Reimagining sea space: from Grotius to Mabo

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In a ‘restrained critique’ of the proceedings of the World Fisheries Congress in July 1996, Sir Tipene O’Regan, Chairman of the Waitangi Tribunal Fisheries Commission, took issue with the failure of fishermen and fisheries managers across the world to examine two assumptions of their marine strategies: first, the right of open access to coastal seas; and second, what he termed ‘the bone fish-hook syndrome’, the belief that customary marine tenures are antithetical to modern marine management strategies.

Examination of these two assumptions from a historical perspective may help to clarify emerging marine issues in post-Mabo Australia. In the light of the High Court decision on native title in June 1992, such an inquiry may offer a way of coming to terms with an under-examined question: to what extent has the privileging of the dominant European construction of sea space precluded serious or meaningful recognition of the inherited rights to sea domains characteristically adjoining the lands of coastal indigenous people.

Sir Tipene graphically challenged the dominant belief that territorial seas are simply adjuncts of centralised states, that marine resources are simply the property of all citizens of that state: ‘When someone wants to take what is someone else’s, they say it belongs to everyone’ (O’Regan 1996). This, he said, is the way open access to coastal seas came to rule historically.

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This right to take was justified by the ideology of backwardness: ‘the bone fish-hook’ label is another way of saying that the more industrious peoples have the right to expropriate the less advanced (as defined by them) in the name of progress and civilisation. Whether on land or sea, this was the doctrine as self-righteous as it was brutal that underlay the inexorable course of colonial expropriation of lands and local marine territories. Sir Tipene was thinking of settler colonies like New Zealand and how islands surrounded by bounded clan and family owned plots of sea were declared to belong to all citizens to use and enjoy, so erasing any other construction of seascape from the historical memory of the coloniser though not from the minds of the colonised.

He could just as easily have been referring to the historical process whereby the locally-based heritable rights to foreshore and adjacent seas bordering the coasts of Europe came to be eclipsed and incorporated into state coastal seas. State territorial seas are only as old as the centralised states which began to become dominant political entities in Europe in the seventeenth century. When English jurist, John Selden (1663:282), wrote in *Mare Clausum: The Right and Dominion of the Sea* 1663 how the mainland and associated islands, together with their adjoining seas, ‘made one Bodie’ of Italy, how the creation of the state sea was the means of ‘keeping other nations at a distance’ he was writing under the shadow being cast by the demise and disappearance of the sea holdings of many coastal groupings. Clans and other groupings were treated dismissively, their laws and customs were classified as primitive, and they themselves were often written off as racially inferior. Events in Ireland and on the Celtic fringe of the British monarchical state as a whole provide a stark and melancholy instance of the way the colonial model with its underpinning ideology of racial inferiority, was developed and perfected, foreshadowing what Hechter (1975:80) calls ‘its more notorious overseas cousin’.

In the period immediately prior to the consolidation of the British state under the Tudors and the declaration of the four surrounding seas as the one ‘British sea’, the seafaring coastal septs of western Ireland were continuing to follow Brehon law, a body of written Irish
law. Ancient coastal holdings may have extended out a distance of nine waves, a ‘measurement’ recorded in the legend of an ancient battle that brought the Milesians to Ireland.\(^2\) Brehon law, practised on land and sea by Irish septs and families, was reviled by English statesmen being seen by them as primitive. Making an explicit comparison of the Irish with ‘the natives of the New World’, Edmund Spenser saw ‘the refusal of the Irish to give up their barbarian customs and clannish pride’ and ‘conform willingly to ... self-evidently superior English practices’, as evidence ‘that they are a barbaric race who must be broken by famine and the sword’ (Cairns and Richards 1988:5, 4).

In the English conquest of Ireland between the twelfth and sixteenth centuries, certain clans defended themselves successfully in battle and ‘in defiance of English law’ against expropriation of their land-sea property, so that by the sixteenth century one half of Connaught was back in the hands of the clans (Butler 1925:197, 202). In that period, the O’Donnell family was called ‘King of the Fish’ in northwest Connaught; the coastal waters adjoining land of the O’Malley sept centred at Clew Bay, County Mayo, west Connaught, were known as ‘O’Malley waters’ and the head of that family ‘issued licences to Spanish, French and English fishermen to fish his sea domains’ (Chambers 1986:38); and foreign fishermen paid fishing dues to the Sullivan-Beare (Bere) of Bantry (Butler 1925:29). In 1601, the thirty-oared galley commanded by Grainne (Grace) O’Malley ‘proved troublesome’ when first attacked by the twenty-one-gun Royal Navy warship Tramontana off the coast of Donegal, a sea-battle that has lapsed largely from historical memory (Glasgow 1965–66:302).

However, while the Brehon laws, together with a construction of sea space based upon local land-sea domains, survived long after their

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official replacement by English law (Chambers 1986:46, cf. Butler 1925), lack of scholarly inquiry into the clans’ interrelationship with the sea, is integral with a culture of ignorance that characterises the colonial imagination. In the name of the right to open access to state territorial waters, local customary rights of land-sea holders in the colonial world were denied in a historical process that also rendered them invisible in Europe. In calling into question the universality and the ‘naturalness’ of open access, customary marine rights may be seen not simply as exceptions peculiar to settler colonies and independent coastal states, but as characteristic of coastal clans, villages and communities in a variety of historical times and situations. These ‘times and situations’ include our own, both with respect to marine territories in former external colonies and to marine tenures in peripheral parts of Europe. For identifiable historical reasons, these have managed to survive well into this century, even until the 1990s.

An exemplary case is the Norwegian cod fishermen’s self-regulatory fishery which they have operated in the Lofoten Island area for the century since 1897 when long-standing fishing rules and practices were enshrined in the ‘Lofoten Law’. The immediate social context of this codification was the desire of the cod fishermen to shake off the power of the landowner-merchant class whose actions had led to ‘the exclusion of the poorest fishermen’ (Jentoft and Kristoffersen 1989:357). A spectacular clash at the entrance to a site known as Trollfjord in 1890, between small fishermen acting in concert and the big shipowners, led directly to the small-holders’ legislation of 1897. So began an era of almost 100 years of a self-regulated fishery. Small-scale fishermen continued to follow customary rules respecting local inheritance of plots of sea and fishing grounds whose origins stretch back over a millennium (Örebech 1993:4).

Few writers have addressed the subject of indigenous rights to the sea within the larger framework of cultural contrasts in representations of sea space. Even fewer have addressed what Sue Jackson (1995:87) calls ‘the imperial history of landscape construction’. With the broad aim of demonstrating ‘how the pervasive and dominant European perceptions
of environments and social space have impeded indigenous aspirations to own and manage the sea, she points to a social construction in which ‘the land, quite unlike the sea, has emerged as a commodity or property which has an economic value’.

Some cultures, Aboriginal and Torres Strait Islander among them, do not observe this ‘cultural distinction between land and sea’, constructing land and sea property into a seamless web of cultural landscape. Nor do they ascribe an economic value to that construction in dissociation from culture; the economic and the religious, the material and the spiritual, are embedded within the one whole (Sharp 1996). In the Murray Island (Mabo) Land Case, plaintiff Reverend Dave Passi explained with passion how he could not sell his land because it was part of himself and his family line; selling it would mean trespassing against Malo’s Law, the traditional law of the Meriam. The right to own land is accompanied by a responsibility: my father gave me ‘every right and all the responsibility’, witness Gobedar Noah told the court (Supreme Court of Queensland, Transcript: 2108; hereafter TQ; Sharp 1996:77–81). That responsibility entails the obligation to care for it and, in return, to receive its ‘gifts’ to share it with those on whose behalf one acts as landholder today and for future times and people. This, an inalienable system, contrasts with the dominant European perspective in which the individual alone owns this object: possession here is utilitarian-economic and self-evidently a real property right.

The Meriam, a sea people whose totems come almost exclusively from the sea, have an expression, gedira gur ‘the sea that belongs to the land’, where land (ged) also means homeland or place. So when plaintiff James Rice explained in court how his father, Loko, showed him his land and sea boundaries at Dauar as a child: ‘This is our boundaries, this is our land. This is our reef’, he was speaking of ged, his land; and in the same breath he was talking about gedira gur, the sea that belongs to that land. In forming a web of association through sites named and tracks made by ancestors, mythical and human, they become and are experienced as an undetachable part of Meriam identity. Such proprietary indivisibility of land and sea territories and estates is characteristic
of coastal Aboriginal and Torres Strait Islander peoples (Keen 1984; cf Smyth 1993:17). Their law creates a moral obligation impelling them to act in certain ways, a part of their socially made human make-up that led one Yolngu elder to say how their feelings for their sea territory were part of their body and blood forcing them to defend it. ‘It is something deep within us’, a Meriam elder told me in 1996. Recognising the vast gap in ways of seeing, Allen (1992:2), a former Northern Land Council lawyer, concludes that to achieve legal recognition of the sea water component of indigenous territories, the first task ‘is to make them understandable, comprehensible, to non-indigenous people’.

In seeking to identify the cultural roots of the dominant perspective on the sea within the history of European expansionism, this chapter is framed by, and takes its bearing from, these key positions within a wider picture. In the following three sections, this chapter considers the social and cultural origins of the belief in freedom of the seas/open access and its undisputed role as an ideology of European maritime powers; it gives an account of its limited contestation in Australia; and it argues that, under contemporary global conditions, indigenous maritime peoples’ move to take primary responsibility for inherited seas may be seen as an important opportunity to create management regimes which develop economically viable fisheries in a culturally and environmentally sustainable way.

**Ruling local sea rights out of the imagination: the cultural roots**

So complete was the enshrinement in statute and in mainstream public consciousness of the belief that sea space cannot be conceived as the property of a local group, that only in the last thirty years has the idea of customary right of local coastal groups to sea territories become the subject of scholarly inquiry or public debate. The few ethnographic field studies of local ownership of sea territories carried out in the 1970s, mainly among indigenous peoples on the periphery of settler colonies,
were often seen as discoveries of ‘unique, rare or isolated systems’ (Cordell 1989:15).

Local sea territories are a form of territorial sea in the sense of being culturally inseparable from adjacent land masses. The difference between local sea tenures and state sea territories may be located broadly within a contrast between community and society. In each case there is sea belonging to land, but the principles of that ‘belonging’ differ in quality. With ‘local’ sea tenures the right to land-sea domains is embedded in persons whose central being is created in face-to-face interrelations. Land-sea property is held and bequeathed by a person on behalf of a family, clan or other group of associated persons. With ‘state’ sea tenure the right to the sea is not a right on behalf of a tangible group of persons associated with a geographical locale. It has been removed from the level of the face-to-face and reconstructed as an impersonal, abstract right vested in a monarch or state acting for all the citizens of a polity. It is given legal expression as public rights where every citizen has the right to use and enjoy the coasts.3 Local property rights along the coasts make a geographical but not a (major) cultural distinction between wet and dry land. State sea territories also belong to land, but they have been severed from dry land property held characteristically in alienable title.

In neither case can a rightholder to sea refuse to accept that right. When a father at the island of Mer is bequeathing his land and reefs and lagoons and outer fishing stations, his son can not conceivably say ‘I’ll just have the dry land. Forget about the reefs and waters.’ Nor can a coastal state refuse its territorial sea. As Lord McNair stated in the Anglo-Norwegian Fisheries Case (1951): ‘International law does not say to a State: “You are entitled to claim territorial waters if you want them.” No maritime State can refuse them’ (International Commission of Jurists, Report 116:160 as cited in Symmons 1993:45; Symmons’

3 For a classificatory scheme and discussion of various forms of rights pertaining to land and sea, see Sharp 1998.
emphasise). Here again, land and sea are also associated culturally, but according to radically different principles to those in local face-to-face coastal communities.

Why has it taken so long to recognise the existence of local sea tenures in coastal waters? Cordell (1989:9) suggests that the association of property rights with land and the tendency for knowledge of contemporary sea tenures to be located within oral tradition has meant that customary rules relating to sea property have been followed largely unbeknownst to officials and officialdom. His observation spoke strongly to me as I began the project from which this chapter is drawn, in 1995.

On the island of Skye, a Gaelic poet, and keeper of cultural tradition, told me how stone fish-traps, very numerous until the second half of the nineteenth century, when they were declared illegal and largely destroyed by the landlords, were owned by certain families and clans. One of the surviving four I saw at Sconser was reminiscent of the fish-traps at Mer. Evans (1979, Fig 75:228) details the way similar stone fish-traps were used by local fisherfolk in the last half-century in County Down, Ireland. Taylor’s (1981:782) study of fishermen of the hamlet of Teelin, south Donegal, illustrates how Teelin villagers, miraculously by-passed by the enclosures, continued to uphold and follow locally evolved social rules and mores in salmon fishing in contemporary times, including the right to exclude outsiders from their community (‘far-siders’), based on their assumption of ownership of and use rights to their estuary: the ‘by-laws’ and code of rules they followed were their own, not those laid down by the national government.

These oral accounts of surviving marine rights, which included seaweed rights and the use of standing stones as foreshore property boundaries on the geographical and social margins of Britain and Ireland, matched written accounts of surviving rights.4 Yet I found no

4 Jentoft and Kristoffersen (1989:355) refer to the ninth International Seminar on Marginal Regions, Skye and Lewis, 5–11 July 1987. ‘Seaweed rights’ refer to the rights to harvest seaweed (also known as wrack), which was used traditionally as an agricultural fertiliser.
comparative account of local sea territories in the Old and New Worlds. Customary marine tenures of indigenous people of the non-European colonial world tended to be seen as exceptions and were treated as ‘curios’.

The origins of the invisibility of ancient and contemporary local sea territories lie in the revolutionary transformation of feudal and pre-feudal, clan-based land-sea tenures, largely completed in England by the end of the eighteenth century (Thompson 1975). From the seventeenth century onwards, this transformation found legal expression in the concept of state territorial seas, which had been established before 1600 in international law through the work of Gentilis. Rights to territorial seas and their resources then moved from the customary marine rights of local coastal inhabitants to the Crown. Coastal waters continued to be integral with coastal lands, but sovereignty over these waters shifted from local inhabitants with fields more or less adjoining the sea, to monarchical states. Inherited coastal territories or domains were absorbed into greater state territorial seas as though they had never existed.

In practice, the Crown frequently granted lease rights to large landowners as private property rights, effectively excluding the traditional owners from the coasts and fisheries. The right to fish in tidal waters in Britain had been enshrined as a public right under the Magna Carta in 1215 (Netboy 1968:165). However, as McCay (1987:198–99) notes, ‘this freedom was abridged and supplemented by claims of the Crown and landowners and the development of complex common-law rights’, so that ‘[o]pen access to the fisheries of England and Wales was gradually whittled away’. Not only did the idea of free access to coastal waters by the citizens of developing monarchical states often find brutal expression in the uprooting of coastal families and clans in the process of the obliteration of ancient heritable sea tenures, but also, to the extent that

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local tenures survived in isolated and sometimes residual form, they were rendered invisible in the name of the Crown. As Selden (1663: Preface) wrote in 1663: ‘the King of Great Britain is Lord of, the Sea flowing about’.

The period of the rise of imperial maritime powers saw the doctrine of freedom of the high seas expounded by Dutch jurist, Hugo Grotius, become joined to market goals, so creating a belief of immense persuasive power. The origins of this belief lie in what is taken to be natural law, where things in a state of nature cannot be alienated as private property, and where water and air are seen as by their nature a gift for all to share in. The lasting appeal of Grotius’ *Mare Liberum*, a book of only seventy-six pages published secretly in 1603–04 and appearing under his name in 1633, may be sought among the philosophical and cultural roots of the belief that the surrounding ocean was a gift of God to all peoples ‘speaking through the voice of Nature’.

Grotius drew upon the works of ancient scholars, especially the pre-Christian jurists Virgil, Ovid, Cicero and Seneca: ‘the air, the sea and the shore’, according to Virgil, ‘are open to all men’; sun, air, waves ‘are public gifts’ Ovid wrote; nature herself ‘enjoins its [the sea’s] common use’ (Donellus IV, 2 as cited in Grotius 1972:30). But unlike Seneca, who inveighs against those who cross the ocean ‘for gain’ (Knight 1920:9), Grotius’ *Mare Liberum* was part of a treatise which he had been asked to prepare in support of the Dutch East India Company, on whose behalf he was legal adviser and advocate (and apparently kin to one of its more influential directors).

The counter-right to dominion and power over the seas, the subject of John Selden’s treatise *Mare Clausum*, was written in the context of Britain’s search for the legal means to exclude Dutch fishing vessels from her territorial waters. This right was remembered almost exclusively as in opposition to Grotius’ thesis.6 Selden’s work lacked the power to stir

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6 Yet both Grotius and Selden accepted the principle of state sovereignty over territorial waters (Grotius 1925:209–10; 1972:30–31). As Prescott has noted, before Grotius wrote, ‘the concept of territorial waters was firmly established’ (1975:35–36, cf Grotius 1925:214). For a further discussion of
the emotions in the same way as the belief in freedom of the seas. As a member of the London-based Grotius Society (Cole 1919:17) wrote of *Mare Liberum*, in appealing to laws ‘written in the minds and on the hearts of every individual’ Grotius ‘appealed to the common sense of mankind for what was fair and right’. Like a biblical text, its thesis was not up for discussion, still less for critique (cf. Knight 1920:4).

Above all, the lasting quality of Grotius’ ideas is found in the profound cultural political role they were destined to play. The imperial wave rose in a crescendo among the modern Ulysses of the nineteenth century. The freedom to sail beyond the sunset, an idea whose magnetic pull was entwined with the hope for the freedom of the human spirit, the God-given chance to venture out into the dread and glorious oceans stirred ancient dreams. The right to navigate freely the widest expanses of oceans was also the indispensable condition for the reconstruction of the heartlands of the rising imperiums of Europe. This very freedom guaranteed the inexorable and rapid development of property in land as an economic commodity value. In turn, it ensured that rising industrial capitalism would tear apart the old structures of agriculture, crofting and fishing, leaving vast numbers of land-less and sea-less people with the freedom only to sell their labour power. Herein lies the tragic paradox of the ‘freedom of the seas’. The belief in private property as the centre of human values sat back to back with the belief in freedom of the seas as a natural right, for ‘water is a moveable, wandering thing and must of necessity continue common by the law of nature’, wrote Sir William Blackstone (II, 1979:18), famed eighteenth century English jurist.

In the turbulent wake of the evictions from land-sea territories after 1845 in the British Isles and Ireland following the Enclosure Acts, the practical possibility of open access to the coasts in the New World had special appeal to the settlers and their descendants, people whose sensibilities had been heightened by a sense of outrage at the wrongs suffered by their forebears. In the popular imagination, freedom of the seas took on a generalised meaning: the unfettered right to fish anywhere, the ideas and assumptions of Selden and Grotius, see Sharp 1995.
right of any citizen to the sandbeaches and the coastal seas of coastal states, and the world seas as an international commons.

The social processes that placed ancient sea tenures of Europe into remission or at least cast them into shadow are the same ones which hide sea tenures in colonial settings from the perceptions of people in dominant cultures. These social processes also contribute to the fragmentary character of information on customary rights to the sea.

Behind the effective blotting out of local sea rights in dominant cultural representations of sea space lay three facts of social history and cultural assumption: two relate to the triumphal march of propertied classes on a course heralding the social annihilation of social formations which upheld local smallholder rights, whether as clan right or property in common. The first relates to the formation of states within the context of the rivalries of sea powers to capture the oceans for their exclusive navigational use (Grotius) and the need to keep ‘other Nations at a distance’ (Selden II, 1663:282). Free access to navigate the high seas for imperial endeavour and the need to exclude others from coastal waters, form the two sides of the coin of rising state imperiums. The second concerns the accumulation of capital and the transformation of the countryside in the interests of an ascendant capitalist-merchant class and their alliance with a landlord class. This process rose to prominence in eighteenth and nineteenth-century England and Scotland. In eighteenth-century England the inexorable thrust of capital accumulation was registered in the Black Act of 1723, which restricted ‘non-monetary use rights’ by outlawing the forest commons (Thompson 1975:244). In the nineteenth century the enclosures uprooted vast numbers of families from inland and coastal areas all over the British Isles and Ireland, resulting in starvation, a landless class and forced emigration. ‘Freedom of the seas’ became an ideological justification for destroying the ‘natural’ rights to ferae naturae, experienced as the right to a fish for the pot or a faggot for the fire (McCay 1989:205).

A third fact rests within a contrast between cultural assumptions. The uprooted and hidden social forms embodied in local inherited sea tenures followed a different set of principles to those of the tenures that
usurped them: a significant manifestation of this difference is that like land the sea was not represented as simply water-bearing resources to be exploited: the aim was to conciliate the land or the sea, not to conquer it. The Irish conceived of the sea as part of ‘Otherworld’ (Heaney 1994:56–62), to be respected, even placated, a withholding space as well as a giving place. In the late nineteenth century, the Shetland Islanders continued to use an ancient secret deep-sea language at the *haaf* or fishing ground, a custom shared with fishermen of Norway, the Faroe Islands and probably throughout the areas of the Viking influence (Drever 1935–46:235). This *haaf* language substituted certain names secret to fishermen for their usual names, these being mainly Old Norse words, many of them of ancient Sami origin, some of them being the words of a devotional language or words drawn from Eddic poetry (Drever 1935–46:236). They included ‘old worship words’ for sun, moon, sea, land and fire; secret words belonging to the ritual of fishing, including the boat and its launching, the destination, hauling the fish; and ‘protective’ words substituted for those tabooed at the *haaf* (240). Pálsson and Durrenberger (1983:521) consider folk beliefs among Icelandic fishermen early this century: the ability of an individual to catch fish or ‘fishiness’ was seen as ‘part of a grand design’ and fish caught were spoken of as ‘gifts of God’.7

One may readily agree that secret languages and belief in luck or magical notions sit awkwardly beside modern Enlightenment-inspired ideas of progress. Small-scale, low-technology fisheries, the social structures that hold them in place and the cultural meanings that underlie their social practices, the law and custom that regulated their practice

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7 John Spence (1935–46) recalls fishing at a deep-sea fishing area off the Shetland Islands in the summer of 1875 in an eighteen-foot sixern or *haf*-boat, divided into six compartments or ‘rooms’. The skipper, ‘a man of great moral worth’ (Spense 35–46:36) and elder of the Established Church was, like other fishermen of his time, most meticulous in his ‘observance of time-honoured customs’ of fishing. Care was taken to avoid ballast stones with white veins through them for it was believed they brought the white waves that might cover the boat.
Customary marine tenure in Australia (e.g. Brehon law), are readily forgotten and pushed aside, the practitioners are taken to be backward, in many ways akin to the indigenous clan societies of those parts of the globe which were brought into the European orbit through the colonial process. Once the dominant perspective is de-naturalised, however, one may seek to understand the principles of difference, a task of some practical urgency today. Perhaps the relativising of the conception of a *mare nullius* of the coasts, a particular social construction with a very short time span in the history of humanity, leaves a way open to discern the mental patterning and the aesthetic unity of other ‘cultural ways’.

Contesting the dominant perspective: some beginnings in Australia

Against the background of hitherto taken-for-granted assumptions, one may examine some of the processes by which the total hegemony of the open-access/state-territorial seas position has begun to be contested in practice over the last decade and particularly since 1993. Significant events in the marine sphere have led to some reassessment of old policy positions in post-Mabo Australia, but not to the relinquishment of underlying premises.

Although hundreds of pages of testimony of maritime Yolngu people along the Arnhem Land coast were devoted to people's explanation of their perspectives on sea space at the beginning of the 1980s, there is little evidence of a recognition by fisheries managers of the depth or meaning of the difference in Aboriginal perspective to the European-Australian one. Certainly seas around Milingimbi and Castlereagh Bay were closed as a result of the hearings.\(^8\) And although efforts were made by some commercial fisheries leaders to show proper respect for Aboriginal concerns and priorities, more than a decade went

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by without significant change. It took an event believed by fisheries officers and commercial fishermen to place in jeopardy the commercial fishing industry in the Gulf of Carpentaria,\(^9\) to move from a ‘cult of forgetfulness’ about Aboriginal claims to a modest programme of recognition. This was the announcement by the Anindilyakwa clan leaders and elders of their intention to lodge a sea-closure application seaward of the mean low-tide mark around Groote, Bickerton and other surrounding islands. The perspective behind this announcement, made at the ‘Turning of the Tide’ conference held at the Northern Territory University in July 1993, was the Anindilyakwa people’s aspiration to manage the local marine environment of which they are the recognised owners and custodians under Aboriginal law (Josif 1993:21–22).

From the perspective of the Aboriginal community, the motivating reason for their decision was that increased use and greater exploitation of the marine environment by outsiders ‘is having a cumulatively detrimental effect on some marine species’ habitats, and that some activities are a threat to cultural sites: ‘we don’t follow the water, we follow the land under the sea...’, one elder stated (Josif 1993:22). It was the same position taken by custodians in neighbouring areas along the Arnhem Land coast (Aboriginal Land Commission, Sea Closure 1980–82: *passim*).

The Anindilyakwa people’s move acted ‘as a trigger galvanising the industry into action.’\(^{10}\) The action led to a series of moves finding public expression in the establishment of eight regional consultative bodies known as Fisheries Committees taking in the 87 percent of Northern Territory coastline inhabited by Aboriginal people.\(^{11}\) These committees comprise commercial, recreational and Aboriginal fishing

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9 The Northern Prawn Fishery is regulated by the Australian Fisheries Management Authority, and other fisheries are controlled by the Northern Territory government.

10 Department of Primary Industries and Fisheries official, notes of conversation with author, Darwin, 4 July 1996.

11 The ‘coastline’ includes ‘the area under Northern Land Council responsibility’, Fisheries Committee, Charter, nd. This takes in coastline and off-shore islands from the western side of the Gulf of Carpentaria
representatives who are referred to by officials as being in ‘partnership’, even in ‘co-management’ with them. While useful, these committees only provide channels for hearing and tackling grievances. They enlighten Aboriginal people on resource management activities already in place, on licensing rules and their relation to sustainability and begin and end with consultation (Fisheries Committee, Charter nd:1–2).

Despite this change, the basic assumptions of non-indigenous Australia remain as they were: no-one owns the water or the sea-bed and the fish are conceived as a resource that belongs to everyone. Property rights or primary caretaking rights to a marine locality are foreign to this way of thinking. At the same conference at which the Anindilyakwa claimed primary rights, public servants responsible for fisheries put the perspective of official government circles on public rights to coastal seas:

Fish and aquatic life are common property resources and the NT and Commonwealth Governments have the responsibility to manage the fishery resources in its adjacent waters on behalf of the whole community. This is undertaken under the provisions of the Fisheries Act 1988, and subordinate legislation (Grey and Lea 1993:1).

Closer to the ground, officials argue that Aboriginal coastal people would gain nothing from rights to the sea: given the habits of fish, small plots of sea could not enclose them and modern fisheries management requires large areas of sea to be viable commercially.

The foray into the area of consultation with Aboriginal people by representatives of the dominant culture makes some concessions to their wishes in regard to conservation of fish and respect for cultural sites; it recognises, puts to use and often sets out to extend their body of knowledge and expertise on dugong and turtle. But it does not address the question of Aboriginal perspectives in any basic way. The Anindilyakwa are interested in learning and exchanging as they and their Yolgnu through Arnhem Land to the far reaches of the Territory adjoining Western Australia.
neighbours did with the Macassans, who recognised their ownership of the land, paying tribute to each land-sea owner for access rights to the foreshore (Thomson 1949:51). They accepted elements of technological change, incorporating them into their economy; they extended their cultural symbols in a way that did not diminish or destroy them. Today they seek ‘to implement a comprehensive marine management program’ which involves other groups in the area. In a co-management scheme to which commercial and recreational fishermen, government agencies and fisheries contributed, the Anindilyakwa would be happy to accept new ideas and technologies but ‘as primary caretakers’ they see ‘the last word’ as lying with themselves (Josif 1993:24).

The reasons for that stance have been explained on countless occasions: by Yolngu in the sea closure hearings or for that matter by the Meriam of the Murray Islands in the hearing of ‘the facts’ in the Supreme Court of Queensland in 1986 and 1989 in the Mabo case. Again and again in the former hearings, Yolngu coastal people expressed two closely related concerns which they backed up with examples from their experience: that outsiders’ activities will deplete the area of fish, mess up the estuaries and rivers with old nets and gear and generally fail to observe rules Aboriginal people hold dear to themselves and their children; and they will fail to respect the centres of creation beings, burial sites and other cultural sites. They explained the cultural arbitrariness for them of two kilometres, the distance beyond the low-water mark recommended by the Aboriginal Land Rights Commission that traditional coastal estates may extend: ‘When Aboriginals sing our sacred songs we don’t start it from two kilometres ... our ceremony songs start off from right out in the ocean’ (Aboriginal Land Commission, Sea Closure, Transcript of Proceedings, Darwin and Milingimbi 1980–81:143–44; hereafter Transcript).

Witnesses contrasted balanda (white people’s) relationships with the sea as ‘just a sea’ for enjoyment and the dollar with their own: the seas are ‘something that means something to our people, something that we belong to’ (Charles Manydjarr, Transcript: 145). Significant places are ‘linked to you with feelings’. Sea places are not just nature out there; nor
are other parts of the environment: ‘The thunder and clouds and birds ... is the feeling of the people’. That interrelationship is part of the round of life where the budding of flowers on land is a sign of the right time for certain sea life (Mr Mawunydjii, Transcript: 22 June 1981:184; cf 167, 172–73). In disclosing some of their beliefs in the hearings, they often drew back as they approached matters of central belief, giving voice to a lifetime of experience that balanda are incapable of understanding: ‘It is just beyond your understanding’, said Mr Gaykamanu, as he sought to explain the idea that ‘Every bit of land means something to Aboriginal people’ (Transcript: 185). Flowers, birds, fish tell; you have to be able to listen. The witnesses were revealing a different sensibility, a different psychological make-up. The sea gives back to those who respect it: ‘It [our tie with the sea] is something which is part of our blood and body that is forcing us and telling us what to do...’ (Mr Weluk, Transcript: 143).

Thus they may approach the matter of fishing differently to many balanda: the sea gives back to those who know and respect it. So, for example, live-release sports fishing is offensive to Aboriginal people. Returning a hooked fish violates their sense of what is morally acceptable. Cree fishermen of Chisaski, Canada express a similar repulsion and they see tagging too as a mark of disrespect to the animal. They say ‘you eat what you catch, you do not kill more than you need, and you approach the task of fishing with basic humility and modesty’ (Berkes 1989:195). Nevertheless, even in rejecting the idea that balanda could ever understand how feelings, visions and dreams about a place may be a way of linking you with it, Charles Manydjarri appealed to the judge face to face, reflecting wistfully on the melancholy of dwindling Aboriginal cultures ‘on the edge of Australia’: ‘because you are interested you are very welcome’, he said. Perhaps this may help you to ‘get a feeling from the Aboriginal people here so you can help us’ to ‘win the victory’ (Transcript: 146). To be taken seriously in practice as primary caretakers.

12 See also Meriam custodian Sam Passi (Au Bala): ‘I use nature for my book’ (Sharp 1993:51–52).
The most imaginative, flexible and intelligent *balanda* persons concerned with fisheries organizations and management do respect the Aboriginal way of doing things and the time is ripe for them to educate the *balanda* fishermen about how Aboriginal people feel about the sea. Nigel Scullion, Chairman, Australian Seafood Industry Council, sees the outlook for co-operation as a rosy one because ‘there is so much goodwill from the Aboriginal people and to a large degree from the [non-Aboriginal] fishermen’ (notes of conversation with the author, Darwin, 8 July 1996). In his view, the key to the rosy future is consultation, and this must be culturally appropriate. The issue remains that even such an enlightened business person does not relinquish the cultural assumption about open public rights to state territorial seas.13

Overcoming the bone fish-hook label: sharing the coasts?

A major sea transformation is underway globally, signalled firstly by the expansion of competitive economic resource pursuits at sea including deep sea bed mining and secondly by a redivision of the seas whereby state territorial seas are expanded to 200 nautical mile Exclusive Economic Zones (EEZ). These changes may hasten ‘the imminent demise of individual fishermen and small business operators in coastal waters (O’Connor and O’Connor 1994:4). On the other hand, the United Nations Convention on the Law of the Sea requirement for each coastal state to determine its own total allowable catch (TAC) carries the rider that where domestic industry is unable to meet all of a TAC, the state has an obligation to offer licences to outsiders for the remainder of the catch quota. In this context, the initiatives being taken by Aboriginal and Torres Strait Islander maritime cultures towards re-assuming the

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13 He identified the ‘cultural value’, which he believes is shared by 97 per cent of Australians, that the beaches and coastal seas are the preserve of all citizens, not of any one group (Nigel Scullion, ‘Late Night Live’, 21 May 1996; cf ‘Lateline’, 28 August 1996).
role of primary guardianship of marine resources and coastal management, might reasonably be welcomed as an opportunity, not feared as a threat.

The thrust of globalisation is to hasten destruction of local cultures through the processes intrinsic to systems geared to economically rationalist goals. This was the process that produced anger and frustration among cod fishermen in arctic Norway when in 1990, in the interests of ‘efficiency’ as conceived by Government officials, small boats skippered and worked by their owners lost their full participation rights in the fishery (Maurstad 1992, 1995; Örebech 1993, 1995). Side by side with this ‘tragedy of the commoners’ as McCay (1989:206–10) has called it, is a trend towards the creation and encouragement of regimes that require participation of so-called ‘user groups’. A review by Sen and Raakjaer Nielsen (1996:21, cf 23) of twenty-two case studies concluded that in almost all the fisheries studied co-management regimes had been established to relieve the consequences of overexploitation. In such cases co-management is clearly ‘a form of crisis management’.

There is a shocking irony in destroying the old sea tenures and then imposing stewardship on user groups. Sen and Raakjaer Nielsen (1996:11–12) cite a Zambian case where the right to participate in a crisis management fishery was conditional on the fishermen and their families leaving their fishing camps or their own villages and ‘emigrating’ to artificially created lakeside fishing villages on Lake Kariba. By contrast, along Australia’s northern coastline, and in other places, the sea territories of indigenous peoples remain relatively healthy and most of their owners have the will to act as their primary caretakers. The Yolngu people of Galiwin’ku (Elcho Island) and the Meriam of the Murray Islands, for example, are putting their perspectives on their inherited sea territories into the public realm and demanding the right to responsibility for the management of their seas (Ginytjirrang Mala 1994, ‘Salt Water People’, SBS 18 September 1996; Day 1993; Media Release, Mer Island, 6 December 1993; Maber Newsletter, nos 1–3, 1996).

In addressing the basic issue of cultural contrast in representing sea space, the world-historical picture tells us that the problem in finding
a future is more deep-seated than the differences between indigenous and non-indigenous perspectives as they manifest themselves in countries like Australia and New Zealand, or in Canada, the United States or South Africa. A wider problem is the long-term failure to take small-scale locally managed marine activities seriously. As Rettig, Berkes and Pinkerton (1989:286) observe, until about the mid 1980s most fisheries managers treated self-managed fisheries, coasts and waterways ‘as anthropological curiosities’. They point to a veritable ‘treasure chest’ of ‘success stories’ reported in the late eighties of ‘informal co-management’ from a range of community situations. A body of work built up by a succession of Norwegian scholars, mainly from arctic Norway, has been able to demonstrate that the success of the Lofoten cod fisheries was contingent on the fishermen taking informed responsibility for the marine environment and in relation to one another (Eythorsson 1992, 1995; Maurstad 1992, 1995).

Similarly, the example of Kowanyama community, some 1,200 people with fifty kilometres of coastline and centred on one of Australia’s largest delta systems on the south east of the Gulf of Carpentaria, challenges the view, often unstated, that Aboriginal communities cannot handle the demands of modern resource and environmental management. At a conference hosted by the Kowanyama community in 1990, a locally-based program to ‘keep the rivers and lands healthy for future generations’ was initiated. Its basis is community ownership, its starting point the special attachment of the people to land and waterways, its brief the maximisation of indigenous management ‘in a way meaningful to the community’ (Sinnamon 1996:4). Its masthead is self-governance, its project is local, not regional or national. Their success comes from having made their plans work themselves. In the words of John Clarke, Kowanyama community ranger and Australia’s first Aboriginal fisheries inspector: ‘We at Kowanyama don’t want a joint management agreement. We are the landowners. We want to control the land the way we want it. Not how they [the land and fisheries managers] run it’ (‘Salt Water People’, SBS Television, 18 September 1996). The community has developed first-hand ties with the coastal Lummi Indian people
of Washington State, where contact and new knowledge are placed in the service of a local project. Unlike the slogan of Western-based environmental groups in the 1990s who said ‘think globally, act locally’, the agenda of the Kowanyama people is ‘think locally, act locally, but exchange knowledge with others even far away and as equals in order that we and they may each act in our own domains more effectively’. As Dwyer (1994:95) has noted, the ‘concern of indigenous systems is with the resident group and not with outsiders, their ambit is species and habitats that contribute to human well-being (both secular and sacred) and not with all species and habitats ..’

Rettig, Berkes and Pinkerton (1989:281–82) have drawn attention to the self-regulatory impulse of base communities and its relevance to the success of co-management systems. They argue that where long-existing local cultures, indigenous and non-indigenous, with customary norms and values independent of national cultures, continue, they may develop an ongoing practical commitment to conservation practices. Thus they are ‘naturals’ for largely self-regulatory co-management regimes. They suggest that indigenous groupings ‘have a head start’ on local-level conservation because group boundaries and obligations to members of the group are defined by kinship and territorial systems (Rettig et al. 1989:282).

The work of Norwegian scholars with small coastal communities gives substance to this contention, both in regard to the application of traditional ecological knowledge in fisheries management and to the delicate decisions of maintaining the integrity of the group and its shared ethic within the general province of social boundary maintenance in the admittance of new members to the group. Eythorsson (1992:1–11) considers the importance of traditional local knowledge among Sami and Norwegian coastal communities who share an ethic of concern for the species. Rettig and others (1989:282) suggest that non-indigenous local communities may never develop the indigenous ‘spiritual kinship to the fish nor the actual kinship to other community members’. However, the work of Drever and Spence (1935–46) on the persistence of the deep-sea language among Shetland Islanders in the
late nineteenth century with its strong components of a secret religious language suggests perhaps that the distinction between aboriginal and non-aboriginal is less salient than the distinction between the differing social forms of ‘community’ and ‘society’.

**Conclusion**

Spokespeople for many indigenous maritime cultures have stated publicly their wish to be primary caretakers of their marine environments. In following the customs and beliefs about the sea of their ancestors, they also see themselves as modern people wishing to earn a living from the sea. Above all, it is their own unique perspective on the sea that assures them that they know what is best for saltwater country. Peter Yu (1995:2), Executive Director of the Kimberley Land Council, confirms what people have said all along the coast: ‘We are not just another “user group” of a limited resource.’ In Jull’s (1993:111) words, each follows ‘the imperative of a unique social culture’.

Perhaps the biggest impediment to recognition of this right is the belief that exercise of the right to particular marine areas means the ‘imprisonment’ of marketable resources in locked-up areas of coast. This view is fuelled by self-fulfilling policies that deny indigenous people the chance to earn a living from their ancestral sea domains. A report of an investigation into indigenous aspirations and their bearing on ecologically sustainable development possibilities gives a resounding ‘no’ to the notion of keeping their sea domains as backwaters:

> What people desire above all is to bear the brunt of responsibility in controlling access of outsiders to land and associated sea territory. Also uppermost is a desire to earn a living from ancestral resources, and not have them locked up unilaterally by government agencies as empty ‘wilderness’ areas. (Commonwealth, *Ecologically Sustainable Development Working Groups, Final Report—Fisheries* [1991:65] as cited in Sutherland 1996:17)
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This resounds with the strategies proposed by the Anindilyakwa who seek ‘a co-operative marine management regime’ (Josif 1993:22), or those of the Steering Committee of Manbuynga ga Rulyapa, which called for ‘An Indigenous Marine Protection Strategy’ on 8 November 1994.

However, there is reason now to believe the (sea) horse may have bolted. Aboriginal people are seeking legal empowerment. Claims to seas around Croker Island, western Arnhem Land were heard in court during 1997, other claims from sea owners along the coast of Arnhem Land are in preparation, and in October 1997, more than one hundred and twenty land-sea claims were before the National Native Title Tribunal. For a number of reasons, some of them a result of the imposition of rules derived from the European perspective on open coastal access (Sharp 1997), consideration of native title was restricted to land above the high-water mark in the Mabo case. The Meriam are now moving towards completing the process of recognition of land-sea rights. They have established a Sea Rights Committee, whose newsletter is *Maber*, the Meriam name for the giant triton or *bu* shell, blown in pre-colonial times as an alarm signal calling the warriors together to respond to an enemy or emergency (*Maber Newsletter*, April, May, June editions, 1996).

A lesson from the experience of Meriam people in their land case is that without practical moves for culturally and environmentally sustainable development, a court success may have a hollow ring. Many Meriam people wish to accept the challenge of making their own future. For nearly five years many of them have struggled to create a viable community fishing economy in a way which respects and conserves land-sea country for future generations. They look forward to a self-determining situation like that now developed at Kowanyama. Events there led Aboriginal fisheries official and community leader, John Clarke to say: ‘It’s superb. I like what we’re doing’ (*Salt Water People*, SBS Television, 18 September 1996).
Notes


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