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Introduction

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Until the 1970s, indigenous systems of marine tenure received little attention not just within Australian waters but worldwide (see Ruddle and Akimichi 1984, 1–5). The reasons for this are complex but without doubt one of the more important is the widespread European understanding that the seas are open to all. This has resulted in the indigenous relationship to the sea being seen only in terms of resource usage and in the many and complex indigenous systems of near-shore marine tenure worldwide becoming invisible.

Over the last three decades, however, research on indigenous marine tenure has received considerable attention partly in response to the failure of fisheries development schemes and partly in response to decolonisation. In the Pacific, in particular, much research has been driven by the belief that traditional systems of marine tenure can be harnessed and/or revived in order to manage near-shore marine resources in a sustainable way (e.g. see Ruddle 1994).

In Australia the interest in marine tenure is even more recent and it was not until the 1980s that the first studies started to appear in response to the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*. Section 73(1)(d) of this Act provides for reciprocal legislation to be passed by the Northern Territory under which Aboriginal communities can apply to close sections of the sea adjoining Aboriginal land for two kilometres off-shore. This resulted in Section 12(1) of the *Aboriginal Land Act 1978 (NT)*, which became the first statutory granting of some limited rights over the sea. Before the sea is closed the Administrator of the Northern Territory may refer the matter of closure to the Aboriginal Land Commissioner for investigation and recommendation.

The statutory test for closure is based on the proof of the right to exclude strangers. Only two applications for closure of the seas have been made to date, in the area around Milingimbi and Howard Island on the Arnhem Land coast,¹ although research for two others was carried out in the 1980s: Croker Island (see Palmer and Brady 1984) and Groote Eylandt (Palmer 1983).

With the Mabo No. 2 judgement in 1992 and the subsequent passing of the *Native Title Act 1993 (Cth)* which contemplates that rights and interests in the sea may be recognised (see s6 and s223), interest has escalated enormously so that marine tenure is set to become a key native title issue. However, it should be emphasised that the statutory right to negotiate does not apply to 'off-shore' areas (s234(8a)) and proposed amendments to the Act will ensure the priority of fishing industry interests over native title, limiting indigenous people only to a right to apply for compensation.

Although native title is now driving the interest in marine tenure, it is important to maintain some conceptual separation between research for an ethnographic documentation of such tenure and research for an application for the recognition of native title rights in the sea, although the two are, of course, closely related. Court rulings and legal discourse are now defining and structuring the kinds of evidence required for a native title application, placing limitations on a purely ethnographic account concerned with local categories, perceptions and

1 The two cases are the Castlereagh Bay/Howard Island decided in 1988 and the Milingimbi, Crocodile Islands and Glyde River Area decided in 1981 by the Aboriginal Land Commissioner. The other cases have not been pursued for two reasons: first, sea claims were proving expensive to research and it was decided it was more cost effective to give priority to land claims. Second, and clearly related, the rights conferred on people achieving a sea closure are minimal since any person with an existing fishing licence is not affected by the closure. Since it was mainly the fishermen that were causing the problems the closures were not nearly as effective as they might appear to be.

understandings, some of which may have only a marginal place in the evidence required by the court.

In this introduction we will begin with a discussion of the issues raised by the ethnographic blind spot regarding marine tenure and its relationship to property theory. We will then overview the literature on Aboriginal people's relationships with the sea, and the relationship between marine tenure and native title before turning to a discussion of the papers in this volume. We conclude with a brief section on the legal terminology associated with the sea.

A blind spot: property rights in the sea

The extent of the blind spot regarding customary marine tenure (CMT) is extraordinary in retrospect. Norman Tindale (1925–26), Lloyd Warner (1937), Fred Rose (1960), Steve Hart and Arnold Pilling (1960), Ronald Berndt (1964; 1970; 1976), Les Hiatt (1965), David Turner (1974), Betty Meehan (1982) and Nancy Williams (1986) all worked with coastal peoples in Arnhem Land and addressed issues of land tenure, or the use of sea, yet they make no mention of the kind of estates or interests in the sea that they describe on the land.² This blind spot is not confined to Arnhem Land as Sandra Pannell's contribution shows, but appears to apply to the whole continent. There is, however, an early and highly significant reference to ownership of the seas in the Torres Strait, although it was consigned to a footnote. Anthony Wilkins noted:

I think there is what may be termed a spatial projection of the idea of proprietorship. As foreshore rights of landed property extend not only over the adjacent reef *but to the water over it* [emphasis added]—as in the case of fish caught

2 Ronald Berndt (1976:map 5) provides a map of estates on Elcho Island which includes the sea within some of them but he makes no comment in the text about the sea as part of the estate. Nancy Williams (1986:92) mentions 'management of land and marine resources' but only makes a passing comment about the sea.

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within the area—so the inhabitants of certain areas appear to have a pre-emptial right to certain distant fishing stations which lie off their part of the coast (1908:167 fn 1).

This appears to be widely true of Aboriginal marine tenure systems.

The first passing reference to sea estates appears to be by Mr Justice Woodward in his First Report in 1973 (1973:33), while the first brief published anthropological writing specifically on marine tenure was in reaction to the inquiry by the *Joint Select Committee on Aboriginal Land Rights in the Northern Territory* in 1977. Howard Morphy and Paul Memmott made submissions to this inquiry explicitly dealing with estates in the sea.³ Athol Chase's writing on east coast Cape York appear to be the first substantive anthropological analysis carried out before the stimulus of landrights although published later (see Chase 1980 and Chase and Sutton 1981). Other early reports are by Ian Keen (1980), Stephen Davis (1982; 1984), Kingsley Palmer (1983) and Kingsley Palmer and Maggie Brady (1984), all arising out of the Northern Territory legislation and the papers by Ian Keen, Ian Crawford, Moya Smith and Kingsley Palmer in the special issue of *Anthropological Forum* 1984–5. The more recent literature reflects the concern with management (e.g. see Gray and Zann 1988; Cordell 1991; Smyth 1993; Sutherland 1996).

This raises the possibility that the late discovery of marine tenure in Australia is because it is only a recent development. It might be argued, for instance, that under the impact of landrights legislation and the possibility of closing the seas in the Northern Territory, there has been an extension of the land based arrangements out into the sea so that open access has given way to a common property system (see Rigsby). It is evident, looking beyond Australia, that not all coastal peoples have systems or probably ever had systems of marine tenure. Property theory would explain this in terms of the economic costs and benefits related

³ Ian Keen also made a submission to this Committee about the sea emphasising the spiritual importance of the coastal waters and sites in the sea. At the end of his submission he does say, 'Waters are of the clan and moiety of the adjoining coast...' (1977:1098).

to maintaining such property rights while anthropologists have documented a range of cultural reasons.⁴

Alternatively, it might be, as Palmer (1988) has suggested that customary marine tenure systems are fragile so that they disappear quickly under the impact of colonialism. Palmer does not suggest why they might be fragile but one factor could relate to the policing of rights and the difficulties created when outsiders introduce new and radically changed maritime technologies which are only differentially available. New technology can also, however, strengthen and extend relations with the maritime environment as the relatively recent introduction of the dugout canoe in the Top End of Australia makes clear (see below).

Yet another possibility is that longstanding practices and arrangements of a more informal nature have firmed up under the impact of the growing prevalence of legal and rights discourses in Aboriginal affairs. This seems possible from a consideration of property theory. If we focus on property as first and foremost a relationship between people in respect of something rather than a relationship simply with a thing *per se* (see Rigsby this volume), attention is focussed on control. A property relationship entails one person controlling or regulating the behaviour of the other in respect of that thing in one of a number of ways. With changes in technology and better understandings among Aboriginal people of the way in which the Australian legal system works, the uncodified and relatively informal indigenous modes of expression of these rights of control have been translated into the language of the encapsulating society.

Control in relation to the right to exclude (i.e. exclusive possession) and the right to alienate have always had a central place in European notions of property. Where there is a recognised right to exclude, the question of its enforcement arises. Normally, of course, such rights do

4 Polunin (1984:269–272) documents a number of cases. For example, the Tanga Islanders of Papua New Guinea had a supernatural dread of the sea in a context where the land was much more productive, and the Balinese have strong land/sea opposition seeing the mountains as pure and the sea as polluted.

not need to be enforced since property rights are respected and there are culturally recognised ways of negotiating access. Nevertheless, there does have to be a mechanism and an expectation that people will enforce their rights if they are breached. The difficulties associated with exercising rights of control over an extensive land estate in a hunter-gatherer context are great enough but people can be tracked and signs of one sort or another put up to warn people off. At sea, neither of these options is available. The basic control of the sea thus rests on sight, which is the same sense that is the initial basis of a social relationship with somebody or the reactivating of it: that is, one perceives their presence. Aboriginal people say, and it is consistent with other practices, that they constantly monitor the sea and those on the shore expect those coming into their field of vision to travel directly towards them to declare their intentions to those living on the shore.⁵ If they fail to do this, and have not previously arranged permission for access, they have breached accepted social practice and the assumption is that because they are behaving furtively they are there with illegal or malicious intent. Arnhem Landers speak of Europeans who come into their sea estates without seeking permission as 'sneaking' in (e.g. Croker Island Transcript 1997:704).

This construction of Aboriginal sea country practice is reinforced by their practice on land of setting fire to the bush when travelling cross-country to announce an impending arrival (e.g. see Heath 1980:536). That is to say, people make themselves visible at a distance to establish their existence and then they proceed straight to the camp where they expect to find the local residents (Heath 1980:536).

The importance of sight is further underlined by its role in defining the dimensions of Aboriginal sea estates. It is common for people to say,

5 Dharlwangu people in northeast Arnhem Land told Peter Toner, a graduate student in the Department of Archaeology and Anthropology at ANU, that the light reflecting off wet canoe paddles can be seen at a great distance. This is something they sing about (see also Berndt 1948:96). See Rose (1994:Chapter 9—Seeing property—especially pages 269,292–293) for a fascinating account of the place of vision in property relations.

when asked how far out to sea their sea estates go, that they go 'to the horizon' (e.g. this has been documented for the Tiwi (Davis and Prescott 1992:49); and the people of the Croker Island area (Peterson and Devitt 1997)). This field of vision is extended both by the distances people can see from elevated points and by the area they can see when at their farthest point of travel from land. Victor Prescott (quoted in Davis and Prescott 1992:49) records that in the mid-eighteenth century, Naples and the Ottoman empire signed an agreement to protect shipping in the area of sea that could be seen from the shore. Of course, as Paul Memmott and David Trigger's paper makes clear, people had an interest in areas way out of sight both in terms of their deep involvement with clouds and more mundanely through their travels into distant waters particularly in the past with Macassans, pearlers, fishers and missionaries. And the Sandbeach people of eastern Cape York Peninsula (see Rigsby and Chase this volume) say their estates extend to the outer reefs of the Great Barrier Reef, which are generally well out of sight beyond the horizon.

One of the difficulties for Aboriginal people in sustaining this definition of the extent of their sea estates is that rarely do they use these more distant areas. Thus the rule of thumb is that standing on the shore a person can see about 20 kilometres out to sea. While there are areas where people did cross such distances of open water, it seems improbable that Aboriginal people went out 20 kilometres beyond the most northern parts of their land estates along much of the Top End coast unless there were islands to be seen. However, just because parts of the sea country were not used, visited or policed does not make them any less part of their sea country as Australia's difficulties with parts of its sea territory in the southern ocean, which are rarely visited and/or unpoliced and almost unpoliceable, makes clear.⁶

6 For instance, see the article in the *Bulletin*, 1 July 1997, page 13. 'Anarchy in the Antarctic. Toothless law: foreign vessels are plundering fish stocks in Australian territory'. The article emphasises the great difficulty of policing waters that are 4500km from Perth.

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As Memmott and Trigger also suggest, when people moved into centralised communities the ability of the estate owners to control their sea estates declined substantially and, at the same time, the sea within easy reach of such communities tended to become an area in which all people in the settlement have similar *de facto* access rights. Rigsby and Chase in their chapter report the same thing for the Lockhart River community but note that the 'public', that has free access to the sea near the community, is the local Aboriginal one and there are complaints when outsiders enter the area. Thus around settled village communities, permission to use the sea country is rarely sought, although in the smaller communities the senior estate owner will usually receive a portion of any turtle or dugong caught there.

Thus centralisation and the fact that most anthropologists have worked in such centralised communities would seem to be important in understanding the invisibility of marine tenure. The parallel with the ownership of the land on which these communities stand is illuminating. Until the advent of village councils in the late 1960s the fact that the land on which an Aboriginal village stood was owned by a small fraction of the resident population certainly went unremarked by Europeans who treated the village areas as open-access areas. However, elections for the village councils started to make the formerly invisible owners visible and they have since become even more evident with the emergence of the idea of rental payments for certain facilities established in the villages. Along with this has gone the decline in the significance of some other rights in some areas, in particular, rights to country through conception in some fringe desert areas, since now far too many people are conceived in the same place threatening the rights of those people with descent interests.

If there is exclusive possession there has to be permission seeking. Yet while Aboriginal people will readily agree that people from other tenure groups should seek permission to fish or hunt in their sea-land estate, when asked if they have ever refused anybody permission to do so, they nearly always say they have not. This, then, appears to undermine the claim that there is real permission-seeking behaviour and

might be taken to suggest that our ethnographic practice is creating rights and interests that do not really exist, rather than recognising that our codification of ethnographic practice for articulation with the state entails such objectification and transformation.

The issue of permission giving is complex. Both in the past and today the people from whom others are normally seeking permission are relatives. Thus unless relationships have become tense or have broken down, in which case people would not ask, people know that their relatives will say yes unless there are exceptional circumstances. One such circumstance is the common practice of closing parts of the sea closely associated with a deceased person because of intensive use or because they were a senior owner of the area. It is significant that in the Croker region, for example, when people are asked why they seek permission they say it is out of 'respect'. This parallels directly the practice of spouses in our own society where each has a car and one wishes to borrow the other's car: normally they would never expect to be refused but they ask out of respect and to acknowledge the other's ownership or possession. If there were tensions leading to a divorce, neither spouse would probably ask to borrow the other's car and their property rights would become explicit in a legal setting.

The fact that people have a firm expectation that any close relative with whom they are in good standing will not refuse them access to their estate can lead to the conversion of this expectation, in the context of a legalistic discourse, to an assertion of this as a right because, normatively speaking, they know they will not be refused. Yet this is clearly not a right but only a strong expectation because there is no ability to enforce this expectation nor are there any obligations associated with such relationships that relate directly to the estate.

It is interesting too that when talking about excluding people or not granting them permission, the refusal of permission to Europeans is normally completely overlooked even though today this is the most common form of exclusion or attempted exclusion of people from sea estates.

Thus the maintenance of these relatively subtle forms of control of the behaviour of others is easily lost in the contexts of access to radically different technologies that allow people to appear and disappear with speed, and who are not accountable to people on the shore because they are in no long standing social relationship with them. Customary marine tenure in places like Australia does indeed seem to be fragile.

Another feature of European property notions as they relate to the sea is that it is only the seabed that is capable of being owned.⁷ This in turn gives control of the column of water above it and all that is in or on it. Aboriginal people's notions of sea tenure clearly encompass the seabed in many areas. Sharp (this volume) quotes a Groote Eylandter saying 'we don't follow the water, we follow the land under the sea...' (see also Bradley) and Charlie Wardaga from Croker Island commented:

That boat go on top and really—on the bottom—[is] that Dreaming. Every boat and every big ship, he go top, but that bottom one, that Dreaming, [it's] inside there ...Aboriginal culture goes right to the bottom—and to the shore (see Peterson and Devitt 1997:6–7)

Wardaga is referring to one of the best known of the ancestral figures, the Rainbow Serpent, which is found throughout Australia wherever there are bodies of water, particularly large bodies of water. Around the coast these spirit beings, of fearsome power, lie beneath the water on the sea bed and can be easily disturbed by things thrown carelessly overboard or in other ways (e.g. Heath 1980:546; Peterson and Devitt 1997). Thus around Croker Island meat and fatty substances should not be thrown overboard in many places because it is feared that this will arouse the local Rainbow Serpent.

⁷ But note that Christy (1996) speaks of the increasingly common replacement of open access conditions by property rights regimes in the world's fisheries.

Access to the maritime environment in historical perspective

It is evident that Aboriginal access to the sea has undergone a number of changes. The most recent of these, prior to European arrival, was the adoption of the dugout canoe in one of several forms. Its adoption clearly facilitated sea travel, made it possible to reach distant islands more easily and regularly and influenced hunting and fishing patterns. Outside of eastern Cape York the dugout canoe seems to have been taken up only in the last three hundred years or so.

The first people to arrive on the greater Australia land mass some 60,000 or more years ago had to cross at least 80km of open sea probably landing them somewhere in what is now western Irian Jaya (see Butlin 1993:14–34). This was an extraordinary early feat of seamanship and one that must have been repeated a number of times. Yet despite this uniquely early engagement with the sea, it cannot be said that most coastal Aboriginal peoples are truly maritime in the sense of being seafarers, but rather that they are intensive users of near-shore waters in mixed economies.⁸ Further, the distribution of the various forms of watercraft at the time of Europeans arrival was complex and discontinuous with a zone of more than two thousand kilometres westwards along the Great Australian Bight being devoid of any watercraft at all (see Davidson 1935:3). This regional diversity has been documented by Davidson, who argued that the distribution of the four principal types of craft—dugouts with one or two outriggers or none; bark canoes of single or several sheets of bark; complex rafts of two or more logs or rolls of reed or bark; and simple rafts consisting of only one log or

⁸ Rhys Jones concluded from his comparison of three Arnhem Land groups, the Anbara Gidjingali who combine access to land and sea roughly equally, the Matai Gidjingali who are basically inland people but with seasonal access to coastal resources at important times and the truly inland Ritharmgu that, ‘There are no structural differences between any of these economic systems’ (1980:129).

roll—reflects the chronology of their invention and/or introduction (see Davidson 1935:8; Akerman 1975; Jones 1976; Rowland 1987).

Only in Cape York did people have substantial sea going canoes. These measured from 24–30 feet long and had double outriggers as far south as Princess Charlotte Bay and single outriggers to the south. They could hold three, four or more people but the life of such canoes could be less than a year because of borers or cracking (see Thomson 1934:243–244; Baker 1988:185). There is no doubt that the bigger canoes in the far north of Cape York Peninsula came from New Guinea via the Torres Strait, mainly by trade, but people did learn to make them locally.⁹ When they were first acquired is unknown but there is good evidence for the diffusion of fish hook technology down the east coast in the last thousand years and it is possible that dugouts may have diffused at the same time (Rowland 1981).

Elsewhere around the continent people used bark canoes or canoe-rafts whose normal range seems to have been limited to between 6.5–13 kilometres (see Jones 1976:260). The construction of these bark canoes varied considerably. Some were made from a single piece of bark and were only suitable for use in calm water (see Davidson 1935; Baker 1988:180) but others were made from several pieces of bark sewn together and were better suited for the rougher conditions of open sea travel (Baker 1988:180). Stories of the stitching coming apart at sea with resultant loss of life are not uncommon and are reported from Maningrida and the Borroloola area (see Cooke and Armstrong this volume; Baker 1988:181; Bradley 1997). Some bark canoes were large enough to hold six men in the Borroloola area (see Spencer and Gillen 1912:484).

Despite their fragility, there is no doubt that people hunted turtle and dugong from such boats using harpoons made from various woods or stingray spines (e.g. see Heath 1980:534; Bradley 1991:96). However, this must have been a more difficult enterprise than from a dugout canoe and it would not have been possible to get the animals into the

9 See footnote 15, Chapter 12 which records empty dugouts drifting down on to eastern Cape York beaches.

bark canoes in most cases. Rather, they would have been tied up alongside and towed back (see Baker 1988:183; Heath 1980:533).

At some relatively late stage, probably in the late seventeenth or early eighteenth century, Macassan trepangers started regularly visiting the north coast of Australia between Broome and the Borroloola area introducing not only dugout canoes, through trade, but metal harpoon heads and axes.¹⁰ It seems safe to assume that the unsinkable dugouts expanded the range of travel and brought islands that were uninhabited or difficult of access within easier range and greatly increased the effectiveness of dugong and turtle hunting. The best evidence for this is provided by Scott Mitchell (1994: Chapter 14) who shows on the basis of archaeological work in the Cobourg Peninsula—Mountnorris Bay area of the Northern Territory that no dugong bones and few turtle remains are to be found in pre-Macassan middens in this area. He makes a strong case for what he calls a ‘sea change’ in Aboriginal economies in this area following access to the new technology which saw a ‘dramatic’ increase in the intensity with which large animals were exploited and a shift in settlement pattern with larger groups of co-residents and decreased mobility, as indicated by the size and structure of midden deposits.

Fred Rose has made a similar argument for Groote Eylandt. He claims that before acquiring the dugout canoe Groote Eylandters were unable to hunt dugong and turtle and he estimates that the population would have been only one-third of the 300–350 recorded by Tindale in the 1920s because of the lack of access to the resources of the sea (see Rose 1961:526–529).¹¹ This would seem to be overstating the impact because the bark canoes did enable the people to get out to the islands,

10 The most likely date based on documentary evidence is around 1720AD (see Macknight 1986) although radio carbon dates could be taken to suggest that regular contact started up to 800 years ago. Macknight, however, rejects these dates (see 1976:98).

11 Tindale (1925–6:110) makes the interesting estimate that ‘There are probably more than twenty-five big sailing canoes in the possession of the islanders in 1921–1922.

as the archaeological evidence makes clear (Clarke 1994). But it does seem likely that turtle and dugong featured less often in the diet prior to these innovations and it may have been that turtles were most commonly captured when they came onto the beach to lay their eggs.¹² It is significant that while Bryce Barker (see paper, this volume) has evidence of turtle bones in deposits on the Whitsunday Islands going back 6000 years, he did not find any dugong bones at all.¹³

The date of the adoption of the dugout canoe could have some bearing on native title especially where there are offshore islands some distance from the coast. Two issues are involved here: the period at which the area came under British sovereignty and the evidence for when people took up the dugout canoe.

Sovereignty over Australia was declared in three stages.¹⁴ The east coast of Australia westwards to 135 degrees east longitude (i.e. just east of Milingimbi) was taken up by the British in 1788; the area westwards to 129 degrees of east longitude in 1825 although the north coast around Fort Dundas-Cobourg Peninsula was taken over in 1824; and the rest of the continent between 1826 and 1831. Exactly how these declarations of sovereignty affect the sea is a complex legal issue. What is of interest here is how the documentation for the adoption of the dugout canoe correlates with these dates.

12 Douglas and Rebecca Bird describe this practice among Torres Strait Islanders (1997).

13 This could be because of how the animal is butchered and the bones treated. Certainly in some areas the remains of turtles and dugong should, in theory, be disposed of in the sea, in keeping with a need to keep key elements of land and sea associated things apart. The mutual antipathy between things of the land and things of the sea is best documented from Mornington Island (see Cawte 1974). However, if turtle bones could find their way into deposits there seems no good reason why dugong bones would not also.

14 There are complex legal issues involved here, especially in relationship to the sea which, apparently, may not have been resolved as yet. The purpose here is only to flag what might possibly emerge as an issue: the timing of the introduction of the dugout canoe.

Along the north coast of Australia the earliest recorded sightings of Aboriginal people actually in a dugout canoe seems to come from March 1818 when a dugout canoe was taken from a group of Aboriginal people near Goulburn Island (King 1827:67). King, (1827:138) however, also reports that the ‘principal rajah’ of one of the Macassan fleets whom he interviewed in Timor in 1818 told him that ‘Their small canoes are frequently stolen from them’ indicating that Aboriginal people had access to such canoes before this date, although for how long and in what numbers is unclear.

In this respect it is interesting that it seems from what Aboriginal people have said that they rarely made dugouts themselves until the Macassans stopped coming at the turn of the century (see Warner 1937:459; Thomson 1937 quoted in Baker 1988:181; Worsley 1954:61–62; Heath 1980:532–533; Baker 1988:181).¹⁵ According to Mitchell (1994:124) the first reference to Aboriginal manufacture of dugouts on the Cobourg Peninsula is to be found in Earl, who was writing in 1846. However, he goes on to say that such indigenous dugout manufacture ‘may not have been common at this time’.

Each Macassan prau brought between three and seven dugouts (*lepa-lepa*) with them (see Mitchell 1994:28) for getting around. They also brought large dugout canoes with one or two outriggers (*balolang*) for dredging trepang. At the end of the season it was the *lepa-lepa* canoes that were given to or traded with the Aboriginal people. Although Aboriginal people had access to iron axes long before the Macassans stopped coming it seems quite compatible with Aboriginal ideas about knowledge and rights to make things, that making dugout was largely left to the Macassans.¹⁶ Given that dugouts seem to have lasted up to

15 Mitchell (1994:124) discusses this matter in respect of the Cobourg Peninsula and says that the first reference to an Aboriginal manufacture of a dugout there is to be found in Earl writing in 1846. However, he goes on to say that such indigenous dugout manufacture ‘may not have been common at this time’.

16 Warner (1937:536) records a myth in which the figure identified with Arnhem Landers, a dog, refuses many items of material culture offered

three years on average (Baker's 1988:185–186) there was no need for Aboriginal people to make them themselves in view of the annual visits. However, it seems that as soon as the Macassans stopped coming, the Aboriginal people started making them along the northern coast.

Another interesting aspect of adoption of dugouts is that outside Cape York and the east coast of Australia (see Davidson 1935 for distribution), they were never fitted with outriggers. This is despite the fact that Warner reported that Macassans used outriggers on the Arnhem Land coast and some of the Aboriginal people he worked with knew about them. He put their failure to adopt them down to their conservatism (1937:459).

Aspects of the economic and cultural relationships with the sea

Surprisingly, given that much of the coast was among the most densely populated areas of the continent, systematic documentation of the economic usage of the sea is almost absent. There is only a single substantive quantitative study of use of the sea. This is Betty Meehan's superb ethnography (1982) based on work around the mouth of the Blyth River in Arnhem Land and focused on shellfish collecting but including a comprehensive range of subsistence data (1977). Prior to Meehan, Margaret McArthur (1960:95) had published some limited quantitative material on three populations in eastern Arnhem Land based on a total of 60 days of observation, as against Meehan's (1982:45) 334 days. Interestingly, neither of these studies makes even passing mention of marine tenure despite the fact that in Meehan's case she briefly covers

to him by the Macassans, including canoes, because, he says, 'I want you to be a Macassar man. I am a black man. If I get all these things I will become a white man and you will become a black man.' According to Mitchell (1994:124), the first reference to Aboriginal people manufacturing dug outs in the Cobourg Peninsula area of the Northern Territory is from Earl.

land tenure. Some, often quite fragmentary, quantitative material is available on turtle and dugong hunting mainly from the east coast and Torres Strait (see Bird and Bird 1997 for particularly rich data; Bradley 1997; Johannes and MacFarlane 1991; Neitschmann 1985; Smith 1988). Beyond this there appears to be no other substantial quantitative information.

There is, however, an enormously rich archaeological literature dealing with coastal economies that is too large to consider here (but see Bowdler 1982) that supplies irrefutable evidence of the longterm economic significance of the sea. Suffice it to say that it goes to the earliest periods where evidence has not been inundated by sea rises. Of most interest here is the widespread documentation of fish traps in the sea around the continent (although absent from some areas such as in the Sand-Beach Region) and the all pervasive shell middens and less common shell mounds. The latter two manifestations of sea use are important because they represent congealed female labour and stand as enduring monuments to women's intensive involvement with the sea which can be easily overlooked because it is largely in the intertidal zone (see Meehan 1982).

Another important aspect of the use of the sea especially along the north coast of Australia was for producing commodities for exchange. In this respect it is clear that Aboriginal people collected materials such as pearl and turtle shell *on their own initiative* for exchange with Europeans and/or Macassans. Brierly (quoted in Mitchell 1994:98) makes this quite clear with his comment that Aboriginal people kept pearl shell hidden from Europeans because they preferred to trade it with Macassans. Another reference to the independent collection of sea produce for trade is from Alfred Searcy, the Sub-Collector of Customs at Darwin from 1882–1896, (1909:32–3) who reports that:

The natives [of the Arnhem Land coast] collected the pearls during the absence of the Malays for whom they saved them and received in exchange grog and tobacco. On all the outlying reefs at low-water pearl-shell could always be procured....

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The Malays took away immense quantities of tortoise shell which was also collected by the natives.

Earl commented in 1846 on the contrast between the Aboriginal people of the Cobourg area and other Aboriginal people in terms of their 'progress' towards commerce:

... it is upon the northern coasts, where aborigines have long held intercourse with a people not greatly superior to themselves ...[that] They have here made the first step towards an improved condition. They have acquired the rudiments of commerce, and although the cultivation on the soil has not yet been attempted, they have learned to collect the natural productions of the country, with the view to exchanging them for food of a superior quality to that which their own land affords. A considerable number have paid one or more visits to Macassar, residing there for months together, which has familiarized them with the language and manners of the people of that country, and may probably lead to a closer intercourse, should the Macassars establish themselves upon the coast (Earl 1846:118)

Aboriginal people also sold their labour to the Macassans and were sometimes paid in canoes (e.g. Macgillivray 1852:147). It is much less clear whether, at any time, Macassans felt the need to pay Aboriginal people for the right to work the trepang or pearlshell beds in recognition of their ownership rights in the sea.

Indigenous interest in the sea encompasses a great deal more than subsistence, as the anthropological literature makes clear. While this literature is silent about marine tenure until the 1980s, it records rocks, reefs and sandbanks out to sea as named places, some as sacred sites (e.g. Berndt 1964; Tindale 1962) and the existence of ancestral dreaming tracks crossing over water to Arnhem Land. Thus Paul Foelsche, a Darwin policeman, in 1881 records a female ancestral figure, Warramurragundji, coming from over the seas and much more recently Catherine and Ronald Berndt (1952) documented the Djangkawu cycle which follows the travel of two sisters across the seas of the Gulf of Carpentaria making a landfall in eastern Arnhem Land.

The social construction of the sea and seascapes is, as these papers show, complex and varied but in all areas there is not suprisingly a strong identification with the sea. This has been best documented by John Bradley in his paper here and more extensively in his thesis (1997; see also Peterson and Devitt 1997) In much of Arnhem Land life force comes from the sea in the form of fish and the souls of the dead migrate to island homes, off to the northeast, or in the case of the Tiwi to the smudge of land on the horizon to the south. On a grander scale everywhere there are foundation stories of human and non-human forces and beings fashioning the seascapes, creating islands, reefs, currents, deeps and imbuing these places and others beneath the sea or along the shore with great power. These powers, places, ancestral heroes and relationships are celebrated in myth, song, ceremonies, paintings and the practices of everyday life.

The real dangers and fears faced by sea users and coastal dwellers have cultural objectification in places that allow for the controlling or unleashing of storms, cyclones, waterspouts, winds, rains and, more rarely, even more powerful catastrophic forces (e.g. see Peterson and Tonkinson 1979; Peterson and Devitt 1997). Commonly, ancestors are thought to control access to sea resources (e.g. see Cooke and Armstrong, and Rigsby and Chase, this volume) such that people fishing or hunting for the first time in an area need to be introduced to them by an owner of the sea estate or run the risk of no success. Elsewhere the hunter and the hunted are understood to be in a complex symbiosis where they need each other (see Bradley this volume).

Marine tenure and native title

Ethnographically speaking, the fact that much recent work on tenure has been carried out for sea closures and native title applications means there has been a pervasiveness of legal discourse in the ethnography of marine tenureship just as there has recently been for land tenure. This tends to alienate Aboriginal people from their own experience

and practice at the same time as it makes those experiences and practices recognisable by the state. Thus the above account of the behaviour expected of people travelling at sea, which is the specific cultural form that the expression of ownership rights takes, is translated into rules and concepts of boundedness. Legal requirements have another, more positive, consequence which is to concentrate attention on ethnographically complex issues that might otherwise go unexamined.

Although no applications for the recognition of native title have yet been finalised some of the legal parameters are now becoming clearer as a result of legal prosecutions. So far the two most relevant deal with men prosecuted for breach of fisheries regulations.

The only extended discussion of the legal issues involved in demonstrating native title in the sea has been provided by Mr Justice Kirby in his judgement in the appeal of the *Mason v Tritton* case heard in March 1994 in the NSW Supreme Court (delivered in August 1994), the background to which is provided by Scott Cane. This case dealt with a man arrested on the South Coast of NSW for having more than the prescribed number of abalone in his possession. Mason's defence was that he was exercising his native title right to fish and therefore outside the scope of the fisheries regulations. Mason lost his case. The reasons for this are discussed by Cane but they were technical so that the nature of his claimed right was never tested.

Kirby's judgement, however, provides a useful discussion of issues involved with rights in the sea, particularly the issue of the 'right to fish' and the nature of the evidence required to prove native title. Formally, these requirements are the same for land and sea. Mr Justice Kirby outlines four requirements. The evidence must be sufficient to demonstrate:

1. That traditional laws and customs extending to the right to fish were exercised by an indigenous community immediately before the Crown claimed sovereignty over the Territory (this date varies across the continent—see above)
2. That the person seeking recognition of their native title is an indigenous person and is a biological descendant of that original indigenous community or group

3. That the person and their immediate descendants have, subject to the general propositions outlined above, continued, uninterrupted, to observe the relevant traditional laws and customs and
4. That the person's activities or conduct in fishing is an exercise of those traditional laws and customs (Kirby 1994:21–22).

Kirby (1994:31) comments that a person seeking recognition of their native title rights 'faces a difficult evidentiary task'. Just how difficult has yet to become apparent and clearly will vary in different parts of the continent as the papers here show. The most difficult ethnographic task is, in situations like those discussed by Bryce Barker and Scott Cane, to find the language to describe the system of traditional laws and customs regulating fishing, where they still exist, and to define the group that holds these laws and customs.

Another relevant fishing case relates to three Western Australian Aboriginal men in the Derschaw case, who also relied on a 'native title rights' defence when prosecuted in 1993 for netting 66 mullet in Six Mile creek near Port Headland against regulations. Although they too lost their case it does not necessarily mean that proof of native title is extremely difficult (see Kennedy 1996:31–2 and Derschaw et al 1996 for a discussion of this case).

A central issue raised by implication in the Mason case is one that is clearly going to recur. Is there a native title right which is commercial in nature: can people sell the products of the sea (or land for that matter) obtained under a native title right? Does the existence of bartering between families in the past, trading with the Macassans or across the Torres Strait, provided the basis, given an already accepted legal notion of tradition as dynamic and evolving, for commercial exchange in the present (see Kilduff and Lofgren 1996:16. They seem quite confident that it does).

The central issue raised by the Derschaw case, where the fish were to be consumed by some of the 300 people attending a funeral, is whether fishing regulations can limit a native title right to fish. Lachlan Kennedy (1996:32) is of the opinion that they do not, relying on s211 of the Native Title Act 1993, which had not been enacted at the time

Derschaw was charged. Section 211 provides that where the enjoyment of native title rights involves hunting, fishing, gathering, or a cultural or spiritual activity, and there is a law which prohibits persons from fishing other than in accordance with a licence or permit, the need for a licence or permit does not apply to native title holders when fishing to satisfy their personal, domestic or non-commercial community needs and they are exercising their native title rights (Kennedy 1996:32). In this Kennedy has been proved correct, as the decision of October 1996 in the case of *Eaton v Yanner* in the Mt Isa Magistrate's Court indicates. Prosecuted under the *Queensland Fauna Conservation Act* for taking crocodiles for food, Murandoo Yanner was acquitted on the grounds that he was exercising his native title rights.

The papers

The first paper is by Bruce Rigsby and provides a survey of property theory considering two general theories for the emergence of property rights: the social contractarian argument that they arise as an alternative to constant conflict over the use of land and resources; and the conventional economists' position that property rights emerge in land and resources when the gains from assigning property rights outweigh the costs of foregoing them. He then considers the character of property rights and provides a useful checklist of rights that will help fieldworkers. He concludes with a consideration of tenure types, drawing attention to the term 'common property', which has been used somewhat confusingly to signify both joint communal property and open-access situations.

Nonie Sharp documents the existence of customary marine tenures in Europe, some of which survived beyond the seventeenth century, when the consolidation of state power led to the concept of territorial seas and absorption of these tenures as if they never existed. Like other authors Sharp asks why it has taken anthropologists and others so long to recognise and acknowledge these customary systems of marine

tenure. Obviously a complex of factors was involved, including the need to keep other nations at a distance and, in the European context, the effects of the enclosure of the commons movement which meant that ordinary people became more committed to open access to the coast and the seas.

Scott Cane discusses the situation of Aboriginal people on the south coast of NSW where people have been interacting with Europeans since first settlement. His paper relates to the research he carried out for the *Mason v Tritton* case in which an Aboriginal man was prosecuted for having too many abalone in his possession and sought to advance as his defence that he was exercising his native title right to fish. The paper raises two key issues: the first relates to the harvesting of sea resources for sale rather than use; the second to what way, if any, the fishing practices of Aboriginal people in the settled parts of Australia differ from those of many non-indigenous Australians who have fished all their lives.

Both Bryce Barker and Patrick Sullivan, in different ways, also deal with people like those on the south coast of NSW whose systems of customary marine tenure have undergone radical transformation under the impact of European arrival.

Bryce Barker, an archaeologist, is able to show that the people with traditional interests in the Whitsunday Islands have a long history of sea use going back 6000 years. This usage has continued down to the present day but it is not now, if it ever was, associated with any elaborate system of sea tenure. It involves simply the collective use of the region by a group of interrelated families who see themselves as holding the area communally. What chance does such a long history of use have of recognition, he asks, when it is not characterised by any developed system of customs and traditions.

Patrick Sullivan describes the system of tenure among the Yawuru in the Broome area of Western Australia. He argues that the tenure-holding unit is best characterised as the 'society'. He describes a complex system of relationships to sea and land under which people have attachment to localised areas on the basis of conception, birth, link through

either parent or long knowledge and association and, at the same time, enjoy rights in the combined land and water of the wider 'society' which, following Berndt, he defines as the widest functional grouping characterised by interactions for ceremonies. This is not a grouping that excludes others from entry onto land and sea but one that does exclude others from the right of possession. Thus in the system that Sullivan describes the sea is held as communal property among all members of the society, rather than some much smaller group, and this he believes to have been a long-standing arrangement which is partly accounted for by the ecology of both the land and sea elements of their country.

Memmott and Trigger's account of tenure in the central part of the Gulf of Carpentaria presents a radical contrast to the kind of system reported by Sullivan. Formally the patrilineal clan-based land system is extended into the sea and there is well-defined boundary location close to the coast in the intertidal zone but fuzzier boundaries further out to sea. However, on land as in the sea, people have the expectation of ready access to the estates of their grandparents in many cases. Rather unusually for Australia, there is a term for the senior male of a clan, *dulmada*, in whom some authority lies in respect of regulating the use of the resource of all parts of the estate. Along the coast and on reefs out at sea there are important places which can be used either to create storms or to make them abate. This seems to be a common feature in many areas: a range of sites that can create heavy rain, strong wind, waterspouts or cyclones or to cause these events to disappear.

Kingsley Palmer discusses the system of tenure in the Groote Eylandt area of the Gulf of Carpentaria which is broadly similar to that described by Memmott and Trigger. While land-based interests extend out into the sea, movement across the sea seems less regulated, although permission is required. The seascape is structured around the travels of mythological beings responsible for the creation of many places, some of which are dangerous.

John Bradley writes about the area immediately to the west of that discussed by Memmott and Trigger. He considers the significance of the sea in the constitution of Yanyuwa identity, looking at the attachment

as expressed in the language and in song. He shows how the same terminology used for land-based features is applied to the seabed confirming a widespread interest in it. A complex symbiotic relationship, expressed as kinship, exists between animals and their environment, as well as between sea animals and their hunters, who are seen as mutually beneficial to each other, such that if hunters do not hunt dugong, their numbers will decrease. Likewise, if sea birds do not hunt fish, then both fish and birds will suffer.

Geoffrey Bagshaw provides a case study from the Crocodile Island region of the north coast of Arnhem Land. The unique feature of this study is that unlike elsewhere the system of tenure in the sea in this area is not an extension of the system found on the adjacent land. Here, where there is a patrilineal moiety system, the muddy waters (*gapu dhulway*) adjacent to the coast are said to be affiliated with one moiety, regardless of the moiety affiliation of the adjacent land and the clear deep blue water (*gapu marumba*) further out to sea is affiliated with the other moiety. It is interesting, however, that the seabed appears to have the moiety affiliation of the land to which it is adjacent.

This contrast between the two kinds of salt water is similar to the one that the Tsimshianic-speaking peoples (the Southern Tsimshian, Coast Tsimshian, Nishga and Gitksan) of the northern coast and hinterland of British Columbia draw between *laxmo 'on* 'the inshore, sheltered salt channels and estuaries' and *laxsiilda* 'the open, blue sea'. However, there is no evidence that the two kinds of salt water articulate with the interregional phratry /moiety system found in the region.

Peter Cooke and Gowan Armstrong describe the situation about the Liverpool River region of the Arnhem Land Coast. Here there is a primary emphasis on patrilineal rights but a complex of other rights and interests allow people access to a range of sea country. They also describe an interesting ritualised fishing expedition, *Lurra*, held by the Kunabidji to persuade the ancestors to be generous in allowing people to make good catches. Having participated in the *Lurra* men could harvest seabird eggs on Haul Round Island in the portion of the Island

allocated to their clan, the football oval-sized island being divided up between the clans on the opposite mainland.

Bruce Rigsby and Athol Chase deal with the life of the Sandbeach People of the east coast of Cape York, a region where some of the most maritime-oriented Aboriginal people are found. Their maritime orientation was first described by Donald Thomson in the 1930s and it has, of course, since undergone the kind of change common around Australia. The pre-European technology of dugout canoes with outriggers has been replaced by aluminium dinghies and fibreglass boats powered by outboards. But the sea, and land, as property still plays a central part in economic and social life and in social relations.

Michael Southon discusses the Kauareg people's traditional knowledge of the seas around the Prince of Wales and neighbouring islands in the southern part of the Torres Strait. Central to their marine tenure is the mythological figure Waubin, who created many features on and around the islands.

Finally, Sandra Pannell provides a provocative postmodern challenge to the idea of CMT and indeed the kinds of ethnographically based studies that make up this volume. She argues that the term customary marine tenure has come to be so all-embracing that it is in danger of becoming meaningless and of producing the very categories and beliefs it is said to be a study of. Rather than an empirical reality, it is coming to stand for an endangered reality, for a system of tenure that is community-based, traditional, caring, conservative, sustainable, sensitive, primitive and associated with the past as against the self-interested open-access systems of European ideas about the sea.

Terminology

The legal definition of the seaward boundaries of the states and territories and of the various categories of sea distinguished in legislation is complex. Any legal or other action for which these definitions are

relevant requires professional legal advice but it seems useful to provide a basic guide to the key terms used to refer to the sea.

It is significant and surprising that the issues surrounding sovereignty in the sea around Australia were not confirmed by legislation until the 1970s with the passing of the *Seas and Submerged Lands Act 1973*, (Cth. See Meyers et al 1996:39). In February 1983, the inner limits of the Australian territorial sea were defined as required by Section 7 of this Act. The greater part of this baseline is the low water line along the coast, which is defined as the ‘Lowest Astronomical Tide, which is the lowest level which can be predicted to occur under average meteorological conditions’ (Australia 1988:3). The rest of the baseline consists of straight lines as follows:

1. Lines across the mouths of rivers which flow directly into the sea.
2. Bay-closing lines to enclose certain bays not more than 24 nautical miles wide at their mouths; and
3. Straight baselines to enclose waters where the coastline is deeply indented and cut into, or where there is a fringe of islands along the coast in its immediate vicinity (Australia 1988:3).
4. Four bays of historical significance in South Australia (Anxious, Encounter, Lacedpede and Rivoli).

From this territorial sea baseline the following categories of waters are distinguished:

Internal waters: waters between the baseline and the shore. These waters are not to be confused with ‘inland’ waters which are those whose connection is with the land although they may be open to the sea. These waters are controlled by the states and territories.

Coastal waters: waters between the baseline and three nautical miles out to sea. These have been vested in the states and territories since 1979.

Territorial sea: waters between the baseline and twelve nautical miles out to sea. The first three nautical miles are the Coastal Waters controlled by the states and territories and the other nine nautical miles are controlled by the Commonwealth.

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Exclusive Economic Zone: this runs from the 12 nautical miles line to 200 nautical miles out to sea from the territorial sea baseline.

The territorial sea baseline is a baseline under international law and does not represent state boundaries which, are generally further landward of the baselines (Australia 1988:4).

The distribution of control of the various fisheries between state and Commonwealth is also complicated. For example, while most fisheries are controlled by the states and territories within their waters some may be controlled by the Commonwealth.

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