Blue Mud Bay – Fisheries Act and ALR Act

Northern Territory v Arnhem Land Aboriginal Land Trust [2008] HCA 29

Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 30 July 2008

Issues

The issues arising in this case were whether:

- the *Fisheries Act 1988* (NT) (Fisheries Act) provides that a person acting in accordance with that Act may enter and fish in waters that lie within the boundaries of a grant in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALR Act);
- whether the Fisheries Act, or a licence granted under it, authorised entry to any particular area.

By a majority of 5 to 2, the High Court found that the Fisheries Act did not, without more, permit entry into the tidal waters within the boundaries of a grant under the ALR Act and that permission from the relevant land council under the *Aboriginal Land Act* (NT) (ALA) was required. (Their Honours Justices Heydon and Kiefel dissented.)

Comment – decision has no effect on native title law

This decision only applies to areas within the boundaries of grants of an estate in fee simple made under the ALR Act in the Northern Territory. It does not disturb the principle established by the High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1 that 'exclusive' native title cannot exist seaward of the high water mark and so there can be no native title right to control access to, or the use of, that area.

Background

This was an appeal against aspects of the judgment in *Gumana v Northern Territory* (2007) 158 FCR 349; [2007] FCAFC 23, summarised in *Native Title Hot Spots* Issue 24.

The Yolngu People are, under the ALR Act, the traditional owners of parts of north-east Arnhem land. In 1980, two grants were made to the Arnhem Land Aboriginal Land Trust (the Land Trust), as representing the Yolngu, pursuant to the ALR Act (the ALR Act grants). The 'mainland grant' covers approximately 90,000km^2 (which included Blue Mud Bay). The Arnhem Land islands grant consists of all the islands (except Groote Eylandt) adjacent to area subject to the mainland grant. Under the ALR Act, the Land Trust must exercise its powers as owner of the land 'for the benefit of the Aboriginals concerned' and in accordance with the directions of the Northern Land Council (NLC).

Each ALR Act grant extended to the low water mark and included areas bounded by straight lines joining the seaward extremities of the banks of rivers, streams and

estuaries that intersected the coast i.e. the grants included the intertidal zone and rivers and estuaries affected by the ebb and flow of the tides.

Subsection 70(1) of the ALR Act provides that '[a] person shall not enter or remain on Aboriginal land' and prescribes a penalty for doing so. 'Aboriginal land' is defined in the ALR Act to mean (relevantly) 'land held by a Land Trust for an estate in fee simple'.

A defence exists under s. 70 if a person enters or remains on Aboriginal land 'in performing functions under' the ALR Act or 'otherwise in accordance with' the ALR Act 'or a law of the Northern Territory'. The ALA is one such 'law of the Northern Territory'. Under the ALA, the relevant land council (NLC in this case) may grant permission to 'enter and remain' on 'Aboriginal land'. The Legislative Assembly of the territory was given the power to enact the ALA by s. 73(1) of the ALR Act.

Since the late 1990s, the NLC (on behalf of the traditional owners) had been in dispute with the territory over the effect of s. 70 of the ALR Act. The NLC maintained that the territory's Director of Fisheries could not authorise fishing in waters overlying Aboriginal land. The director maintained that tidal waters ebbing and flowing over Aboriginal land were not part of the Aboriginal land and so fishing licences could validly authorise fishing in those waters. This dispute led to proceedings being brought in the Federal Court.

One proceeding was a claimant application filed on behalf of members of the Yolngu People. They were subsequently recognised as holding native title to the area the subject to the mainland grant—see *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50, *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 and *Gumana v Northern Territory* (2007) 158 FCR 349; [2007] FCAFC 23, summarised in *Native Title Hot Spots* Issue 14, Issue 16 and Issue 24 respectively.

The other proceeding filed related to the interaction of the ALR Act and the Fisheries Act. It is the findings of the Full Court of the Federal Court in relation to that proceeding which gave rise to the appeal to the High Court.

At first instance, it was found that an ALR Act grant did not confer a right to exclude fishing in the intertidal zone. On appeal, the Full Court overturned that finding and declared that the Fisheries Act:

- had no application in relation to areas within the boundary lines described in the ALR Act grants;
- did not confer on the Director of Fisheries a power to grant a licence under that Act that would authorise or permit the licence holder to enter and take fish or aquatic life from areas subject to the ALR Act grants;
- was invalid and of no effect in so far as it purported to operate with respect to areas subject to the ALR Act grants.

The territory was granted special leave to appeal against the judgment on the Fisheries Act in June 2007. The appeal was heard in December 2007. By the time the

oral hearing of the appeal had finished, it was accepted that all three of the Full Court's declarations should be set aside as they were 'too wide'—at [15] to [16].

Wrong premise – common law right to fish abrogated

In a joint judgment, Chief Justice Gleeson and their Honours Justices Gummow, Hayne, and Crennan began by noting that:

> Much of the argument in the appeal to this Court, and in the courts below, proceeded from the premise that there is a common law public right to fish in tidal waters and that …how that right does or does not intersect with the rights given by the grants under the [ALR]…Act [was the relevant question]. These reasons will show that this premise is wrong—at [19].

Their Honours canvassed the law on point, noting a common law right to fish in the sea and tidal navigable waters was accepted in Australia at sovereignty but, because it was a public rather than a proprietary right, it so could be abrogated or regulated by a competent legislature—at [22], referring to *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330.

It was found that, by necessary implication, the Fisheries Act abrogated any public right to fish in tidal waters that existed before it was enacted—at [27].

According to their Honours:

> It is the statutory exclusion provided by s 10(2), in favour of fishing for subsistence or personal use only, to which a person fishing in tidal waters may look for exemption from the otherwise general prohibition of s 10(1) against fishing except "under and in accordance with a licence" issued under the Act. And a person may rely upon that exemption only "within such limits (if any)" relating to the matters identified in s 10(2) as may be prescribed for any such fish or aquatic life. But whether and how a person may take fish or aquatic life in the Northern Territory are questions to be answered by resort to the Act—at [28].

Therefore, what had to be resolved in this case was whether or not there was any 'competition' between rights derived from the Fisheries Act and the rights of the Land Trust under the ALR Act grants. Rather, the relevant questions were:

- whether the Fisheries Act, or a licence granted under it, authorised entry to any particular area
- whether 'the Fisheries Act seeks to provide that a person who acts in accordance with that Act may enter and fish in waters that lie within the boundaries of the [ALR Act] grants'—at [30] to [31].

The Fisheries Act does not authorise entry

Their Honours considered four sections of the Fisheries Act:

- section 11, which provides for licences to issue subject to conditions e.g. restricting the 'fisheries region' or the 'area of operation' of the licence and stating that nothing in the licence diminished the licence holder's responsibility to obtain 'any necessary approvals from land owners to transit through, or operate the licence within' the stipulated area of its operation;

- section 22, which deals with fisheries management plans that may regulate fishing in a managed fishery;
- section 53, which provides that nothing in, or done under, the Fisheries Act limits the rights of Aboriginal people to continue to use resources of an area in their traditional manner, subject to certain restrictions;
- section 55, which deals with aquaculture leases of Crown land and provides that the grant of such a lease do not, of itself, give the lease holder a right to prevent people from passing over the surface of any water but that conditions attached to an associated aquaculture licence may allow passage through the area covered by the lease (or part of it) to be restricted or prohibited.

It was concluded that:
- apart from ss. 11, 22, 53 and 55, the Fisheries Act does not deal with *where* persons *may* fish but, rather, provided for where persons *may not* fish;
- nothing in the Fisheries Act authorised persons (whether as licence holders or otherwise) to 'enter any particular place or area for the purpose of fishing'—at [33] and [36].

Their Honours noted that the Full Court had treated the Fisheries Act as 'doing no more' than regulating the exercise of a public right to fish or to navigate in the intertidal zone or tidal waters. However:

> Once it is recognised not only that the common law right to fish in tidal waters has been abrogated by the Fisheries Act, but also that a licence under the Fisheries Act gives no authority to enter any identified area, it is apparent that the debate in the courts below about the "application" of the Fisheries Act proceeded from incorrect premises—at [39].

Public right of navigation not relevant to the issue of statutory construction
It was noted that:
- the common law public right 'to pass and repass, and to remain for a reasonable time…in tidal waters for all purposes of navigation, trade and intercourse' was used in argument to explain how a person might enter the intertidal zone or tidal waters by sea without traversing Aboriginal land 'and then exercise what was said to be either a common law public right to fish' or a right given by a Fisheries Act licence;
- no party suggested that the public right to navigate extended to taking fish or other aquatic life in the intertidal zone or the tidal waters that were within the boundaries of the ALR Act grants;
- what was in issue was whether a person holding a Fisheries Act licence was permitted to fish in the intertidal zone or in tidal waters 'within the boundaries' of the ALR Act grants, an activity that 'goes beyond the exercise of any right of navigation';
- in any case, common law rights of navigation were, like the right to fish, 'susceptible to legislative abrogation';
- once it was recognised that 'the essential question' concerned 'the proper construction and application' of s. 70(1) of the ALR Act, 'rather than any question of competition between the rights of a landholder and public rights', reference to

public rights of navigation 'provide no assistance to the task of statutory construction'—at [40] and [60].

Comment on right to navigate

While it wasn't necessary for their Honours to make a finding on point, given the relevant question as they formulated it, the common law right to navigate appears to have been abrogated to the extent that it is inconsistent with s. 70 of the ALR Act—at [43] to [44].

Did the ALR Act grants allow Land Trust to exclude Fisheries Act licence holders?

Their Honours then turned to the relevant question, which was whether or not the ALR Act, and the grants made under it, allowed the Land Trust to exclude a person holding a licence under the Fisheries Act from the waters lying within the boundaries of the grants. The answer to that question turned upon the proper construction of s. 70 of the ALR Act and the expression 'Aboriginal land' in that context—at [41].

The ALR Act grants in question were both described in Schedule 1 of the ALR Act by a 'metes and bounds' description which is:

> A description in words, starting from some identifiable datum point, of the external dimensions of the boundary of a portion of land as a continuous line from and to the point of commencement— Online Encyclopaedic Australian Legal Dictionary, Lexis Nexis.

As noted earlier, s. 70(1) of the ALR Act provides that a person 'shall not enter or remain on Aboriginal land' unless they do so 'in performing functions under' the ALR Act or 'otherwise in accordance with' the ALR Act 'or a law of the Northern Territory'.

It was found that:

- the areas subject of the ALR Act grants were defined by metes and bounds which, for the sea boundaries, were fixed as a relevant 'low water mark' i.e. the ALR Act expressly provided for the grant of interests in fee simple over areas that included areas that would be covered by tidal waters;
- by defining the areas granted by reference to low water mark, the ALR Act grants 'gave effect to the expressly intended operation' of the ALR Act;
- the description of the interest granted as 'an estate of fee simple' was to be understood 'as giving due weight to a number of other provisions' of the ALR Act, including reservations in relation to minerals and mineral exploration, the exclusion of certain roads, the capacity to have the grant registered under the Torrens title system 'according to its tenor' and restrictions on alienation of the land;
- the 'evident purpose' of the restrictions on alienation was to 'confine the classes of persons to whom, and the circumstances in which, the land might be alienated' i.e. subject to some exceptions, an estate or interest for a term that exceeded 40 years could not be granted without the written consent of the relevant minister, the written direction of the Northern Land Council and, importantly, the consent of traditional owners—at [46] to [49].

Their Honours went on to find that, despite the fact that an ALR Act grant 'differed in some important ways' from interests 'ordinarily recorded' under the Torrens system as an estate in fee simple:

> [I]t must be understood as granting rights of ownership that "for almost all practical purposes, [are] the equivalent of full ownership"…In particular, subject to any relevant common law qualification of the right…, or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant—at [50].

No distinction between when the tide is in and when it is out

The submission that the ALR Act grants were 'limited to rights over the solid surface of the earth, and gave no rights in respect of the superjacent waters' was rejected—at [51].

In the course of so doing, three 'uncontroversial propositions' were first noted:

- the 'immediate question to be decided' was 'whether entering or remaining within the intertidal areas, when those areas are covered by water, is to enter or remain on Aboriginal land', which was 'a question about the proper construction' of s. 70(1) of the ALR Act;
- the ALR Act frequently referred to 'land' and that was 'ordinarily understood as referring to a solid portion of the earth's surface';
- it was not to be 'supposed' that the grants to the Land Trust gave 'a proprietary interest to the grantee in respect of any particular column of water that might overlie the intertidal zone'—at [52].

Their Honours were careful to point out that:

> Because the immediate question in the present matter depends upon the proper construction and application of s 70(1) of the…[ALR] Act, it is neither necessary nor productive to attempt to define exhaustively the nature or extent of the rights conferred by the grants over the intertidal zones when they are covered by water. In particular, the question of statutory construction is not answered directly by identifying what rights are conferred by the grants or by asking whether a grant of an estate in fee simple, made under the [ALR]…Act, should be understood as subject to a common law right to fish or a common law right of navigation.
>
> The references made in argument to a distinction between the dry land and land covered by water are therefore to be understood as arguments directed to the proper construction of either the reference to "Aboriginal land" in s 70(1) or, perhaps, the reference in that provision to "enter or remain". That is, the distinction that was drawn sought to limit the application of s 70(1) to conduct involving direct contact with the solid surface of the earth—at [53] to [54].

It was found that:

> The asserted distinction between dry land and the land in the intertidal zone when covered by water should not be drawn. The Aboriginal land which is the subject of the grants now in issue is defined by metes and bounds. To define the land in that way requires that s 70(1) is given effect, according to its terms, by reference to those metes and

> bounds and without regard to whether the tide is in or out at the time of an alleged entry or remaining. Nothing in the Land Rights Act requires a different conclusion—at [55].

Risk distinguished

In *Risk v Northern Territory* (2002) 210 CLR 392; [2002] HCA 23 (*Risk*), it was found that, for the purposes of s. 3(1) of the ALR Act, 'land in the Northern Territory' does not include the seabed of waters below low water mark of bays within the limits of the territory. Reference was made to s. 73(1)(d) of the ALR Act (which is Commonwealth legislation), which provides for the legislative assembly of the territory to make laws:

> [R]egulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 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.

Part III of the ALA, which deals with the control of entry onto seas adjoining 'Aboriginal land' (as defined in the ALR Act), is such a law.

Gleeson CJ, Gummow, Hayne and Crennan JJ were of the view that:

> [P]rovision of power to pass legislation [such as the ALA] prescribing a two kilometre buffer zone of sea adjoining the boundary of Aboriginal land makes evident sense if the boundary of Aboriginal land is fixed at low water mark, as it is in the grants now under consideration, and if the prohibition on entering and remaining on Aboriginal land is engaged whether or not the intertidal area is covered with water. But if that prohibition operates only when and to the extent that the intertidal zone can be entered on foot, the provision for enactment of legislation providing a buffer zone would necessarily operate in a very odd way—at [57].

Their Honours were of the view that:

- what was said in *Risk* neither required nor supported the conclusion that the phrase 'Aboriginal land' in s. 70(1) should be 'understood as confined, in intertidal zones, to only the land surface of that area';
- the ability to create a buffer zone pursuant to s. 73(1)(d) supported the view that 'Aboriginal land' should be understood as 'extending to so much of the fluid (water or atmosphere) as may lie above the land surface within the boundaries of the grant and is ordinarily capable of use by an owner of land'—at [58].

Decision

Gleeson CJ, Gummow, Hayne and Crennan JJ concluded that:

- subsection 70(1) could be engaged if a person holding a licence under the Fisheries Act entered or remained on waters within the boundaries of the ALR Act grants;
- whether this was so turned on whether they did so 'in accordance with' the ALR Act (a Commonwealth law) or 'a law of the Northern Territory';
- holding a licence under the Fisheries Act was not within that qualification;
- under the ALA, permission could be given by the NLC (in this case) to enter and remain upon Aboriginal land;

- the exercise of permission granted by the NLC pursuant to the ALA would be to enter or remain on the land in accordance with 'a law of' the territory i.e. the ALA;
- because the declarations made by the Full Court were framed too widely, the appeal should be allowed in part—at [61] to [62].

Their Honours decided that there should be a declaration that:

> Sections 10 and 11 of the *Fisheries Act*…do not confer on the Director of Fisheries…a power to grant a licence under that Act which licence would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines described in the Arnhem Land (Mainland) Grant and the Arnhem Land (Islands) Grant made under the...[ALR Act]—at [62].

As it was a condition of the grant of special leave to appeal that they undertake to do so, the appellants were ordered to pay the respondents' costs of the appeal.

Kirby J agreed that these were the appropriate orders and generally agreed with the reasoning in the joint reasons for judgment, noting that:

> The conclusion expressed in the joint reasons is reinforced…by adopting the approach to the definition, enlargement or diminution of native title rights that I sought to explain [in dissent] in *Griffiths v Minister for Lands, Planning and Environment*…That approach finds support in judicial decisions upon analogous problems of statutory construction adopted by courts of high authority in other common law jurisdictions, called upon to declare the ambit of the legal rights to the traditional interests of indigenous peoples living in societies settled during colonial times—at [67], referring to *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, summarised in this issue of *Native Title Hot Spots*.

The dissenting judgments

His Honour Justice Heydon would have allowed the appeal for (among others) the following reasons:

- only the soil of the intertidal zone was 'Aboriginal land' pursuant to s. 70;
- the ordinary meaning of 'land' was the solid portion of the earth's surface and it did not include waters flooding over it and ebbing from it with the tides;
- the ALR Act contained no indication that 'land' should bear a different meaning and, in fact, contained some provisions that positively supported the use of 'land' in the ordinary sense, including s. 73(1)—at [102] to [103].

Her Honour Justice Kiefel would also have allowed the appeal. After a lengthy discussion of the issues, Kiefel J concluded (among other things) that:

- the ALR Act does not provide for the control of entry onto intertidal waters or activities such as fishing by the Land Trust;
- the ALR Act does provide the foundation for a further statutory regime (i.e. 'Northern Territory laws'), that may prohibit or regulate those activities and Part III of the ALA is such a law;
- absent a 'sea closure' effected pursuant to s. 12 of the ALA, it was 'not unlawful for persons, otherwise entitled to take fish, to fish' in the intertidal waters of the ALR Act grants;
- a person taking fish in compliance with the terms of the Fisheries Act, or a licence issued under it, was entitled to do so in the intertidal zones in question in the

absence of 'an exclusion' (i.e. a sea closure) under Part III of the ALA– at [160] to [161].

Kiefel J would have disposed of the appeal by, among other things, making declarations to the effect that the Land Trust does not have the power to exclude persons from fishing in intertidal zones of the ALR Act grants and that the power to do so was contained in Part III of the ALA—at [162].