

## 2

# A survey of property theory and tenure types

*Bruce Rigsby*

[I]f kinship be regarded as the social instrument that structuralizes the fundamental roles which individuals play toward each other as persons, property as a social institution is the instrument that structuralizes the roles which individuals play in the complex system of human relations that prevail in regard to the ownership of valuable objects, whether material or not (Hallowell 1955[1943]:246).

[P]roperty is always a contested concept ... [and it] changes over time (Radin 1993:119).

In the evolutionary anthropology of the past century and its successors up into the 1950s, property was a notable concept, but with the rise of new interests in and concerns with ecology and evolution, property and tenure (or ownership) were by and large replaced by terms such as territoriality, range and use<sup>1</sup> in anthropological studies of people/

---

1 Barnard and Spencer (1996:625) wrote:  
*territoriality* A slightly ambiguous term which may refer either to cultural mechanisms to define or defend territory or to observed behaviour indicating a preference for remaining within a given territory. The term is in common use in archaeology and social anthropology (especially in reference to hunter-gatherers), but often has ethological connotations (emphasis in original). Some early notable references to works that exemplify the shift to ecological and evolutionary approaches are Damas (1969a, 1969b) and Lee and De Vore (1968). Amongst Australianists, Peterson (1975, 1976, 1986 plus other items) and Hunn and Williams (1982) are significant. Williams (1997) includes a section on 'Territory/Territoriality' that surveys the broader literature, including contributions

land relations. In our country, following the 1992 Mabo No. 2 decision and the federal Native Title Act 1993, Aboriginal and Torres Strait Islander people's rights and interests in land under their traditional law and custom are recognisable by the common law where they have not been extinguished by acts of the Crown or other adverse acts. This sea change in the law respecting indigenous land rights has implications for anthropological work in native title and other land-related actions. We need to refamiliarise ourselves with the theory and concepts of property and ownership, but at the same time, we should continue to study territoriality, range and use.

Keesing (1981:67–75, 212, 213) distinguished cultural structure from social structure in the same way that Goodenough (1969:329–330) earlier differentiated cultural anthropology from social anthropology. The first is a system of organised knowledge and rules or principles held by social actors which we infer from our observations of their behaviour (including their speech and discourse), while the second is a system of patterned regularities we can infer from the same kinds of observations. In other words, we observe what people do and say, and we can model this either as a cultural system of organised knowledge and rules for action or behaviour or as a social system of patterned regularities of action or behaviour. Both perspectives are important for us as we seek to analyse and describe how people own and use land. If we take seriously the requirements that Mabo No. 2 and the *Native Title Act 1993* established, then we anthropologists and our clients must present to native title tribunals and federal courts evidence of fact and expert opinion that there is an ongoing system of traditional laws and customs

---

by anthropologists. We suggest that it would be useful to explore the relationships amongst terms arranged by proportional analogy such that:

property	:	estate	:	possession	:	occupancy	etc.
territoriality	:	range	:	defence	:	use	etc.

One might speculate that the linkage of the institution of property with bourgeois liberal economic and political theory was also related to anthropologists' shift to evolutionary and ecological approaches.

that connects people to their land and waters. This includes a system of tenure, as well as a system of use. Customary marine tenure<sup>2</sup> adds to the challenge that the study of property and the traditional Aboriginal ownership of land pose for us. Cordell (1993:163) observed that 'land and marine tenure may be divisible for the sake of analysis, but from indigenous coastal peoples' perspectives[,] they are indivisible'. The point is important not only as a representation of indigenous beliefs and values, but also as a statement that terrestrial and marine tenure should be analysed and described in a single account, using the same kinds of terms and relations amongst them.

## Tenure, property rights and objects of property

There is a wider body of theory that we can draw upon to better understand Aboriginal tenure systems.<sup>3</sup> The concepts of tenure (or ownership)

---

2 Any serious consideration of customary marine tenure in Australia must refer to the work of John Cordell. It was Cordell's (1989) excellent collection of papers on sea tenure that helped to frame a general field for study, and it is his (Cordell 1992, 1993) less inclusive term 'customary marine tenure' that has captured a wider audience. Hviding (1996:388–389) noted that he introduced the term 'customary marine tenure' in 1987, published as Hviding (1989), and he provided a brief discussion of his choice of wording. Hviding (1996) is a superlative monograph, comprehensive in its coverage and elegantly written. We sometimes abbreviate customary marine tenure to CMT here.

3 There is an extensive literature on property which includes earlier writers such as Locke, Hume, Proudhon and Bentham and extends to the present day (e.g. Munzer 1990; Radin 1993; Rose 1994). In another context, I (Rigsby 1997:31–34) sought to gain a perspective on the anthropological literature that American anthropologists might have drawn on to analyse and describe Indian systems of land tenure during the period the Indian Claims Commission operated, and this led me to read more widely in the property literature. Up until about 1955, anthropology texts often included chapters or sections on property (e.g. Boas 1938; Herskovits 1948, 1952[1940]; Lowie 1920, 1940, 1948) and the

and property are at its centre. Tenure and property always involve three terms; in symbolic logic, we say that the predicate 'own' takes three arguments. We can formalise them in the proposition 'A owns B as against C', as did Brewer and Staves (1995:3); Hallowell (1955[1943]:239) and Paul (1987:193). This contrasts with the simpler 'A owns B', as in popular discourse and in Snare (1972:200), who spoke of 'the special relationship which may hold between a person and a physical object called "owning"'.<sup>4</sup>

Tenure or ownership is the relationship of A to B as against C, while property, strictly speaking, is the rights that A has in B, the thing that A owns as against C. Hallowell (1955[1943]:239) noted that the term 'property' has two common senses: it signifies both the object that is owned, as well the rights that are exercised over it.<sup>5</sup> He argued, citing economists and lawyers, that the term should be restricted to the first sense. We accept his view and will use 'object of property' for the second sense (see also Rose 1994:253, 263; Waldron 1988:30). It also bears noting that B need not in fact be a physical object, but can be incorporeal knowledge, for example, see Lowie (1929).

---

wider social science literature included contributions from anthropologists (e.g. Lowie 1933). By and large, these anthropological writings were more descriptive, historical and encyclopaedic than analytical, but Radcliffe-Brown (1952[1935]) and Hallowell (1955[1943]) are exceptions. Anthropologists have been conspicuously absent from the more recent literature, and economists, historians, lawyers, philosophers and political scientists have been prominent contributors. In all its years, the Annual Review of Anthropology has not run a general overview article on land tenure, although Shipton (1994) surveyed the literature on African land tenure.

4 However, all Snare's rules make reference to persons (C) other than A. Hann (1996:454) observed that 'most anthropologists would now agree that rights over things are better understood as rights between people'. Munzer (1994:15ff) contrasts the 'sophisticated' relational view of property with the 'popular' view of property as things.

5 See also the discussion in Williams (1986:202), which cites Hohfeld (1964), but does not privilege one sense over the other.

The inclusion of two personal (or group) arguments (namely, A and C) makes the owning relationship a social one. There is no property in nature apart from humans. As Demsetz (1967:346) expressed it:

In the world of Robinson Crusoe property rights play no role. Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society. An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specification of his rights.

The property relationship is also a cultural phenomenon, i.e. it is based on symbolism, the arbitrary assignment of meaning. Marshall Sahlins (1996:1) recently reminded us that Leslie White used to say that an ape could not recognise the difference between holy water and distilled water for there is no chemical difference, only a symbolic one. Snare (1972:200) speculated that a Martian would understand little of our daily social life if he did not comprehend that much action makes sense only in the context of the property institution:

For example, he would completely miss what we are doing when we sell an automobile or give a gift or steal an apple. After all, a stolen apple doesn't *look* any different from any other apple.

The triadic formulation of tenure and property relationships also recognises the insight encapsulated in the conventional definition of rights *in rem* as rights which A holds in B 'as against the world' (Radcliffe-Brown 1952[1935]:33; Munzer 1990:31; Rose 1994:271). The phrase 'as against the world' not only quantifies the C argument, but in so doing, it introduces the condition that ownership implies the right to exclude others from possession, occupation and use and enjoyment of the object of property, for example, land (see Munzer 1990:89).

Common law courts and tribunals in land rights cases here and overseas have generally insisted on evidence that a claimant group has exercised its right to exclude others from its land, i.e. the right of exclusion is a *sine qua non* of ownership. In its absence, there is no ownership—there is no property.<sup>6</sup>

However, the triadic formulation of tenure and property relationships remains incomplete as formulated because it fails to note that they exist only in the context of wider cultural and social systems which have internal and external dominion<sup>7</sup> dimensions. It fails to note that the A and C parties constitute a polity, that is, a rule or norm-generating and—maintaining community, and it fails to note that the set of parties in C can generally be partitioned into those who are members of the polity and those who are not, for example citizens and residents vs foreigners, kin vs strangers, us vs them, etc. The quantification of C as ‘as against the world’ has the same defect.

In the first respect, property relationships exist as a subset of the social relationships in a polity, and its members customarily and conventionally acknowledge and observe one another’s property rights. Phrased another way, members of a polity hold beneficial or proximate titles (Sutton 1996a) in land and other objects of property. The polity itself, however, exercises dominion internally, that is, it sets the parameters of tenure and title.<sup>8</sup> For example, in state-based polities, the

---

6 Several writers (Williams 1982; McCay 1987) have commented on the difficulty of getting evidence for one indigenous group excluding others because public ideology stresses sharing and generosity. See below for further discussion of the right to exclude.

7 Dominion is the aspect of sovereignty that polities exercise with respect to the ownership of land and waters in their territories. In earlier discourse, dominion was contrasted with sovereignty. The two terms respectively translate the Latin *dominium* and *imperium*, from Roman law and jurisprudence. Contemporary political thought sees dominion related to sovereignty as part to whole, not as a coordinate function of a polity.

8 Walker (1980:1221) defined ‘title’ as ‘[t]he legal connection between a person and a right constituted by some act or event having legal significance. Every right which a person has attaches to him by virtue of

state typically exercises rights of escheat, eminent domain, taxation and regulation. The latter may include zoning, building restrictions and requirements, etc. All these relate to its holding of the radical or underlying title to its territory. In classical and contemporary Aboriginal Australia, a non-state-organised polity, the leading men and elders of a region exercise the underlying title by mutually confirming one another's group proximate titles and by dealing with problematic cases, for example where a group dies out and/or where succession, boundaries, divided rights and the like are contested and disputed (Sutton 1996a).

In the second respect, polities have external relations with other polities, for example, state-based polities regulate whether and how non-citizens may hold property rights in their territories. In the common law countries, the courts have consistently held over the past few centuries that only the state (e.g. the Crown in Commonwealth countries) can acquire rights in land recognisable by its law in other territories. Only a state can acquire radical title to the territory (or a part of it) of another polity. Private individuals cannot do so. But to return to the triadic formulation of tenure and property relationships, the point is that the members of a polity cannot expect to have their property rights automatically recognised and respected by members of another. Tenure systems, i.e. systems of property rights, always exist in an 'international' inter-polity context. During the colonisation of the New World and our own country, it was often the case that the members of the indigenous

---

some title, and rights of the same character, e.g. ownership of goods, may be vested in different persons by virtue of different kinds of titles, by making, by gifts, by purchase, by inheritance, and so on.' He also noted that '[i]n land law 'titles' or 'title deeds' denote those deeds which evidence a person's title to particular land, which require to be examined by a prospective buyer and which are transferred to him on completion of the purchase'. This definition seems incomplete for we generally speak of title with respect to some object of property to which rights and interests attach. Thus broadened, title as a legal connection can be used cross-culturally, but in its sense as a sign of that connection, we note that in societies that lack writing, title deeds may be manifested in speech, song, dance, artistic designs, etc.

non-state-based polities did not have their property rights recognised by settler members of the colonising state-based polities, or even by the colonising polity itself. Such was the case with the property rights of Aboriginal people in land and waters under their own traditional law and custom until the *Mabo No. 2* decision in June, 1992.

## The origins and functions of property

Property is universal, an institution found in all human societies (Smith 1985:404, 407–408), and property in land similarly is universal—see Hallowell (1955[1943]:242–244), who noted that the denial that hunter-gatherers and pastoralists own land was ‘linked with the pseudo-history of the social evolutionary theories of the nineteenth century’ and referred readers to Herskovits (1940) for evidence they own land. Hallowell (1955[1943]:249) concluded that one of the ‘primary contributions [of the institution of property] ... to a human social order and the security of the individual’ is that ‘individuals are secured against the necessity of being constantly on the alert to defend [valuable] objects [of property] from others by physical force alone’ (see also Rose 1994:296). This is because in human societies, we internalise norms and values with respect to property. Over and above the anticipation and fear that other owners will exercise force and commit violence against us, we are motivated not to trespass by the wider ‘moral, religious, or legal penalties’ that may operate if we do not do our duty. The institution of property probably has an evolutionary history like those of kinship<sup>9</sup>

---

9 See the opening quotation above from Hallowell (1955[1943]:246). He credited Bunzel (1938:340) for the insight of their parallelism. Smith (1985:404–406) argued that in the Old World, humans shifted from hunting and gathering to agriculture as climatic change, ‘overkill’ or whatever resulted in the ‘loss of the favoured easy prey [which] substantially increased the opportunity cost of hunting and gathering compared with agriculture’. He also suggested (p. 406) that ‘[a] good working hypothesis is that property rights and exchange predate the Agricultural Revolution’ and he argued this on the basis of the ethnographic evidence got from



and language that takes them back at least to the emergence of *Homo sapiens sapiens*. Phrased another way, we have always been territorial, like other contemporary hominoids, but when we became landowners, acquired kinfolk and began to speak modern-type language, we also became human.<sup>10</sup>

But if property is very old in our species, its specific objects nonetheless have shallower histories. It is a truism of our discipline that not all the plant and animal species and natural phenomena found in the environment of a particular society are recognised as resources and assigned value in its culture. No doubt many Aboriginal groups knew of the presence of gold in their countries before non-Aboriginal prospectors and miners invaded their lands, but there is no reason to believe that gold was the object of specific property rights and interests in the indigenous tenure systems as it later became. Similarly, Aboriginal people have probably owned and used the beach and littoral areas of their estates for millenia, but whether they owned and used the off-shore areas (especially the reefs and seagrass beds) where most dugongs and sea turtles are found is another question. This leads us to the question of what are the conditions under which particular things become objects of property.

In the history of thought on the origins of property (see Umbeck 1981:50–64), several kinds of theories were proposed. Much early Western thought (from the Greeks onward) regarded property as originating from God, so that property rights were considered to be ‘natural’ and people were obliged to respect them. The philosopher Locke argued in the 18th century that land and things became property only when humans invested their labour in their production, but a century earlier, Hobbes developed a social contract theory which survives in current theories. Hobbes’ *Leviathan* (1951 [1651]) situated the original contract

---

hunter-gatherers studied during the past hundred years.

10 Smith (1985:404) proposed that to be human means to use language, tools, organization, property rights and exchange, but that only exchange is unique to humans. We disagree and restrict language and property rights similarly.

squarely in human society and the acquisitive, maximising propensities of people. For Hobbes, the right each individual had to the use of his own physical power or labour was the only natural right. In the absence of any agreements, people must live in a continual state of 'warre' with their neighbors. 'It is consequent also to the same condition, that there be no propriety, no dominion, no mine and thine distinct; but only that to be every man's that he can get: and for so long as he can keep it' (Hobbes 1951[1651]:83–84, cited by Umbeck 1981:1, 51).

In *The Social Contract*, Rousseau (1938[1762]) took issue with Hobbes' view that 'Might makes right', but he contributed to helping to understand the costs associated with the original contract. He concluded that where resources have little or no economic value, a contract regulating their use would probably not be made. Rousseau (1938[1762]68–69, cited by Umbeck 1981:53) wrote:

Unfriendly and barren lands, where the product does not repay the labour, should remain desert and uncultivated, or peopled only by savages; lands where men's labour brings in no more than the exact minimum to subsistence should be inhabited by barbarous peoples: in all such places all polity is impossible.

Umbeck (1981:53) thought it possible to assemble 'a fairly full theory of the creation of private property rights from the work of Hobbes and Rousseau'. Where there are no agreements, rights are determined by personal violence and force. In such situations, much potential income is lost that could be got by contracting with others to grant and recognise exclusive rights to property. However, the contract will be costly to form and enforce. Given the costs, the gains from contracting increase with the value of the resources to be made private property.

Umbeck (1981:53) also noted that the social contract theory fell into disfavour after Rousseau and for nearly two centuries the relationship among property rights, contract and the state was forgotten or ignored. He said that it was reintroduced into modern price theory by way of the literature on 'externalities'. Umbeck (1981:53–64) reviews the development of the externality concept from Pigou (1938) and Knight

(1924) through Coase (1960), Gordon (1954) and Cheung (1970, 1974) to Demsetz (1967).<sup>11</sup>

Demsetz (1967:350) proposed that property rights emerge, i.e. they are assigned, 'with the emergence of new or different beneficial and harmful effects'. Communities assign property rights 'when the gains of internalization become larger than the cost of internalization'. By 'internalization', Demsetz means that the beneficial and harmful effects of actions, such as hunting, fishing, mining, cutting timber, etc. then are brought squarely to bear on owners as they so act and exercise their property rights.<sup>12</sup>

The primary empirical case that Demsetz examined in support of his theory was that of the development of private property rights in land amongst Northeastern Algonkian peoples.<sup>13</sup> Originally, men

---

11 Common (1988:79) wrote: 'An external effect, or *externality*, exists when the activity of a firm or a household gives rise to consequences for other firms or households, which consequences are not intentional and do not figure in the costs or benefits associated with the activity as perceived by the originating firm or household. A good example of an externality is the release by a firm of polluting waste products in some environmental media.' See also Neher (1990:225) and Tisdell (1993:4–5).

12 See also Neher (1990:159) and Tisdell (1991:55). Anderson and Hill (1975) is in the same vein as Demsetz (1967).

13 See Leacock (1954) and Hickerson (1967), who argued that precontact Northeast Algonkians owned land communally and that the ownership of hunting territories by families and individuals developed as a result of their involvement in the fur trade. Rose (1994:26, 200, 287), Schmidt (1994:51–52) and Waldron (1988:7–9) recapitulated Demsetz' account. Gordon (1954:134–135) referred to Speck (1926) and Malinowski (1935) when he wrote that 'stable primitive cultures appear to have discovered the dangers of common-property tenure and to have developed measures [i.e. private property in land] to protect their resources'. Speck was an early advocate of the view that Northeast Algonkian family hunting territories were precontact. Berkes' (1989b) chapter, 'Cooperation from the Perspective of Human Ecology' in Berkes (1989a) surveyed and analysed new empirical material on James Bay Cree hunting territories and he corrected and criticised Demsetz' (1967) analysis thoroughly.

hunted game primarily for food and the furs they required for their own use. There was no need to assess the impact of one's own actions on the stocks of game nor to assess the effects of others' hunting the same game on one's own chances. But with the advent of the fur trade, the exchange-value of furs increased greatly as also did the scale of hunting. It then became advantageous for hunters to husband and conserve fur-bearing animals by hunting over only a portion of their land each year in rotation and by excluding trespassers and punishing poachers. The assignment of property rights in specific territories was a response to the new conditions. They allowed a community to adjust to new cost-benefit possibilities where the costs of not assigning property rights had become greater than the costs of assigning them.<sup>14</sup>

Umbeck (1981) proposed a contractarian theory for the emergence and assignment of property rights in land. His primary empirical case was California for perhaps two decades from the discovery of gold in 1848. The United States acquired California from the Mexican Republic by treaty the same year, and the new military governor abolished Mexican law, which had regulated mining previously. The 200,000 or so miners who rushed into the territory encountered a situation where they were technically trespassers and there was no American law regulating access to minerals on public lands. The new state government did not commence activities until 1850 and did not fund a law enforcement operation for a few more years. But as Umbeck (1981:5) noted, '[y]et by 1850..., miners had organized into groups and had agreed upon explicit contracts in which exclusive and transferrable rights to land were assigned to individuals within a given mining area or district. By 1866 over 500 separate and distinct districts were formed, each with their own system of property rights'. He also observed that while the contracts varied in some respects, each 'explicitly enumerates the rights that each miner shall be allowed in choosing between alternative land uses and the amounts of land each miner can claim as his own property'.

Umbeck's social contract theory is grounded in the human capacity for violence and it attempts to identify situations where the cost

---

14 Smith (1975) is in the same vein.

of violence leads people to forego it and to enter into property rights arrangements with one another. He (1981:28) wrote:

For property rights to exist, some individuals must be able to exclude others from using or deriving income from a good. Ultimately, this ability to exclude depends on violence. Any contract in which individuals explicitly agree to assign and maintain exclusive rights will succeed or fail depending on the group's ability to use or threaten to use violence. The contract, if it is formed, must assign to each individual the exclusive rights to property equal in value to what the individual could get through personal violence. This distribution is predictable, given the relative abilities of individuals in violence and, [for example,] mining and the relative productivity of land. In order for the contract to be formed, ... [two] conditions are necessary: there must be economies of scale in violence, and there must be some advantage to being 'first.' These two conditions are not sufficient. The third condition, which is necessary and sufficient, is that there are positive costs of contracting, these costs must be less than the gains [of violence and not contracting].

Umbeck (1981:60–64) criticised Demsetz' account of the instituting of private property rights amongst Northeastern Algonkians in response to the fur trade, and he argued that his own contractarian theory was mutually exclusive with Demsetz' externality-based theory. Umbeck (1981:64) contrasted the two theories, and he concluded:

property rights do not emerge from nowhere. They are subject to individual choice. Because individuals in the real world have chosen not to assign property rights to regulate all possible margins of resource use, the decisions about resource use are not necessarily made outside the market. Rather, it is an indication that the market for property rights is not without costs. It is more economical not to assign rights to some resources and, in so doing, allow them to be used in ways different from private property. To observe a resource, the rights to which have never been assigned, and to label its use externality, is to label our ignorance of the rel-

## Customary marine tenure in Australia

evant constraints. To suggest ways to remedy this externality without studying the relevant constraints is to demonstrate our ignorance.

...Before any type of economic activity—Crusoe islands aside—can take place, there must be some type of contract specifying who has what rights to what resources. All individual production decisions... are constrained at many margins by contracts... Every time a good is exchanged, some type of contract is implied. The contract is the basic building block of economic activity. Only by understanding the contractual constraints under which each individual operates and the costs associated with new contractual arrangements will economics ever be able to explain the wide range of human behavior we observe every day.

No matter which of the theories—Demsetz' or Umbeck's—we opt for, both are relevant to customary marine tenure in Australia, for they lead us to believe that property rights in offshore sea country and its resources only developed when Aboriginal people got watercraft that made them accessible and when they acquired technology and techniques that made the hunting of dugongs and sea turtles on reefs and seagrass beds possible.<sup>15</sup> Similarly, property rights in bailershell, cone

---

15 It is generally accepted that the first colonisers (in the biogeographical sense) must have had seaworthy watercraft (perhaps rafts) to make the journey to Greater Australia successfully, but it is not clear that that tradition of making and using such watercraft continued without interruption to the present. With respect to dugout canoes, which make offshore waters, islands, etc. accessible, it is generally accepted that the Macassans brought dugouts to the Top End several centuries ago, and that the single- and double-outrigger technology found in Torres Strait and along the northeastern coast of our continent at the time of European contact derives ultimately from Melanesian sources. Some scholars believe that simple dugout technology (without outriggers) on the east coast, whatever its ultimate origins, dates back several millenia, while others consider the dugout-*cum*-outrigger complex to have arrived from Melanesia only in the past few centuries. Dugout canoes not infrequently drift in to the

shell, giant clams, mother-of-pearl shell and other reef resources would have arisen with new demand and with new technology and techniques to harvest them. Groups assigned property rights in the new resources when it became too costly not to do so, whether by way of reduced production or of increased intergroup violence.

## The character of property rights

Property rights are a subset of the rights<sup>16</sup> that members of a society (or polity or community) have and exercise, and one way to identify them is simply to list them. For example, A.M. Honore (1961; summarised by Becker 1977:18–19; see also Munzer (1990:22) and Waldron (1988:49)) proposed that the ‘full’ or ‘liberal’ concept of ownership included eleven kinds of rights, which are:

The right to possess—that is, to exclusive physical control of the thing owned. Where the thing cannot be possessed physically, due, for example, to its ‘non-corporeal’ nature, ‘possession’ may be understood metaphorically or simply as the right to exclude others from the use and other benefits of the thing.

---

east coast of Cape York Peninsula. In November, 1975, Athol Chase and I saw a small (less than two metres) single-outrigger canoe that had drifted onto the beach near our camp on the mainland near Cape Sidmouth. It was seaworthy and the children played about with it. In May, 1997, we saw another small single-outrigger canoe beached not far north of Cape Sidmouth, but it was holed or split. Chase saw larger (six metres or more) double outrigger canoes washed onto Night Island and the beach near the Pascoe River in the 1970s. Aboriginal people say that such canoes come from the Solomon Islands. It is unclear whether their ancestors first acquired dugouts with outriggers by constructing them from such models or whether Torres Strait Islanders introduced the complex and instructed people in their construction.

16 See Williams (1986:123–124, endnote 7.) for a good discussion of the notion of ‘right’.

## Customary marine tenure in Australia

The right to use—that is, to personal enjoyment and use of the thing as distinct from 3 and 4 below.

The right to manage—that is, to decide how and by whom a thing shall be used.

The right to the income—that is, to the benefits derived from the foregoing personal use of a thing and allowing others to use it.

The right to the capital—that is, the power to alienate the thing and to consume, waste, modify, or destroy it.

The right to security—that is, immunity from expropriation.

The power of transmissibility—that is, the power to devise or bequeath the thing.

The absence of term—that is, the indeterminate length of one's ownership rights.

The prohibition of harmful use—that is, one's duty to forbear from using the thing in certain ways harmful to others.

Liability to execution—that is, liability to have the thing taken away for repayment of a debt.

Residuary character—that is, the existence of rules governing the reversion of lapsed ownership rights.

Although Honore considered the total complement comprised full ownership in 'mature legal systems', he said that none was essential to ownership—even the right to possession could be restricted.

Scholars have generally considered that the right to exclude others from entry and use is criterial or diagnostic of property rights in land, but Hallowell (1955[1943]:239–240) observed some time ago that our Western view that exclusive possession and use are essential to the property relationship is 'only one specific constellation of property rights, a limiting case, as it were', and that absolute property rights are not found in any society. Sutton (1996a:9–14) recently examined the right of exclusion in indigenous Australian systems of land tenure. He noted (1996a:11) that acts of physical exclusion are rare, and he considered



that the right of exclusion has been overemphasised. He concluded (p. 14):

That such a right is in many cases qualified.

That such a right is only one aspect of the relevant exclusionary powers.

That exclusive possession is at core an exclusive right much more than it is right to exclude.

That even when it is a right to exclude, the most important things from which the possessors may exclude others are rights of identification with land, fundamental decision-making over land, and uses or alterations of land that cause permanent and significant depletion or destruction, rather than mere physical presence on the land.

Other have considered that the right to alienate (see Honore's right 5) is necessary, else there is no property. For example, Justice Blackburn wrote in the *Milirrpum* Decision, 'I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate' (cited by Williams 1986:199) However, this restriction overlooks and ignores the classical work of Maine<sup>17</sup> that communal landed property in some societies is inalienable and people acquire rights in it, not through purchase or inheritance, but through their gaining membership of the perduring corporation that owns it. As Williams (1986:91) noted, succession to land amongst the Yolngu was not well understood by anthropologists in 1970 nor was the topic developed clearly in evidence during the hearings. The insistence that the right to alienate is criterial to property is perhaps based upon the mistaken assumption that land is always a commodity (something that can be bought and sold) in a system of market exchange based upon contracts between buyers and sellers. But as we have just noted, real property existed before the emergence of markets for land in complex societies, and certainly it existed long before the emergence of capitalism.

In analysing and describing Aboriginal systems of tenure, the Honore listing is helpful to insure one has comprehensively listed the

---

<sup>17</sup> See footnote 33 below.

several kinds or property rights. Certainly, one must modify, reformulate and expand some of them, say, to note that owners have certain ceremonial rights in specific sites, that owners have the right to be asked for permission to enter and use country, etc. What is missing in Honore's listing are 'the right to state 'proper' (customary-lawful) possessive claims over land, [and] the right to speak for, on behalf of, or even authoritatively *about* the country and its content as cultural property (i.e. to represent it, in both senses)' (Sutton 1996a:12). These are universally found in Aboriginal tenure systems.

## Types of property right systems

Berkes<sup>18</sup> and Farvar (1989:9–10) and Tisdell and Roy (1996:4), resource and development economists, identified four ideal types of tenure systems ('property regimes')<sup>19</sup>. These are (we have slightly rephrased their definitions):

18 I came across the Berkes (1989a) volume only toward the end of my research and writing of this chapter and I have not had the opportunity to make as much use of it here as it merits. It includes papers by anthropologists, e.g. Acheson (1989) and Freeman (1989), and papers treating CMT, e.g. Acheson (1989), Baines (1989) and Ruddle (1989). I recommend the book as a significant work to readers on property. The journal *Marine Resource Economics* has also published articles bearing on CMT and common property issues, e.g. Ruddle (1988); Ruddle, Hviding and Johannes (1992); Yamamoto (1995) and Christy (1996).

19 Munzer (1990:25, 89, 92–93) contrasted private property with public property: 'The identification of the owners or right-holders facilitates additional terminology. If the owners are identifiable entities distinguishable from some larger group, there is *private property*. The most common example is individual private property, where an individual person is the owner—in severalty, as lawyers say. Other sorts of private property exist when the owners or right-holders are persons considered together, such as partnerships and co-tenancies, or are artificial entities that represent the financial interests of persons, such as corporations. Contrasted with private property are various sorts of *public property*. Here the owners are the state, city, community, or tribe. Some forms of ownership involve a

1. Private property, where rights are held by individuals and their corporate counterparts.
2. State property, where rights are held by the state.
3. Communal property (Latin *res communis* ‘common property’), where rights are held by a community of users.
4. Open-access property (Latin *res nullius* ‘no one’s property’), where access is free and open to all.

The term communal property has a long history. In the nineteenth century, anthropologists such as Morgan, as well as Marx and Engels, regarded the evolution of human society—and specifically, the emergence of capitalism—to have involved the replacement of communal property by private property. More recently, Teh and Dwyer (1992:1–2), an introductory property law text, also distinguished communal property from private property and noted that ‘[t]he general non-recognition of communal property in Anglo-Australian law is traceable to the growth of capitalism in western civilisations’. Demsetz (1967:354) defined ‘communal ownership’ as rights ‘which can be exercised by all members of a community’, and gave the example of the right to walk on a city footpath. The Mabo No. 2 decision did not use the term

---

mixture of private and public property rights.’ Waldron (1988:38–46) distinguished private, collective and common property, and he considered corporate property in contemporary market-based economies to be a ‘mutation of private property’ (pp. 57–59), but noted that it could also be a form of collective property too. Radin (1993:2, 11, 16–17, 104, 233) distinguished personal property from fungible property. The former is constitutive of personhood, and the latter is not. Radin (1993:233 n44) wrote: ‘If an object is fungible it is perfectly replaceable with money or other objects of its kind. If it is personal it has become bound up with the personhood of the holder and is no longer commensurate with money.’ Her distinction corresponds closely to the one that Carrier (1995:10) drew between possessions and commodities, respectively, and I believe, better characterises their differences. Carrier’s conceptualisation of terms and their interrelations misses the point that what we humans exchange are objects of property. One cannot properly exchange what one does not own or have property rights in.

communal property, but used a series of phrases that leave no doubt that the High Court believed that traditional Aboriginal rights and interests in land were such that it was communal property. The phrases used are 'communal rights and interests in land', 'communal native title', 'communal title', 'communal proprietary interest', 'communal usufructory occupation', 'communal occupation', 'communal lands', 'common law communal native title' and 'traditional communal title'.<sup>20</sup>

The relationship of communal property to the term common property bears some examination because the latter term is sometimes used to signify both common property and open-access property as defined above by Tisdell and Roy (1996). For this reason, Cordell (1989:6) was careful to distinguish sea tenure from 'common property, the catch-all notion invoked to categorize fishing, fishermen and particular management problems associated with fisheries'. He wrote (Cordell 1989:4) 'that the world's inshore seas, at least from the standpoint of many traditional fishing societies, may not or should not be thought of as common property—that is, in the sense of open access, a precondition for many Western legal and theoretical usages of the term'. Here Cordell alluded to the common property resource model that Hardin (1968) popularised in his well-known paper, 'The Tragedy of the Commons'.<sup>21</sup> Cordell (1992:35–36) later said that Hardin's and his sympathisers' model does not 'accurately portray fishermen's and indigenous people's attitudes and actions in using marine resources, scarce resources, and sea space, or to guide management of traditional economies'. Cordell (1993:162) further noted that 'CMT institutions are distinct from ... open-access commons or 'common pool' resources'.

In an endnote, Cordell (1989:22–23) expanded on the point:

There is still no consensus regarding the fisheries definitions, theories and models of common property advanced by econ-

---

20 We cite no specific passages here, but we searched the electronic text of the decision with our wordprocessor to assemble them.

21 Demsetz (1967), Gordon (1954) and Scott (1955) are in the same vein as Hardin (1968).

omists... Disagreement over terminology in part reflects a tendency to interchange and indiscriminately use 'common property,' the 'commons,' 'common pool,' 'communal,' 'public domain' and 'public good.' For example, Ciriacy-Wantrup and Bishop (1975) argue that common property rights refer to a condition in which a number of owners are coequal in their use rights, Others disagree, pointing out that [the existence of] use rights violate[s] the basic assumptions of the common property model: free and open access...

Thus, Cordell identified two distinct views of common property in resource and environmental economics. CMT fits within one of them 'as a special system of property rights within the framework of common property resource management problems' (Cordell 1992:13). CMT also exemplifies 'community-based or joint property' (Cordell 1992:19).<sup>22</sup>

Ciriacy-Wantrup and Bishop (1975), Quiggin (1986) and McCay (1989; 1987) wrote at greater length about the conflict between these two models of common property, and all expressed the view that the 'tragedy of the commons' or open-access regime misapplies the term property to situations where there is in fact no property.<sup>23</sup> McCay (1989:205) put it as 'what is everybody's is nobody's', while Ciriacy-Wantrup and Bishop (1975:713) phrased it as 'everybody's property is nobody's property'.<sup>24</sup> The open-access regime certainly does not fit the

---

22 See also Cordell (1992:2), where he notes that 'it is the quality of shared or joint tenure that sets CMT systems in question here apart from forms of state ownership or private property'.

23 The equation of open access situations with common property is conventional in the resource and development economic literature, e.g. see Common (1988:224), Neher (1990:5, 29, 51, 88–89, 225), Clark, Munro and Charles (1985:100), Tisdell (1991:36, 63–64, 107–121, 147) and Tisdell (1993:7, 12). See Christy (1996) for a critical overview of the current period in which property rights regimes are replacing open access conditions in fisheries around the world.

24 Neher (1990:88) also wrote, 'If all property were common property, all property would be everybody's property, and everybody's property would be nobody's property'.

situations of property rights that villagers had in the commons as we know them from English history. It may be empirically more applicable to situations where ‘resource raiders’ ignore indigenous property rights, as discussed by Ganter (1994) with respect to beche-de-mer, pearlshell, trochus and sandalwood in northeastern Australia. Tisdell and Roy (1996) disambiguated the two senses of common property, as did Berkes and Farvar (1989) before them, by separately designating them as ‘communal property’ and ‘open-access property’ (but as we have seen, some scholars regard the latter term as an oxymoron).

## Common property and joint property

The term common property also occurs in the common law tradition, where it contrasts particularly with joint property, but that tradition also uses modifying terms which describe how property rights are distributed over and amongst individuals and groups. It speaks of rights which are held jointly, in severalty, in common or in division.<sup>25</sup> This leads us

---

25 Rights in severalty are rights that an individual person holds to the exclusion of others. Where two (or more) persons hold rights, Radcliffe-Brown (1952[1935]:44–45) distinguished among rights in common (‘A and B have similar and equal rights over Z and these are such that the rights of A will not conflict with those of B’), joint rights (‘A and B (or any number of persons) exercise jointly certain rights over Z’) and rights in division (‘A has certain rights over Z and B has certain other definite rights’). We discuss rights in common and joint rights below. Radcliffe-Brown (1952[1935]:44) observes that rights in division ‘may be defined either by custom or by a specific contract, or agreement. An example is the relation of owner and tenant of a leased land or building’. Brewer and Staves (1995:17) refer to rights in division in seventeenth and eighteenth century England thus: ‘...It cannot be the case... that in this period[,] older, multiple-use rights to property were simply supplanted by a rise of absolute property rights [held by individuals]... In the seventeenth and eighteenth centuries, even interests in land were divided among owners and renters, mortgagors and mortgagees, owners with life estates and remaindermen, or owners with legal interests and owners with equitable

to review Stanner's (1969) unpublished paper, 'The Yirrkala Case: Some General Principles of Aboriginal Land-Holding'.<sup>26</sup> Stanner prepared the paper for the plaintiffs' lawyers as an attempt to reduce the traditional land tenure system to principles constructed with terms deriving from the Roman and common law traditions, but it was not submitted to the court. Amongst other things, Stanner discussed the distribution of property rights over and amongst individuals and groups. He (1969:2) wrote:

It is unquestionable that all the [A]boriginal peoples who have been studied adequately had a conception of land as property. The three ideas necessary to the conception demonstrably coexisted. That is, (a) an idea of ownership under right of title, (b) an idea of corollary right of possession, and (c) an idea of correlative or connected rights of occupation and use. There were also customary rules determining with whom rights properly lay and by whom they could be properly exercised.

In [A]boriginal understanding land was much more than property in our sense; ownership was more intrinsic; title, right and possession were embedded in different doctrines; and use and occupation were articulated into a highly distinctive body of social habits; but there was a sufficient coincidence between their underlying ideas and ours in relation to all these matters to justify the use of European terms, provided there are accompanying explanations.

The three ideas mentioned were at the foundation of [A]boriginal society insofar as it involved land. Taken together, they support an inference that there was a real if unverb-alized conception of 'estate' in land, and that there was a true

---

interests.'

26 I thank Nancy Williams for providing me with a copy of Stanner (1969) and for telling me a bit about its history. Williams (1986:35, 101–104, 141, 163–164, 202) used and cited Stanner (1969) extensively; Sharp (1996) did the same.

‘system’ of land-holding, occupation and usage in rational connection with the circumstances of aboriginal society.

Stanner (1969:3) noted that some anthropologists have tried explain the Aboriginal relationship of ownership between people and land by saying the people belonged to the land, rather than the land belonged to the people. He thought it to be a true statement, but ‘vague and mystical’. We believe the statement to be half-true as phrased.<sup>27</sup> Both clauses are indeed true, but they do not contrast as the *rather than*-complementiser signifies. Thus, it is true both that Aboriginal people belong to the land and that the land belongs to Aboriginal people. The predicate in the first clause signifies inalienable possession, the whole-to-part relationship. Inalienable possession is the relationship of a person’s body (the physical site of the self) to their head. Aboriginal people are part of their land because they incarnate spirit that comes from it. The predicate in the second clause signifies alienable possession, the socially and culturally constituted phenomenon of ownership. Alienable possession is the relationship of a headhunter to his severed trophy. Rephrased, we can say that Aboriginal people belong to the land and they own the

---

27 In an earlier piece, I (Rigsby 1993:147) attacked ‘the silly notion that ‘traditional Aboriginal wisdom is that the land owns the people who live on it’ (Kaufman 1992:38)’ for being ‘a romantic construction of Aboriginal people that is both untrue and politically harmful to their interests’. I quoted the late Jack Bruno’s Yir-Yoront text which translates closely as:

I am the owner of [this] country.

It’s my property.

They will never take away this our land.

They will not take it from us.

For we want to keep walking about in plenty of room.

I have also heard many Lamalama people assert that they own specific land and sea country. Having read and pondered Stanner’s statement, I have changed his analysis and understanding of the complex proposition it encodes and developed them further. See also pp. 200–201 on Sandbeach People’s religion below. Williams (1986:102, 199) provided other references to the view that the land owns Aboriginal people, that Aboriginal people belong to the land. Note also Davis (1989:39–40).



land, but not that the land owns them (except in a secondary metaphorical sense).

Stanner further elucidated the relationship between people and land by describing it as dual. That is, the relationship was at once *in animam* 'in spirit'<sup>28</sup> and *in rem* 'in a thing'. In other words, the relationship had both spiritual and material dimensions. The root<sup>29</sup> of Aboriginal title derived from the 'historic-genetic' relation of the owning group to particular land *in animam* (i.e. part-to-whole), and the group's *in rem* relationship (i.e. its ownership of the land) resulted from it and depended upon it. Stanner (1969:3) described this dual relation of ownership as a first fundamental axiom.

Stanner's second fundamental axiom was that 'the clearest, most unequivocal, most enduring and most perfect ownership-relation between persons and land' was that 'between a patrilineal descent group (clan) or similar group and a more or less definite tract or region or set

---

28 Stanner used the phrase *in animum*, but this was an error. He incorrectly selected the masculine noun *animus* 'intellect, judgement, courage, commitment', where he plainly intended the feminine noun *anima* 'soul, vital principle, life'. The preposition *in* governs the accusative case in such phrases, so that we purists must use 'rights *in animam*' with the feminine accusative singular form of the noun, not *in animum* with the masculine accusative singular form of another noun. Don Barrett, my Latinist colleague at The University of Queensland, enlightened me on these linguistic matters.

29 The 'root' of a title is the historical event which gave rise to it. There were no written title deeds to record, for example, that so-and-so acquired such-and-such land by purchase or grant of the Crown. Instead, Aboriginal people in the north know and tell how the Dreamings or Story-Beings fashioned specific landscapes and perhaps 'sat down' in a place to remain for all time. The root of their title derives from the specific creative acts of the ancestral beings during the Dreamtime or Story-Time and from the unbroken links of spirit that connect them, their deceased ancestors (called the 'Old People' on eastern Cape York Peninsula) and specific land. It is their spiritual relationship to land which gives rise to their *in rem* relationship to it.

of localities or places' (1969:3). We need not dwell on the point, but we note there has been extensive debate the past three decades or so over the character of owner groups in classical and contemporary Aboriginal social organisation. Whatever position one takes, one surely must recognise that significant property rights are vested in groups, but at the same time, people are linked to land and to one another through multiple, cross-cutting ties (Rumsey 1996).

Stanner's axioms rested upon fundamental postulates that Aboriginal people did not conceive to be open to question. Three postulates were:

Human life was indivisibly corporeal and spiritual because each person as corporeal being incarnated one or more spiritual elements 'which had entered or affected or become one with the embryo at or about the time of conception' (1969:4). These pre-existed conception and they persisted after death at least for a time. Importantly, these numinous beings came from a specific place or made themselves known at a specific place. This indissoluble connection of a person to their place of origin by 'a spiritual link externally manifest in land as an outward and visible sign' was the relation *in animam*.

The corporeal and spiritual elements were so indissoluble that each person 'was 'with' or 'of' a locality, or a locality was 'with' or 'of' him or her' (1969:4). Thus specific country or land was intrinsic to the identity of persons and owning groups.<sup>30</sup>

---

30 One can find much evidence for this around the country in the indigenous language patterns for clan names and for personal names which are constructed with place names. For example, Lamalama speakers call the Olkola-speaking clan who have Dog Story as their main totem, *Mbatorrarrbinh* 'People who have Dog [Story]', while they call certain of their close neighbours *Mbarimanggudinhma* 'People from Ngudinh [country]'. In the southern part of the Sandbeach Region—see chapter 12 below—significant members of a clan were sometimes named for important places in their estates. For example, Old Man Monkey Port Stewart was called *Aakurr Yintyingga* 'Yintjingga Country' after the indigenous name for the Port Stewart area, and Old Lady Emma Claremont was

Some empirical data are in order here. Sunlight Bassani explained to Rigsby (1995) that the land or ground around Port Stewart is part of his group, just the same as the trees, the animals, ‘anything you name’, shade, etc. ‘That’s our family’, he concluded. This is a clear statement that Lamalama people share spirit with their land. It also asserts that Lamalama people and their land are parts of a whole universe of social actors.

Each member of an owning group was related to their land *jointly* ‘with every other member of the group, without distinction of sex, age, status or any other criterion. The relation was truly joint, as distinct from common or several, in a sense closely analogous to the European conception of the ‘four unities’ of joint tenancy’ (Stanner 1969:4).<sup>31</sup>

In the common law tradition, the four unities criterial to joint ownership or tenancy are (a) title—each co-owner must acquire by virtue of the same instrument or act, (b) possession—each co-owner must be entitled to possession of the whole property, (c) interest—each co-owner must acquire the same interest, and (d) time—each co-owner must acquire the rights at the same time (Hardy Ivamy 1993:145; Martin 1990:220; Rutherford and Bone 1993:185–186; Walker 1980:667). Stanner (1969:4) noted that all these conditions were met, except that

---

called *Ngaachi Yalmarraka* ‘Yalmarraka Country’ after a major place at the mouth of Breakfast Creek. The former name is Uuk-Umpithamu and the latter is Umpila.

31 Note that Cordell (1992:2, 19) correctly identified CMT ownership as joint—see endnote 22—but in common law terms, the object of joint ownership is joint property, not common property. Driver (1961:244, 245, 252) also identified joint property as a major type amongst Native American peoples. Lowie (1929:557, 559) said that amongst the Hidatsa ‘children inherit the right of jointly buying proprietary rights from their own father’ and amongst the Nootka, ‘the lineage of eldest-born descendants virtually constitutes a joint-company as regards the relevant rights’. Also Hiatt (1962), Williams (1986) and Sharp (1996) speak of joint ownership of their land by Gidjingarli, Yolngu and Meriam people, respectively.

the unity of time in Aboriginal ownership 'extended to the unborn and the dead as well as the living'.

The common law tradition distinguishes joint ownership or tenancy from co-ownership or tenancy in common 'in that joint tenants have one interest in the whole, and no interest in any particular part', whereas '[t]enants in common have several and distinct interests in their respective parts which may be in unequal shares and for interests of unequal duration' (Burke 1977:2:1748). Tenants in common hold property by unity of possession because none of them knows their own individual part, but this is the only unity in the ownership because they may hold different kinds of interest, they may hold from different sources of title and their interests may vest in each at different times.<sup>32</sup>

Stanner (1969:8) later expanded his argument for joint ownership by noting that '[t]he estate could not be diminished by the deaths of any of the joint owners; it remained the undivided property of the survivors; it did not, in a strict sense, pass by 'inheritance' between generations but remained 'in' the dual spiritual-corporeal stream of life—certainly, no one could be 'disinherited'.<sup>33</sup> He also wrote 'that the rights were vested, not severally in individual persons, or in common between persons, but jointly in a particular kind of kinship group'(1969:9).

---

32 Rumsey (1996:4, 8, 9) speaks of 'rights-in-common', but his phrase seems to signify in an ordinary English way that people share the same interests, not that they have different interests.

33 This formulation built on the understanding of Maine (1931[1861]) that: 'Ancient law ... knew next to nothing of individuals. Property was held and transmitted not by private citizens but by corporations of blood relatives linked by descent in the male line and putatively descended from a common male ancestor. Corporate identity was perpetual; corporate property was undivided, unmalleable, and sometimes absolutely inalienable... Neither ethnology nor classical scholarship supported the view that human social life began on the basis of contracts between individuals. What they suggested, rather, was that society had evolved *towards* contract and private property from an earlier condition in which the rights of individuals were defined and protected on the basis of their status as members of corporate descent groups (Hiatt 1996:14).

A lawyer, we believe, would be unlikely to accept Stanner's qualification of the unity of time and would not accept his argument that traditional Aboriginal land tenure meets all the criteria for common law joint tenure. But of the forms of common law tenure, it most closely resembles joint tenure.

Stanner (1969:10) also noted that there might be a few areas of land in the Yirrkala region that were 'areas of commonalty' or 'box up' places. He thought these lay outside the clan estates and 'on the hunting ranges of merging or overlapping bands,' but they 'in no way threaten or qualify the clan estates.'

Here we believe that Stanner's analysis went offtrack when he spoke of 'areas of commonalty'. We know what he intended in ordinary English, but in legal terminology, we think it more accurate to regard 'Murri roads' and 'company land' (to use the Cape York Creole and Aboriginal English terms) again as the joint property of two or more owner groups and their members,<sup>34</sup> not as their common property.

To summarise this far, we have considered Stanner's arguments that Aboriginal property rights in land are held jointly, not in common, not in severalty (individually), and not in division. Becker (1977:25) also noted that:

When a thing is jointly owned in the full liberal sense, for example, any disposition of the thing by one person without the consent of the others is a violation of their rights of ownership—even if one has taken no more than one's share [but one's individual share is not known in joint ownership! BR]. Joint ownership means joint management, and more fundamentally, joint right to the capital.

In the Cliff Islands and Lakefield National Parks land claim transcripts, there is much evidence for joint Lamalama ownership of their estate, and we give just one bit of it here. When Rigsby examined Sunlight Bassani on the topic of whether he could sell or give away part of the

---

34 See also Hiatt (1962:279–280) on 'company' or joint ownership of land amongst the Gidjingarli.

## Customary marine tenure in Australia

Lamalama estate, he included in his reply:

If I'm going to sell him, if I say I'm going to sell it, I might get killed from somebody else, my family, 'What do you want to sell that country for? That's our country'. (dftT1808/fnlT1875)

This makes reference to the need to consult with other joint owners on matters of import, and thus it is evidence for joint ownership.<sup>35</sup>

Finally, Stanner (1969:8–9) spoke of 'several classes of less precise rights which lay with people who were not of the true joint owners' and he called such people 'secondary right-holders'. He distinguished amongst:

1. Wives who 'had virtually an unconditional right of residence on and occupation and use of their husbands' lands *in rem*'
2. Husbands who 'had a clear but probably less express right to visit, occupy and use his wife's clan lands.'
3. 'A woman's children [who] had an express right to visit, live on, occupy and use the lands of her patrilineal clan and in many cases they had as well some degree of right to use the lands *in anim[a]m*'.
4. Men and women who 'had acknowledged ritual duties ... involving persons or categories of persons in other clans', amongst other rights, had 'a right of entry into that clan's domains and, while there, to support from the resources of that clan.'
5. 'A somewhat undifferentiated general public right to limited visitation, occupation and use by the owners' consent'.

These certainly must be part of any adequate analysis and description of Aboriginal tenure systems. It is also clear that individuals and groups may sometimes transform secondary rights into primary property rights<sup>36</sup> over time in a variety of circumstances relating to succession, regencies and even land claim actions.

---

35 See also Williams (1886:80) on the need to consult within a Yolngu clan.

36 Williams (1986:175) preferred 'presumptive' and 'subsidiary' to primary and secondary, while Sutton (1997) spoke of 'transferrable' and 'transferred' rights.

## Conclusion

In this chapter, we surveyed property and tenure generally. We identified communal property as an ideal type of tenure system. We noted that the phrase ‘common property’ signifies two different situations amongst resource and environmental economists, while it signifies something else again in the common law tradition. One sense is that of communal property, which is the indigenous property regime attributed to Aboriginal people, and the second is that of open-access property. For its part, the common law distinguishes common property from joint property. We also reviewed Stanner’s argument that most Aboriginal property rights in land are held jointly, not in common, not in severalty (individually), and not in division.<sup>37</sup> We accept Stanner’s argument and the observations of other anthropologists regarding joint tenure in Aboriginal Australia, and we suggest that the communal property regime as an ideal type should be interpreted also as joint tenure.

## References

Acheson, James M. 1989. Where have all the exploiters gone? Co-management of the Maine lobster industry. In *Common property resources: ecology and community-based sustainable development* (ed) Fikret Berkes. London: Belhaven Press. Pp. 199–217.

Anderson, Terry and Hill, P. 1975. The evolution of property rights: a study of the American west. *Journal of Law and Economics* 18:163–179.

---

<sup>37</sup> The point also has some importance for our understanding of corporateness because Radcliffe-Brown (1952[1935]:34, 44, 45) and Williams (1986:95–96) both proposed that it is the joint ownership of property in land that makes groups corporate. While we now recognise that Aboriginal people have multiple cross-cutting links and ties to one another and to land and that they are members of a variety of social categories and groups, we must surely also recognise that they also are members of corporate groups that perdure by virtue of their ownership of land.

## Customary marine tenure in Australia

- Barnard, Alan and Spencer, Jonathan (eds). 1996. *Encyclopedia of social and cultural anthropology*. London and New York: Routledge.
- Baines, Graham B.K. 1989. Traditional resource management in the Melanesian South Pacific: a development dilemma. In *Common property resources: ecology and community-based sustainable development* (ed) Fikret Berkes. London: Belhaven Press. Pp. 273–295.
- Becker, Lawrence C. 1977. *Property rights: philosophic foundations*. London, Henley and Boston: Routledge and Kegan Paul.
- Berkes, Fikret (ed). 1989a. *Common property resources: ecology and community-based sustainable development*. London: Belhaven Press.
- Berkes, Fikret. 1989b. Cooperation from the perspective of human ecology. In *Common property resources: ecology and community-based sustainable development* (ed) Fikret Berkes. London: Belhaven Press. Pp. 470–88.
- Berkes, Fikret and M. Taghi Farvar. 1989. Introduction and overview. In *Common property resources. ecology and community-based sustainable development* (ed) Fikret Berkes. London: Belhaven Press. Pp. 1–17.
- Boas, F. (ed). 1938. *General Anthropology*. Boston: D.C. Heath and Company. [see index entries on property, many by Ruth Bunzel].
- Brewer, John and Staves, Susan. 1995. Introduction. In *Early modern conceptions of property* (eds) John Brewer and Susan Staves. London and New York: Routledge. Pp. 1–8.
- Bunzel, Ruth. 1938. The economic organization of primitive peoples. In *General anthropology* (ed) Franz Boas. Boston: D.C. Heath and Company. Pp. 327–408.
- Burke, John (ed). 1977. *Jowitt's dictionary of English law*. Second edition. Volume 2. London: Sweet and Maxwell.
- Carrier, James. 1995. *Gifts and commodities: exchange and western capitalism since 1700*. London: Routledge.



- Cheung, Steven N.S. 1974. A theory of price control. *Journal of Law and Economics* 17:53–71.
1970. The structure of a contract and the theory of a non-exclusive resource. *Journal of Law and Economics* 13:49–70.
- Christy, Francis. 1996. Thalassorama: the death rattle of open access and the advent of property rights regimes in fisheries. *Marine Resource Economics* 11:287–304.
- Ciriacy-Wantrup, S.V. and Bishop, Richard C. 1975. 'Common Property' as a concept in natural resources policy. *Natural Resources Journal* 15:713–727.
- Clark, Colin, Munro, Gordon and Charles, Anthony. 1985. Fisheries, dynamics, and uncertainty. In *Progress in natural resource economics: essays in resource analysis by members of the Programme in Natural Resource Economics (PRE) at the University of British Columbia* (ed) Anthony Scott. Oxford: Clarendon Press. Pp. 98–120.
- Coase, Ronald H. 1960. The problem of social cost. *Journal of Law and Economics* 3:303–344.
- Common, Michael. 1988. *Environmental and resource economics: an introduction*. London and New York: Longman.
- Cordell, John. 1993. Indigenous peoples' coastal-marine domains: some matters of cultural documentation. In *Turning the tide: papers presented at the conference on indigenous peoples and sea rights*. Darwin: Faculty of Law, Northern Territory University. Pp. 159–173.
1992. Managing sea country: tenure and sustainability of Aboriginal and Torres Straits Islander marine resources. Report on indigenous fishing and ecologically sustainable development (ESD) Fisheries Working Group. St Lucia: Department of Anthropology and Sociology, University of Queensland.
- Cordell, John (ed). 1989. *A sea of small boats*. Cultural Survival Report 26. Cambridge, Massachusetts: Cultural Survival, Inc.

## Customary marine tenure in Australia

Damas, David (ed). 1969a. *Contributions to anthropology: band societies. Proceedings of the conference on band organization. Ottawa, August 30 to September 2, 1965*. Ottawa: National Museums of Canada. Bulletin No. 228. Anthropological Series No. 84.

1969b. *Contributions to anthropology: ecological essays. Proceedings of the conference on cultural ecology. Ottawa, August 3—6, 1966*. Ottawa: National Museums of Canada. Bulletin No. 230. Anthropological Series No. 86.

Davis, Stephen. 1989. Aboriginal tenure of the sea in Arnhem Land, northern Australia. In *A sea of small boats* (ed) John Cordell. Cultural Survival Report 26. Cambridge, Massachusetts: Cultural Survival, Inc. Pp. 37–59.

Demsetz, Harold. 1967. Toward a theory of property rights. *American Economic Review* 57:347–359.

Driver, Harold E. 1961. Chapter 14: Property and inheritance. In *Indians of North America* (ed) Harold E. Driver. Chicago: University of Chicago Press. Pp. 244–264.

Freeman, Milton M.R. 1989. Graphs and gaffs: a cautionary tale in the common-property resources debate. In *Common property resources: ecology and community-based sustainable development* (ed) Fikret Berkes. London: Belhaven Press. Pp. 92–109.

Ganter, Regina. 1994. *The pearl-shellshells of Torres Strait: resource use, development and decline, 1860s–1960s*. Carlton, Victoria: Melbourne University Press.

Goodenough, Ward H. 1969. Frontiers of cultural anthropology: social organization. *Proceedings of the American Philosophical Society* 113(5):329–335.

Gordon, H. Scott. 1954. The economic theory of a common property resource: the fishery. *Journal of Political Economy* 62:124–142.

Hallowell, A. Irving. 1955. The nature and function of property as a social institution. In *Culture and experience*. Philadelphia: University of

A survey of property theory and tenure types

Pennsylvania Press. Pp. 236–249. [Reprinted from *Journal of Legal and Political Sociology* 1:115–138(1943)].

Hann, CM. 1996. Property. In *Encyclopedia of social and cultural anthropology* (eds) Alan Barnard and Jonathan Spencer. London and New York: Routledge. Pp. 453–454.

Hardin, Garrett. 1968. The tragedy of the commons. *Science* 163:1243–1248.

Hiatt, L.R. 1996. *Arguments about Aborigines: Australia and the evolution of social anthropology*. Cambridge: Cambridge University Press.

1962. Local organization among the Australian Aborigines. *Oceania* 32:267–286.

Hardy Ivamy, E.R. (ed). *Mozley and Whiteley's law dictionary*. Eleventh edition. London: Butterworths.

Hobbes, Thomas. 1951[1651]. *Leviathan: or the matter, forme and power of a commonwealth ecclesiastical and civil*. Oxford: Mowbray.

Herskovits, Melville J. 1952. *Economic anthropology: a study in comparative economics*. Second edition. New York: Alfred A. Knopf. [Published originally as *The Economic Life of Primitive Man* in 1940].

1948. *Man and his works. the science of cultural anthropology*. New York: Alfred A. Knopf.

Hickerson, Harold. 1967. Some implications of the theory of the particularity, or 'atomism', of northern Algonkians. *Current Anthropology* 8(4):313–343.

Hohfeld, W.N. 1964. *Fundamental legal conceptions* (ed) W.W. Cook. New Haven: Yale University Press.

Honore, A.M. 1961. Ownership. In *Oxford essays in jurisprudence* (ed) A.G. Guest. Oxford: Oxford University Press. Pp. 107–147.

Hviding, Edvard. 1996. *Guardians of Marovo lagoon, practice, place, and politics in maritime Melanesia*. Pacific Islands Monograph Series 14.

## Customary marine tenure in Australia

Center for Pacific Islands Studies, School of Hawaiian, Asian, and Pacific Studies. Honolulu: University of Hawaii Press.

1989. *All things in our sea: the dynamics of customary marine tenure, Marovo Lagoon, Solomon Islands*. NRI Special Publication 13. Boroko, Papua New Guinea: National Research Institute.

Kaufman, Tina. 1992. SBS Television program guide, 10 August–4 September. *Modern Times*. Pp. 38–39.

Keesing, Roger. 1981. *Cultural anthropology: a contemporary perspective*. Second edition. New York: Holt, Rinehart and Winston.

Knight, Frank H. 1924. Some fallacies in the interpretation of social cost. *Quarterly Journal of Economics* 38:582–606.

Leacock, Eleanor B. 1954. The Montagnais 'hunting territory' and the fur trade. *American Anthropologist* 56:3, Part 2.

Lee, Richard B. and Irven De Vore (eds). 1968. *Man the hunter*. Chicago: Aldine-Atherton.

Lowie, Robert H. 1948. *Social organization*. New York: Rinehart and Company.

1940. *An introduction to cultural anthropology*. New York: Rinehart and Company.

1933. Land tenure: primitive societies. In *Encyclopaedia of the social sciences* (ed) Edwin R.A. Seligman. Volume 9. London: Macmillan. Pp. 76–77.

1929. Incorporeal property in primitive society. *Yale Law Journal* 37:5:551–563.

1920. *Primitive society*. New York: Horace Liveright.

McCay, Bonnie J. 1989. Sea tenure and the culture of the commoners. In *A sea of small boats* (ed) J. Cordell. Cultural Survival Report 26. Cambridge, Massachusetts: Cultural Survival, Inc. Pp. 203–227.

1987. The culture of the commoners: historical observations on old and new world fisheries. In *The question of the commons: the culture and ecology of communal resources* (eds) B. J. McCay and J. M. Acheson. Tucson: University of Arizona Press. Pp. 195–216.

Maine, Sir Henry Sumner. 1931[1861]. *Ancient law: its connection with the early history of society and its relation to modern ideas*. London: Humphrey Milford, Oxford University Press.

Malinowski, Bronislaw. 1935. *Coral gardens and their magic*. In two volumes, London: Allen and Unwin.

Martin, Elizabeth M. (ed). 1990. *A concise dictionary of law*. Second edition. Oxford: Oxford University Press.

Munzer, S. R. 1990. *A theory of property*. Cambridge: Cambridge University Press.

Neher, Philip A. 1990. *Natural resource economics: conservation and exploitation*. Cambridge: Cambridge University Press.

Paul, Ellen Frankel. 1987. *Property rights and eminent domain*. New Brunswick, New Jersey and Oxford: Transaction Books.

Peterson, Nicolas. 1986. *Australian territorial organization*. Oceania Monograph 30. Sydney: University of Sydney. (in collaboration with Jeremy Long).

Peterson, Nicolas (ed). 1976. *Tribes and boundaries in Australia*. Social Anthropology Series No. 10. Canberra: Australian Institute of Aboriginal Studies.

Quiggin, John. 1986. Common property, private property and regulation. The case of dryland salinity. *Australian Journal of Agricultural Economics* 30(2,3):103–117.

Pigou, A.C. 1938. *The economics of welfare*. Fourth edition. New York: Macmillan.

Radcliffe-Brown, A.R. 1952. Patrilineal and matrilineal succession. In

## Customary marine tenure in Australia

*Structure and function in primitive society*. Glencoe, Illinois: The Free Press. Pp. 32–48. [Reprinted from *The Iowa Law Review* 20:2(1935)].

Radin, Margaret. 1993. *Reinterpreting property*. Chicago: University of Chicago Press.

Rigsby, Bruce. 1997. Anthropologists, Indian title and the Indian Claims Commission. In *Fighting over country: anthropological perspectives* (eds) D.E. Smith and J. Finlayson. Centre for Aboriginal Economic Policy Research Monograph 12. Canberra: Centre for Aboriginal Economic Policy Research, Australian National University. Pp. 15–45.

1993. Review of Barry Alpher, Yir-Yoront lexicon: sketch and dictionary of an Australian language. *Canberra Anthropology* 16 (2): 146–148.

Rose, C. M. 1994. *Property and persuasion: essays on the history, theory and rhetoric of property*. Boulder, Colorado: Westview Press.

Rousseau, Jean Jacques. 1938[1762]. *The social contract*. New York: Dutton.

Ruddle, Kenneth. 1989. Solving the common-property dilemma: village fisheries rights in Japanese coastal waters. In *Common property resources: ecology and community-based sustainable development* (ed) Fikret Berkes. London: Belhaven Press. Pp. 168–184.

1988. Social principles underlying traditional inshore fishery management systems in the Pacific basin. *Marine Resource Economics* 5:351–363.

Ruddle, K., E. Hviding and R.E. Johannes. 1992. Marine resources management in the context of customary tenure. *Marine Resource Economics* 7:249–273.

Rutherford, Leslie and Sheila Bone (eds). 1993. *Osborne's concise law dictionary*. Eighth edition. London: Sweet and Maxwell.

Rumsey, Alan. 1996. Aspects of native title and social identity in the Kimberleys and beyond. *Australian Aboriginal Studies* 1:2–10.

Sahlins, Marshall. 1996. 'Sentimental pessimism' and ethnographic

experience: or, why culture is not a disappearing object. Unpublished paper. 119 pp.

Schmidtz, David. 1994. The institution of property. In *Property rights* (eds) Ellen Frankel Paul, Fred D. Miller, Jr. and Jeffrey Paul. New York: Cambridge University Press. Pp. 42–62.

Scott, Anthony. 1955. The fisheries: the objectives of sole ownership. *Journal of Political Economy* 63:116–124.

Sharp, Nonie. 1996. *No ordinary judgement: Mabo, the Murray Islanders' land case*. Canberra: Aboriginal Studies Press.

Shipton, Parker. 1994. Land and culture in tropical Africa: soils, symbols, and the metaphysics of the mundane. *Annual Review of Anthropology* 23:347–377.

Smith, Vernon L. 1985. Comment. In *Progress in natural resource economics: essays in resource analysis by members of the programme in Natural Resource Economics (PRE) at the University of British Columbia* (ed) Anthony Scott. Oxford: Clarendon Press. Pp. 403–421.

1975. The primitive hunter culture, Pleistocene extinction, and the rise of agriculture. *Journal of Political Economy* 83:727–755.

Snare, Frank. 1972. The concept of property. *American Philosophical Quarterly* 9 (2):200–206.

Speck, Frank G. 1926. Land ownership among hunting peoples in primitive America and the world's marginal areas. *Proceedings of the 22nd International Congress of Americanists*. Rome, II. Pp. 323–332.

Stanner, W. E. H. 1969. The Yirrkala case: some general principles of Aboriginal land-holding. Unpublished manuscript. Pp. 1–12.

Sutton, P. 1997. *Possession, occupation and Aboriginal native title*. Draft discussion paper prepared for the National Native Title Tribunal. Pp. 1–15.

1996a. The robustness of customary Aboriginal title under Australian pastoral leases. Manuscript. 36 pp. [A shorter version of this paper was

## Customary marine tenure in Australia

published as The robustness of Aboriginal land tenure systems: underlying and proximate customary titles. *Oceania* 67:7–29].

1996b. *Families of polity: post-classical Aboriginal society and native title*. Discussion paper published by the National Native Title Tribunal. 77 pp.

Teh, Gim and Dwyer, Byron (eds). *Introduction to property law*. Second edition. Sydney: Butterworths.

Tisdell, Clem. 1993. *Environmental economics: policies for environmental management and sustainable development*. Brookfield, Vermont: Edward Elgar Publishing Company.

Tisdell, Clement A. 1991. *Economics of environmental conservation: economics for environmental and ecological management*. Amsterdam, London, New York, Tokyo: Elsevier.

Tisdell, Clem and Kartik Roy. 1996. Governance, property rights and sustainable resource use: analysis with Indian Ocean rim examples. *Working Papers on economics, ecology and the environment*. Working Paper No. 1. St Lucia: Department of Economics, University of Queensland.

Umbeck, John R. 1981. *A theory of property rights. With application to the California gold rush*. Ames: Iowa State University Press.

Waldron, J. 1988. *The right to private property*. Oxford: Clarendon Press.

Walker, David M. 1980. *The Oxford companion to law*. Oxford: Clarendon Press.

Williams, Nancy M. 1997. Territory, land, and property: milestones and signposts. Unpublished review paper prepared for the Academy of the Social Sciences in Australia. 37 pp.

1986. The Yolngu and their land: a system of land tenure and the fight for its recognition. Canberra: Australian Institute of Aboriginal Studies.

1982. A boundary is to cross: observations on Yolngu boundaries and permission. In *Resource managers: North American and Australian hunter-gatherers* (eds) Nancy M. Williams and Eugene S. Hunn. Washington, D.C.: American Association for the Advancement of Science. Pp. 131–153.



A survey of property theory and tenure types

Williams, Nancy M. and Eugene S. Hunn (eds). 1982. *Resource managers: north American and Australian hunter-gatherers*. Washington, D.C.: American Association for the Advancement of Science.

Yamamoto, Tadashi. 1995. Development of a community-based fishery management system in Japan. *Marine Resource Economics* 10:21–34.