HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

WILLIAM MAXWELL RISK — APPELLANT

AND

THE NORTHERN TERRITORY OF AUSTRALIA & ANOR — RESPONDENTS

Risk v Northern Territory of Australia
[2002] HCA 23
30 May 2002
D12/2001

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

J Basten QC with S A Glacken for the appellant (instructed by the Northern Land Council)

T I Pauling QC, Solicitor-General for the Northern Territory with R J Webb for the first respondent (instructed by the Solicitor for the Northern Territory)

No appearance for the second respondent

H Fraser QC with N J Henwood intervening on behalf of the Northern Territory Seafood Council Inc (instructed by Cridlands)

CATCHWORDS

Risk v Northern Territory of Australia

Aboriginals – Land rights – Claim under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) to areas of the seabed of bays and gulfs within the limits of the Northern Territory – Whether the seabed of bays and gulfs amenable to claim – Whether "land in the Northern Territory" includes the seabed of bays or gulfs.

Words and phrases – "land" – "land in the Northern Territory".

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s 3(1), definition of "Crown Land".

1 GLEESON CJ, GAUDRON, KIRBY AND HAYNE JJ. The central question in this appeal is whether the seabed of bays or gulfs within the limits of the Northern Territory can be the subject of claim under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act"). This question was answered in the negative by an Aboriginal Land Commissioner (Olney J) and by the majority of the Full Court of the Federal Court of Australia[1] (French and Kiefel JJ; Merkel J dissenting). That answer was correct. The seabed of bays and gulfs within the limits of the Northern Territory cannot be subject to a claim under the Land Rights Act. That is not to say, however, that under the *Native Title Act* 1993 (Cth) ("the NTA") a claim cannot be made to what that Act refers to as "land" or "waters" in that area[2]. Section 210 of the NTA provides that nothing in that Act affects the rights or interests of any person under, among other Acts, the Land Rights Act. Whether any claim made under the NTA would succeed is, of course, a question that was not debated in, and is not decided by, this appeal.

2 In May 1997, the Northern Land Council, on behalf of the appellant and others, applied under the Land Rights Act for determination of a claim. The application, to an Aboriginal Land Commissioner appointed under Pt V of the Land Rights Act, claimed what was said to be unalienated Crown land in the Beagle Gulf Area. The claim originally included, but was later confined to, a claim to what was described as "[a]ll that land in the Northern Territory of Australia which is adjacent to, and seawards of the low water mark of the seacoast of the mainland" from a point in the west described as "the northernmost point of the western boundary" of an area of Aboriginal land[3] to, in the east, the point where the western bank of the Adelaide River meets the low water mark of the seacoast of the mainland.

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1 *Risk v Northern Territory* (2000) 105 FCR 109.

2 *Native Title Act* 1993 (Cth), ss 223 and 225 and the definitions of "land" and "waters" in s 253.

3 "Aboriginal land" is defined in s 3(1) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) as:

> "(a) land held by a Land Trust for an estate in fee simple; or
>
> (b) land the subject of a deed of grant held in escrow by a Land Council".

The Aboriginal land referred to in this application was the Delissaville/Wagait/Larrakia Aboriginal Land.

3 The area thus described is, we were told, about 10,000 square kilometres and is bounded on the west by a line more than 124 km long, on the east by a line about 45 km long, on the north by Bathurst and Melville Islands, and on the south by the coast of the mainland from about the middle of Fog Bay to the Adelaide River. The port of Darwin lies in about the middle of that part of the coast of the mainland. The area includes part of Fog Bay and part of Beagle Gulf and Van Diemen Gulf. There are some islands in the area claimed.

4 The Aboriginal Land Commissioner (Olney J) determined that:

> "so much of the area claimed … as is adjacent to, and seaward of, the low water mark of the seacoast of the Northern Territory or of any island adjacent thereto including the bed of any bays or gulfs of the mainland or of any such islands is not land which may properly be the subject of an application pursuant to s 50(1)(a) of [the Land Rights Act]".

The Full Court of the Federal Court dismissed an application to review that decision made under s 39B of the *Judiciary Act* 1903 (Cth) and s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[4]. By special leave, the appellant now appeals to this Court.

The Land Rights Act

5 In order to deal with the issue that now arises, it is necessary to understand the way in which the Land Rights Act operates. Passed in 1976, before the enactment of the *Northern Territory (Self-Government) Act* 1978 (Cth), the Land Rights Act provides for the making of grants of an estate in fee simple in land to Aboriginal Lands established under the Act. Nothing turns on the amendments that were made in consequence of the Northern Territory attaining self-government.

6 The Land Rights Act provides for the establishment of Aboriginal Land Trusts[5]:

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4 *Risk v Northern Territory* (2000) 105 FCR 109.

5 s 4(1). (As originally enacted, s 4(1) used the expression "for the benefit of groups of Aboriginals" but nothing turns on that.)

> "to hold title to land in the Northern Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission".

A Land Trust so established is bound to exercise its functions in relation to land held by it in accordance with directions given to it by the relevant Aboriginal Land Council established under the Land Rights Act[6].

7 The Land Rights Act requires[7] that Aboriginal Land Trusts be established to hold certain areas referred to in the Act as "the Crown land described in Schedule 1". Some of those areas are described by metes and bounds; others are described by reference to Survey Plans lodged with the Surveyor-General of the Northern Territory. From time to time, new areas have been added to Sched 1 to the Land Rights Act[8].

8 Most of the areas referred to in Sched 1 are on the mainland; some, however, relate to islands – the Arnhem Land Islands, Bathurst Island and Melville Island. Some of the mainland areas abut the coast and include rivers that enter the sea at the coast. There are, therefore, some parts of those areas which would be inundated permanently.

9 In addition to the provisions made in relation to the several areas referred to in Sched 1, the Land Rights Act also provides for claims to be made to, and for grants to be made of, areas other than those described in Sched 1 to the Act. Application may be made to an Aboriginal Land Commissioner by, or on behalf of, Aboriginals claiming to have what the Land Rights Act refers to[9] as "a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals". On such an application being made, the Commissioner is bound to ascertain whether those Aboriginals, or any other

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6 s 5(2).

7 s 4(1).

8 See, for example, *Aboriginal Land Rights (Northern Territory) Amendment Act* 1978 (Cth), s 25, by which the areas called "Alligator Rivers (No 1)" and "Alligator Rivers (No 2)" were added.

9 s 50(1)(a).

Aboriginals, are the traditional Aboriginal owners of the land, and then[10] to report his findings. Where the Commissioner finds that there are Aboriginals who are the traditional Aboriginal owners of the land, the Commissioner makes recommendations to the relevant Minister for the granting of the land, or any part of it, in accordance with the Act.

10 As may be expected, the provisions of the Act which deal with claims to areas other than those described in Sched 1 use terms (particularly the terms "traditional land claim" and "traditional Aboriginal owners") to which the Land Rights Act assigns particular meanings. (Each definition is expressed to be subject to a contrary intention appearing, but it was not suggested that it was necessary, in this case, to depart from the meaning assigned by the Act.) Several of these definitions must be noted. First, because s 50(1) provides for the making of claims by or on behalf of "Aboriginals claiming to have a traditional land claim to an area of land" the definition of "traditional land claim" is important. It is defined as[11]:

> "a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership."

In turn that directs attention to the expression "traditional Aboriginal owners". That is defined as[12]:

> "a local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
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> (b) are entitled by Aboriginal tradition to forage as of right over that land."

It will be noted that the definition of "traditional Aboriginal owners" has two elements – spiritual affiliation *and* entitlement by Aboriginal tradition to forage as of right over the land.

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10 s 50(1)(a)(ii).

11 s 3(1).

12 s 3(1).

11 "Aboriginal tradition" is also a term defined in the Act. It is defined as[13]:

> "the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships."

12 Claims may be made under s 50(1) of the Land Rights Act only to unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals. "Crown land" is defined. At times relevant to the application which gives rise to this appeal, the definition provided[14]:

> "'**Crown Land**' means land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land, or land that has been so alienated but has been resumed by, or has reverted to or been acquired by, the Crown, but does not include:
>
> (a) land set apart for, or dedicated to, a public purpose under an Act; or
>
> (b) land the subject of a deed of grant held in escrow by a Land Council."

Both "alienated Crown land" and "unalienated Crown land" are so defined as to exclude land in a town from the land that may be the subject of a claim under the Land Rights Act.

13 It will be necessary to return to the effect of the definitions that have been mentioned. Before doing so, however, it is convenient to refer to what may happen if a claim is granted.

14 If an Aboriginal Land Commissioner makes a recommendation, in a report made under s 50(1)(a), that an area of Crown land should be granted to a Land Trust, and the Minister is satisfied that the land should be granted, the Minister is obliged to take certain steps. Those steps are: to establish a Land Trust or Trusts, to ensure that estates and interests in the land not held by the Crown are acquired by the Crown, and then to make a recommendation to the

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13 s 3(1).

14 s 3(1).

Governor-General that a grant of an estate in fee simple in the land be made to the relevant Land Trust or Trusts[15]. A deed of grant made pursuant to a recommendation of the Minister is to be expressed to be subject to certain reservations of rights to minerals and rights to explore for minerals[16], and shall exclude land on which there is a road over which the public has[17] or, at a specified earlier time, had[18] a right of way. On the application of a Land Trust to which the deed of grant of an estate in the land is delivered, the appropriate officer under the laws of the Northern Territory relating to the transfer of land is then bound[19] to register, and otherwise deal with, the deed of grant under that law according to its terms. By this path, the relevant Land Trust would become registered as the owner of an estate in fee simple in the land (subject to the reservations and exceptions earlier mentioned).

15 Land held by a Land Trust for an estate in fee simple (and land the subject of a deed of grant held in escrow by a Land Council) is defined as "Aboriginal land" in the Land Rights Act[20]. Part VII of the Land Rights Act makes a number of provisions affecting what may be done with, or on, that Aboriginal land. It may not be resumed, compulsorily acquired, or forfeited under any law of the Northern Territory[21]. Roads may not be constructed over Aboriginal land without the written consent of the relevant Land Council[22], and provision is made for when such consent may be given.

16 Particular reference must be made to the provisions regulating entry on, and use or occupation of, Aboriginal land. Section 70(1) provides that:

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15 s 11.

16 s 12(2).

17 s 12(3).

18 s 12(3A).

19 s 12(5).

20 s 3(1).

21 s 67.

22 s 68(1).

> "Except in the performance of functions under this Act or otherwise in accordance with this Act or a law of the Northern Territory, a person shall not enter or remain on Aboriginal land."

Contravention of that prohibition is an offence attracting a monetary penalty, but it is a defence[23] "if the person charged proves that his entry or remaining on the land was due to necessity".

17 Section 71 of the Land Rights Act qualifies the operation of s 70(1). It provides that an Aboriginal, or group of Aboriginals, is entitled to enter upon Aboriginal land, and use or occupy that land "to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land".

18 The Land Rights Act further provides for what is described (in the heading to s 73 of that Act) as "Reciprocal legislation of the Northern Territory". The Legislative Assembly of the Northern Territory is given power to make certain kinds of law. Those laws include laws providing for the protection of sacred sites in the Northern Territory[24], laws regulating or authorising the entry of persons on Aboriginal land "but so that any such laws shall provide for the right of Aboriginals to enter such land in accordance with Aboriginal tradition"[25], and laws providing for protection or conservation of wildlife on Aboriginal land[26].

19 It is the fourth subject of reciprocal Territory legislation for which the Land Rights Act provides which is the most important for present purposes. Section 73(1)(d) provides that the Legislative Assembly has power to make "laws regulating 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". Again, it is provided that any such law shall provide for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition.

20 Apart from the references in Sched 1 to the low water mark of the coast, in cases where the land is described by metes and bounds, the provisions of

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23 s 70(3).

24 s 73(1)(a).

25 s 73(1)(b).

26 s 73(1)(c).

s 73(1)(d) were the only explicit reference in the Land Rights Act, at the time of its enactment, to the sea or to waters of the sea. (The Legislative Assembly of the Northern Territory having now provided in Pt III of the *Aboriginal Land Act* (NT) for the control of entry onto seas adjoining Aboriginal land and, in particular, provided a procedure for closing all or part of the seas adjoining and within two kilometres of Aboriginal lands, the Land Rights Act now provides[27] for financial assistance in respect of legal representation in closure of the seas applications. For present purposes, nothing turns on these provisions for assistance.)

21 No doubt, the Land Rights Act's definition of "Crown Land" is the starting point for considering the question at issue in this case. The claim that gives rise to the present matter must fail if what is claimed is not "unalienated Crown land" or "alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals". It not being suggested that what is claimed is alienated land, is it, or could it be, unalienated Crown land? That is, is it, or could it be, "land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land" or having been so alienated "has been resumed by, or has reverted to or been acquired by, the Crown"?

22 As is noted earlier, the area claimed was described as "land in the Northern Territory" within certain limits. Whether the whole of the area within the limits given in the application is an area within the Northern Territory is a question the Aboriginal Land Commissioner did not resolve. Rather, attention was directed to whether the bed of any bays or gulfs of the mainland and of adjacent islands is "*land* in the Northern Territory". It is to that issue which most attention was directed in determining, as a separate issue, whether the claimed area, or any part of it, is land which may be the subject of an application pursuant to s 50(1)(a) of the Land Rights Act. Nonetheless, it is as well to say something about the limits of the Northern Territory.

23 The *Northern Territory Acceptance Act* 1910 (Cth) provided for the acceptance of the Northern Territory, as a Territory under the authority of the Commonwealth, and for the carrying out of the agreement that had been made between South Australia and the Commonwealth for the surrender of the Territory by the State to the Commonwealth. That Act defined[28] the Northern Territory as:

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27 s 74A.

28 s 4.

> "that part of Australia which lies to the northward of the twenty-sixth parallel of South Latitude and between the one hundred and twenty-ninth and one hundred and thirty-eighth degrees of East Longitude, together with the bays and gulfs therein, and all and every the islands adjacent to any part of the mainland within such limits as aforesaid, with their rights, members, and appurtenances".

24 For present purposes, what is notable is that, but for whatever may be the consequence of the inclusion within the geographic limits of the Northern Territory of "the bays and gulfs therein, and all and every the islands adjacent to any part of the mainland … with their rights, members, and appurtenances", the geographical limits of the Territory ordinarily end at low water mark. Of course, within those limits there will be areas that are permanently inundated, but apart from the bays and gulfs in the mainland, there is no seabed within the areas of the Northern Territory, only the inter-tidal zone on the coast. With that in mind, how is the expression "land in the Northern Territory" to be understood when it is read in the definition of "Crown Land" in the Land Rights Act?

25 There are at least three reasons to conclude that "land in the Northern Territory" does not mean the seabed of bays or gulfs. First, there are strong textual indications in the Land Rights Act that "land in the Northern Territory" does not include the seabed. Secondly, the nature of the interest which is granted to a Land Trust suggests that the seabed is not "land in the Northern Territory". Thirdly, any remaining doubt about the matter is put to rest when regard is had to relevant extrinsic material and the legislative history which lies behind the Land Rights Act.

Textual indications

26 No doubt "land" is a word that can be used in a way that would encompass the seabed[29]. It may be doubted, however, that the word would ordinarily be understood as encompassing the seabed. The distinction between "land" and "sea" is often made. It is only when particular attention must be paid to distinguishing between the two that the distinction can be seen to be attended by the same kind of difficulty as arises in distinguishing between "night" and "day". In each case, the legal geometer who seeks to define the line may find it blurred and indistinct. But that is not to deny either that there is a distinction, or that "land" is ordinarily used in a way that would not include the seabed.

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29 See, for example, *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199.

27 Next, there is the fact that (for the reasons given earlier) the ordinary operation of the Land Rights Act will be in relation to areas of land, not in relation to any area of seabed. If it did operate in relation to areas of seabed, that would be exceptional.

28 By far the most important textual indication is, however, to be found in s 73(1)(d). It may readily be accepted that, as the appellant submitted and was recognised in the Full Court of the Federal Court[30], Aboriginal tradition does not distinguish between "land" and "sea" and that "country" can include "sea country"[31]. It must, however, also be recognised that s 73(1)(d) of the Land Rights Act does make the distinction between "land" and "sea". And the evident purpose of s 73(1)(d) is to provide for laws regulating the use of parts of the sea adjoining Aboriginal land while, at the same time, permitting traditional use of those waters.

29 This provision, permitting the Northern Territory legislature to create a two kilometre "buffer zone" of sea adjoining Aboriginal land assumes that the buffer zone thus created is not itself "Aboriginal land". That is, s 73(1)(d) assumes that the strip of sea up to two kilometres wide is not "land held by a Land Trust for an estate in fee simple" or "land the subject of a deed of grant held in escrow by a Land Council"[32]. Yet s 73(1)(d) also assumes that there may be Aboriginals who, in accordance with Aboriginal tradition, may enter, and use the resources of, those waters. Those Aboriginals who, in accordance with Aboriginal tradition, may enter, and use the resources of, those waters may not fall within the definition of "traditional Aboriginal owners" in the Land Rights Act. Aboriginal tradition may extend the right to enter and use the resources of an area to individuals, other than the traditional owners of the area. But if the appellant's contention that there are traditional owners of the area the subject of this claim is right, it would follow that the provision for a two kilometre buffer zone is unnecessary to protect their interests. They are entitled to seek a grant of the land. Nor would it be necessary to protect the interests of those Aboriginals who, though not owners, are entitled to use the waters. Entry by persons in this latter category would not be contrary to s 70 of the Land Rights Act, being an entry of the kind permitted by s 71. It follows that, if the appellant is right, s 73(1)(d) would have little if any useful work to do.

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30 *Risk v Northern Territory* (2000) 105 FCR 109 at 130-131 [60]-[62] per Merkel J.

31 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582; 184 ALR 113.

32 s 3(1), definition of "Aboriginal land".

30 This may be reason enough to reject the appellant's central contention. There are, however, some further considerations to which reference should be made.

The nature of the interest claimed

31 The area claimed includes the bed of bays and gulfs. If the claim were to be allowed, the grant that would be made would be of an estate in fee simple in that part of the seabed. It would follow that, if granted, the claimants' interest in the seabed would, on its face, appear to permit them to control access to the superjacent waters.

32 We were told, in argument, that whether a grant of an estate in fee simple in the seabed would permit the grantee to prevent the exercise of public rights to fish or to navigate in the waters above that part of the seabed is an unresolved question. So too, we were told, the attendant question of construction of the statutory prohibition (in s 70(1) of the Land Rights Act) against entering or remaining on Aboriginal land, is said to be unresolved. Those questions not having been argued in this matter it is inappropriate to resolve them. Nonetheless, it may be observed that there is nothing in the Land Rights Act which appears to limit the rights of the holder of an estate in fee simple in land granted under the Act to rights over only the solid substance of the earth's crust, as distinct from those parts of the superjacent fluid (be it liquid or gas) which can ordinarily be used by an owner. And in the end it may be doubted that the appellant limited the claim that had been made to a claim to the seabed alone, for to do so would deny the existence of one of the two essential elements of the Act's definition of "traditional Aboriginal owners" as a local descent group of Aboriginals who "are entitled by Aboriginal tradition to forage as of right over [the land in question]". On the face of things, in its primary meanings, the word "forage" seems inapt to activities upon under-sea land, at least when that land is more than a few metres from the shore line. But if the expression "forage … over that land" is to have application to submerged land, it must be understood as extending at least to fishing in and taking the resources of the sea. The assertion of entitlement to forage over the area the subject of the claim which gives rise to this appeal (an assertion necessarily implicit in the claim) seems contrary to any narrow understanding of the subject of the present claim as being only the seabed, as distinct from the superjacent waters.

Extrinsic material and legislative history

33 Any remaining doubt about the proper construction of the expression "land in the Northern Territory" is put to rest when regard is had, first, to the two

reports of the Aboriginal Land Rights Commission which preceded the introduction into the Parliament of the Aboriginal Land (Northern Territory) Bill 1975 ("the 1975 Bill") which lapsed on the double dissolution of Parliament on 11 November 1975, and the later enactment of the Land Rights Act, and, secondly, the legislative history of the 1975 Bill and the Land Rights Act.

34 The Aboriginal Land Rights Commissioner (Woodward J) recognised, in his first report, that[33]:

> "Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the waters between the coastline and offshore islands belonging to the same clan."

This, in the Commissioner's then view, was a matter "requiring careful consideration"[34].

35 The solution proffered in the second report of the Aboriginal Land Rights Commission was to provide that[35]:

> "the definition of Aboriginal land where a coastline is involved should include both off-shore islands and waters within two kilometres of the low tide line".

The 1975 Bill, therefore, provided (in part) that[36]:

> "… where Aboriginal land adjoins the territorial sea, or internal waters of Australia, appertaining to the Northern Territory, that part of the territorial sea or internal waters so appertaining that is within 2 kilometres of the boundary of the Aboriginal land shall, for the purposes of section 73, be deemed to be part of that Aboriginal land".

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33 Australia, Aboriginal Land Rights Commission, *First Report*, July 1973 at par 205.

34 Australia, Aboriginal Land Rights Commission, *First Report*, July 1973 at par 207.

35 Australia, Aboriginal Land Rights Commission, *Second Report*, April 1974 at par 91.

36 cl 74.

But when, following a change of government, the Bill that became the Land Rights Act was introduced, a different solution was adopted. No longer did the Act provide that where Aboriginal land adjoined the territorial sea or the tidal waters of Australia, that part of the sea or waters within two kilometres of the boundary of the Aboriginal land was deemed to be part of it; instead, provision was made in the form of what is now s 73(1)(d). And attempts to amend the Bill for the Land Rights Act by introducing the former provision were rejected. The legislative history of the Land Rights Act, therefore, runs contrary to the appellant's submissions.

36 All this being so, "land in the Northern Territory" when used in the definition of "Crown Land" in the Land Rights Act does not include the seabed of bays or gulfs.

37 The appeal should be dismissed with costs.

38 McHUGH J. The issue in this appeal is whether the bed of a bay or gulf in the Northern Territory is "land" for the purposes of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act").

39 In May 1997, the appellant, William Maxwell Risk, and nine other persons asserted a traditional land claim on an area covered by the waters of Beagle Gulf which is the area between the coastline of the city of Darwin and Bathurst and Melville Islands. Following amendments to the claim, a portion of Fog Bay and a portion of Van Dieman Gulf were included in the claim. The area claimed covers approximately 10,000 square kilometres of the Territory. All of it is situated within the limits of the Northern Territory. The "Claimants contend that any land within the limits of the Northern Territory is claimable under the Land Rights Act, including the air or water column over that land."

40 In November 1999, the Aboriginal Land Commissioner rejected the claim. He determined that so much of the area claimed, as was adjacent to and seaward of the low water mark of the seacoast of the Northern Territory or of any island adjacent thereto, was not land that could be claimed under s 50 of the Land Rights Act. In December 1999, the claimants applied under s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and ss 39(B)(1) and 39B(1A) of the *Judiciary Act* 1903 (Cth) for an order of review of the determination. In December 2000, the Full Court of the Federal Court (French and Kiefel JJ, Merkel J dissenting) held that "the Commissioner was correct in his conclusions and the application should be dismissed.[37]"

41 The Land Rights Act does not define "land". But s 22(1)(c) of the *Acts Interpretation Act* 1901 (Cth) declares that, in any Act unless the contrary intention appears, "*Land* shall include messuages tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein". However, this definition is concerned with interests[38] in land and throws no light on whether the term "land" in federal statutes includes the sea-bed.

42 In its ordinary meaning, "land" means the "solid portion of the earth's surface, as opposed to sea, water"[39]. In certain statutory contexts, however, "land" is capable of referring to the sea-bed. In *Goldsworthy Mining Ltd v*

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37 *Risk v Northern Territory of Australia* (2000) 105 FCR 109 at 124.

38 See, for example, *Re Lehrer and the Real Property Act* (1960) 61 SR (NSW) 365 at 370-371.

39 *Shorter Oxford English Dictionary*, vol 1, 3rd ed (rev) (1975) at 1172.

Federal Commissioner of Taxation[40], Mason J held that, for the purpose of s 88 of the *Income Tax Assessment Act* 1936 (Cth), a lease for dredging purposes of the sea-bed was a lease of land. Hence, whether or not land in the Land Rights Act includes the sea-bed depends on the history, context and purpose of the Land Rights Act[41].

The history of the Land Rights Act

43 The Land Rights Act is the product of a Royal Commission presided over by Woodward J. His Honour had to inquire into and report on "appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land"[42].

44 In his First Report dated July 1973, Woodward J made a number of recommendations for the recognition of the traditional rights and interests of the Aborigines in and in relation to land. In the course of doing so, he said that "[i]t seems clear that Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the waters between the coastline and offshore islands belonging to the same clan.[43]" In his Second Report ("the Final Report"), dated April 1974, Woodward J referred to a request by the Northern Land Council that to protect fishing rights "an area stretching 12 miles out to sea should be treated as part of Aboriginal land for purposes of protection of land rights.[44]" The learned Commissioner said[45]:

> "423. However I am unable to endorse a claim to an area of sea as great as twelve miles from the coast. It seems to me that the legitimate interests of Aborigines will be protected if their traditional fishing rights are preserved and their right to the privacy of their land is clearly recognised by the establishment of a buffer zone of sea which cannot legally be

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40 (1973) 128 CLR 199 at 215. See also *Dampier Mining Co Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 408 at 428.

41 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

42 Aboriginal Land Rights Commission, First Report, July 1973, p iii.

43 Aboriginal Land Rights Commission, First Report, July 1973, par 205.

44 Aboriginal Land Rights Commission, Second Report, April 1974, par 421.

45 Aboriginal Land Rights Commission, Second Report, April 1974.

> entered by commercial fishermen or holiday makers. An exception would have to be made in cases of emergency.
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> 424. To establish these principles some arbitrary figure has to be arrived at, which I have already suggested (para 91) might be two kilometres from low tide. Since all the fishing is done by netting or by the use of hand-lines in comparatively shallow water, this should suffice for both the purposes to which I have referred".

45 Paragraph 91 of the Final Report suggested "that the definition of Aboriginal land where a coastline is involved should include both off-shore islands and waters within two kilometres of the low tide line." A draft Bill was annexed to the Final Report[46]. Section 12 of the Bill directed that certain parcels of land described in Sched 3 should be directly vested in certain bodies. The parcels were "[t]o contain descriptions by boundaries, including where appropriate off-shore islands, and waters within two kilometres of seaward of the low tide lines" of the reserves and other areas set out in the Schedule.

46 The Aboriginal Land (Northern Territory) Bill 1975 gave substantial effect to the various recommendations of the Royal Commissioner. However, it did not provide for any two-kilometre "buffer zone" to be part of the land referred to in Sched 3. Instead, it deemed the adjacent waters for two kilometres from the boundary of Aboriginal land to be part of that land for the purpose of certain sections controlling the right of entry on Aboriginal land. The Aboriginal Land (Northern Territory) Bill lapsed on the dissolution of Parliament in November 1975.

The context

47 A new Bill was introduced into the Federal Parliament in June 1976. In important respects, it differed from the 1975 Bill. The 1976 Bill became the Land Rights Act. The Act provides for the appointment of Aboriginal Land Commissioners to determine applications by Aboriginals who claim to have a traditional land claim[47]. To understand the operation of the Act, it is necessary to refer to a number of provisions in the Act. Section 50(1) provides:

> "The functions of a Commissioner are:
>
> (a) on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in

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46 Aboriginal Land Rights Commission, Second Report, April 1974, Appendix D.

47 Sections 49 and 50.

which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals:

(i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and

(ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12;

... "

48 "Unalienated Crown land" means "Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town.[48]" "Alienated Crown land" means "Crown land in which a person (other than the Crown) has an estate or interest, but does not include land in a town[49]." "Crown Land" means "land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land[50]." It also includes land that has been alienated but has been resumed by or has reverted to or been acquired by the Crown[51]. But "Crown Land" does not include: "(a) land set apart for, or dedicated to, a public purpose under an Act; or (b) land the subject of a deed of grant held in escrow by a Land Council"[52].

49 "Traditional land claim" means "a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership"[53]. "Traditional Aboriginal owners" means[54]:

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48 Section 3.

49 Section 3.

50 Section 3.

51 Section 3.

52 Section 3.

53 Section 3.

54 Section 3.

"a local descent group of Aboriginals who:

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land;"

"Aboriginal tradition" means "the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships"[55].

50 If a Commissioner makes a report under s 50(1)(a) and recommends that an area of Crown land be granted to a Land Trust for the benefit of Aboriginals, the Minister must establish a Land Trust or Land Trusts under s 4 to hold the land[56], provided the Minister is satisfied that the land should be granted[57]. Upon the fulfilment of all relevant conditions, the Minister must "recommend to the Governor-General that a grant of an estate in fee simple in that land be made to that Land Trust.[58]" The functions of a Land Trust include holding title to land vested in it in accordance with the Land Rights Act[59]. A Land Trust must not exercise its functions in relation to land that it holds "except in accordance with a direction given to it by the Land Council for the area in which land is situated"[60]. Where a direction is given, the Trust must "take action in accordance with that direction.[61]"

51 Section 21 requires the Minister to divide the Northern Territory into at least two areas and to establish an Aboriginal Land Council for each area. With the approval of the Minister, a Land Council may perform any functions that may

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55 Section 3.

56 Section 11(1)(c).

57 Section 11(1)(b).

58 Sections 11(1)(e), 11(1AB)(e), 11(1AD)(f) and 11(1AE)(e).

59 Section 5(1)(a).

60 Section 5(2)(a).

61 Section 5(2)(b).

be conferred on it by a law of the Northern Territory[62]. In particular, a Land Council may perform functions in relation to[63]:

> "(a) the protection of sacred sites;
>
> (b) access to Aboriginal land; and
>
> (c) schemes for the management of wildlife on Aboriginal land."

52 In carrying out its functions with respect to any Aboriginal land in its area a Land Council must have regard to the interests of, and must consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginals interested in the land[64].

53 On receiving a recommendation under ss 10 or 11 with respect to land, the Governor-General may "execute a deed of grant of an estate in the land in accordance with the recommendation and deliver it to the grantee"[65].

54 The Land Rights Act also empowers the Minister to establish Aboriginal Land Trusts to hold the Crown land that is described in Sched 1 to the Land Rights Act[66]. Six of the areas referred to in Sched 1 have boundaries that abut the sea. The boundaries are described in terms that make it clear that they do not extend beyond the low water mark of the relevant area. Some of the areas – Bathurst Island, Melville Island and the Arnhem Land Islands – as their names indicate are islands.

55 Section 70 of the Land Rights Act prohibits a person from entering or remaining on Aboriginal land except in the performance of a function under the Act or in accordance with a law of the Northern Territory. Breach of s 70 is an offence, but it is a defence "if the person charged proves that his entry or remaining on the land was due to necessity."[67] Section 71 declares:

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62 Section 23(2).

63 Section 23(2).

64 Section 23(3).

65 Section 12(1)(a).

66 Section 4(1).

67 Section 70(3).

"**(1)** Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

(2) Subsection (1) does not authorize an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an Aboriginal Council or other incorporated association of Aboriginals."

56 Importantly, s 73 of the Land Rights Act empowers the Northern Territory Legislature, *inter alia*, to create offshore buffer zones or to close sea areas. It provides:

"**(1)** The power of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* in relation to the making of laws extends to the making of:

...

(d) laws regulating 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;"

57 "Aboriginal land" means[68]:

"(a) land held by a Land Trust for an estate in fee simple; or

(b) land the subject of a deed of grant held in escrow by a Land Council;"

58 However, a law made under s 73 is effective only if it is "capable of operating concurrently" with the Land Rights Act, the laws of the

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68 Section 3.

Commonwealth, the *National Parks and Wildlife Conservation Act* 1975 (Cth) and the regulations, schemes and things done under those Acts[69].

59 The Northern Territory Legislative Assembly has exercised the power conferred by s 73 by enacting the *Aboriginal Land Act* (NT). Section 12(1) empowers the Administrator of the Territory to "close the seas adjoining and within 2 kilometres of Aboriginal land to any persons or classes of person, or for any purpose" other than to certain Aboriginal groups. Section 3 gives "Aboriginal land" the same meaning that it has under the Land Rights Act. Section 15 empowers the Land Council for the area to issue permits to enter the seas "subject to such conditions as the Land Council thinks fit." The section also empowers the "traditional Aboriginal owners of an area of Aboriginal land adjoining closed seas" to issue entry permits subject to conditions. Those who enter or remain on "closed seas" without a permit commit an offence against the Act[70].

60 No provision of the Land Rights Act refers to the sea-bed. Nor does it expressly authorise the making of applications for rights in respect of the use of waters otherwise than by applications authorised by laws made under s 73. All of its provisions are consistent with the term "land" meaning that solid portion of the earth's surface above the low water mark of the sea surrounding the Northern Territory and its adjacent islands.

Meaning of "land" in the Act

61 It is against this background that the question arises as to whether the term "land" in the Land Rights Act nevertheless encompasses claims in relation to the sea-bed. In my opinion, nothing in the Land Rights Act gives any ground for supposing that "land" in that Act includes the sea or the sea-bed below the low water mark. Indeed, s 73(1)(d) strongly suggests that closure orders made by the Administrator were to be the Act's only mechanism for protecting the rights of the traditional Aboriginal owners to their "sea country". Section 73(1)(d) operates on the assumption that the "waters of the sea" are not "Aboriginal land" within the meaning of s 3 of the Land Rights Act. That paragraph is almost a

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69 After the application was filed in 1997 but before the determination was made by Olney J in November 1999, s 73 was amended by Sched 4, Pt 3, items 36 and 37 of the *Environmental Reform (Consequential Provisions) Act* 1999 (Cth) which was assented to on 16 July 2000. Although not material to the determination of this appeal the amendments replaced the reference to the *National Parks and Wildlife Conservation Act* 1975 (Cth) with the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

70 *Aboriginal Land Act* (NT), s 14(1).

conclusive indicator that the sea and sea-bed in the two kilometre buffer zone is not land that can be the subject of a determination under s 50 of the Act. If that is so, it is impossible to conclude that the sea and sea-bed beyond the buffer zone is land that can be the subject of a s 50 determination.

62 There are other indications – although far from conclusive – that the legislation was concerned with land as a solid portion of the earth's surface above the low water mark. Thus, s 3 makes it an essential condition of the definition of "traditional Aboriginal owners" that they are "a local descent group of Aboriginals who … are entitled by Aboriginal tradition to forage as of right over that land"[71]. The term "forage" includes "the act of searching for provisions of any kind"[72]. In that sense, it is wide enough to include fishing in the seas below the low water mark and the recovery of clams, oysters and other edibles attached to or on the sea-bed. But the more natural meaning of the term "forage" is the search for food on land above the low water mark. The historic and primary meaning of the term was and still is "food for horses and cattle"[73]. Although in s 3 "forage" obviously has a wider meaning than obtaining food for horses and cattle, it requires a strained construction of the term to regard it as including fishing or the recovery of edibles on or attached to the sea-bed. The natural meaning of "forage" and its association in s 3 with a "right over that land" indicates that "land" in the Land Rights Act is referring to land above the low water mark.

63 Section 11(3) declares that a reference "to land shall be read as not including any reference to any land on which there is a road over which the public has a right of way." Section 11 also refers to "the land, or a part of the land" and to "different parts of the land". Section 11(1AF) deals specifically with recommendations for grants of land comprised in a road over which the public right of way has ceased to exist. Section 18 deals with the vesting of an estate in fee simple in land in a Land Trust where "the land is being occupied or used by a mission with the licence or permission of the Crown". These sections support the view that in the Act "land" is an entity separate from the sea and the sea-bed.

64 Section 23(2) describes one of the functions of a Land Council as including "schemes for the management of wildlife on Aboriginal land".

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71 Section 3.

72 *Macquarie Dictionary*, 3rd ed (1998) at 825.

73 *Shorter Oxford English Dictionary*, vol 1, 3rd ed (rev) (1975) at 784; *Macquarie Dictionary*, 3rd ed (1998) at 825.

Significantly, there is no reference to schemes for managing fishing or the taking of edibles from the sea or sea-bed.

65 Section 46, which deals with the terms and conditions on which a grant of mining interests in respect of Aboriginal land may be made, requires an intending miner to make a statement to the relevant Land Council concerning certain matters. They include the "amount of vehicular access to and within the affected land with reference to any proposals to construct roads, landing strips or other access facilities[74]" and "the water, timber and other requirements to be obtained from the affected land[75]". The section is clearly dealing with that part of the earth's surface that is not covered by the sea. Significantly, the Act makes no provision for mining in the sea or the sea-bed.

66 All of the above sections suggest or at all events confirm that "land" in the Land Rights Act is confined to the solid portion of the earth's surface above the low water mark.

67 Moreover, the Reports of the Royal Commission and the subsequent history of the legislation in the Federal Parliament strongly confirm this conclusion. They suggest that the Parliament did not intend to confer any rights on Aboriginals to claim title to the seas or sea-bed adjoining those solid portions of the earth's surface of which they were the traditional owners. Given the terms of the Reports, Parliament must be taken to have known "that Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land.[76]" Parliament also knew that "the waters between the coastline and offshore islands belonging to the same clan[77]" were regarded as part of their land. Yet not only did the Parliament omit to define "land" as including off-shore areas, it rejected so much of the Royal Commissioner's draft Bill as gave title to "off-shore islands, and waters within two kilometres of seaward of the low tide lines" in relation to the areas described in Sched 3. Instead, it gave the Legislature a general power to make laws regulating or prohibiting the entry of persons and the controlling of fishing and other activities in sea waters within two kilometres of Aboriginal land[78]. The terms of s 73 and the other sections to which I have referred make an almost unanswerable case for concluding that neither the sea nor the sea-bed below the low water mark is land for the purpose of this Act.

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74 Section 46(1)(a)(iv).

75 Section 46(1)(a)(vi).

76 Aboriginal Land Rights Commission, First Report, July 1973, par 205.

77 Aboriginal Land Rights Commission, First Report, July 1973, par 205.

78 Section 73.

Order

68 The appeal should be dismissed with costs.

69 GUMMOW J. This appeal from the Full Court of the Federal Court (French and Kiefel JJ; Merkel J dissenting)[79] raises a question of construction of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Act"). The Full Court, which was exercising original jurisdiction[80], dismissed an application under s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and s 39B of the *Judiciary Act* 1903 (Cth) to review a determination of the second respondent (Olney J acting as Aboriginal Land Commissioner) given on 30 November 1999.

70 The determination was in the following terms:

> "[T]hat so much of the area claimed in the Beagle Gulf Area Land Claim (Application No 191) as is adjacent to, and seaward of, the low water mark of the seacoast of the Northern Territory or of any island adjacent thereto including the bed of any bays or gulfs of the mainland or of any such islands is not land which may properly be the subject of an application pursuant to s 50(1)(a) of [the Act]".

71 By application dated 27 May 1997, lodged with the Commissioner under par (a) of s 50(1) of the Act, the appellant and nine other persons asserted a traditional land claim under the Act to an area covered by the waters of Beagle Gulf. That Gulf lies between the coast adjacent to the city of Darwin and Bathurst and Melville Islands. After various amendments, the claim covered Beagle Gulf, a portion of Fog Bay and a portion of Van Diemen Gulf. The limits of the area claimed were defined by closing lines for the Bay and Gulfs and were described by reference, among other things, to the high water mark of the mainland and territorial sea base lines proclaimed under s 7 of the *Seas and Submerged Lands Act* 1973 (Cth). Also specified were certain islands, sandbars, islets, reefs, rocky areas and other formations within the Gulfs and the Bay. The area encompassed by the claim approached 10,000 square kilometres. The easterly closing line drawn from Melville Island to the mouth of the Adelaide River on the mainland was approximately 45 kilometres and the westerly closing line from the mainland to Bathurst Island was approximately 124 kilometres.

72 The waters with which this litigation is concerned have been assumed to lie within the limits of the Northern Territory as "bays and gulfs therein" as identified in the Letters Patent of 6 July 1863, issued pursuant to s 2 of the *Australian Colonies Act* 1861 (Imp)[81]. The Letters Patent defined the extended

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79 *Risk v Northern Territory of Australia* (2000) 105 FCR 109.

80 (2000) 105 FCR 109 at 111.

81 24 & 25 Vict c 44.

colony of South Australia which then included what is now the Northern Territory[82].

73 The circumstances leading up to the introduction of the Act and the scheme of the Act appear from the judgment of Brennan J in *R v Toohey; Ex parte Meneling Station Pty Ltd*[83]. The circumstances identified by his Honour included the second and final Report ("the Report") made by Sir Edward Woodward under a Commission to inquire into and report, among other things, upon the appropriate means to recognise and establish the traditional rights and interests of Aboriginals in and in relation to land. In construing the Act, it is appropriate to have regard to the recommendations of the Report[84].

74 The Act provides for the establishment of Aboriginal Land Councils (Pt III) and the making of grants of land to Aboriginal Land Trusts (Pt II). Brennan J observed in *Meneling*[85]:

> "The Act provides for the grant of title to two classes of Crown land. The first class consists in the parcels of land described in Sch 1 (ss 10 and 12). That land substantially comprises the Aboriginal reserves in the Northern Territory. The second class consists in other areas of Crown land in respect of which the Aboriginal Land Commissioner has made a recommendation to the Minister under s 50(1)(a) that that area be granted to a Land Trust (ss 11 and 12)."

75 As will be apparent, this appeal concerns the attempt by the appellant and the other claimants to engage the functions of the Commissioner under par (a) of s 50(1) and thus to obtain a grant of title in the second of the two classes identified by Brennan J. Sections 11 and 12, to which Brennan J referred, detail a process consequent upon a favourable recommendation by the Commissioner in a report under par (a) of s 50(1) whereby the Governor-General acts upon a recommendation that a grant be made of an estate in fee simple to a Land Trust established under s 4 of the Act. One of the functions of such a Land Trust is to hold title to land vested in it in accordance with the Act (s 5(1)(a)). The statute

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82 See *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 551-552; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1606 [108]; 184 ALR 113 at 147; *Raptis (A) & Son v South Australia* (1977) 138 CLR 346 at 352-353, 359-360, 367-372, 393.

83 (1982) 158 CLR 327 at 354-358.

84 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"), s 15AB(2).

85 (1982) 158 CLR 327 at 355.

does not confer or authorise the conferral of proprietary rights upon any particular persons beneficially.

76 The function of the Commissioner under par (a) of s 50(1) is to be exercised only upon an application of a particular description, namely one made by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being "unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals". The expression "Crown Land" is defined in s 3(1) as meaning:

> "land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land, or land that has been so alienated but has been resumed by, or has reverted to or been acquired by, the Crown, but does not include:
>
> (a) land set apart for, or dedicated to, a public purpose under an Act; or
>
> (b) land the subject of a deed of grant held in escrow by a Land Council".

In the same provision, the term "unalienated Crown land" is defined as meaning "Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town". The term "Aboriginal" is defined as meaning "a person who is a member of the Aboriginal race of Australia". Further, the expression "traditional land claim" when used in relation to land "means a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership". "[T]raditional Aboriginal owners", in relation to land:

> "means a local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land".

77 There is no definition of "land". The majority of the Full Court determined that (a) the ordinary legal meaning of "land" does not extend to the seabed of coastal waters beyond the low water mark and (b) to define "land" as used in s 50 of the Act so as to cover the seabed of bays and gulfs within the limits of the Northern Territory would be artificially to extend the ordinary legal meaning of the word.

78 After the decision of the Full Court, this Court delivered judgment in *The Commonwealth v Yarmirr*[86]. It was determined in *Yarmirr* that the native title rights and interests with which the *Native Title Act* 1993 (Cth) ("the Native Title Act") is concerned may extend to rights and interests in respect of the sea, seabed and subsoil beyond the low water mark. The Native Title Act was enacted after the Act but does not purport to repeal it in any way. To the contrary, s 210 of the Native Title Act specifies that nothing in that statute "affects the rights or interests of any person under … the *Aboriginal Land Rights (Northern Territory) Act 1976*".

79 It is accepted, for the purposes of this appeal, that the issues respecting the construction of that statute arise independently of the issues of construction of the Native Title Act determined by *Yarmirr*[87]. However, the operation of the Native Title Act in respect of the sea, seabed and subsoil beyond the low water mark answers the contention by the appellant that, unless "land" for the purposes of the Act has the meaning he supports, there will be a gap in federal legislative provision for the Northern Territory respecting the traditional rights and interests of Aborigines.

80 The decision of the Full Court upholding the determination by the Commissioner gave to s 50 of the Act a correct construction. It follows that the appeal should be dismissed.

81 In *Dampier Mining Co Ltd v Federal Commissioner of Taxation*[88], in the course of construing provisions of the *Income Tax Assessment Act* 1936 (Cth) ("the Tax Act"), Mason and Wilson JJ said that it was "somewhat artificial" to speak of the seabed as being "land". However, they went on to refer to the judgment of Mason J in an earlier case construing the Tax Act, *Goldsworthy Mining Ltd v Federal Commissioner of Taxation*[89]. There, his Honour had referred to the long history of leases for mining purposes of strata of land underlying the sea, but also had observed that there may be some question as to whether the seabed answers the description of "land" in every sense in which that word is used.

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86 (2001) 75 ALJR 1582; 184 ALR 113.

87 cf *Pareroultja v Tickner* (1993) 42 FCR 32, a decision concerned with the state of affairs after the judgment in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 and before the commencement of the Native Title Act.

88 (1981) 147 CLR 408 at 428.

89 (1973) 128 CLR 199 at 210-211.

82 The definition of "land" in s 22(1) of the Interpretation Act is of no particular assistance. It derives from the definition in s 3 of the *Interpretation Act* 1889 (UK)[90] and states that in any Act of the Parliament, unless the contrary intention appears:

> "***Land*** shall include messuages tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein".

There is, as Jacobs J put it[91], brought within a definition in the terms of that in s 22(1)[92] "every interest which in law is, or savours of, realty" so that "[p]robably the easement, and certainly the *profit a prendre* and the rent charge, are 'land' within the definition". But the present case concerns not particular interests in realty (if a grant may be made in respect of the seabed, the Act directs that it be of a fee simple) so much as the geographical situation of "land" as a portion of the surface of the earth. The distinction between land and real interests was drawn, in the context of the law of vendor and purchaser, by Barwick CJ in *Travinto Nominees Pty Ltd v Vlattas*[93].

83 The question of construction upon which this appeal turns is to be resolved, as always, by regard to the text of the statute as a whole, and the subject, scope and purpose of the statute and against the legislative history and antecedent circumstances, including the recommendations made in the Report.

84 The Report was presented in April 1974. It contained no recommendations that the land rights which it proposed should extend to the seabed. That is a significant circumstance for any consideration of the subsequent legislative history. Rather, under the heading "The land to be transferred", there appeared in pars 90 and 91 of the Report, respecting what became land included in Sched 1 to the Act, the following:

> "90. In my opinion, all land presently contained in Aboriginal reserves (other than Bagot and Maranboy), should, by proclamation under the proposed Act, be vested in incorporated trusts. The following table lists

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90 52 & 53 Vict c 63.

91 *Re Lehrer and the Real Property Act* (1960) 61 SR (NSW) 365 at 370-371. See also *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 2]* (1987) 162 CLR 153 at 162-163.

92 Jacobs J was construing the definition in s 21(e) of the *Interpretation Act of 1897* (NSW) which is in the same terms as that in the federal statute.

93 (1973) 129 CLR 1 at 13.

the areas concerned, the proposed name of the trust for each area and the organization which should nominate the trustees from at least in the first instance. In case any dispute should arise as to who is entitled to nominate trustees in the future, the responsible Minister will have to make a decision as to whose advice it is appropriate to accept.

91. The proclamation should describe the reserves by their boundaries because in some cases there are doubts about the validity of past reservations or revocations. For reasons which are set out below (paras 422-5), *it is recommended that the definition of Aboriginal land where a coastline is involved should include both off-shore islands and waters within two kilometres of the low tide line*. I believe that a case could be made out for including also the waters of some of the wider estuaries and of certain enclosed bays, such as Buckingham, Arnhem and Blue Mud Bays. However, the definition of enclosed waters for such purposes is a complex matter and I do not anticipate any problems arising in practice. If I am wrong in this, the Northern Land Council may wish to raise the question again at some later time." (emphasis added)

85 In addition, under the heading "Fisheries", the following appeared in pars 419-425:

"419. The policy of the Department of Primary Industry is that there should be open access by Australian fishermen to all fisheries which government is in a position to control.

420. Although there has been some doubt about the legal position in the past, the estuaries and tidal flats of Northern Territory Aboriginal reserves have been generally regarded as being part of the reserves and therefore out-of-bounds to commercial fishermen.

421. *The Northern Land Council has now asked that this principle be recognized and extended and that an area stretching 12 miles out to sea should be treated as part of Aboriginal land for purposes of protection of land rights. Such a claim would be relevant both to fishing and to off-shore exploration for petroleum or minerals.*

422. I accept that Aborigines make traditional claims to most, and probably all, off-shore islands. Their legends link those islands with the mainland because of the passage of mythical beings from one to the other. The effect of this is that the sea between also has significance. Certainly Aborigines generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land.

423. *However, I am unable to endorse a claim to an area of sea as great as twelve miles from the coast. It seems to me that the legitimate interests of Aborigines will be protected if their traditional fishing rights are*

preserved and their right to the privacy of their land is clearly recognized by the establishment of a buffer zone of sea which cannot legally be entered by commercial fishermen or holiday makers. An exception would have to be made in cases of emergency.

424. To establish these principles some arbitrary figure has to be arrived at, which I have already suggested (para 91) might be two kilometres from low tide. Since all the fishing is done by netting or the use of hand-lines in comparatively shallow water, this should suffice for both the purposes to which I have referred.

425. All transfers of land to Aboriginal ownership should, unless there is some strong argument to the contrary in a particular case of which I am not aware include off-shore islands." (emphasis added)

86 Even the limited proposal in pars 423 and 424 respecting the "buffer zone" for waters within two kilometres seaward of low tide lines ultimately did not find legislative acceptance. The text of the descriptions of the reserves which were included in Sched 1, relative to the sea, are set out by French and Kiefel JJ in their judgment[94]. The phrases used fix upon such criteria as the low water mark and provide specifically for rivers, streams and estuaries. The Aboriginal Land (Northern Territory) Bill 1975 read for a second time in the House of Representatives on 16 October 1975 did provide for the control by Aboriginals of entry onto their land and the two kilometres of sea adjoining it, with provision for certain exemptions. However, that Bill lapsed on dissolution of Parliament in November 1975. The Bill for what became the Act received its second reading in the House of Representatives on 4 June 1976. It did not contain any provision respecting the two kilometre "buffer". An attempt in the Senate to introduce such a provision as cl 70A[95] was unsuccessful.

87 The Act makes no reference to the seabed nor to grants of rights associated with waters, save for what might be protected by Northern Territory laws made pursuant to s 73. The legislative compromise reflected in s 73 was to confer certain powers upon the Legislative Assembly for the Northern Territory to make ordinances under what was then s 4U of the *Northern Territory (Administration) Act* 1910 (Cth). Section 73 was later amended[96] by substituting a reference to the power of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act* 1978 (Cth). Section 73(1)

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94 (2000) 105 FCR 109 at 119.

95 Australia, Senate, *Parliamentary Debates* (Hansard), 9 December 1976 at 2902.

96 By the *Aboriginal Land Rights (Northern Territory) Amendment Act (No 3)* 1978 (Cth), s 9.

provides that the power of that legislature extends to the making, among other things, of:

> "(d) laws regulating 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".

88 However, this conferral of power is qualified by the concluding provision in s 73(1)[97]:

> "but any such law has effect to the extent only that it is capable of operating concurrently with the laws of the Commonwealth, and, in particular, with this Act, the *National Parks and Wildlife Conservation Act 1975* and any regulations made, schemes or programs formulated or things done, under this Act, or under that Act".

89 In exercise of the power so conferred upon it, the Northern Territory legislature has enacted Pt III of the *Aboriginal Land Act* (NT) ("the Territory Act"). This comprises ss 12-20. In particular, s 12 confers a power upon the Administrator to close the sea adjoining and within two kilometres of Aboriginal land. In the Territory Act, the expression "Aboriginal land" is given, by the definition in s 3 thereof, the same meaning as under the Act. Section 12 of the Territory Act states:

> "(1) The Administrator may, by notice in the *Gazette*, close the seas adjoining and within 2 kilometres of Aboriginal land to any persons or classes of person, or for any purpose other than to Aboriginals who are entitled by Aboriginal tradition to enter and use those seas and who enter and use those seas in accordance with Aboriginal tradition.
>
> (2) The notice in the *Gazette* referred to in subsection (1) shall specify –
>
> (a) the area closed by the notice by description of the boundaries and by a diagram showing the approximate position of the boundaries;

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97 This provision was amended, with effect from 16 July 2000, by Sched 4 to the *Environmental Reform (Consequential Provisions) Act* 1999 (Cth). The amendment replaced the reference to "the *National Parks and Wildlife Conservation Act 1975*" with a reference to "Division 4 of Part 15 of the *Environment Protection and Biodiversity Conservation Act 1999*".

(b) the persons or classes of persons to whom the area is closed; and

(c) the purpose for which the area of the sea is closed.

(3) The Administrator may, before deciding to close a part of the seas in accordance with this section, and in the event of the Administrator not being prepared to close an area of seas within 56 days of the matter being referred to him, the Administrator shall refer the matter of the closure to the Aboriginal Land Commissioner and request that the Aboriginal Land Commissioner inquire into and report on –

(a) whether, in accordance with Aboriginal tradition, strangers were restricted in their right to enter those seas;

(b) whether the use of those seas by strangers is interfering with or may interfere with the use of those seas in accordance with Aboriginal tradition by the Aboriginals who have traditionally used those seas;

(c) whether the use of those seas by strangers is interfering with or may interfere with the use of the adjoining Aboriginal lands by the traditional Aboriginal owners;

(d) whether any person would be disadvantaged if the seas were closed to him;

(e) the commercial, environmental and recreational interests of the public; and

(f) such other matters as the Aboriginal Land Commissioner considers relevant to the closure of those seas.

(4) The Aboriginal Land Commissioner shall report to the Administrator."

90 Section 14(1) creates an offence for persons who enter onto or remain on "closed seas" without the issue of a permit to do so in accordance with Pt III. This specific provision respecting "closed seas" may be contrasted with the federal offence created by s 70 of the Act. This is directed to persons who "enter or remain on Aboriginal land" other than in the performance of functions under the Act or otherwise in accordance with the Act or a law of the Northern Territory (s 70(1)). The term "Aboriginal land" is defined in s 3(1) of the Act as meaning:

"(a) land held by a Land Trust for an estate in fee simple; or

(b) land the subject of a deed of grant held in escrow by a Land Council".

91 Had it been proposed to authorise the grants of a fee simple in the seabed in areas such as those covered by the present claim, then it would be expected that a central provision of the legislative scheme such as s 70 would contain detailed provisions for exemption and defences to balance the competing interests involved. The succeeding sub-sections to s 70(1) do contain detailed qualifications to the interdiction of s 70(1), but in terms which presuppose that the "Aboriginal land" concerned will not be located beneath the sea.

92 The scheme of the Act is that legislation enacted pursuant to s 73(1)(d) would provide the regime for the entry of persons into and the control of fishing and other activities in waters of the sea adjoining and within two kilometres of Aboriginal land. The Act stopped short of making the further provision (such as that for a 12 mile zone supported by the Northern Land Council) canvassed but not recommended in the Report. It should be added that the Northern Land Council had not proposed a seaward reach of land grants with the scope of that advanced by the present appellant.

93 The appeal should be dismissed with costs.

94 It should be added that nothing decided by this litigation denies the efficacy of grants under the Act in respect of areas including rivers and estuaries. The determination by the Commissioner was not directed to such matters.

95 CALLINAN J. The Northern Land Council, on behalf of Mr Risk ("the appellant") and nine other people, made a traditional land claim under s 50(1)(a) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Act") to the Aboriginal Land Commissioner for the seabed of the Beagle Gulf which lies in the Northern Territory. The area claimed was as follows:

> "All that land in the Northern Territory of Australia which is adjacent to, and seawards of the low water mark of the seacoast of the mainland from, in the west, the northern-most point of the western boundary of Delissaville/Wagait/Larrakia Aboriginal Land (marked on the map by the letter 'X'), and from, in the east, the point where the western bank of the Adelaide River meets the aforesaid low water mark (marked on the map by the letter 'Y');
>
> including, without limitation:
>
> (A) any islands, or part of any island, to low water mark, in the region described above, including any rights, members or appurtenances of such an island, or part thereof;
>
> (B) the bed of any bays or gulfs of the mainland or of an aforesaid island (or part thereof), or part of any such bay or gulf, in the region described above; and
>
> (C) all those sandbars, islands, islets, reefs, rocky areas and other formations enumerated on the map attached to this application;
>
> but excluding:
>
> (D) land which is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act* 1976.
>
> (DA) land, which at the time of lodgement of Beagle Gulf Area land claim, was the subject of claim pursuant to any of the following land claims under the *Aboriginal Land Rights (Northern Territory) Act* 1976:
>
> - Kenbi Mainland land claim (no 37):
> - Kenbi Islands land claim (no 127):
> - Port Patterson land claim (no 153):
> - Vernon Islands land claim (no 9).
>
> (E) land located within a town within the meaning of the *Aboriginal Land Rights (Northern Territory) Act* 1976;
>
> (F) Northern Territory Portions 3578, 3580, 3581 and 3582."

96 The description also referred to a map and a part of the Port Hurd area which had been withdrawn from the claim. As particularised, the claim excluded:

> "(i) land which is the seabed of the high seas;
>
> (ii) land which is the seabed of the twelve nautical mile territorial sea of Australia;
>
> (iii) land which is the seabed of the first three nautical miles of the territorial sea of Australia adjacent to the base lines under the *Seas and Submerged Lands Act* 1973 (Cth);
>
> (iv) land which is the seabed landward of the aforementioned base lines, but not within the Northern Territory."

97 There were other exclusions which are not material for present purposes.

98 On 3 July 1998, the Aboriginal Lands Commissioner (Olney J), at the request of the Attorney-General for the Northern Territory, issued a Notice of Intention to commence an inquiry to determine a preliminary issue, whether the claimed area, or any part thereof is land which may properly be the subject of an application pursuant to s 50(1)(a).

99 The Commissioner determined that issue on 30 November 1999 in this way:

> "The Aboriginal Land Commissioner determines that so much of the area claimed in the Beagle Gulf Area Land Claim, (Application No 191) as is adjacent to, and seaward of, the low water mark of the seacoast of the Northern Territory or of any island adjacent thereto including the bed of any bays or gulfs of the mainland or of any such islands is not land which may properly be the subject of an application pursuant to s 50(1)(a) of the *Aboriginal Land Rights (Northern Territory) Act* 1976."

100 In his reasons the Commissioner said this:

> "Having regard to the context in which the *Land Rights Act* was developed (including the comments and recommendations in the Woodward Reports) the specific provisions of the Act, (particularly those of the land descriptions in Schedule 1) and the absence of any defining provision that would extend the meaning of 'land' to include the bed of bays and gulfs which are part of the Northern Territory, I am of the view that for the purposes of the *Land Rights Act* the words 'land in the Northern Territory' mean the solid part of the earth's surface which is above the line of the low water mark. In reaching this conclusion I have not overlooked the fact that the *Land Rights Act* is clearly beneficial legislation which in the case

of doubt should be construed in a manner favourable to those for whose benefit it is passed. In this case there is no basis to doubt what Parliament intended. Accordingly, I am of the opinion that the bed of any bays or gulfs of the mainland of the Northern Territory and of any islands adjacent to any part of the mainland, is not within the ambit of the definition of 'Crown land' in s 3(1) of the *Land Rights Act* and cannot be the subject of an application made under s 50(1)(a) of that Act. It follows that the Aboriginal Land Commissioner has no function to perform in relation to a claim to the bed of any such bays or gulfs."

101 On 24 December 1999 the appellant sought a review of that determination by the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and orders under s 39B of the *Judiciary Act* 1903 (Cth)[98]. Because the Commissioner is a judge of the Federal Court the application fell to be decided by a Full Court of the Federal Court exercising original jurisdiction. That Court was constituted by French, Kiefel and Merkel JJ, the last of whom dissented and would have allowed the application. The majority, French and Kiefel JJ identified the questions to be answered in a form that I am content to adopt[99].

"The islands, sandbars, islets, reefs, rocky areas and other formations mentioned in the application, if within the region described and properly to be regarded as land in the Northern Territory, could be the

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98 "**39B Original jurisdiction of Federal Court of Australia**

(1) Subject to subsections (1B) and (1C), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

(1B) …"

99 *Risk v Northern Territory* (2000) 105 FCR 109 at 112 [8].

subject of an application pursuant to s 50(1)(a). The question whether they were within the particular region and whether or not they constituted land were matters which could only be resolved by evidence as to the location and other characteristics of the areas in question and by application of appropriate legal principles. The land description however, raised a different issue altogether in that the area to which it referred was identified as 'the bed of any bays and gulfs of the mainland … in the region described above'. The Commissioner put it thus (at par 11): 'The question is quite simple, namely, is the bed of a bay or gulf which is in the Northern Territory, land in the Northern Territory for the purposes of the Land Rights Act.'"

102 It is also convenient to adopt their Honours' summary of the history of the enactment under which the claim was made[100].

> "In 1971, Blackburn J sitting in the Supreme Court of the Northern Territory, rejected a claim by Aboriginal people of the Gove Peninsula seeking common law recognition of their traditional native title and the invalidation of certain leases granted to Nabalco Pty Ltd[101]. … In February 1973 the Commonwealth Government established a Royal Commission under Woodward J who had appeared as Senior Counsel for the plaintiffs in the Gove case to inquire into and report on statutory recognition of Aboriginal land rights in the Northern Territory. The Letters Patent which conferred the commission, required Woodward J to inquire into and report on, *inter alia*:
>
> > '… appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land …'
>
> Nothing in the terms of reference as further particularised in the Letters Patent made any explicit reference to seabed claims.
>
> In his First Report, dated 19 July 1973, Woodward J noted that a number of Aboriginal communities had raised with him questions of fishing rights. They pointed to traditional dependence on fish, turtles, shellfish, dugong and other forms of sea life and asked whether their land rights would extend out to sea and if so, how far. He said (at par 205):

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100 *Risk v Northern Territory* (2000) 105 FCR 109 at 114-117 [17]-[21].

101 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

> 'It seems clear that Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the waters between the coastline and offshore islands belonging to the same clan.'

Some of the communities which spoke to Woodward J were not concerned merely with traditional methods of food gathering but were looking ahead to the development of fishing ventures as a form of commercial activity. They feared that some of the best areas might be fished out before they could put such ideas into practice (par 206). The Royal Commissioner said (at par 207): 'In the absence of any clear-cut claims on this subject I do no more than draw attention to it as a matter requiring careful consideration.'

In his Final Report dated April 1974, Woodward J made detailed recommendations for land rights legislation applicable to the Northern Territory and annexed a Draft Bill. He set out what were in his view, the aims of the recognition of land rights for Aborigines:

> '(i) the doing of simple justice to a people who have been deprived of their land without their consent and without compensation,
>
> (ii) the promotion of social harmony and stability within the wider Australian community by removing, so far as possible, the legitimate causes of complaint of an important minority group within that community,
>
> (iii) the provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living,
>
> (iv) the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs, and
>
> (v) the maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority.'

These aims would be best achieved by:

> '(a) preserving and strengthening all Aboriginal interests in land and rights over land which exist today, particularly all those having spiritual importance,

(b) ensuring that none of these interests or rights are further whittled away without consent, except in those cases where the national interest positively demands it – and then only on terms of just compensation,

(c) the provision of some basic compensation in the form of land for those Aborigines who have been irrevocably deprived of the rights and interests which they would otherwise have inherited from their ancestors, and who have obtained no sufficient compensating benefits from white society, and

(d) the further provision of land, to the limit which the wider community can afford, in those places where it will do most good, particularly in economic terms, to the largest number of Aborigines.'

In the Final Report, Woodward J referred, under the heading 'Fisheries', to a submission by the Northern Land Council that an area stretching 12 miles out to sea should be treated as part of Aboriginal land for the purposes of protection of land rights. He said (at 422):

> 'I accept that Aborigines make traditional claims to most, and probably all, off-shore islands. Their legends link those islands with the mainland because of the passage of mythical beings from one to the other. The effect of this is that the sea between also has significance. Certainly, Aborigines generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land.'

He went on to say however that he was unable to endorse a claim to an area of sea as great as 12 miles from the coast (par 423). He considered that the legitimate interests of Aborigines would be protected if traditional fishing rights were preserved and their right to the privacy to the land clearly recognised by the establishment of a buffer zone of sea which could not legally be entered by commercial fishermen or holiday makers (par 423). To give effect to that opinion an arbitrary figure had to be arrived at which he suggested might be two kilometres from low tide (par 424). Since all fishing was done by netting or the use of hand lines in comparatively shallow water, that figure should suffice for the purposes to which he had referred (par 424).

In relation to land for which he specifically recommended transfer, being all land contained in Aboriginal reserves, Woodward J said (at par 91):

> 'The proclamation should describe the reserves by their boundaries because in some cases there are doubts about the validity of past reservations or revocations. For reasons which are set out below (paras 422-425), it is recommended that the definition of Aboriginal land where a coastline is involved should include both off-shore islands and waters within two kilometres of the low tide line. I believe that a case could be made out for including also the waters of some of the wider estuaries and of certain enclosed bays, such as Buckingham, Arnhem and Blue Mud Bays. However the definition of enclosed waters for such purposes is a complex matter and I do not anticipate any problems arising in practice.'

There was nothing in the Final Report which in terms contemplated or recommended that land rights should extend to the seabed. The Draft Bill which was Appendix D to the First Report did not define 'land', or 'Crown Land'. 'Traditional Aboriginal Owners' was defined in the same terms as were ultimately adopted in the Land Rights Act. In particular the Draft Bill did not give effect to the recommendation in par 91 of the Final Report that the definition of land should include waters within two kilometres of the low tide line. However, s 12 of the Draft Bill proposed direct vesting of parcels of land referred to in Sch 3 which in turn indicated that the parcels were 'to contain descriptions, including where appropriate, offshore interests and waters within two kilometres of seaward of the low tide line' of specified 'reserves and other land areas' set out in the Schedule."

103 In dismissing the appellant's application French and Kiefel JJ said this[102]:

> "To define 'land' as used in s 50 of the Land Rights Act as covering the seabed of bays and gulfs within the limits of the Northern Territory is artificially to extend the ordinary and ordinary legal meaning of the word. In so concluding, it may be accepted that there may be examples when the word 'land' is so extended in particular statutory contexts. The history of the Land Rights Act and its beneficial purpose must be recognised. But it must also be recognised that the Land Rights Act applies only to certain categories of land and that it represents a balance of interests. It is inconceivable that the Land Rights Act was intended to extend to the seabed of bays and gulfs within the Territory and yet failed to make that explicit. Moreover there are express and limited references to waters which have already been canvassed. In our opinion, the Commissioner was correct in his conclusions and the application should be dismissed."

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102 *Risk v Northern Territory* (2000) 105 FCR 109 at 124 [39].

The appeal to this Court

104 It is from that decision that the appellant appeals to this Court. In order to determine the appeal it is necessary to analyse the relevant provisions of the Act. Some definitions should first be noted[103].

> "'**Aboriginal land**' means:
>
> (a) land held by a Land Trust for an estate in fee simple; or
>
> (b) land the subject of a deed of grant held in escrow by a Land Council.
>
> …
>
> '**Aboriginal tradition**' means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.
>
> …
>
> '**alienated Crown land**' means Crown land in which a person (other than the Crown) has an estate or interest, but does not include land in a town.
>
> …
>
> '**Crown Land**' means land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land, or land that has been so alienated but has been resumed by, or has reverted to or been acquired by, the Crown, but does not include:
>
> (a) land set apart for, or dedicated to, a public purpose under an Act; or
>
> (b) land the subject of a deed of grant held in escrow by a Land Council.
>
> …
>
> '**sacred site**' means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.
>
> …

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103 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) s 3.

'**traditional Aboriginal owners**', in relation to land, means a local descent group of Aboriginals who:

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land.

…

'**traditional land claim**', in relation to land, means a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership."

105 Section 3A refers to Crown land vested in the Northern Territory. It provides as follows:

"**Crown land vested in Northern Territory**

(1) Notwithstanding any law of the Northern Territory, the application of this Act in relation to Crown land extends to Crown land that is vested in the Northern Territory.

(2) Notwithstanding any law of the Commonwealth or of the Northern Territory, the Commonwealth is not liable to pay to the Northern Territory any compensation by reason of the making of a grant to a Land Trust of Crown land that is vested in the Northern Territory."

106 Section 4 makes provision for Aboriginal Land Trusts to be established to hold title to land in the Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned. The trustees are obliged to exercise their functions in accordance with a direction of the (Aboriginal) Land Council for the area in which the relevant land is situated[104].

107 Section 10 (subject to some qualifications) provides for an immediate recommendation by the Minister to the Governor-General that a grant of an estate in fee simple be made to the relevant Land Trust of lands described in Sched 1 to the Act.

108 Section 11 is the section under which the Minister may act upon a recommendation made by the Commissioner. Relevantly it provides as follows:

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104 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), s 5(2).

"**Recommendations for grants of Crown land, other than that described in Schedule 1**

(1) Where:

(a) a Commissioner has, before the commencement of the *Aboriginal Land Rights Legislation Amendment Act 1982*, recommended, or, after the commencement of that Act, recommends, to the Minister in a report made to him under paragraph 50(1)(a) that an area of Crown land should be granted to a Land Trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area of land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission; and

(b) the Minister is satisfied:

(i) that the land, or part of the land, should be granted to a single Land Trust to be held for the benefit of Aboriginals who are the relevant Aboriginals in relation to that land or that part of that land; or

(ii) that different parts of the land should be granted to different Land Trusts so that each Land Trust holds the land granted to it for the benefit of Aboriginals who are the relevant Aboriginals in relation to that last-mentioned land;

the Minister shall:

(c) establish:

(i) in a case where he is satisfied that the land, or a part of the land, should be granted to a single Land Trust – a single Land Trust under section 4 to hold that land, or that part of that land, for the benefit of Aboriginals who are the relevant Aboriginals in relation to the land, or the part of the land, proposed to be held by that Land Trust; or

(ii) in a case where he is satisfied that different parts of the land should be granted to different Land Trusts – 2 or more Land Trusts under section 4 respectively to hold those different parts of that land for the benefit of Aboriginals who are the relevant Aboriginals in relation to the parts of the land respectively proposed to be held by each of those Land Trusts;

(d) where land in respect of which a Land Trust has been or is proposed to be established in accordance with paragraph (c) is, or includes, alienated Crown land, ensure that the estates and interests in that land of persons (other than the Crown) are acquired by the Crown by surrender or otherwise; and

(e) after any acquisition referred to in paragraph (d) has been effected in relation to land and a Land Trust has been established in accordance with paragraph (c) in respect of that land, recommend to the Governor-General that a grant of an estate in fee simple in that land be made to that Land Trust.

…

(3) A reference in subsection (1), (1AB), (1AD) or (1AE) to land shall be read as not including a reference to any land on which there is a road over which the public has a right of way."

109 Pursuant to sub-s 12(1) of the Act the Governor-General shall on receipt of a recommendation under ss 10 or 11, with respect to a land grant or estate granted in the land in accordance with the recommendation reserve from any such grant, surface and subsurface minerals (s 12(2)).

110 Section 19, subject to some listed exceptions, prohibits any dealings with, or dispositions by a Land Trust of any estates or interests in land vested in it. Section 20A applies the law of the Northern Territory relating to the transfer of land, to any permissible dealings with land by, or on behalf of a Land Trust.

111 Part III of the Act is concerned with the establishment, elections, funds, meetings, and obligations and functions of the Land Councils, the last of which include the protection of the interests of traditional Aboriginal owners and other Aboriginal interests in Aboriginal land in the area administered by the relevant Land Council[105].

112 Part IV of the Act is concerned with mining. It is necessary to do no more than note that it establishes a separate regime for the grant of mining tenements of various kinds over Aboriginal land from the regime for the grant of such tenements (including exploratory licences) in respect of other lands. With one exception, (proclaimed national interest) Aboriginal Land Councils are empowered to exercise a very large measure of control over the grant of mining tenements on Aboriginal lands.

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105 Section 23(1)(b).

113 Section 50, in Pt V of the Act, under which the application was made, relevantly provides as follows:

"**Functions of Commissioner**

(1) The functions of a Commissioner are:

(a) on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals:

(i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and

(ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12;

(b) to inquire into the likely extent of traditional land claims by Aboriginals to alienated Crown land and to report to the Minister and to the Administrator of the Northern Territory, from time to time, the results of his inquiries;

…

(3) In making a report in connexion with a traditional land claim a Commissioner shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed, and shall comment on each of the following matters:

(a) the number of Aboriginals with traditional attachments to the land claimed who would be advantaged, and the nature and extent of the advantage that would accrue to those Aboriginals, if the claim were acceded to either in whole or in part;

(b) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part;

(c) the effect which acceding to the claim either in whole or in part would have on the existing or proposed patterns of land usage in the region; and

(d) where the claim relates to alienated Crown land – the cost of acquiring the interests of persons (other than the Crown) in the land concerned.

(4) In carrying out his functions a Commissioner shall have regard to the following principles:

(a) Aboriginals who by choice are living at a place on the traditional country of the tribe or linguistic group to which they belong but do not have a right or entitlement to live at that place ought, where practicable, to be able to acquire secure occupancy of that place;

(b) Aboriginals who are not living at a place on the traditional country of the tribe or linguistic group to which they belong but desire to live at such a place ought, where practicable, to be able to acquire secure occupancy of such a place."

114 It is sufficient to note in passing that s 70 of the Act which prohibits (subject to some limited exceptions) entry without authorisation upon Aboriginal lands, does not, as would be appropriate if land includes sea waters, make any provision for the passage across, moving or fishing in, or access for any other purposes to the sea.

115 Section 71 states which, and for what purposes, Aboriginal persons may enter and use or occupy land the subject of a grant under the Act. It provides as follows:

"**Traditional rights to use or occupation of Aboriginal land**

(1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

(2) Subsection (1) does not authorize an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an Aboriginal Council or other incorporated association of Aboriginals."

116 Section 74A deals with the funding of applications for closure of seas, which may be made under Northern Territory legislation. It says nothing about the meaning to be given to the word "land" which is used in the Act in many places. By contrast, there is only one reference in the Act to the sea and that appears in sub-s 73(1)(d) which empowers the legislature of the Territory under the *Northern Territory (Self-Government) Act* 1978 (Cth) to make:

> "(d) laws regulating 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".

117 That sub-section provides, in my opinion, a strong indication that "land" as used in the Act does not embrace the sea. Indeed, it indicates, first, that sea waters require and are given separate statutory treatment from land; secondly, that waters of the sea (and presumably the bed under them) adjoin, are separate from, and are not therefore part of, "Aboriginal land"; and, thirdly, that special provision for the pursuit of Aboriginal activities in seawaters, which would otherwise not be necessary if they were claimable lands, was necessary.

118 It may be accepted that in some contexts land may embrace the seabed. In *The Commonwealth v New South Wales*[106] ("the *Royal Metals Case*") the Court considered the definition of land in the *Lands Acquisition Act* 1906 (Cth). Knox CJ and Starke J there said[107]:

> "These sections may empower the Governor-General to acquire the estates or interests or rights of persons or of States in or over land, or to take some *defined portion of the terrestrial globe*. In our opinion they do both." (emphasis added)

119 Land has been described as a defined three-dimensional space, identified by natural or imaginary points located by reference to the earth's surface[108]. In its legal signification land may, in some circumstances, include "any ground, soil or earth"[109] and may comprehend the seabed[110].

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106 (1923) 33 CLR 1.

107 (1923) 33 CLR 1 at 23.

108 Ball, "The Jural Nature of Land", (1928) 23 *Illinois Law Review* 45 at 62, 67.

109 *Halsbury's Laws of England*, 4th ed, vol 39, par 377.

120 In *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* Mason J held that the seabed of Port Hedland harbour was land for the purposes of the Income Tax legislation for two reasons. His Honour said[111]:

> "There is no reason for thinking that, at common law, a lease cannot be granted of portion of the seabed, provided that the property the subject of the grant is defined with sufficient certainty. There may be some question whether the seabed answers the description of 'land' in every sense in which that word is used. But in general the word in its legal signification includes any ground, soil or earth."

121 After referring to the long history of leases for mining purposes of submerged land, his Honour concluded that the subject matter of the lease was "land within the general acceptation of that expression, notwithstanding that it has the character of seabed"[112]. With respect to s 88(2) of the *Income Tax Assessment Act* Mason J said[113]:

> "The word 'land' is defined, in the absence of a contrary intention, by s 22 of the *Acts Interpretation Act* 1901-1966, in such wide and general terms as would enable it to comprehend a part of the seabed. There is, I think, nothing in the context of s 88(2) which would require that it should be read in a more restricted sense. I conclude, therefore, that the dredging lease was a lease of land within the meaning of s 88(2)."

122 It is also true that the territorial limits of the Northern Territory extend to include bays and gulfs. This appears from Letters Patent dated 6 July 1863 issued pursuant to s 2 of the *Australian Colonies Act* 1861 (Imp) which defined the territorial limits of the Colony of South Australia to include,

> "… so much of [the] Colony of New South Wales as lies to the northward of [26° S] and between [129° and 130° E] together with the bays and gulfs therein, and all and every the islands adjacent to any part of the mainland within such limits as aforesaid, with their rights, members, and appurtenances."

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110 *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 210-211.

111 (1973) 128 CLR 199 at 210.

112 (1973) 128 CLR 199 at 211.

113 (1973) 128 CLR 199 at 215.

This is the same formula as appears in the Letters Patent dated 19 February 1836 and issued for the initial establishment of the Colony of South Australia[114].

123 But, that in different situations, and under different legislation enacted for different purposes, the seabed and what is above or below it may, or should be regarded as "land" cannot be determinative of its meaning in this Act. That meaning has to be ascertained by reference to the language and discernible purpose of this Act, read as a whole. And there are, as will appear further indications yet of a statutory intention to exclude sea waters and the seabed in other sections of the Act.

124 Section 50(3)(c) requires the Commissioner, in making a report, to comment on the effect that acceding to a claim would have on the existing, or proposed "patterns of land usage in the region" a phrase neither immediately nor readily applicable to the fishing and navigation of sea waters. Nor is it without significance that the Commissioner is not obliged to comment on, if not patterns of the usage of the seas, at least the means and frequency of resort to, and exploitation of them.

125 Section 50(4) refers to places where Aboriginals are living "on" traditional country and to the aim "[of] acquir[ing] secure occupancy", again expressions more naturally appropriate to land, than to the seabed or the sea.

126 The respondents also point to the use of the word "forage" in sub-s 3(1) of the Act[115], the establishment of the right to which is one of the conditions for the obtaining of a grant. The notion of "foraging" on the seabed permanently covered by water, irrespective of its depth, or in the sea itself is an unlikely one. The word "foraging"[116] may in some circumstances have a contemporary

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114 See *Raptis (A) & Son v South Australia* (1977) 138 CLR 346 at 359 per Gibbs J, 366-372 per Stephen J, 380-381 per Mason J, 390-391 per Jacobs J.

115 Found in the definition of "traditional Aboriginal owners".

116 *The Macquarie Dictionary* (2nd rev ed) (1987) at 688:

> "1. food for horses and cattle; fodder, provender. 2. the seeking or obtaining such food. 3. The act of searching for provisions of any kind. 4. A raid."

See also Borroloola Land Claim (No 1), A Report, per Toohey J at [97]:

> "The word 'forage' is capable of some shades of meaning, but I take it to refer here to a search for food in a roving sort of way."

See also *The Shorter Oxford English Dictionary*, vol 1, 3rd ed (rev) (1975) at 784-785:

(Footnote continues on next page)

meaning extending to the act of searching for provisions of any kind, or of wandering in search of supplies, or of hunting or searching about on sea or on land, but it certainly does not have a primary meaning of fishing or exploiting the seas or seabeds. A description of fishing as foraging has the appearance of a metaphor rather than of an accurate statement of fact. The primary and preferable meaning that the word conveys is of activities on land.

127 It is also important to bear in mind that the Act was enacted against the background of existing public rights, including of fishing and navigation, being public rights which qualify the Crown's rights in respect of the seabed and the space above it[117]. Necessarily, a right of fishing may involve not only the fishing of the seas, but also the use of the seabed, by standing on it, or anchoring in it to fish, placing nets in, below and on it, and the taking of some forms of sedentary aquatic life (not so attached to be considered a permanent part of the solum) from it[118].

128 The structure and text of the Act in the respects to which I have referred, and the legislative history of the Act, in particular the decision by the legislature not to adopt the substance of the recommendations of Woodward J with respect to an area delineated by the two kilometre mark and Aboriginal use and occupation thereof, point inexorably in my opinion, to the conclusion that the Act does *not* authorize the claiming and granting of title to seawaters or the seabed beneath them. Land, in the Northern Territory, as referred to in the Act does not extend to the beds of the bays and gulfs of the Territory. The appeal should therefore be dismissed with costs.

"1. To collect forage from; to overrun (a country) for the purpose of obtaining or destroying supplies. Also, to plunder, ravage. 2. To rove in search of forage or provisions; also to raid. 3. To make a roving search *for*; to rummage. 4. To raven. 5. To supply with forage or food. 6. To obtain by foraging."

117 *Commonwealth v Yarmirr* (2001) 75 ALJR 1582; 184 ALR 113.

118 cf *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 at 14-15 [48]-[51], 16 [64], 22-23 [87]-[92] per Mansfield J.