

**NORTHERN TERRITORY OF AUSTRALIA & ANOR v. ARNHEM LAND
ABORIGINAL LAND TRUST & ORS (D7/2007)**

Court appealed from: Full Court of the Federal Court of Australia

Date of grant of special leave: 21 March 2007

Grants of estates in fee simple were made in 1980 under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the Land Rights Act") over areas of Arnhem Land comprising the "Mainland" grant and the "Islands" grant. The grants extend seaward to the low water mark and to straight lines joining the seaward extremities of each of the opposite banks of each river, stream and estuary which intersects that area of coast, much of which is subject to tidal inflows and outflows ("the tidal areas"). The first respondent is an Aboriginal Land Trust established under the Land Rights Act to hold title to the Mainland and Island grants and exercise its powers as owner of that land for the benefit of the third respondents ("the traditional Aboriginal owners"). The second appellant ("the Director of Fisheries") administers the *Fisheries Act 1988* (NT) ("the Fisheries Act") and, in the course of that administration, issued fishing licences which permit licence holders to fish and navigate in the tidal areas covered by the Mainland and Island grants. The respondents commenced proceedings in the Federal Court seeking declarations pursuant to section 39B of the *Judiciary Act 1903* (Cth) to the effect that:

1. the rights of the traditional owners to enter and occupy the land and waters covered by the grants were exclusive of all others;
2. the Aboriginal Land Trust was entitled to prevent persons entering the land and waters covered by the grants to take fish or aquatic resources; and
3. the Fisheries Act did not affect their exclusive entitlements and could not authorise the Director of Fisheries to grant licences to enter and fish in the areas covered by the grants without the permission of the traditional Aboriginal owners.

These proceedings, together with related proceedings seeking a determination of native title (the latter not challenged in this Court) were heard together by Selway J, who refused to make the declarations sought and gave reasons for that decision. Before his Honour could make orders, he died and Mansfield J made final orders on 11 October 2005. The respondents appealed to the Full Court of the Federal Court.

On 2 March 2007 the Full Court (French, Finn and Sundberg JJ) in a joint judgment allowed the appeal and made declarations in the terms sought, including that the Fisheries Act is invalid insofar as it purports to operate with respect to the areas covered by the grants. The Court applied the decision of this Court in *Risk v Northern Territory* (2002) 210 CLR 392 that "land" in the Land Rights Act is land above the low water mark and that section 73(1)(d) assumes that the buffer zone of sea adjoining Aboriginal land is not itself Aboriginal land. The Court concluded that a grant of an estate in fee simple to the low water mark, under the Land Rights Act, confers a right to exclude from the inter-tidal zone those seeking to exercise a public right to fish or navigate.

The grounds of appeal include:

- Whether the provisions of the Fisheries Act apply in tidal areas within the boundaries of “aboriginal land” within the meaning of the Land Rights Act;
- Whether a grant in fee simple of land including tidal areas confers rights to exclude from the tidal waters which overlie such land all persons including persons exercising public rights to fish and navigate;
- Whether the Full Court erred in concluding that the Fisheries Act is not capable of operating concurrently with the Land Rights Act and must be read down in accordance with section 59 of the *Interpretation Act* (NT) such that the Fisheries Act does not confer a power on the Director of Fisheries to grant licences to authorise the licence holder to enter and take fish from the tidal areas covered by the Mainland and Island grants.