DRAFT

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On the visibility of Indigenous Australian systems of marine tenure

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Between 1921 and 1977 twelve anthropologists worked in coastal communities of Arnhem Land in Australia's Northern Territory, researching and writing about land tenure, among other things, 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 in the sea. Today there is a well developed and dynamic system of indigenous marine tenure along the Arnhem Land Coast. This lack of visibility raises a number of questions including how old these systems 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. It might be that customary marine tenure systems are fragile (see Palmer 1988) so 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 rights and the difficulties created when outsiders introduce new and radically changed maritime technologies which have not been available to Aboriginal people until recently. 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).

The late discovery of marine tenure might be because it is only a recent development that has come about under the impact of land rights legislation that provides for the possibility of closing-off of the seas to non-Indigenous people in the Northern Territory. This could have led to an extension of the land based arrangements out into the sea so that open access has given way to a marine tenure system.

Another possibility is that longstanding practices and arrangements of a more informal nature have firmed up under the impact of the growing prevalence of legal and rights discourses in Aboriginal affairs. With a better understanding among Aboriginal people of the way in which the Australian legal system works, the uncodified and relatively informal indigenous modes of expression of these rights of control, may have been translated into the language of the encapsulating society.

In this paper I want to consider this issue of visibility of the system of Indigenous marine tenure in the waters surrounding Croker Island off the coast of Arnhem Land, from an historical perspective. I will begin with an outline of the background on which this research is based. I will then look at what sparse evidence there is for the existence of an Indigenous system of marine tenure beginning with the history of the relationship with the Macassan and Buginese fisherman that came to Arnhem Land from the early 18th century onwards before considering more recent history.

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. 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 their places of cultural and spiritual importance in the sea and to safeguard their cultural and spiritual knowledge in relation to the sea but the rights to the sea and sea bed have to yield to all 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 they may be liable for compensation.

The people of this region do not hunt any major migratory species such as whales although occasionally pilot and sperm whales have become beached on Croker Island, or nearby, and on Elcho Island, some 330 km to the east, the Warramiri clan has whale (sperm whale) as one of its most important clan totems (Warner 1958:39-40). Today, right 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.

Contact with the Macassans and Buginese in the 18-19th century

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 them in 1907 (see MacKnight 1976). They arrived in December with the northwest monsoon and stayed to March when the wind moved round to the southeast. They mainly sought beche 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 stopping in on the Cobourg Peninsula opposite Croker Island initially to visit the British settlements established there between 1827 - 1849 and from the 1880s onward to report into the customs station in Bowen Strait to pay their taxes.

There are two aspects to 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 the metal for harpoons with which to catch 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 Macassan's left. In typically Aboriginal fashion it appears that they recognised Macassan property rights in the knowledge associated with the making of canoes, which, of course, created a basis for exchange with them.

From archaeological evidence, in particular, it is clear that the impact of dugout canoes was considerable. In the Blue Mud Bay area it is clear that they 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 but that following access to 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 coresidents and decreased mobility, as reflected in the size and structure of middens (Mitchell 1994: chapter 14). How this 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 Macasserese 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. 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 crew worked were regulated by Aboriginal people beyond the social relations established between the local Aboriginal people and the particular Macassan captains. How the exchange relations that were established with Macassans were interpreted either by the Macassans or the Aboriginal people at the time is unknown.

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 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 built up strong relations with particular Aboriginal families who in some cases took their names. The Europeans were dependent on Aboriginal labour, as the Protector of Aborigines acknowledged in 1914 (page37). Aboriginal people from the area neighbouring Croker would come to the camps of Brown and Sunter in the 1920s looking for work and be taken on (see Sunter 1937: 254) but no details are provided that reflect on anything related to Aboriginal relationships with the sea or which 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 Aboriginal people's contact with outsiders to missionaries, a few government servants, the occasional anthropologist and a declining number 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 had almost nothing to say about the sea, a word that does not appear in the index.

One single report stands out in the first half of the twentieth century. It involves a Rotuman missionary stationed on Croker Island for about a year from the end of 1941 who described 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 goes on to say, 'If we did not, he would work magic on us, and we would die unless we went away very soon' (Taito nd: 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 test case. Pages 15-51 of the 63 page monograph are maps and listings of site names and details. On page 1 of the introductory fourteen pages he says: '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 says 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 no references other than those mentioned above are made about the sea. Many of the annotations for the sites indicate that the 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).

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) where the task was 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 who 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 get a fishing industry off the ground (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 the Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the water 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).

> The first legal recognition of any Aboriginal interest in the sea arose from these observations by Mr Justice Woodward. Although the *Aboriginal Land Rights (Northern Territory) Act 1976* gives no rights to the seas 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 2km of Aboriginal land. Specifically, the *Aboriginal Land Act 1978(NT*) Section 21(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 Aboriginal who are entitled by Aboriginal tradition to enter and use those seas and who enter and use those seas in accordance with Aboriginal tradition. '.

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 (s12(3)). Only two cases seeking sea closure have come before the Commissioner because of the cost of preparing cases, the weak exclusion rights they grant 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 matters. Nevertheless this legislation precipitated some research along the Arnhem Land coast (see Keen 1980; Davis 1982, 1984; Palmer 1983; and Palmer and Brady 1984), and 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.

They 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 been to before (1984: 52) which among other thing 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 was 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).

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 eleven days in two sessions. Devitt and myself had produced a document of 65 pages 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, a register describing each of the sites and genealogies covering all of 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 some what differently by different judges.

We contemplated pursuing the community based model of sea ownership as in the Palmer and Brady sea closure document but once fieldwork began it did not seem appropriate. Not least because whenever any of the several disputes about ownership of places 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 (*yuwurrumu*).

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
- 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 *yuwurrumu*. Although these rights flow from birth to all *yuwurrumu* members, most are only exercised in their strongest form by senior members of the *yuwurrumu*. There are others who have claim to interests in the estate who are not *yuwurrumu* members but they have to have their claim acknowledged by the senior *yuwurrumu* 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).

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 touched on 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 they spoke about their relations to the

sea in relation to: Macassans, boundaries, permission seeking, and the basis for recognition of right holders.

Croker Islanders's 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 father's father, Rudbuk, had been to Macassar and was widely known for his ability to speak Macassan. Her own father who was born shortly after the Macassans stopped coming and lived into his eighties worked for trepangers and other people along the coast whose boats include Japanese and Indonesian crew and knew some Indonesian too. 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 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 had this to say (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.

Basis for recognition (T527-8):
Thank you. 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 her?---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.

Conclusion

The foregoing provides evidence of the very different ways in which Aboriginal people's relationship with the sea had been conceptualised both by them and by outsiders. Although there is no evidence of 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. While working with Ronald Berndt mapping the almost exclusively coastal sites on the Island no mention was made by him 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 are these differences and switches to be understood and what do they say about the visibility of customary marine tenure in the Croker area?

At the heart of the issue is the nature of property. If the focus is on property as first and foremost a social relations 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

Take the case of the Macassans. There is no substantive evidence contemporary with Macassan 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's 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 Yarmirr'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 emphasise that today the relationship with the Macassans is seen as a social relationship based on mutual respect whether or not it was such a gift exchange relation in the past.

In the case of the Rotuman missionary it is tempting to say that the exchange with him was based on the feeling that he could be drawn into a social relationship that recognised Islanders' rights because he was not like the European missionaries, of whom the people had long experience, as Methodist missionaries had been on a neighbouring island for more than 20 years, but more like the Croker Islanders with his

dark skin. I emphasise that there is no evidence for this as I failed to ask how people might talk about the episode today.

In respect of the anthropologists I think the reason for them not seeing the marine tenure are quite complex. It can be assumed that there were reasonable relations between them and the people they worked with intensively and it was certainly the case that there was a good relationship between Ronald Berndt and the men he worked with on Croker. As 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 moving around the island or sea, 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 on based 'racial' grounds, the framework of the thinking of both the Aboriginal people and the researchers was very much an us-them one, 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). It helped make the system recognisable by describing it in the language of the instructing lawyers and the courts.

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

When we come to what the Aboriginal people actually said in the hearings about their system of marine tenure and the language they used to talk about 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. Particularly where the issue of property rights are concerned it has difficulties with the open-ended, decentred, continuously negotiable indeterminancies 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 it has not had before.