HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

NORTHERN TERRITORY OF AUSTRALIA
& ANOR APPELLANTS

AND

ARNHEM LAND ABORIGINAL LAND TRUST
& ORS RESPONDENTS

Northern Territory of Australia v Arnhem Land Aboriginal Land Trust
[2008] HCA 29
30 July 2008
D7/2007

ORDER

1. *Appeal allowed in part.*

2. *Set aside the order first numbered 2 of the orders of the Full Court of the Federal Court of Australia made on 2 March 2007 and, in its place, order that it be declared that:*

> *Sections 10 and 11 of the* Fisheries Act *(NT) do not confer on the Director of Fisheries (NT) a power to grant a licence under that Act which licence would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines described in the Arnhem Land (Mainland) Grant and the Arnhem Land (Islands) Grant made under the* Aboriginal Land Rights (Northern Territory) Act *1976 (Cth).*

3. *Appellants to pay the first, second and third respondents' costs of and incidental to the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

D F Jackson QC with V B Hughston SC for the appellants (instructed by Solicitor for the Northern Territory)

B W Walker SC with S A Glacken for the first, second and third respondents (instructed by Northern Land Council)

M A Perry QC with G J Kennedy for the fourth respondent (instructed by Cridlands)

D M J Bennett QC, Solicitor-General of the Commonwealth with R J Webb QC for the fifth respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Northern Territory of Australia v Arnhem Land Aboriginal Trust

Aboriginals – Land rights – Rights to exclude persons from tidal waters under *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("Land Rights Act") – Grants of "Estate in Fee Simple" extending to low water mark – Grants subject to Land Rights Act – Subject of grants "Aboriginal land" under Land Rights Act – Under Land Rights Act, s 70(1), a "person shall not enter or remain on Aboriginal land" – Defence under Land Rights Act, s 70(2A), if person enters or remains on land in accordance with that Act, or law of Northern Territory – Under *Aboriginal Land Act* (NT) relevant Land Council may grant permission to enter and remain on Aboriginal land – Meaning of "Aboriginal land" – Whether, without permission, licensee under *Fisheries Act* (NT) ("Fisheries Act") can fish in "intertidal zone", or in tidal waters within boundaries of grants – Whether fishing in those waters is to "enter or remain on Aboriginal land" – Construction of Land Rights Act, s 70(1) – Whether licensee under Fisheries Act does not contravene Land Rights Act, s 70(1), because enters or remains on land "in accordance with … a law of the Northern Territory".

Statutes – Construction – Whether Fisheries Act, by necessary implication, abrogated any pre-existing common law public right to fish in tidal waters – Whether Fisheries Act permits licensee to enter any place to fish in accordance with licence – "Application" of Fisheries Act – Public rights of navigation – Approach to interpretation – Whether legislation extinguishing Aboriginal rights requires specificity.

Words and phrases – "Aboriginal land", "enter or remain on Aboriginal land", "Estate in Fee Simple", "public right of navigation", "public right to fish", "waters of the sea".

Aboriginal Land Act (NT), ss 4, 5, 12.
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), ss 3(1), 70(1), 70(2A), 73(1).
Fisheries Act (NT), ss 10(1), 10(2), 11.

1 GLEESON CJ, GUMMOW, HAYNE AND CRENNAN JJ. The central issue arising in this appeal is whether a grant in fee simple, made under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act"), confers rights to exclude from tidal waters within the boundaries of the grant persons who wish to take fish or aquatic life in those waters, including persons holding a licence under the *Fisheries Act* (NT) ("the Fisheries Act"). That issue arises in litigation the origins of which can be traced to Aboriginal traditional owners of parts of Blue Mud Bay in northeast Arnhem Land wishing to determine their rights to exclude fishermen and others from waters in that area.

2 On 30 May 1980, pursuant to the Land Rights Act[1], the Governor-General executed deeds of grant of an estate in land to the first respondent (Arnhem Land Aboriginal Land Trust – "the Land Trust") in relation to two areas described in Sched 1 to the Land Rights Act. One grant, the Arnhem Land Mainland Grant ("the Mainland Grant"), concerned approximately 90,000 square kilometres of the mainland of the Northern Territory between the mouth of the East Alligator River in Van Diemen Gulf (in the west) and the mouth of the Roper River in the Limmen Bight (in the east) but excluding Cobourg Peninsula. The other grant, the Arnhem Land Islands Grant ("the Islands Grant"), concerned all the islands (except Groote Eylandt) in the Northern Territory generally adjacent to the land the subject of the Mainland Grant.

3 The Yolngu people are the traditional owners of parts of Arnhem Land, including areas of Blue Mud Bay. Blue Mud Bay lies within the Mainland Grant. Before the Land Rights Act came into force, Blue Mud Bay fell within the Arnhem Land Reserve created in 1931 "for the use and benefit of Aboriginal native inhabitants" under the Crown Lands Ordinance 1927 (NT) and under subsequent Northern Territory Ordinances dealing with reserves.

4 Both grants made under the Land Rights Act described the interest granted as "an Estate in Fee Simple". The Land Trust must exercise its powers as owner of the land "for the benefit of the Aboriginals concerned"[2]. The Land Trust must act in accordance with the directions of the relevant Land Council[3] – the Northern Land Council – and the functions of the Land Council, under the Land Rights Act, include the protection of the interests of the traditional Aboriginal

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1 ss 10(1) and 12(1)(a).

2 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act"), s 5(1)(b).

3 s 5(2).

owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council[4].

5 Both grants were subject to the provisions of the Land Rights Act and to some conditions, exceptions and reservations. Each extended to low water mark and included areas bounded by straight lines joining the seaward extremities of the banks of rivers, streams and estuaries intersecting the coast. The grants encompass the area of land that is covered and uncovered by water at different times of the day, depending upon the position of the tides ("the intertidal zone"). In addition, rivers and estuaries are affected by the ebb and flow of the tides and tidal waters therefore extend landward of the straight line boundaries of the grants.

6 The Land Rights Act refers[5] to land the subject of grants, like the Mainland Grant and the Islands Grant, as "Aboriginal land". Section 70(1) of the Land Rights Act provides that "[a] person shall not enter or remain on Aboriginal land" and prescribes a penalty for doing so. The general prohibition in s 70(1) is qualified in several respects by other provisions of the Land Rights Act and it will be necessary to describe and examine those qualifications in more detail. Immediately, however, it is sufficient to notice that in proceedings for an offence against s 70(1) it is a defence[6] if the person enters or remains on the land "in performing functions under [the Land Rights] Act or otherwise in accordance with [the Land Rights] Act or a law of the Northern Territory". One law of the Northern Territory relevant to s 70(1) and the defence for which s 70(2A) provides is the *Aboriginal Land Act* (NT) ("the Aboriginal Land Act"). Under the Aboriginal Land Act[7] the relevant Land Council may grant permission to enter and remain on Aboriginal land. Power to enact such a law was given to the

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4 s 23(1)(b).

5 s 3(1), "Aboriginal land".

6 When the Full Court of the Federal Court gave its judgment in this matter, the relevant provision took the form quoted and was contained in s 70(2A) of the Land Rights Act. That section was later amended. With some minor and presently irrelevant changes the substance of the provision made by the former s 70(2A) was thereafter contained in s 70(2A)(e) and (h) of the Land Rights Act.

7 s 5(1).

Legislative Assembly of the Northern Territory by s 73(1) of the Land Rights Act[8].

7 This appeal is brought by the Northern Territory and the Director of Fisheries for the Northern Territory against orders of the Full Court of the Federal Court of Australia. That Court made declarations about the application and validity of the operation of the Fisheries Act in areas within the boundary lines described in the Mainland Grant and the Islands Grant and about whether the Fisheries Act confers power to grant a licence which would authorise or permit the holder to enter and take fish or aquatic life from areas subject to those grants.

8 As mentioned at the outset of these reasons, the central issue in this appeal is whether, without permission from the Land Trust, a person holding a licence under the Fisheries Act can fish in the intertidal zone within the boundaries of either the Mainland Grant or the Islands Grant, or in the tidal waters within those boundaries. To resolve that issue it will be necessary to consider two questions. Is fishing in those waters to enter or remain on Aboriginal land? This question should be answered, "yes". Does a person who holds a licence under the Fisheries Act enter or remain on that land "otherwise in accordance with ... a law of the Northern Territory", so as to found a defence to contravention of s 70(1) of the Land Rights Act? This question should be answered, "no".

The proceedings below

9 Two proceedings in the Federal Court of Australia were tried concurrently. One proceeding, instituted by the Land Trust (the first respondent in this Court), the Northern Land Council (the second respondent), and the third respondents in this Court ("the native title holders"), sought declarations of their rights under the grants that have been described and sought orders restraining both the Director of Fisheries and the Northern Territory itself from issuing fishing licences in relation to areas the subject of claims to native title (which

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8 "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:

...

(b) laws regulating or authorizing 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".

included areas within the boundaries of the grants). The other proceeding was a claim to native title by persons who included the native title holders.

10 The proceeding seeking declarations that the rights of the traditional owners over the intertidal zone or in the tidal waters within the boundaries of the grant were exclusive of all others was commenced, at least in part, in order to resolve a difference of opinion that had arisen in about 1996 or 1997 between the Northern Land Council on the one hand, and the Director of Fisheries on the other about whether the Director could, pursuant to the Fisheries Act, grant licences to persons to fish in, and enter upon, the intertidal zone. There had been reports of commercial fishing and fishing by non-Aboriginals within Blue Mud Bay, although it was not known whether the persons who were observed fishing had been issued with Fisheries Act licences. The Northern Land Council considered that the Director of Fisheries could not "authorise fishing in waters overlying Aboriginal land". The Director of Fisheries considered that tidal waters over Aboriginal land were not part of the Aboriginal land and that fishing licences could validly authorise fishing in those waters.

11 Evidence was presented at trial by officers of the Northern Land Council and by members of the Yolngu people that strangers had engaged in fishing activities within the boundaries of the Mainland Grant. There was no evidence that these strangers were holders of a Fisheries Act licence or were purporting to act pursuant to permission granted by a Fisheries Act licence. Some evidence was led at trial of an arrangement between the Northern Land Council, the Land Trust and a commercial crabber authorising commercial crabbing within the boundaries of the grants.

12 At trial there was debate about whether the proceeding instituted by the Land Trust, the Northern Land Council and the native title holders constituted a "matter". The trial judge (Selway J) held that there was sufficient evidence in the correspondence of a "real dispute as to the powers under the *Fisheries Act* and whether those powers could be used to interfere with the rights claimed by the applicants". Accordingly, his Honour found that there was a matter which could be determined by proceedings seeking declarations of the respective rights and powers of the parties[9].

13 The trial judge concluded[10], however, that the first proceeding seeking declarations and injunctions should be dismissed but that, in the second

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9 *Gumana v Northern Territory* (2005) 141 FCR 457 at 472 [49].

10 (2005) 141 FCR 457 at 462 [2]-[3].

proceeding, a determination of native title should be made. In the first proceeding, his Honour held that the Land Rights Act and the grants made under that Act gave the Land Trust an estate in fee simple to the low water mark[11]. If the matter had been free from authority, Selway J would have concluded[12] that "a statutory grant of an estate in fee simple to the low water mark necessarily conferred a right to exclude from the inter-tidal zone, including a right to exclude those seeking to exercise a public right to fish or to navigate". But Selway J held that authority binding upon him (particularly the decision of the Full Court of the Federal Court in *Commonwealth v Yarmirr*[13]) required the opposite conclusion. Accordingly, Selway J held that the grants did not confer the right to exclude persons exercising public rights to fish in the intertidal zone or in the tidal waters on the landward side of the boundaries of the grants[14].

14 Before orders giving effect to these conclusions were made, Selway J died. The parties agreed that another judge of the Federal Court (Mansfield J) should make such orders as followed from the reasons for judgment which Selway J had published and orders were made accordingly.

15 The plaintiffs in the first proceeding (the Land Trust, the Northern Land Council and the native title holders) appealed to the Full Court of the Federal Court against the orders of Mansfield J dismissing that proceeding. In the second proceeding, the native title holders appealed against the determination of native title (seeking a larger determination than had been made) and the Commonwealth and the Northern Territory cross-appealed against the determination. The Full Court (French, Finn and Sundberg JJ) made orders[15] disposing of the several appeals and cross-appeals that had been instituted in respect of the two proceedings. It is not necessary to trace the detail of those orders. For immediate purposes what is important is the declarations, made by the Full Court, that:

"[T]he *Fisheries Act 1988* (NT):

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11 (2005) 141 FCR 457 at 478 [69].

12 (2005) 141 FCR 457 at 483 [73].

13 (1999) 101 FCR 171.

14 (2005) 141 FCR 457 at 486 [85]-[86].

15 *Gumana v Northern Territory* (2007) 158 FCR 349.

(a) has no application in relation to areas within the boundary lines described in the Deeds of Grant [in respect of the Mainland Grant or the Islands Grant];

(b) does not confer on the [Director of Fisheries] a power to grant a licence under that Act, which licence would authorise or permit the holder to enter and take fish or aquatic life from areas subject to the Grants;

(c) is invalid and of no effect in so far as it purports to operate with respect to areas subject to the [G]rants."

Those declarations are the focus of the appeal to this Court by the Northern Territory and the Director of Fisheries for the Territory. An issue, agitated in the courts below, about whether the Fisheries Act regulates the conduct of persons permitted by the Land Trust to enter and to fish in those waters was not pressed in this Court. Counsel for the parties at whose suit the declarations were made – the Land Trust, the Northern Land Council and the native title holders – accepted that the declaration made in the present matter by the Full Court, that the Fisheries Act "has no application in relation to areas within the boundary lines described" in the Mainland Grant and the Islands Grant, could not be supported. That is, counsel for those parties accepted that the Fisheries Act operates according to its tenor in waters within the boundaries of Aboriginal land. Counsel recognised that licences under the Fisheries Act did not purport to grant access to lands or seas upon which fishing could take place or which would need to be traversed before rights under a licence could be exercised. Licences merely authorised the specific activity of fishing. Accordingly, the particular detail of the operation of the Fisheries Act was not examined in argument and is not considered in these reasons.

16 Because the plaintiffs at whose suit the declarations were made (the Land Trust, the Northern Land Council and the native title holders) did not seek to support, in oral argument, the first of the declarations made by the Full Court, the appeal by the Territory and the Director must be allowed, at least to that extent. And as will later be explained, in written submissions made after the conclusion of the oral hearing, the Land Trust, the Northern Land Council and the native title holders also accepted that the second and third declarations should be set aside and a more limited declaration made, to the effect that the Fisheries Act does not "without more" authorise or permit entry into areas within the boundaries of the grants.

Identifying the relevant questions

17 The relevant questions in the present appeal have been identified earlier in these reasons as being, first, whether fishing in the intertidal zone or in the tidal waters within the boundaries of the grants is to "enter or remain on Aboriginal land", and secondly, whether a person who holds a licence under the Fisheries Act enters or remains on that land "otherwise in accordance with ... a law of the Northern Territory". It is the answers to those questions that determine what declarations the Full Court should have made.

18 Those questions are framed by reference to s 70 of the Land Rights Act. To explain why they are the questions that must be addressed, it is necessary to deal first with some matters which underpinned much of the argument in the courts below but which, on examination, should be put aside from consideration. Those matters are first, the suggestion that there is a common law public right to fish in tidal waters of the Northern Territory, and second, the suggestion that a licence granted under the Fisheries Act permits the holder of the licence to go into any waters or perhaps any particular areas of water for the purposes of fishing in accordance with the licence. It will also be necessary to say a little more about the proposition that the Fisheries Act does not "apply" within the boundaries of the grants, or is to an extent invalid, and to make very brief mention of public rights of navigation.

A public right to fish?

19 Much of the argument in the appeal to this Court, and in the courts below, proceeded from the premise that there is a common law public right to fish in tidal waters and that the immediately dispositive question in the litigation required identification of how that right does or does not intersect with the rights given by the grants under the Land Rights Act. These reasons will show that this premise is wrong. No question arises of any intersection between a common law right to fish and rights given by the grants under the Land Rights Act.

20 It is convenient to refer to the right to fish relied on in argument in this Court and in the courts below as a "common law" right because it finds its roots not only in the writings of Coke, Bracton and Hale[16], but also in English judicial decisions since at least the 17th century[17].

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16 The history of the right is described in Moore and Moore, *The History and Law of Fisheries*, (1903) at xxxvii-xliii.

17 See, for example, *Lord Fitzwalter's Case* (1673) 1 Mod 105 [86 ER 766].

21 In the relevant volume of the first edition of *Halsbury's Laws of England*, published in 1910, it was said[18]:

> "In all waters within the territorial limits of the kingdom, subject to the flow and reflow of the tide, the public, being subjects of the realm, are entitled to fish[19], except where the King or some particular subject has gained a propriety exclusive of the public right[20], or Parliament has restricted the common law rights of the public. ...
>
> As the public right of fishery is dependent on the presumed ownership of the soil by the Crown, the area in which the right may be exercised is limited to the Crown's right to the soil. It extends, therefore, only to the high-water mark of ordinary tides[21], and as far up rivers as the tide in the ordinary and regular course of things flows and reflows".

And only a few years later, in 1913, Viscount Haldane LC, speaking for the Privy Council in *Attorney-General (British Columbia) v Attorney-General (Canada)*[22], said:

> "Since the decision of the House of Lords in *Malcomson v O'Dea*[23], it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that *no public right of fishing in such waters, then existing, can be taken away without competent legislation*. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia." (emphasis added)

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18 vol 14 at 574, pars 1269-1270 (footnotes omitted in part).

19 *Ward v Creswell* (1741) Willes 265 [125 ER 1165].

20 *Royal Fishery of Banne Case* (1610) Dav 55 [80 ER 540]; *Lord Fitzwalter's Case* (1673) 1 Mod 105 [86 ER 766]; *Neill v Duke of Devonshire* (1882) 8 App Cas 135.

21 *Attorney-General v Chambers* (1854) 4 De G M & G 206 [43 ER 486]; *Malcomson v O'Dea* (1863) 10 HLC 593 [11 ER 1155].

22 [1914] AC 153 at 170.

23 (1863) 10 HLC 593 [11 ER 1155].

22 It is against this background that, in *Harper v Minister for Sea Fisheries*[24], Brennan J (with whose reasons the other members of the Court agreed in this respect) spoke of the existence of a public right to fish in tidal waters being accepted in Australia. But as Brennan J also pointed out in *Harper*[25], because the common law right of fishing in the sea and in tidal navigable rivers is "a public not a proprietary right, [it] is freely amenable to abrogation or regulation by a competent legislature".

23 Because the common law right of fishing is amenable to statutory abrogation or regulation, no conclusion may be reached about whether a common law right to fish in tidal waters of the Northern Territory persists without first considering the Fisheries Act. That Act is an enactment of the Parliament of the Northern Territory pursuant to authority granted by s 6 of the *Northern Territory (Self-Government) Act* 1978 (Cth), extended by s 5 of the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth). That legislation empowers the Director of Fisheries to regulate all fishing and includes the power to grant licences for commercial fishing.

24 Section 10(1) of the Fisheries Act provides that:

> "Subject to this Act or to an instrument of a legislative or administrative character made under it, a person shall not –
>
> (a) take any fish or aquatic life;
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> ...
>
> unless the person does so under and in accordance with a licence."

The sub-section then prescribes the penalty for contravention of that prohibition as "$20,000 or imprisonment for 2 years".

25 The general prohibition in s 10(1) is then qualified by a number of other provisions. In particular, s 10(2) provides that:

> "Nothing in this section shall apply to the taking of fish or aquatic life by a person for subsistence or personal use only (and not for the purposes of sale), within such limits (if any) relating to numbers, quantity,

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24 (1989) 168 CLR 314 at 330; [1989] HCA 47.

25 (1989) 168 CLR 314 at 330.

> size, weight, methods, types and amounts of fishing gear, and periods of time (including closed and open seasons), as may be prescribed for any such fish or aquatic life."

And s 11 provides for the grant of an appropriate licence to a person "who proposes to do any thing specified in section 10(1)".

26 The fourth and fifth respondents in this Court (respectively, the Northern Territory Seafood Council Inc – "the Seafood Council" – and the Commonwealth) both submitted that licences granted under the Fisheries Act permit access to areas within the boundaries of the grants to the Land Trust made under the Land Rights Act. But a basis for the argument was not articulated beyond reference to the continued existence of the common law public right to fish which, so it was submitted, had not been abrogated by the Fisheries Act. The Commonwealth submitted that the Fisheries Act "preserves and operates upon the public rights of fishing, albeit heavily regulated". And the appellants' submissions that the common law public right to fish authorises entry to areas within the boundaries of the grants depended upon the common law public right to fish not having been abrogated by statute.

27 These submissions should not be accepted. The statutory abrogation of a public right may appear not only from express words but by necessary implication from the text and structure of the statute[26]. By necessary implication, the Fisheries Act (and in particular ss 10 and 11) abrogated any public right to fish in tidal waters in the Northern Territory that existed before the Fisheries Act was enacted. (It is not necessary to examine whether the right was abrogated by earlier legislation.) Just as "when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament"[27], the comprehensive statutory regulation of fishing in

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26 *Chief Commissioner for Railways and Tramways (NSW) v Attorney-General for New South Wales* (1909) 9 CLR 547 at 560; [1909] HCA 75; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185-186, 248-249; [1996] HCA 40; cf *Campbell v Macdonald* (1902) 22 NZLR 65.

27 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459 per McHugh J; [1997] HCA 36. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 69-70 [85]; [2005] HCA 50; *Barton v The Commonwealth* (1974) 131 CLR 477 at 501; [1974] HCA 20; *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

the Northern Territory provided for by the Fisheries Act has supplanted any public right to fish in tidal waters.

28 It is the statutory exclusion provided by s 10(2), in favour of fishing for subsistence or personal use only, to which a person fishing in tidal waters may look for exemption from the otherwise general prohibition of s 10(1) against fishing except "under and in accordance with a licence" issued under the Act. And a person may rely upon that exemption only "within such limits (if any)" relating to the matters identified in s 10(2) as may be prescribed for any such fish or aquatic life. But whether and how a person may take fish or aquatic life in the Northern Territory are questions to be answered by resort to the Act, not any common law public right. The common law public right has been abrogated.

29 It follows that the outcome of the present litigation does not depend upon resolving any competition between a public right (the right to fish) and whatever may be the rights conferred on the Land Trust by the grants made under the Land Rights Act.

30 It is necessary, however, to go on to consider whether there is some relevant competition between rights derived from the Fisheries Act and the rights of the Land Trust under the grants. That is, because no common law right to fish in the tidal waters of the Northern Territory survived the enactment of the Fisheries Act, it becomes necessary to inquire whether the Fisheries Act seeks to provide that a person who acts in accordance with that Act may enter and fish in waters that lie within the boundaries of the grants. (It is not necessary to distinguish between the intertidal zone and the tidal waters on the landward side of the straight line boundaries.)

31 The declarations made by the Full Court may be understood as assuming that, if otherwise valid, the Fisheries Act purports to authorise entry to waters within the boundaries of the grants for the purpose of taking fish or aquatic life. So much is implicit in the declaration that the Fisheries Act does not confer power to grant a licence that would permit the holder to enter those waters, and the declaration that the Fisheries Act is invalid and of no effect in so far as it purports to operate with respect to those waters. It is necessary to examine whether the Fisheries Act or a licence granted under that Act does authorise entry to any particular area.

The Fisheries Act

32 The general provision for licences made by s 11 of the Fisheries Act contemplates (s 11(7)) that a licence may be issued subject to conditions, including conditions relating to areas that may be used. Several examples of

fishing licences of varying scope were in evidence in the proceeding before Selway J. One of these is described as a "Coastal Line Fishery Licence". Some had conditions attached. Among the conditions imposed on the licences in evidence were conditions restricting the "fishery region" or the "area of operation" of the licence. Other conditions of some of the licences stipulated which vessels may be used, what "gear" was to be used, the necessity for the attendance of the licensee, and the species of fish or aquatic life which might be taken under the licence. One licence contained the statement in a condition relating to the "area of operation" that "[n]othing in the licence or these conditions shall diminish the licensee's responsibility for obtaining any necessary approvals from land owners to transit through, or operate the licence within" the stipulated area of operation.

33 Neither the licence itself nor any provision of the Fisheries Act confers any permission upon the holder to enter any particular place or area for the purpose of fishing.

34 Several provisions of the Fisheries Act affect where a person may fish. Section 22 permits declaration of an area, place or any waters as "a fishery management area" and declaration of a fishery as "a managed fishery". Management plans may then be declared in respect of such areas and those plans may regulate fishing in those areas.

35 Where a person may fish may also be affected by exercise of the power given by s 55 of the Fisheries Act to grant a lease of Crown land for aquaculture. It is to be noted, however, that s 55(4) provides:

> "A lease does not of itself confer upon the lessee the right to exclude a person from passing over the surface of any water, but the conditions of the aquaculture licence may require or authorize the lessee to mark out a lease or part of a lease that indicates that passage through that area is restricted or prohibited."

Reference should also be made to s 53(1), which permits Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner to continue to use those resources in that area in that manner. Section 53(1) provides:

> "Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional

> manner from continuing to use those resources in that area in that manner."

Sub-section (2) provides that nothing in s 53(1) authorises a person to enter any area used for aquaculture, to interfere with or remove fish or aquatic life from fishing gear that is the property of another person or to engage in commercial activity.

36 But apart from the provisions that have been mentioned, the Fisheries Act does not deal with where persons may fish. Rather, the Fisheries Act provides for where persons may *not* fish. And nothing in that Act authorises persons (whether as the holder of a licence or otherwise) to enter any particular place or area for the purpose of fishing.

37 Counsel for the first to third respondents (the Land Trust, the Northern Land Council and the native title holders) did not contend to the contrary. In particular, to the extent that the second and third declarations made by the Full Court were premised upon construing the Fisheries Act as purporting to provide for the issue of a licence that would permit the holder to *enter* areas within the boundaries of the grants, the first to third respondents accepted that a licence granted under the Act did not, without more, permit entry. And the first to third respondents did not seek to support the third declaration that had been made: that the Fisheries Act is invalid in so far as it purports to operate with respect to areas subject to the grants.

Does the Fisheries Act "apply" within the boundaries of the grants?

38 In the courts below, much attention was directed to whether the Fisheries Act "applied" within the boundaries of the grants. And as noted earlier, the Full Court's first declaration was that the Fisheries Act "has no application in relation to areas within the boundary lines described" in the grants. Again, however, the plaintiffs at whose suit the declaration was made (the Land Trust, the Northern Land Council and the native title holders) accepted in this Court that that declaration cannot be supported and should be set aside.

39 To ask whether the Fisheries Act "applies" in areas the subject of the grants does not expressly identify the subject of the debate. In the Full Court, the more specific question identified[28] was whether the Fisheries Act could operate concurrently with the Land Rights Act if, and to the extent that, the Fisheries Act

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28 (2007) 158 FCR 349 at 366 [59].

did not authorise any interference with the rights conferred by the Land Rights Act. The Full Court concluded[29] that the grants under the Land Rights Act "conferred a right to exclude from the intertidal zone including a right to exclude those seeking to exercise a public right to fish or to navigate". The Full Court considered[30] that the consequence was that the Fisheries Act "has to be read down under s 59 of the *Interpretation Act 1978* (NT) so as not to authorise the grant of a licence to take fish in relation to the intertidal zone". As the reference to s 59 of the *Interpretation Act* shows, the Full Court's conclusion was founded in considerations of the legislative power of the Northern Territory Legislative Assembly. But as the reference to exclusion of "those seeking to exercise a public right to fish" shows, the Fisheries Act was treated as doing no more than regulating the exercise of that right. Once it is recognised not only that the common law right to fish in tidal waters has been abrogated by the Fisheries Act, but also that a licence under the Fisheries Act gives no authority to enter any identified area, it is apparent that the debate in the courts below about the "application" of the Fisheries Act proceeded from incorrect premises.

Rights of navigation

40 Finally, it is necessary to notice that, although mention was made in the courts below of public rights of navigation, it was not suggested in argument in this Court that the public's right to pass and repass, and to remain for a reasonable time[31] in tidal waters for all purposes of navigation, trade and intercourse[32] extended to taking fish or other aquatic life in the intertidal zone or tidal waters within the boundaries of the grants. In this connection, it was not suggested that the references made by this Court to public rights of navigation in *The Commonwealth v Yarmirr*[33] and in *Western Australia v Ward*[34] bore directly upon the issues that must be considered. Rather, reference was made in argument to public rights of navigation as explaining how it could be that a person might enter the intertidal zone by sea and then exercise what was said to

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29 (2007) 158 FCR 349 at 372 [90].

30 (2007) 158 FCR 349 at 372 [90].

31 *Orr Ewing v Colquhoun* (1877) 2 App Cas 839.

32 *Halsbury's Laws of England*, 1st ed, vol 28 at 400, par 767.

33 (2001) 208 CLR 1; [2001] HCA 56.

34 (2002) 213 CLR 1; [2002] HCA 28.

be either a common law public right to fish or a right given by the licence issued under the Fisheries Act.

The relevant questions restated

41 Having decided that any common law right to fish has been abrogated and that the Fisheries Act does not authorise persons (whether as the holder of a licence or otherwise) to fish in any particular place or area, attention must turn to the Land Rights Act and the grants that have been made under it. In particular, do the Land Rights Act and the grants made under it permit the Land Trust to exclude persons who hold a licence under the Fisheries Act from entering waters that lie within the boundaries of the grants? And those questions turn, in the first instance, upon the proper construction of s 70 of the Land Rights Act and proper application of the expression "Aboriginal land".

The parties' arguments

42 The appellants (the Northern Territory and the Director of Fisheries) and the Seafood Council submitted that the prohibition in s 70 against entering or remaining on Aboriginal land prohibited entry or remaining on only the dry land of the intertidal area (when exposed by the tide) and did not prohibit entry or remaining on the tidal waters overlying that land. The Commonwealth advanced a generally similar argument but also urged an analysis that proceeded by examining whether the grants made under the Land Rights Act should be understood as abrogating the common law public right to fish (or the common law public right of navigation).

43 The first to third respondents submitted that the grants to the Land Trust related to a defined geographical area and that entry within the boundaries of that area (whether covered by tidal waters or not) was prohibited by s 70.

44 The submission of the first to third respondents should be accepted and the contrary submissions of the appellants and of the Seafood Council and the Commonwealth rejected.

The Land Rights Act

45 Section 4(1) of the Land Rights Act obliged the Minister responsible for the administration of the Act to establish Aboriginal Land Trusts "to hold the Crown land described" in Sched 1 to the Act. There were some qualifications to that obligation provided by s 10(1) and (2) of the Act but those qualifications are not relevant. Section 10(1) then obliged the Minister to recommend to the Governor-General "that a grant of an estate of fee simple in that land, or in the

part of that land to which subsection (2) does not apply, be made to that Land Trust". Again, the qualification to that obligation, if s 10(2) were engaged, may be set aside as irrelevant. Section 12(1)(a) empowered the Governor-General to "execute a deed of grant of an estate in the land in accordance with the recommendation and deliver it to the grantee".

46 The areas which are the subject of the grants which are now in issue were described in Sched 1 to the Land Rights Act. They were defined by metes and bounds which, for the sea boundaries of the areas, were fixed as a relevant "low water mark". The Land Rights Act thus expressly provided for the grant of interests in fee simple over areas that included areas that would be covered by tidal waters.

47 The grants that are now in question were effected in accordance with the statutory steps described. By defining the areas granted by reference to low water marks, the grants gave effect to the expressly intended operation of the Act.

48 The Land Rights Act's adoption of the description of the interest to be granted as "an estate of fee simple" must be understood giving due weight to a number of other provisions of the Act. First, a deed of grant under s 12 was to be expressed to be subject to reservations about minerals and mineral explorations that were identified in that section. Secondly, a deed of grant under s 12 was to be expressed to *exclude* from the grant land on which a road over which the public had a right of way existed at either of two identified times[35]. Thirdly, on the application of a Land Trust to which a deed of grant was delivered, "the Registrar-General or other appropriate officer under the law of the Northern Territory relating to the transfer of land" was obliged[36] to "register and otherwise deal with that deed of grant under that law according to its tenor". That is, the deed could be, and deed of grant of the areas now in issue have been, registered under the Torrens title system of title by registration adopted in the Territory[37]. Fourthly, the power of a Land Trust to deal with any estate or interest in the land was circumscribed by the Land Rights Act, particularly ss 19, 19A and 20.

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35 Section 12(3A) – the commencement of s 3 of the Act and the time of execution of the deed of grant.

36 s 12(5).

37 The *Real Property Act* (NT) has been replaced by the *Land Title Act* (NT).

49 The evident purpose of the restrictions on alienation was to confine the classes of persons to whom, and the circumstances in which, the land might be alienated. Alienation to Aboriginals or to Aboriginal or Torres Strait Islander corporations for residential or business purposes of Aboriginals was permitted (s 19(2)). Alienation to the Commonwealth, the Northern Territory, or an Authority of the Commonwealth or the Territory for a public purpose, or to a mission for any purpose was permitted (s 19(3)). But subject to some other exceptions whose detail need not be noticed, an estate or interest in the land, the term of which exceeds 40 years[38], could be granted only if particular conditions were met. Those conditions included not only the written consent of the Minister and the written direction of the relevant Land Council, but also the consent of traditional owners of the land[39].

50 It is thus apparent that the interest granted under the Land Rights Act differed in some important ways from the interest ordinarily recorded under the Torrens system as an estate in fee simple. But despite these differences, because the interest granted under the Land Rights Act is described as a "fee simple", it must be understood as granting rights of ownership that "for almost all practical purposes, [are] the equivalent of full ownership"[40] of what is granted. In particular, subject to any relevant common law qualification of the right[41], or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant.

51 Chief emphasis was placed by the appellants (and the parties who supported them, the Commonwealth and the Seafood Council) on the argument that the right of the Land Trust, as the holder of the fee simple, to exclude others from entering land was qualified by the common law public right to fish. That is, chief emphasis was placed by these parties on arguments that assumed that the

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38 s 19(7).

39 s 19(4A) and (5).

40 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656 per Deane, Dawson and Gaudron JJ; [1993] HCA 45. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ; [1992] HCA 23; *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1998] HCA 58.

41 *Fejo* (1998) 195 CLR 96 at 128 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

grants in question were to be understood as identifying boundaries to what was granted that did not require the making of some further distinction between the land underlying the intertidal areas and the waters lying above those areas. But in so far as those parties made the submission that the grants were limited to rights over the solid surface of the earth, and gave no rights in respect of the superjacent waters, the submission should be rejected.

52 It is convenient to begin consideration of this aspect of the argument by noticing three uncontroversial propositions. First, the immediate question to be decided in this matter is whether entering or remaining within the intertidal areas, when those areas are covered by water, is to enter or remain on Aboriginal land. That is a question about the proper construction of s 70(1) of the Land Rights Act. Secondly, the Land Rights Act makes frequent reference to "land", and that is ordinarily understood as referring to a solid portion of the earth's surface. Thirdly, it is not to be supposed that the grants to the Land Trust give a proprietary interest to the grantee in respect of any particular column of water that might overlie the intertidal zone.

53 Because the immediate question in the present matter depends upon the proper construction and application of s 70(1) of the Land Rights Act, it is neither necessary nor productive to attempt to define exhaustively the nature or extent of the rights conferred by the grants over the intertidal zones when they are covered by water. In particular, the question of statutory construction is not answered directly by identifying what rights are conferred by the grants or by asking whether a grant of an estate in fee simple, made under the Land Rights Act, should be understood as subject to a common law right to fish or a common law right of navigation.

54 The references made in argument to a distinction between the dry land and land covered by water are therefore to be understood as arguments directed to the proper construction of either the reference to "Aboriginal land" in s 70(1) or, perhaps, the reference in that provision to "enter or remain". That is, the distinction that was drawn sought to limit the application of s 70(1) to conduct involving direct contact with the solid surface of the earth.

55 The asserted distinction between dry land and the land in the intertidal zone when covered by water should not be drawn. The Aboriginal land which is the subject of the grants now in issue is defined by metes and bounds. To define the land in that way requires that s 70(1) is given effect, according to its terms, by reference to those metes and bounds and without regard to whether the tide is in or out at the time of an alleged entry or remaining. Nothing in the Land Rights Act requires a different conclusion.

Risk v Northern Territory

56 Reference was made in argument to *Risk v Northern Territory*[42]. In *Risk*, this Court held that "land in the Northern Territory" in s 3(1) of the Land Rights Act does not include the seabed below the low water mark of bays or gulfs within the limits of the Territory. As was pointed out in *Risk*[43], "[t]he distinction between 'land' and 'sea' is often made", and "'land' is ordinarily used in a way that would not include the seabed". Particular reference was made in *Risk* to s 73 of the Land Rights Act, a provision dealing with reciprocal legislation of the Northern Territory. One of the heads of legislative power of the Territory's Legislative Assembly dealt with by s 73(1)(d) is

> "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 The plurality reasons in *Risk* concluded[44] that if a grant could be made under the Land Rights Act to the seabed below the low water mark of bays or gulfs, s 73(1)(d) would have little or no useful work to do. If a grant could be made under the Land Rights Act in respect of the seabed below low water mark of bays and gulf, it would not be necessary to have legislative power to provide for a two kilometres buffer zone adjoining Aboriginal land. If the Land Rights Act permitted the making of a grant of the seabed of waters below low water mark, the references in s 73(1)(d) to traditional Aboriginal owners entering and using the resources of waters within two kilometres of Aboriginal land would not be needed to protect the interests of either those who were the traditional Aboriginal owners of the area or of others who, though not owners, were entitled to use the waters for traditional purposes. By contrast, provision of power to pass legislation prescribing a two kilometre buffer zone of sea adjoining the boundary of Aboriginal land makes evident sense if the boundary of Aboriginal land is fixed at low water mark, as it is in the grants now under consideration, and if the prohibition on entering and remaining on Aboriginal land is engaged

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42 (2002) 210 CLR 392; [2002] HCA 23.

43 (2002) 210 CLR 392 at 404 [26] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

44 (2002) 210 CLR 392 at 404-405 [29] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

whether or not the intertidal area is covered with water. But if that prohibition operates only when and to the extent that the intertidal zone can be entered on foot, the provision for enactment of legislation providing a buffer zone would necessarily operate in a very odd way.

58 Two conclusions can be drawn from these considerations. First, what is said in *Risk* neither requires nor supports the conclusion that "Aboriginal land" when used in s 70(1) should be understood as confined, in intertidal zones, to only the land surface of that area. Secondly, the provisions of s 73(1)(d) support the view, expressed earlier, that the expression "Aboriginal land", when used in s 70(1), should be understood as extending to so much of the fluid (water or atmosphere) as may lie above the land surface within the boundaries of the grant and is ordinarily capable of use by an owner of land.

59 As explained earlier in these reasons, a contrary construction of s 70(1), of the kind urged by the appellants, the Commonwealth and the Seafood Council, is not supported by reference to a common law public right to fish. That right has been abrogated by legislation.

60 Nor can reference to common law rights of navigation support the view that s 70(1) should be given the limited operation urged by those parties. As explained earlier in these reasons, reference was made to these rights to explain how a person could enter the intertidal zones without traversing Aboriginal land. What is in issue in this case is whether the holder of a licence issued under the Fisheries Act may fish in the intertidal zone or in tidal waters within the boundaries of the grants. That activity goes beyond the exercise of any right of navigation. Further, like the common law right to fish, common law rights of navigation are susceptible to legislative abrogation. Once it is recognised that the essential question at issue concerns the proper construction and application of s 70(1), rather than any question of competition between the rights of a landholder and public rights, reference to public rights of navigation provides no assistance to the task of statutory construction.

Conclusion and orders

61 For the reasons that have been given, s 70(1) can be engaged if a person holding a licence under the Fisheries Act enters or remains on waters within the boundaries of the grants. Whether s 70(1) *is* engaged in any particular case turns upon whether the entry or remaining is "in accordance with [the Land Rights Act] or a law of the Northern Territory". As explained earlier, the holding of a licence under the Fisheries Act is not within that qualification to the operation of s 70(1). But again as noted earlier, under the Aboriginal Land Act, permission can be given by a Land Council to enter and remain upon Aboriginal land.

Exercise of permission granted under the Aboriginal Land Act would be to enter or remain on the land in accordance with that law of the Northern Territory.

62 The principal arguments advanced by the appellants, the Commonwealth and the Seafood Council, should be rejected. But because the declarations made by the Full Court were framed too widely it is necessary that the appeal be allowed to the extent necessary to reframe the orders. The form of declaration should substantially follow the form proposed by the appellants. The orders of the Court should be:

1. Appeal allowed in part.

2. Set aside the order first numbered 2 of the orders of the Full Court of the Federal Court of Australia made on 2 March 2007 and in its place order that it be declared that:

> Sections 10 and 11 of the *Fisheries Act* (NT) do not confer on the Director of Fisheries (NT) a power to grant a licence under that Act which licence would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines described in the Arnhem Land (Mainland) Grant and the Arnhem Land (Islands) Grant made under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

Consistent with the undertakings given as a condition for the grant of special leave to appeal to this Court there should be a further order that:

3. The appellants pay the first, second and third respondents' costs of and incidental to this appeal.

63 KIRBY J. I agree in the orders proposed by Gleeson CJ, Gummow, Hayne and Crennan JJ. Generally, I agree with their reasons ("the joint reasons"). As explained in those reasons, the issues presented for decision in this Court include:

- The construction of ss 3(1), 10(1), 12(1), 19, 19A, 20, 70 and 73 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act");
- The construction of s 5(1) of the *Aboriginal Land Act* (NT) ("the Aboriginal Land Act");
- The construction of ss 10, 11, 22, 53 and 55 of the *Fisheries Act* (NT) ("the Fisheries Act"); and
- The determination of the extent to which, if at all, the Fisheries Act abrogates any common law public right to fish[45], common law rights of navigation[46] and the Aboriginal interests in land granted pursuant to the Land Rights Act and the Aboriginal Land Act ("the Land Acts").

Deciding meaning before determining power

64 The unanimous reasons of the Full Court of the Federal Court of Australia[47], challenged in this appeal, demonstrate that there is an arguable basis for that Court's opinion. This was that the applicable provisions of the Fisheries Act should be read down, pursuant to s 59 of the *Interpretation Act* (NT), so as not to empower the issue of a licence under that Act to take fish in the intertidal zone where such activity would fall within the boundary of an estate in fee simple granted to Aboriginal owners under the Land Rights Act. On the basis explained by the Full Court, that approach to the issue of statutory *power* has much to be said for it.

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45 cf *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330; [1989] HCA 47. See joint reasons at [19]-[31].

46 *The Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56; *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28; cf joint reasons at [40].

47 *Gumana v Northern Territory* (2007) 158 FCR 349 at 372 [90]-[91].

65 However, the conventional method of tackling questions such as those raised in this appeal is first to ascertain the *meaning* of the contested legislation before addressing any questions of *power* that remain to be decided[48].

66 Adopting that course in the present case obliges this Court to examine closely the language and apparent purposes of the Fisheries Act, and the manner of its operation when read alongside the Land Acts. This process yields the *meaning* of the Fisheries Act favoured in the joint reasons. It avoids the need (which a different meaning might have presented) to examine the *power* of the Northern Territory, by the Fisheries Act, to produce the consequences for which the Territory (and those supporting its submissions) contend.

Governing principles of statutory interpretation

67 The conclusion expressed in the joint reasons is reinforced, in my view, by adopting the approach to the definition, enlargement or diminution of native title rights that I sought to explain in *Griffiths v Minister for Lands, Planning and Environment (NT)*[49]. That approach finds support in judicial decisions upon analogous problems of statutory construction adopted by courts of high authority in other common law jurisdictions, called upon to declare the ambit of the legal rights to the traditional interests of indigenous peoples living in societies settled during colonial times[50]. Most clearly, several Canadian decisions insist that[51]:

> "Indian title … being a legal right, it could not … be extinguished except by surrender to the Crown or by competent legislative authority, *and then only by specific legislation*."

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48 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; [1948] HCA 7; *R v Hughes* (2000) 202 CLR 535 at 582-583 [117]; [2000] HCA 22; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81]; [2000] HCA 33.

49 (2008) 82 ALJR 899 at 915-920 [87]-[108].

50 See eg *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; cf Nijman, "Ascertaining the Meaning of Legislation – A Question of Context", (2007) 38 *Victoria University of Wellington Law Review* 629 at 653-654. See also *Paul v Canadian Pacific Ltd* (1983) 2 DLR (4th) 22 at 33; *Nowegijick v The Queen* [1983] 1 SCR 29 at 36.

51 *Calder v Attorney-General of British Columbia* [1973] SCR 313 at 402 per Hall J (emphasis added); cf Slattery, "Understanding Aboriginal Rights", (1987) 66 *Canadian Bar Review* 727 at 766-767. Compare *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; [1992] HCA 23; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 155 per Gaudron J, 185 per Gummow J ("clearly and distinctly"); [1996] HCA 40.

68 When that approach is adopted, as it should be, in respect of the propounded intersection of the Land Acts, on the one hand, and the Fisheries Act, on the other, it leads to the interpretation of s 70(1) of the Land Rights Act, and ss 10 and 11 of the Fisheries Act, that the joint reasons have accepted.

69 The interpretation favoured in the joint reasons also accords with a number of other principles of construction which I accept as applicable to the task in hand:

- It preserves the Aboriginal interests concerned as a species of valuable property rights not to be taken away without the authority of a law clearly intended to have that effect[52];

- It does this against the background of the particular place that such Aboriginal rights now enjoy, having regard to their unique character as legally *sui generis*[53], their history, their belated recognition, their present purposes and the "moral foundation" (now recognised in legislation) for respecting them[54];

- It ensures that, if the legislature of the Northern Territory wishes to qualify, diminish or abolish such legal interests it must do so clearly and expressly, and thereby assume full electoral and historical accountability for any such provision[55]; and

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52 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 415-416 [30]-[31]; [2001] HCA 7; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 580-582 [101]-[106]; [2002] HCA 49.

53 *Guerin v The Queen* [1984] 2 SCR 335 at 348-349, 376, 382, 392; cf *Wik* (1996) 187 CLR 1 at 176 per Gummow J. Although the fiduciary principle has not been accepted as applicable in Australia, the source and origin of communal Aboriginal interests in land is quite different from that of other such interests in Australia: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58-63; cf *Northern Territory v Alyawarr* (2005) 145 FCR 442 at 494-495 [187].

54 *Alyawarr* (2005) 145 FCR 442 at 461 [63].

55 *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 615 [44]; *Plaintiff S157 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; [2003] HCA 2; *Chang v Laidley Shire Council* (2007) 81 ALJR 1598 at 1614-1615 [85]; 237 ALR 482 at 502; [2007] HCA 37.

- It avoids needless argument about the suggested invalidity of the Fisheries Act that might otherwise arise if a broader operation were to be attributed to that Act.

70 Reflecting the considerations that lead to the foregoing legal conclusions, on 13 February 2008 a National Apology was provided to the indigenous peoples of the Commonwealth[56]. Given the attention to, and nation-wide reflection upon, its making, terms and reconciliatory purposes, it is appropriate in my view for this Court to take judicial notice of that National Apology. The Court does not operate in an ivory tower. The National Apology acknowledges once again, as the preamble to the *Native Title Act* 1993 (Cth) already did[57], the wrongs done in earlier times to the indigenous peoples of Australia, including by the law of this country. Those wrongs included the non-consensual denial and deprivation of basic legal rights which Australian law would otherwise protect and uphold for other persons in the Commonwealth. In the case of traditional Aboriginals, these right included rights to the peaceful enjoyment of their traditional lands and to navigate and to fish as their ancestors had done for aeons before British sovereignty and settlement.

71 Although the National Apology was afforded on behalf of the Government of the Commonwealth, with support of the Opposition[58] and other political parties, and reflects an unusual and virtually unprecedented parliamentary initiative, it does not, as such, have normative legal operation. It is not contained in an Act of the Federal Parliament nor in a law made by any other Australian legislature with legislative powers. Yet it is not legally irrelevant to the task presently in hand. It constitutes part of the factual matrix or background against which the legislation in issue in this appeal should now be considered and

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56 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 February 2008 at 167-173 (the Hon K M Rudd MP, Prime Minister). See also Rudd, "Federal Government Apology", (2008) 7(4) *Indigenous Law Bulletin* 2 at 2-3.

57 See *Native Title Act* 1993 (Cth) *Preamble* at par 3 ("progressively dispossessed"), par 4 ("most disadvantaged in Australian society"), par 6 ("recognising international standards"), par 8 sub-par (a) ("rectify the consequences of past injustices"), par 10 ("[j]ustice requires … compensation on just terms"), par 11 ("enjoy fully their rights and interests"), par 12 ("due regard to their unique character"), par 16 ("the descendants of the original inhabitants of Australia"), par 17 ("further advance the process of reconciliation among all Australians").

58 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 February 2008 at 173-177 (the Hon B J Nelson MP, Leader of the Opposition).

interpreted[59]. It is an element of the social context in which such laws are to be understood and applied, where that is relevant. Honeyed words, empty of any practical consequences, reflect neither the language, the purpose nor the spirit of the National Apology.

72 In my opinion, the need for specific and clear legislation to extinguish any traditional legal rights of the indigenous peoples of Australia was already the law of this country, before the National Apology, for the reasons that I elaborated in *Griffiths*. The National Apology reinforces the appropriateness and timeliness of this approach to the interpretation of all relevant Australian legislation. This Court should adopt that approach and do so uniformly. In my opinion the majority reasons do that in this case. That is why I support the approach that they favour[60].

Application of the principles to this case

73 Once this analysis is adopted, there is no difficulty in reading the Land Acts, and each of them, alongside the Fisheries Act in a manner that permits all of those statutes to fulfil their evident purposes, according to their terms. The Fisheries Act is not, then, a law of the Northern Territory that gives specific authority, as such, to enter or remain upon "Aboriginal land", contrary to s 70(1) of the Land Rights Act. The Fisheries Act controls the activity of fishing. But, without more, it does not purport to do so within "Aboriginal land". Likewise, the concept of "Aboriginal land", defined as it is, extends to intertidal land[61]. The fact that, pursuant to the Land Rights Act, relevant land is held for "the benefit of the Aboriginals concerned"[62] tends to indicate a recognition of the traditional rights of such Aboriginals to take fish or aquatic life from intertidal areas[63].

74 In the context of the determination of the Aboriginal rights in question in this appeal, the joint reasons adopt an approach to the interpretation of the legislation that should be adopted in all such cases; not just this one[64]. Applied to

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59 cf Curthoys, Genovese and Reilly, *Rights and Redemption – History, Law and Indigenous People*, (2008) at 40-41, 140-141, 229-230.

60 I would repeat what I said in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 81 ALJR 1622 at 1652-1653 [138]; 237 ALR 512 at 551; [2007] HCA 38.

61 Joint reasons at [58].

62 Land Rights Act, s 5(1)(b).

63 See joint reasons at [58].

64 cf *Griffiths* (2008) 82 ALJR 899.

the legislation in question here, it produces the conclusions stated in the joint reasons.

Orders

75 The orders proposed in the joint reasons should be made.

76 HEYDON J. The circumstances underlying this appeal are set out in the plurality judgment.

The key question in relation to "Aboriginal land"

77 The Full Federal Court considered that the key question was the effect of grants of an estate in fee simple to the low water mark to the first respondent under and in furtherance of the purpose of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Act"). In particular, the question was whether, as the Full Federal Court considered, those grants denied to persons other than the third respondents the right to obtain access to the waters above the land.

The appellants' submissions

78 The relevant grants were made because a Land Trust (the first respondent) had been established in respect of "land constituting, or included within, an area of land described in Schedule 1" (s 10(1)(a) of the Act) and the Minister had recommended to the Governor-General that a grant of an estate in fee simple "in that land" be made to the first respondent (s 10(1) (tailpiece)). Pursuant to s 12(1)(a), in 1980 the Governor-General executed two deeds of grant of those estates "in the land" in accordance with the recommendation.

79 *The question propounded by the appellants.* Section 70(1) of the Act provides that: "[A] person shall not enter or remain on Aboriginal land." In the present circumstances the relevant meaning of "Aboriginal land" is "land held by a Land Trust for an estate in fee simple": s 3(1). The estates in land granted comprise land held by a Land Trust for an estate in fee simple. The appellants did not seriously contest that the grant included at least the soil on the landward side of the low water mark. One primary submission by the appellants, however, was that the grants did not include the waters above that soil as the tide ebbed and flowed. That is, the appellants submitted that the only "land" granted between high water mark and low water mark was the soil, not the waters above it, and that only the soil was "Aboriginal land". "It is not a grant of fee simple ... in the waters. It is a grant of an estate in land covered by water from time to time."

80 *The appellants' reliance on s 73(1).* The appellants' submission concentrated on s 73(1). As they pointed out, s 73(1)(a) gives the Legislative Assembly of the Northern Territory power to make laws in relation to "sacred sites ... including sacred sites on Aboriginal *land*"[65] (emphasis added). Section 73(1)(b) gives it power to make "laws regulating or authorizing the entry of

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65 See at n 94 below.

persons on Aboriginal *land*"[66] (emphasis added). And s 73(1)(c) gives it power to make laws protecting or conserving wildlife including "wildlife on Aboriginal *land*" (emphasis added). However, s 73(1)(d) gives it 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*, 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". (emphasis added)

The appellants stressed the distinction between "Aboriginal land" as referred to in each of pars (a), (b), (c) and (d) of s 73(1) and "waters of the sea ... adjoining, and within 2 kilometres of, Aboriginal land" as referred to in s 73(1)(d)[67].

81 The appellants submitted that it is not correct to limit the meaning of "waters of the sea" to those waters of the sea which are beyond the boundaries of Aboriginal land, ie seaward of the low water mark. The submission was directed to reasoning of the Full Federal Court which centred on the following proposition[68]:

> "[T]he text, structure and context of [the Act] itself indicate that certain particular benefits were intended to be conferred upon or (in the case of the s 73(1)(d) legislative compromise) denied to, the Aboriginals by the grant to the low water mark."

The Court said that what Aboriginals traditionally regarded as their land extended well beyond low water mark and well beyond any 2 kilometre buffer zone seaward of low water mark. The Court considered that the grant of a fee simple to low water mark gave limited recognition to that traditional view, but only limited recognition, because the s 73(1)(d) legislative compromise "denied a Land Trust the benefit of the inclusion of the 2 km seaward buffer zone in the definition of 'Aboriginal land'". However, the "grant to the low water mark (as distinct from the high water mark)", coupled with the facility in s 73(1)(d) for the

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66 See above at [6].

67 They noted that Callinan J said in *Risk v Northern Territory* (2002) 210 CLR 392 at 434 [117]; [2002] HCA 23: that s 73(1)(d) "indicates ... that sea waters require and are given separate statutory treatment from land; ... and ... that special provision for the pursuit of Aboriginal activities in sea waters, which would otherwise not be necessary if they were claimable lands, was necessary."

68 *Gumana v Northern Territory* (2007) 158 FCR 349 at 373 [94] per French, Finn and Sundberg JJ.

Northern Territory Legislative Assembly to protect the traditional Aboriginal view by making laws preventing the entry of non-Aboriginals into the 2 kilometre buffer zone, afforded some recognition of that traditional view. This reasoning treated the waters of the sea above the soil landward of the low water mark as entirely distinct from waters of the sea seaward of the low water mark. The reasoning treated the former waters as being Aboriginal land, and the latter waters as "waters of the sea". The appellants submitted that the construction relied upon led to extraordinary results: it meant that s 73(1)(d) conferred power to make laws to prohibit the entry of persons into the 2 kilometre zone, and to control fishing and other activities there, but conferred no power to make laws on these subjects in the adjacent intertidal zone above the low water mark. Even assuming the Full Federal Court's construction to be correct, in that latter zone, while *regulation* would be possible by enacting a s 73(1)(b) law, *prohibition* by means of a law enacted by the Legislative Assembly would not be possible and prohibition would rest only with Land Councils, despite their limited capacity in that respect. But the appellants submitted that whether or not the construction led to extraordinary results, in any event the language of s 73(1)(d) did not support the distinction at the heart of that construction.

82 The appellants argued that there was a difference between "waters of the territorial sea of Australia" and "waters of the sea" in general. The territorial sea of Australia is an area the breadth of which is measured by a distance – formerly three nautical miles, now 12 – from low water mark or straight base lines drawn across bays, gulfs and the like by proclamations made by the Governor-General under s 7 of the *Seas and Submerged Lands Act* 1973 (Cth). The "waters of the sea" include the territorial sea, but also include tidal waters above the soil on the landward side of the low water mark. The appellants submitted that their argument was supported by the fact that the expression "waters of the sea" is commonly employed in Commonwealth legislation to include all waters, whether above or below low water mark[69] – that is, whether they are part of the territorial sea or not.

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69 The *Seas and Submerged Lands Act* 1973 (Cth), s 10, distinguishes between internal waters and the territorial sea thus:

> "It is by this Act declared and enacted that the sovereignty in respect of the internal waters of Australia (that is to say, any waters of the sea on the landward side of the baseline of the territorial sea) so far as they extend from time to time, and in respect of the airspace over those waters and in respect of the sea-bed and subsoil beneath those waters, is vested in and exercisable by the Crown in right of the Commonwealth."

The legislative assumption is that "waters of the sea" lie on both sides of the baseline. The *Customs Act* 1901 (Cth), s 73(2), prohibits breaking the bulk cargo of an aircraft arriving in or on a flight to Australia while the aircraft is flying over Australia or "in, or flying over, waters of the sea within the outer limits of the territorial sea of Australia". The legislative assumption is that "waters of the sea"

(Footnote continues on next page)

83 *The appellants' adoption of McHugh J and Callinan J.* The appellants then advanced various arguments which adopted by quotation, summary and cross-reference statements made in *Risk v Northern Territory* by McHugh J and Callinan J.

84 *The ordinary meaning of "land".* One argument was that the primary submission of the appellants follows from the ordinary meaning of "land". McHugh J said[70]: "In its ordinary meaning, 'land' means the 'solid portion of the earth's surface, as opposed to sea, water'." McHugh J accepted that a statutory meaning could depart from the ordinary meaning. But he said that all of the provisions of the Act "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"[71]. He also said[72]:

> "[Section] 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 Act]."

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are not restricted to the outer limits of the territorial sea. The *Historic Shipwrecks Act* 1976 (Cth), s 3A(1)(b), refers to removal of part of a ship from "waters of the sea that are within the limits of a State": since waters within the limits of a State are "internal waters", and not part of the territorial sea (*The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 56-57 [63]; [2001] HCA 56), the legislative assumption is that "waters of the sea" includes waters above the low water mark. See also *Defence Act* 1903 (Cth), s 51(1) (definitions of "Australian waters" and "internal waters"). In addition to the instances referred to by the appellants, see *Control of Naval Waters Act* 1918 (Cth), s 2(1) (definitions of "sea" and "waters"); *Protection of the Sea (Powers of Intervention) Act* 1981 (Cth), s 3(1) (definition of "internal waters"); *Admiralty Act* 1988 (Cth), s 3(1) (definitions of "inland waters" and "sea"); *Offshore Petroleum Act* 2006 (Cth), s 326 (definitions of "area to be avoided" and "prescribed safety zone"). The same usage is employed in State legislation, eg *Native Vegetation Act* 1991 (SA), s 3(1) (definition of "waters of the sea").

70 *Risk v Northern Territory* (2002) 210 CLR 392 at 407 [42], quoting *Shorter Oxford English Dictionary*, vol 1, 3rd ed (rev) (1975) at 1172.

71 *Risk v Northern Territory* (2002) 210 CLR 392 at 412 [60].

72 *Risk v Northern Territory* (2002) 210 CLR 392 at 412-413 [61].

85 McHugh J then said that there were "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"[73].

86 *Entitlement to "forage".* The first of these indications turned on an element in the definition of "traditional Aboriginal owners". The functions of an Aboriginal Land Commissioner under s 50(1) included functions in relation to "traditional land claims". That expression is defined in s 3(1) thus:

> "***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."

The expression "traditional Aboriginal owners" is defined thus in s 3(1):

> "***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."

McHugh J discussed the entitlement to "forage" thus[74]:

> "The term 'forage' includes 'the act of searching for provisions of any kind'[75]. 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 seabed. 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'[76]. 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 seabed. The natural meaning of 'forage' and its association

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73 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [62].

74 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [62].

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

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

> in s 3 with a 'right over that land' indicates that 'land' in [the Act] is referring to land above the low water mark."

Hence, the appellants' argument implied, if an entitlement by Aboriginals to fish in waters covering the land above the low water mark is irrelevant to a claim by them to be "traditional Aboriginal owners", those waters are incapable of being granted to a Land Trust and cannot be "Aboriginal land" within the definition of that term in s 3(1). Similarly, Callinan J, after citing numerous dictionary definitions, said[77]:

> "The word 'foraging' may in some circumstances have a contemporary 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."

87 *Sections 11 and 18.* A second group of indications that the legislation was concerned with land as a solid portion of the earth's surface above the low water mark was described thus by McHugh J[78]:

> "Section 11(3) declares that a reference [in s 11(1), (1AB), (1AD) or (1AE)] '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'."

The appellants submitted that these provisions supported the conclusion that "land" was something distinct from the waters of the sea.

88 *Section 23(2).* A third indication that the legislation was concerned with land as a solid portion of the earth's surface above the low water mark was said by McHugh J to be the following[79]:

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77 *Risk v Northern Territory* (2002) 210 CLR 392 at 436 [126] (footnote omitted).

78 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [63].

> "Section 23(2) describes one of the functions of a Land Council as including 'schemes for the management of wildlife on Aboriginal land'. Significantly, there is no reference to schemes for managing fishing or the taking of edibles from the sea or seabed."

89 *Section 46.* The fourth indication that the legislation was concerned with land as a solid portion of the earth's surface above the low water mark was put thus by McHugh J[80]:

> "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' (s 46(1)(a)(iv)) and 'the water, timber and other requirements to be obtained from the affected land' (s 46(1)(a)(vi)). 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 seabed."

McHugh J concluded[81]:

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

90 *Section 50(3)(c) and (4).* The appellants also referred to two other statutory indications relied on by Callinan J and supportive of McHugh J's conclusion[82]:

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79 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [64]. Section 23(2) provides that a Land Council may "perform any functions that may be conferred on it by a law of the Northern Territory, including … functions in relation to:

(a) the protection of sacred sites;

(b) access to Aboriginal land; and

(c) schemes for the management of wildlife on Aboriginal land."

80 *Risk v Northern Territory* (2002) 210 CLR 392 at 413-414 [65].

81 *Risk v Northern Territory* (2002) 210 CLR 392 at 414 [66].

> "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.
>
> 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."

91 *The Arnhemland case.* In addition, the appellants relied on *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)*[83], where Mansfield J held that:

(a) the waters above low water mark were waters of the sea;

(b) the power in s 73(1)(d) to make laws "closing the seas" in a sense of prohibiting people from entry was not limited to closing them in an area 2 kilometres seaward of low water mark;

(c) the words "adjoining ... Aboriginal land" in s 73(1)(d) included all waters coming into contact with Aboriginal land, "whether overlying that land in the intertidal zone or seaward of the low water mark"; and

(d) (implicitly) that the waters overlying Aboriginal land in the intertidal zone were not themselves Aboriginal land.

Accordingly, the appellants submitted that the "word 'adjoining' is one that covers waters above as well as waters that are seaward".

92 *Aboriginal Land Commissioners.* The appellants also relied on statements which they said were supportive of their submission made by Judges of the Federal Court of Australia or the Supreme Court of the Northern Territory acting as Aboriginal Land Commissioners determining Aboriginal land claims[84] or

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82 *Risk v Northern Territory* (2002) 210 CLR 392 at 435-436 [124]-[125].

83 (2000) 170 ALR 1 at 10-11 [33]-[34], reversed on other grounds in *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488.

84 See those referred to in *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 at 9 [26].

reporting to the Administrator of the Northern Territory on whether certain seas should be closed under s 12 of the *Aboriginal Land Act* (NT)[85].

Two caveats

93 *Risk v Northern Territory.* It is necessary at once to enter a caveat about the use in this appeal of *Risk v Northern Territory*. In that case the issue was whether the expression "Crown land" in s 50(1)(a) of the Act, which was defined in s 3(1) as a species of "land in the Northern Territory", included the seabed below the low water mark of bays or gulfs within the limits of the Territory. It was held unanimously that it did not. The issue was thus different from that posed by the appellants in the present appeal, namely whether the expression "Aboriginal land", in its application to land which is above the low water mark but is covered by tidal waters as the tide comes in, applies only to the surface of the soil or extends to the waters above it. Hence, what McHugh J and Callinan J said on the latter issue consisted of obiter dicta, and in some respects what they said is better adapted to the issue before the Court in that case than the issue before it in this. In particular, the Court in that case did not have to resolve, or seek to resolve, what were described in the plurality judgment as two unargued questions[86]. One was 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". The other concerned the construction of s 70(1). An aspect of the first question does arise in the present case, and so does the second question. Being dicta, the observations of McHugh J and Callinan J are not binding, any more than a statement to the contrary made in the plurality judgment is[87].

94 *Reports of Aboriginal Land Commissioners.* Another caveat must be entered in relation to opinions expressed in the reports of Federal Court Judges or Judges of the Supreme Court of the Northern Territory sitting as Aboriginal Land

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85 *Closure of Seas: Castlereagh Bay/Howard Island Region of Arnhem Land*, (Report by Aboriginal Land Commissioner Justice Kearney to the Administrator of the Northern Territory, 1 July 1998) at 17-18, pars 80-81.

86 *Risk v Northern Territory* (2002) 210 CLR 392 at 405 [32] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

87 *Risk v Northern Territory* (2002) 210 CLR 392 at 405 [32] per Gleeson CJ, Gaudron, Kirby and Hayne JJ: "[T]here is nothing in [the 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."

Commissioners. While the carefully considered opinions of distinguished lawyers delivered on a solemn occasion, particularly in a field of which they have specialised knowledge, can, with respect, have great value, they are in a different category from statements of the law made in the course of exercising judicial power. Although those opinions merit careful attention, they are in the end only valuable to the extent that their reasoning is persuasive.

The answer of the first three respondents

95 The arguments of the appellants described above were put as part of their written submissions in chief, although to a limited extent they were developed orally, and some of the points made by the appellants were briefly put by the Commonwealth orally. However, while the first three respondents dealt at length with the appellants' submissions going to other issues, they offered few arguments having any relevance to the arguments of the appellants summarised above[88], and none which grappled with their detail. They did not mention, let alone deal with, the relevant paragraphs of the appellants' written submissions on that subject. In particular, the first three respondents did not refer critically to the paragraphs in *Risk v Northern Territory* setting out the reasoning of McHugh J and Callinan J on which the appellants relied. They did rely on a dictum in the plurality judgment in *Risk v Northern Territory*[89] which was contrary to the dicta of McHugh J and Callinan J, but they did not offer specific submissions criticising either the reasoning in the dicta of McHugh J and Callinan J, or what the appellants said about the reasoning in those dicta in their submissions in chief. Thus they did not offer any argument explaining directly and in terms why that reasoning was wrong. Although this silence does not of itself make the appellants' submissions correct, reasons will be given below why the appellants' submissions should be accepted[90]. But first it is necessary to deal with the arguments which the first three respondents did advance in relation to the issue propounded by the appellants.

96 *Reformulation of question.* The first three respondents offered a refinement of the principal question propounded by the appellants. The first three respondents said the question was not whether the first respondent owned "the flowing water" above the land on the landward side of the low water mark: the question was rather whether the first respondent could bring an action in trespass against someone who brought a vessel onto those waters, or whether that

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88 At [78]-[92].

89 (2002) 210 CLR 392 at 405 [32]: quoted at n 87 above.

90 At [101]-[105].

person contravened s 70(1). Even if the question is so reformulated, however, the answer must be adverse to the first three respondents.

97 *Consequences of particular construction of s 73(1)(d).* The first three respondents said that if the appellants' contention that non-Aboriginal persons could enter the waters covering the soil above low water mark was correct, the effect of s 73(1)(d) would be "odd" because it would be possible under s 73(1)(d) to make laws making the area between low water mark and points 2 kilometres seawards "closed seas". The first three respondents said:

> "So, we say, what an odd reading of the interaction of the grant, the prohibition on entry and remaining in [s] 70 and the specific lifting of that prohibition for certain Aboriginals in [s] 71, what an odd reading [if] that would produce greater liberty of entry by strangers onto Aboriginal land, the tidal zone, than with sea that happened to be closed offshore of it."

The outcome would only be odd if the s 73(1)(d) power to enact laws closing the seas on the seaward side of low water mark did not extend to a power to enact laws closing the seas on the landward side of low water mark as well. As noted above[91], the appellants construed s 73(1)(d) as conferring the wider power, while the Full Federal Court construed s 73(1)(d) as conferring the narrower power[92]. The appellants' construction is the sounder. It is the reliance by the first three respondents on the Full Federal Court's construction of s 73(1)(d) that produces the oddness, and the appellants' construction removes it.

98 *The sacred sites.* The first three respondents referred to s 69(1), which provides: "[A] person shall not enter or remain on land in the Northern Territory that is a sacred site." They also referred to s 69(2A), which is in the same terms as s 70(2A)[93]. The first three respondents said:

> "One of the questions which we will seek to raise in a pointed way against our friends as the result of the overall analysis is to [inquire] whether it is truly supposed that the statute with the long title this statute has and against the background shown in the travaux [préparatoires] ... is a statute which leaves open the following prospect, that is, the prospect that somebody claiming to be entering land in accordance with what has been grandly called the common law public right of navigation, thereby escapes the sanctions of the law designed to prevent such entry in relation to sacred sites."

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91 At [81].

92 *Gumana v Northern Territory* (2007) 158 FCR 349 at 373-374 [94].

93 See above at [6].

Section 69(1) refers to "land ... that is a sacred site". Section 70(1) refers to "Aboriginal land". The appeal does not arise out of any specific complaint about entering or remaining on land that is a sacred site. The question which the first three respondents asked is one which is better answered not in the abstract but in the concrete circumstances of a case which raises it. In a case of that kind, it would be necessary to bear in mind that in s 3(1), a "sacred site" is defined as including any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition. It would also be necessary to consider the terms of any law made by the Legislative Assembly of the Northern Territory pursuant to s 73(1)(a)[94]. It is thus entirely possible for laws to be made preventing activity in waters above low water mark so as to protect Aboriginal sites and prevent their desecration, and it was suggested in argument that those laws already had been made.

99 *Billabongs.* The first three respondents submitted that nobody had ever denied that a billabong was part of Aboriginal land, and suggested that the same must be true of land down to low water mark when covered by water. The appeal is not about billabongs, and billabongs are not waters of the sea. Arguments about whether the expression "Aboriginal land" extends to, or has consequences for rights in, the waters covering land between low water mark and high water mark are entirely immaterial to any controversies about billabongs, which, in the unlikely event of their ever arising, can be resolved in litigation directed to their resolution.

100 *Statutory scheme.* Finally, the first three respondents offered a general analysis of the statutory scheme, which they submitted was consistent only with their desired outcome in relation to the soil landward of the low water mark and the waters above it, and inconsistent with the outcome desired by the appellants. That analysis, general as it was, was not directed to and did not negate the persuasiveness of the specific matters described below.

Conclusion relating to "Aboriginal land"

101 The appellants were correct to submit that the grant of "land" down to the low water mark granted the soil, not the tidal waters which covered the area from high water mark to low water mark, and that only the soil was Aboriginal land. That is so for the following reasons.

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94 That paragraph refers to:

> "laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites".

102 *Ordinary meaning of "land".* First, "land" ordinarily means the solid portion of the earth's surface and, in the case of land extending to low water mark, does not include the waters flooding over it and ebbing from it with the tides[95].

103 *No indications pointing away from the ordinary meaning of "land".* Secondly, there are no indications in the Act that the word "land" in that legislation bears a different meaning from the ordinary meaning[96].

104 *Positive indications supporting the ordinary meaning of "land".* Thirdly, apart from s 73(1), there are several positive indications that "land" bears its ordinary meaning in the legislation. None, taken separately, is decisive, but when taken together they have some force. These indications are found in s 50(1) read with the definitions in s 3(1) of "traditional land claim" and "traditional owners" in relation to the entitlement to forage[97]; s 11[98]; s 18[99]; s 23(2)[100]; s 46[101]; s 50(3)(c)[102]; and s 50(4)[103].

105 *The consequences of s 73(1).* Fourthly, the structure of s 73(1) supports the ordinary meaning. Paragraphs (a)-(c) of s 73(1) refer specifically to "Aboriginal land". Section 73(1)(d) also refers to "Aboriginal land", but contrasts that phrase with the phrase "waters of the sea". The phrase "waters of the sea" is expressed to include the territorial sea (ie which may comprise waters on the seaward side of low water mark) but also includes waters in the area between the landward side of low water mark and the seaward side of high water mark. Pursuant to that construction, the waters on the landward side of low water mark are vertically "adjacent" because they are above Aboriginal land, and

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95 *Risk v Northern Territory* (2002) 210 CLR 392 at 407 [42].

96 *Risk v Northern Territory* (2002) 210 CLR 392 at 412-414 [60]-[66].

97 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [62] and 436 [126]: see above [86].

98 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [63]: see above [87].

99 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [63]: see above [87].

100 *Risk v Northern Territory* (2002) 210 CLR 392 at 413 [64]: see above [88].

101 *Risk v Northern Territory* (2002) 210 CLR 392 at 413-414 [65]: see above [89].

102 *Risk v Northern Territory* (2002) 210 CLR 392 at 435-436 [124]: see above [90].

103 *Risk v Northern Territory* (2002) 210 CLR 392 at 436 [125]: see above [90].

the waters on the seaward side are horizontally "adjacent" because they are next to Aboriginal land[104]. That construction accords with a standard usage in Commonwealth legislation[105]. Since the expression "waters of the sea" applies to the waters on either side of low water mark, s 73(1)(d) makes special provision for the Legislative Assembly of the Northern Territory to legislate for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition. This would not be necessary if those waters were themselves Aboriginal land, or if rights of entry and use which were exclusive to Aboriginals applied in those waters on the ground that the soil beneath them was Aboriginal land which had been granted to a Land Trust in fee simple[106].

Effect of s 70(2A)

106 Since the relevant waters are not "Aboriginal land", a person entering the relevant waters in order to fish or traverse them is not in breach of s 70(1). The effect of the defence given by s 70(2A) therefore need not be considered. Nor need any of the arguments on other issues in this appeal, since they fall away.

Interrelation of s 70 with s 73

107 The appellants were also correct to submit that the first respondent could not prevent the otherwise lawful exercise of rights of fishing and navigation in the tidal waters which cover the area from the high water mark to the low water mark. This is so for reasons given by Kiefel J[107].

Orders

108 The grants to the first respondent did not grant title to the waters above the land granted landwards of the low water mark, and did not create exclusive rights in those waters. The waters were not Aboriginal land, and s 70(1) is not contravened by persons who fish in or traverse those waters. It follows that no declaration which depends on the contrary of either of those propositions should be made. Neither the relief sought at trial nor the relief granted in the Full Federal Court should be granted either.

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104 *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 at 10-11 [33].

105 See above [82].

106 *Risk v Northern Territory* (2002) 210 CLR 392 at 434 [117].

107 Reasons of Kiefel J at [141]-[146], [148]-[151], [154].

109 The appeal should be allowed and the order of Mansfield J dismissing the further amended application should be restored. By reason of a condition on which special leave was granted, the appellants should pay the first, second and third respondents' costs of the appeal.

110 KIEFEL J. The first respondent, the Arnhem Land Aboriginal Land Trust ("the Land Trust"), is an Aboriginal Land Trust established under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act"). On 30 May 1980 the Governor-General executed Deeds of Grant to the Land Trust to hold lands "in Fee Simple subject to the provisions of [the Land Rights Act]". The description of the land and islands in the grants does not correspond with that of the Arnhem Land (Mainland) and Arnhem Land (Islands) in Sched 1 to the Land Rights Act, but it is not disputed that the areas are the same. The boundary of the Mainland grant extends seaward of the coast to the low water mark and by straight lines joins the seaward extremities of estuaries, rivers and streams. The grant to the low water mark, of an area which includes Blue Mud Bay, takes in the intertidal zone.

111 Since the 1990s issues concerning the right of persons to take fish in the Blue Mud Bay area, pursuant to licences issued by the Director of Fisheries of the Northern Territory under the *Fisheries Act* (NT), have been litigated[108]. Declarations were sought as to the exclusive rights of the traditional owners to enter and occupy the lands and waters and that the Land Trust was entitled to prevent persons from entering the land and waters or taking fish or aquatic resources. Members of the Yolngu people also sought and obtained a determination of native title to part of the area the subject of the grant[109].

112 A Full Court of the Federal Court (French, Finn and Sundberg JJ) ordered, subsequent to that determination, that it be amended to delete reference to the native title holders' rights to make decisions about access to, and the use of, the intertidal zone and outer waters because, at the time of sovereignty, those rights were inconsistent with the public's right of access for fishing and navigation[110]. That order is not in issue on this appeal.

113 In the proceedings brought with respect to the grants under the Land Rights Act, their Honours declined to follow an earlier decision of a Full Court of the Federal Court in *The Commonwealth v Yarmirr*[111]. It had been applied by judges of that Court as holding that a grant of fee simple under the Act did not confer upon a Land Trust the exclusive right to control access to the sea over the

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108 See the history referred to in *Gumana v Northern Territory* (2007) 158 FCR 349 at 353-354 [2]-[10].

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

110 *Gumana v Northern Territory* (2007) 158 FCR 349 at 395-396 [170]-[172].

111 (1999) 101 FCR 171.

tidal foreshore[112]. That aspect of the decision was not considered by this Court in *The Commonwealth v Yarmirr*[113]. The Full Court in this case was satisfied that a grant of an estate in fee simple under and for the purposes of the Land Rights Act conferred upon the Land Trust a right to exclude others from the intertidal zone, including those seeking to exercise a public right to fish there[114]. Their Honours considered that the Act contained a power by which the Land Trust could itself grant a licence which would permit fishing in the zone[115]. It followed that the *Fisheries Act* would have to be read down if it were to operate concurrently with the Land Rights Act[116].

Background to the Land Rights Act

114 In 1931 an area of land was proclaimed as the Arnhem Land Reserve "for the use and benefit of the aboriginal native inhabitants of North Australia" under s 102 of the Crown Lands Ordinance 1927 (NT). The Reserve was described, in the schedule to the proclamation, as bounded by the "coastline". No reference was made to high or low water marks. In 1963 four reserves were consolidated under a proclamation made under the Crown Lands Ordinance 1931 (NT). This followed upon the receipt of the Yirrkala Report, by a Committee established in response to a petition from the Aboriginal people of Yirrkala who made complaints about the use of land in the Reserve for mining purposes[117]. Sackville J, in *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust*[118], observed that the reason for the revocation of the proclamations of the four grants, prior to their consolidation by proclamation on the same day, 28 October 1963, appeared to be that the Yirrkala Report cast some doubt on their validity. The 1963 proclamation identified the boundaries of the lands by reference to the low water marks of various rivers and the Timor and Arafura Seas and used straight lines to join the extremities of the banks of rivers, streams

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112 See *Arnhemland Aboriginal Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 at 13-14 [46] per Mansfield J; reversed on other grounds in *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488; *Gumana v Northern Territory* (2005) 141 FCR 457 at 484-485 [80] per Selway J.

113 (2001) 208 CLR 1; [2001] HCA 56.

114 (2007) 158 FCR 349 at 372 [90].

115 (2007) 158 FCR 349 at 376 [103], referring to Land Rights Act, s 19(11).

116 (2007) 158 FCR 349 at 376 [103], referring to Land Rights Act, s 74.

117 Australia, *Report from the Select Committee on Grievances of Yirrkala Aborigines, Arnhem Land Reserve*, October 1963.

118 (2001) 109 FCR 488 at 496 [39].

and estuaries. It was these reserve lands which the Land Rights Act came to deal with.

115 Provision was made to control access to Aboriginal reserves under successive Ordinances. In each of the three Ordinances referred to on this appeal[119] an offence was created where a person, not being an Aborigine or a specified official, entered or remained upon a reserve[120]. The Full Court of the Federal Court observed that the only early attempt to regulate or proscribe entry by sea into an area adjacent to a reserve, made it an offence to enter the "territorial waters" adjacent to a reserve[121]. The term was not defined, was criticised for its uncertainty and was not re-enacted[122].

116 The Commonwealth Government established the Woodward Inquiry following upon the unsuccessful attempts by Aboriginal people to prevent bauxite mining and treatment on the Gove Peninsula in Arnhem Land. In *Milirrpum v Nabalco Pty Ltd*[123] Blackburn J rejected the claim that their traditional rights in land had been unlawfully invaded by the mining company which had been granted mining rights by the Commonwealth Government. Brennan J observed in *R v Toohey; Ex parte Meneling Station Pty Ltd*[124] that this judgment was the stimulus for the Inquiry.

117 The Commissioner, Mr Justice A E Woodward, was appointed to inquire into and report upon the appropriate means to recognise and establish the traditional rights and interests of Aborigines in relation to land and to satisfy their reasonable aspirations to rights in or in relation to it and as to arrangements for vesting title to land in the Northern Territory then reserved for the use of Aboriginal inhabitants of the area[125]. Woodward J considered that the provision

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119 Aboriginals Ordinance 1918 (NT); Welfare Ordinance 1953 (NT) and Social Welfare Ordinance 1964 (NT).

120 1918, s19; 1953, ss 44 and 45; 1964, s 17.

121 Aboriginals Ordinance, s 19AA.

122 *Gumana v Northern Territory* (2007) 158 FCR 349 at 364 [46].

123 (1971) 17 FLR 141 (Supreme Court, NT).

124 (1982) 158 CLR 327 at 354; [1982] HCA 69.

125 Australia, Aboriginal Land Rights Commission, *Second Report*, April 1974 at [1] ("the Second Woodward Report").

of land might not only preserve the spiritual link of Aboriginal persons to their land, it might also be of economic benefit to them[126].

118 One of the key recommendations of the Commissioner's second report, of April 1974, was that land comprised in the reserves, including the Arnhem Land Reserve, should be vested in a body such as an incorporated trust[127], which would hold the lands for the benefit of those Aborigines having traditional rights[128]. It was proposed that the Land Trust, with the consent of the regional Land Council, would be able to grant leases, licences and permits and, with the consent of the Minister, grant rights for the purposes of mineral or petroleum search or recovery, tourism and other approved purposes[129]. Regional Land Councils would conduct negotiations concerning the commercial use of the land[130].

119 It is to be recalled that the recommendations made in the Woodward reports occurred before recognition by the common law of native title[131] and before provision was made by the *Native Title Act* 1993 (Cth) for statutory recognition and the determination of the existence of native title rights and interests. In relation to the title to the land to be granted under the proposed legislation Woodward J said that he regarded any form of leasehold title as inadequate[132]. He considered title expressed as fee simple to be preferable, and explained[133]:

> "I had suggested that these requirements could all be met by the creation of a new form of statutory title, to be known as Aboriginal Title, but I am reminded by a submission from the Northern Council that it is necessary to tread warily here. It is pointed out that if the title is expressed as being in fee simple, all the normal incidents of such title would be known. This would resolve any doubts about the applicability

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126 Second Woodward Report at [3(iii), (iv)] and [4(d)].

127 Second Woodward Report at [73], [90].

128 Second Woodward Report at [95].

129 Second Woodward Report at [144(x)].

130 Second Woodward Report at [144(iii)].

131 *Mabo v Queensland [No 2]* (1992) 175 CLR 1; [1992] HCA 23*; Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40.

132 Second Woodward Report at [70].

133 Second Woodward Report at [72].

of the general law and facilitate any future dealing with the land, which may not be envisaged at present but which could be contemplated by later generations".

120 Some difficulty was presented by the question of entry onto land. Woodward J observed that "[o]ne of the most important proofs of genuine Aboriginal ownership of land will be the right to exclude from it those who are not welcome". He agreed that it should be supported by a permit system, administered by officers of the Land Councils[134].

121 The recommendations in the report were said by the Commissioner largely to give effect to the submissions put by the Land Council. There were however three claims which he was unable to recommend be accepted in full. One of them was the extension of the reserve boundaries from the coastline to a distance of 12 miles out to sea[135]. He explained[136]:

> "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.
>
> 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.
>
> 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."

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134 Second Woodward Report at [109].

135 Second Woodward Report at [11].

136 Second Woodward Report at [422]-[424].

122 Woodward J recommended that the definition of Aboriginal land, where a coastline is involved, should include off-shore islands and waters within two kilometres of the low tide line[137].

123 Neither report referred to the question of fishing rights, other than those of the traditional inhabitants. The references that were made to fishing generally assumed that any rules and restrictions applying to protect fish stocks would apply to Aboriginal fishing[138]. The possibility that the Land Council might license commercial fishing was discussed, but was not the subject of a recommendation[139].

The legislative response – the Land Rights Act

124 The original Aboriginal Land (Northern Territory) Bill 1975 (Cth) more closely reflected the aspirations of the Second Woodward Report. It had not been passed when the Parliament was prorogued on 11 November 1975. The new government introduced and read two Bills ("the 1976 Bills"). The first[140] was the subject of significant amendments which were ultimately incorporated into the Aboriginal Land Rights (Northern Territory) Bill 1976 [No 2] (Cth).

125 In the 1975 Bill the function of the Aboriginal Land Commissioner, to be appointed under the proposed Land Rights Act to deal with claims to land, was to inquire not only into the desirability of securing land for the use of its traditional owners, but to ascertain and report to the Minister on land which might satisfy the needs of Aboriginal people[141]. In the Second Reading Speech for the first of the 1976 Bills the Minister for Aboriginal Affairs referred to "the predominant position of the traditional owners" as now being defined and suggested that this had not been made clear in the 1975 Bill[142]. The focus of the Land Rights Act, upon the recognition and protection of traditional land rights, is apparent from many of its provisions.

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137 Second Woodward Report at [91].

138 Second Woodward Report at [426]-[427].

139 Second Woodward Report at [429]-[430].

140 Aboriginal Land Rights (Northern Territory) Bill 1976 (Cth).

141 Aboriginal Land (Northern Territory) Bill 1975, cl 5.

142 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 June 1976 at 3083-3084.

126 Section 50(1)(a) of the Land Rights Act provides that an application may be made to an Aboriginal Land Commissioner by or on behalf of Aboriginals "claiming to have a traditional land claim" to an area of land. That land must be Crown land. The general definition of "Crown land" is "land in the Northern Territory"[143]. The report by the Commissioner to the responsible Minister, in connection with a claim, is required to have regard to the strength of the traditional attachment of the claimants to the land[144]. "Traditional Aboriginal owners", in relation to land, is defined to mean a local descent group of Aboriginals who have common spiritual affiliations to the land and are entitled by Aboriginal tradition to forage as of right over the land[145]. A grant of land may be made to an Aboriginal Land Trust on the recommendation of the Minister[146]. Aboriginal Land Trusts established under the Land Rights Act are 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"[147].

127 Whilst the focus of the Bill as enacted shifted to the protection and maintenance of traditional uses of the land, the basic model of landholding recommended in the Second Woodward Report is retained in the Land Rights Act. A grant of land under the Act is to be of an estate in fee simple[148] to a Land Trust, which holds the title as trustee[149]. A deed of grant may be registered, according to its tenor[150]. The Deeds of Grant in question are expressed to be subject to the provisions of the Act.

128 The Land Rights Act protects pre-existing rights of use and occupation[151]. It reserves certain rights and requires them to be expressed in a grant. The rights to minerals which are vested in the Commonwealth or the Northern Territory

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143 s 3.

144 s 50(3).

145 s 3.

146 ss 10 and 12.

147 s 4(1).

148 ss 10(1) and 12(1).

149 s 5(1)(a) and (b).

150 s 12(5).

151 eg by the Director of National Parks, s 12A; the Crown or a public authority, s 14; missions, s 18; and the mining company operating the Ranger mine, s 18A.

remain with them[152]. Provision is made for the grant of licences to explore for or mine minerals[153]. A grant is required to exclude roads over which the public has a right of way[154].

129 The Land Rights Act refers to a Land Trust as exercising its powers as owner of the land[155]. Section 19(1), however, provides that "[e]xcept as provided by this section or section 19A or 20, a Land Trust shall not deal with or dispose of, or agree to deal with or dispose of, any estate or interest in land vested in it". Section 19A refers to the grant of a head lease over a township and s 20 to leases in compliance with obligations of the Commonwealth. The ability of the Land Trust to deal with interests in the land less than freehold interests is further regulated by s 19. That section permits the grant of an estate or interest in the land by a Land Trust to certain persons and for specified purposes[156] or the grant of an estate or interest in the land for any purpose at the direction of the Land Council and with the consent of the Minister, although consent is not necessary where the term created is less than 40 years[157]. An estate or interest in land includes a licence granted in respect of that land[158].

130 The Land Rights Act deals expressly with the control of entry upon Aboriginal land. Provision is made for a Land Trust, at the direction of the relevant Land Council, to authorise entry upon Aboriginal land for a specified purpose that is related to an estate or interest which it has granted[159]. Section 69 contains a prohibition upon a person entering or remaining upon land in the Northern Territory that is a sacred site. The general provision with respect to entry upon land the subject of the grant is s 70(1). It assumes importance on the appeal. It provides that "[a] person shall not enter or remain on Aboriginal land". "Aboriginal land" is relevantly defined[160] to mean "land held by a Land Trust for

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152 s 12(2)(a) and (b).

153 s 12(2)(c). Agreement must be reached with a Land Council for such a licence: s 40.

154 s 12(3) and (3A).

155 s 5(1)(a) and (b).

156 s 19(2) and (3).

157 s 19(4A) and (7).

158 s 19(11).

159 s 19(13).

160 By s 3.

an estate in fee simple". An exception is provided by sub-s (2) where a person has an estate or interest in the land[161]. Sub-section (4) entitles a person to enter and cross Aboriginal land for the purpose of access to land in which they have an estate or interest, where there is no other practical way of gaining access to it. It is a defence, in proceedings for an offence under sub-s (1), that the person enters or remains on the Aboriginal land, "in performing functions under this Act or otherwise in accordance with this Act or a law of the Northern Territory"[162].

131 Section 73 is of particular significance to the issues on the appeal. It is entitled "Reciprocal legislation of the Northern Territory". No reference will be found to the matters for which it provides in the Woodward reports. It gives law-making power to the Legislative Assembly of the Northern Territory with respect to the protection of sacred sites and for the protection of wildlife, including wildlife on Aboriginal land[163]. Importantly, for present purposes, it gives power to make laws with respect to entry upon Aboriginal land and the waters of the sea adjoining that land in these terms:

> "(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:
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> …
>
> (b) laws regulating or authorizing 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;
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> …
>
> (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;

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161 This includes a mining interest: s 66.

162 sub-s 2A.

163 s 73(1)(a) and (c).

> 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, Division 4 of Part 15 of the *Environment Protection and Biodiversity Conservation Act 1999* and any regulations made, schemes or programs formulated or things done, under this Act, or under or for the purposes of that Division."

132 Sections 73(1)(d) and 74A(1) are the only provisions in the Land Rights Act which refer to fishing and to the waters of the sea. Section 74A(1) refers to financial assistance which might be given for legal representation of persons in connection with an inquiry, by an Aboriginal Land Commissioner, into the regulation and prohibition of entry of persons into or the control of fishing or activities in waters of the sea, in terms which mirror s 73(1)(d). Such an inquiry may be one to close the seas in an area. These inquiries have been held since the coming into effect of the *Aboriginal Land Act* (NT) ("the Aboriginal Land Act"), to which reference will shortly be made.

133 The original Land Rights Bill, introduced into the Parliament in 1975, did not contain the clause which became s 73. It proposed giving effect to the Second Woodward Report by providing that that part of the territorial sea that is within two kilometres of the boundary of Aboriginal land should be deemed to be part of that land[164]. The Bill contained only one provision relating to entry onto Aboriginal land, a clause in the same terms as the present s 70. If it had been enacted the result would have been that entry onto the land the subject of the grant or into the sea "buffer zone" would have been prohibited.

134 That situation changed with the change of government. The Bill for what became the Land Rights Act[165] did not provide for a "buffer zone" but instead provided legislative powers to the Northern Territory in what would become s 73. Speaking of the amendments proposed to the first of the 1976 Bills[166], the Minister said[167]:

> "I indicated in introducing the Bill that some relevant matters were to be covered by the Northern Territory Legislative Assembly in complementary legislation: The protection of sacred sites and wildlife in Aboriginal lands and the control of entry into those lands and adjacent

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164 Aboriginal Land (Northern Territory) Bill 1975, cl 74.

165 Aboriginal Land Rights (Northern Territory) Bill 1976 [No 2].

166 Aboriginal Land Rights (Northern Territory) Bill 1976 (Cth).

167 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 November 1976 at 2780.

> waters. It is now intended to spell out in the Bill, however, guidelines stipulating the kind of laws which should be made by the Legislative Assembly, and to guarantee recognition in those laws of traditional rights."

The Minister also said that it was intended that the complementary legislation provide for Land Councils to be involved in arrangements for entry onto Aboriginal land, for wildlife conservation and the protection of sacred sites.[168] In *Risk v Northern Territory* it was observed that attempts to amend the final Bill, by reintroducing the recommendation of the Woodward report, were rejected[169]. The response of the Northern Territory Legislative Assembly to s 73 was the Aboriginal Sacred Sites Ordinance 1978 (NT)[170] (pursuant to s 73(1)(a)), the Aboriginal Land Ordinance 1978 (NT) (pursuant to s 73(1)(b) and (d)) and the Territory Parks and Wildlife Conservation Ordinance 1977 (NT) (pursuant to s 73(1)(c)).

135 The Land Rights Act came into effect on 26 January 1977, save for s 70. The Northern Territory gained self-government, a matter which had been under discussion for some time, on 1 July 1978[171]. On 1 January 1979 the Aboriginal Land Ordinance 1978 (NT), which became the Aboriginal Land Act, came into effect[172]. Section 70 of the Land Rights Act commenced on the same date.

The Aboriginal Land Act

136 In the Aboriginal Land Act "Aboriginal land" is given the same meaning as in the Land Rights Act[173]. Part II deals with "Entry onto Aboriginal Land". It provides that a person, other than an Aboriginal entitled by Aboriginal tradition, shall not enter or remain upon Aboriginal land unless that person has been issued with a permit to do so[174]. The Land Council or the traditional Aboriginal owners

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168 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 November 1976 at 2779.

169 (2002) 210 CLR 392 at 406 [35] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; 420-421 [86]-[87] per Gummow J ("the legislative compromise"); [2002] HCA 23.

170 Repealed in 1989 and replaced with the *Northern Territory Aboriginal Sacred Sites Act* (NT).

171 *Northern Territory (Self-Government) Act* 1978 (Cth).

172 The name was amended by the *Statute Law Revision Act* (NT).

173 Aboriginal Land Act, s 3.

174 s 4(1), (2) and (3).

for the area may issue permits[175] to a person to enter and remain upon Aboriginal land or to use a road that is bordered by that land. Part III deals with "Control of Entry onto Seas Adjoining Aboriginal Land". Section 12(1) provides:

> "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."

137 Before deciding to close a part of the seas in accordance with the section the Administrator is to refer the matter to the Aboriginal Land Commissioner and request a report[176]. That report is to deal, amongst other things, with whether the use of those seas by strangers may interfere with the use of those seas in accordance with Aboriginal tradition by the Aboriginals who traditionally use those seas; whether a person would be disadvantaged if the seas were closed; and the commercial, environmental and recreational interests of the public[177]. Section 13 allows the Administrator to re-open seas which have been closed.

Control of entry onto land and waters

138 The owner of intertidal lands has the exclusive right of fishing in the waters overlying the lands and to grant that right to another[178]. The argument before the Full Court involved whether that right was subjugated to the paramount right of the public to fish in public waters, which is recognised by the common law[179]. That public right is amenable to abrogation or regulation by statute[180]. The issue identified by their Honours, the resolution of which would answer this question, was whether the Land Trust had the right to exclude the public from entry upon the land and the taking of fish from the waters above it[181].

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175 s 5(1) and (2).

176 s 12(3).

177 s 12(3)(b), (d) and (e).

178 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 329-330 per Brennan J; [1989] HCA 47, referring to *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 167-168, 170.

179 *Harper* (1989) 168 CLR 314 at 330; public rights also extend to navigation, a right of way over tidal waters; see *Halsbury Laws of England*, 4th ed, vol 18 at [604].

180 (2007) 158 FCR 349 at 374 [94].

181 (2007) 158 FCR 349 at 373 [92].

Their Honours clearly considered that whatever rights the Land Trust had with respect to fishing in the waters were inextricably linked with its right to exclude. The view taken by their Honours was that the Land Rights Act both recognised and enforced such a right and it was effective to abrogate any public rights to fish, assuming that they existed[182].

139 The Full Court did not determine the question in favour of the Land Trust by reference to the grant to it of an estate in fee simple of the intertidal lands alone[183], although the grant nonetheless assumes importance in their Honours' reasoning. It is apparent that their Honours considered that the Land Rights Act, in its purposes and its provisions, provides a statutory acknowledgment of the Land Trust's right, as owner, to exclude entry[184]. Section 70 was considered to be of "decisive significance" by their Honours, its language reflecting and reinforcing the extent of the Land Trust's rights[185]. It did not admit of a qualification that would exempt a person purporting to exercise a public right to fish in the tidal zone[186]. The public rights asserted had no place in the legislative scheme of that Act, their Honours concluded[187].

140 In arriving at that opinion their Honours saw s 70, and other provisions of the Act, as furthering the recommendations in the Second Woodward Report, which addressed directly the question of entry onto Aboriginal land[188]. It will be recalled that Woodward J identified the power of exclusion as an important incident of the Aboriginal ownership to be dealt with in the legislation[189]. It is necessary to consider whether the Land Rights Act gives effect to that recommendation or whether it altered that right, as it did with other incidents of a Land Trust's ownership, by itself providing for control of entry.

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182 (2007) 158 FCR 349 at 375 [100].

183 (2007) 158 FCR 349 at 372 [88].

184 (2007) 158 FCR 349 at 372 [90], 373 [92], 374 [94].

185 (2007) 158 FCR 349 at 374 [94].

186 (2007) 158 FCR 349 at 374 [94].

187 (2007) 158 FCR 349 at 375 [99].

188 (2007) 158 FCR 349 at 375 [99].

189 Second Woodward Report at [109].

141 The fee simple is the largest estate in land. It has come to resemble ownership and its proprietor is commonly called the owner of the land[190]. It is, for almost all practical purposes, the equivalent of full ownership of land[191]. This does not mean that it cannot be the subject of encumbrances[192]. The fee simple estate is different from traditional Aboriginal ownership of land, which has been described as "primarily a spiritual affair rather than a bundle of rights"[193]. It may be inferred that Woodward J chose the fee simple title as the subject of a grant under the proposed legislation for the security and certainty it would provide and because he foresaw the possibility of future dealings in the land.

142 It is apparent from a number of provisions of the Land Rights Act that the rights of a Land Trust as owner of the land the subject of a grant are modified. The grant itself describes the estate or interest in the land as being in fee simple subject to the provisions of the Act. It is that interest which is the subject of registration.

143 It was always intended that the estate or interest the subject of the grant would not completely accord with one of fee simple. This may be seen by the denial of that estate's essential characteristic, alienability. This was one of the recommendations of Woodward J. The Land Rights Act, as passed, contained further reservations with respect to the land and exclusions which altered the incidents of ownership. It provides for the continuing rights of third parties. It makes detailed provisions restricting and regulating such dealings as there may be in leasehold and other interests. It provides for the making of laws to protect sites and wildlife on the land and provides for the control of entry onto Aboriginal land and waters of the sea.

144 In *Davies v Littlejohn*[194] Isaacs J said that the statute there in question shaped and stated the characteristics of the tenure it created. Although his Honour was not speaking of a statute which permits the grant of land according

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190 Megarry and Wade, *The Law of Real Property*, 6th ed (2000) at 2.16.

191 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1998] HCA 58; *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656 per Deane, Dawson and Gaudron JJ; [1993] HCA 45; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ.

192 See *Challis's Law of Real Property*, 3rd ed (1911) at 218-219.

193 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 358 per Brennan J.

194 (1923) 34 CLR 174 at 187; [1923] HCA 64.

to an estate known to land law, as is here the case, the statement of the effect of statutory provisions is appropriate to a grant of an estate in fee simple with the reservations and exceptions made by the Land Rights Act. As Gummow J pointed out in *Wik Peoples v Queensland*[195], whilst a statute may appear to adopt general law elements and principles in a new regime, in truth it may be seen to do so only on particular terms.

145 These restrictions, and the assumption of control over the lands the subject of a grant, are not contrary to the purposes of the Land Rights Act. Its overall purpose is declared by its long title to be to benefit Aboriginal people, as the Full Court observed[196]. It is evident from the provisions of the Act that it does so by recognising and protecting traditional rights of use with respect to the land. This extends to the protection of such rights with respect to waters of the sea adjoining Aboriginal lands by s 73(1)(d). The Act also provides for the creation of some interests in the land by the Land Trust, albeit regulated, and that Land Councils might benefit by activities such as mining upon the land[197]. These powers may not be as extensive as envisaged by Woodward J. The objectives of the Act do not require that the Land Trust be able to exercise all of the powers of an owner. The later inclusion of s 73 shows a legislative intention to leave many such matters as issues of governance by the Northern Territory, so long as traditional rights of use are protected.

146 It would not therefore seem to be a correct approach, to the question of the Land Trust's power to exclude or authorise entry, to view it as an owner, assume that it retains the powers of an owner and read the statute in this light. Regard must be had to the provisions of the Land Rights Act and as to how the matter of entry is there dealt with.

147 There is a specific reference, in s 19(13), to the Land Trust being able to authorise persons to enter or remain upon Aboriginal land. It arises when it has granted an estate or interest in the land of the kind permitted by s 19 and pursuant to its requirements. The authority is limited to the purpose that is related to that estate or interest. A licence in respect of land is such an interest (s 19(13)). It was this provision to which the Full Court referred in connection with the possible authorisation of persons, by the Land Trust, to enter upon the foreshore and to fish there. Section 19(13) does not refer to that activity. Neither it nor s 19(11) provides a power of general permission or prohibition to a Land Trust.

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195 (1996) 187 CLR 1 at 197.

196 *Gumana v Northern Territory* (2007) 158 FCR 349 at 375 [99].

197 See in particular Pt IV "Mining".

148 Section 70(1) contains the general prohibition of entry onto Aboriginal land. It does not reinforce the existence of an authority, on the part of the Land Trust as owner, to exclude entry onto Aboriginal land. It does not, for example, state that there shall be no entry and no person shall remain upon the land without the permission of the owner. It assumes the power to control entry and exercises it by the express prohibition in the section, in the way that entry has historically been denied to reserves. And s 70 creates an offence in the event of entry. The likelihood that s 70 was intended to support a Land Trust's power as owner is further diminished by the provision for the making of Northern Territory laws with respect to entry upon land in s 73(1)(b).

149 Section 73(1)(b) provides that the Legislative Assembly of the Northern Territory may make laws which *regulate* or *authorize* the entry of persons onto Aboriginal land. It is addressed to the same subject as s 70. Section 73(1)(a), which permits the making of laws to protect and regulate or authorise the entry of persons onto sacred sites, is similarly addressed to the subject of s 69.

150 In argument on the appeal it was suggested that it would be a defence to s 70(1) if a person entered upon Aboriginal land in accordance with a law of the Northern Territory of the kind referred to in s 73(1)(b), by reason of s 70(2A). Such an approach assumes that the prohibition in s 70 remains operative when laws of the kind referred to in s 73(1)(b) have been enacted. The defence would then afford an excuse. A preferable approach would be to construe s 70(1) together with s 73(1)(b). The language and structure of the sections strongly suggest this, as does their legislative history. They should be construed on the basis that they are intended to give effect to harmonious goals[198]. That objective is not achieved by reading the Act to provide for the making of laws which authorise or regulate entry onto land, and at the same time give effect to a prohibition on entry. It is achieved by reading s 70(1) as subject to the qualification that, where laws of the kind referred to in s 73(1)(b) are made, an exception is created to s 70. Such a statutory provision or effect is not uncommon[199]. If no such laws exist, the prohibition is effective. At present such laws do exist, those in Pt II of the Aboriginal Land Act. The effect is that s 70(1) is not contravened and no offence is committed.

151 The Land Trust does not have the right of an owner to exclude persons from the land the subject of the grant. Section 70 does not give effect to such a right. The provisions of the Land Rights Act have altered that right. The effect of s 70, together with laws of the kind referred to in s 73(1)(b), is that entry is not

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198 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

199 See eg *Corporations Act* 2001 (Cth), s 5G(4).

prohibited where there is a scheme of regulation or authorisation under a Northern Territory law. That is provided by s 5(1) and (2) of the Aboriginal Land Act, which give power to the Land Council, and the traditional Aboriginal owners of an area, to issue permits for entry. The recommendation to that effect in the Second Woodward Report is implemented.

152 Both s 70 and Pt II of the Aboriginal Land Act are concerned with "Aboriginal land" as it is defined in the Land Rights Act. The word "land" is not defined by the Act. If Aboriginal land extends to waters over the intertidal zone, s 70 is not presently effective to render entry upon them unlawful. If those waters are included in Aboriginal land, entry upon them is subject to a permission which may be granted under the Aboriginal Land Act. Any question concerning the regulation of any extant public right to fish must be considered in that context. There is, however, a question whether the term "Aboriginal land" is intended to include those waters. If it does not, the question then arises whether fishing in waters in the intertidal zone is regulated by laws made by reference to s 73(1)(d), namely Part III of the Aboriginal Land Act.

153 Their Honours in the Full Court held that, if the waters are Aboriginal land, the power granted by s 73(1)(b), to enact laws regulating entry of persons on Aboriginal land, does not extend to a power to make laws with respect to fishing. This activity is dealt with by s 73(1)(d)[200]. Their Honours recognise the distinction made, in s 73, between Aboriginal land and waters of the sea. Their Honours, however, considered that the laws which could be made under s 73(1)(d) were not intended to operate with respect to waters lying over Aboriginal land in that zone. They saw s 73(1)(d), in its reference to waters of the sea, as "including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of, Aboriginal land" as giving effect to the buffer zone which had been recommended in the Second Woodward Report, although the waters are not called Aboriginal land in the Land Rights Act[201]. Their Honours were influenced to their conclusion by the view that s 73(1)(d) presupposes a particular boundary with Aboriginal land, for otherwise the two kilometre zone would move with the tide[202]. Their Honours took that boundary to be that of the grant.

154 Section 73(1)(d) is not without its difficulties in interpretation. If the Full Court's construction were the correct one it would mean that laws of the kind referred to in s 73(1)(d), such as the sea closure provisions in Pt III of the

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200 (2007) 158 FCR 349 at 376 [103].

201 (2007) 158 FCR 349 at 376 [103].

202 (2007) 158 FCR 349 at 373 [94].

Aboriginal Land Act, would operate from the low water mark, but there would be no such regime for waters when they inundate the intertidal zone. It would suggest the retention of an exclusive right in the Land Trust to fishing in the waters over the zone when it does not have the right to control entry to the land under the waters. The Act contains no reference to such a right pertaining to those waters. It does not provide for the Land Trust dealing with such a right, whereas it makes detailed provision with respect to land. The Act does not itself assume control of entry of persons onto those waters or regulate to prohibit fishing in them, it makes provision for that control in s 73(1)(d). Section 73 is a clear expression of statutory intention that entry onto Aboriginal land and sacred sites on that land, the protection of wildlife on Aboriginal land and entry onto waters of the sea adjoining them are matters which can be dealt with by the Legislative Assembly of the Northern Territory. That legislature has done so. In providing for that legislative jurisdiction s 73 requires that such laws protect traditional Aboriginal rights of access and use. By that means the legislation would operate consistently with the principal purpose of the Land Rights Act.

155 "Land" is ordinarily understood to be the solid part of the earth's surface, as distinguished from the sea[203]. Apart from s 73(1)(d)[204], the provisions of the Land Rights Act concern land in this sense. This was observed in the joint judgment in *Risk*[205]. A number of provisions indicate that this is the case. They include provisions concerning the occupation of the land[206], the extraction of minerals from it[207], and roads constructed upon it[208]. The title given by a grant is referable to land. The grant is made in recognition, in part, of an Aboriginal group's traditional right to forage. As McHugh J noted in *Risk*[209], the more natural meaning of that word involves the search for food on land. An application for a grant is with respect to Crown land, which is defined by the Act as land in the Northern Territory.

156 Sections 73(1)(d) and 74A(1) are the only provisions in the Land Rights Act which refer to sea waters or to fishing. Section 73(1)(d) draws a clear

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203 *The Shorter Oxford English Dictionary*, 3rd ed (rev) (1973), vol 1 at 1172.

204 and s 74A(1).

205 (2002) 210 CLR 392 at 404 [27] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

206 See above at fn 151.

207 Land Rights Act, s 12 and Pt IV.

208 Land Rights Act, s 12(3).

209 (2002) 210 CLR 392 at 413 [62].

distinction between Aboriginal land and waters of the sea. This distinction was adverted to in *Risk*[210], in connection with the question whether the words "land in the Northern Territory" include the seabed. It was held that it did not. McHugh J observed that s 73(1)(d) operates upon the assumption that the "waters of the sea" are not Aboriginal land within the meaning of s 3 of the Act and therefore not the subject of an application under s 50[211]. Callinan J was also of the view that the reference to land in the Act did not include the sea[212]. This accords with the treatment elsewhere in the Act of Aboriginal land as land in the ordinary sense of the term.

157 Reading "Aboriginal land" as referrable to land over which tidal waters do not flow, dry land in that sense, gives effect to the distinction between land and waters in their ordinary and natural meaning. "Waters of the sea" would ordinarily be understood to refer to all such waters, regardless of whether they cover tidal lands at times[213]. Such a construction of s 73(1)(d) would not deny the meaning of Aboriginal land as referable to land the subject of the grant, as it is defined. It would maintain the distinction created by the section. It would give effect more fully to the meaning of the term "waters of the sea". I observe that in sea closure determinations the term has been taken to include waters which overlie the boundaries of Aboriginal land[214]. The application of the construction would take the two kilometre zone, the subject of the powers of closure under the Aboriginal Land Act, from the high water and not the low water mark. The waters of the sea would be taken to adjoin Aboriginal land which was not inundated by waters from time to time. McHugh J in *Risk* appears to have assumed that the line should be taken from the low water mark, but it was not necessary to the matter decided and his Honour was not required to consider the operation of s 73(1)(d).

158 It is not necessary to the purposes of control of entry for fishing and other activities in waters of the sea that a line be taken from the boundary of the grant land. To the contrary, it would achieve no statutory purpose and run counter to the purpose of the protection of traditional rights to fish. The Land Rights Act

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210 (2002) 210 CLR 392 at 404 [26] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 412-413 [61] per McHugh J.

211 (2002) 210 CLR 392 at 412-413 [61].

212 (2002) 210 CLR 392 at 434 [117], 435-436 [123]-[125].

213 See reasons of Heydon J at fn 69.

214 *Closure of Seas: Castlereagh Bay/Howard Island Region of Arnhem Land*, Report by Aboriginal Land Commissioner Justice Kearney to the Administrator of the Northern Territory (1 July 1988) at 17-18 [81].

did not establish the buffer zone referred to in the Woodward reports, one which extended from the boundary of the grant and which included the sea as part of Aboriginal land. It did not identify that boundary as a point of reference. It drew a distinction between waters of the sea and Aboriginal land, which is to say land the subject of the grant.

159 It is unlikely that the legislation enacted pursuant to s 73(1)(d) was not intended to apply to waters over intertidal zones. One regime is likely to have been intended with respect to all waters of the sea. This was the view expressed by Mansfield J in *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)*[215].

Conclusion

160 The issues on the appeal fall to be determined by reference to the provisions of the Land Rights Act. That Act does not provide for the control of entry onto intertidal waters or activities such as fishing by the Land Trust. It provides the foundation for a further statutory regime, Northern Territory laws, which may prohibit or regulate those activities. Part III of the Aboriginal Land Act is such a law. Absent a closure effected pursuant to s 12 it is not unlawful for persons, otherwise entitled to take fish, to fish there.

161 It is not necessary to determine the question whether persons have a right to fish in open waters by reason of the ancient public right, or because of the common law principle that a person is free to do anything, subject only to the provisions of the law[216]. One such provision, where a person is not an Aboriginal exercising a traditional right to fish[217] or a person taking fish for their subsistence or personal use,[218] requires that a licence be obtained under the *Fisheries Act*[219]. That Act does not provide for permission to fish in particular areas and is of limited relevance to the issues on the appeal. The terms of a licence under the *Fisheries Act* may exclude fishing in certain areas, notably areas the subject of fishing management plans[220]. There is no suggestion that the tidal zones in

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215 (2000) 170 ALR 1 at 11 [33]-[35].

216 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564; [1997] HCA 25.

217 *Fisheries Act*, s 53.

218 *Fisheries Act*, s 10(2).

219 s 10(1).

220 s 11(7).

question are subject to such plans. A person taking fish in compliance with the terms of the Act, or a licence issued under it, is entitled to do so in the intertidal zones in question, in the absence of an exclusion effected under the Aboriginal Land Act. The Land Trust does not have the right to exclude the public from that use.

Orders

162 I would allow the appeal, set aside the declarations, make declarations as to the meaning of the terms "Aboriginal land" and "waters of the sea", make a declaration to the effect that the Land Trust does not have the power to exclude persons from fishing in intertidal zones and declare that the power to do so is contained in Pt III of the Aboriginal Land Act. On the grant of special leave the appellant undertook to pay the costs of the first, second and third respondents. There should be an order accordingly.