

Blue Mud Bay: Northern Territory of Australia v Arnhem Land Aboriginal Land Trust [2008] HCA 29

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On 30 July 2008 the High Court handed down its Blue Mud Bay decision recognising that the rights and interests held by the Yolgnu people under the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth) (the Land Rights Act) included the right to make decisions about who enters their waters irrespective of the operation of the *Fisheries Act 1988* (NT) (Fisheries Act). The decision has significant economic and political implications by providing leverage for negotiating with industry and a starting point for economic development.

Blue Mud Bay lies within the Arnhem Land Mainland Grant which is a grant of freehold title to the Aboriginal Land Aboriginal Land Trust (the Land Trust).¹ In the decision, the High Court held in a majority of 5:2 that the Land Trust has the ability to exclude others from entering or remaining on Aboriginal Land as defined under the Land Rights Act. This exclusion operates unless one of three exemptions apply. The relevant exemption in this case was that people may enter or remain on Aboriginal land under a law of the Northern Territory. Accordingly, the central legal question of the decision was whether granting a fishing license amounts to such an exemption.²

The decision was reached primarily on principles of statutory interpretation. The majority accepted the

¹ [2], [4], [5] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

² [17] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

argument that even though the Fisheries Act controlled fishing within the boundaries of Aboriginal land and waters, a fishing license is not sufficient to confer permission to enter or remain on Aboriginal land.

The scope and function of fishing licenses was viewed narrowly as regulating an activity as opposed to authorising entry into a particular area. The Northern Territory Government, the Director of Fisheries, the Northern Territory Seafood Council and the Commonwealth raised two main arguments in their cases that:

- There is a common law or public right to fish in tidal waters which has not been removed by the Fisheries Act;³ and
- The Land Rights Act does not extend to intertidal waters.

In considering these arguments, the High Court recognised that there was a public right to fish under the Magna Carta but found that this right can be easily removed or regulated by legislation.⁴ After considering the provisions

of the Fisheries Act the High Court concluded the extensive provisions regulating fishing had removed any common law or public right to fish in tidal waters. This contrasts with the position taken by the High Court in the Croker Island Case⁵, in which it was suggested that the public right to fish was among the skeletal principles of the law of England that could not be

adapted to accommodate an exclusive native right or rights approaching exclusivity. The reasoning in Blue Mud Bay more reflects the views of Kirby J in his minority decision. Accordingly, any right to fish would need to either be conferred by the Fisheries Act or not excluded under the Land Rights legislation. The High Court focused on whether the Fisheries Act or a license under the Fisheries Act conferred a right to enter any particular area. After considering the provisions of the legislation the High Court found that even though it did specify where fishing was not permitted it did not specify where fishing was permitted, that is, the licenses are not connected to a particular case.⁶ The court also considered the common law right to navigation. They held that the right to navigate

³ [19] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

⁴ [23], [24]-[29] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

⁵ *Commonwealth v Yarmirr* [2001] HCA 56.

⁶ [36] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

through waters did not carry with it a right to fish; it merely explained the method of entry to a place.

The next issue was whether or not the Land Trust has the power to exclude people from intertidal waters on Aboriginal land under the Land Rights Act. There was some disagreement within the High Court as to whether or not the Land Trust was an 'owner' with this ability. Justice Kiefel argued that Aboriginal ownership of land is primarily a spiritual affair rather than a bundle of rights' and that the grant of freehold to Aboriginal people did not confer ownership.⁷ Both Kiefel and Heydon JJ applied the ordinary meaning of land to find that the land granted to the Land Trust was soil only, not the tidal waters covering the area from the high water mark to the low water mark.⁸ Justice Heydon felt that the definition of 'traditional land claim' and 'traditional owners' supported the ordinary meaning of land.⁹

The majority rejected this argument, and held that Aboriginal land is defined by particular boundaries and that the right to exclude relates to the area within the boundary regardless of the tide:

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...Nothing in the Land Rights Act requires a different conclusion.¹⁰

The majority concluded that the terms of the grant, is 'for all practical purposes, the equivalent of full ownership of land'.¹¹

Interestingly, Justice Kirby made judicial notice of the National Apology and determined that such policy issues should be taken into account in the interpretation of statutes affecting the rights of Indigenous people.¹²

The decision does not have any direct impact on native title jurisprudence. However, as noted above, it demonstrates that rights over water even in areas subject to highly regulated licensing regimes can sustain a right to exclude. Its also indicates that the non exclusive native title to offshore areas may be more robust than is currently presumed.

For more information on offshore native title in Australia please go to:

http://ntru.aiatsis.gov.au/research/offshore%20native%20title/offshore%20native%20title_1.htm

⁷ [141] per Keifel J.

⁸ [103] per Heydon J; [155] per Kiefel J.

⁹ [104]-[105] per Heydon J. This was essentially the argument put by the Northern Territory Director of Fisheries, Seafood Council and the Commonwealth. The remaining issue was whether or not Aboriginal land included intertidal waters. They argued that the Land Rights Act was limited to prohibiting entry on dry land or areas that were exposed by the tide: [42] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

¹⁰ [55] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

¹¹ [50] per Gleeson CJ, Gummow, Hayne and Crenaan JJ.

¹² [70]-[71] per Kirby J.