

## Stay of orders refused — Blue Mud Bay

### *Arnhem Land Aboriginal Land Trust v Northern Territory* [2007] FCAFC 31

French, Finn and Sundberg JJ, 16 March 2007

#### Issue

The issue in this case was whether declaratory orders of the Full Court of the Federal Court made in *Gumana v Northern Territory* [2007] FCAFC 23 (the *Gumana* appeal, summarised in *Native Title Hot Spots* Issue 24) could be stayed until the High Court either:

- refused special leave to appeal; or
- finally determined any appeal for which special leave was granted.

#### Background

On 2 March 2007, the court (among other things) made declaratory orders in the *Gumana* appeal that the *Fisheries Act 1988* (NT) (Fisheries Act):

- had no application in relation to areas within the boundary lines of the Arnhem Land (Mainland) and Arnhem Land (Islands) grants (ALRA grants) made under the *Aboriginal Land Rights Act 1976* (Cwlth);
- did not confer on the Northern Territory Director of Fisheries a power to grant a licence authorising or permitting the holder to enter and take fish or aquatic life from areas subject to the ALRA grants; and
- was invalid, and of no effect, with respect to the area subject to the ALRA grants-- see *Gumana v Northern Territory* [2007] FCAFC 23 (summarised in *issue 24* of *Native Title Hot Spots*) at [105].

The territory foreshadowed its intention to seek special leave to appeal to the High Court against the court's judgment in relation to the Fisheries Act in the *Gumana* appeal. All parties consented to seeking orders for a stay of the declaratory orders on that point, with a view to preserving the status quo pending the outcome of the special leave application.

Justices French, Finn and Sundberg considered whether there was power to stay the declaratory orders made in relation to the Fisheries Act in the *Gumana* appeal. It was decided that there was no basis for, or any utility in, the orders sought in this case, having regard to the case law. This was despite the fact that the orders proposed were sought by consent because the court 'will not make an order by consent unless it is within power and appropriate' — at [5] and [7] to [8].

Their Honours considered that making the orders sought in this case could be misleading and engender a false sense of security:

If licences issued under the ... Fisheries Act ... do not validly authorise fishing in the intertidal zone the position is not changed by staying the declaration. Nor is the essential

dilemma resolved by delaying entry or ‘suspending’ the operation of the declaration whatever that may mean—at [8].

It was noted that this did not prevent the parties from making any agreement they wished pending the outcome of the special leave application. Without expressing a conclusion, their Honours said:

[I]t may be that it is possible under s. 19 of the ALRA for the Northern Land Council to grant a licence to all holders of licences issued under the Fisheries Act to continue to operate in the intertidal zone in accordance with the terms of their licences until the special leave application is heard and determined—at [9].

### **Decision**

The proposed consent orders granting a stay of the declaratory orders were not approved.