

The promise of native title and the predicament of customary marine tenure

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There seems to be no doubt in the minds of many lawyers that native title in Australia ‘extends to the sea’ (Bartlett 1993a:17).¹ More specifically, a number of lawyers have argued that native title applies to the seabed and sea fisheries, and includes both coastal waters and territorial seas (Bartlett 1993a; Bergin 1993; Behrendt 1995; Kilduff and Lofgren 1996; Storey 1996). As such, native title extends from the territorial sea baseline for a distance of two hundred nautical miles, covering the area now referred to as the Exclusive Economic Zone (EEZ) (Kilduff and Lofgren 1996; Storey 1996).² This still seems to be the predominant view amongst the legal fraternity even in the face of the argument that the common law does not exist outside the colonial boundary of the low water mark. This is a strange argument indeed for it appears to acknowledge that in all other situations it is possible for the Crown to extend the limits of its sovereign rights over time, but insists, in this instance, on freezing native title at that moment in history when the doctrine of *terra nullius* first came into effect in Australia.

While the legal status of native title over offshore places and seas seems clear in the minds of many, this is certainly not the case

1 As Sharp (1996:205) points out, even those individuals and organisations ideologically opposed to native title concluded that ‘rights to the sea [are] inherent in the High Court’s decision’.

2 The Exclusive Economic Zone incorporates those areas of the sea which were previously known as the ‘Contiguous Zone’, the ‘Continental Shelf’ and the ‘Australian Fisheries Zone’. In those cases where the continental shelf extends past 200 nautical miles, the outer limit of the EEZ is taken as the edge of the continental shelf to a maximum distance of 350 nautical miles.

regarding the anthropological evidence for native title over these areas. The basis of this particular expression of native title is often spoken of by anthropologists in terms of 'customary marine tenure' (CMT). Just as a system of land tenure underpins the observation of native title on land, CMT is posited as encapsulating the fundamental principles, or laws and customs, which inform native title over waters, seas, sea bed and fisheries and to which native title conforms to. The investigation of CMT is not confined to the discursive practices of anthropologists nor is it restricted to the area of native title. In this regard, CMT is also of considerable interest to those working in the related areas of resource management, environmental protection, and sustainable development. In anthropology, and in other disciplines such as geography, marine science and law, CMT is spoken of as something which has a discernible, empirical reality and thus as something which is a legitimate object of study. Following on from this, CMT is also seen as something which has disciplinary value as a theoretical concept. This has not always been the case, however, and it is correct to say that CMT has only achieved this status in the last twenty five years or so. Before this time, CMT, as an acknowledged area of inquiry within the discipline of anthropology, did not exist.

The discipline of anthropology is historically characterised by the making, unmaking and remaking of its object of study. For example, this century we have seen the abandonment of 'primitive thought', the rise and fall of totemism, a gradual disenchantment with kinship, the decline of culture and its recent rediscovery in postmodernist writings. Often this ebb and flow of inquiry is associated with the fortunes and misfortunes of schools of thought within the discipline, such as structural functionalism, and/or with the slings and arrows of politically-driven, social changes.

If totemism represents one of the disappearing objects of anthropology then, conversely, it could be said the Customary Marine Tenure or CMT constitutes one of the rapidly emergent artefacts of the discipline; one which is also exported (or imported) to other disciplines. The broad appeal and cross-disciplinary employment of CMT suggests a shared

understanding of the value and content of this concept. Yet, it is evident from the literature that CMT is used to speak of often widely disparate things. In this respect, and as I demonstrate in the following sections of this chapter, current discussions of CMT have much in common with the previous anthropological treatment of totemism.

The obvious question to ask here is how useful a concept is CMT in demonstrating proof of native title over the sea, and to what extent can the anthropological record on CMT be called upon to support these claims? If we ask the question, as I do in this paper, what is CMT, the answers, as we shall see, represent a multitude of often conflicting definitions. If this is the case, then perhaps it is more productive to ask what is accomplished when the concept of CMT is invoked, and who really benefits from its invocation?

Tenure and native title

It could be said that until the advent of federal land rights legislation in Australia in 1976, anthropological interest in the subject of Aboriginal tenure, particularly land tenure, was on the decline. It is probably true to say that it never, independently at least, reached the dizzying anthropological heights that totemism, Aboriginal religion, kinship or social organisation did—evidence of which is reflected in the fact that between 1935 and 1971 more than 40% of the articles printed in *Oceania* were devoted to these subjects. As this suggests, more often than not, discussion of Aboriginal systems of land tenure was subsumed within an examination of what had become the staples of anthropology in Australia. There are exceptions, of course, and, in this respect, the continent-sized undertaking of Tindale (1974) and the more localised work of Piddington (1971) and Pink (1936) spring to mind.

It is not entirely clear whether these references to systems of land tenure within the context of religion, social organisation and kinship intentionally reflected the interpenetration of these themes in Indigenous cultures or whether this conjunction was a product of its

time, conforming to the requirements of holistic ethnography (Marcus and Cushman 1982; Clifford 1988). What is apparent, however, is that in the post-land rights era in Australia, a number of ethnographic works devoted primarily to the subject of land tenure (and land rights) were published (see Peterson and Langton 1983; Hiatt 1984; Myers 1986; Peterson and Long 1986; Williams 1986).

In this period, the previous works of anthropologists were (and are) often called upon to corroborate land claim findings, and their use in this supportive role functioned to stamp these findings with the authenticating mark of time and anthropological tradition. The same can be said of anthropological research in the era of native title where the work of anthropologists and others in a particular region arguably takes on an even greater significance than under the federal *Aboriginal Land Rights (NT) Act 1976*.

Under the *Native Title Act 1993*, the former writings of ethnographers, missionaries and explorers now function to not only corroborate present-day forms of social and territorial organisation, but they also serve as evidence of the distinctiveness of native title-holding communities and their laws and customs (a role they are rarely called upon to perform under land rights legislation). These texts and other sources are also invaluable in demonstrating continuity of occupation, of connection between the native title applicants and the previous occupiers and of connection between the applicants and the area covered by a native title application. And where they do not fully support existing laws, customs, and social forms, they often provide some indication of indigenous processes of transformation and succession.

Anthropologists are not the only ones to appreciate the importance of these materials in the determination of native title, especially in a Federal Court situation. Lawyers have pointed to the need for documentary sources in providing proof of native title (Bartlett 1993b; Fitzgerald 1995), while Aboriginal and Torres Strait Islander Representative Bodies recognise the crucial role of historical records and texts and have begun the process of document acquisition and the establishment of native title research collections. Furthermore, indigenous peoples are not only

aware of the significance attached to these documents by lawyers and anthropologists in the native title process, but they also acknowledge the meaning some of these sources have for them at a more personal level.

While there appears to be a general acceptance amongst those involved in the preparation of native title documents of the requirement to engage historical and, in particular, anthropological sources, there has also been some criticism of these texts. At one level, previous commentaries on Aboriginal and Torres Strait Islander land tenure have the potential to become, in a largely uncritical manner, the base-line of tradition in native title hearings. A situation similar to that which existed in the first decade or so of the *Aboriginal Land Rights (NT) Act 1976* could easily prevail under the native title regime. This time, however, conformity is expressed with respect to the codifications found in previous writings rather than in terms of the model found in the legislation. This problem is all too evident in the constant recourse to Tindale's tribal map of Australia (although not necessarily recourse to the book which the map accompanies), which often presents a situation where the map precedes the territory to the point where it becomes its own referent (Baudrillard 1983). For some anthropologists, then, the challenge in the post-Mabo era is to 'expound the fundamentally different meaning of *land* and of relationships with *land* which exist in Aboriginal Australia [emphasis added]' (Kondos and Cowlshaw 1995:12).

As this last comment suggests, the focus of anthropologists and of anthropological texts is (and has been) upon land and land tenure systems. If we look to the anthropological record in Australia, we find that, up until the late 1970s, references to the sea are strangely muted, if not absent, in the writings of anthropologists. Let me illustrate this statement with specific reference to the Kimberley region of Western Australia.

To the islands: the north-west Kimberley region

The area of the north-west Kimberley I have in mind includes the fiord-like coastline from Wyndham to Derby, the thousands of islands and reefs congregated into archipelagos and groups located off-shore, and the hundreds of thousands of square kilometres of coastal waters and territorial sea encompassed within this region. Some of the most prominent figures in the discipline of anthropology undertook research in this region. Anthropologists such as Basedow (1918), Elkin (1930a; 1930b; 1931–2; 1933), Kaberry (1939), Tindale (1953; 1974), Birdsell (Tindale 1953), Lommel (1952) and Petri (1954), not to mention missionary ethnographers such as Reverend J. R. B. Love (1917; 1927–40; 1935a; 1935b; 1939) and Reverend Gribble (1930). Even Sir James Frazer (1937) refers to this region in the supplement to his *magnum opus* on taboo and totemism. All these anthropologists worked with people who had a long tradition of coastal and marine occupation and lived within close proximity of the sea. It was also the case that at the time they conducted their research in this region the only effective means of transport between the towns of Derby and Wyndham and the missions established in more remote places, such as Kunmunya or Forrest River, was by lugger or other sea-going vessel. And yet, for all of this, there is barely a mention of the sea or anything to do with it in their writings, let alone any discussion of Aboriginal systems of marine tenure and the possibility that areas of sea could be owned by Aboriginal peoples in a proprietary sense.

Elkin (1930a:349), for example, writing about the Aboriginal inhabitants of the Forrest River Mission, briefly mentions that the tides experienced in Cambridge Gulf are caused by the actions of ‘Lumiri’, a ‘large, salt-water snake’. This is the closest Elkin gets to talking about Aboriginal laws and customs in relation to the sea. For the most part, his comments on the sea or the coast are confined to stating the territorial location and extent of various tribal groups. For instance, Elkin (1931–32:312) states that the ‘country of the Ungarinyin, Wurara and Unambal tribes ... extends from the north-western shore of King Sound

up the coast some little distance north of the Prince Regent River, and inland about one hundred miles at most.

Elkin's efforts are easily surpassed by Petri (1954), even though Petri mainly worked with people, the 'Ngarinjin', who were considered to be a 'land-locked tribe'. Not only does Petri give the coastal locations of various tribal territories, he also provides some details about the mythological creation of Walcott Inlet and the origin of the tides, the use of shells as trade items and the construction and use of catamarans and canoes amongst neighbouring 'tribes'. None of this, of course, even approximates a discussion of indigenous systems of marine tenure.

These comments of Elkin and Petri, and others such as Kaberry and Lommel, amount to nothing more than a form of ethnographic curio collecting. This kind of data collection often characterised earlier anthropological objectives, which was the compilation of an ethnographic compendium on a particular 'tribe' or 'society'.

Of the ethnographers who worked in this region prior to the 1970s, Tindale provides the most detailed descriptions of Aboriginal occupation of coastal and marine environments, even though the time he spent in the area was limited to a number of months only. However, given Tindale's pre-occupation with setting the record straight on Australian Aboriginal tribes, their proper names, terrains, distribution and their use of the environment, much of what he has to say in his fieldnotes and published work is driven by these objectives. For example, comments about tribal terrains, such as 'along the coast to the north of the Worora are the Wunambullu, who extend from Mt Trafalgar to Cape Voltaire' (Tindale 1953:81), are quite common. He also (Tindale 1953:83–85) remarks about the composition of tribes:

the remnants of a small tribe whose headquarters are the Montgomery Islands are the Yaudjibaia, [who are] now rapidly being absorbed into the Worora, but [are] men of a distinct physical type.

There are also numerous references to Aboriginal exploitation of marine environments and the use of sea-going vessels. For instance, Tindale (1953:865–867) writes that the Laiau clan of the 'Wunambal':

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used wooden canoes to visit all the islands from Cape Voltaire to Cassini Island and Long Reef. They have visited these areas for as long as present day people remember ... Dugong, turtle eggs and cockles were obtained on these trips, which were made in the wet season when there is water on the islands; in dry times they visited waters on the mainland.

Or, in a passage which seems to encapsulate most, if not all, of Tindale's anthropological concerns, he (1974:147) writes that:

In the island-dotted northern half of King Sound, the Buccaneer Archipelago, and the Montgomery group, there were four ... peoples—the Jaudjibaia, Umede, Ongkarango and Djaii—all of whom were dependent on rafts for gaining the greater part of their subsistence. Of these the Umede and Ongkarango were in part mainland based and exploited some inland products; the Jaudjibaia ... of the Montgomery Islands ... were completely island based.

While Tindale's material contains some valuable references to Aboriginal occupation and exploitation of marine areas and resources in this region, nowhere does he talk explicitly about Aboriginal possession of waters, seas, sea bed and resources. As such, there is no discussion of what might today be identified as a system of 'customary marine tenure'. The closest Tindale comes to this is in his discussion of the location and extent of clan and tribal territories which, in a number of instances, includes the littoral, off-shore islands and, on one occasion where he describes the tribal territory of the 'Jaudjibaia', 'reefs' (Tindale 1974:242).

Much of what Tindale observes for the various 'tribes' occupying the north-west Kimberley coastal region is also found in Blundell's (1975) doctoral thesis on the 'Worora'. Written some twenty years after Tindale's fieldwork in the Kimberley, Blundell also describes Aboriginal use of marine resources (although in more detail than Tindale), their occupation of coastal and offshore places, the production of marine-based technology, trade in marine products, the location and limits of 'tribes' in the region and, more specifically, the estates of

particular Worora clans. While Tindale's material indicates that for one tribe at least, Aboriginal people possessed exposed and submerged reefs, Blundell suggests that the estates of two Worora clans include coastal waters. According to Blundell (1975:97), the Be:waninawaja clan owns 'the large bay called George Water', while the Umbrewewul clan is said to have 'owned Doubtful Bay and the immediately adjacent coast from the mouth of the Sale River, south around Doubtful Bay to Raft Point'. Blundell also differs from Tindale in that she provides information about the cosmological significance of the land and some offshore islands, and as such, presents a more detailed discussion of Aboriginal land tenure in this part of the Kimberley. Notwithstanding these details, it is not clear from her ethnography whether the system of social and territorial organisation she describes also applies to sea areas. And, certainly on the subject of marine tenure, Blundell is silent.

I should point out here that in both Tindale's and Blundell's work, discussion of Aboriginal occupation and use of marine environments is by no means coherent or concentrated, but is scattered, largely as passing references, throughout the text. This is also the case for the other works I referred to earlier in this section.

The historical paucity of published material on Aboriginal maritime use and occupation is not unique to this region, and has been commented upon by a number of researchers working in other areas in Australia (see Johannes 1988; Palmer 1988; Cordell 1991a, 1991b, 1999c; Bergin 1993). Of these researchers, Kingsley Palmer is one of the few who have attempted to offer an explanation for this situation.

Palmer suggests that one of the possible reasons for the lack of documentary information derives from the consequences of European settlement. According to Palmer (1988:4), 'many of the coastal cultures were among the first to disappear from the face of the newly settled land'. While this argument may be more applicable to other parts of Australia, it does not adequately explain present-day continuity of occupation among coastal peoples (e.g.. Bardi and Jawi peoples living at One Arm Point and Lombadina on the Dampier Land Peninsula) who have a long history of contact with other societies, including Europeans.

Palmer is perhaps more correct when he states that the lack of information on Aboriginal maritime cultures is a product of European perceptions and orientations. In this respect, he (Palmer 1988:4) identifies the preoccupation of anthropologists with 'myth ... religion, material culture, ... kinship and social organisation' and the settler's economic focus on land as the major causes for these omissions.

This is partially the case in the northwest Kimberley region which, thanks largely to Elkin, became one of the recognised sites for research on Australian Aboriginal totemism. This part of the Kimberley was also internationally acknowledged as the home of 'Wandjina' paintings, and a considerable proportion of the literature on this region is devoted purely to the examination of this particular form of rock art (e.g. Elkin 1930b; Love 1930; Schulz 1956; Lommel 1961; Crawford 1968; Capell 1971; Blundell 1974). As a result, the significance of Wandjina in local tenure (both land and sea) systems was largely overlooked in the ensuing European obsession with the image itself.

As for Palmer's argument that Europeans were oblivious to Aboriginal use of the sea because of their own emphasis upon land-based economic activities, it is difficult to sustain this proposition historically with respect to the northwest Kimberley region. Europeans had long exploited the marine and offshore resources of this area. From the 1860s, Europeans were actively harvesting pearl shell and pearls from the reefs of the region. In addition, American whaling ships operated in the area, and a number of the offshore islands were exploited for their guano and mangrove bark resources. Other Europeans commercially collected trepang and trochus shell, and exploited turtle and dugong populations. In many of these endeavours, Aboriginal people were contracted, in part, because of their expertise and local knowledge and, in part, because they were seen as expendable.³

3 An article on the 'Northwest Pearl-Shell Fishery' in *The Inquirer*, dated March 1875, reports that 'no dark man's life is valued in the economising of that life, but the utmost of diving must be sucked out of that man, kill him or not; for who knows who will be his owner next season.'

The operation and continuation of European commercial activities in the coastal waters of this region was facilitated by the marine equivalent of the doctrine of *terra nullius*, *mare nullius*. The sea was (and still is) envisaged by Europeans as common property, where individuals enjoy unrestricted access to what are seen as inexhaustible public resources.⁴ For Europeans, this vision of unlimited, infinite resources is not muddied by the actualities of localised resource depletion. In the case of the Kimberley and elsewhere in Australia, when this situation arose, users simply shifted their efforts to another area and ‘discovered’ a hitherto unexploited shell bed or fishery stock. A similar attitude applied to the use of ‘native labourers’, with European pearlers travelling to different parts of Indonesia (Kupang, ‘Makassar’, Endeh, the Kei Islands and Solor), Singapore and north Australia to pick up divers to replace those who had been exhausted or killed by the activity.⁵ If the sea was *mare nullius*, then non-Europeans were definitely *homo nullius* (Pannell 1996). This kind of shifting cultivation on the part of the Europeans, more correctly referred to as ‘resource raiding’ (Bennett 1976), not only relied upon the concept of *mare nullius*, but it usually went hand-in-hand with the expansion of colonial frontiers.

One of the paradoxes of this kind of exploitative strategy is that it tends to downplay or ignore the fact that exploitation of marine areas and resources is predicated upon quite specialised knowledge of species and environments. This is still the case today where recreational and even some commercial fishing, for example, is casually spoken of in terms of the alternating operation of luck and misfortune and yet this kind of fishing is underpinned by a long history of angling lore as well

4 In an 1894 editorial in the *Nor’ West Times*, entitled ‘Our Pearling Industry’, the writer declares that ‘facts and figures prove that the supply of shell is practically inexhaustible, and is being renewed each year..’ (1894:2).

5 An advertisement in the 17 October 1891 edition of the *Nor’ West Times* placed by Galbraith and Co. describes the services they offer. In the words of the advertisement: ‘Coolies, boatmen, divers and goods imported from Singapore, and produce sold there to best advantage’ (1891:2).

as a multi-million dollar information industry. The upshot of this is that fishers and those who exploit the sea and its resources are seen as the marine equivalents of hunter-gatherers, occupying and using the sea in a largely arbitrary fashion.

While *mare nullius* and its associated assumptions informed the prevailing ethos, the reality, however, was quite different. Off the Kimberley coast, for example, productive pearling grounds were jealously guarded by Europeans, as were reefs and banks stocked with trepang and trochus shell.

The fact is that even historically the sea was far from the propertyless or ownerless expanse it is commonly believed to be. In this connection, many writers, including anthropologists (Ruddle and Akimichi 1984; Sharp 1996), are quick to cite the 'freedom of the seas' (*mare liberum*) case argued by the Dutch attorney Hugo Grotius on behalf of the Dutch East India Company in 1604, as the source of the common property view of the sea (see Sharp this volume). However, as the historian Leonard Andaya (1993:41) points out, the notion of *mare liberum*, and the concept of free trade that was associated with it, was rejected by the Dutch in their mercantile operations in Asia. To acknowledge a 'policy of open seas' would have placed Dutch interests at a severe disadvantage in the already 'well-entrenched Portuguese and Asian trade networks.' Another historian, Simon Schama (1988:341), even goes so far as to refute the idea that the Dutch were actually advocating an open seas policy, and argues that Dutch mercantile colonialism was predicated on an 'elaborate and extensive system of protection.' As this indicates and, as Cordell (1989:12) rightly points out, the concept of 'freedom of the seas' is inextricably linked to the idea of privatisation. It is this contradiction between public property and private profits which largely contributes to the 'tragedy of the commons' (Hardin 1968).

Strange as it may sound, it is from the paradoxical crucible of the 'tragedy of the commons' that 'customary marine tenure' emerges in the early 1970s. The motivating force behind the appearance of this concept was not purely a moral or ethical one driven by the need to recognise the long overlooked proprietary rights and cultural interests of indigenous

peoples in seas and resources. Rather, it was more an economic one, powered by the pressing industry requirement for alternative strategies for managing over exploited marine fisheries.

The 'solution': CMT

It became apparent in the early 1970s that there was a 'crisis in the world's fisheries' (McGoodwin 1990:1). Simply stated, 'there [were] too many people chasing too few fish' (McGoodwin 1990:1). However, there was more to the crisis than just an imbalance between fish and people. As McGoodwin (1990:72–74) points out, part of the problem stems from the models upon which the modern management of fisheries is based.

For the past forty years, the most prevalent management strategies for fisheries have been based on bio-economic modelling, that is, a combination of models to do with the biology of fish populations and models circumscribing the economic conditions of markets. Unfortunately, as experience demonstrated, formal bio-economic models work well in theory but never quite perform so well in reality. The problem is that these largely mathematical formulations assume a rational, steady-state and predictable world, both human and biological. As such, they are unable to adequately explain the emotional investment and social value of fishing for small-scale producers. Furthermore, these models are not very useful when trying to understand the political process of policy formulation in the fisheries sector (McGoodwin 1990).

One of the other major stumbling blocks in this 'crisis in the world's fisheries' was with the very identification of the 'root cause' of the problem. Many analysts pointed their finger at the common property, open-access status of fisheries and argued that the lack of regulation in this commons was the real cause of over-exploitation and over-capitalisation (McGoodwin 1990). While there a number of limitations associated with the somewhat deterministic 'tragedy of the commons' formulation of the problem (for an outline of these limitations, see McGoodwin 1990), one of the outcomes of this soul searching was

an emphasis upon local management regimes. This emphasis is not just a recognition of the impact of small-scale producers on fisheries resources, but it is also an acknowledgment that local and, in many cases, indigenous, management practices could be used in large-scale fisheries to avoid the occurrence of the tragedy of the commons.

The notion that indigenous customs and behaviours could be incorporated into modern management practices and regional fisheries policy particularly captured the imagination of anthropologists, fisheries scientists and bureaucrats working in the Pacific in the late 1970s. And, thus, systematic work commenced on what, Ruddle (1994) calls, 'traditional community-based systems of marine resource management'. From these studies the concept of 'customary marine tenure' gradually emerged.

The recent emergence of CMT: the Pacific

Many authors comment upon the relatively recent emergence of CMT as an object of study, particularly in the Pacific. For example, Donald Schug (1995:17) observes that 'since the late 1970s, there has been a growing literature describing various systems of customary marine tenure in Oceania'.

Hand-in-hand with these statements about the recent appearance of CMT are comments relating to the paucity of materials on CMT. For instance, Ruddle and Akimichi (1984:5) talk about a 'dearth' of studies, 'scant literature', and 'relative lack of anthropological studies'. They (Ruddle and Akimichi 1984:4-5) identify one of the paradoxes of the anthropology of fishing when they state that 'compared with the large literature on agricultural societies there are far fewer anthropological and related studies of fishing communities. And more importantly, most such studies of fishermen concern their activities on land and not at sea'. This is a view also supported by Cordell (1989:5) when he describes how 'classic land tenure studies are virtually silent on the subject of sea tenure'.

While many writers are quick to point out the lack of material on CMT, few propose explanations for why this might be the case. Ruddle (1994:1) suggests that the nature of local CMT is not well known due to the 'fragmentary and commonly anecdotal nature of, and confusion of tenses in, the existing literature, the lack of ... fieldwork ... and the rapid decay and disappearance of such systems since Western contact'. In an earlier work, Ruddle and Akimichi (1984:5) argue, somewhat enigmatically, that the paucity of research can 'be attributed to ... methodological and operational problems ... [and is the] function of national priorities where developing countries... have directed their national development efforts at agriculturalists'. In the same work, however, they (Ruddle and Akimichi 1984:4) also observe that the passage of the United Nations Law of the Sea Convention 'has further obscured the preexisting and age-old 'Fishermen's Law of the Sea' or traditional sea tenure'. Apparently linked to this argument, Ruddle and Akimichi (1984:1) state that 'understanding of traditional systems of inshore sea tenure was hampered by the dominant Western theories of fish as a common property resource...'

At the same time that authors bemoaned the absence of materials and talked about the recent development of CMT, many were able to refer to historical materials on indigenous relationships with the sea. For example, while Carrier and Carrier (1989) explicitly point to a dearth of published material on sea tenure, they cite works which refer to aspects of sea tenure going back to the turn of the century. The fact that they are able to do this is confirmed by Cordell's (1984:306) observation that 'generations of Western explorers and ethnographers have documented and often marvelled at the sophistication of indigenous nautical science and fishing in Oceania'. Nicholas Polunin (1984) is another author who provides numerous examples of what he calls 'sea tenure', taken from a variety of historical sources, many pre-dating more recent literature and some going back as far as 1840.

Contrary to the view of many, Polunin suggests that the lack of observations does not necessarily account for the apparent patchy distribution of marine tenure systems. He (Polunin 1984:269) argues that

it may be the case that ‘marine tenure never existed in certain areas, or, if it existed, it disappeared some time ago’. With regard to this argument, Polunin (1984:272) proposes that one of the reasons ‘why marine tenure might not have developed more extensively than it appears to have done [is because] marine areas may not be worth owning in many cases: the resources may not be valuable enough’. Indeed, he (Polunin 1984:270) suggests that in many cases ‘more reliable means of human sustenance were available on land’ and that ‘when faced with the alternative of land—or a sea-based livelihood, people seem in most cases more inclined to choose the former’. In this connection, Polunin (1984:271) cites the attitudes of the ‘Balinese’ and their reported aversion to the sea. He also talks about the uncertainty of the sea and the dangers associated with it, especially in relation to ‘natural phenomena, such as tidal waves’ and social factors such as the risk of slaving raids.

Now you see it, now you don’t

Polunin’s (1984) comments represent a cautionary tale against assuming the empirical and universal existence of CMT. And, yet, the appearance of CMT as a valid object of study is often spoken of as the discovery of this assumed reality rather than as a discourse that was produced at a particular place and moment in history. For example, Ruddle (1994:1) observes that ‘...only in the last two decades has it been realised that ‘sea tenure’ ... exists at all’, while Ruddle and Akimichi (1984:1) declare that ‘... sea tenure—is one of the most significant ‘discoveries’ to emerge from the last ten years of research in maritime anthropology’. Viewing CMT as a discourse rather than as a discovery sheds some light on the different descriptions of what CMT is. In the literature on CMT in the Pacific, there seems to be less emphasis on indigenous proprietary rights in marine areas, which in some countries, such as Fiji, Vanuatu, Yap and Western Samoa, have, to varying degrees, been constitutionally or legally recognised, and more emphasis upon ‘traditional’, community-based management of fisheries resources, to the point where Bergin

(1993:22) is able to declare that ‘CMT in the Pacific [refers to] systems of ‘traditional resource management’’. This observation becomes even more pertinent when we examine the representation of CMT in Australia.

It seems that at the very moment when Ruddle and others are celebrating the discovery of CMT, it threatens to disappear. Ruddle (1994:19) himself talks about ‘the rapid decay and disappearance of such systems since Western contact’ while Carrier and Carrier (1989:115) declare that ‘traditional forms of sea tenure may be disappearing in Oceania’. Robert Johannes (1981:79) is even more pessimistic and talks about how ‘the destruction of fishing tenure in the vicinity of district centres may be inevitable in Oceania [and concludes that] It has already occurred in many places’. In light of the constant reminders about the recent appearance of CMT and the paucity of historical materials on this subject, it is somewhat puzzling to ascertain the basis let alone the content of these comments. This situation is made even more puzzling by the fact that many of these same authors speak of the incredible ‘heterogeneity in tenure traditions across cultures’ (Cordell 1989:21). Not only variability but, as Gracie Fong (1994:1) points out, ‘it has been said that the Pacific Basin probably contains the greatest ... complexity and adaptability in customary marine tenure systems’. If this is the case, it would seem then that the observation and identification of ‘traditional’ systems undergoing collapse or ‘destruction’ is a somewhat difficult, if not impossible, undertaking.

The ‘decline’, ‘breakdown’, ‘disappearance’ and ‘loss’ that authors such as Polunin (1984:270, 280), Ruddle and Akimichi (1984:4–5), Nietschmann (1985:144), Zann (1985:65) and Cordell (1989:301) and others talk of is said to result from ‘commercialisation’ (Cordell 1984:301) and the ‘impact of Western marine management concepts’ (Ruddle and Akimichi 1984:4). Again, these are strange remarks and appear to be oblivious to the *longue duree* of cross-cultural encounters in this region (cf. Sahlins 1981).

As a response to this situation of perceived loss and decay, a number of authors suggest a form of salvage anthropology, arguing that ‘if not

intensively studied soon, the opportunity to examine on a worldwide basis a phenomenon that is still scarcely known will be irretrievably lost' (Ruddle and Akimichi 1984: 5).

This is a familiar narrative in anthropology—a case of the 'pure products... going crazy' (Clifford 1988:5) upon contact with a dismembering and diseased modernity. Also familiar is the scenario of rescue and redemption through the salvage work of anthropologists. Both the story and the solution assume a certain fragility and passivity on the part of indigenous cultures and peoples. As Clifford (1988: 14–15) points out, 'the great narrative of entropy ... assumes a questionable Eurocentric position at the 'end' of a unified human history ... memorialising the world's local historicities'. One of the things this history does is to determine which peoples and which cultures will be relegated to the status of museum pieces and which will be redeemed as active, intact, coeval societies and practices. Judging from the literature on CMT in the Pacific, it seems that for some groups, at least, the writing (read, their future destinies) is already on the wall. The implications of this scenario for arguing native title over seas and offshore places in Australia is both politically obvious and ethically disturbing. Especially, when authors such as Johannes and MacFarlane (1984 and 1991) have already signalled the decline of 'traditional sea rights' in the Torres Strait.

CMT in Australia

As in the Pacific, CMT in Australia is said to be a recent phenomenon. Writing at the beginning of the nineties, Cordell (1991a:511) states that 'the rights and ownership customs of maritime peoples [in Australia] have not been widely documented until recently'. Notwithstanding this recent interest in CMT, Cordell (1991c:108) is still able to claim that 'Australian researchers are at the leading edge of work in documenting CMT systems and studying their management applications'. Unaware of the ironic truth of his statement, Cordell (1991a:514) even goes so

far as to suggest that ‘if sea tenure didn’t exist it would probably have to be invented.’

Unlike the initial situation in the Pacific, the ‘invention’ of CMT in Australia is largely linked to the assertion and recognition of indigenous ‘sea rights’. While there is some suggestion of the ‘narrative of entropy’ in operation—Cordell (1991a:514) talking about ‘pockets or vestiges’ of CMT, Williams (1994:39) on the ‘decline’ of customary fishing rights in the Torres Strait and, of course, Johannes and MacFarlane’s (1991) comments on the same subject—many writers point to the historical, political, cultural and legal circumstances which resulted in the marginalisation or complete disavowal of indigenous tenure systems.

A much celebrated case in point is the Mabo No. 1 judgement, a precursor to the decision that signalled the abandonment of the notion of *terra nullius* and the recognition of native title in Australia. Here Sharp discusses Justice Moynihan’s conclusion that the plaintiffs’ claim to seas and reefs was not supported by the evidence and, in fact, their rights to these areas had been ‘lost’. Sharp (1996:194) argues that Moynihan came to this conclusion because he assumed that ‘rights must be exercised in order to keep them alive’. In other words, rights in an area are extinguished if that area is not continually used by the native title holders. Sharp (1996:194) remarks that this particular viewpoint amounts to a ‘transference of western legal concepts and social values to the appraisal of an indigenous order’. The recent literature on CMT in Australia provides us with a number of other examples where the long-held doctrines and straight-out racism which inform *mare nullius* and its claims of universal applicability are exposed.

The common property assumptions of *mare nullius* represent one, particular expression of European marine tenure, a system of marine tenure which has been written about in some detail. If the common property model and its various permutations represent the predominant European marine tenure system in Australia, what then does customary marine tenure refer to in this context?

What's in a name?

One of the major problems encountered in assessing the materials on CMT in Australia (and elsewhere, for that matter) is terminology, or more precisely, variation in the terminology used by researchers and writers.

In part, this variation can be explained in terms of disciplinary differences, most notably, in the disciplinary differences between law and anthropology. Notwithstanding the legal origins of the concept of tenure, members of the legal profession tend to avoid using the term CMT and prefer to use other disciplinary terms. Terms such as, 'Aboriginal sea rights' (Bartlett 1993a:9), 'native title to the sea' (Bartlett 1993a), 'sea rights' (Allen 1993:53), 'Indigenous Peoples' rights over the sea' (White 1993:65), 'Indigenous sea rights' (White 1993:69), 'sea rights' (McIntyre 1993:107), 'Indigenous sea rights' (McIntyre 1993:112), 'fishing rights' (Bennion 1993:113) and 'customary or traditional fishing rights and interests' (Sutherland 1996:3). Even when lawyers do use the expression CMT, as in the case of Allen (1993) and Haigh (1993), they observe that it is a term customarily associated with the work of anthropologists and tend to rely on their definitions of CMT.

There is also considerable terminological variation amongst anthropologists (or those acting in this capacity) and, even at the level of individual anthropologists, there seems to be a lack of consistency in their use of terms. For instance, in addition to CMT, we find 'traditional customary fishing rights' (Williams 1994:39), 'ownership of the seas' (Palmer 1988), TURF ['Traditional Use Rights in Fisheries'] (Johannes 1988:33), 'marine traditional native property rights' (MTNPR) (Bergin 1993:31–33), 'sea country' (Bergin 1993:1), 'coastal landscapes', 'seascapes' and 'coastscapes' (Smyth 1993:25), 'sea property' (Sharp 1996:205) and 'sea tenure' (Davis 1988:68; Cordell 1991a:513 and 1991b:7), just to cite a few of the many appellations used. To add to the problem, a single author will not only use a number of different terms but will use these different terms as if they are interchangeable. For example, Cordell (1991a:511) uses the term 'marine property

customary law' as interchangeable with 'sea tenure', which is also interchangeable with 'customary territorial rights and arrangements'. In the same volume, Cordell (1991a:512, 514) also speaks of 'traditional marine tenure', 'home reef tenure systems' and 'community custody and territorial regulation of home reef economies'. Elsewhere he (Cordell 1991c:1–2) uses the expressions 'sea country', 'extended regional estates', and 'ancestral domains in the sea'.

While it is apparent that this variability can, at one level, be accounted for along professional lines, it is also probably the case that it stems, in part, from the nascent status of CMT as an object of study. However, the confusion which arises from the variable use of these terminologies is not alleviated by attempts to define these terms or describe what CMT is.

A system of tenure by any other name ... ?

Before I proceed with a discussion of the different definitions of CMT, I should point out that in a number of articles and volumes, the meaning of 'customary marine tenure' is often assumed. That is, writers often use the phrase without offering any details about its content. This said, there are many who do offer stock definitions of CMT.

A number of writers suggest that CMT refers solely to the ownership of marine areas—an association captured by Haigh (1993:131) when he mistakenly glosses CMT as 'customary marine territories'. For example, Allen (1993:50) states that 'the general term employed to describe ownership of salt-water country is CMT'. In a similar vein, Keen (1984:431) observes that the 'formal systems of tenure of coastal peoples embrace the foreshore, seas, reefs, rocks, and sandbanks, as well as large and small islands'. This is a view reiterated by Mulrennan (1992:35–36) when she states that 'traditionally many nearshore water areas [in the Torres Strait] were owned or policed through native customs and tenure ...'. Perhaps, Cordell (1991c:2) neatly summarises this particular approach to what CMT is when he states that:

Customary marine tenure in Australia

the range of group territories indigenous peoples have fashioned in the sea are dealt with under the rubric 'customary marine tenure'. CMT systems ... consist of collective or 'communal' domains—discrete, culturally-defined, territories, controlled by traditional owners.

Obviously, 'ownership' in the sense that it is used here refers to local or folk notions of possession as opposed to the common law understanding of these concepts.

A number of authors argue that 'sea tenure is indivisible from land tenure' (Cordell 1991b:7), and it is apparent from their work that CMT is just an extension of 'exactly the same principles as land tenure' (Sharp 1996:197). As such, the units of local or territorial organisation recorded for Aboriginal land tenure systems are also advocated for CMT systems. Thus, while Cordell talks generally about 'traditional owners', there seems to be no doubt in the minds of many writers that areas of sea, reef and coast are 'owned' by either lineages, clans or both. For instance, Sharp (1996:197) writes that for the Meriam Peoples, 'the sai, reef flat areas and 'outside' or further out to sea to certain named fishing grounds, are the property of clans and lineages who resided within clan territories'. In the case of the Yolngu, however, Keen (1984:433) states that 'the sea is held by individual clans'. In the case of the Lardil people, these are 'patriclans' (Memmott 1983:44). Smyth (1994:21) suggests that in addition to the 'local clan', the 'coastal sea' is owned by the 'members of ... family group [who] have primary and even exclusive use and management rights'.

While these authors suggest that the sea-holding unit is a localised descent group, a clan or a lineage, others suggest that 'sea tenure' and 'sea rights' are organised according to systems of kinship (Beckett 1991:348; Cordell 1991a:513). This would suggest a more inclusive possessory group, which theoretically would consist of people from a number of so-called 'lineages' or 'clans'. This seems more in line with Cordell's (1991c:103) assertions that CMT refers to 'communal, or collectively-held coastal marine property' and is closely associated with 'cultural identity' (1991b:7).

While some authors talk of ownership of areas, in what seems to be a local as opposed to a legal reality, others define CMT as a 'bundle of rights' (Haigh 1993:131). Cordell (1993:161) also speaks of CMT in terms of rights when he remarks that 'CMT is the de facto communal form of property rights still practiced extensively by indigenous coastal groups and other traditional maritime communities'. Jackson (1995:91), on the other hand, jettisons the concept of CMT altogether and prefers to speak of 'sea rights' which, in her words, refer to 'the rights of indigenous people to own, use, exclude others, and manage their maritime estates and all contained within them (permanent or transitory), including the sea bed'. The 'bundle of rights' view of CMT is particularly noticeable in works published post-Mabo where the focus is upon the legal determination of native title wherein the Crown is recognised as holding radical title to lands and seas. In this connection, Sharp (1996:205) writes 'native title to the sea ... accommodates conceptions of the sea and 'sea property' embedded in the principles of customary marine tenure'. In these comments, the phrase 'native title rights' becomes a synonym for CMT or replaces the term altogether.

Michael Southon (1995:6-1) is critical of the 'sea rights' only perspective of CMT and argues that 'an important issue in sea tenure is that the sea is not the resource itself but merely the medium in which the resource moves'. In this connection, Southon suggests that CMT does not just refer to possession of marine areas but also includes exclusive possession of marine resources. Obviously, this is something different in his eyes than talking about rights in resources and areas.

There are a handful of writers who tend to describe CMT purely in terms of certain resources and specific associated activities. Most notably, 'traditional' fisheries and 'traditional' fishing. This view coincides with much of the writing on CMT in the Pacific. For instance, Williams (1994:39) states that '[Torres Strait] islanders had a system of traditional fishing customs under which different groups of people (usually clans) held clearly defined areas in which they could hunt and fish'. Cordell (1991a) is critical of the view which restricts CMT to the usage of fisheries and advocates, on this occasion at least, a more inclusive definition

of CMT. For Cordell (1991a:513), 'sea tenure is closely bound up with kinship, sharing, traditional law and authority, and other structures which shape cultural identity...'

In this definition, CMT appears to know no bounds and, in the words of Cordell (1991a:513), also includes: 'the use of marine resources ... access to subsistence fisheries ... food preferences ... sacred seaspace ... social relations ... named story places ... a knowledge system'; 'myths, totems and taboos' (1991c:109); 'octopus holes, winds and currents, star clusters, an area of beach, the right to gather shells at certain times of year, rights of passage through reefs and between islands, landing places for canoes, and mythical islands' (1991b:5). A similar kind of definition is given by Davis (1988:68) who, in his examination of 'sea tenure', discusses the 'boundaries of clan estates, economic zones, sites and paths of ancestral activity, the location of residential and hunting camps and the knowledge and use of the sea and foreshore throughout the yearly cycle'.

One of the problems with this more inclusive definition of CMT, a problem also encountered by anthropologists in their attempts to nail down totemism, is that it tends to define CMT out of existence. CMT is now so broad in its scope and so encompassing in its subject range that it loses its power of discrimination.

This was also the fate of totemism. One of the fundamental problems with totemism was the disposition, on the part of anthropologists, to lump together quite disparate and unrelated phenomena into a single category which supposedly not only had an analytical veracity but also corresponded to an empirically observable reality. In those situations where it was apparent that a discrepancy existed between what was observed and the conceptual basis of totemism, a situation which it seems occurred quite frequently, anthropologists and others reverted to a series of secondary elaborations to smooth over the ruptures produced by the seeming contradictions. Elkin's dissection of totemism into a 'multiplicity of heterogeneous forms' (Levi-Strauss 1963:114) is a classic example of anthropological attempts to preserve the notion of

totemism even in the face of overwhelming evidence to the contrary. These attempts led Levi-Strauss (1963:79) to conclude that:

totemism is an artificial unity, existing solely in the mind of the anthropologist, to which nothing specifically corresponds in reality.

The desire to create unity where there is none is also apparent in the way that anthropologists and others make sweeping statements about the common features and functions of CMT. For example, Sharp (1996:204) states that 'customary marine tenures in coastal Australia have major similarities'. Cordell (1993:162–164) is far more ambitious and not only lists what are the 'essential features and issues' of CMT but also states that 'CMT systems can be viewed ... as an attempt by indigenous societies to deal with problems of managing resources by controlling and restricting access to territory' (1991c:108). These kind of generalisations about CMT abound, notwithstanding Cordell's (1991c:110) cautionary words to the effect that 'sufficient data do not yet exist, nor have adequate consultation procedures been instituted with indigenous groups, to definitively typecast peoples' land tenure much less CMT'.

And, yet, given all of this—the often inconsistent terminological variations, the differences in definition, and the sweeping generalisations—there still seems to be acceptance and acknowledgment of the theoretical and practical value of the CMT concept.

The theoretical and practical value of CMT

Customary marine tenure is often spoken of as if it were the anthropological equivalent of interferon and, in this respect, is often accorded quite amazing powers and properties. For example, Mulrennan (1992:35) declares that 'the concept of customary marine tenure is a particularly valuable marine conservation measure', while Cordell (1989:19–20) argues that 'sea tenure studies provide new insights into its [fishing conflicts] sources and may suggest new resolutions'. On another occasion, Cordell (1984:302) suggests that studies of CMT have 'produced

a heightened appreciation of the nature, causes and consequences of human territoriality in the coastal marine environment'. Ruddle and Akimichi (1984:6), on the other hand, point to the economic and political benefits of CMT, and state that the study of 'traditional systems of sea tenure [will] enable policy-makers and planners to make better informed choices and to avoid repetition of past and often needless and tragic failures'.

Anthropologists and others are able to make these claims on the basis of what they perceive to be are the many positive functions of CMT. Some of properties attributed to CMT systems are summarised by Ruddle and Akimichi (1984:4) when they state that 'certain systems of traditional law prevented over-fishing and promoted resource conservation and a stable fishery by limiting access to a particular fishing ground or by enforcing temporal restrictions of various kinds'. In addition to their management functions, CMT systems are also said to preserve 'sacred sea space' (Davis 1984), alleviate 'uncertainty' (Cordell 1989:18), resolve conflict, ensure 'community survival', 'spread risk', foster 'equality', meet 'basic human needs', and avoid 'scarcity' (Ruddle, Hviding, and Johannes 1992).

While Cordell (1989) cautions against rashly asserting some of these claims, it is apparent from the way that anthropologists, marine scientists, geographers and lawyers speak of the features and functions of 'Customary Marine Tenure' that CMT is fast acquiring the status of a canonical truth in much the same way that ESD ('Environmentally Sustainable Development'), TEK ('Traditional Ecological Knowledge'), ERM ('Environmental Resource Management') and other popularised concepts have. In this connection, I would like to conclude by looking at the implications of invoking CMT.

The invocation of CMT

Levi-Strauss recognised the power of canonical truths when he spoke about what is accomplished by the invocation of totemism. Levi-Strauss

saw how the idea of totemism became the yardstick by which it was possible to distinguish the 'savage' from 'white' Christian civilised society. This was accomplished not simply by placing 'primitive' societies in nature but by differentiating them according to their 'attitude towards nature' (Levi-Strauss 1963:70). As such, he concludes that totemism produced the very categories and beliefs it was said to reflect or be a study of.

Many of Levi-Strauss' insights relating to this aspect of totemism can be readily applied to the idea of CMT. CMT obtains its meanings from its inverted juxtaposition with non-indigenous, notably Western systems of tenure. A distinction is thus made between community-based, restricted property models of indigenous groups and the self-interested, open-access tenure models of Europeans. In this scenario, the roles ascribed to the actors in the colonial fantasy of *terra nullius* are reversed and it is the Europeans who now suffer the 'tragedy' of *mare nullius*.

These differences in tenure are used to mark a much wider range of differences between indigenous and non-indigenous practices and peoples. Positioned in this inversion, CMT also comes to signify what is traditional and tribal, what is caring and conservative, what is primitive and past, and what is sustainable and sensitive. In many respects, it is because CMT carries with it the political capital of authenticity that it is invoked by indigenous groups in their engagements with others, be it local agencies, national governments or multinational enterprises. In some cases in the Pacific, this has led to the legal codification of aspects of local CMT (Graham 1994).

The invocation of CMT, however, is not simply confined to the polarised playing field of indigenous and non-indigenous differences. Nor is it the case that those who claim CMT or are identified by others as 'having' it constitute a homogenous group. In the way that concepts such as 'tradition' and 'custom' have been used in Australia and Melanesia, CMT, as the literature from the Pacific and, closer to home, the Torres Strait indicates, is also invoked to authorise and refute claims amongst indigenous individuals and groups in relation to a specific location, region or resource (see Teulieres 1992; Ruddle 1995; Schug 1995).

Notwithstanding these uses of CMT, the concept has the potential to become a marker of difference in the way that race, class and gender are often used. Moreover, because it gives the appearance of equally valuing other practices and beliefs, the invocation of CMT often masks the operation of discourses such as primitivism, racism, sexism and nationalism.

Like the concepts of race, class and gender, there is an assumption that CMT is or can be objectified. That it somehow exists separate from other arenas or aspects of social life, and that it is communally acknowledged as doing so. There is also a belief that it exists as real outside of any discourse. And, thus, CMT is presented as an empirical reality which innocently awaits circumscription rather than being seen as part of a discourse which requires critical retrospection.

What usually results from this kind of positioning is a discursive differentiation in terms of the who of CMT. A distinction is thus made between who has CMT and who hasn't. This further leads to qualifications as to what extent CMT is intact or to what extent it has 'broken down', as some would say. CMT in this sense constitutes a form of social distinction. However, it is not the content of CMT that serves to differentiate between social groups but its application. CMT thus singles out those 'endangered authenticities' (Clifford 1988:5) so beloved of classical anthropology and largely ignores those populations and practices viewed as contaminated by contact with the West or other 'outside' influences. In this respect, CMT represents another way of essentialising the Other. Rather than recognising and celebrating difference, the invocation of CMT can be seen as a continuation of the imposition of colonial categories of difference. It either maintains hierarchies or creates new ones. In this connection, CMT becomes a mechanism for marginalising the already marginal.

People are now defined not because they have a common culture or a common history of experience, but because they share CMT, even though this representation may not accord with the way they themselves view their collective identity. At the same time, however, CMT also represents a way of legitimating people's understandings and

practices. But, as the example of CMT in the Pacific clearly demonstrates, this new-found respectability and rationality often derives from the desires of the West. Those peoples who possess CMT are said to have something which not only has been lost by the West but which also has the power to redeem and rejuvenate Western practices, particularly those concerned with fisheries and environmental management. In the Pacific, the so-called 'discovery' of CMT was triggered by these acquisitive needs. The paradox of this situation is that while CMT is often used to critique European discourses and management practices, its very appropriation serves to perpetuate these discourses and extend the ground for the articulation of difference and hierarchy.

Often propped up by out-dated concepts of culture and society, which valorise consensus, homogeneity, stability and corporateness, CMT has more to do with the aspirations of those who invoke the concept than those who are said to possess it. Discussion of CMT not only highlights the concerns of certain individuals but it promotes this concern as a universal phenomena. In doing so, it narrows the potential for other kinds of discussions.

CMT, I would argue, is more imagined than documented. CMT constructs its referents rather than reflecting them. But this does not make it any less real, and nor does it seem to lessen its appeal.

The predicament of CMT

The predicament of CMT, then, and the predicament for those practitioners working in the area of native title, is that behind the single concept of CMT lies the collective reality of unsubstantiated generalisations, a multitude of often conflicting definitions, a variety of often incommensurate terms, inconsistencies in terminological usage, limited field-based research, a paucity of published sources, an ignorance of the ontology of CMT, disregard for the effects of a discourse centred upon CMT and a largely uncritical use of CMT as a concept.

The problem is not, as Cordell (1993:166) suggests, the 'potential for misinterpretation and distortion of custom, particularly on questions of maritime boundaries, and in identifying traditional owners and the composition of communities of tenure-holders'. This is a problem which is not particularly unique to CMT and could easily characterise the kind of issues encountered in many areas of anthropological endeavour. The real predicament lies in the potential for CMT, like totemism, to become a victim of its own fetishization where in the end only the signifier (CMT in this case) remains, 'bereft of its erased significations' (Taussig 1992:118). It would seem then that without the caution derived from anthropological hindsight, CMT, like totemism, will collapse 'at the very moment when it [seems] most secure' (Levi-Strauss 1963:72). The looming tragedy for anthropology is that the 'misadventures' of CMT, like totemism, will serve as an allegory for the state of the discipline.

CMT and native title

So where does this leave CMT in the era of native title? I would suggest here that unless anthropologists and others develop, what McGoodwin (1990:80) calls, 'more rigorous methods of analysis in their studies' CMT will be left high and dry as an analytical category. However, as I have already indicated, the problem is not purely a matter of an absence of 'analytical rigour'. The problem is more fundamental than this, and derives from the ontological and epistemological foundations upon which the edifice of CMT rests. Until these issues are seriously debated and addressed in a reflexive and constructive manner, the legal and anthropological value of CMT as an element of proof in native title claims over seas, sea bed, fisheries and offshore places is extremely limited. This is not to say that CMT has little value in terms of its popular or political appeal. Far from it. And perhaps it is here, in the negotiation of policy guidelines, legislative and regulatory initiatives, environmental planning, management strategies, development agreements,

conservation measures, heritage protection and social equity outcomes between indigenous and non-indigenous interests, that the real value of CMT lies.

Notes

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