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FISHING CASE TESTS ECONOMIC WATERS FOR TRADITIONAL OWNERS

by Sean Brennan and Peta MacGillivray

Can Northern Territory ('NT') fishers trawl coastal waters that lie within the boundaries of Aboriginal land, without the consent of traditional owners? That was the legal question tested in the High Court over two days in early December 2007.[1] The answer will have economic significance for fishers, traditional owners and the NT Government and could potentially confirm major new opportunities for Aboriginal participation in the NT economy.

A LONG PATH TO THE HIGH COURT

The litigation over the area known as Blue Mud Bay has a long history. Yolngu people in north-east Arnhem Land own land in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA'). They first took legal action against the NT Director of Fisheries in 1997, seeking to prevent the grant of fishing licences over tidal waters within the boundaries of Aboriginal land.[2] That litigation later stalled after an inconclusive appeal.[3]

Traditional owners and the Northern Land Council ('NLC') commenced similar legal proceedings in 2002, which were heard by the Federal Court in conjunction with a native title claim to areas of Blue Mud Bay by named Yolngu clans. Justice Selway delivered judgment in both the native title and land rights matters in February 2005.[4] Although inclined to agree with the Yolngu that traditional owners had the right to exclude fishers from the intertidal zone under the ALRA, Justice Selway felt bound to follow what he understood to be the contrary conclusion reached by a majority of the Full Federal Court in *Yarmirr*, another NT native title matter.[5]

In 2007, the Aboriginal parties successfully appealed Justice Selway's decision on the ALRA issue to the Full Federal Court. Not bound by the Full Court reasoning in *Yarmirr* as the single judge had been, this differently constituted Full Court bench reached the opposite conclusion. The appeal judges upheld the right of Yolngu people to exclude both members of the public and licensed fishers from entering tidal waters to fish within land trust boundaries.[6] It was from this decision that the High Court granted the NT Government special leave to appeal,[7] resulting in the December 2007 hearing.

THE LEGAL AND PRACTICAL QUESTION AT STAKE

On the foreshore, seawaters cover and then retreat and leave uncovered the seabed below, according to the tides. This area between the high and low water marks is known as the intertidal zone and in the Northern Territory it can stretch for very long distances. The fee simple held by an Aboriginal land trust is granted to the low water mark and therefore encompasses this intertidal zone of sea bed that is periodically covered by tidal waters.

Where a land grant also includes river mouths and bays, the boundary is a straight line drawn from headland to headland at the low water mark. Again this encompasses river and sea beds that are covered by shifting tidal waters.

It can be fruitful to fish in these intertidal waters, especially when the tides are high or across river mouths and bays.[8] But commercial or recreational fishers who do so are within the boundaries of Aboriginal land. This creates the potential for a legal dispute that is quasi-constitutional in nature.

On the one hand, a Commonwealth law – the ALRA – grants Aboriginal traditional owners a freehold interest and reinforces it with an array of restrictions on third party entry or use. On the other hand, a Northern Territory law – the *Fisheries Act 1988* (NT) – creates licences for people to fish in NT waters. In addition, it has been argued that members of the public continue to enjoy a paramount right to enter waters and fish *under the common law*.

Is a Territorian holding a fishing licence under the NT Act entitled to enter and fish on tidal waters within the boundaries of an Aboriginal land trust? Or is that simply inconsistent with the strong-form legal ownership created under Commonwealth land rights law? The answer is relevant not only to the Blue Mud Bay area off

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Arnhem Land, the subject of this current litigation, but to 84 per cent of the NT coastline[9] where Aboriginal land trusts currently exist to the low water mark.

A RIGHT TO EXCLUDE?

From one perspective the case could raise a question similar to that agitated in the *Wik* native title case.[10] In *Wik*, the High Court had to decide the meaning of the word 'lease' – a term drawn from the common law of England – when it was used in a Queensland statute creating a distinctively Australian interest in land, the pastoral lease.

Did the *Land Act 1910* (Qld) and its 1962 successor import all the attributes of the common law lease, particularly the grant of exclusive possession, such that there was no room left for co-existing native title in the same land once a statutory lease for pastoral purposes was granted?

The High Court majority judges in *Wik* said no and rested their conclusion on two propositions. Firstly, pastoral leases are creatures of statute not the common law. Secondly, they were novel interests in land created in the 19th century to address local conditions quite different from England. Thus the specific statutory details and the underlying legislative purpose were treated as critical to the conclusion that pastoral leases were not grants of exclusive possession.

Here in the Blue Mud Bay litigation the context is quite different. The ALRA was again a response to distinctively Australian conditions. In that statute, the Commonwealth Parliament responded to generations of dispossession by creating a strong-form property right that implemented the vision of the Woodward Royal Commission (the 'Aboriginal Land Rights Commission' of 1973): to restore control over land to Aboriginal people, including the ability to exclude those whose presence was not welcome.

The term 'fee simple' has been given a very broad reading by the Australian courts.[11] Indeed, Aboriginal people in the native title context have been unsuccessful in their attempts to show that particular fee simple grants were qualified interests that allowed for co-existing Aboriginal rights in land.[12] This plenary view of the term fee simple might have encouraged the Aboriginal party in this litigation to play up the Commonwealth Parliament's use of the term and the unlikelihood of it being abridged by a rival interest, such as a statutory or common law right to fish.

However, perhaps mindful of the underlying principles of *Wik* and of the High Court's repeated impatience with advocates who favour common law arguments in areas dominated by statute,[13] Bret Walker SC for the coastal traditional owners did not dwell on the statutory use of the term 'fee simple'. Instead, Walker widened the focus to a broader range of interlocking Commonwealth and Territory provisions, which speak to the strength of control, over land and entry by others, enjoyed by Aboriginal traditional owners. Walker also emphasised statutory purpose: 'the manifest intent' of the ALRA was, he said, 'to provide under our legal system real control over the destiny of Aboriginal land … by the traditional owners'.[14]

CONCLUSION

More than 80 traditional owners were present in the gallery of the High Court while counsel for the NT, the NT Seafood Council, the Commonwealth and Aboriginal interests presented their oral arguments. The strong contingent of community representatives from the entire NT coastline stirred excitement amongst those watching the case, as well as media interest. The presence of traditional owners at the hearing reminded everyone, including those deciding the case, that the generational economic futures of coastal Aboriginal communities are on the line. A decision is due before Chief Justice Murray Gleeson's retirement in August 2008.

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1 Transcripts of proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* (High Court of Australia, Full Court, 4-5 December 2007).

2 *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 (Mansfield J).

3 *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488 (Spender, Sackville and Merkel JJ).

4 *Gumana v Northern Territory* (2005) 141 FCR 457.

5 *Commonwealth v Yarmirr* (1999) 101 FCR 171, 201, 221-222 (Beaumont and von Doussa JJ).

6 *Gumana v Northern Territory* (2007) 158 FCR 349 (French, Finn and Sundberg JJ).

7 Transcript of proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* (High Court of Australia, Gummow, Kirby and Heydon JJ, 21 June 2007).

8 Commercial crabbing has also been attempted in the intertidal zone of Blue Mud Bay: *Gumana v Northern Territory* (2005) 141 FCR 457, 466 (Selway J).

9 Transcript of proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* (High Court of Australia, Jackson SC, 4 December 2007), 4.

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10 *Wik Peoples v Queensland* (1996) 187 CLR 1.

11 In the native title case of *Fejo v Northern Territory* (1998) 195 CLR 96, [43], a six-way joint judgment of the High Court stated that '[a]n estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership of the land" and confers "the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination"'.

12 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 133-134, 146-147 (Gleeson CJ and Gaudron, Gummow and Hayne JJ); *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178 (Lehane J); *Lawson v Minister for Land & Water Conservation* (NSW) [2003] FCA 1127 (Whitlam J).

13 For an example in this litigation, see the comments of Gummow J and Kirby J during the special leave hearing: Transcript of proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* (High Court of Australia, Gummow and Kirby JJ, 21 June 2007), 10, 11.

14 Transcript of proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* (High Court of Australia, Walker SC, 5 December 2007), 91.

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