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FEE SIMPLE ESTATE AND Footholds IN FISHING: THE AUSTRALIAN HIGH COURT'S FORMALISTIC INTERPRETATION OF THE ABORIGINAL LAND RIGHTS ACT

Heather Ahlstrom Coldwell[†]

Abstract: The coast of the Northern Territory in Australia boasts some of the world's best fishing and hosts a lucrative commercial fishing industry. The Northern Territory is also home to over 50,000 Aboriginal people who rely on these waters for their subsistence and livelihood. However, the Aboriginal population is effectively barred from participating in the commercial fishing industry by Territory regulations and economic disadvantage.

In July 2008, ten years of litigation over access to coastal waters adjoining Aboriginal land in the Northern Territory culminated with the High Court's decision in *Northern Territory of Australia v. Arnhem Land Aboriginal Trust*. The High Court recognized that the Aboriginal landowners had estates in fee simple to the tidal waters adjoining their land. While the High Court recognized the boundaries of Aboriginal lands extend over intertidal land, it did not analyze the potential conflict between property interests of the Aboriginal landowners and those rights conferred by a fishing license. This limitation was partially based on the Court's ruling that a license issued under the Northern Territory's Fisheries Act, without more, does not grant permission to enter and take fish from the Aboriginal intertidal waters. However, the decision left open the possibility that the Northern Territory could enact new legislation or amend the Fishing Act in order to augment the Territory's authority to regulate in the granted intertidal waters. This comment argues that unless the Northern Territory acts in accordance with Aboriginal best interests and in cooperation with Aboriginal landowners, such future legislation would likely conflict with Commonwealth law enacted for the benefit of the Aboriginal population.

I. INTRODUCTION

The "Top End" of the Northern Territory,¹ a peninsula that extends over 4000 miles of coastland,² is home to a robust commercial fishing industry.³ It is both the "last frontier of a macho non-Indigenous tradition"

[†] The author would like to thank Professors Robert Anderson and William Rodgers of the University of Washington Law School for their input and expertise, as well as the tireless editors of the journal, and her supportive husband.

¹ The "Top End" is the colloquial name for the peninsula. Northern Land Council, An Overview: Land Councils & the Top End, http://www.nlc.org.au/html/over_nt.html (last visited Mar. 8, 2010). The "Top End" is also known as Arnhem Land. See Travel Info Map of Arnhem Land and Grove, <http://en.travelnt.com/advice/maps/arnhem-land-and-grove.aspx> (last visited Mar. 8, 2010).

² Roger Maynard, *Aborigines Win Control of Sea Fishing Rights*, THE INDEP., Aug. 1, 2008, at 32 available at <http://www.independent.co.uk/news/world/australasia/aborigines-win-control-of-sea-fishing-rights-882629.html>.

³ Jens-Uwe Korff, *Blue Mud Bay High Court Decision*, CREATIVE SPIRITS, <http://www.creativespirits.info/aboriginalculture/land/blue-mud-bay-high-court-decision.html> (last visited

where “few freedoms are regarded as more important than the right to fish”⁴ as well as home to over 60,000 indigenous residents.⁵ These residents, known as the Yolngu,⁶ comprise the poorest sector of the population.⁷ Fishing is critical to Yolngu culture and subsistence;⁸ however, economic and regulatory impediments bar the indigenous population from accessing the immense assets of the commercial fishing industry in the Northern Territory.

In 1976, the Australian Commonwealth enacted the Aboriginal Land Rights Act (“Land Rights Act”)⁹ recognizing Yolngu traditional ownership of areas throughout the Northern Territory.¹⁰ The Land Rights Act granted over 80 percent of the Northern Territory coastline in inalienable fee simple estates¹¹ to Aboriginal Land Trusts.¹² The granted areas extend to the low water mark, including lands that are under water during high tide (commonly known as the “intertidal zone”).¹³ In spite of Aboriginal

Mar. 8, 2010) (estimating the production value from commercial fisheries at AU\$50 million, and the number of people employed directly in the seafood industry at 1,440).

⁴ Maynard, *supra* note 2.

⁵ Northern Land Council, *supra* note 1.

⁶ Yolngu means “Aboriginal human being” in all the dialects of the various clans that inhabit Arnhem Land. World Culture Encyclopedia: Oceania: Murngin Orientation, <http://www.everyculture.com/Oceania/Murngin-Orientation.html> (last visited Jan. 16, 2010).

⁷ J. Taylor, *Indigenous Economic Futures in the Northern Territory: The Demographic and Socioeconomic Background*, at 12 (Centre for Aboriginal Economic Policy Research, Discussion Paper No. 246/2003, 2003), available at http://www.anu.edu.au/caepr/Publications/DP/2003_DP246.pdf.

⁸ A.P.M. Coleman, G.W. Henry, D.D. Reid, and J.J. Murphy, *Indigenous Fishing Survey of Northern Australia*, in *The National Recreational and Indigenous Fishing Survey* (Gary W. Henry & Jeremy M. Lyle, eds., 2003), FRDC Project No. 99/158, available at <http://www.daffa.gov.au/fisheries/recreational/recfishsurvey>.

⁹ Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.) (“Land Rights Act”).

¹⁰ *Id.*; see also *Gumana v. Northern Territory* (2007) 158 F.C.R. 349, 353.

¹¹ Estates provide a legal means of dividing property interests over time. Property interests are categorized as either freehold estates or non-freehold estates. Fee simple ownership is one kind of freehold estate. An estate in fee simple grants the broadest range of property interests, which generally include “the right to possess and use the property, the right to sell it or give it away, and the right to devise it by will or leave it to . . . heirs.” Inalienability is a restriction on the property owner’s power to transfer ownership. JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 307-308 (2d ed. 2005); see also JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 450, 503, 505 (4th ed. 2006). Australian courts sometimes use the terms “freehold estate” and “estate in fee simple” interchangeably. See, e.g., *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 88-89.

¹² The grant was made in 1980; see *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 466; see also Wali Wunungmurra, *Journey Goes Full Circle from Bark Petition to Blue Mud Bay*, ABC NEWS, Aug. 14, 2008, <http://www.abc.net.au/news/stories/2008/08/14/2334855.htm> (last visited Jan. 16, 2010); Dept. of Primary Industries, Fisheries and Mines, *Indigenous Fisheries: Moving Forward 2003*, [http://www.nt.gov.au/d/Fisheries/index.cfm?header=Indigenous%20Fisheries:%20Moving%20Forward%202003&CFID=20356845&CFTOKEN=86211676&jsessionid=f0309efcd185\\$3F\\$3F\\$3](http://www.nt.gov.au/d/Fisheries/index.cfm?header=Indigenous%20Fisheries:%20Moving%20Forward%202003&CFID=20356845&CFTOKEN=86211676&jsessionid=f0309efcd185$3F$3F$3) (last visited Jan. 16, 2010).

¹³ Aboriginal Land Rights (Northern Territory) Act, 1976, sched. 1 (Austl.). The Schedule refers to both the “high water mark” and “low water mark.” *Id.* The courts refer to this area as the “intertidal zone.”

ownership of the intertidal zone, commercial fishermen continued fishing in granted areas using licenses issued by the Northern Territory Department of Fisheries.¹⁴ In response, the Yolngu petitioned the courts for declarations that Aboriginal owners possessed the right to exclude others from the granted areas, and that the Director of Fisheries did not have authority to issue commercial fishing licenses in these areas.¹⁵

In July 2008, almost ten years after the Yolngu filed their first complaint, the High Court of Australia (“High Court”) issued its decision regarding access to Aboriginal tidelands in the granted areas. In *Northern Territory of Australia v. Arnhem Land Aboriginal Trust* (“Blue Mud Bay”),¹⁶ the High Court recognized that the Aboriginal Land Trust’s fee simple estates included the intertidal zone, and that a fishing license under the Northern Territory’s Fisheries Act did not excuse a person from trespassing onto Aboriginal land.¹⁷ Thus, the High Court held that the Fisheries Act does not authorize entry into the intertidal zones granted to the Arnhem Land Aboriginal Land Trust (“Arnhem Land Trust”) under the Land Rights Act.

The *Blue Mud Bay* decision is generally seen as a victory for Aboriginal property rights in the Northern Territory.¹⁸ Certainly, the High Court’s clarification of the boundaries of Aboriginal land as extending over the intertidal zone is a positive development. However, the decision likely did not end the dispute between the Aboriginal landowners and the Northern Territory’s commercial fishing industry.

The High Court recognized the physical boundaries of Aboriginal land held by the Arnhem Land Trust, but it did not analyze the legal extent of the

see Gumana and Others v. Northern Territory of Australia and Others (2005) 141 F.C.R. 457, 462. Australian courts define the low water mark as the mean low water mark, as determined by the tides. Yarmirr and Others v. Northern Territory and Others [No. 2] (1998) 82 F.C.R. 533, 547. The high water mark is the average height reached between the highest tides each lunar month and the lowest over the year. ADRIAN BRADBROOK, SUSAN V. MACCALLUM & ANTHONY P. MOORE, AUSTRALIAN REAL PROPERTY LAW 608 (3d ed. 2002).

¹⁴ Gumana and Others v. Northern Territory of Australia and Others (2005) 141 F.C.R. 457, 457. Beginning in the 1990s, Yolngu people in Arnhem Land became aware of commercial fishing in Blue Mud Bay, and attempted to prevent fishing in those waters without Aboriginal permission. *Id.* at 466.

¹⁵ The action seeking declarations regarding the land grant was originally filed in 1997. *Id.* at 467 (referring to *Arnhem Land Aboriginal Land Trust v. Director of Fisheries (NT)* (Action No. D 5 of 1997)). The Yolngu filed a separate suit in 1998 asking for a native title determination in the waters and adjacent land pursuant to the Native Title Act 1993 (Cth). *Id.* (referring to *Yakiki Maymurur v. Northern Territory* (No. DG 6043 of 1998)).

¹⁶ Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust (2008) 236 C.L.R. 24. The underlying cases at the Federal Court as well as the High Court’s July 2008 decision are commonly referred to as *Blue Mud Bay*. In this comment, the term refers to the High Court’s July 31, 2008, decision.

¹⁷ *Id.* at 67.

¹⁸ See Media Release, Northern Land Council, Traditional Owners Win Blue Mud Bay Case (July 30, 2008), <http://www.nlc.org.au/html/files/Traditional%20Owners%20Win%20Blue%20Mud%20Bay%20Case.pdf> (last visited Jan. 16, 2010).

Trust's property rights in that land or the potential conflict of property rights between Northern Territory fishermen and the Aboriginal landowners. The Arnhem Land Trust has fee simple estates in the intertidal zone, the title that imparts the greatest extent of property rights possible—including full rights of exclusion.¹⁹ A fishing license granted under the Fisheries Act also constitutes a property right, which conflicts with the Arnhem Land Trust's estate if exercised in Aboriginal land without permission. The High Court instead limited its decision to the trespass provision in the Land Rights Act, and ruled that the Fisheries Act, "without more," does not authorize or permit entry onto Aboriginal lands.²⁰ The ruling leaves open the question of what constitutes something "more" that the Northern Territory may do to authorize entry onto Aboriginal lands. This comment argues that despite the narrow holding of the recent decision, future legislative action by the Northern Territory government to allow non-Aboriginal fishing on Land Trust property would directly conflict with the Aboriginal peoples' property interests, the statutory scheme and intent of the Land Rights Act, and the Commonwealth Constitution.

This comment analyzes the effect of the High Court's ruling in *Blue Mud Bay* and the limitations it places, if any, on future legislative actions taken by the Northern Territory. Part II describes the interests at stake and explains how the Land Rights Act, "the most significant land rights legislation in Australia[,] resulted in the transfer of almost half of the Territory's land to Aboriginal ownership under inalienable freehold title."²¹ Part III relays the procedural history leading up to the July 2008 High Court decision, and summarizes the High Court's findings. Part IV analyzes the limitations of the High Court's decision in *Blue Mud Bay* and its failure to definitively resolve conflicting property rights and laws. Finally, Part V suggests that, while the immediate effect of the decision gives the Arnhem Land Trust authority to regulate access to the intertidal zone, the *Blue Mud Bay* ruling also gives the Northern Territory the motivation and possibly the means to pursue future legislative actions to limit the Aboriginal landowners' authority, although any such actions would violate the Commonwealth Constitution²² and the Land Rights Act.

¹⁹ See discussion of freehold estates, *supra* note 11.

²⁰ Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust (2008) 236 C.L.R. 24, 67.

²¹ Australian Gov't, Dep't of Families, Housing, Community Services and Indigenous Affairs, Land Rights Program, http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Pages/land_rights_program.aspx (last visited Jan. 16, 2010).

²² Commonwealth of Australia Constitution Act, 1901, [hereinafter "Commonwealth Const."].

II. BACKGROUND: FIGHTING FOR FISH IN THE NORTHERN TERRITORY

Access to the Northern Territory's natural resources has long been the center of disputes between the Aboriginal population and European settlers.²³ Currently, the Northern Territory's Fisheries Act²⁴ and Fisheries Regulations²⁵ control all commercial and recreational fishing. Although the Fisheries Act does not explicitly prohibit Aboriginal participation in commercial fishing, Aboriginal people are effectively barred from entering the commercial fishing industry. First, the Fisheries Act places restrictive conditions upon Aboriginal fishermen.²⁶ Further, the high cost of a commercial license places it out of reach of the extremely poor Aboriginal population in the Northern Territory.²⁷ In the late twentieth century, Aboriginal people began looking to the courts and legislature for legal recognition of their property rights.²⁸ Although their protests resulted in positive legislative action by the Commonwealth, Aboriginal property rights in the Top End remain divisive.

A. *Fishing in the Bay of Plenty: The Northern Territory's Fisheries Act*

Despite living next to some of the world's best fishing waters, economic disadvantages and the Northern Territory's fishing regulations restrict the Aboriginal population's ability to make use of this resource. Arnhem Land occupies a peninsula on the northern tip of Australia, abutted by the Arafura Sea and Gulf of Carpentaria,²⁹ and its coastline stretches over 4000 miles (about 6400 kilometers).³⁰ Blue Mud Bay, the "bay of plenty,"³¹ is on the east side of the peninsula, adjacent to the Gulf of Carpentaria.³² Prior to British colonization, a diverse and well-established Aboriginal

²³ *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 462.

²⁴ Fisheries Act, 1988 (NT). The Director of Fisheries issues commercial licenses by authority given in the Fisheries Act sections 10 and 11.

²⁵ Fisheries Regulations, 1993 (NT).

²⁶ Fisheries Regulations, *supra* note 25, secs. 183, 187.

²⁷ Dept. of Primary Industries, *supra* note 12.

²⁸ In 1963, twelve Aboriginal people from the Northern Territory signed petitions on bark and presented them to the Northern Territory Parliament, asking for governmental recognition of their rights to the land. National Archives of Australia, *Yirrkala Bark Petitions 1963 (Cth)*, available at <http://www.foundingdocs.gov.au/item.asp?dID=104>.

²⁹ Northern Territory Government, *Blue Mud Bay and Associated Coastal Floodplains*, at 2, www.nt.gov.au/nreta/environment/conservation/pdf/25_bluemudbay.pdf (last visited Mar. 8, 2010).

³⁰ Chris Graham, *Bay of Plenty*, European Network for Indigenous Australian Rights, Aug. 7, 2008, <http://www.eniar.org/news/BlueMudBay.html> (last visited Jan. 24, 2010); Maynard, *supra* note 2.

³¹ Phrase borrowed from the article's title. *Id.*

³² Northern Territory Government, *supra* note 29.

population occupied all of Australia, including Arnhem Land.³³ The Aboriginal inhabitants of northeast Arnhem Land, although collectively known as the Yolngu, comprised various cultural groups, each with its own languages, traditions, and customs.³⁴ The Yolngu have a strong connection to both Arnhem Land and its adjacent waters, and depend on access to fish for both their physical and cultural survival.³⁵

The Director of Fisheries regulates all commercial fishing in the Northern Territory by issuing licenses.³⁶ Commercial fishing is a billion dollar industry in the Northern Territory, yet indigenous people's share in the commercial fishing industry is miniscule.³⁷ For example, of AU\$9.6 million earned in mud crab takings in the Northern Territory in 2002, approximately 85.2 percent was taken by commercial fisheries, 5.6 percent by recreational fishers, and 9.2 percent by indigenous fishers.³⁸ While the Fisheries Act includes provisions for Aboriginal Coastal Licenses, these licenses impose strict limitations.

On its face, the Fisheries Act does not prohibit Aboriginal people from applying for commercial licenses.³⁹ In fact, the statute and regulations include special provisions for Aboriginal licenses.⁴⁰ Upon a showing of membership in a group that has received land grants under the Land Rights Act and approval from the appropriate governing council, a person may obtain an Aboriginal Coastal License for about AU\$10.00 per year.⁴¹ These licenses are subject to strict limitations, however. The holder of an Aboriginal Coastal License is limited to using traditional gear and is restricted from commercial sales of the catch.⁴² Only one Aboriginal Coastal license may be issued per community,⁴³ and the holder may not also have a

³³ Maureen Tehan, *Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-Mabo Era*, 7 PAC. RIM L. & POL'Y J. 765, 771 (1998).

³⁴ See *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 463.

³⁵ Coleman, *supra* note 8 at 98.

³⁶ Fisheries Act, *supra* note 24, sec. 11.

³⁷ Northern Territory Seafood Council, *The Industry*, <http://www.ntsc.com.au/the-industry.html> (last visited Jan. 19, 2010); Australian Fisheries Management Authority, *Commercial Fishing Industry*, <http://www.afma.gov.au/fisheries/industry/default.htm> (last visited Jan. 19, 2010).

³⁸ M. Durette, *Indigenous Property Rights in Commercial Fisheries: Canada, New Zealand and Australia Compared*, Center for Aboriginal Economic Policy Research Working Paper No. 37/2007, 2007, at 21, <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP37.pdf> (last visited March 27, 2010).

³⁹ Email from Robert Carne, Australian Department of Regional Development, Primary Industry, Fisheries and Resources, NT Fisheries Group, to author, (Jan. 13, 2009,) (on file with author). "There are some Indigenous individuals with commercial licences as well as a couple of Indigenous organisations with licences."

⁴⁰ Fisheries Act, *supra* note 24, sec. 53; Fisheries Regulations, *supra* note 26, sec. 183.

⁴¹ Fisheries Regulations, *supra* note 25, sec. 183; email from Carne, *supra* note 39.

⁴² Fisheries Regulations, *supra* note 25, sec. 189, 191; email from Carne, *supra* note 39.

⁴³ Fisheries Regulations, *supra* note 25, sec. 184.

commercial license.⁴⁴ “Most importantly, no ‘managed’ species, are allowed to be harvested [under these licenses], i.e. species such as mud crab and barramundi that have their own fishery licences.”⁴⁵ The Fisheries Act therefore imposes restrictive conditions upon Aboriginal Coastal licensees. It severely limits the number of Aboriginal licenses, bars fishing for the most valuable species, and precludes a holder from engaging in commercial fishing.

In addition to regulatory restrictions, Aboriginal fishermen face economic challenges to participating in commercial fishing. Because the Director of Fisheries issues limited numbers of licenses for each species, the licenses themselves are a commodity with a high market value.⁴⁶ The value of a license is directly tied to the market value of the fish.⁴⁷ “This means that the value of these licences is set by individual licensees and will fluctuate depending on catch rates from the previous season (Barramundi and mud crab licences may cost around [AU]\$500[,000] each).”⁴⁸ Thus, Aboriginal access to commercial fishing also depends upon economic resources.

An indigenous person may apply for a commercial license, but “it’s a matter of having the finances and capacity to run the business.”⁴⁹ For example, a barramundi license and operation costs between AU\$600,000 to AU\$1 million; operating a commercial mud crabbing operation may cost AU\$420,000.⁵⁰ In contrast, a 2001 census reported that the average annual personal income for indigenous people was AU\$12,200.⁵¹ Indigenous people comprise over half the population in the Northern Territory, but they are the most under-employed and economically disadvantaged population therein.⁵² Thus, the high value of a commercial fishing license is likely prohibitive to most Aboriginal fishermen with commercial aspirations.⁵³

⁴⁴ Fisheries Regulations, *supra* note 25, sec. 187; email from Carne, *supra* note 39.

⁴⁵ Email from Carne, *supra* note 39.

⁴⁶ Fisheries Act, *supra* note 24, sec. 11. A Northern Territory fishing license is not restricted by area but by species. Likewise, the catch is not limited by quotas, but rather the type of gear used in the catch. Email from Carne, *supra* note 39.

⁴⁷ Email from Carne, *supra* note 39.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Northern Territory News, *Commercial Fishermen ‘Not Affected,’* Aug. 6, 2008, at 22.

⁵¹ The average personal income of a non-indigenous person in 2001 was \$32,200. Taylor, *supra* note 7, at 12.

⁵² BUREAU OF RURAL SCIENCE, AUSTRALIAN GOV’T., *Northern Planning Area Social Profile, in NATIONAL ATLAS OF MARINE AND COASTAL COMMUNITIES*, at 5, 11 (2006), available at http://adl.brs.gov.au/mapserv/fishcoast/pdf/06%20Northern_Planning_Area.pdf (last visited Jan. 3, 2010); Taylor, *supra* note 7, at 7.

⁵³ Even when commercial licenses were made available to Aboriginal populations, the market value of the license prevailed over the communities’ fishing needs. Mr. Carne noted that “Some 25 years ago,

Even if a community combined its resources, an investment of half a million dollars is almost certainly beyond reach. The “bay of plenty” remains out of reach for most Aboriginal residents of Arnhem Land, while commercial fishermen using Fisheries Act licenses enjoy the bounty of Blue Mud Bay’s resources.

B. The Land Rights Act: Recognizing Aboriginal Property Interests in Arnhem Land

The Aboriginal population of Arnhem Land had property interests in Blue Mud Bay long before the Northern Territory, “together with the bays and gulfs therein,” was surrendered to the Commonwealth in 1910.⁵⁴ By the end of the twentieth century, the Commonwealth enacted the Land Rights Act, a statute meant to protect Aboriginal property interests. Despite the intended purpose, the extent of Aboriginal property rights arising from the Land Rights Act forms the center of the current controversy.

Because Arnhem Land is so remote, the Aboriginal population had little contact with European colonists until the late 1920s.⁵⁵ As more settlers entered Australia, conflict over access to natural resources became inevitable. Attempting to protect the Aboriginal residents, the government created the Arnhem Land Reserve, an area comprising approximately 31,200 square miles, for “the use and benefit of Aboriginal native inhabitants.”⁵⁶ Over the next thirty years, the government created additional reserves, which were consolidated by proclamation on October 28, 1963, creating a reserve of over 35,000 square miles.⁵⁷ Despite these efforts, relations between natives and non-natives worsened.⁵⁸

many Indigenous people were issued commercial licences, however, as licence numbers were reduced and their value increased, these people chose to sell.” Email from Carne, *supra* note 39.

⁵⁴ *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 463. The Commonwealth of Australia was created by the Commonwealth Constitution, enacted in 1901. Commonwealth Const., *supra* note 22. The Commonwealth Constitution imported both British statute and common law. BRADBROOK, *supra* note 13, at 4, 7. The Northern Territory became a Territory under the Australian Constitution pursuant to section 7 of the Northern Territory Surrender Act 1907 (SA) and section 6 of the Northern Territory Acceptance Act 1910 (Cth). *Gumana I*, 141 F.C.R. at 463. Australian property law, including fee simple estates, has its roots in the English feudal system. BRADBROOK, *supra* note 13, at 1, 4.

⁵⁵ *Gumana I*, 141 F.C.R. at 463.

⁵⁶ *Director of Fisheries (NT) v. Arnhem Land Aboriginal Land Trust* (2001) 109 F.C.R. 488, 495-96.

⁵⁷ *Id.* at 496. Of note, unlike the previous reserves, this new proclamation described the boundaries of the reserve as extending in straight lines across the banks of rivers, streams, and estuaries, and included the low water marks of the various rivers and the Timor and Arafura Seas.

⁵⁸ *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 464 (“[W]hat limited early physical interaction there was between the Yolngu people near Blue Mud Bay and ‘Europeans’ or other ‘outsiders’ would seem to have been violent and bloody.”).

Tensions over natural resources in Arnhem Land eventually lead to the courthouse. In *Milirrpum v. Nabalco Pty Ltd*,⁵⁹ Aboriginal plaintiffs argued they were entitled to quiet enjoyment and occupation of Arnhem Land, and the Commonwealth had insufficient interest in Aboriginal lands to grant mining rights in the land to a mining company.⁶⁰ The Federal Court held the Aboriginal rights and interests in land on the Gove Peninsula “were not capable of recognition by the common law as property, or alternatively, that no Aboriginal rights or interests in land had survived the Crown’s acquisition of the radical title⁶¹ to the land in dispute.”⁶² *Milirrpum* has the dubious honor of being viewed as one of the most egregious rulings in Aboriginal rights jurisprudence.⁶³

Although the Federal Court’s decision was much maligned, *Milirrpum* actually provided the foundation for the eventual recognition of native title⁶⁴ in Australia by acknowledging that Aboriginal people had a system of traditional laws and possessed traditional rights under those laws.⁶⁵ Aboriginal protests over the *Milirrpum* decision brought about political interest in Aboriginal property rights. During its successful campaign in 1972, the Australian Labor Party pledged to recognize Aboriginal ownership of traditional lands.⁶⁶

In an effort to fulfill its campaign promise, the Commonwealth Government appointed a commission to determine the “appropriate means to recognise and establish the traditional rights and interests of the Aborigines

⁵⁹ *Milirrpum v. Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 F.L.R. 141 (Aboriginal land owners unsuccessfully tried to restrain proposed bauxite mining on the Gove Peninsula in the Northern Territory).

⁶⁰ *Id.* at 150-51.

⁶¹ Radical title is “all land within a territory over which the Crown has assumed sovereignty.” *Mabo and Other Plaintiffs v. The State of Queensland [No. 2]* (1992) 175 C.L.R. 1, 48 (“Mabo 2”). Radical title thus underlies native title. See RICHARD H. BARTLETT, *NATIVE TITLE IN AUSTRALIA* 26 (2d ed. 2004).

⁶² *The Queen v. Toohey; Ex parte Meneling Station Pty. Ltd.* (1982) 158 C.L.R. 327 at 354 (summarizing the holding of *Milirrpum v. Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 F.L.R. 141).

⁶³ BARTLETT, *supra* note 61, at 13 (describing Blackburn’s decision as “singularly flawed” and “entailing a great deal of misinterpretation and discounting of any authorities suggesting conclusions contrary” to his own).

⁶⁴ Native title was first recognized in Australia by the High Court in *Mabo 2*. *Mabo 2*, (1992) 175 C.L.R. 1. It is a proprietary right, based in Aboriginal occupation of land prior to British colonization, which assumes that certain rights and land survived colonization. BARTLETT, *supra* note 61, at 26-27. In 1993, the Australian Commonwealth enacted the Native Title Act 1993 (Cth), giving native title statutory recognition. While the Arnhem Land Trust made a concurrent claim to establish its native title rights to the claimed lands, only the land grants claim was at issue in *Blue Mud Bay* at the High Court. *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24.

⁶⁵ *Milirrpum v. Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 F.L.R. 141, 268 (“I hold that I must recognize the system revealed by the evidence as a system of law.”); *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 465.

⁶⁶ BARTLETT, *supra* note 61, at 13; BRADBROOK, *supra* note 13, at 276-77.

in and in relation to land.”⁶⁷ The commission’s two reports⁶⁸ formed the basis for the subsequent Land Rights Act.⁶⁹ The Act established land councils to represent Aboriginal interests, including the Northern Land Council, which represents the Aboriginal people of the Northern Territory.⁷⁰ It also designated trusts (including the Arnhem Land Trust) to hold title over the granted land and to exercise ownership powers.⁷¹

In 1980, Sir Zelman Cowen, then Governor-General of the Commonwealth of Australia,⁷² granted the land around Blue Mud Bay (as described in Schedule 1) to the Arnhem Land Trust in fee simple.⁷³ Schedule 1 of the Land Rights Act defines the granted area by metes and bounds⁷⁴ extending to the low water mark of the coastal areas.⁷⁵ “The Land Rights Act thus expressly provided for the grant of interests in fee simple over areas that included areas that would be covered by tidal waters.”⁷⁶

The purpose of the statute is clear: “The Land Rights Act is beneficial legislation, recognizing the importance of traditional land to the Aboriginal people and their spiritual affinity with it. It is an Act designed to return to the Aboriginal people so much of their traditional land as Australian society

⁶⁷ ABORIGINAL LAND RIGHTS COMMISSION, FIRST REPORT (July 1973), available at <http://www.austlii.edu.au/au/other/IndigLRes/1973/2.html>. The Commission’s recommendations are commonly referred to as the “Woodward Commission Reports.”

⁶⁸ *Id.*; ABORIGINAL LAND RIGHTS COMMISSION, SECOND REPORT (April 1974), available at <http://www.austlii.edu.au/au/other/IndigLRes/1974/2.html>.

⁶⁹ Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.); see *Gumana I*, 141 F.C.R. at 465; see also *Arnhemland Aboriginal Land Trust v. Director of Fisheries (NT)* (2000) 170 A.L.R. 1, 8; *Risk v. Northern Territory* (2002) 210 C.L.R. 392, 405-406, 408-09; BRADBROOK, *supra* note 13, at 277.

⁷⁰ Aboriginal Land Rights (Northern Territory) Act, 1976, sec. 21 (Austl.).

⁷¹ The Arnhem Land Trust holds title in granted lands and exercises its powers as owners of the land. Aboriginal Land Rights (Northern Territory) Act, 1976, secs. 4, 5 (Austl.). Members of the Trust are nominated by the appropriate Land Council, as established under section 23 of the Land Rights Act. The purpose of the Land Council is to promote and protect the interests of the aboriginal population. Aboriginal Land Rights (Northern Territory) Act, 1976, sec. 23(1) (Austl.). There are currently four Land Councils in the Northern Territory; the Northern Land Council appoints the members of the Arnhem Land Aboriginal Land Trust. See *Agreements, Treaties and Negotiated Settlements Projects (ATNS)*, Arnhem Land Aboriginal Land Trust, <http://www.atns.net.au/agreement.asp?EntityID=3210> (last visited Jan. 20, 2010); see also Northern Land Council, *supra* note 1.

⁷² The Governor-General is the monarch’s representative in the Commonwealth, and exercises the executive power of the Commonwealth on behalf of the monarch. Commonwealth Const., *supra* note 22, sec. 61; see also Governor-General of the Commonwealth of Australia, Governor-General’s Role, <http://www.gg.gov.au/governorgeneral/category.php?id=2> (last visited Jan. 20, 2010).

⁷³ See *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 466.

⁷⁴ Metes and bounds are defined as “[t]he territorial limits of real property as measured by distances and angles from designated landmarks and in relation to adjoining properties.” BLACK’S LAW DICTIONARY 1012 (8th ed. 2004).

⁷⁵ Aboriginal Land Rights (Northern Territory) Act, 1976, sched. 1 (Austl.).

⁷⁶ *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 62.

can make available to them.”⁷⁷ Despite these efforts to promote clarity in title and property rights for the Aboriginal landowners, the grant to the Arnhem Land Trust did not end conflicts over access to the coastal areas of Arnhem Land.

III. IN PURSUIT OF PROPERTY RIGHTS: THE *BLUE MUD BAY* LITIGATION

The 1980 grant of lands to the Arnhem Land Trust became the source of litigation starting in 1994.⁷⁸ Even after the transfer of land in 1980, the Northern Territory refused to restrict commercial fishing in Arnhem Land.⁷⁹ The Arnhem Land Trust’s frustration at the Northern Territory’s management of fishing in granted areas eventually led the parties to court. In 1997, the Arnhem Land Trust asked the Federal Court of Australia to declare that the Director of Fisheries lacked authority to issue fishing licenses in tidal areas within the areas granted under the Land Rights Act.⁸⁰ Ten years later, the full Federal Court entered declarations on the Trust’s lawsuit.⁸¹ It ruled that the Fisheries Act has no application in the granted areas, including the intertidal zone, and that a license issued under the Fisheries Act does not authorize the license holder to enter and take fish from granted areas.⁸²

The Northern Territory Government and Director of Fisheries filed an application for special leave to appeal in the High Court.⁸³ At the High Court, the parties agreed to set aside the Federal Court’s declaration that the Fisheries Act had no application in granted areas.⁸⁴ The High Court noted

⁷⁷ *Pareroultja and Others v. Tickner and Others* (1993) 42 F.C.R. 32 at 39 (quoting Attorney-General (NT) v. Minister for Aboriginal Affairs (1989) 25 F.C.R. 345).

⁷⁸ Mary Yarmirr and five other Aboriginal claimants filed a complaint in federal court in 1994, seeking judicial recognition of their native title in the Croker Island region of the Northern Territory. *Yarmirr and Others v. Northern Territory and Others* [No. 2] (1998) 82 F.C.R. 533; *see also* Siiri Aileen Wilson, Comment, *Entitled as Against None: How the Wrongly Decided Croker Island Case Perpetuates Aboriginal Dispossession*, 18 PAC. RIM L. & POL’Y J. 249 (2009); Media Release, Northern Land Council, *supra* note 18.

⁷⁹ *See* *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 466. (describing Yolngu attempts to control commercial fishing activities in Blue Mud Bay).

⁸⁰ *Id.* at 466-67 (citing *Arnhem Land Aboriginal Land Trust v. Director of Fisheries (NT)* (Action No D 5 of 1997). A year later, the Trust requested a determination of native title in the waters of Blue Mud Bay and the adjacent land. *Id.* at 467 (citing *Yakiki Maymuru v. Northern Territory* (No DG 6043 of 1998). The Land Rights Act claim and the native title claim were adjudicated concurrently through the Federal Courts, until the land rights claim reached the High Court in *Blue Mud Bay*. *Id.*

⁸¹ *Gumana v. Northern Territory* (2007) 158 F.C.R. 349, 349.

⁸² *Id.* at 376-77.

⁸³ Press Release, Northern Land Council, Fact Sheet Interim Commercial Fishing Licences, <http://www.nlc.org.au/html/files/BMB%20commercial%20info%20pamphlet07.pdf> (last visited Mar. 10, 2010).

⁸⁴ *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 54. One may speculate why the Aboriginal counsel agreed to the application of the Fisheries Act within

that “counsel for [the Arnhem Land Trust] accepted that the Fisheries Act operates according to its tenor in waters within the boundaries of Aboriginal land.”⁸⁵ However, the Court also remarked, “the particular detail of the operation of the Fisheries Act was not examined in argument and is not considered in these reasons.”⁸⁶

Thus, when *Blue Mud Bay* arrived at the High Court, the dispute was narrowed to one issue: whether the fee simple estate granted under the Land Rights Act conferred to the Arnhem Land Trust the right to exclude persons holding licenses issued under the Fisheries Act from entering the intertidal zone.⁸⁷ To resolve this issue, the High Court first asked whether fishing in granted intertidal waters constitutes “enter[ing] or remain[ing] on Aboriginal land” within the meaning of section 70.⁸⁸ Second, it inquired whether a person who enters or remains on Aboriginal land while holding a Fisheries Act license is acting “in accordance with . . . a law of the Northern Territory.”⁸⁹

As to the first question, the analysis turned on whether the intertidal areas constitute “land” within the meaning of the Land Rights Act.⁹⁰ The High Court determined that because the granted land is defined by metes and bounds in Schedule 1, Aboriginal land as defined under the Land Rights Act includes the intertidal zone within the granted areas.⁹¹ In other words, trespass may occur whether or not the land described within the boundaries is covered with water, and thus fishing in the intertidal zone constitutes “entering or remaining on Aboriginal land” in violation of section 70(1) of the Land Rights Act.⁹²

The High Court answered the second question—whether a person who enters Aboriginal land while holding a Fisheries Act license is acting

Aboriginal land: perhaps they thought establishing the boundaries of Aboriginal land was of primary importance and would resolve future questions about the applicability of the Fisheries Act.

⁸⁵ *Id.* at 54.

⁸⁶ *Id.*

⁸⁷ *Id.* at 50.

⁸⁸ Section 70(1) of the Land Rights Act prohibits entering or remaining on Aboriginal land; section 70(2A) provides a defense to Section 70(1) for those “performing functions under [the Land Rights] Act or otherwise in accordance with [the Land Rights] Act or a law of the Northern Territory.”

⁸⁹ *Northern Territory*, 236 C.L.R. at 55.

⁹⁰ *Id.* at 55-60, 62-66. Although the Court presented the questions in this order, its analysis proceeds in the opposite order. The Court first addresses the second question, and then answers the first issue.

⁹¹ *Id.* at 66.

⁹² *Id.* at 66-67. The High Court noted its prior decision in *Risk v. Northern Territory* (2002) 210 C.L.R. 392, in which the plurality held that “land in the Northern Territory in section 3(1) of the Land Rights Act does not include the seabed below the low water mark of bays or gulfs within the limits of the Territory.” *Id.* at 65. The *Blue Mud Bay* court finds this decision neither binding nor compelling a different result because *Risk* involved the seabed beyond the low water mark and the claim here only includes the intertidal zone between the low and high water marks. *Id.* at 66.

under the law of the Northern Territory—by analyzing whether either a common law right to fish or a Northern Territory fishing license provides a legal defense to violating section 70(1) of the Land Rights Act.⁹³ The Court unequivocally dismissed the public right to fish argument proposed by the Northern Territory, stating “[n]o question arises of any intersection between a common law right to fish and rights given by the grants under the Land Rights Act.”⁹⁴ Rather, any public right to fish that may have existed under common law has been abrogated by subsequent statutes. Thus, “the comprehensive statutory regulation of fishing in the Northern Territory provided for by the Fisheries Act has supplanted any public right to fish in tidal waters.”⁹⁵ In sum, the Court dismissed the notion that a common law public right to fish provided a defense to entering or remaining on Aboriginal land.

The Court likewise dismissed the second proposed defense—that fishing in the intertidal zone was justified by a Fisheries Act license. The Court found that instead of granting any additional rights, a fishing license restricted fishing activities through the imposition of conditions.⁹⁶ The High Court noted, “[T]he Fisheries Act does not deal with where people may fish. Rather, the Fisheries Act provides for where persons may *not* fish.”⁹⁷ The Court concluded that a fishing license is not a law of the Northern Territory that exempts a license-holder from the prohibition against entering or remaining on Aboriginal land without consent.

In a 5-2 decision, the High Court ultimately found in favor of the Arnhem Land Trust on the issue of whether the fee simple estate granted under the Land Rights Act conferred to the Arnhem Land Trust the right to exclude persons holding licenses issued under the Fisheries Act from entering the intertidal zone.⁹⁸ Its orders, however, substantially revised the Federal Court’s declarations, finding they were “framed too widely.”⁹⁹ Instead, the High Court limited its order to state only that the Fisheries Act

⁹³ *Id.* at 55-60.

⁹⁴ Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust (2008) 236 C.L.R. 24, 55-56.

⁹⁵ *Id.* at 58.

⁹⁶ *Id.* at 59-60; Fisheries Act, *supra* note 24, sec. 11.

⁹⁷ Northern Territory, 236 C.L.R. at 60.

⁹⁸ The majority decision (by Chief Justice Gleeson, and Justices Gummow, Hayne, and Crennan) was joined in result by Justice Kirby. Two justices, Heydon and Kiefel, dissented. Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust (2008) 236 C.L.R. 24.

⁹⁹ The Federal Court declared that the Fisheries Act: (1) has no application within the granted areas; (2) does not confer authority upon the Director of Fisheries to issue licenses that would allow taking fish from granted areas; and (3) is of no effect within granted areas. *Gumana v. Northern Territory* (2007) 158 F.C.R. 349, 376-77. The High Court set aside all three declarations related to the Fisheries Act. *Northern Territory*, 236 C.L.R. at 67.

does not, “without more,” permit a Fisheries Act licensee to enter or take fish from the areas granted to the Arnhem Land Trust under the Land Rights Act.¹⁰⁰ The Court’s narrow ruling did not answer questions about potential conflicts of property interests between fishing licenses issued by the Northern Territory, the Arnhem Land Trust’s property rights in the intertidal zone, and the extent to which the Territory’s legislative power is limited by the Land Rights Act.

IV. THE *BLUE MUD BAY* DECISION DID NOT RESOLVE CONFLICTING PROPERTY INTERESTS IN THE INTERTIDAL ZONE

The *Blue Mud Bay* decision does not resolve the contradictory property interests at stake in this dispute because a fundamental problem remains. Under the grant of land authorized by the Land Rights Act, the Aboriginal Land Trusts received fee simple estates, the title grant that imparts the greatest extent of property rights possible.¹⁰¹ Fishing licenses granted under the Northern Territory’s Fisheries Act also constitute a property interest: They have market value and confer the right to take benefits from the land or water.¹⁰² Licenses issued under the Fisheries Act are a property interest that—when exercised without the landowners’ consent—conflicts with the Arnhem Land Trust’s property rights under the Land Rights Act. Because the High Court did not discuss the conflicting property rights involved, this dispute remains unresolved. The High Court left the door open to further legal actions to resolve this conflict by limiting its discussion to the trespass clause of the Land Rights Act.¹⁰³ In so doing, the Court failed to analyze the substantive property rights conferred by the Fisheries Act, which conflict with the rights under the Land Rights Act.

A. *An Estate in Fee Simple Is the Equivalent of Full Ownership*

A fee simple estate is the broadest grant of property rights possible.¹⁰⁴ In *Blue Mud Bay*, the Court acknowledged that “because the interest granted under the Land Rights Act is described as ‘fee simple,’ it must be understood as granting rights of ownership that ‘for almost all practical purposes, [are] the equivalent of full ownership’ of what is granted.”¹⁰⁵ The Federal Court

¹⁰⁰ *Northern Territory*, 236 C.L.R. at 67.

¹⁰¹ See *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 466.

¹⁰² *Harper v. Minister for Sea Fisheries* (1989) 168 C.L.R. 314 at 314.

¹⁰³ *Aboriginal Land Rights (Northern Territory) Act*, 1976, sec. 70 (Austl.).

¹⁰⁴ *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 63-64. (citing *Nugalline Investments Pty Ltd v. Western Australia Club Inc.* (1993) 177 C.L.R. 635 at 656).

¹⁰⁵ *Id.*

below noted “[w]here a statute authorises the grant of a fee simple estate, it is presumed that the estate granted has the characteristics of such as estate under the general law.”¹⁰⁶ The lands granted to the Arnhem Land Trust, therefore, have all the property rights that normally accompany an estate in fee simple.¹⁰⁷

An estate in fee simple is the bedrock of Australian property law. The owner of a fee simple estate has the “the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination.”¹⁰⁸ Fee simple “simply does not permit the enjoyment” of the land by anyone else without the owner’s consent.¹⁰⁹

No other estate grants broader property interests in land than a fee simple.¹¹⁰ However, ownership of land, including fee simple estates, is subject to limitations imposed by the Commonwealth.¹¹¹ Likewise, the Arnhem Land Trust’s ownership of granted areas is not absolute. The Trust likely does not have ownership of the waters above the granted lands.¹¹² Further, the Land Rights Act includes a reservation of mineral rights and the application of an inalienability rule.¹¹³ The reservation of mineral rights does not differentiate the Land Rights Act grants from many others; rather, it

¹⁰⁶ *Gumana v. Northern Territory* (2007) 158 F.C.R. 349 at 353, 371.

¹⁰⁷ The Land Rights Act Commissioner, Judge Woodward, stated, “It is pointed out that if the title [granted to Aboriginal land trusts] is expressed as being in fee simple, all the normal incidents of such title would be known. This would resolve any doubts about the applicability of the general law and facilitate any future dealing with the land, which may not be envisaged at present, but which could be contemplated by later generations.” ABORIGINAL LAND RIGHTS COMMISSION, SECOND REPORT, *supra* note 68, ¶ 72.

¹⁰⁸ *Fejo v. Northern Territory* (1998) 195 C.L.R. 96 at 126 (quoting *Nullagine Investments Pty Ltd v. Western Australian Club Inc.* (1993) 177 CLR 635 at 656; citing *Commonwealth v. New South Wales* (1923) 33 CLR 1 at 42).

¹⁰⁹ *Id.*

¹¹⁰ BRADBROOK, *supra* note 13, at 44.

¹¹¹ “Upon settlement of the various Australian States in the early 19th century, British statute and common law was received and applied. The most immediate impact was the feudal doctrine that all land is owned by the Crown and that private rights depend upon a grant from the Crown.” BRADBROOK, *supra* note 13, at 4.

¹¹² The *Blue Mud Bay* court did not reach this issue, noting only that the Northern Territory argued against the Arnhem Land Trust’s ownership of water. *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 64. Further, any claims to seawater are likely barred by the High Court’s decision in *Risk v. Northern Territory* (2002) 210 C.L.R. 392 (holding that seabeds and bays within the Northern Territory cannot be subject to a claim under the Land Rights Act).

¹¹³ Aboriginal Land Rights (Northern Territory) Act, 1976, sec. 12 (Austl.). In his dissenting opinion in *Blue Mud Bay*, Justice Kiefel asserts that the property granted to Aboriginal land trusts was never meant to constitute full fee simple, as evidenced by the reservation of alienability. *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 94. This view overlooks the unique purpose of the Land Rights Act, which was to preserve the property rights of the Aboriginal population. Restricting the trusts’ ability to alienate land belonging to the population is consistent with the purpose of the Land Rights Act, and should not be interpreted as abrogating fee simple rights other than alienability.

is consistent with Crown practice.¹¹⁴ Common law and statutory limitations aside,¹¹⁵ the property rights granted to the Arnhem Land Trust constitute the broadest expanse of property rights available.

B. A Fishing License Is a Property Interest

A fishing license is a property interest that potentially conflicts with the Land Trust's fee simple estate. "[T]he issuing of licenses under the Fisheries Act involves the conferring of some form of proprietary rights on license holders, or alternatively rights analogous to a profit à prendre."¹¹⁶ Generally, proprietary property rights include the right of use and enjoyment, the right to alienate, and the right to exclude.¹¹⁷ A profit à prendre is a common law right to the bounties of the land: It confers the privilege to take something of value from the soil or a product of the soil (such as the right to mine or hunt).¹¹⁸ A fishing license grants such a privilege upon its holder.¹¹⁹

The High Court has recognized that "[a] fee to obtain such a privilege [as a fishing license] is analogous to the price of a profit à prendre; it is a

¹¹⁴ Peter van Hattem, *The Extinguishment of Native Title (and Implications for Resource Development)*, in RESOURCE DEVELOPMENT AND ABORIGINAL LAND RIGHTS IN AUSTRALIA (Richard H. Bartlett, ed., 1993) at 65 (describing reservations of rights under the Mining Act 1978 (Western Austl.) and Petroleum Act 1967 (Western Austl.)).

¹¹⁵ The Northern Territory argued that the public right to navigation supported its position that the Arnhem Land Trust cannot exclude others from the intertidal zone. The court dismissed this contention, but did not preclude the public right to navigation as a limitation on the Land Trust's authority to exclude others from the granted areas. *Northern Territory*, 236 C.L.R. at 61.

¹¹⁶ *Arnhemland Aboriginal Land Trust v. Director of Fisheries (NT)* (2000) 170 A.L.R. 1, ¶ 56. Initially, both the Arnhem Land Trust and the Director of Fisheries agreed upon this point. Although the Federal Court disagreed with the parties' submissions, his decision seems have been largely influenced by the Full Court's rulings in *Yarmirr v. Northern Territory (No 2)* (1998). *Id.* ¶ 72. Judge Mansfield also noted, however, that the *Yarmirr* decision did not involve lands granted under the Land Rights Act. *Id.* ¶ 43.

¹¹⁷ *Milirrpum v. Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 F.L.R. 141, 272; BRADBROOK, *supra* note 13, at 17-22.

¹¹⁸ BLACK'S LAW DICTIONARY 1247 (8th ed. 2004); *see also* BRADBROOK, *supra* note 13, at 723-25.

¹¹⁹ Similarly, the characterization of the right to fish as proprietary has support in Indian law jurisprudence in the United States. In *United States v. Winans*, the Supreme Court recognized that the Indians' rights to fish in the "usual and accustomed places" were reserved under treaty, and those rights were treated as implied easements in the land. *United States v. Winans*, 198 U.S. 371 (1905); *see also* *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998) (holding that the right to take shellfish as granted under a treaty agreement between tribes and the government was a "servitude" encumbering private landowners' property rights in tidelands); Michael C. Blumm & James Brunberg, "Not Much Less Necessary . . . Than the Atmosphere They Breathed": *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 NAT. RESOURCES J. 489, 540 (2006).

charge for the acquisition of a right akin to property.”¹²⁰ Moreover, the High Court acknowledged the possibility that a license that interfered with another’s property rights may be an improper exercise of legislative authority:

If the right to fish . . . were created in diminution of proprietary rights of the owner of the seabed and without the owner’s consent, some question of the validity of the law might have arisen, for the legislature of a State may not be competent to create proprietary rights out of property beyond the boundaries of the State and to which the State has no title.¹²¹

Fishing licenses used in the granted intertidal zone denigrate the Arnhem Land Trust’s property rights because they allow a person to take valuable property (fish) from Aboriginal land that should be under the sole control of the Arnhem Land Trust. Although the Court noted this potential conflict of property interests, it did not resolve this issue in its prior decisions or in *Blue Mud Bay*, despite its centrality in the dispute about Arnhem Land’s intertidal zone. The Court could have resolved this conflict by examining the substantive property interests at stake as well as the limitations imposed upon Northern Territory legislation by the Commonwealth Constitution and the Land Rights Act.

C. *Blue Mud Bay Did Not Resolve the Conflict of Laws Between the Land Rights Act, Commonwealth Constitution and the Northern Territory’s Legislation*

The High Court had an opportunity in *Blue Mud Bay* to resolve conflicting interests between the Land Trust beneficiaries and Fisheries Act licensees: It could have engaged in an analysis of the implicated property rights and the limitations imposed upon Northern Territory legislation by the Commonwealth Constitution and the Land Rights Act. For now, the issue remains unresolved, although it was addressed in earlier proceedings of *Blue Mud Bay*. The Federal Court below held that “the Fisheries Act has to be read down¹²² under [section] 59 of the Interpretation Act 1978 (NT) so as not to authorise the grant of a licence to take fish in relation to the intertidal

¹²⁰ Harper v. Minister for Sea Fisheries (1989) 168 C.L.R. 314 (ruling that because the fee for a commercial fishing license is the price imposed by the public for the privilege of taking fish, it was a “charge for the acquisition of property” not a tax or duty).

¹²¹ *Id.* at 335.

¹²² Judge Mansfield of the Federal Court uses the term “read down” in the sense of “restricted in its operation,” or “limited in scope.” See *Gumana v. Northern Territory* (2007) 158 F.C.R. 349, 372.

zone.”¹²³ The High Court found this issue unnecessary to address because the Arnhem Land Trust’s claim could be resolved by analyzing whether section 70(1) of the Land Rights Act allows Fisheries Act licensees to enter Aboriginal land without permission.¹²⁴ However, by avoiding this issue, the High Court sidestepped acknowledging that the Fisheries Act is invalid insofar as it conflicts with the Land Rights Act, and missed the opportunity to prevent future disputes over the use of Territory fishing licenses in areas granted under the Land Rights Act.

Under both the Commonwealth Constitution and the Land Rights Act, Northern Territory legislation is effective only to the extent that it does not conflict with the Land Rights Act. The Commonwealth retains power to make laws for the Northern Territory, and can also limit the effectiveness of laws enacted by the Northern Territory Legislative Assembly.¹²⁵ Under the Commonwealth Constitution, laws passed by any state or territory that conflict with a Commonwealth law are invalid. “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”¹²⁶

The Land Rights Act, a Commonwealth law, expressly invalidates any law enacted by the Northern Territory that cannot operate “concurrently with the laws of the Commonwealth.”¹²⁷ The High Court has previously recognized the limitations of Northern Territory statutes in regards to the Land Rights Act, noting that the scope of the Act exceeds any authority available to the Northern Territory.¹²⁸

¹²³ *Id.* at 372. Section 59 (“Act to be construed subject to power”) of the Interpretation Act 1978 (NT) states, “Every Act shall be read and construed subject to the Northern Territory (Self-Government) Act 1978 of the Commonwealth and any other Act of the Commonwealth relating to the power of the Legislative Assembly to make laws in respect of particular matters, and so as not to exceed the legislative power of the Legislative Assembly, to the intent that where any Act would, but for this section, have been construed as being in excess of that power it shall nevertheless be a valid Act to the extent to which it is not in excess of that power.” Interpretation Act, 1978, sec. 59, (Northern Territory).

¹²⁴ Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust (2008) 236 C.L.R. 24, 60-61.

¹²⁵ Northern Land Council, *supra* note 1.

¹²⁶ Commonwealth Const., *supra* note 22, sec. 109.

¹²⁷ Aboriginal Land Rights (Northern Territory) Act, 1976, secs. 73(1), 74 (Austl.); see also JOHN REEVES, BUILDING ON LAND RIGHTS FOR THE NEXT GENERATION: REPORT ON THE REVIEW OF THE ABORIGINAL LAND RIGHTS ACT OF 1976, ch. 3 (1998), <http://www.austlii.edu.au/au/other/IndigLRes/1998/8.html> (last visited Mar. 28, 2010) [hereinafter “REEVES REPORT”] (laws of the Northern Territory apply to aboriginal land only to the extent that they are capable of operating concurrently with the Land Rights Act).

¹²⁸ The Queen v. Kearney; ex parte Japanangka (1984) 158 C.L.R. 395, 419 (cited in Arnhemland Aboriginal Land Trust v. Director of Fisheries (NT) (2000) 170 A.L.R. 1, ¶ 83).

Furthermore, although the Commonwealth may compulsorily acquire land from the Land Trust, the Northern Territory may not.¹²⁹ Section 67 of the Land Rights Act provides that “Aboriginal land shall not be resumed, compulsorily acquired or forfeited under any law of the Northern Territory.” This principle should apply equally to taking property by way of fishing licenses granted by the Northern Territory. As the Land Trust has superior property interests in the granted intertidal zone, any permission to take fish from these areas granted by the Northern Territory to licensees amounts to taking Aboriginal property in violation of Section 67.

Each of the lower courts in the *Blue Mud Bay* litigation noted that the Northern Territory may not authorize actions that destroy or detract from a right conferred by Commonwealth law.¹³⁰ The Federal Court stated that if later courts found that the Fisheries Act conferred an entitlement that was inconsistent with the grants of the Land Rights Act, the Fisheries Act must be limited in its application to the extent of these conflicting rights.¹³¹

The High Court avoided the question of whether, by issuing fishing licenses that may be used in granted areas, the Northern Territory improperly authorizes an infringement of the Arnhem Land Trust’s property rights under the Land Rights Act. Its ruling leaves the interaction between the Land Rights Act and Fisheries Act unresolved. However, because the property rights granted by the Fisheries Act are irreconcilable with those granted to land trusts under the Land Rights Act, the High Court should have upheld the Federal Court’s declaration that the Fisheries Act must be “read down” to the Land Rights Act. Further, the Court should have concluded that the Fisheries Act is invalid insofar as it authorizes licensing in the granted tidelands areas without the Aboriginal landowners’ consent.

V. AFTER *BLUE MUD BAY*: POSITIVE AND POTENTIALLY NEGATIVE IMPLICATIONS FOR THE ARNHEM LAND TRUST

Despite its shortcomings in terms of explicitly defining the extent of the Arnhem Land Trust’s property rights, the immediate effect of the *Blue Mud Bay* decision is that the Trust now has certainty as to the physical borders of Aboriginal land. *Blue Mud Bay* holds unequivocally that the

¹²⁹ REEVES REPORT, *supra* note 127, ch.3.

¹³⁰ *Arnhemland Aboriginal Land Trust v. Director of Fisheries (NT)* (2000) 170 A.L.R. 1, ¶ 83; *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 483 (Judge Selway, however, concluded that the Fisheries Act did not interfere with property rights granted under the Land Rights Act, because both were subject to the public rights to fish and navigate—this conclusion was overruled by the High Court); *Gumana v. Northern Territory* (2007) 158 F.C.R. 349, 372.

¹³¹ *Arnhemland Aboriginal Land Trust*, 170 A.L.R. ¶ 74.

granted land includes the intertidal zone and that the Aboriginal landowners have property interests in that zone. Thus, the result of this ruling is that, for now at least, the Arnhem Land Trust controls entry into the intertidal zone. However, a secondary effect of the decision is that although the Land Trust now controls the entry into the granted area, both the Northern Territory and the fishing industry may now have the motivation, and possibly the means, to challenge the Arnhem Land Trust's authority to regulate entry into the intertidal zone. Negotiations over fishing in Blue Mud Bay are inevitable.¹³² Rather than continuing the battle in court or the legislature, the Northern Territory should instead endeavor to engage in good faith negotiations going forward, recognizing the Land Trust's authority to exclude from the intertidal zone and the beneficial purpose of the Land Rights Act.

A. *Positive Effects: Arnhem Land Trust Gains a Stronger Negotiating Position*

Despite its shortcomings, the immediate effect of the High Court's ruling is recognition of the Arnhem Land Trust's right to exclude others from the granted areas, including the intertidal zone. Although some argue the *Blue Mud Bay* decision "does not have any direct impact on native title jurisprudence,"¹³³ aboriginal leaders hailed the decisions as a victory for Yolngu land rights in the Top End.¹³⁴ Because property is power, *Blue Mud Bay* marks a significant shift in power for the Arnhem Land Trust.

In addition to expressly defining the boundaries of Aboriginal land, *Blue Mud Bay* also represents a shift in power between the Arnhem Land Trust, the Northern Territory government, and commercial fishermen. Property law involves relationships, so the "legal definition of those relationships confers—or withholds—power over others."¹³⁵ These rights are not absolute and unchanging, but rather reflect changing relationships among people.¹³⁶ Thus the "scope of property rights changes over time as

¹³² The Northern Territory and Arnhem Land Trust have made temporary arrangements for extending commercial licenses while negotiations continue. The temporary licenses have been extended three times since the July 2008 decision. Northern Territory Government, Fishing Arrangements, <http://www.fishing.nt.gov.au/> (last visited Jan. 17, 2010).

¹³³ Tru Tran, *Blue Mud Bay: Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust [2008] HCA 19*, NATIVE TITLE NEWSLETTER, (Native Title Research Unit), July/August No. 4/2008, http://ntru.aiatsis.gov.au/publications/2008pdfs/newsletter/Jul_Aug_2008.pdf (last visited Mar. 28, 2010).

¹³⁴ Media Release, Northern Land Council, *supra* note 18.

¹³⁵ Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 41 (1991). Professor Singer proposes a "social relations approach" to property law as an alternative to the natural rights approach. Joseph W. Singer & Jack M. Beerman, *The Social Origins of Property*, 6 CAN. J. L. & JURIS., 217 (1993).

¹³⁶ Singer & Beerman, *supra* note 135, at 228; see also Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998).

social conditions and relationships change.”¹³⁷ The *Blue Mud Bay* litigation provides a vivid illustration of social relations in property law. Because the Arnhem Land Trust has the authority to exclude fishermen from the granted intertidal zone, the Aboriginal landowners will “become the regulators, because it’s their sea and their resource.”¹³⁸

It is undisputed that the Land Trust is now in a better position when participating in negotiations with the Northern Territory over access to fishing in the intertidal zone. “What the *Blue Mud Bay* decision means for Aboriginal people is that they now control access to the waters of a major fishery, and in effect, they have a monopoly over more than 80 percent of the water where barramundi, mud crabs and trepang are caught.”¹³⁹ With a legally recognized right to exclude from the tidelands along the Northern Territory coast, the balance of power has shifted in favor of the Aboriginal landowners.¹⁴⁰

Following the Federal Court’s ruling in 2007, Northern Territory fishermen gloomily predicted the decision signaled the end of commercial fishing in the Territory.¹⁴¹ Despite their fears, the Land Council took a conservative and compromising approach following its win in Federal Court. In a document titled “Grant of Commercial Fishing Licences and Permits re Tidal Waters Overlying Aboriginal Land,” the Council automatically granted free interim licenses to all Fisheries Act commercial fishing licenses.¹⁴² The day *Blue Mud Bay* was announced in July 2008, the Arnhem Land Trust pledged to continue the interim agreement, and promised a twelve-month minimum amnesty period “to enable good faith negotiations to occur.”¹⁴³ This amnesty continues while the negotiations proceed. In the most recent update, the Northern Territory government stated that “[a]ll Land Councils have extended the interim arrangements to allow commercial and

¹³⁷ Singer & Beerman, *supra* note 135, at 228.

¹³⁸ Graham, *supra* note 30.

¹³⁹ *Id.*

¹⁴⁰ Whether the Aboriginal landowners have authority to issue their own fishing licenses is another issue that may arise as the outcome of *Blue Mud Bay* is negotiated.

¹⁴¹ Media Release, Amateur Fishermen’s Association of the Northern Territory, Inc., *No Fisheries Law—Not Good Enough!* AFANT (Mar. 8, 2007), <http://www.afant.com.au/blog/?m=200705> (last visited Jan. 3, 2010).

¹⁴² Grant of Commercial Fishing Licences and Permits re Tidal Waters Overlying Aboriginal Land, 2007, (Northern Territory), 2.1, <http://www.nlc.org.au/html/files/Microsoft%20Word%20-%20Licence%2016%20final%203%20April%202007.pdf> (last visited Mar. 10, 2010); *see also* Northern Land Council Fact Sheet, *supra* note 83.

¹⁴³ Media Release, Northern Land Council, *supra* note 18.

recreational fishers to continue to operate in waters overlying Aboriginal land.”¹⁴⁴

While the Aboriginal landowners gained a stronger negotiating position as a result of *Blue Mud Bay*, gaps in the High Court’s ruling weaken the Arnhem Land Trust’s position. Changes in the balance of power are usually met with resistance, and given the stakes in this case—over 80 percent of the Northern Territory coastline and a billion dollar commercial fishing industry—the Aboriginal landowners should expect continued challenges to their ownership of and authority to exclude from the intertidal zone. The Northern Territory is likely to search for something “more” to shift the power back in its favor.

B. Future Northern Territory Legislation Cannot Diminish Aboriginal Landowners’ Property Interests

The High Court’s decision in *Blue Mud Bay* leaves open the possibility that an amended Fisheries Act, or a newly passed Northern Territory law, could excuse entry onto Aboriginal land without the landowner’s permission in the future. The High Court’s decision failed to affirm the extent of the Arnhem Land Trust’s property rights in granted areas, and also effectively invited the Northern Territory to look for what “more” it needs to assert its authority over the intertidal zone, or to diminish the Arnhem Land Trust’s power to exclude from the granted areas. Northern Territory legislators have attempted in the past,¹⁴⁵ and may again attempt, to pass new legislation that would further inhibit the Arnhem Land Trust’s ability to regulate fishing in the granted tidelands. However, if the Northern Territory attempted to pass laws concerning the intertidal area in question, it would find limited support for its actions in the Land Rights Act.

Following the Federal Court’s ruling in 2007, Terry Mills, a member of the Northern Territory legislature, proposed an amendment to the Aboriginal Land Act 1978 (NT) (“Aboriginal Land Act”).¹⁴⁶ Mr. Mills’

¹⁴⁴ See Northern Territory Government, Fishing Arrangements, *supra* note 132. The statement also notes that “[t]he Northern Territory Government is continuing to meet with Land Councils and stakeholders individually or as part of a broader stakeholder group to work towards a practical negotiated outcome.” *Id.*

¹⁴⁵ Aboriginal Land Amendment (Inter-tidal Waters) Bill, 2007, Serial 92, *available at* <http://notes.nt.gov.au/dcm/legislat/Acts.nsf/5504d78eee675d6e6925649e001bb652/c8d06661cc677b0a692572cf000b89f6?OpenDocument>.

¹⁴⁶ *Id.* The Northern Territory does not have authority to legislate in contradiction to the Land Rights Act as discussed in Part IV.C, *supra*. However, the Land Rights Act includes a “legislative compromise” in section 73, whereby the Northern Territory legislature is given qualified powers to make laws regulating entry of persons into waters “adjoining, and within, two kilometers of” Aboriginal land. The result of section 73 is the Aboriginal Land Act 1978 (NT), which Mr. Mills’s bill proposed to amend.

proposed amendment recommended that the “appropriate authority” might “grant a general exemption in relation to Aboriginal inter-tidal waters” or revoke a previously granted exemption.¹⁴⁷ Although this proposition seems to overstep the Northern Territory’s authority and interfere with the Arnhem Land Trust’s property rights in the intertidal waters, Mr. Mills presented the bill as a compromise that would save confused fishermen from violating the Land Rights Act. “It is our belief [sic] that the issue of permits and licenses, at this juncture when there is still a level of uncertainty is creating some unnecessary complexity and angst.”¹⁴⁸

Despite the Territory’s contentions in the *Blue Mud Bay* litigation and the rhetoric of Mr. Mill’s proposal, the Aboriginal Land Act confers only limited authority upon the Territory to regulate entry into waters bordering Aboriginal lands. First, the Aboriginal Land Act operates entirely by reference to the Commonwealth’s Land Rights Act: All of its definitions are taken from the Land Rights Act,¹⁴⁹ and the authority of the Northern Territory to control entry into adjoining seas derives from section 73 of the Land Rights Act.¹⁵⁰ The Northern Territory therefore may legislate only to the extent that its laws do not conflict with the Land Rights Act. Further, as described above, the Land Rights Act and Commonwealth Constitution expressly limit the effectiveness of the Aboriginal Land Act to the extent that it does not conflict with the Land Rights Act and other laws of the Commonwealth.¹⁵¹ Thus, the Territory cannot provide an exemption from trespass onto Aboriginal lands beyond those provided under the Land Rights Act.

To the extent the Territory would purport to allow non-Aboriginals entry onto Aboriginal lands for fishing, this grant of a conflicting property interest would also violate the Aboriginal estate in fee simple. The Arnhem Land Trust has the “equivalent of full ownership” in the intertidal waters and the High Court has previously found that a fishing license is a form of property. Should the Northern Territory attempt to authorize non-Aboriginals to enter and take property from Aboriginal lands without the

¹⁴⁷ *Id.*

¹⁴⁸ Terry Mills, Northern Territory Second Reading Speeches, Aboriginal Land Amendment (Intertidal Waters) Bill 2007, http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nt/bill_srs/alawb2007398/srs.html?query=%5Eintertidal%20zone. The bill lapsed due to Mr. Mills’s resignation. Aboriginal Land Amendment (Inter-tidal Waters) Bill, *supra* note 145.

¹⁴⁹ Aboriginal Land Act, pt. I, sec. 3.

¹⁵⁰ Aboriginal Land Rights (Northern Territory) Act, 1976, sec. 73 (Austl.); Aboriginal Land Act, pt. III.

¹⁵¹ Aboriginal Land Rights (Northern Territory) Act, 1976, sec. 74 (Austl.); Commonwealth Const., *supra* note 22, sec. 109; *see* Part IV.C *supra*.

Land Trust's consent, the Northern Territory denigrates the Arnhem Land Trust's property rights in the intertidal zone.

In the future, the Northern Territory legislature could attempt to enact legislation in the same vein as Mr. Mill's proposal under the guise of regulating coastal waters. However, any unilateral and/or uncooperative revision that purports to authorize commercial fishing in the Aboriginal intertidal zone would run afoul of Aboriginal property interests and violate the Land Rights Act and the Commonwealth Constitution. Instead, any future Northern Territory legislation should recognize the beneficial intent of the Land Rights Act and the Arnhem Land Trust's superior property interests in the intertidal zone.

C. *A Purpose of the Land Rights Act Is To Protect Aboriginal Property Interests in the Northern Territory*

If the Northern Territory does attempt to augment its authority to regulate in the intertidal zone, the courts should analyze the conflicting property interests involved, and look to the beneficial purpose of the Land Rights Act to resolve any disputes between the Territory and Aboriginal landowners.¹⁵² The legislative history of the Land Rights Act and the lower courts' findings in *Blue Mud Bay* support recognizing the broad range of Aboriginal property rights that were granted in fee simple estate to the Arnhem Land Trust.¹⁵³ The Land Rights Act was specifically enacted to protect Aboriginal interests in land in the Northern Territory,¹⁵⁴ a beneficial purpose which the Northern Territory should acknowledge in its negotiations with the Arnhem Land Trust. A preferable approach to resolving the conflicting property interests in Blue Mud Bay would acknowledge not only the nature of the property interests at stake, but also the unique status of Aboriginal legal claims and the current political landscape.¹⁵⁵

The Land Rights Act had the explicit purpose of protecting Aboriginal property interests in the Northern Territory. It is, as the Federal Court has

¹⁵² See Part IV, *supra*.

¹⁵³ See Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.); see ABORIGINAL LAND RIGHTS COMMISSION, FIRST REPORT, *supra* note 67; see ABORIGINAL LAND RIGHTS COMMISSION, SECOND REPORT, *supra* note 68; see *Gumana and Others v. Northern Territory of Australia and Others* (2005) 141 F.C.R. 457, 457; *Gumana v. Northern Territory* (2007) 158 F.C.R. 349, 349.

¹⁵⁴ The long title states that it is "[a]n Act providing for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals, and for other purposes." Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.).

¹⁵⁵ *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 69-70.

recognized, “beneficial legislation.”¹⁵⁶ Although the *Blue Mud Bay* majority is silent on the issue,¹⁵⁷ other Australian courts have recognized the purpose of the Land Rights Act. “The Land Rights Act is beneficial legislation, recognising the importance of traditional land to the Aboriginal people and their spiritual affinity with it. It is an Act designed to return to the Aboriginal people so much of their traditional land as Australian society can make available to them.”¹⁵⁸ The beneficial purpose of the Land Rights Act is clear from both its language and its history.

The background against which the Land Rights Act should be interpreted includes not only the legislative purpose but also recent political actions. Justice Kirby¹⁵⁹ endorsed this approach in his concurrence to *Blue Mud Bay*.¹⁶⁰ Notably, Justice Kirby took judicial notice of Prime Minister Rudd’s National Apology to Australia’s indigenous population, issued with the support of the Opposition¹⁶¹ on February 13, 2008.¹⁶² Justice Kirby suggested that the National Apology comprised part of the “factual matrix or background against which the legislation . . . must be considered and interpreted.”¹⁶³ The Apology acknowledged past wrongs, including the denial and deprivation of basic legal rights. The concurrence noted that

¹⁵⁶ “The Land Rights Act is beneficial legislation, recognizing the importance of traditional land to the Aboriginal people and their spiritual affinity with it It is an attempt to do justice to the Aboriginal people consistent with the good government and progress of Australia for all its people.” *Pareroultja and Others v. Tickner and Others* (1993) 42 F.C.R. 32 at 39 (quoting *Attorney-General (NT) v. Minister for Aboriginal Affairs* (1989) 25 F.C.R. 345).

¹⁵⁷ The High Court discusses the mechanisms of the Land Rights Act, but not its legislative purpose or history. *Northern Territory*, 236 C.L.R. at 62-65.

¹⁵⁸ *Pareroultja and Others v. Tickner and Others* (1993) 42 F.C.R. 32 at 39 (quoting *Attorney-General (NT) v. Minister for Aboriginal Affairs* (1989) 25 F.C.R. 345).

¹⁵⁹ Justice Michael Donald Kirby was appointed to the High Court in 1996 and served through 2009. High Court of Australia, Former Members of the Court, http://www.hcourt.gov.au/justices_02.html (last visited Jan. 17, 2010).

¹⁶⁰ See *Northern Territory*, 236 C.L.R. at 67-71.

¹⁶¹ The largest party that is not currently in power is known as Her Majesty’s Loyal Opposition (or “Opposition”). The Opposition’s role is to “scrutinise the government” and “hold them accountable for their decisions.” Parliamentary Education Office: FAQ: Our Government, http://www.peo.gov.au/faq/faq_17.html (last visited Jan. 17, 2010).

¹⁶² *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (2008) 236 C.L.R. 24, 69-70; Prime Minister Kevin Rudd, Apology to Australia’s Indigenous People (February 13, 2008), http://www.aph.gov.au/house/rudd_speech.pdf (last visited Jan. 3, 2010).

¹⁶³ *Northern Territory*, 236 C.L.R. at 70. The factual background could well include decisions from other common law countries that have recognized the purpose of beneficial legislation for indigenous populations. For example, in *Alaska Pacific Fisheries Co. v. United States*, the United States Supreme Court ruled that the Fisheries Company unlawfully encroached on Indian land when it constructed a fish trap in waters adjacent to reserved land. *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918). Noting that “[t]he purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life,” the Court affirmatively held that that the reservation of the “body of lands known as Annette Islands” included adjacent waters. *Id.* at 89.

those wrongs also included denial of the “rights to the peaceful enjoyment of . . . traditional lands and [the rights] to navigate and to fish as their ancestors had done for aeons before British sovereignty and settlement.”¹⁶⁴

Examples of political support for recognizing Aboriginal needs and interests abound: On April 6, 2005, former Prime Minister Howard and the Chief Minister of the Northern Territory, Clare Majella Martin, signed an “Overarching Agreement on Indigenous Affairs Between the Commonwealth of Australia and the Northern Territory of Australia.”¹⁶⁵ Acknowledging that the Aboriginal population “suffers the highest comparative levels of disadvantage, across all socio-economic indicators” the governments agreed to prioritize Indigenous economic development.¹⁶⁶ The Northern Territory’s Fisheries Act itself states that its purpose is “to maintain a stewardship of aquatic resources that promotes fairness, equity and access to aquatic resources by all stakeholder groups, including . . . indigenous people.”¹⁶⁷

While the Aboriginal population’s legal rights in land have ebbed and flowed with their political gains and losses, the property rights acknowledged in *Blue Mud Bay* denote a considerable legal gain for the Aboriginal landowners. “Property is derived from sovereignty, but also creates sovereignty.”¹⁶⁸ Aboriginal authority over commercial fishing in the Northern Territory may not yet amount to sovereignty over this valuable activity, but the decision ensured that Aboriginal peoples at least have a seat at the table. Respecting the Aboriginal landowners’ position at the table should be a judicial and legislative priority as the parties negotiate the outcome of *Blue Mud Bay*.

VI. CONCLUSION

The Land Rights Act, beneficial legislation enacted by the Australian Commonwealth to preserve and promote Aboriginal land ownership, granted the Aboriginal people ownership of a majority of the Northern Territory coastline. The Act explicitly confers a wide range of ownership interests through the grant of fee simple estates in Northern Territory lands. The *Blue Mud Bay* ruling took a positive step in recognizing the Aboriginal owners’

¹⁶⁴ *Northern Territory*, 236 C.L.R. at 69-70.

¹⁶⁵ Overarching Agreement on Indigenous Affairs Between the Commonwealth of Australia and the Northern Territory of Australia, 2005-2010, available at http://www.fahcsia.gov.au/sa/indigenous/pubs/general/bilateralagreements/northern_territory/Pages/default.aspx.

¹⁶⁶ *Id.* at 2.

¹⁶⁷ Fisheries Act, *supra* note 24, sec. 2A.

¹⁶⁸ Singer, *supra* note 135, at 51.

right to exclude from granted lands. However, the High Court should have gone further and recognized that rights under a fishing license issued by the Northern Territory improperly interfere with the Land Trust's property rights and that the Fisheries Act is only effective to the extent that it does not interfere with the Aboriginal landowners' superior property rights in the intertidal zone.

Commercial fishing is an extremely lucrative business in the Northern Territory. The Aboriginal population, which has the greatest economic need, is in large part barred from participating in this industry by both statutory regulation and economic disadvantage. According to the Northern Territory Seafood Council, over AUS\$1.4 billion is invested in the industry along this coastline.¹⁶⁹ Yet the Aboriginal population living on on this land remains effectively excluded from commercial fishing, and therefore cannot benefit from the natural resources that are so essential to their physical and cultural survival.¹⁷⁰

The Australian government, whether through legislative action or judicial ruling, must protect the Aboriginal owners' property rights in the granted lands. Future actions by the Northern Territory Parliament should be carefully reviewed for potential abuse of the Northern Territory's limited authority to control Aboriginal Land under the Land Rights Act. The stakes are too high and the Aboriginal need too great for the Australian authorities to allow the commercial fishing industry to take fish from Aboriginal lands without Aboriginal consent.

¹⁶⁹ Northern Territory Seafood Council, *supra* note 37.

¹⁷⁰ Taylor, *supra* note 7.