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## On the Visibility of Indigenous Australian Systems of Marine Tenure

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## On the Visibility of Indigenous Australian Systems of Marine Tenure

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### 1. INTRODUCTION

Between 1921 and 1977 twelve anthropologists undertook research in various coastal communities of Arnhem Land in Australia's Northern Territory, investigating, among other things, land tenure, yet not one of them mentioned the existence of a system of customary marine tenure (for the resulting publications see TINDALE [1925–6]; WARNER [1937]; WORSLEY [1954]; BERNDT [1964,1970,1976]; ROSE [1960]; HIATT [1965]; SHAPIRO [1969]; TURNER [1974]; MEEHAN [1982]; MORPHY [1991]; KEEN [1994]; WILLIAMS [1986]). Some of them, such as Ronald Berndt [1976], actually mapped sites located in the sea<sup>1</sup>). Today there is a well developed and dynamic system of indigenous marine tenure along the Arnhem Land Coast. The failure to recognize these systems raises a number of questions including how old they are and why, if they have any antiquity, they have not been more visible.

Three possible explanations have been advanced for this lack of visibility. First, it might be that customary marine tenure systems are fragile (see PALMER [1988]), such that they disappear quickly under the impact of colonialism. Why they might be fragile is not clear, but one factor could relate to the policing of access rights and the difficulties created when outsiders introduce new and radically changed maritime technologies. However, new technology can also strengthen and extend relations with the maritime environment, as the introduction of the dugout canoe seems to have done in Arnhem Land (see below).

Second, marine tenure might be a recent development that has come about under the impact of land rights legislation that provides for the possibility of preventing use of the sea out to two kilometres from the coast by non-indigenous people in the Northern Territory. This could have led to an extension of the land-based arrangements into marine environments such that open access has given way to a marine tenure system.

A third possibility is that longstanding practices and arrangements of a more informal

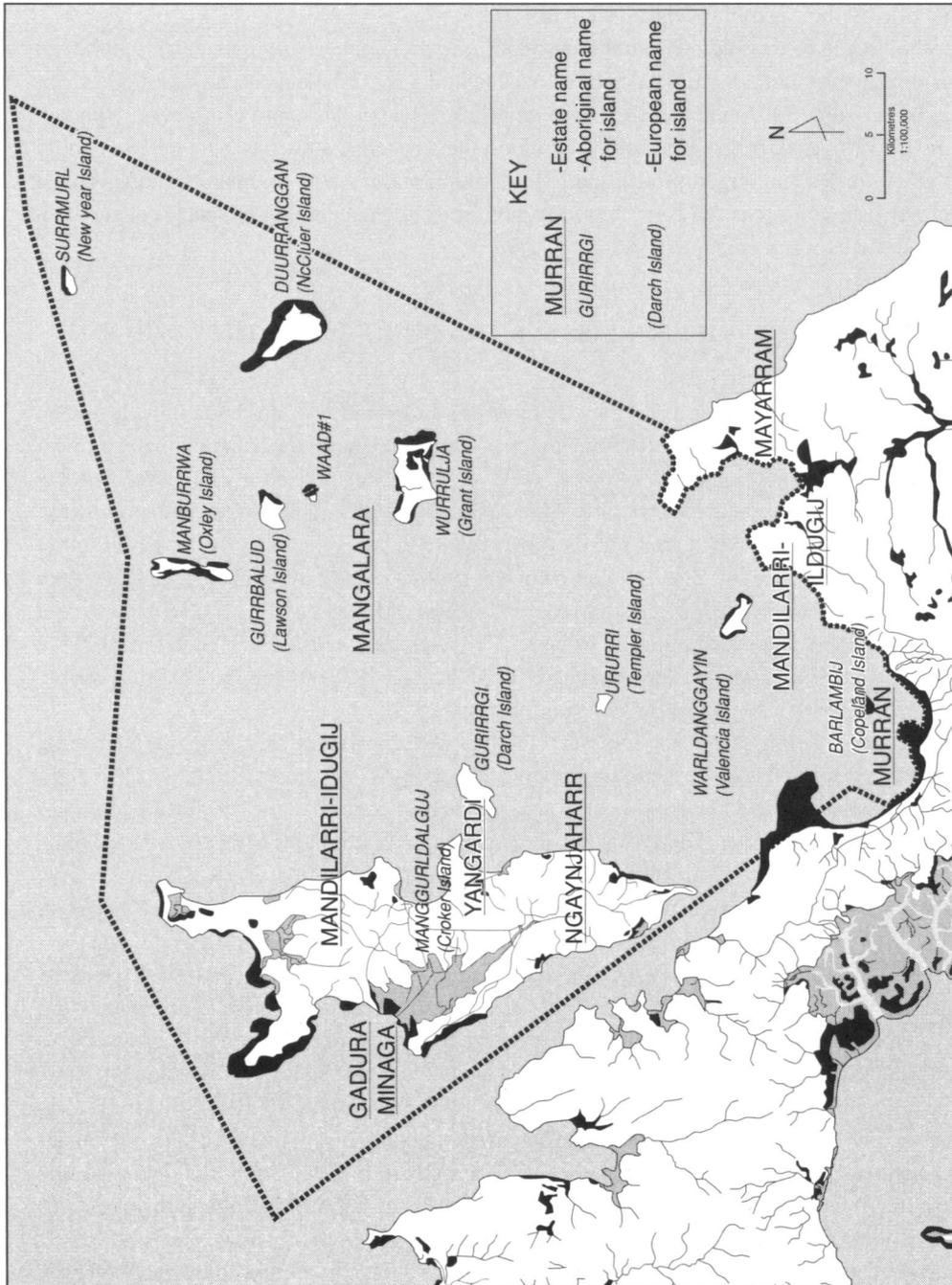
nature have become more formalized under the impact of the growing prevalence of legal and rights discourses in Aboriginal affairs. With a better understanding by Aboriginal people of the way in which the Australian legal system operates, the uncodified and relatively informal indigenous modes of expression of these rights of control may have been translated into the language of the encapsulating society.

In this paper I address the issue of the visibility of the system of indigenous marine tenure in the waters surrounding Croker Island (Map 1) off the coast of Arnhem Land from an historical perspective. I begin with the background to the research before turning to the sparse evidence for the existence of an indigenous system of marine tenure. The history starts with the early 18th century visits of the Macassan and Buginese fishermen to the Croker Island area and ends with native title litigation over sea rights in the 1990s.

## 2. BACKGROUND

This paper is based primarily on research carried out for litigation to test whether the Australian legal system recognised native title in the sea, but it also draws on on-going research into marine tenure in the Blue Mud Bay area of eastern Arnhem Land<sup>2</sup>). The original decision in this case, *Mary Yarmirr and Others versus the Northern Territory of Australia and Others* was handed down in 1998 (Case 771 Federal Court of Australia 6th July 1998) and then twice appealed with a judgement being handed down by the High Court in October 2001. The final position is that Australian courts recognise communal native title in relation to the sea and sea bed, but that this is not an exclusive possession nor does it confer the right to fish and hunt for commercial purposes. It allows people to visit and protect places of cultural and spiritual importance, and to safeguard cultural and spiritual knowledge associated with these localities. However, these rights to the sea and sea bed have to yield to the rights granted by government to others where there is any inconsistency. The consequence is that governments authorising the use of the sea have to be aware of the rights of the indigenous native title-holders, and where their recognised rights have to yield to other interests, the native title-holders may be able to claim compensation.

Several features of the Croker Island region made it appropriate as a test case. There is still a high dependence on marine resources amongst the 200 or so people who live on the Island, as there is among the people of Blue Mud Bay, and because of the configuration of small offshore islands to the east of Croker Island (see Map 1) there is, in effect, a small inland sea which encouraged people to travel across open water of up to 20 km in quite frail bark canoes in the past. The area is also one in which the people have had contact with Buginese and Macassarese fishermen since the early 1700s, which typically involved the exchange of items. This contact and exchange opened up the issue of the terms on which the fishermen were able to fish in the waters off Croker Island and the possibility that the court would recognise the transactions as commercial. Further, in 1983–4 research was carried out relating to a sea closure claim, and thus it was assumed that little additional effort would be required to bring the test case to court—an assumption that proved wrong. Finally the people of Croker Island have, in the last 20 years, made a number of documented protests to the Northern Territory government about the activities of government and other fishermen in their offshore territory, well before the recognition of



**Map 1** Sketch map showing the location of the boundary to the application area and the relative locations of estates. (Country of the Northern Land Council)

native title by the Australian legal system in 1992<sup>3</sup>).

The people of this region do not hunt major migratory species such as whales, although occasionally pilot and sperm whales have beached on Croker Island and adjacent areas. On Elcho Island, some 330 km to the east, the sperm whale is one of Warramiri clan's most important totems [WARNER 1958: 39–40]. Today, all along the Arnhem Land coast, the people mainly hunt green turtles and dugong from small aluminium dinghies with outboard motors, catch a variety of fish with spear and line, but rarely nets, and collect a number of species of shellfish and crustaceans.

### 3. CONTACT WITH THE MACASSANS AND BUGINESE IN THE 18TH–19TH CENTURIES

Macassan and Buginese fishermen (here referred to simply as Macassans) made annual visits to the north coast of Australia from about 1720 onwards until the Australian government terminated these visits in 1907 (see MACKNIGHT [1976]). They arrived in December with the northwest monsoon and stayed through to March, when the wind moved round to the southeast. They mainly sought *bêche de mer* but they also collected pearl shell, pearls, hawksbill turtle shell and sandal wood. For most of the nineteenth century there cannot have been less than a thousand fishermen spread along the coast each wet season [MACKNIGHT 1976: 29]. A substantial proportion of them stopped in on the Cobourg Peninsula opposite Croker Island, initially to visit the British settlements established there from 1827–1849, and from the 1880s onward to report to the customs station in Bowen Strait to pay their taxes.

There are two aspects of the impact of the Macassans that are relevant to marine tenure. The more easily dealt with is the issue of their impact on Aboriginal technology. It was from the Macassans that the Aboriginal people secured dugout canoes and metal for harpoons for catching turtle and dugong. That Aboriginal people valued the canoes is clearly suggested by the complaints of a Macassan captain of a prau to Commander King that Aboriginal people regularly stole dugout canoes in the early period of contact [KING 1827: 138]. Later they were borrowed or exchanged mainly for labour and turtle shell [WILSON 1835: 86; MACGILLIVRAY 1852: 147]. It was not until late in the nineteenth century that Aboriginal people started making canoes themselves, an activity that they only really became involved in when the Macassans left. In typically Aboriginal fashion, they appear to have recognised Macassan property rights in the knowledge associated with the making of canoes and therefore left canoe making to them, which, of course, created a basis for exchange.

From archaeological evidence, in particular, it is clear that the impact of dugout canoes was considerable. In the Blue Mud Bay area, they apparently greatly stimulated the use and occupation of Groote Eylandt (see CLARKE [1994]) and, it can be assumed, although no research has been done to demonstrate this, they likewise facilitated access to the small islands off Croker Island. Archaeological research on Croker Island itself and the adjacent mainland has, however, demonstrated that no dugong bones and few turtle remains are to be found in pre-Macassan midden sites. However, following the introduction of the new technology there is a dramatic increase in the remains from these animals as well as evidence for a shift in settlement pattern, with larger groups of co-residents and decreased mobility, as reflected in the size and structure

of middens [MITCHELL 1994: Chapter 14]. How this may have been related to the system of marine tenure is unclear.

More relevant to marine tenure is the issue of the relationship between the Macassans and Aboriginal people. What were the conditions under which the Macassans were able to live and work along the coast of Arnhem Land? Did they seek permission from Aboriginal people? Were there payments from Macassan captains to local people to safeguard them from attack and to secure access and collaboration for the harvest of sea products? The evidence that exists for the Macassans acknowledging Aboriginal people's interests in the coastal waters is only circumstantial.

The historical record indicates that there was always conflict with the Macassans but that it decreased from the beginning of the nineteenth century [MITCHELL 1994]. Given that there were on average 30 men to a prau, the crews of two boats would certainly be in a position to defend themselves against Aboriginal attack. Nevertheless, there are many records of Macassans being killed by Aboriginal people along the coast, and in the 1870s six Macassans were killed in the vicinity of Croker Island [REID 1990: 152–3]. That is to say that Macassans could well have imposed themselves on Aboriginal people regardless of whether Aboriginal people wanted them there or not. It does seem that the Macassans had a preference for setting up their camps on the small islands that allowed them more control over access to their base camps, although there were many camps along the mainland coast. It is also, however, beyond dispute that the people at Croker Island and elsewhere along the coast had extensive and complex relationships with individual Macassans. These included Aboriginal people learning the Macassan language, exchanging names with them, visiting Macassar for extended periods<sup>4</sup>, adopting much Macassan material culture, storing pearls and shells harvested during the winter for later exchange, and incorporating many referents to Macassans and their way of life in ceremonies (see EARL [1846: 118]; WARNER [1958]). Thus there were complex and extended social relations between the Aboriginal people and the Macassans which involved some Macassans returning to the same area each year. Likewise there were similar although briefer relations with the English at Raffles Bay and the nearby settlement of Port Essington between 1827 and 1849 when the English were trying to establish an Australian Singapore on the Arnhem Land coast.

Despite this, there are no contemporary accounts from the period of Macassan visits that provide any definite evidence that the locations in which particular prau captains and their crews worked were regulated by Aboriginal people beyond the social relations established between the local Aboriginal people and particular Macassan captains<sup>5</sup>. How the exchange relations that were established with Macassans were interpreted either by the Macassans or the Aboriginal people at the time is unknown.

#### 4. 1907–1977

Nineteen hundred and six was the last year that the Macassans were allowed to visit the north coast. From then until the 1940s there is no evidence relating to the Aboriginal people's relationship to the sea, although they continued to assist a few European trepangers who lived along the north coast, including two on Croker Island. These Europeans led isolated lives and established strong relations with individual Aboriginal people who, in some cases, took the

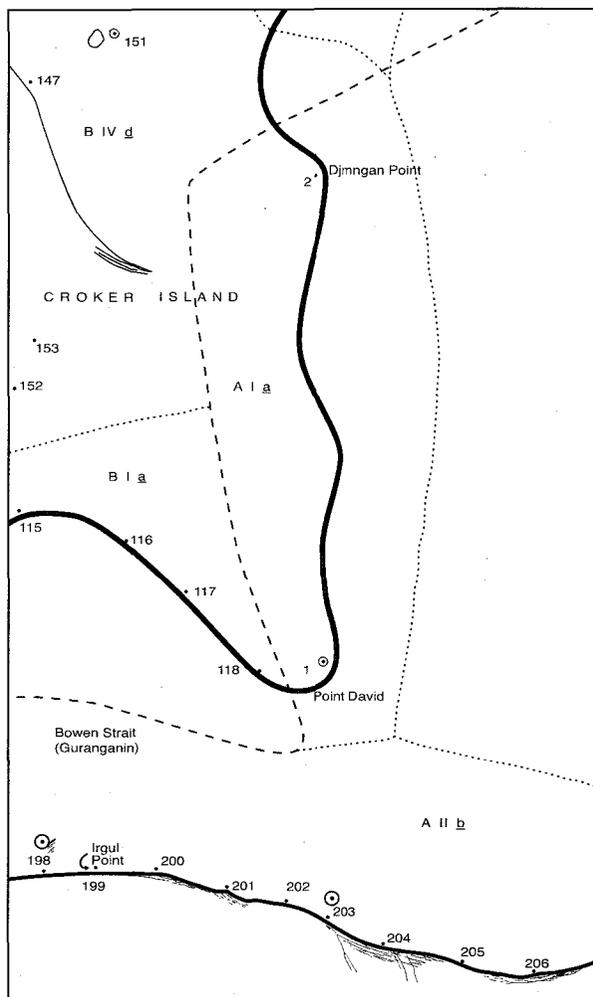
Europeans' names. The Europeans were dependent on Aboriginal labour, as the Protector of Aborigines acknowledged in 1914 (page 37). Aboriginal people from the area neighbouring Croker Island would come to the camps of Brown and Sunter in the 1920s looking for work and be taken on (see SUNTER [1937: 254]). However, no details are provided relating to Aboriginal relationships with the sea, or about which of the Aboriginal people from the mainland felt comfortable living in their camps and working for them in sea country associated with other Aboriginal people.

In 1931 an area of about 95,000 square km, including Croker Island, was declared an Aboriginal reserve that barred entry by Europeans except with government permission. This reduced the Aboriginal people's contact with outsiders to missionaries, a few government servants, the occasional anthropologist and limited numbers of European and Japanese trepangers until well after the Second World War.

Lloyd Warner, the first anthropologist to work in Arnhem Land, living at the Methodist mission on the small island of Milingimbi, noted that land along the sea, bays and inlets had very definite boundaries [1958: 18], but he had almost nothing to say about the sea, a word that does not appear in the index of his book.

One single report from the first half of the twentieth century stands out. It involves a Rotuman missionary stationed on Croker Island for about a year from the end of 1941. He describes meeting an Aboriginal man who declared himself the owner of Croker Island and everything on it, including the trees, people, and, significantly, the fish. On that basis he requested that he be provided with goods by the visiting missionary, who in his account of this event states, 'If we did not, he would work magic on us, and we would die unless we went away very soon' <sup>6</sup> [TAITO 1971: 8-9].

In 1966 Ronald Berndt [1970: 12] mapped the named places and sacred sites of Croker Island, the adjacent islands and the mainland. Map 1 in the monograph, titled: 'General perspective: Enclosed area indicates tribal territories under discussion. All are in the Arnhem Land Reserve', hatches an area that includes all the sea in the Croker Island test case. Pages 15-51 of the 63 page monograph consist of maps and listings of site names and details. On page 1 of the introductory fourteen pages he states: 'All Aborigines, whatever their socio-cultural perspective, were directly dependent on the land and what it produced...' with no mention of the sea, despite the fact that the great majority of the named sites were on the sea shore. Later on he states that some of the ancestral beings 'disappeared into the territory of another "tribe", or into the ground, the sky or the sea; but in doing so they remained spiritually attached to the land across which they had travelled and the sites they had made or been associated with in some other way' [1970: 6]. Although the maps do show the territories encompassing sea water close to the shore (see Map 2), there are no references, other than those mentioned above, to the sea. Many of the annotations for the sites indicate that a particular reef is good for hunting turtle or that a place is a fishing site. Despite this, the first words of the conclusion underline the land orientation of Berndt's thinking: 'In the earlier part of this paper, I said that social relationships themselves are underpinned by a spiritual association with the land and with the sacred and traditional sites within that land' [1970: 53].



**Map 2** Croker Island and Adjacent Mainland  
(After BERNDT [1970])

## 5. 1977–1984

The first passing reference to sea estates appears to be by Mr Justice Woodward in the First Report of the Commission into Aboriginal Land Rights in 1973 [1973: 33], the task of which was to determine how to grant rights, rather than whether they should be granted. This arose in response to the legal counsel representing the Aboriginal people before the Commission, which suggested that Aboriginal people should have exclusive control out to 12 (nautical) miles, or if that were too broad, to 3 (nautical) miles, on religious, social and economic grounds: religious, because there were sites and tracks of ancestral heroes in and crossing the sea; social, because boats had come to the shore unlawfully in the past seeking Aboriginal women; and economic, because the people wanted to develop a fishing industry [NLC 1974: 129]. Woodward wrote:

A number of Aboriginal communities in the North have raised with me questions of fishing rights. They point to their traditional dependence on fish, turtles, shellfish, dugong and other forms of sea life and they ask whether their land rights will extend out to sea and, if so, how far. It seems clear that Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the waters between the coastline and offshore island belonging to the same clan.... In the absence of any clear-cut claims on this subject I do no more than draw attention to it as a matter requiring careful consideration [1973: 33].

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, and the first substantive anthropological analysis carried out before the stimulus of land rights, although published later, appears to relate to east coast Cape York (see CHASE [1980] and CHASE and SUTTON [1981])<sup>7</sup>.

The first legal recognition of any Aboriginal interest in the sea arose from the observations by Mr Justice Woodward. Although the *Aboriginal Land Rights (Northern Territory) Act 1976* gives no rights to the sea, it empowers the Northern Territory government to pass reciprocal legislation complimentary to this Act by allowing it to make laws that regulate or prohibit entry on seas within 2 km of Aboriginal land. Specifically, the *Aboriginal Land Act 1978(NT)* Section 12(1) allows the Northern Territory government to close the seas adjoining and within 2km of Aboriginal land: 'To any persons or classes of person, or for any purpose other than to Aboriginals who are entitled by Aboriginal tradition to enter and use those seas and who enter and use those seas in accordance with Aboriginal tradition.' [s.12(1)].

The statutory test for the closing of the sea requires an inquiry by the Aboriginal Land Commissioner into whether, in accordance with Aboriginal tradition, strangers were restricted in their right to enter the seas in question [s.12(3)]. Only two cases seeking sea closure have come before the Commissioner. This is because of the cost of preparing cases, the weak exclusion rights they grant to Aboriginal people that do not prevent commercial fisherman with existing licences, (which can be on-sold with the access rights), from entry to the closed area and the priority given to land claims. Nevertheless, this legislation precipitated some research along the Arnhem Land coast (see KEEN [1980]; DAVIS [1982, 1984]; PALMER [1983]; and PALMER and BRADY [1984]), much of which is discussed in a special issue of *Anthropological Forum* 1984-5. Particularly relevant here is that Palmer and Brady carried out the anthropological research for an application for sea closure on behalf of the Croker Island people in 1984, although it never went to court.

Palmer and Brady reported a complex set of rules governing use of the seas, according to which both user and owner were formally bound by reciprocal arrangements to utilise seas in particular and designated ways [1984: 108]. People had to be formally introduced to the new land and sea they had not visited before [1984: 52], which, among other things, alerted them to various dangerous places along the shore and in the sea that could cause physical harm or result in severe storms and waterspouts that would sink their boats. The sea closure claims were prepared as a community claim on the basis that the members of the various patrilineal clans (*yuwurrumu*) are inter-related, an inter-relation that was said to parallel the relationships between the different clan territories. As such they joined to 'look after their land and sea as a company'

[1984: 48].

## 6. 1992–2002

On 23rd April 1997, the first formal day of hearings began in the application by the Croker Island people for recognition of native title rights in the sea and ran for 11 days in two sessions. Devitt and myself (Peterson and Devitt 1997) produced a 65 page document as an anthropological report on the system of customary marine tenure, together with a map of over 300 named places that related to the sea shore and sea, and a register describing each of the sites and genealogies of all the applicants. This report was tantamount to the pleadings of the applicants, although the whole status of anthropological reports in such cases is unclear and understood somewhat differently by different judges.

We contemplated pursuing the community-based model of sea ownership as in the Palmer and Brady sea closure document. However, once fieldwork began this did not seem appropriate, not least because whenever any of the several disputes about ownership of sections of sea estates were aired, people never spoke about collective ownership of the sea but always spoke in terms of their rights as members of a patrilineal descent group (*yuwurumu*).

We described a system of marine tenure which involved four elements:

- the estate: the primary spatial unit in which estate groups (see below) have native title rights and interests;
- the estate group: all those people with native title rights and interests in an estate;
- the incidents of title: all of the native title rights and interest that can be held in an estate; and
- the mechanism of succession: the processes by which estate groups threatened by extinction gain new right holders.

Of the ten incidents of title, all the important ones were held by the *yuwurumu*. Although these rights are given at birth to all *yuwurumu* members, most are only exercised in their strongest form by senior members of the *yuwurumu*. There are other people who have a claim to interests in the estate who are not *yuwurumu* members, but they must have their claim acknowledged by the senior *yuwurumu* members.

The judge relied upon the facts of the system of native title as set out in our report, which the evidence, taken and tested on Croker Island from the Aboriginal applicants, showed to be ‘not controversial’ [OLNEY 1998: para 68].

## 7. THE TERMS IN WHICH THE CROKER ISLANDERS PRESENTED THEIR EVIDENCE

The terms in which the Croker Islanders presented their evidence to the court can only be discussed very briefly here, given that the transcript of evidence presented to the court covers 831 pages. It also included site visits by boat and helicopter. Here I will simply look at four illustrative examples of how the Croker Islanders spoke about their relations to the sea in respect to: Macassans, boundaries, permission seeking, and the basis for recognition of right holders.

*Crocker Islanders' view of the Macassans* : During the hearings for the court case some evidence was elicited from the native title applicants about the Macassans. Foremost among those giving evidence was Mary Yarmirr whose patrilineal grandfather, Rudbuk, had been to Macassar and was widely known for his ability to speak Macassan. Her father, who was born shortly after the Macassans stopped coming and who lived into his eighties, worked for trepangers and other people along the coast on boats that included Japanese and Indonesian crew, and as a consequence knew some Indonesian. Another man who gave evidence about the Macassans was Wardaga, whose father's brother, Nawudba, was said to have brought a coconut back from Macassar and planted it on one of the islands, where it still stands today. He was asked:

*When they got trepang, did they pay the Aboriginal people anything, give them any pay? ... Yes, no [not] money, only tucker—flour and brown sugar.  
And brown sugar? ... Yes, and little bit of rice, you know (T615: 6–9)*

Mary Yarmirr was asked a similar question (Transcript 559[22–30]; 560 [1–3]).

*The question was, Mary, did your father tell you whether the Macassans made any payment to people when they came and gathered trepang? ... Yes. They gave them—its[sic] a kinder word than “pay” —gave them calicos.*

*Boundaries*: After an extended session of describing where the boundaries to various sea estates run while looking out to sea from Valencia Island (T444), Mary Yarmirr responded to the elicitation of her evidence by her counsel with the following exchange:

*Mandilarri [clan] share with Murran [clan]? ... Yes, because our water overlaps theirs, and then that goes around to Yangardi [clan].*

*It goes around to Yangardi?—Yangardi and Mangalara [clan].*

*That is around on the other side? ... Around the other side.*

*Back where we started? ... Yes. I must inform you this balanda [European] system where we actually have to identify where our sea country lies. In our traditional way of life all clan members one family and we share these waters together. It's when balanda law comes into divide us we feel very—we feel that we been insulted, and it's against our law, because we share these waters together.*

*And is that a feeling that just you have or that other people have too? ... A feeling that I think most of us do have, because then you separate each clan by doing that.*

*Permission*: When Ronald Lamilami was being asked about permission seeking he replied as follows (T 193–5):

*When you go to Somerville Bay, whose area are you going to there? ...That's my mother's clan group.*

*Yes. And do you need to ask to go there? ...Yeah, for courtesy. Yeah, we'd ask them, yeah.*

*Who would you ask? ...I'd ask—I'd just let my mother know that I'm going to that area.*

*All right? ...Even though she's my mother, but I still, you know.*

*Yes. I do not know whether you can answer this question, Ronald, but is it different going to your mother's area, say, than going to Murran area or to Charlie's area? ...No. No, the same.*

*It is the same? ...Yes.*

*All right. And what about Cape Croker? ...Yeah, well, going to Cape Croker, it's a - that place, it's—I mean, it's - there's a lot of sites of significance in that area, and the—in respect to that, you know, we don't, sort of, go there, only mainly for fishing, when we go trawling, yeah.*

*All right. And you say one of the places that you go to is Ajamarugu, 149; what do you go there for? ...For turtle, fishing, yeah. Oysters.*

*Do you need to ask to go there? ...Yeah.*

*Who do you ask about going...? ...I'd ask Joy.*

*Joy? ...But bear in mind that a lot of the catch that we do, bring back, you know, we give some of the catch to the traditional owners.*

*Yes. Why do you do that? ...Well, I'm—firstly, we're going to their country, and full respect—you know, we have to bring them something back, so in next time when we go there, you know, they'll confirm that it's okay for us to go...*

*All right? ...otherwise they won't let you go.*

*All right? ...They just be selfish.*

*The—and if you did not do that, give them a share of what you get, could they stop you going? ...They would, yes. I mean, you'd have that guilty conscience in you, that—you know, asking for the second, you know, permission to go, you know, you'd be cautious about how to go about it.*

*What give [sic] them the right to stop you going? ...Well, firstly, it's their grass, you know. I mean, the sea bed is theirs, you know, that's part of their yuwurrumu.*

*Basis for recognition (T527-8):*

*Thank you [Mary]. Do you know a lady called Pavalina Henwood? ... Yes, I do.*

*She swore an affidavit—and I do not know whether you have seen it—but she says that—I am referring to paragraphs 19 and 20, your Honour. She says that under the law, custom and tradition of the Walgi [people], if she finds herself in the vicinity of Croker Island, she would be entitled to fish here. Is that correct or incorrect according to your understanding? ...That's incorrect, because she is not related to this island or to my yuwurrumu.*

*Right. Did you know her when she was living here? ...I grew up with her.*

*And she was one of the people, I think, that was held at the mission. Is that right? ...That's correct.*

*Because she also says that:*

*Under the law, custom, tradition, observance and belief of the Aboriginal people of the Northern Territory, I have an entitlement to fish in the waters surrounding Croker Island by virtue of my period of incarceration at the Methodist institution upon that island.*

*I take it you would disagree with that too? ...Could you explain it in a simple way.*

*Yes, okay. I am sorry. What I was reading to you were, if you like, the words in the document...? ... Lawyer's words.*

*If she were to say that because she did live here at the time of the mission, because of that, she now has the right to fish in the waters around this island? ...She has no rights. Her yuwurrumu is totally different from mine. She is not a Mandilarri woman.*

## 8. CONCLUSION

The foregoing provides evidence of the very different ways in which Aboriginal peoples' relationship with the sea has been conceptualised both by them and by outsiders. Although there is no evidence to indicate how the Macassans understood the situation, the Croker Islanders today believe that they sought permission. In the 1940s, there is the slightest hint of a senior Islander asserting the right to control access to fish in respect of the Rotuman missionary. Ronald Berndt, mapping the almost exclusively coastal sites on the island, made no mention of estates

encompassing the sea. In 1983, when Palmer and Brady prepared a sea closure application, they described a system of community ownership of the sea. In 1998 Devitt and myself produced an incidents of title model based on estates, that included both land and sea, owned by small patrilineal descent groups. Finally, from the brief excerpts of actual evidence taken in the Croker Island hearings, a range of models emerged: recognition of Aboriginal rights by Macassans; community title when exasperated by the questioning of legal counsel asking about boundaries; and a clan-based model when asked about permission-seeking and claims by an ex-mission inmate. How is this fragmentary and sometimes apparently contradictory evidence to be understood and what does it say about the visibility of customary marine tenure in the Croker Island area?

At the heart of the issue is the nature of property. If the focus is on property as first and foremost a social relation between people in respect of things that entails one person controlling or regulating the behaviour of the other in respect of that thing in one of a number of ways, the picture becomes clearer<sup>8)</sup>.

In the case of the Macassans, there is no substantive evidence contemporary with their visits that allows it to be said that they recognised Aboriginal rights in the sea. However, there is clear evidence in the eyes of the applicants that there were well defined social relationships between some Macassans and the applicants' ancestors, which included known individuals going to stay in Macassar for at least nine months, on holiday as it was referred to in one case (T613), and the transfer of goods. Mary Yarmir's refusal of the opposing counsel's assumption that the transfer of goods was pay rather than gift giving is significant in this respect. It emphasises that today the relationship with the Macassans is seen as a social relationship based on mutual respect whether or not it was a gift-exchange relation in the past.

In the case of the Rotuman missionary, it is tempting to suggest that the exchange with him was based on the feeling that he could be drawn into a social relationship that recognised Islanders' rights. This is because he was not like the European missionaries, of whom the people had long experience (Methodist missionaries had been on a neighbouring island for more than 20 years) but more like the Croker Islanders, given his dark skin. I emphasise that there is no evidence for this as I failed to discuss their use with people.

With respect to the anthropologists, I think the reason for them not recognizing the marine tenure are quite complex. It can be assumed that there were reasonable relations between them and the people with whom they worked intensively, and it was certainly the case that there was a good relationship between Ronald Berndt and the men he worked with on Croker Island<sup>9)</sup>. Berndt's 1970 work suggests the orientation was entirely towards the land, even when on the sea shore, partly because the land has always been a major ethnographic and theoretical interest in Australian ethnography. Further, until very recently there was no sophisticated theoretical interest in the actual activities of hunting, fishing and gathering that might have occasioned closer questioning. I also think that in the case of Ronald Berndt, who actually mapped places relevant to or in the sea from his camp rather than visiting the actual locations, it was probably assumed he knew. It is rare that even the best informants offer information on topics they are not asked about, especially on topics that are quite new.

In the case of the Palmer and Brady report, sea estates were recognised, but because of the legislation that limited closure to 2km from the shore, it reduced the need to explore their

dimensions in detail. More importantly, because the closure was directed at Europeans rather than other Aboriginal people, that is, that it was based on 'racial' grounds, the framework of the thinking of both the Aboriginal people and the researchers was very much 'us-them', making a community based approach 'natural'. This is reflected in the emphasis on the inter-related nature of the clans, and because of this the inter-related nature of their interests in the sea.

The report prepared by Devitt and myself was framed by adversarial court proceedings under the *Native Title Act*. As the judge acknowledged, our report served 'the very useful purpose of providing the contextual background against which the oral testimony of the applicants' witnesses can be better understood, to a very large extent the report can be accepted as both reliable and informative... The applicants' anthropological evidence is virtually unchallenged... and assists the Court's understanding of the cultural significance of much of that evidence' (judgement para 64-65)<sup>10</sup>. It helped make the system recognisable by describing it in the language of the instructing lawyers and the courts.

Of course, the question of what relationship the language we used bears to the actual conceptualisation of the Croker Island people themselves, is extremely complex. However, just as the judge could recognise the system we described in the fractured and often cryptic verbal evidence presented by the Applicants, so too could the Applicants recognise their system in what we wrote: we had proofed it with them. The research, the proofing, the report written by myself and Devitt, the hearing, and other factors, all served in the socialisation of all parties to the acceptance of a common discourse.

When we consider what the Aboriginal people actually said in the hearings about their system of marine tenure and the language they used to describe it, most of which was identical in content to what they had been telling us during the research, although new details emerged from time to time, one thing stands out. Whether talking about permission seeking, boundaries or the rights of a person of mixed descent who had grown up on the Island but left many years ago, the issue that kept resurfacing was social relationships and the language of respect and acknowledgement, even between mother and son. This asking or letting the appropriate people know where one is going is the fleeting and virtually invisible day-to-day social expression of the system of sea tenure.

Legal discourse is an extreme form of an elaborated code in the pursuit of clarity, the elimination of ambiguity and the creation of agreed facts<sup>11</sup>). Particularly where the issue of property rights are concerned it has difficulties with the open-ended, decentred, continuously negotiable indeterminacies of Aboriginal discourse. It is a discourse that is more often than not formulated with a concern for managing social relations, particularly when speaking in public, than spelling out a jural regime. The consequent ambiguities around boundaries and permission-seeking, and the low levels of inconsistency produced by frequent exception-making, as a result of the need to accommodate particular individuals, especially when they are present, sit uncomfortably with the elaborated code of legal discourse. But the state and the courts as the dominant partner in the native title proceedings fashion the relationship and proceedings largely to their own liking, and in so doing give indigenous relations to the sea a formality and visibility they have not had before.

## NOTES

- 1) Berndt recorded 264 place names along 90 miles of coast [1970: 10]. In Elkin, Berndt and Berndt [1950: 36] there is an unelabrated statement in parenthesis — '(For the sea, too, is divided among the clans).'
- 2) The research for the test case at Croker Island was carried out jointly with J. Devitt. In eastern Arnhem Land the research is being conducted under an Australian Research Council SPIRT grant for which the Industry Partner is the Northern Land Council. The grant was awarded to A. Clarke, H. Morphy and myself, and entitled, 'Indigenous marine tenure and resource use at Blue Mud Bay: ethnographic and archaeological perspectives'.
- 3) One example of this is that in 1978 two Croker Islanders council members of the Northern Land Council took out an interim injunction during the Ranger Uranium mine negotiations because they had not been allowed to discuss a proposal from seaboard communities that there be a trade off of control of access to the sea adjacent to their land in return for signing the agreement [see ROWSE 2000: 158].
- 4) '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].
- 5) The Buginese are well known for ignoring local property rights in the sea and focusing on building social relationships with the people of the area in which they are fishing [see ROBINSON 2002].
- 6) There are no rivers on Croker Island and the only fish of significance are from the sea.
- 7) Howard Morphy [1977] and Paul Memmott made submissions to this inquiry explicitly dealing with estates in the sea. 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...' [KEEN 1977: 1098].
- 8) This is, of course, the classic anthropological position formulated by Radcliffe-Brown [1952].
- 9) One of his main informants was Wardaga, with whom we worked closely and who told me, on various occasions between 1968 and 1998, about his relationship with Ronald and Catherine Berndt.
- 10) Judge Olney does comment, 'It contains some speculation but not much, and to the extent that it does, I have not found it necessary to refer to it.' Of the two criticisms the judge voiced, one concerned our quoting an Aboriginal person who was not called as a witness to verify a statement we attributed to her. This was because she declined to give evidence when the day came, for reasons that are unclear to us. The other involved an historical chapter where we had used one or two adjectival and adverbial emphatics. This led to us being seen to be advocating a point of view.
- 11) The term 'elaborated codes' is Bernstein's [1971-5]. Originally, elaborated code was known as 'formal code', and more recently he has changed his concerns and writes about 'person-oriented' and 'position-oriented' families [see WARDHAUGH 1986: 317-320].

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