Appeal in Blue Mud Bay (Gumana) — Full Court

Gumana v Northern Territory [2007] FCAFC 23

French, Finn and Sundberg JJ, 2 March 2007

Issue

This case deals with two appeals, one dealing with issues arising under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA) and the other with issues arising under the *Native Title Act 1993* (Cwlth) (NTA).

The key issue in the ALRA appeal was whether, under grants made pursuant to the ALRA, the land trust holding those grants had exclusive possession to the intertidal zone.

The key issues in the NTA appeal were:

- whether s. 47A applied to the inter-tidal zone;
- the status of spouses to a clan estate in any determination of native title;
- whether the native title 'bundle' included the right to control the use and enjoyment of the determination area by other Aboriginal people governed by native title holders' traditional laws and customs.

Background

The Yolngu people are, under the ALRA, the recognised traditional owners of parts of north-east Arnhem land, including the area known as Blue Mud Bay. In 1980, grants in fee simple down to the low water mark of Blue Mud Bay (i.e. including the inter-tidal zone) were made to the Arnhem Land Aboriginal Land Trust (the land trust), as representing the Yolngu, pursuant to the ALRA (the ALRA grants).

In the 1990s, the Yolngu:

- started a number of proceedings against the Northern Territory of Australia seeking declarations that the Director of Fisheries did not have the power to issue fishing licences in the tidal waters that were covered by the ALRA grants (ALRA proceedings);
- filed a claimant application under the NTA seeking recognition of native title in relation to the water that flowed over, and the area adjacent to, the ALRA grants (NTA proceedings).

The ALRA proceedings and the NTA proceedings were heard together by Justice Selway in 2004—see *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 (*Gumana No. 1*). However, as Selway J died before making final orders, Justice Mansfield gave 'full effect' to Selway J's reasons in *Gawirrin Gumana v Northern Territory* (No 2) [2005] FCA 1425. These decisions are summarised in *Native Title Hot Spots* Issue 14 and Issue 16 respectively.

The land trust, the Northern Land Council and the Yolngu (in their capacity as traditional owners under the ALRA) appealed against the decision in the ALRA proceedings (ALRA appeal). The Yolngu, this time in their capacity as native title holders, also appealed against certain findings in relation to the determination of native title. The Commonwealth and the Northern Territory then cross-appealed against some aspects of the native title determination (NTA appeal)—at [11] and [12].

The ALRA appeal

In *Gumana No. 1*, Selway J held that:

- the ALRA grants gave the land trust an estate in fee simple to the low water mark but did not confer the right to exclude persons exercising public rights to fish or navigate in the inter-tidal zone i.e. between high and low water mark ;
- the *Fisheries Act 1988* (NT) (Fisheries Act) was capable of operating concurrently with the ALRA.

Selway J's findings were based on the authority found in *Commonwealth v Yarmirr* (2000) 101 FCR 171 (Full Court in *Yarmirr*) that the grant of a fee simple to a land trust under the ALRA over the inter-tidal zone did not:

- include the water flowing over that zone; and
- confer on the land trust the exclusive right to control access to the water overlying that zone.

In the ALRA appeal, the court (Justices French, Finn and Sundberg) 'independently' considered the correctness of the findings of the Full Court in *Yarmirr* and decided it was 'plainly wrong' and 'ought not ... be followed'—at [91].

This conclusion came as a result of a consideration of the ALRA. Section 253 of the NTA defines 'waters' to include (among other things) the foreshore i.e. 'the shore, or subsoil under or airspace over the shore, between high water and low water'. The ALRA does the converse i.e. where an estate in fee simple is granted to the low water mark pursuant to the ALRA (as in this case), the foreshore is 'land' and *not* 'waters of the sea' or the seabed.

Given the 'declared beneficial purpose' of the ALRA and, after an examination of its structure and its context, their Honours concluded that:

- a grant in fee simple to the low water mark made pursuant to the ALRA was intended by Parliament to confer an exclusive right over the inter-tidal zone;
- therefore, the Fisheries Act must be read down so as not to authorise either entry by the public or the issue of permits or licences for the purpose of fishing in that area;
- fishing in the water flowing over the inter-tidal zone of the ALRA grants from a boat would be 'no less a trespass ... than would fishing from the surface of the land in that zone'—at [92] to [94], [99] and [103] to [104].

Decision on ALRA appeal

In respect of the ALRA appeal, the court declared that the Fisheries Act:

- had no application in relation to areas within the boundary lines of the ALRA grants;
- did not confer on the territory's Director of Fisheries a power to grant a licence under the Fisheries Act that authorised or permitted the holder of that licence 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 areas subject to the ALRA grants, including the water that flowed over the land subject to those grants—at [105].

The native title appeal

At first instance, Selway J found (among other things) that:

- section 47A of the NTA applied to the whole of the area covered by the ALRA grants and so the extinguishing effects of those grants must be disregarded for all purposes under the NTA;
- however, s. 47A did not permit the court to disregard 'non-recognition' at sovereignty of the native title holders' exclusive right to occupy the inter-tidal zone because of the inconsistency between the public rights to fish and navigate at common law in the waters of those areas and the asserted exclusive native title right.

On appeal, their Honours found that the native title holders' complaint on this point required an inquiry into the concepts of 'recognition' and 'extinguishment' under the NTA as they emerged from the authorities. It was decided that;

- the concept of extinguishment found in the NTA was premised on the existence of a native title right or interest that was 'recognised' by the common law at sovereignty and so subsequently able to be 'extinguished' by the 'creation' of an inconsistent right or interest by the new sovereign;
- this was consistent with the requirement in s. 223(1)(c) that native title rights and interests must be rights and interests 'recognised by the common law of Australia';
- from the time of its reception in Australia, the common law recognised public rights to fish and to navigate i.e. the common law of this country never recognised any exclusive native title rights to the territorial sea or the inter-tidal zone;
- section 47A could not rectify the 'failure' of the common law to ever recognise certain classes of native title rights and interests, such as an exclusive right to occupy the inter-tidal zone—at [125] to [127] and [134].

The court rejected the Commonwealth's complaints in its cross-appeal that:

- the spouse of a Yolngu clan member did not necessarily have a connection with that member's clan estate for the purposes of s. 223(1)(b); and
- the rights and interests of those spouses were not necessarily native title rights and interests as defined in s. 223(1)—at [135].

Their Honours noted that, in *Northern Territory v Alyawarr* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16), the Full Court rejected a substantially similar argument on the basis that the relevant 'connection' for the purposes of s. 223(1)(b) was the connection between the community as a whole and the area the subject of the claim—at [142].

In this case, the Commonwealth attempted to distinguish *Alyawarr* on the ground that the rights and interests were not held communally. French, Finn and Sundberg JJ rejected this contention because:

- the native title holders' case was always pleaded as a 'communal' claim, which the Commonwealth had not contested, pleading rather that there may be others with whom the native title holders might share a 'collective entitlement';
- the pleadings did not raise a case that, if the native title holders were to succeed, then they could do so only on a 'non-communal' basis;
- the Commonwealth was content for the native title holders to have a communal 'land-based' native title determination;
- the anthropological propositions Selway J accepted both reflected and supported the 'communal' claim, as did his Honour's findings; and
- the determination of native title made by Mansfield J recognised and recorded a communal entitlement—at [145] to [151].

The court noted that, in *Alyawarr* at [79], it was said that determinations recognising the existence of native title made under s. 225 covered: ' [A] range of possibilities which depend upon the nature of the society said to be the repository of the traditional laws and customs that give rise to the native title rights and interests claimed'.

French, Finn and Sundberg JJ went on to find that:

> What emerges from the discussion [in *Alyawarr*]...is the flexible approach adopted by the courts arising out of the flexible language of s. 223(1) of the Native Title Act - whether the rights and interests found are 'communal, group or individual', and of s. 225(a) - who are the persons holding the 'common or group rights'. The answer will depend upon the evidence—at [159].

Their Honours concluded that:

- Selway J's reasons made it clear he intended the native title rights and interests to be held communally by the native title holders and that Mansfield J had so determined;
- thus, in accordance with *Alyawarr* , it was not necessary to enquire whether there was a 'connection' between a clan member's spouse and the determination area;
- the relevant question was whether there was a connection between the community as a whole and the land and waters and '[c]learly there is'—at [160].

It was observed that: 'It is a curiosity of the Commonwealth's cross-appeal that many of the anthropological propositions with which its expert agreed [at trial] ... lead directly to the failure of the cross-appeal'—at [163].

The other ground on the cross appeals in the NTA proceedings, raised by both the Commonwealth and the territory, was that the determination made by Mansfield J recognised a native title right to make decisions about access to, and the use and enjoyment of, the determination area by Aboriginal people who recognised themselves as governed by the traditional laws and customs acknowledged and observed by the native title holders.

While their Honours had some difficulty with this aspect of Mansfield J's determination, in the circumstances the court did not feel the issue needed to be pursued because the right under challenge could not be recognised in a native title determination:

> It is settled by the highest authority that a native title right that is inconsistent with the public's right of access to the inter-tidal zone and outer waters for fishing and navigation is not recognised by the common law for the purposes of s. 223(1)(c) ... Aboriginal people are part of the public, whether they do or do not recognise themselves as governed by the traditional laws and customs acknowledged and observed by the appellants, and accordingly have, since the assertion of sovereignty, had the right to fish in and navigate the inter-tidal zone and outer waters—at [170] and [171].

Decision on the NTA appeal

The court dismissed:

- the native title holders' appeal in relation to s. 47A;
- the Commonwealth's cross-appeal on the rights of spouses.

Both the Commonwealth's and territory's cross-appeals regarding access by other Aboriginal persons were allowed.

Comment

Their Honour's decision regarding rights in the inter-tidal zone applies only to areas within the boundaries of land grants made under the ALRA. The principle established by the High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1 that 'exclusive' native title cannot exist in either territorial waters or the inter-tidal zone continues to apply in relation to native title.

Postscript

The territory unsuccessfully sought a stay of orders pending the outcome of any appeal: see *Arnhem Land Aboriginal Land Trust v Northern Territory* [2007] FCAFC 31, summarised in *Native Title Hot Spots* Issue 24.