court has the power to make an order in the terms agreed by the parties and that an order in the terms sought would satisfy the formal requirements of the Act. Moreover, I consider it appropriate to make such an order without requiring any further hearing.

9 As I have indicated previously, it is always a cause of great satisfaction when native title claims are settled by agreement rather than through litigation: see *Mark Anderson on behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717 at [7]-[8]. The resolution of this claim by consent has particular significance since it is nine years, almost to the day, since the High Court in *Mabo* made the first determination of native title in Australia. That determination was, of course, for the benefit of the Meriam people on whose behalf the present application is brought. The declaration made by the High Court in *Mabo* included a declaration that 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands...' (at 217) but the islands of Dauar and Waier, the subject areas of the present application, were expressly put to one side and thus excluded.

10 The contrast between the determination process of that earlier claim and the one with which we are concerned today is a measure of the change that has taken place since. As counsel who appeared as junior with Mr Ron Castan QC for the plaintiffs in *Mabo* has described (Bryan Keon-Cohen, 'The Mabo Litigation: a personal and procedural account' (2000) 24 *Melbourne University Law Review* 893) the claim by Eddie Mabo, Celuia Salee, Sam Passi, Father Dave Passi and James Rice, which was commenced on 30 May 1982, was strongly contested by the State of Queensland. The *Queensland Coast Islands Declaratory*

Act 1985 (Qld) purported to extinguish retrospectively any and all traditional rights to land in the Torres Strait without compensation, and following the enactment of that Act the State of Queensland amended its defence so as to rely upon it to defeat the claim of the plaintiffs. That Act was, however, declared by the High Court to be invalid as being contrary to ss 9 and 10 of the *Racial Discrimination Act 1975* (Cth): see *Mabo v Queensland [No 1]* (1988) 166 CLR 186. This barrier having been removed, the Meriam people were ultimately successful in establishing, in *Mabo*, the existence of native title over the island of Mer.

11 Since that first historic determination, there have been 21 determinations of native title by this Court, 15 of which have given effect to the agreement of the parties. The majority of these have been in the Torres Strait. These numbers suggest that governments and other parties are increasingly cognisant of the benefits of negotiated settlements of native title claims, which otherwise have the potential to be lengthy, costly and divisive.

CONNECTION AND NATIVE TITLE

12 While today's proceeding may be seen as having a broad symbolic significance, it also marks the culmination of a 20 year process for the Meriam people, a process which commenced in 1981 when a legal team was first retained to prepare a claim on their behalf. That claim sought recognition by the Australian legal system of a reality which was no doubt very clear to the Meriam people – that they had a connection with their country that significantly pre-dated European settlement and had been maintained through the generations. The anthropological report prepared by Dr Beckett refers to archaeological evidence indicating that people lived on Dauar and collected shellfish approximately 2500-3000 years ago. He says that although it is not possible to identify definitely those people as Meriam, they may well have been so and certainly by the time the first Europeans recorded accounts of their impressions of the Murray Islands it was clear that the Meriam people were in occupation and, judging by their developed social systems, had been for some time.

13 Both this and the earlier claim relate to islands in the Murray Island group. As I have noted, the Meriam people's native title rights and interests with respect to the largest island, Mer, were recognised in *Mabo*. The remaining two islands, Dauar and Waier, are smaller than Mer and are not permanently inhabited at present. They are very close to each other, and at low tide it is possible to wade between Dauar and Waier. Dauar is about 1580 metres in length, and consists of two steep hills with a saddle between them and sandspits at either

end. Waier is crescent shaped and immediately reveals its origins as the crater of an extinct volcano. Dauar and Waier lie almost 2 kilometres from Mer from which they are separated by deep water.

14 Dr Beckett reports that the Meriam people have identified eight sub-groups on the basis of their association with particular areas of land and sea. One of these groups is the Dauwereb group, which numbers some 51 people and is the group that initiated this claim on behalf of the Meriam people. All of the individual applicants in the original and current applications are descended from the Dauwereb people.

15 Dr Beckett says that early European reports of the people who inhabited the three islands indicate that they were a single people who had developed in particular ways according to the differing terrains of the three islands. There was frequent contact between the people who inhabited the three islands. They shared a common language, common institutions and there was frequent intermarriage amongst the various clans. Gardening and fishing were the primary sources of food on all the islands. Because the terrain on Dauar and Waier is steeper and less suited to cultivation than is the case on Mer, it would seem that those people living on Dauar and Waier relied less on cultivation and more on fishing and other marine resources than those people on Mer, and that trading of these resources occurred. Fresh water was scarce on all three islands as there are no permanent streams or lakes. There were three wells; two on Dauar and one on Mer, and it would seem that the Dauwereb had to travel to Mer at times for water when it became scarce.

16 The affidavit of Andrew Passi attests to his traditional connection with the land and waters of the determination area and speaks to the continuing association with the area and the observance of traditional laws and customs. The affidavit is of course unchallenged and uncontradicted. Mr Passi describes the relationship of the Meriam people to the determination area and he refers to kinship systems and to the observance of laws relating to land tenure as follows:

> *"The traditional landowners have an acknowledged system of traditional laws and customs which they have observed and continue to observe relating to, among other things, land ownership. These laws and customs determine who are the rightful owners of particular parcels of land, how such ownership may rightfully pass from one person to another and collectively recognised the continuing traditional association with the claim area of the Meriam people."*

17 In support of the Meriam people's native title rights over the determination area Mr Passi says:

> *"(a) Meriam people have always enjoyed, and continue to enjoy, their rights to use, occupy and live on their land and to exclude others from it and to use and enjoy the natural resources of the land such as animal and plant life. For example, I and my family frequently visit Dowar to hunt for turtle, collect turtle eggs, fish from the beach and collect plant materials for food and other purposes. Some Meriam families have houses there.*
>
> *(b) Meriam people leave their land to their children and others in accordance with their tradition and custom and grant and withhold permission for others to use their land. For example, my family will inherit my land when I die.*
>
> *(c) Meriam people hunt over the land, forage the land, garden the land and generally use the resources of the land albeit in somewhat changing ways over the years. For example, members of my family often collect turtle eggs from Waier and Dowar.*
>
> *(d) Meriam people trade and share in their natural resources amongst themselves and trade with other including Papuans, other Torres Strait Islanders and non-indigenous persons. For example I trade with Papuans on occasion.*
>
> *(e) Meriam people conduct social, religious and economic life upon the claim area including the visiting of cultural sites of significance, conducting burials and tomb stone openings, participating in festivals and associated traditional dancing and being responsible on a daily basis for the care of the land. For example, I sometimes visit sites of cultural significance at Waier and Dowar and I visit the graves of my ancestors in the cemetery at Dowar."*

18 The findings of Moynihan J in the Supreme Court of Queensland in *Mabo v Queensland* [1992] 1 Qd R 78, as referred to in the judgments in *Mabo*, are consistent with the evidence of Mr Passi that the Meriam people had, at the time of annexation, an identifiable system of tenure and connection to areas of land and that these were regulated by their traditional laws and customs. As Deane and Gaudron JJ said in *Mabo* (at 115):

> *"It suffices, for the purposes of this judgment, to say that the Meriam people lived in an organised community which recognised individual and family rights of possession, occupation and exploitation of identified areas of land."*

See also the conclusions by Brennan J and Toohey J to this effect at 62 and 190-2 respectively.

19 The anthropological report supports the other evidence that this system has continued to the present day, albeit with adaptations as a result of changing circumstances. Dr Beckett reports that on all three islands garden and residential land as well as reefs and fish traps have owners, and boundaries can be identified. Indeed, disputes over boundaries and ownership have been longstanding and some were the subject of hearings before the Murray Island Community Court, which operated from the 1890s until the writ was issued in the *Mabo* case. The names for the various plots and other areas have been in use for a long time, and many of them are associated with spiritual figures. Moreover, it is common ground between the parties that the Meriam people possess traditional law and customs and continue to observe them today, and that by those laws and customs they have a connection with the determination area. The evidence before the Court points unequivocally to the conclusion that this common ground reflects the reality.

HISTORY OF DEALINGS WITH DAUAR AND WAIER

20 It is however necessary to give further consideration to one particular aspect of the history of Dauar and Waier; that aspect concerns the effect of a grant, in 1931, of a lease over the whole of the two islands for a sardine factory.

21 It appears that the Meriam people's contact with European settlers was initially quite limited, with the islands being left relatively undisturbed until the second half of the nineteenth century. In 1871 the London Missionary Society came to the Murray Islands and it moved its Torres Strait headquarters to Mer in 1877. In 1879 the *Queensland Coast Islands Act 1879* (Qld) was passed under which the Murray Islands were annexed by the colony of Queensland. Following concerns about the validity of this annexation, the Imperial Parliament passed the *Colonial Boundaries Act 1895* (Imp). The High Court of Australia in *Wacando v Commonwealth* (1981) 148 CLR 1 found that the *Colonial Boundaries Act 1895* (Imp) remedied any failure of the *Queensland Coast Islands Act 1879* validly to incorporate the Murray Islands into Queensland, and that the islands of the Torres Strait including the Murray Islands had therefore been validly annexed.

22 In 1912 the Murray Islands were declared under the *Land Act 1910* (Qld) to be reserves for the use of the Aboriginal inhabitants of the State. The reservation of the Murray Islands for this purpose was published in the *Queensland Government Gazette* on 15 November 1912 at 1330. The entry for the Murray Islands reads: "Murray Islands (Meer,

Daua, Waua), containing an area of about 1200 acres (exclusive of Special lease 1677)". Special lease 1677 was granted in favour of the London Missionary Society and applied only to the island of Mer. In 1939 the Governor in Council placed the 'Reserve for the Use of the Aboriginal Inhabitants of the State, comprising Murray Islands (Meer, Daua and Waua)' under the control of trustees. This action was taken pursuant to s 181 of the *Land Act 1910* (Qld) and was done with explicit reference to the reservation of the land for the use of the Aboriginal inhabitants of the State: see *Queensland Government Gazette,* 9 September 1939, 791. As Brennan J noted in *Mabo* at 65, pursuant to s 4(15) of the *Land Act 1962* (Qld) the reservation of the Murray Islands and the appointment of trustees of the reserve continue in force notwithstanding the repeal of the *Land Act 1910* (Qld) and are deemed to have been made under the analogous provisions of the *Land Act 1962* (Qld). Accordingly, the Murray Islands remain to this day "a reserve" for the benefit of indigenous people.

23 By the end of the nineteenth century the Dauwereb people had, according to Dr Beckett's report, largely ceased living on Dauar and had moved to Mer, although they often returned to Dauar at weekends. This movement was influenced by a number of factors: the shortage of water, and the development of infrastructure on Mer such as a school, a church and a store. The Dauwereb people occupied an area of land on Mer called Webok, which looked toward Dauar, and they maintained their connection to Dauar. In 1931 the Queensland Government granted a lease of land, to which I have already referred, for a sardine factory. The factory was constructed on Dauar and was run by two non-islanders. Schedule Two of the lease specified, however, that the lessees were not to interfere with the use by the Meriam people of their gardens and land, or of their fishing operations. The lease was forfeited in 1938 for failure to pay rent.

24 Dr Beckett records that following the end of the Second World War, a store, a school and a church were built on Dauar and some Dauwereb people went to live once more on Dauar. In 1956 there were again problems associated with the lack of water on Dauar and most of the Dauwereb returned to live on Mer in the village at Webok.

25 Since that time many Meriam people have left the Murray Islands to pursue employment but they have retained their connection with their country. Dinghies and motorised boats have meant easier access to Dauar and Waier from Mer, and Dr Beckett reports that several families have, in recent years, built huts on Dauar for longer stays on the

island and that permanent homes have been planned. The Meriam people continue to cultivate the land and to fish and harvest other marine resources in the waters surrounding the three islands.

THE EFFECT OF THE 1931 LEASE

26 The effect of the sardine factory lease on the native title interests of the Meriam people was referred to by members of the High Court in their judgments in *Mabo*. The plaintiffs in that case argued that the lease was not validly granted and that, even if it were, the reservations in the lease meant that the grant was not inconsistent with the continuing exercise of native title rights and so did not affect or extinguish native title. Differing views were expressed about the possible effects of the lease. Brennan J considered that if the lease were validly granted it would have extinguished native title but thought it was not appropriate to decide the point (at 72-3). Deane and Gaudron JJ also considered it inappropriate to decide the issue, but indicated that they though it likely that the reservations in the lease had the effect that native title would not have been extinguished (at 117). Toohey J declined to express a view (see at 197). Dawson J, on the other hand, considered that the grant of the lease was inconsistent with the preservation of native title (at 158).

27 *Mabo* was, of course, decided prior to the enactment of the Act and whether or not the grant of the lease did amount to an extinguishing act, s 47A of the Act now makes it clear that in certain specified circumstances such an act is to be disregarded for the purpose of making a determination of native title. Section 47A provides:

> *"(1) This section applies if:*
> *(a) a claimant application is made in relation to an area; and*
> *(b) when the application is made:*
> *(i) a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or*
> *(ii) the area is held expressly for the benefit of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and*
> *(c) when the application is made, one or more members of the native title claim group occupy the area.*
>
> *(2) For all purposes under this Act in relation to the application, any*

extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by any of the following acts must be disregarded:

(a) the grant or vesting mentioned in subparagraph (1)(b)(i) or the doing of the thing that resulted in the holding or reservation mentioned in subparagraph (1)(b)(ii);

(b) the creation of any other prior interest in relation to the area, other than, in the case of an area held as mentioned in subparagraph (1)(b)(ii), the grant of a freehold estate for the provision of services (such as health and welfare services)."

28 This section was recently applied by Merkel J in *Rubibi Community & Anor v The State of Western Australia & Ors* [2001] FCA 607. In considering the requirement of occupation in sub-section (1)(c), Merkel J followed the approach of the majority of the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 where, at 437, Beaumont and von Doussa JJ said:

"We think a broad meaning should be taken of the word 'occupy' in the requirement in s47A(1)(c) that one or more members of the native title claim group occupy the area. We think this requirement is met where a claimant member is one of the many people who share occupancy, and that the land may be relevantly occupied even though the person is rarely present on the land so long as that person makes use of the land for the reserved purpose as and when the person wishes to do so".

29 Although the islands of Dauar and Waier are not permanently inhabited by the Meriam people, the evidence indicates that the Meriam people make use of the land as and when they wish to do so in a manner that is consistent with the reserved purpose. I am therefore satisfied that the Meriam people "occupy" the determination area for the purposes of subs (1)(c) of the Act. I am also satisfied that at the time that the application was made, as now, the determination area was encompassed by s 47A(1)(b)(ii) as it is held and reserved expressly for the benefit of Torres Strait Islanders as a result of the reservation of 1912 (which referred to the people as Aboriginal Inhabitants). Accordingly, I find that the requirements of s 47A are met and consequently I do not need to determine whether or not the grant of the lease for the sardine factory did extinguish or otherwise affect native title.

30 For these reasons, I am satisfied that native title rights and interests continue to be held by the Meriam people in relation to the determination area.

TERMS OF THE PROPOSED ORDER

31 The proposed order, which is consistent with the terms agreed by the parties,

recognises that native title exists over the whole of the land and inland waters of Waier and Dauar on the landward side of the high water mark. The Meriam people, as the common law holders, are entitled to possess, occupy, use and enjoy the land and water within the determination area in accordance with their traditional laws and customs. The proposed order contains other provisions, required by the Act, which are self-explanatory and which it is unnecessary for me to set out here.

32 It is for these reasons that I have concluded that it is appropriate to make the order sought by the parties to give effect to their agreement, and I now make that order.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Black.

Associate: 

Dated: 14 June 2001

Solicitor for the Applicant:	Ms Alison Murphy Torres Strait Regional Authority
Counsel for the Respondent:	The Honourable Mr R Welford, Attorney General for the State of Queensland
Solicitor for the Respondent:	Ms Majella Pollard Crown Law
Date of Hearing:	14 June 2001
Date of Judgment:	14 June 2001