



HIGH COURT OF AUSTRALIA

Public Information Officer

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NORTHERN TERRITORY OF AUSTRALIA AND DIRECTOR OF FISHERIES (NT) v ARNHEM
LAND ABORIGINAL LAND TRUST, NORTHERN LAND COUNCIL, NATIVE TITLE
HOLDERS*, NORTHERN TERRITORY SEAFOOD COUNCIL AND COMMONWEALTH OF
AUSTRALIA

Traditional Aboriginal owners had the right to exclude fishermen and others from tidal waters within Blue Mud Bay in north-east Arnhem Land, the High Court of Australia held today.

In 1980, pursuant to the Commonwealth *Aboriginal Land Rights (Northern Territory) Act* (the Land Rights Act), the Governor-General granted estates in fee simple of two areas to the Arnhem Land Aboriginal Land Trust, which held title to the land and exercised its powers as owner for the benefit of the Aboriginals concerned. The Land Trust had to do so in accordance with the direction of the Northern Land Council (NLC). The mainland grant covered 90,000 square kilometres between the mouth of the East Alligator River in Van Diemen Gulf in the west and the mouth of the Roper River in the Limmen Bight in the east, excluding Cobourg Peninsula. The islands grant covered all islands, except Groote Eylandt, adjacent to the mainland grant. Each grant extended to the low-water mark. The Yolngu people are the traditional owners of parts of Arnhem Land, including Blue Mud Bay, which lies in the mainland grant. Section 70(1) of the Land Rights Act prohibited outsiders from entering or remaining on Aboriginal land. Under the NT *Aboriginal Land Act*, a land council may grant permission to enter and remain on Aboriginal land.

In the Federal Court of Australia in 2005, the Land Trust, the NLC and the native title holders sought declarations of their rights under the grants, along with orders restraining the NT and the Director of Fisheries from issuing fishing licences for areas subject to native title claims, including areas within the grants. Commercial fishing and fishing by non-Aboriginals in Blue Mud Bay had been observed over many years. The NLC argued that the Director could not authorise fishing in waters overlying Aboriginal land. The Director argued that tidal waters were not part of Aboriginal land and fishing licences validly authorised fishing there. Justice Bradley Selway dismissed the proceeding. He held that grants under the Land Rights Act gave the Land Trust an estate in fee simple to the low-water mark but did not confer a right to exclude fishing in tidal waters. Before orders giving effect to these conclusions could be made, Justice Selway died, and Justice John Mansfield finalised the orders. The Land Trust, the NLC and native title holders appealed to the Full Court of the Federal Court against Justice Mansfield's orders. The Full Court made declarations that the NT *Fisheries Act* did not apply to the grant areas, did not confer on the Director of Fisheries a power under that Act to grant licences to authorise or permit fishermen to enter and take seafood from those areas, and was invalid and of no effect regarding the grant areas. The NT and the Director appealed to the High Court.

The High Court, by a 5-2 majority, allowed the appeal in part, to the extent that the declarations were too broad and needed to be reframed. The Land Trust, the NLC and native title holders accepted that none of the three declarations should stand and that a more limited declaration should be made, to the effect that the *Fisheries Act* did not by itself authorise or permit entry into the grant areas. The Court held that without permission from a land council a person holding a fishing licence could not fish in tidal waters within the grant areas. Fishing in those waters was to enter or remain on Aboriginal land,

contrary to section 70(1). The common law right of fishing could be abrogated or regulated. By necessary implication, the *Fisheries Act* abrogated any public right to fish in NT tidal waters and the comprehensive statutory regulation of fishing provided by that Act supplanted any public right to fish in tidal waters. The NT, Director of Fisheries and the Seafood Council submitted that the section 70 prohibition against entering or remaining on Aboriginal land extended only to land and did not include entering or remaining in tidal waters over that land. The Land Trust, the NLC and native title holders submitted that the grants related to a defined geographical area and that entry to that area, whether covered by tidal waters or not, was prohibited by section 70. The majority accepted that submission. It held that the Land Rights Act expressly provided for the grant of estates in fee simple over areas that included sections that would be covered by tidal waters.

The High Court made the declaration that the *Fisheries Act* did not confer on the Director of Fisheries a power to grant a licence under that Act which would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines of the mainland grant and the islands grant.

* The listed native title holders are Gawirrin Gumana, Djamawa Marawili, Marrirra Marawili, Nuwandjali Marawili, Daymambi Munuggurr, Manman Wirrpanda and Dhukal Wirrpanda, on behalf of the Yarrwidi Gumatj, Manggalili, Gumana Dhalwangu, Wunungmurra (Gurumuru) Dhalwangu, Dhupuditj Dhalwangu, Munyuku, Yithuwa Madarrpa, Gupa Djapu, Dhudi Djapu, Marrakula1, Marrakula2, and Nurrurawu Dhappuyngu (Dhurili/Durila) groups.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*