

## CASE NOTE: BLUE MUD BAY

### The Blue Mud Bay Appeal Decision

*Gumana v Northern Territory of Australia* [2007] FCAFC 23

By Eleanor McEvoy

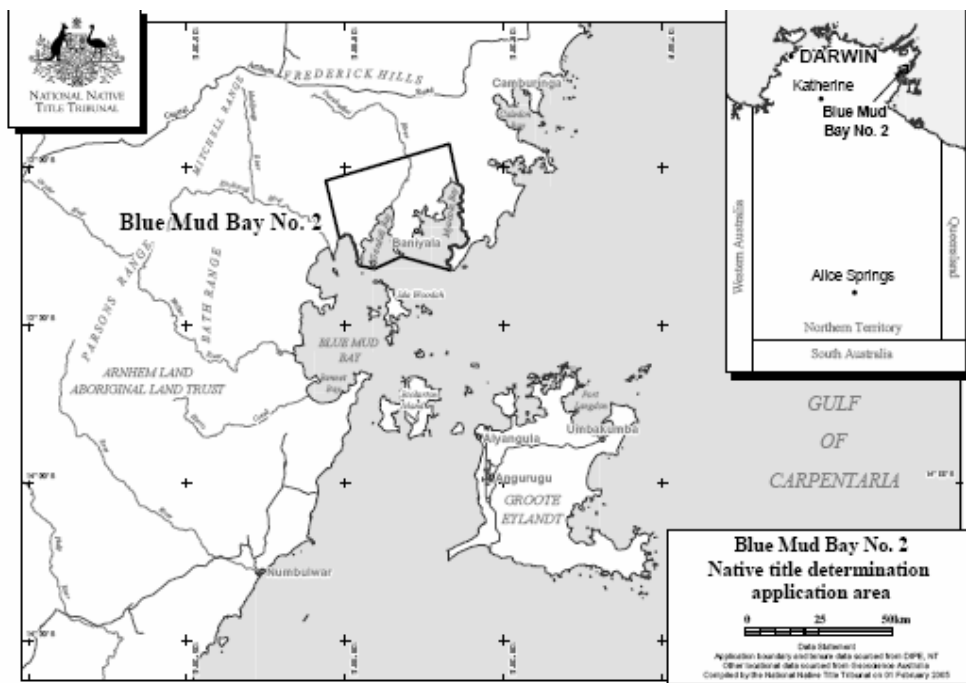
The Blue Mud Bay Appeal was heard during August 2006 with judgment being handed down in March 2007. The appeal arose from the first instance findings of the Federal Court in 2005<sup>1</sup> where the Court found that the Yolngu people of Blue Mud Bay could in no way claim exclusive possession of the inter-tidal waters of their country despite the land, including the land to the low tide mark, having been granted as freehold through the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act). The first instance judge Justice Selway considered himself bound by the High Court decision in *Yarmirr v Commonwealth*<sup>2</sup> and therefore declined to exclude anyone from the inter-tidal zone in Blue Mud Bay.

Blue Mud Bay is a small bay on the eastern coast of Arnhem Land and partially consists of a large area of low lying inter-tidal zone (between the high and low water marks). The inter-tidal zone was not considered, in the first decision, to be an area from which the Indigenous owners of the land could exclude people through a Native Title claim. It was decided that the area was subject to the paramount common law rights of fishing and innocent navigation as well as international agreements with regard to navigation.

The Yolngu people of Blue Mud Bay appealed the decision arguing that the first decision was incorrect in relation to the Land Rights Act.

They argued that the Federal Court's Land Rights decision was incorrect:

- because the creation of the Arnhem Land Aboriginal Land Trust included the grant of an estate in fee simple to the low water mark therefore rights could not be granted in the intertidal zone except by the Indigenous owners
- the *Fisheries Act 1988* (NT) (Fisheries Act) was therefore subject to the land grant and the Director of Fisheries (NT) did not have the right to grant any interest in the inter-tidal zone to commercial fishers.



Map of the Blue Mud Bay claim area courtesy of the NNTT

The Commonwealth cross-appealed claiming that the Native Title decision had been incorrectly made due to Selway J allowing for spouses of the Yolngu tribes members being considered as part of the claimant group. They also cross-appealed the decision on the grounds that Native Title should be considered extinguished over any sea-bed because traditionally the common law does not recognise the ability of anyone to own the sea-bed. Both the Northern Territory and the Director of Fisheries (NT) argued that the Land Rights Act was 'qualified by public rights to fish and navigate' therefore the Fisheries Act could validly apply as an extension of the public rights, as the Land Rights Act did not specifically exclude fishing and navigation in the intertidal zone.

<sup>1</sup> *Gumana v Northern Territory of Australia* [2005] FCA 50.

<sup>2</sup> *Commonwealth v Yarmirr* (2001) 208 CLR 1.



## The Land Rights Appeal

The land rights appeal considered the following matters:

- Does the fee simple grant amount to exclusive possession of the inter-tidal zone?
- Does the Fisheries Act (NT) authorise the granting of licences in the inter-tidal zone to commercial fishers?

The Land Rights Act which created the Arnhem Land grant expressly allowed for certain types of access to Indigenous lands specifically regarding roads and any minerals within the grant. There was, however, no mention of public fishing or navigation rights above the low water mark. The court believed it was important to recognise that the owner of a fee simple estate has 'the equivalent of full ownership'<sup>3</sup> and therefore confers all the rights of ownership including the right to exclude. They also recognised that 'the foreshore can be made subject of private ownership.'<sup>4</sup>

In conclusion, the court held that 'the Land Rights Act as revealed in its text and context 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.'<sup>5</sup>

In handing down its decision on the Land Rights element of the case, the court set aside the first instance decision with regard to the rights of the Director of Fisheries (NT) to grant licences to commercial fishers. The court recognised that the Land Rights Act granted a fee simple estate to the Arnhem Land Trust and therefore no further rights could be granted without permission of the estate holders (the Yolngu people). However, the court refrained from making a decision with regard to the rights of the public to navigate and fish in the intertidal zone of Blue Mud Bay.<sup>6</sup>

## The Native Title Decision

- Should Native Title be considered as extinguished in the inter-tidal zone because the common law does not recognise the ability of anyone to hold a right of exclusive possession in the sea?
- Can a spouse be considered a member of the native title claimant group?

- Do the Yolngu people of Blue Mud Bay have a right to control access to the area by other Indigenous people despite exclusive possession not being granted in the Native Title decision?

Initially the court found that while there is no history of the common law recognising native title in the sea or sea-bed 'that limitation does not constitute extinguishment'.<sup>7</sup> The court stated that extinguishment will only occur where 'it is premised on the existence of a right or an interest'<sup>8</sup> which exists at common law – extinguishment is not premised on the non-existence of a right. Accordingly, the cross-appeal by the Commonwealth was dismissed.

As to the Commonwealth's other cross-appeal regarding the spouses of appellants being included in the claimant group, the court held, following the decision in *Alyawarr*,<sup>9</sup> that the claim was communal and therefore it was unnecessary to find a connection between individual spouses and the land or water. The connections exist to the community as a whole.<sup>10</sup>

Finally the Commonwealth and Northern Territory both appealed against the finding at first instance contained in paragraph 7(c) of the determination. This paragraph gave the claimants 'the right to make decisions about access to and use and enjoyment of the area by Aboriginal people who recognise themselves as governed by the traditional laws and customs acknowledged and observed by the native title holders'.<sup>11</sup> The Court held that Aboriginal people must be considered as 'part of the public, whether they do or do not recognise themselves as governed by the traditional laws and customs [of] the appellants'.<sup>12</sup> The court therefore upheld the cross-appeal and overturned the finding in paragraph 7(c) concluding that the public has the right to fish and navigate in the inter-tidal zone.

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<sup>3</sup> *Gumana v Northern Territory of Australia* [2007] FCAFC 23 [83].

<sup>4</sup> *Ibid* [85].

<sup>5</sup> *Ibid* [90].

<sup>6</sup> *Ibid* [104, 105].

<sup>7</sup> *Ibid* [127].

<sup>8</sup> *Ibid* [127].

<sup>9</sup> *Alyawarr v Northern Territory* (2005) 145 FCR 442.

<sup>10</sup> *Gumana v Northern Territory of Australia* [2007] FCAFC 23 [160].

<sup>11</sup> *Ibid* p63.

<sup>12</sup> *Ibid* [170].