Annual Conference 2005, from 27-30 September and have called for session proposals. Details about the conference and how to submit a proposal for a session can be found at:
http://www.arts.adelaide.edu.au/sociales/anthro/aasac2005/

Native Title Services Victoria are seeking expressions of interest from consulting anthropologists to conduct preliminary research for two Victorian native title groups. For more information please contact:
Phillippa Sutherland
Manager – Research
P: 03-9321 5330 F: 03-9326 4075
E: psutherland@ntsv.com.au

FEATURE

Gumana v Northern Territory **[2005] FCA 50, Selway J, 7 February 2005 (Update on Blue Mud Bay Case)**

By Phillipa Hetherton
Solicitor, Northern Land Council

The area of the Blue Mud Bay claim covers two large shallow bays on the western side of the Gulf of Carpentaria and the adjacent land. The land subject to the claim is part of the Arnhem Land Aboriginal Land Trust, granted in 1978 as freehold title to the traditional Aboriginal owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the '*Land Rights Act'*). There are a number of homelands in the claim area and the lives of the traditional Aboriginal owners who live there are inextricably connected to the sea, both as a source of physical sustenance and through stories, songs, painting, designs, beliefs about ancestral beings and cultural practices which are suffused with references to the sea.

Gumana v Northern Territory [2005] FCA 50, the 'Blue Mud Bay' case, was heard by His Honour Justice Selway between August and November 2004. The applicants sought to have recognised their traditional rights and interests in the land and waters in Blue Mud Bay through the *Native Title Act 1994* and the '*Land Rights Act'*.

Two proceedings were heard together;

- an application under the *Judiciary Act* seeking declarations that the grant to the Arnhem Land Aboriginal Land Trust (under the *Land Rights Act*) of a freehold interest extending to the low water mark entitles the applicants to control the access to the whole of the grant, including in relation to persons who are purportedly authorised to enter and fish in the inter-tidal zone pursuant to the *Fisheries Act 1988* (NT) or a licence granted thereunder; and
- an application under the *Native Title Act* for a declaration of native title over lands and waters, including land and waters in the inter-tidal zone and outer waters of the bays.

Evidence for both matters was heard together in Yirrkala and on-country, with final submissions heard in Canberra. Due to concessions by both sides, the recognition of non-exclusive native title rights in the inter-tidal zone and outer waters of the two bays was not in dispute. Among the main matters in issue were:

- the nature and extent of the applicants' rights in the inter-tidal zone (both by reason of the freehold grant to the Land Trust under the *Land Rights Act* and pursuant to the *Native Title Act*);
- whether the *Yarmirr* case precluded recognition of native title rights in the sea to restrict access to

sacred sites in the sea, and to temporarily restrict access to areas of sea; and

- how section 73 of the *Land Rights Act* limits the powers of the Northern Territory Government in relation to the regulation of fisheries in the sea to 2km seaward of the low water mark.

The applicants presented extensive evidence about the nature of their traditional laws and customs and sought to prove that their rights and interests pursuant to Yolngu law are exclusive and entitle them to exclude persons from the whole of the waters subject to claim. Their evidence was supported by expert anthropological evidence, and by the end of hearing traditional evidence the anthropologists for the Respondent parties were in substantial agreement about the extent and type of rights and interests that continue to be held under Yolngu traditional law and custom in land and sea.

Justice Selway handed down his decision on 7 February 2005. His Honour accepted the evidence of the applicants that, as a matter of fact, under Yolgnu law clan-members have a right to access and use the resources of and to control other persons' access to and use of the resources of their country in the whole of the claimed area, whether land or sea, and that this includes a right to exclude others, whether Aboriginal or not. However, legal recognition of these factual findings was limited. His Honour's decision in relation to the three matters identified is discussed below.

The inter-tidal zone

In relation to the nature and extent of the applicants' rights in the inter-tidal zone His Honour identified the crucial question as whether, by granting the Arnhem Land Aboriginal Land Trust a freehold interest that extended to the low water mark, the Commonwealth Parliament exercised its power to create an exclusive right over the tidal foreshore and the arms of the sea. His Honour indicated that were the matter free of judicial authority he would have thought that the grant to the low water mark, combined with section 70 of the *Land Rights Act* (which relates to entry on to Aboriginal Land), would have meant that the grant included exclusive occupation of the waters to the low water mark and so conveyed rights to exclude persons from the waters of the sea to the low water mark. However, His Honour found that he was so bound by the *Yarmirr* case and consequently, that the applicants' rights in the inter-tidal zone are subject to the public rights to fish or navigate.

The applicants argued that section 47A of the *Native Title Act* required that any 'non-recognition' of exclusive native title rights due to the public rights to fish or navigate (as in *Yarmirr*) be disregarded in the inter-tidal zone. His Honour rejected this argument, finding that section 47A does not permit the 'non-recognition' of native title rights to be disregarded and thus that the applicants' rights in the inter-tidal zone are subject to the public rights. His Honour did find however, that section 47A has the affect that any extinguishing effects of fisheries legislation are to be disregarded in the inter-tidal zone.

Restricting access to sacred sites in the sea

The applicants gave extensive evidence about Yolngu law and custom relating to restrictions on access to sacred sites in the sea (both in the inter-tidal zone and outer waters) and practices relating to closure of areas of sea after a death or during certain ceremonies. The applicants argued that a native title right to exclude permanently from small areas or to exclude temporarily from areas in the sea pursuant to these Yolngu traditional laws

and customs is not inconsistent with the public right to fish or navigate. His Honour found that this traditional right would be inconsistent with the common law right to fish and thus was not recognised by the common law at the date of settlement.

Regulation of fisheries in the sea to 2km seaward of the low water mark - section 73 of the *Land Rights Act*

The applicants were unsuccessful in their argument that the result of section 73 (1)(d) of the *Land Rights Act* is that the Northern Territory Government does not have the legislative power to enact the *Fisheries Act* so as to authorise the grant if fishing licences within 2km of the low water mark.

Final Orders and Determination

At the time of decision, the case was reserved pending the parties' submissions on the form of the native title determination and final orders in the Judiciary Act matter. Written submissions have been filed by all parties. However the date for hearing of submissions was vacated due to the unexpected death of Justice Selway. Dates have now been set for hearing submissions regarding the form of the final orders and native title determination before Justice Mansfield on 18-19 July 2005.

NATIVE TITLE IN THE NEWS

National

The Federal Government was reported to have proposed putting all legal services provided by native title bodies up for competitive tender. This decision comes amid concerns from mining companies that underfunding of native title representative bodies (NTRB) adversely affects the resolution of native title claims and the quality of legal service provided. Central Land Council Director David Ross said the tendering of NTRBs would fragment communities, lead to confusion and overlapping claims. *Australian Financial Review, pg 36*. 08-Apr-05.

The 'Native Title Report 2004' prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner of HREOC was released. The report is currently being tabled in Parliament. The report supports negotiated outcomes to Indigenous land issues, a whole of government approach to resolving disputes over land and water and the recognition for the need for sustainable and enduring agreements between parties to avoid long and costly disputes. *NNTT Media Release, pg 5*. 08-Apr-05.

Spacial data used to map native title boundaries is now available free online on the National Native Title Tribunal website. This initiative will allow the Tribunal to utilise existing government infrastructure and also increase exposure of native title information to the community. The online information will especially be useful for legal, historical and educational purposes, with the information updated monthly.
Kalgoorlie Miner, pg 7. 05-Apr-05.

New South Wales

Ian Watson represented The Darug People from coastal NSW in a co-management agreement with Baulkham Hills Shire Council over the 300 hectare Bidjigal Reserve dispelling their previous native title claim. The Reserve which combines