Proposed determination of native title – Blue Mud Bay

Gumana v Northern Territory [2005] FCA 50

Selway J, 7 February 2005

Issue
The key issue in this application for a determination of native title was whether the claimants had the right to exclude others from the intertidal zone and from the sea around certain sites of significance (the *djalkiri* areas) and temporary exclusion areas.

Background
The claim area consists of 1,489 sq km of land and waters in the northern part of Blue Mud Bay in east Arnhem Land. The applicants were members of the Yolngu people, who had a long history of political and legal action asserting their claims to land. Although the area in dispute in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 did not involve Blue Mud Bay, some of those having traditional rights in the area of Blue Mud Bay had been involved in that case either as witnesses or as interpreters—at [11] to [16] and [27].

Pastoral leases had previously been granted over parts of east Arnhem Land, including the land portion of the area covered by the application and in 1931 that area formed part of the newly created Arnhem Land Reserve—at [11] and [12].

A grant of fee simple was made in 1980 under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA) to the Arnhem Land Aboriginal Trust (the trust) over land, including the 'land' area of Blue Mud Bay. The seaward boundary of the relevant land was defined as the low water mark—at [19] and [20].

Earlier proceedings were brought to control fishing in Blue Mud Bay:
- seeking orders that the Director of Fisheries did not have power to grant fishing licences allowing fishing in tidal waters within the area of the land grant; and
- to assert and establish the claims of the Yolngu people to the area.

The former matter lead to the decisions of Justice Mansfield in *Arnhem Land Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 and the Full Court of the Federal Court in *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488. The latter matter involved the making of a claimant application under the *Native Title Act 1993* (Cwlth).

In order to refine the issues in dispute, the applicants issued two new proceedings. In the first proceeding (the NTA proceeding), a determination of native title was sought in respect of a reduced area. In the second proceeding (the Judiciary Act proceeding) the relevant applicants sought declarations under the *Judiciary Act 1903* (Cwlth)

(Judiciary Act) of their rights under the land grant and orders to restrain the Director of Fisheries from issuing fishing licences in relation to parts of the area covered by the native title application. The two proceedings were heard together—at [26] to [30].

The respondents conceded that the applicants had a native title right of exclusive possession to that part of the application area to the landward side of the high water mark, excluding rivers and estuaries that are subject to the tides, and accepted that the trust and the other applicants had an exclusive right to occupy the area pursuant to their grant in fee simple under the ALRA, except in relation to the inter-tidal zone—at [34] and [35].

The applicants conceded that, following *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*Yarmirr*), they could not succeed in their claim for exclusive possession of all of the area seaward of the low water mark, but this concession was qualified in relation to 'two or maybe three [types of] areas' of spiritual significance—at [36].

Given those concessions, his Honour considered that the following issues remained in relation to both proceedings:

- do all of the issues raised in the Judiciary Act proceedings raise a 'matter' for the purposes of Chapter III of the Commonwealth Constitution?
- if they do, does the land grant confer on the Land Trust the exclusive right of occupation over the whole area of the grant? In particular, does it exclude any subsisting public right to fish over the whole area of the grant?
- If not, does it do so:
    - between the high water mark and the low water mark;
    - in those parts of rivers affected by the flow and reflow of the tide and, if so, in which parts?
- if there is a 'matter', does s. 73 of the ALRA limit the powers of the Northern Territory Parliament in relation to the regulation of fisheries within the area of the grant and/or within two kilometres seaward of the area of the grant?
- for the purposes of s. 225 of the NTA, what are the native title interests of the claimants in relation to the area covered by the grant? In particular, do the applicants have a native title right of exclusive occupation to the inter-tidal area? Do they have a right to exclude persons from the djalkiri areas?
- for the purposes of s. 225 of the NTA, what other rights and interests exist in relation to the area covered by the grant?
- in light of the answer to issue (d), what is the effect of s. 47A of the NTA?
- is s. 47A of the NTA within the powers of the Commonwealth Parliament?
- in particular, is s. 47A invalid for being inconsistent with the separation of judicial power implicit within Chapter III of the Commonwealth Constitution?
- in light of the answers in relation to the above issues, does the Fisheries Act 1988 (NT) (Fisheries Act) authorise the Director of Fisheries to grant licences in relation to:
    - the inter-tidal zone within the claim area;
    - the djalkiri areas?
- in light of the answers to the above issues what determination of native title should be made pursuant to ss. 81, 94A and 225 of the NTA?—at [44]

The Judiciary Act proceedings

In relation to the first three issues noted above, his Honour concluded:

> The court has jurisdiction to determine whether the Fisheries Act validly permits the issuing of fishing licenses authorising fishing in the inter-tidal zone of the land grant, or waters of the sea within two kilometres of the external boundaries of the land grant and whether the Fisheries Act has any application to waters of the sea adjoining, and within two kilometres of the boundaries of the land grant and to make appropriate declarations in that regard—at [46] to [50].

Selway J noted that:

- he was bound by the decision and reasons of the Full Court in *Commonwealth v Yarmirr* (1999) 101 FCR 171 (*Commonwealth v Yarmirr*);
- therefore, he was bound to hold that the fee simple in the foreshore is qualified in that the rights of the native title applicants do not include rights to exclude those exercising public rights to fish or navigate and, further, that those rights were not excluded by s. 70 of the ALRA;
- he approved of the reasoning of Mansfield J in *Arnhem Land Aboriginal Land Trust v Director of Fisheries NT* (2000) 170 ALR 1;
- he was bound to conclude that the applicants do not have the right, pursuant to the grant, to exclude those exercising public rights to fish or navigate from estuaries or navigable rivers which are tidal —at [51] to [85] and [87].

His Honour was clearly not comfortable with the conclusion of the Full Court in *Commonwealth v Yarmirr*. Indeed, Selway J was of the view that the common law rights to fish or navigate in the inter-tidal zone had been abrogated by the creation of the reserves over the area. His Honour postulated two possible explanations for the Full Court's reasons and orders:

- the land grant under the ALRA is only of solid land and does not extend to the (sea) waters above it. However, this presented conceptual problems; or
- the grant of a fee simple to the low water mark includes the right to exclude persons from the land and the water above it, but that right is qualified in relation to the public rights to fish and to navigate, but not as to other activities, such as bathing—at [81] to [83].

Paragraph 73(1)(d) of the ALRA confers powers upon the Territory to make laws controlling fishing in waters:

> [I]ncluding waters of the territorial sea of Australia, adjoining, and within two kilometres of, Aboriginal land, but so that any such laws shall provide for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition.

In his Honour's view, the conferral of powers of self government on the Northern Territory by the *Northern Territory (Self Government) Act 1978* (Cwlth), and extension of these powers to coastal waters by the *Coastal Waters (Northern Territory Powers) Act 1980* (Cwlth), should not be read down by reason of s. 73(1)(d) of the ALRA so as to invalidate licences issued under the *Fisheries Act 1988* (NT)—at [113] and [115].

His Honour therefore determined it was inappropriate to make any of the declarations sought by the applicants in the Judiciary Act matter—at [118].

Nature of a determination of native title

Selway J considered the nature of a determination of native title and discussed the elements of statutory native title with reference to existing authorities—at [119] to [151].

Anthropological evidence

Selway J made some interesting observations concerning the admissibility of anthropological evidence, including that:

- the description of anthropological evidence as 'expert' evidence has the potential to mislead;
- contrary to the common assumption that 'expert' evidence is primarily a variety of opinion evidence, much anthropological evidence was the direct consequence of significant field work over a lengthy period, and may not be evidence of opinion at all;
- rather, it may be the direct evidence of the observations that the anthropologist has made—at [156].

Similarly, evidence given by anthropologists which is derived from what that person has been told by others is complicated by the hearsay rules of evidence. Selway J expressed the view that evidence of a 'custom' or tradition including evidence of what is believed about a custom or tradition is evidence of a fact and is not hearsay. It can be treated as evidence of 'reputation' for this purpose and so there was no prohibition under the *Evidence Act 1995* (Cwlth) of the admissibility of that evidence. 'It is direct evidence of facts and is admissible' as such. This approach is less applicable where the evidence arises from an investigation specifically for the purpose of giving evidence in particular litigation—at [157], [159] and [160].

Selway J noted one problem often associated with anthropological evidence is that of partiality, in other words, whether it is 'evidence' or 'argument', but this should not lead to a discounting of the weight of anthropological evidence simply because other parties have not been able to provide other experts with the same knowledge and contact with the applicants. Indeed, '[i]f the respondents are not in a position to challenge the evidence, then it may be appropriate for them to consider whether they can properly dispute the claims based on that evidence'—at [163] to [164].

Another problem relates to the form in which written anthropological reports often seem to be prepared. His Honour agreed with Sackville J who commented in *Jango v Northern Territory (No 2)* [2004] FCA 1004 at [11]:

> "it is often difficult to discern whether the authors are advancing factual propositions, assuming the existence of particular facts, or expressing their own opinions"... close liaison between the lawyer and the anthropologist may be needed to ensure that the anthropologist's report not only properly reflects the views of the expert (rather than the hopes of the lawyer's clients), but that it is in a proper admissible form—at [165] and [166].

Many of the above observations applied to the applicants' anthropologist in the present case. His Honour had no concerns about accepting his evidence. His conclusions were entirely supported by the Aboriginal evidence; the conclusions drawn were generally supported by the (extensive) anthropological literature, and to the extent that the anthropological evidence involved matters of opinion, those opinions were confirmed by the other anthropologists for other parties—at [167] to [171].

Orders made for a 'hot tub' involving each senior anthropologist for each party under the supervision of the Deputy Registrar enabled the experts to identify the issues and principles about which they agreed or disagreed. This reduced areas of disagreement to two significant issues involving rights in the sea and whether a 'right of innocent navigation' is recognised by Yolngu law. These were eventually settled after hearing the evidence of the Yolngu witnesses or as the result of concessions made by the applicants—at [173] to [175].

Yolngu evidence

The applicants called six Yolngu witnesses, all experienced senior men. 'Individually and collectively they were impressive witnesses'—at [179] and [183].

His Honour saw advantages in the witnesses preparing written statements as part of their tender of evidence, in terms of time and prior preparation. Objections as to this involving evidence in narrative form and asking leading questions were overruled on the grounds that the Evidence Act permits such with leave of the court—at [180], [182] and [184].

Maintenance of traditional law and custom—s. 223(1)(a)

Concerning continuity of tradition:

> [u]ltimately the evidence of the existence of the relevant Aboriginal tradition and custom as at 1788, and of the rights held by the particular clans in 1788 and thereafter pursuant to that tradition and custom, is based upon evidence derived from what the Yolngu claimants currently do and from what they have observed their parents and elders do and from what they were told by their parents and elders—at [194].

His Honour considered such a conclusion could be inferred from the witness evidence in this case and that there was sound common law authority to do so—at [197] to [202].

Subject to what is said below in relation to succession, his Honour found that:

- the relevant clans had the same system of traditions, laws and customs as at 1788; and
- they have observed those traditions, laws and customs from that time to the present—at [202].

In relation to the claimed right by the clans to exclusive possession of their lands, his Honour concluded, subject to certain exceptions, that 'the evidence clearly

established that the relevant clans have a right to exclude others, whether Aboriginal or not, from their land'—at [209].

His Honour accepted that it was clear from the evidence that Yolngu law makes provision for the succession of rights (and obligations) between clans and that such succession had occurred in relation to one clan, which no longer had any living members, and another which had no remaining senior men—at [217] to [220].

The evidence established that nine *djalkiri* sites did exist in the waters and tidal foreshores of the claim area and the claimants still observed rules in relation to them—at [221] to [224].

Connection by those laws and customs—s. 223(1)(b)

His Honour broadly dealt with connection, observing that:

> [i]t is probably true to say that the connection between the Aboriginal group and its country in accordance with Aboriginal tradition and custom is ordinarily a "spiritual" connection. It is also true that that connection is usually reflected in the physical occupation of the relevant land. This does not mean, however, that every right or interest enjoyed by every Aboriginal has to have a "spiritual" aspect to it. "Cultural" and "social" connections may also be sufficient...Nor does it mean that every right must be reflected in the physical occupation and use of the land—at [228].

During a period between 1935 and the mid-1970s referred to as the 'mission period' there was a break in physical connection with the claim area. No party disputed, and his Honour accepted, that this physical break did not bring an end to 'connection' between the claimants and the claim area for the purposes of the NTA:

> [T]he clans retained their connection with the land under their traditions and customs. The evidence was clear that they continued to visit the area during that period and that they still treated the land as their country.

Recognition of rights and interests by common law—s. 223(1)(c)

In relation to the inter-tidal zone, Selway J briefly discussed a 'difficult question' as to the effect of inconsistent common law rights upon a traditional right of exclusive occupation. His Honour felt that question raised the issue of whether the right of exclusive possession should be considered as one general right, or as a 'bundle' of separate rights, or whether its correct characterisation is a question of fact. This was relevant because, apart from certain exceptions, there was no evidence (or insufficient evidence to satisfy his Honour) that the claimants had any rights separate and distinct from the right of exclusive possession. However, given the concessions made by the parties referred to above, it was unnecessary for his Honour to consider this issue further—at [231] to [240].

In relation to the *djalkiri* areas, Selway J observed that the High Court in Yarmirr had not addressed this issue. His Honour was of the view that a traditional right to exclude from an area of the sea or from the inter-tidal zone is inconsistent with the common law public right to fish and navigate. This was so even though the areas involved were not great and possibly it would not be inconsistent with the public

right to navigate to limit access to the *djalkiri* areas, particularly as many of them involved or included rocks, reefs and other hazards to navigation.

His Honour held:

> However, statute aside, it would not appear that the public right to fish could be limited to particular areas. In my view a right to exclude from *djalkiri* areas would be inconsistent with the common law right to fish. Consequently, the traditional right of the claimants to exclude from sites to the seaward of the high water mark (which area would include rivers and estuaries affected by the tides) was not recognised as a native title right by the common law at the date of settlement. On the basis of existing authority it is my view that the applicants' native title rights in relation to those areas are the same as those identified by Cooper J in *Lardil*—at [243], referring to *Lardil Peoples v Queensland* [2004] FCA 298.

Notwithstanding this, his Honour added that 'this does not mean, of course, that persons can access those sites'. On the evidence before the court, the nine sites would be 'picked up' by the Northern Territory *Aboriginal Sacred Sites Act 1989* —at [244].

'Extinction'

Given the concessions made by the parties, it was not necessary to consider extinguishment in any detail. 'For the sake of completeness', it was observed that any native title rights in minerals or petroleum were extinguished by the statutory vesting of minerals and petroleum in the Crown (following the High Court in *Western Australia v Ward* (2002) 213 CLR 1). His Honour also held that '[t]o the extent that the claimants or their ancestors possessed any exclusive or commercial right to fish, that right was extinguished in part by the various statutes dealing with fisheries which were applicable from time to time in the Northern Territory' leaving a non-exclusive right to take fish for non-commercial purposes—at [247], following *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at [137] to [157] and *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488 at [54] to [71].

Comment

His Honour's use of the term 'extinction' is, with respect, idiosyncratic. The term has had some rare currency in the past as a loose synonym for 'extinguishment' in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (Brennan J at [63], [72], [73]; Dawson J at [34]), *Wik Peoples v Queensland* (1997) 187 CLR 1 (Gummow and Kirby JJ) and *Western Australia v Commonwealth* (1995) 183 CLR 373 (*Native Title Act Case*) (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at [101]), but the term 'extinguishment' has become the more accurate and descriptive judicial term of art in recent years. The NTA speaks exclusively in terms of 'extinguish' and 'extinguishment' (see for example, s. 237A).

Further, his Honour's conclusion that the statutory fisheries regime extinguished in part any exclusive right to fish, with respect, appears to misinterpret what was said both in *Yarmirr* and the *Land Trust* case. In the former case, Justice Olney held that it was the common law that did not recognise an exclusive right to fish, and consideration of the statutory regime was only relevant in the context of a claim to non-exclusive rights. In *Yarmirr*, his Honour said:

> Nothing about the history of the legislative and administrative control of fishing in relation to the claimed area is indicative of an intention to extinguish a non-exclusive, non-commercial native title nor to create inconsistent third party rights—at [154].

In relation to the latter case, the issue before Justice Mansfield was whether the statutory regime had abrogated the public right to fish—at [71].

Applicability of s. 47A

Selway J accepted that s. 47A of the NTA applied to the area of the land grant, including the inter-tidal zone and the waters above it. A submission that the occupants did not 'occupy' the inter-tidal zone was rejected—at [249] and [250].

The applicants sought to have the effect of s. 47A extended so as to disregard the 'non-recognition' by the common law of the traditional right of exclusive possession in relation to the inter-tidal zone, thereby 'disregarding' the effect of the public rights to fish and navigate in that zone. This submission was rejected by his Honour—at [252] and [263].

His Honour carefully distinguished between 'non-recognition' of native title by the common law (notionally as at the date of settlement), and 'extinguishment' of native title by an exercise of 'sovereign will' since settlement—at [254] and [255].

In his Honour's view, an examination of the intention of Parliament suggested that 'the word "extinguishment" in s. 47A(2) NTA means extinguishment by an act of sovereign will (usually legislation or an act done pursuant to legislation) of a right capable of recognition by the common law as at the date of settlement'—at [261].

It was unlikely that the word 'extinguishment' was intended to include 'non-recognition' which is not limited to inconsistency with common law rights, but includes non-recognition on the basis that the rights claimed, or the traditions on which they are based, are ones that the common law would not recognise for reasons of judicial policy—at [256] to [257].

Validity of s. 47A

The High Court in the *Native Title Act Case* observed that the legislative power to enact the NTA is subject to implied limitations arising from the text and structure of Chapter III of the Commonwealth Constitution. These include the limitations that the Parliament cannot exercise judicial power and that the judiciary cannot exercise legislative power. The Northern Territory argued that s. 47A NTA does both. It said that the Parliament is exercising judicial power and that the courts are exercising legislative power.

Selway J considered that s. 47A of the NTA:

> [D]oes not direct the court as to the manner in which it is to exercise its jurisdiction. Instead, it directs what law is to be applied in the proceedings, subject to the ascertainment of various facts. It does not direct what findings should be made in that regard. The direction as to what law should be applied is a proper function of the

> Parliament...[L]egislation in similar form to s. 47A NTA is relatively common. It is certainly not incompatible with the judicial function—at [267].

Alternatively, it was argued that s. 47A confers on the court the non-judicial function of creating rights. His Honour did not agree, finding that the extent to which s. 47A may create rights was merely the consequence of applying the legislation following the judicial finding that the statutory pre-conditions have been met: 'It is s. 47A NTA, not this Court, that "creates" the relevant rights'—at [268].

Decision

In general terms, the native title rights of the native title holders were found to be:

- a right of exclusive possession to the 'land' other than the inter-tidal zone (including the area of rivers and estuaries affected by the ebb and flow of the tides);
- and rights 'similar to those identified in *Yarmirr* as further explained in *Lardil*' in the sea and the inter-tidal zone (as extended above)—at [275].

All parties were given the opportunity to make further submissions as to the form of the final orders, including any determination under the NTA, after they had the opportunity to consider the reasons—at [274].