WET OR DRY, IT'S ABORIGINAL LAND:

THE BLUE MUD BAY DECISION ON THE INTERTIDAL ZONE

by Sean Brennan

INTRODUCTION

A long legal battle by Yolngu traditional owners in the Northern Territory (NT) to control the entry by fishing boats to coastal Aboriginal land has ended with a landmark victory in the High Court. The decision reaffirms the strength of Aboriginal property rights under the statutory land rights regime that operates in the NT. The ruling applies to the intertidal zone (the area between high and low water marks) including river mouths and estuaries along most of the NT coastline,[1] creating unprecedented opportunities for Aboriginal participation in the seafood industry.

On 30 July 2008, by a margin of five judges to two, the High Court rejected an appeal by the NT Government that was backed by the Commonwealth and the NT Seafood Council, in what has become known as the *Blue Mud Bay* case.[2] The Court confirmed that a fishing licence granted by the NT Director of Fisheries does not authorise the holder to enter waters within the boundaries of Aboriginal land. In coastal areas, grants of 'Aboriginal land' under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) are made to the low water mark. As such they encompass an intertidal area that, in northern Australia, can stretch over long distances and contains rich fishing grounds.

All parties agreed that the subsoil in the intertidal zone comes within the statutory definition of 'Aboriginal land'. The appellants argued that 'waters' do not and that, therefore, a person fishing from a boat in the tidal waters that periodically flow in and cover the intertidal zone does not 'enter or remain on Aboriginal land' in violation of section 70 of the ALRA.[3] Alternatively, the appellants said that entry to the intertidal zone by the holder of a fishing licence was 'in accordance with…a law of the Northern Territory' and thus within a statutory defence available under section 70(2A). The High Court majority agreed that the Act did differentiate between land and waters but rejected the two arguments that were said to follow.

THE HIGH COURT MAJORITY

The conclusion of the majority was built on three key propositions. Section 70 of the ALRA says that, in general, a person may not enter and remain on Aboriginal land unless they can show legal authority to do so.[4] Secondly, the intertidal zone is 'Aboriginal land' because it falls within the boundaries defined in the grant made to a coastal Aboriginal land trust; this is so regardless of the fact that tidal waters may periodically cover the terrestrial surface of the grant, the subsoil of the zone. Finally, the *Fisheries Act* (NT) is not a law of the NT that authorises *entry* to any particular place – it merely permits conditionally what it otherwise declares to be a prohibited activity: the taking of fish or aquatic life.[5]

The earlier Full Federal Court ruling in favour of the Yolngu in 2007 had a constitutional flavour. It declared that the NT *Fisheries Act* had to be 'read down' as having no application to Aboriginal land. The High Court said that proposition was too broad and deflected attention from the critical legal question. The Yolngu's lawyers had reached the same conclusion by the time of the High Court hearing and the shift in legal rationale did not change the ultimate outcome. As a matter purely of statutory interpretation, the High Court found that the licensing scheme in the *Fisheries Act* (NT) fell short of even setting up a contest between the Territory and Commonwealth laws, because it did not authorise entry to places.[6] On tidal waters inside the boundary of Aboriginal land, an NT fishing licence simply provided no legal answer to the criminal trespass provision in section 70 of the Federal Act.[7]

THE MINORITY

Justice Heydon denied that a boat fishing on tidal waters between the high and low water marks was on 'Aboriginal land'. He identified provisions in the ALRA that distinguished between land and waters and treated the distinction as decisive for the question of section 70 and its breach.[8] Contrary to the suggestion of the Full Federal Court, the grant of land to the low water mark was not a deliberate parliamentary conferral of rights on Aboriginal people over the most landward part of their sea country.

Justice Kiefel noted the 1974 Woodward Royal Commission, which recommended that sea waters up

to two kilometres beyond the boundary of an Aboriginal land grant should be deemed part of that land. The Bill presented and passed during the period of the Fraser Government, however, dispensed with this offshore 'buffer zone'; instead, it gave the NT Legislative Assembly the power to make certain reciprocal laws regarding access, fishing, wildlife and sacred sites (section 73).

These grants of power to the NT Legislative Assembly, Justice Kiefel suggested, undercut the authority of traditional owners. In particular, they displaced the right to exclude that would otherwise accompany a fee simple grant. The ALRA did not affirm and reinforce the exclusionary powers of the Aboriginal owners, as the Full Federal Court and the High Court majority had said (with an emphasis on the trespass provision in section 70). Rather, the Act diminished the property rights of traditional owners, by handing legislative control over entry and other issues to the NT Legislative Assembly.[9]

On Justice Kiefel's interpretation, Aboriginal fee simple owners in the NT hold property rights that are radically inferior to other owners and highly vulnerable to legislative alteration by the NT Assembly. Section 70 lacks the powerful affect attributed to it by the majority. Laws about access passed by the NT Assembly (a constitutionally subordinate legislature) do not *complement* this strongly worded Commonwealth prohibition, they *displace* it entirely.[10] In these respects, Justice Heydon agreed with Justice Kiefel's dissent.[11]

Like Justice Heydon, her Honour said that the waters above the subsoil of the intertidal zone should be divorced from 'Aboriginal land' and regarded as waters of the sea, subject to regulation by the NT Assembly under section 73(1)(d) of the ALRA. Justice Kiefel concluded that nothing in the law passed by the Assembly pursuant to section 73(1)(d) automatically precludes fishing in a zone that runs for two kilometres seaward from the *high* water mark. Unless a sea closure has been declared under that law,[12] a person holding a *Fisheries Act* licence can enter and fish in the intertidal zone adjoining Aboriginal land.

THE PRACTICAL OUTCOME

Following the unanimous decision by the Full Federal Court in favour of the Yolngu in March 2007, traditional owners and the Northern Land Council (NLC) established a minimalist licensing regime pending the outcome of the High Court appeal. The Aboriginal owners of the intertidal zone issued interim licences and permits to commercial and recreational fishers in tidal waters. The licences and permits were issued automatically and without fee. The NLC foreshadowed a further 12 month amnesty if successful in the High Court, allowing for the negotiation of a new fishing regime for tidal waters on Aboriginal land.[13] On the day of the High Court decision, the NLC confirmed that this amnesty would continue.

The interim licensing regime corresponds with comments made in the High Court and Federal Court regarding the legal mechanisms available to reconcile NT fishing laws with federally granted Aboriginal land rights. The Full Federal Court had said that section 19 of the ALRA gives traditional owners the power, conditioned by statute, to grant interests in Aboriginal land, including licences to use that land. This power, the Court said, could be used to license fishing in the intertidal zone.[14] The High Court plurality pointed out that Land Councils can grant permits to enter and remain on Aboriginal land under the NT legislation enacted by the Legislative Assembly pursuant to section 73 of the ALRA.[15] The interim licence-plus-permit scheme for tidal waters explicitly relies on section 19 of the ALRA and the permit scheme provided under section 5 of the *Aboriginal Land Act* (NT).[16]

In the aftermath of the Federal Court and High Court decisions, the NLC said that traditional owners were seeking to build relationships with the fishing industry. This effort, together with the political breathing space provided by the long amnesty and its maintenance of the status quo, appears to have paid some dividends. In the past, a strong legal outcome for traditional owners, with an impact on activity as dearly regarded by non-Indigenous Territorians as fishing, may have brought a torrent of negative responses. Race issues have played a divisive role in local Assembly elections and the High Court's decision came down at the precise midpoint of the 2008 election campaign.

The media reportage of *Blue Mud Bay*, however, was restrained, as were the comments from key political players. The chair of the NT Seafood Council was reported to be 'relaxed' about the decision and taking a positive approach to talks with the NLC. A spokesperson for the Amateur Fishermen's Association registered concerns for its membership but did not reject the decision. Political leaders from both major parties in the NT sought to reassure non-Indigenous Territorians, but again did not denigrate the Court's decision itself. The Chief Minister said that goodwill existed on all sides and a negotiated agreement would be achieved.[17]

The Federal Minister for Indigenous Affairs, Jenny Macklin, said that ways must be found 'for Indigenous

people to build a stronger economic future…through access to land and certain property rights'. She pointed to the *Blue Mud Bay* decision as an example where substantial legal control over access to the intertidal zone should ensure that traditional owners can 'leverage land assets' and pursue 'significant commercial opportunities in key fisheries'.[18] This represents a welcome departure from the hypocrisy of political leaders who, on the one hand, exhort Aboriginal people to escape welfare dependency and embrace economic opportunity and, on the other hand, criticise and appeal court decisions that might help build a platform to do just that.[19]

CONCLUSION

The *Blue Mud Bay* decision from the High Court stands as one of the most significant affirmations of Indigenous legal rights in recent Australian history. The High Court majority refrained from spelling out in comprehensive terms what legal entitlements the traditional owners hold over the intertidal zone.[20] But they left no doubt over the strength of the right to exclude others, as both fee simple grant holders and also as beneficiaries of the criminal trespass provision in section 70 of the ALRA.

The decision creates a strong bargaining position for coastal Aboriginal people in the NT from which to negotiate joint participation 'in the management and development of a sustainable fishing industry – including the protection of fishing stocks, protection of sacred sites and participation in enterprises'.[21] To access the rich natural resources of the intertidal zone on Aboriginal country, commercial fishers must now talk with the traditional owners about the terms and conditions on which that can occur. The High Court's decision gives Australia the opportunity, belatedly, to catch up with Canada and New Zealand in building co-operative structures between government, business and Indigenous peoples in commercial fisheries.[22]

More broadly, across nearly 50% of the NT landmass where the ALRA has restored country to traditional ownership, the *Blue Mud Bay* majority affirms the strength of the property rights that have been granted. They are, 'for almost all practical purposes, the equivalent of full ownership of the land'.[23] Legally and constitutionally, this marks an important line in the sand in any future debate, negotiation, litigation and legislation about the operation of Commonwealth and NT laws on and near Aboriginal land.

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1 Lawyers for the Northern Territory (NT) told the High Court that Aboriginal land grants to the low water mark line 84 per cent of the coastline and may eventually cover 88 per cent: Transcript of proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* (High Court of Australia, Jackson SC, 4 December 2007), 4.

2 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29. The majority consisted of a plurality judgment (Gleeson CJ, Gummow, Hayne and Crennan JJ) and a separate concurring judgment by Kirby J. The appeal was from a unanimous Full Federal Court decision in *Gumana v Northern Territory* (2007) 158 FCR 349 (French, Finn and Sundberg JJ). The High Court hearing, held in December 2007, was discussed in Sean Brennan and Peta MacGillivray, 'Fishing Case Tests Economic Waters for Traditional Owners' (2008) 7(2) *Indigenous Law Bulletin* 18.

3 'A person shall not enter or remain on Aboriginal land. Penalty: 10 penalty units': section 70(1), *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). Subsequent subsections include defences and qualifications to the prohibition.

4 The grant of fee simple also carries with it a right to exclude others that reinforces the statutory effect of section 70: *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 [50] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

5 See the plurality judgment, ibid, [15], [33] and [36] and the judgment of Justice Kirby [73].

6 Justice Kirby was less critical of the quasi-constitutional approach taken by the Full Federal Court. He said that it was not wrong to approach the case as a question of *power* in this way, just that it was preferable to conclude that, as a more modest matter of statutory interpretation, the *Fisheries Act* (NT) did not authorise entry to the intertidal zone, within the boundaries of Aboriginal land: ibid [64]-[66].

7 Nor did a 'paramount' public right to fish, also relied on by the appellants. The High Court majority found that this common law right had been abrogated by the comprehensive *Fisheries Act* (NT), which was centred around a conditional prohibition on the taking of fish or aquatic life: ibid [27]-[28].

8 He also collaterally relied on a construction of section 73(1)(d) that differed from the majority by treating waters above the subsoil of the intertidal zone as 'adjoining' Aboriginal land in a vertical sense: ibid [105].

9 Justice Kiefel said that backstop protection of traditional rights was provided in the wording of section 73, as part of a legislative compromise by the Commonwealth between Aboriginal people and the new self-governing polity then about to come into existence (the NT was granted self-government by the Commonwealth with effect from 1 July 1978): ibid [145].

10 Ibid [150].

11 Ibid [107]. Justice Kiefel invoked an idea from the High Court decision in *Wik Peoples v Queensland* (1996) 187 CLR 1 – a case that dealt with the right to pasture cattle. A 'pastoral lease' was not a 'lease', for reasons of text, context, purpose and history. A statute may appear to adopt an aspect of the common law, said Justice Kiefel, but courts must be alert to the statutory terms on which Parliament has borrowed the existing legal concept. See Sean Brennan and Peta MacGillivray, 'Fishing Case Tests Economic Waters for Traditional Owners' (2008) 7(2) *Indigenous Law Bulletin* 18, 19.

12 Part III of the *Aboriginal Land Act* (NT), which essentially deals with sea closures.

13 Northern Land Council, 'Blue Mud Bay Case: Interim Licensing Scheme' (Media Release, 2 April 2007) 1.

14 *Gumana v Northern Territory* (2007) 158 FCR 349, 376 (French, Finn and Sundberg JJ).

15 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 [61] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

16 Northern Land Council, *Fact Sheet: Interim Commercial Fishing Licences*, 2 April 2007, 1.

17 ABC Radio, 'High Court Hands Control of Much of NT Coastline to Traditional Owners', *PM*, 30 July 2008; ABC News, *Compensation for Blue Mud Bay Decision Unlikely: Macklin* (2008) Australian Broadcasting Corporation <http://www.abc.net.au/news/stories/2008/07/30/2319441.htm> at 8 September 2008.

18 Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Indigenous Economic Development Conference' (Speech delivered at the Garma Festival, Gulkula, 9 August 2008).

19 For example, the *Wik* decision about the co-existence of native title and pastoral leases and the *Bennell* decision (since overturned) that recognised the traditional connection of Noongar people to the Perth metropolitan area. The range of ways in which amendments in 1998 to the *Native Title Act 1993* (Cth) wound back the right of native title holders to negotiate with mining companies and other proponents of development offers another example of the economic position of Indigenous people being undermined as they sought to leverage their legal rights to property.

20 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 at [53] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

21 Northern Land Council, 'Traditional Owners Win Blue Mud Bay Case' (Media Release, 30 July 2008) 1.

22 See, for example, Melanie Durette, 'Indigenous Property Rights in Commercial Fisheries: Canada, New Zealand and Australia Compared', CAEPR Working Paper 37/2007, Centre for Aboriginal Economic Policy Research, 2007.

23 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635, 656 (Deane, Dawson and Gaudron JJ) quoted in *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 [50] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

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