

Land, Rights, Laws: Issues of Native Title



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The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

The question of offshore native title rights raises complex issues about ownership of and access to the sea. The Croker Island decision, which recognises the existence of native title rights to the sea, determined that exclusive native title rights over the sea are not possible under common law or international law. This paper looks at the challenges faced by native title claimants who wish to protect their marine native title rights but are frustrated in doing so given that offshore native title claims have limited statutory procedural rights.

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Limitations to the Recognition and Protection of Native Title Offshore: The Current 'Accident Of History'¹

Katie Glaskin

The High Court explained in *Mabo* that native title is not a title 'created' by the common law, but one 'recognised' by the common law... Arguably, indigenous sea rights exist as a matter of fact, and their 'origins' are not founded on any concept of English land law, or indeed any notions of international law, *as they depend entirely for their existence on observance by indigenous people of their traditional laws and customs...* They pre-date international or municipal law notions of sovereignty, coming to the fore only when international law

In recent legal, anthropological and political considerations of native title, much attention has focused on the *Native Title Act 1993* (Cth) (the NTA) and the *Native Title Amendment Act 1998* (Cth) (the NTAA) with respect to land. What is frequently excluded in much of the

discussion about native title is a consideration of the recognition and protection of marine native title.

That marine native title has received less attention may in part be a consequence of its more limited application as contrasted with land-based native title. In part, it may reflect a legal view that sea rights, especially when referred to alongside phrases such as ‘exclusive possession’, are considered too difficult within an Australian (and international) legal context. Perhaps even more fundamentally, it is likely to be a cultural reflection of the legal notion that sea cannot and should not be ‘owned’ or exclusively possessed; that it belongs to all.

Native title is *sui generis*, a unique title with no other equivalent, since it does not ‘conform to traditional common law concepts’.³ Yet the ability of Indigenous groups to have their unique native title legally recognised, especially with respect to marine areas, appears to become more elusive as time goes on. While the legal basis for the recognition of marine native title goes through protracted court processes, little legal remedy is available to Indigenous groups to protect their marine-based native title, whether that be the title itself or native title rights and interests. This is the issue I wish to draw attention to in this paper.⁴

Meyers et al note that approximately 120,000 Aboriginal and Torres Strait Islander people live within twenty kilometres of the Australian coast.⁵ Many of these coastal Indigenous groups conceptualise themselves as ‘saltwater’ people and consider their existence and identity to be contingent upon the sea. As well as exploiting marine resources, ‘saltwater’ people possess cosmologies incorporating marine features (which they maintain were created by ancestral beings) and derive important ritual elements from the sea. During the West Australian Aboriginal Land Inquiry of 1983, Dampierland communities:

argued their case that their members had interests in the land and sea, that people exploited marine resources, and that they had an intimate knowledge of their environment. Substantial evidence was given as to the existence of ritual and mythological sites in the sea... *Seaman accepted that these Aboriginal people had due claim on a traditional basis to areas of sea in and around the Dampier Peninsula...*⁶

Indigenous groups have complex systems of marine tenure, such as that described by Bagshaw⁷ with reference to the Burarra and Yan-nhangu peoples of the Blyth River-Crocodile Islands region of north east Arnhem Land. Their degree of relatedness to and affinity with the sea is such that Bagshaw characterises them as possessing a ‘*consubstantial identification* with saltwater...’⁸ One aspect of this identification is that Burarra and Yan-nhangu ‘...explicitly state that they were begotten by, *inter alia*, their human genitors... and the body of water which forms part of their respective estates...’⁹ That some Indigenous connections to marine areas can be described as ‘consustantial’ – being of the same essence – is an indication of the extent to which the marine environment has shaped the identities of Indigenous ‘saltwater’ people. Cordell’s observation that ‘sea space is social space that may play an even more pivotal role than land in shaping the identity of coastal peoples in a

region', is entirely apposite not just ethnographically and socially speaking but also historically and contemporarily.¹⁰ In many instances, the marine environment has played a key role in the history of contact, settlement and colonisation among 'saltwater' people. In many coastal and island areas the earliest outsider access to such regions has been by sea (as in the Northern Territory where Macassans traded with coastal groups). In addition, the earliest occupation of the country of the coastal Indigenous groups has frequently been premised on exploitation of marine resources, as in the pearling and trochus industries (which also relied on the exploitation of Indigenous labour).

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The recognition of native title offshore

While the *Mabo (No.2)* judgement did not establish the existence of native title rights offshore, s.6 and s.223 of the NTA allowed for the possibility that native title in the sea could be recognised.¹¹ The first *de jure* recognition of native title rights to the sea in Australia, the *Croker Island determination (Mary Yarmirr & Ors v The Northern Territory of Australia & Ors)* (1998) 156 ALR 370), provided for a limited recognition of native title rights and interests in the sea.¹² The judgement delivered by Olney J said that 'communal native title exists in relation to the sea and sea-bed within the claimed area.... [but] The native title rights and interests *do not* confer possession, occupation, use and enjoyment of the sea and sea-bed to the exclusion of all others'.¹³ Rather, the native title rights of the common law holders were reduced to the right to travel through or within the claimed area, fish and hunt (non-commercially), visit and protect places, and safeguard their cultural and spiritual knowledge.¹⁴ These native title rights and interests are considered to be affected by, and required to yield to, other rights and interests 'to the extent of any inconsistency',¹⁵ meaning they are subject to the extant legal rights of others. While a similar principle applies to other native title rights, in the *Croker Island determination*, the 'rights of others', encompassing 'a public right to fish' and a 'public right to navigate', were interpreted very broadly. The 'public right to fish' and 'a public right of navigate', recognised by the common law, were considered incompatible with a finding that the native title holders enjoyed exclusive possession of the claimed area.¹⁶ In his judgement, Olney J cited Viscount Haldane's advice to the Privy Council in *Attorney-General for the Province of British Columbia v Attorney-General for the Dominion of Canada* ([1914] AC 153 at 171), who held that:

the public have a right to fish, and by reasons of the provisions of the Magna Carta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise.¹⁷

The Croker Island applicants appealed the decision delivered by Olney J since it conferred limited recognition of their marine native title rights and interests. The Commonwealth 'with the support of the Northern Territory and the fishing industry parties'¹⁸ also appealed the decision on various grounds.¹⁹ The *Croker Island appeal (Commonwealth of Australia v Yarmirr)* (1999) 168 ALR 426) largely reiterated the original judgement, with Merkel J dissenting. In contrast to the joint judgement of Beaumont and von Doussa JJ, Merkel J concluded that 'a right to an exclusive fishery in a particular offshore area can be recognised and protected as a native title right or interest under the Native Title Act'.²⁰ McIntyre and Carter note that Merkel J:

found that the common law had adopted and received the principle of international law that a coastal state had sovereignty over its territorial sea... [accordingly] 'the clear implication of sections 6, 10, 223 and 225 of the NTA is that native title in respect of the sea can exist' and that the legislature had

‘implicitly accepted that pre-existing native title can burden the Crown’s ultimate and paramount rights as sovereign in respect of the sea’. Further, he was of the view that there was no ‘solid reason for the common law recognising native title with respect to the land but not in respect of the sea’.²¹

One basis for the Federal Court determination that claimant groups are unable to have their marine interests exclusively recognised, lies in international law guaranteeing the right of innocent passage through the territorial sea, subject to the caveats that the traversed area is not damaged or exploited.²² In the *Croker Island determination*, Olney J concluded that:

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It would be contrary both to international standards and the values of the common law, for the common law to recognise a native title right which conflicts with Australia’s international obligation to permit innocent passage of the Ships of all States through its territorial seas.²³

McIntyre and Carter observe that on appeal, Merkel J was of the view that ‘neither the right of innocent passage, nor the right of safe navigation, which are rights of way rather than property rights, were inconsistent with an otherwise exclusive right to fish’.²⁴ Sharp argues that state territorial seas only date back to the seventeenth century in which centralised states ‘began to become dominant political entities in Europe’.²⁵ The right of free passage referred to by Olney J reflects the notion that the sea belongs to all citizens. This has the effect described by Sharp of expropriating local marine territories, such that ‘...any other construction of the seascape [is erased] from the historical memory of the coloniser, though not from the minds of the colonised’.²⁶

Protection of marine native title

A significant dimension of the lack of protection Indigenous Australians have with respect to their sea rights, is the absence of the ‘right to negotiate’ offshore. Under the NTA, once the National Native Title Tribunal (NNTT) had accepted and registered a native title claim, claimants held the ‘right to negotiate’ (RTN) in relation to certain ‘permissible future acts’²⁷ within the claim area. Registration of native title claims under the NTA conferred the right to negotiate with respect to land, affording land-based native title rights and interests a degree of protection. Under the NTAA, new requirements for the registration test have been introduced and the right to negotiate has substantially altered. Previously registered native title claims are also required to apply for re-registration.²⁸

The registration test introduced by the NTAA is concerned with the procedural rights of native title claimants. Accessing the right to negotiate is one of the procedural rights gained from passing the registration test. In many instances the right to negotiate is now replaced by ‘the right to be consulted’. The non-recognition of marine native title with its concomitant ‘procedural right’ (‘a right to be notified of the act’ and ‘a right to object to the act’²⁹) has afforded native title claimants with marine claims little protection for their marine native title. McIntyre and Carter describe the situation with respect to the protection of marine native title this way:

In other words, a native title claimant group who have gone through the difficult task of passing the new registration test may find that acts may be engaged in without according them procedural rights, and they will be able to do nothing about it without going through the difficult and time consuming process of proving their native title, to determine, *after* the event which may have destroyed

their native title, whether or not the act was a future act in relation to which they *had* procedural rights which may have been exercised before the act was done. It makes the concept of the legislation providing for procedural rights totally ludicrous.³⁰

McIntyre and Carter's view seems justified, since by the time the native title holders with marine interests have established that they should have had procedural rights, their native title has already been extinguished or impaired, leaving them only the right to compensation. This is corroborated by Sparkes who states that in his view, the declaration of a marine park would:

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be a permissible future act without notification or negotiation with the native title holders. This may seem to be unfair, but that is the scheme of the Native Title Act where rights in respect of 'waters' (offshore and onshore) are less protected than equivalent rights on land. Compensation may be payable for the impairment of native title rights.³¹

In lieu of the limitations of statutory procedural rights to protect marine native title rights and interests, McIntyre and Carter explore the potential of injunctive relief as an alternative legal mechanism to protect Indigenous sea rights. They conclude that '...injunctive relief is unlikely to prove a satisfactory substitute for ineffective statutory procedural rights', indicating that Indigenous groups have no viable alternatives at their disposal to protect their marine native title rights and interests.³²

The National Indigenous Working Group stressed the importance of the right to negotiate provisions within the NTA, saying that these principles:

have provided many Aboriginal people with a real right for the first time to directly control the protection of their culture, to be involved in economic activity through agreements... and allowing them to control negative social impacts related to these developments.³³

Löfgren makes the important point that 'the right to negotiate is a *sui generis* aboriginal right associated with common law aboriginal title,' noting that this common law native title right was explicitly recognised in *Western Australia v Ward*, 'where Lee J held that the "... right to negotiate is an incident of native title"'.³⁴ Evidently, since the right to negotiate does not apply to offshore areas, native title in marine areas is already considered from a legal point of view – prior to full resolution through the courts – as constituting a lesser property right than land-based native title rights. This illustrates the clear disjunction between the NTA reflecting the body of European law from which the legislation is derived, and Indigenous conceptions of country. The European conceptualisation, translated legislatively, is that the sea (offshore) is a fundamentally different realm than land (onshore). Commonwealth and state laws apply differently to *terra firma* (once considered *terra nullius*) than to *mare*, which being considered still to be *mare nullius*, attracts statutes invoking that it belongs to all (with the logical corollary that exclusive possession is vested in no-one).

Given that the Commonwealth and state governments have been unwilling to recognise and therefore consider negotiating over native title in the sea, marine claims are more likely to be heard in the Federal Court than to reach negotiated settlements either within or outside the native title process. During the period between the registration of a native title claim over sea and the time in which it is ultimately heard in the Federal Court, claimants with registered

native title claims have little protection for their marine native title. Rather, their native title rights and interests may be actively impaired in the interim period, since claimants have little legal recourse to protect their rights.

The Bardi and Jawi native title claim [35](#) area is located in the northern Dampierland/King Sound region of the north west Kimberley in Western Australia. The discovery of rich pearling grounds brought pearling fleets into this region from the early 1880s [36](#) onwards. During the early days of the pearling industry, the occupation of bays by fleets of pearling luggers constituted a physical, rather than legal, expropriation of sea space. The coloniser's construction of sea space as an open-access domain for public exploitation (in this case gathering pearl shell) meant that the notion of Indigenous ownership of bodies of sea was not at issue. [37](#) Since pearlers required no legal tenure of the marine territory they exploited, [38](#) expropriation of areas of sea country was implicit rather than explicit during this time. Explicit expropriation of sea country occurred in this area with the issue of pearling leases for cultured pearl farms from the early 1960s onwards. Bardi and Jawi have consistently maintained that the issue of these pearling leases has alienated important areas of their sea country. [39](#)

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The absence of formal negotiating rights with respect to the sea minimises claimants' ability to intervene in contexts where their marine rights are at risk, such as in the issue of pearling leases, aquaculture leases, the declaration of marine parks and offshore mineral exploration. The Bardi and Jawi native title claim, which includes land and sea, has been registered with the NNTT since 1996. In 1999 the claim passed the new registration test under the amended NTA, and has yet to be heard by the Federal Court. [40](#) The claimants have viewed native title as a mechanism through which they could protect their sea country, but this has not proved to be the case. In 1996 a member of the claimant group noted that the West Australian government had granted five new pearling leases in the region since the NTA came into effect. Further pearling leases continue to be granted over portions of sea within and proximate to the claim area. Despite the long-standing successful registration of their native title claim, the claimants are positioned such that they have no legal grounds to contest the issue of new pearling leases. Claimants have expressed the view that they have 'no protection', one claimant concluding that 'white people have the upper hand and we've got nothing to stop them with... I think this native title is a waste of time...' Another surmised that 'what we are afraid of is where is our protection for more development going on in the sea?' Between lodging the claim in 1995 and the time in which the claim will be heard in the Federal Court (it was referred in April 1998), more pearling leases can be issued by the Fisheries Department of the West Australian government. It could even be suggested that, like the plethora of s.29 notices with which the West Australian government inundated the NNTT following the loss of their High Court challenge, [41](#) this may be a deliberate strategy [42](#) to weaken claimants' potentially recognisable marine native title rights.

The *Croker Island determination* found in part that the applicants could not be granted exclusive possession because 'Australia's obligations under international law of the sea treaties precluded the possibility of recognition of a exclusive possession or occupation, or a right to control access by others to the area'. [43](#) While a pearling lease clearly does not legally equate to exclusive possession (it is, after all, a lease), once long lines are set up, in practical terms it does constitute an exclusion. Claimants cannot traverse the area occupied by the long lines. Non-indigenous lease-holders are quick to assert the legal rights of their lease and to monitor the area for any sign of encroachment by outsiders, with the effect that Aboriginal people holding common law native title rights to the area are excluded. If the Croker judgements stand in future native title determinations relating to sea, once a pearling lease is issued common law native title rights are likely to have to co-exist with the lease and yield

to it 'to the extent of any inconsistency'. The sea occupied by these lines is physically appropriated space and legally expropriated country. That this is the case is evidence that free passage principles can be broached by the granting of rights to the sea.⁴⁴ It is with these matters in mind that the term 'inconsistency' should be employed. It is hardly surprising that some members of claimant groups with marine interests have become disillusioned with native title, since even as they are actively seeking the protection and recognition of their marine native title rights and interests, some of these are being eroded.

This article has been written primarily to bring attention to the current situation of 'saltwater' native title claimants. The fundamental importance of sea country to such groups is inadequately and unsatisfactorily reflected by a limited recognition of marine native title (as in the Croker Island judgements) and in the absence of the right to negotiate offshore. A corollary of the latter is that the extent of such groups' native title may be actively and

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deliberately diminished even as they engage with the protracted processes of the NTA (as amended) through the granting of other interests while they wait for their cases to be heard. Ironically, Smyth commented that:

Coastal indigenous people were the first to be dispossessed, even before settlement... On the other hand, there is a sense that some coastal indigenous people, perhaps many, have never been dispossessed, in the sense that their sea country has never explicitly been taken away from them and their rights to those sea areas, and the beaches, the estuaries, the inter-tidal areas, have never explicitly been taken away. That is an accident of history.⁴⁵

For some Indigenous people, at least, the 'accident of history' Smyth refers to – in which their rights to sea have 'never been explicitly taken away' – may fast be fading as an accurate portrayal of their current situation.

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I am grateful to Geoffrey Bagshaw and anonymous referees for comments on an earlier draft of this paper.

¹. Smyth, D. 'State and territory laws affecting coastal and marine areas' in *Proof and Management of Native Title: Summary of proceedings of a workshop*, Native Titles Research Unit, AIATSIS, Canberra, 31 January – 1 February 1994, pp.78-81, 1994, p.78. See concluding paragraph of this paper for the full context.

². Meyers, G.D., M. O'Dell, G. Wright and S.C. Muller *A Sea Change in Land Rights Law: The Extension of Native Title in Australia's Offshore Areas*, Native Title Research Unit, AIATSIS, Canberra, 1996, p.40, my emphasis.

³. *Mabo & Ors v Queensland (No. 2)* (1992) 175 CLR 1 per Deane, Gaudron JJ at para.22).

⁴. McIntyre and Carter have recently drawn attention to the same issue from a legal perspective. See McIntyre, G. and Graham C. 'Future Acts Affecting Native Title Offshore and Injunctive Relief', paper presented in Session 8(5), 18 April 2000, 3.30-5.30pm, at the

Native Title in the New Millennium - Representative Bodies Legal Conference, Melbourne, 16-20 April 2000.

[5.](#) Meyers op. cit., p.3.

[6.](#) Green, N. 'Aboriginal affiliations with the sea in Western Australia' in Gray, F. and L. Zann (eds) *Traditional Knowledge of the Marine Environment in Northern Australia*, Great Barrier Reef Marine Park Authority, Townsville, pp.19-29, 1988, p.27, my emphasis. And see Seaman, P. *The Aboriginal Land Inquiry Report*, Government Printer, Western Australia, 1984, p.83.

[7.](#) Bagshaw, G. '*Gapu Dhulway, Gapu Maramba*: conceptualisation and ownership of saltwater among the Burarra and Yan-nhangu peoples of northeast Arnhemland' in Peterson, N. and B. Rigsby (eds) *Customary Marine Tenure in Australia*, Oceania Monograph 48, University of Sydney, Sydney, 1988, pp.154-177.

[8.](#) Ibid., p.168, my emphasis.

[9.](#) Ibid., p.162, original emphasis.

[10.](#) Cordell, J. 'Introduction: sea tenure' in Cordell, J. (ed.) *A Sea of Small Boats*, Cultural Survival Inc, Cambridge, pp.1-32, 1989, p.35.

[11.](#) Section 6 of the NTA is the more explicit of these. It states that, 'This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*.'

[12.](#) In the Northern Territory, Aboriginal people have received some recognition of customary marine tenure through the *Aboriginal Land Act 1978* (NT). As Peterson and Rigsby note, s.12(1) of this Act represents 'the first statutory granting of some limited rights over the sea', allowing for sea closures out to two kilometres from Aboriginal land (Peterson, N. and B. Rigsby 'Introduction' in Peterson and Rigsby op. cit., p.1). This reciprocal legislation was made possible through the provisions in s.73(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and has resulted in two applications for sea closures on the Arnhem Land coast. In conjunction with this, s.53 of the *Fisheries Act 1988* (NT) provides for continuing use of areas of sea water in a traditional manner, and allows Aboriginal people with licences to catch and sell fish within their own community.

[13.](#) *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* (1998) 156 ALR 370, the *Croker Island determination*, 'Proposed determination of native title', point 3, my emphasis.

[14.](#) Ibid, point 4a, b, c, and d.

[15.](#) Ibid, point 5.

[16.](#) Olney J in the *Croker Island determination* held that 'the comments made above concerning the inability of the common law to recognise a claimed native title right that would contradict the common law public right to navigate have equal application to the public right to fish' (at para.135).

[17.](#) Ibid.

18. *Commonwealth of Australia v Mary Yarmirr & Ors* (1999) 168 ALR 426, the *Croker Island appeal*, (c) ‘The issues on the appeals’.
19. In particular, the Commonwealth took issue with Justice Olney’s decision that native title could extend beyond the limits of the Northern Territory.
20. The *Croker Island appeal*, (d) ‘The judgements on the appeals’.
21. McIntyre and Carter op. cit., pp.2-3.
22. Olney J in the *Croker Island determination* notes that Article 14 of the Geneva Convention ‘preserves the rights of ships of all States to enjoy (subject to the Convention) the right of innocent passage through the territorial sea. Article 17 of the UN Convention contains a similar provision in relation to the right of innocent passage’ (para.133).
23. Ibid.
24. McIntyre and Carter op. cit., p.7.
25. Sharp, N. ‘Reimagining sea space: from Grotius to Mabo’ in Peterson and Rigsby op. cit., pp.47-65, p.47.
26. Ibid.
27. Permissible future acts are ‘essentially acts relating to mining, the compulsory acquisition of native title for the purpose of making a grant to a third party, and any other acts approved by the Commonwealth Minister’ (see s.26 of the NTA). The right to negotiate under the NTA was not the equivalent of a veto; rather, it allowed claimants and proponents of permissible future acts (the ‘parties’) to attempt to reach a negotiated agreement regarding the development or acquisition under consideration. Upon failure to reach a negotiated agreement either party could apply to an arbitral body ‘for a determination of whether the act may go ahead and if so on what conditions’ (ss.27 and 35).
28. This is true for claims which were lodged on or after 27 June 1996 (when the native title amendment process began in Federal Parliament), or before this date, where the application includes freehold or leasehold land. Under the amended NTA, native title applications are now lodged directly in the Federal Court rather than in the NNTT. The greater proportion of native title applications lodged under the NTA prior to the commencement of the amended Act have been required to re-negotiate the registration test.
29. As defined in the NTA (s.253).
30. McIntyre and Carter op. cit., p.12, original emphasis.
31. Sparkes, S. ‘Below low water: marine boundaries and native title – a brief overview’ in Meyers, G.D. (ed) *In the Wake of Wik: old dilemmas, new directions in native title law*, NNTT, Perth, pp.266-279, 1999, p.274.
32. McIntyre and Carter op. cit., p.18.
33. National Indigenous Working Group on Native Title, *Negotiation, Certainty and Coexistence: Indigenous Position in Response to the Wik Decision and the Government’s Proposed Amendments to the Native Title Act, 1993*, April 1997, p.8.

[34.](#) (1996) 141 ALR 753 at para.766 cited in Löfgren, N. ‘Compulsory Acquisition and the Right to Negotiate’, *Land, Rights, Laws: Issues of Native Title*, Issues paper No.25, Native Title Research Unit, AIATSIS, September 1988, p.7.

[35.](#) Bardi/Jawi NNTT Application No. WC 95/48; Federal Court Application No. WAG 49/98.

[36.](#) Bain writes that reports of ‘remarkable finds’ of mother-of-pearl shell at Cygnet Bay in the King Sound area had occurred by 1884. In Bain, M.A. *Full Fathom Five*, Artlook Books, Perth, 1982.

[37.](#) I am grateful to an anonymous referee for drawing this explicitly to my attention.

[38.](#) Olney J in the *Croker Island determination* observes that in the Northern Territory ‘...the scheme of both the fishing and pearling ordinances [which have required commercial fishers and pearlery to obtain licences] was purely one of regulation’, that is *not involving tenure* (para.154). This statement could be equally applied to Western Australia.

[39.](#) Following the Aboriginal Land Inquiry of 1983, Seaman reported that ‘the Dampierland communities [which includes this claimant group] are concerned that pearling leases and associated land leases have been granted to non-Aboriginal people in areas of Aboriginal significance’ (Seaman, P. *The Aboriginal Land Inquiry Report*, Government Printer, Western Australia, 1984, p.84).

[40.](#) The claim was lodged with the NNTT on 1 September 1995 and was registered by the NNTT on 15 April 1996. The claim was re-registered to conform to the requirements of the NTAA on 10 October 1999.

[41.](#) *The State of Western Australia v Commonwealth* (1995) 183 CLR 373.

[42.](#) See De Soyza, A. ‘Engineering Unworkability: The Western Australian State Government and the Right to Negotiate’, *Land, Rights, Laws: Issues of Native Title*, Issues paper No.26, Native Title Research Unit, AIATSIS, October 1988.

[43.](#) The *Croker Island appeal*, ‘The decision of Olney J at first instance’, (b)(i).

[44.](#) I am grateful to an anonymous reader for bringing this to my attention.

[45.](#) Smyth op. cit., p.78.

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