Strangers in Sea Country: The Early History of the Northern Territory's Legislation Recognising Aboriginal Peoples' Relationships to the Sea

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Abstract

This article uses a reconciling sovereignties frame to analyse the initial debates in the 1970s about recognising Aboriginal peoples' relationships to sea country in the Northern Territory ('NT') which culminated in declaring 'sea closures' in the 1980s. Sea closures were unique to the NT and were the first substantive legal mechanism in Australia that recognised a form of Indigenous rights over the sea. Sea closures are still the law 'on the books' in the NT, but they can be seen as a legal and policy failure given that only two were ever declared. However, the history of sea closures reveals assertions of sovereignty made by both Aboriginal peoples and the settler state in legal, sociological and empirical ways. The reconciling sovereignties methodology seeks to analyse interactions between assertions of sovereignty, across time, to identify what was fundamentally at stake during this important part of Australian legal history.

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I Introduction

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*') was at its commencement, and today remains, the most comprehensive Indigenous[1] land rights legislation in Australia. One element of the *ALRA* which has not been closely examined is how discussion about legislation relating to sea country rights emerged at the same time. It appears that the first time Indigenous sea country relationships were raised in a formal settler-state[2] context was during the Aboriginal Land Rights Commission ('Woodward Commission') of 1973–74. The Woodward Commission recommended that all seas within two kilometres of Aboriginal land be 'closed' to non-Indigenous people automatically and without an application being required. Given that 85% of the coastline of the Northern Territory ('NT') is now Aboriginal land,[3] if such a recommendation had been legislated in the *ALRA*, the contemporary situation in the NT would have been significantly different: Traditional Owners would have had priority access to large areas of sea country and there would have been limits on non-Indigenous people accessing the sea.

However, this recommendation of Justice Woodward was not taken up by the Commonwealth legislature. Instead, controversially, the *ALRA* provided the NT legislature with the power to enact reciprocal legislation in relation to access to sea country.[4] The *Aboriginal Land Act 1978* (NT) ('*AL Act*') provided that an application could be made to close seas adjacent to Aboriginal land.[5] These became known as 'sea closures' and they were the first substantive legal mechanism to recognise a form of Indigenous rights to the sea in Australia. However, there were several high-level exemptions to sea closures in the *AL Act*, such as the exemption for licensed commercial fishers, that meant that this statutory mechanism did not provide for exclusive use by Traditional Owners.[6]

In this respect, the NT legislature prioritised what it labelled as the 'existing rights' of commercial fishers, reflecting the settler state's concern with continuing to control the economic exploitation of the seas. Given the commercial fishing

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1 The author acknowledges that use of appropriate terminology with respect to Aboriginal and Torres Strait Islander peoples is important. This is particularly so in the context of a legacy of research where such considerations were not made. Where possible, specific communities have been identified as this is most respectful. Where such specificity is not possible, this article has used the term 'Indigenous' when referring generally to both Aboriginal and Torres Strait Islander peoples, and the term 'Aboriginal peoples' when referring to the NT context.

2 For the purposes of this article, the settler state is a 'collection of institutions and bureaucracies whose authority is constructed or maintained' by the parliaments of the NT and the Commonwealth: Douglas Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (University of Toronto Press, 2001) 5. This includes both the executive and the legislative roles. More broadly, courts and judges are also part of the settler state. There is a strong separation of powers in Australia, but courts are clearly settler-state institutions that operate within the paradigm of settler-state sovereignty.

3 Transcript of Proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* [2007] HCATrans 324, 40–5 (DF Jackson).

4 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 73(1)(d) ('*ALRA*'). See also *Risk v Northern Territory* (2002) 210 CLR 392, 406 [35]; Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2789 (Les Johnson).

5 *Aboriginal Land Act 1978* (NT) s 12 ('*AL Act*').

6 Ibid ss 16–20.

exemptions, the sea closure mechanism only provided Traditional Owners with a very limited ability to control who entered those seas. Only two sea closure applications were pursued by Traditional Owners to declaration.[7] Notwithstanding, sea closures are still provided for in the legislation and, in theory, could be applied for today.

This history reveals assertions of sovereignty made by both Traditional Owners and the settler state over the sea. Traditional Owners have asserted sovereignty through spiritual authority, relationship and obligation; use rights (both subsistence and trade); and the ability to control who enters sea country and to make decisions for sea country.[8] The settler state asserted sovereignty through governmental authority over the sea; obligations to provide 'open access' for public rights; and control over economic exploitation.[9] Using a reconciling sovereignties frame, this article analyses the initial debates about recognising Aboriginal peoples' relationships to sea country in the NT, through to the declaration of the first sea closure (after an inquiry by the Aboriginal Land Commissioner) in 1983.

Much has happened in this legal space since 1983. Specifically in the NT context, sea country native title was recognised initially in *Yarmirr v Northern Territory*,[10] and affirmed in *Commonwealth v Yarmirr*[11] in 2001. In 2008 the determination was made in the *Blue Mud Bay Case*[12] that, pursuant to the *ALRA*, land in the intertidal zone (the area between high- and low-water marks) in the NT could be claimed and recognised as 'Aboriginal land'. This decision sparked the Blue Mud Bay negotiations between relevant Aboriginal land councils and the NT government (with some third-party involvement) that are, to some degree, still ongoing as at March 2023.[13] The analysis presented in this article is part of a larger project that considered assertions of sea country and marine sovereignties that have been made right up until the present day.[14] In particular, the larger project used a historical frame to examine why the contemporary negotiations around the *Blue Mud Bay Case* have stretched on for so many years after the decision. However, the least known part of this history relates to these initial debates about sea closures in the 1970s and early 1980s, hence the focus of this article.

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7 One sea closure was in the Milingimbi, Crocodile Islands and Glyde River area, and the other was in the adjacent Howard Island and Castlereagh Bay area: Commonwealth, Office of the Aboriginal Land Commissioner, *Report for the Year Ended 30 June 2005* (Annual Report, 21 September 2005) 42 ('*Land Commissioner Annual Report 2005*'); Anthony Bergin, 'Aboriginal Sea Claims in the Northern Territory of Australia' (1991) 15(3) *Ocean and Shoreline Management* 171, 177.

8 Lauren Butterly, 'Reconciling Indigenous and Settler-State Assertions of Sovereignty over Sea Country in Australia's Northern Territory' (PhD Thesis, The University of New South Wales, 2020) 44–7 ('Reconciling Indigenous and Settler-State Assertions').

9 Ibid 49–55.

10 *Yarmirr v Northern Territory* (1998) 82 FCR 533 ('*Yarmirr FC*').

11 *Commonwealth v Yarmirr* (2001) 208 CLR 1 ('*Yarmirr HCA*').

12 *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 ('*Blue Mud Bay Case*').

13 In December 2022, a new permit system was announced (commencing 1 January 2023) that may be seen as partially resolving some of these negotiations: Jano Gibson, 'Northern Land Council to Introduce New Fishing Permit System 14 years after Blue Mud Bay Ruling', *ABC News* (online, 9 December 2022) <https://www.abc.net.au/news>. However, not all areas have a finalised permit system, so negotiations are still formally ongoing. Further, whether a 'once off' resolution is possible, or if it evolves, will need to be examined over time.

14 Butterly, 'Reconciling Indigenous and Settler-State Assertions' (n 8) 44–7.

One methodological limitation associated with splitting up the larger project is that the research in the early 1970s and 1980s contains the fewest Indigenous voices due to the type of material that is available in the archives; whereas the remainder of the larger research project contains significant, and direct, Indigenous voices. The Indigenous voices presented in this article are most often mediated through paraphrasing in submissions, reports or parliamentary debates. In line with Indigenous research methodologies, this article examines texts within their broader context, particularly where they are produced by settler-state institutions or non-Indigenous authors.[15]

The article proceeds as follows. Part II briefly explains the reconciling sovereignties methodology. Part III considers the initial discussions and recommendations about sea country rights in the Woodward Commission. Part IV explores the drafting of, and parliamentary debates around, the first legislative provisions relating to sea country in the *ALRA*. Part V then examines how sea closures were eventually legislated in the reciprocal NT legislation and the application process, and practical reality, of the declaration of the first sea closure. Finally, Part VI draws together the assertions of sovereignty to identify what was fundamentally at stake during this important part of Australian legal history, and how that history plays out in the contemporary debates about Aboriginal rights to sea country in the NT.

II Reconciling Sovereignties

This article uses a reconciling sovereignties frame specifically developed for this research to examine the interaction between co-existing assertions of Indigenous and settler-state sovereignty over sea country. Revealing interactions between assertions of sovereignty across historical episodes requires a framework that allows comparison over a range of different contexts including royal commissions, the drafting and enactment of legislation, and litigation. Given the Indigenous–settler-state context, the frame must be capable of analysing assertions of sovereignty in a way that acknowledges the inherent colonial power imbalance, but simultaneously recognises Indigenous self-determination. Further, the frame has to reach beyond settler-state law in two ways: it must see Indigenous legal systems; and it must not be restricted to the formal instruments associated with doctrinal law (case law, statutes). In the latter context, it must be able to include consideration of governance mechanisms that come in a wide variety of forms.

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[15] See, eg, Karen Martin (Booran Mirraboopa), 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Research' (2003) 27(76) *Journal of Australian Studies* 203; Aileen Moreton-Robinson and Maggie Walter, 'Indigenous Methodologies in Social Research' in Maggie Walter (ed), *Social Research Methods* (Oxford University Press, 2nd ed, 2010) (online chapter 2009) 1; Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Zed Press, 2012); Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, 'Living Texts: A Perspective on Published Sources' (2013) 6(1) *Indigenous Research Methodologies and Indigenous Worldviews* 1, 9–10.

A *Reconciling*

The concept of 'reconciling', as used in this article, represents a continuing process. It is not being used to attempt to demonstrate a form of neat or finalised 'reconciliation' between the settler state and Indigenous peoples. Rather, it is used to trace the emerging threads of interaction between settler-state and Indigenous assertions of sovereignty. More broadly, the concept of reconciliation is highly contested. Carwyn Jones notes that reconciliation can be problematic for Indigenous peoples as it is 'often deployed to encourage Indigenous peoples to "forgive and forget"'.[16] State-sanctioned reconciliation processes are sometimes seen to be requiring Indigenous peoples to accept the assertion of settler-state sovereignty, but the state itself does not have to concede or give something up in return. John Borrows states: 'Reconciliation should not be a front for assimilation.'[17] As a result, reconciliation has become a 'dirty word' for many Indigenous peoples.[18] Instead, there is a strong sense that settler-state institutions cannot 'achieve a more satisfactory relationship with Indigenous people without some reconsideration of their claims' to sovereignty.[19]

The reconciling sovereignties frame used in this article analyses the interactions between settler-state and Indigenous assertions of sovereignty to demonstrate how these assertions exist in a constant dialogue. In this context, the term 'reconciling' is used primarily in a descriptive sense. The historical analysis seeks to capture the configuration of the relationship between competing assertions of sovereignty over sea country based in rival sources of authority over time.

B *Sovereignties*

Assertions of sovereignty may be anchored in Indigenous laws, settler-state law or international law, or they may be expressed in ways that fit within contemporary inter-societal governance approaches. Sovereignty has been selected as the register to describe and analyse the issues at stake because it allows us to see the ways in which Indigenous peoples have asserted their power to 'make decisions and have control over the decisions' that affect their lives.[20] In this context, sovereignty goes beyond settler-state legal rights and reaches into both Indigenous laws and inter-societal experiences of governance.

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16 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (University of British Columbia Press, 2016) 57.

17 John Borrows, 'Domesticating Doctrines: Aboriginal Peoples after the Royal Commission' (2001) *McGill Law Journal* 615, 660–1.

18 Penelope Edwards, *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Palgrave Macmillan, 2016) 8.

19 Jeremy Webber, 'We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty' in Douglas Sanderson and Patrick Macklem (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2015) 69.

20 Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans, Ann Genovese, Alexander Reilly and Patrick Wolfe (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013) 163, 164.

Sovereignty is not an Indigenous word or concept. It is a word that has roots in a Western philosophical context that is generally grounded in international law. The notion that Indigenous sovereignties survived colonisation, and now continue to co-exist with settler-state sovereignty, forms a separate body of predominantly Canadian literature that this frame is grounded in.[21] This co-existence is also a practical reality in Australia; Indigenous sovereignty was never ceded.[22]

Theories of legal pluralism form the base of the reconciling sovereignties frame. Broadly, theories of legal pluralism emphasise that different legal orders can co-exist.[23] This notion of co-existing legal orders can be challenging to apply in the Indigenous–settler-state context because of the dominant or, arguably, normative nature of settler-state legal orders in jurisdictions such as Australia.[24] However, there is a model of legal pluralism that sees Indigenous and settler-state legal orders as constantly negotiating with one another.[25] This displaces the assumption that there is one normative order.[26] Once it is accepted that Indigenous laws and settler-state laws continue to co-exist, this suggests that there are also co-existing assertions of sovereignty.

The frame of this article has been informed by Canadian legal scholarship. Despite the rich and rigorous discussions of Indigenous sovereignties that have challenged Australian settler-state political, legal and academic perspectives,[27] the legal scholarship on reconciling sovereignties has developed in a more explicit way in Canada. This is because some Canadian settler-state institutions have acknowledged that 'Crown sovereignty does not have all of the attributes of lawful

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21 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2007); Kent McNeil, 'Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions' in Julie Evans, Ann Genovese, Alexander Reilly and Patrick Wolfe (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013) 37; Kent McNeil, 'Indigenous Nations and the Legality of European Claims to Sovereignty over Canada' in Sandra Tomsons and Lorraine Mayer (eds), *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) 242; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) 107–31; Webber (n 19); Mark Walters, '"Looking for a Knot in the Bulrush": Reflections on Law, Sovereignty, and Aboriginal Rights' in Douglas Sanderson and Patrick Macklem (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2015) 35; Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (University of Saskatchewan Native Law Centre, 2012); Kim Stanton, 'Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission' (2017) 26 *Journal of Law and Social Policy* 20.

22 'The Uluru Statement from the Heart', *The Uluru Statement* (Web Page, 2023) <https://ulurustatement.org/the-statement/>.

23 Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) *Sydney Law Review* 375; Margaret Davies, 'Legal Pluralism' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 805.

24 Jones (n 16) 45–7.

25 Jeremy Webber, 'Legal Pluralism and Human Agency' (2006) 44 *Osgoode Hall Law Journal* 167, 189.

26 Ibid 190.

27 See, eg, Behrendt (n 20); Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) (particularly ch 6); Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan, *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19; Kirsty Gover and Eddie Cubillo, 'The Challenge of Indigenous Polities' in Cane, Ford and McMillan (n 27) 227; Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the *Yorta* Decision' (2004) 3(2) *Borderlands e-Journal*.

authority'.[28] The Canadian Supreme Court explicitly uses the concept of reconciliation in its jurisprudence and has 'begun to qualify its references to Crown sovereignty' by speaking of 'asserted' and 'assumed' Crown sovereignty.[29] Although the Supreme Court of Canada has not formally recognised the existence of continuing Indigenous sovereignties,[30] by 'allowing doubt' about the primacy of Crown sovereignty 'to creep in where it was once excluded', the Canadian jurisprudence has led to new forms of analysis of sovereignties and reconciliation.[31]

Australian settler-state institutions have not exhibited the same doctrinal or normative tone in relation to settler-state sovereignty as the Canadian Supreme Court.[32] It should be noted that Australia does not have an equivalent of s 35 of the *Constitution Act 1982*.[33] Section 35 'recognized and affirmed' the rights of 'the aboriginal peoples of Canada'.[34] However, the fact that Australia does not have an equivalent, in itself, does not diminish the value of the Canadian scholarship on reconciling sovereignties to the broader Australian context for at least two reasons: first, the Canadian scholarship reaches beyond the courts (in fact, Jeremy Webber has argued it is a 'great mistake' to think that such conversations are the 'exclusive province of the courts');[35] and second, even in the limited context of settler-state courts, all Indigenous rights cases are about reconciling Indigenous and non-Indigenous interests that have roots in co-existing assertions of sovereignty.

The methodology used in this article deliberately seeks to use Canadian scholarship to highlight new ways of seeing the relationship between Indigenous and settler-state assertions of sovereignty. In this context, this methodological frame 'skips over' the important questions, which are being carefully and rigorously analysed by other scholars, about why Australian settler-state institutions, particularly courts, have continued to skirt around the issue of plural sovereignties.[36] The reconciling sovereignties frame aims to use the Canadian scholarship as the base to see what happens when we choose to view both Indigenous and settler-state sovereignties in the Australian context.

C *Defining Assertions of Sovereignty*

Aboriginal peoples' conceptions of sea country sovereignty are not uniform, and they vary across different communities in the NT. However, broadly, Traditional Owners have asserted sovereignty through spiritual authority, relationship and obligation; use rights (both subsistence and trade); and the ability to control who

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28 Mark Walters, 'The Jurisprudence of Reconciliation: Aboriginal Rights in Canada' in Will Kymlicka and Bashir (eds), *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008) 165, 186.

29 Webber (n 19) 71.

30 Ibid. See also Doug Moodie, 'Thinking outside the 20th Century Box: Revisiting "*Mitchell*" — Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government' (2003–4) 35(1) *Ottawa Law Review* 1.

31 Webber (n 19) 71.

32 See, eg, Dorsett (n 27) 20; Gover and Cubillo (n 27) 228.

33 *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*') s 35.

34 Ibid.

35 Webber (n 19) 65.

36 See above n 32 and accompanying text.

enters sea country and to make decisions for sea country.[37] Aboriginal laws about sea country have been described as relating to caretaking, responsibility and custodianship, as well as knowledge, language, sharing and family.[38] Across many Traditional Owner groups in the NT, Aboriginal laws require non-Traditional Owners (Aboriginal people or non-Indigenous people) to seek permission to enter sea country.[39] Permission requirements are based on having cultural and environmental responsibilities that do not 'easily translate into European property laws and institutions'.[40] These responsibilities involve the ability to make holistic decisions about the use of sea country including deciding who enters and what they can and cannot do in sea country.

Settler-state sovereign rights over territorial waters were asserted as part of the acquisition of sovereignty in the international law context of colonisation. The assertion of those sovereign rights gave overarching ownership to the settler state within the international law paradigm, but the sea was, unlike land, otherwise 'unownable space' and 'open to everyone'.[41] There were 'public rights' to fish and navigate, as well as the international law right of free passage, that required 'protection' by the settler state.[42] The right of free passage was (and is) relatively uncontested,[43] whereas the public rights were far less certain.[44] As a result, the settler state's assertions of public rights were often based on broader sociological interpretations.

Overall, the settler state's asserted acquisition of sovereignty ignored and attempted to erase Indigenous sovereignties over sea country even though they continued to be exercised and asserted. The reconciling sovereignties frame seeks to bring the conversation between the co-existing sovereignties to the fore.

III First Settler-State Discussion of Sea Country 'Rights': Woodward Commission

In December 1972, the Whitlam Government was elected. One of its first acts was to appoint Justice Edward Woodward to undertake a judicial inquiry into Aboriginal land rights.[45] The Woodward Commission was tasked to consider the issue of

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37 Butterly, 'Reconciling Indigenous and Settler-State Assertions' (n 8) 44–7.

38 Buku-Larrngay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (Buku-Larrngay Mulka Centre in association with Jennifer Isaacs Publishing, 1999) 9–12; *Yarmirr HCA* (n 11) 147 [332].

39 See, eg, Stephen Davis, 'Aboriginal Claims to Coastal Waters in North-Eastern Arnhem Land, Northern Australia' (1984) 17 *Senri Ethnological Studies* 231, 239–43. For a detailed consideration of this issue, see Butterly, 'Reconciling Indigenous and Settler-State Assertions' (n 8) ch III(C)(3).

40 John Cordell, *Managing Sea Country: Tenure and Sustainability of Aboriginal and Torres Strait Islander Marine Resources* (Report, Ecologically Sustainable Development Fisheries Working Group, 1991) 2.

41 Nonie Sharp, *Saltwater People: The Waves of Memory* (Allen and Unwin, 2002) 46.

42 Ibid.

43 *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 17; *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) s 6.

44 Butterly, 'Reconciling Indigenous and Settler-State Assertions' (n 8) 175–6.

45 The Woodward Commission was prompted by *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ('*Gove Land Rights Case*').

Aboriginal relationships to land more broadly and make recommendations, which resulted in the *ALRA*. The Letters Patent establishing the Woodward Commission requested Justice Woodward to inquire into and report on:

> The appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to *land*, and to satisfy in other ways the reasonable *aspirations* of the Aborigines to rights in or in relation to land …[46]

There was no mention of sea country in the Letters Patent. However, as will be discussed in this Part, Aboriginal people brought sea issues to the Woodward Commission.

Justice Woodward produced two reports. The *First Report* was to identify the issues and stimulate further submissions, and the *Second Report* was the final report that provided detailed drafting instructions for proposed Aboriginal land rights legislation.[47] Both reports included discussion on sea issues. Most of the discussion relating to the sea appeared under the heading 'Land Usage', and the subheading 'Fisheries'.[48] This speaks to a theme that becomes apparent, of seeing the sea as ancillary to the land rather than as important in its own right.

Anthropologists Nicolas Peterson and Bruce Rigsby, who published the first Australian book on Aboriginal 'customary marine tenure' in 1998,[49] suggest that the *First Report* was the 'first passing reference to sea estates' in a settler-state legal context in Australia.[50] However, Justice Woodward did not use the words 'tenure' or 'estate'; rather, he used the relationship to land as context:

> It seems clear that Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the waters between the coastline and offshore islands belonging to the same clan.[51]

It seems Justice Woodward's attention was on the relationship of those waters to adjacent land, rather than seeing the relationship to the sea as something that could stand alone. Perhaps this was a way to stay within the terms of reference, while still ensuring that sea country was considered.

In discussing the Woodward Commission, it is important to start by exploring the Aboriginal 'claim' to sea country. The word 'claim' is used here because Justice Woodward stated in his *First Report* that there were no 'clear-cut claims' to sea country or fisheries.[52] Although the Woodward Commission was an inquiry aimed at understanding Aboriginal rights and aspirations, and how they could be

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46 Commonwealth, Aboriginal Land Rights Commission, *First Report* (1973) iii (emphasis added) ('*Woodward Commission First Report*'); Commonwealth, Aboriginal Land Rights Commission, *Second Report* (1974) 1 (emphasis added) ('*Woodward Commission Second Report*').

47 *Woodward Commission First Report* (n 46) 48; *Woodward Commission Second Report* (n 46) app D.

48 *Woodward Commission First Report* (n 46) 33; *Woodward Commission Second Report* (n 46) 80.

49 Nicolas Peterson and Bruce Rigsby (eds), *Customary Marine Tenure in Australia* (Sydney University Press, 1998).

50 Nicolas Peterson and Bruce Rigsby, 'Introduction' in Peterson and Rigsby (eds), *Customary Marine Tenure in Australia* (n 49) 1, 2.

51 *Woodward Commission First Report* (n 46) 33.

52 Ibid.

recognised, it still functioned such that the legal representatives of the Traditional Owners were required to make a 'claim' in relation to sea country. Justice Woodward used the word 'claim' to describe the articulation of Aboriginal relationships to sea country that would assist his Honour in preparing the drafting instructions for the *ALRA*.

A *What Was the 'Claim' to Sea Country?*

The *First Report* contained only a short section relating to 'fisheries' that began by noting that a 'number of Aboriginal communities in the North have raised … questions of fishing rights'.[53] Justice Woodward identified the question raised by Aboriginal communities as: 'whether their land rights will extend out to sea and, if so, how far'.[54] This emphasised that it was the Aboriginal communities that brought this issue to the Commissioner. Justice Woodward noted that the communities submitted that they relied on fish, turtles, shellfish, dugongs and other sea life for subsistence and traditional uses.[55] Further, some communities suggested that they were 'looking ahead' to developing commercial ventures.[56]

The Northern Land Council ('NLC'), representing Traditional Owners,[57] made their submission after the *First Report* and before the *Second Report*, noting that Aboriginal reserves appeared to extend to the low-water mark, but stating: 'The Dreaming of some Aborigines lies beyond this limit and the Aborigines wish to be able to exclude others from an area which lies within a line drawn 12 miles from the coastline'.[58] Their submission further noted that the 'interest of Aborigines in the area within the 12 mile limit is in part religious, in part social, and in part economic'.[59] The social and economic aspects were explained briefly as relating to the social impact of non-Indigenous boat crews camping unlawfully, and the economic benefits of a potential Aboriginal fishing industry.[60] The NLC's submission contained a combination of the three assertions of sovereignty: spiritual authority, use rights, and control over who enters.

The explanation here for why the NLC claimed an area out to 12 miles was that 'Australia's jurisdiction with respect to fishing or movement within this area appears to be established internationally … and there is no reason why Municipal legislation should not create a prohibition against entry into this area except with a permit'.[61] The NLC claimed an area as far as the Commonwealth's asserted

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53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
57 The Northern Land Council ('NLC') represents Traditional Owners in relation to land and sea in the northern part of the NT: see 'NLC Regional Map', *Northern Land Council* (Web Page, 2023) <https://www.nlc.org.au/uploads/pdfs/NLC_Regions_2017.pdf>.
58 Northern Land Council, Submission to Aboriginal Land Rights Commission (January 1974) 90.
59 Ibid 129.
60 Ibid.
61 Ibid 89–90. In 1968, the Commonwealth introduced into its fisheries legislation 'declared fishing zones' that extended to 12 nautical miles: *Fisheries Act 1967* (Cth) s 3; JG Starke, 'International Legal Notes' (1967) 41 *Australian Law Journal* 31, 31. It was not until 1990 that Australia formally

sovereign fisheries rights reached at the time. However, it seems that the NLC was claiming more than the sovereign rights over fisheries that the Commonwealth had claimed out to 12 miles. It appeared that the NLC also claimed the ability to exclude people generally (beyond just fishers).

The NLC's submission went on to note that 'if the 12 mile limit should prove to be too wide a boundary for the exclusive use of Aborigines, the three mile limit might be considered'.[62] Further, because the 'States control waters within the three mile limit', 'it is reasonable to seek an exclusive right for Aborigines to enjoy a like area off the coast of the Reserves'.[63] The assertion that states, and the NT, controlled waters to the three-mile mark would go on to be challenged in the *Seas and Submerged Lands Case*,[64] and then negotiated through the 1979 Offshore Constitutional Settlement.[65] In this context, the Woodward Commission was taking place during a time of more general uncertainty as to governance arrangements of the marine area from the settler-state perspective.

Similarly to Justice Woodward's approach, the NLC's submission seemed to be about the sea's relationship to land. However, it was a broader suggestion that if, like a state or the NT, someone owns the land bordering the sea, they should have rights over that adjacent sea. It was a claim that Aboriginal ownership of land should be viewed equally to settler-state ownership of land. In line with this, the claim was advanced as an exclusive right with a permit system to allow for non-Indigenous entry, and an 'exemption in favour of putting to shore in cases of emergency'.[66] This proposed a system of requiring permission, by way of permit application, to enter sea country.

This concept of requiring permission had, by this time, been seen in much anthropological work,[67] and had been analysed as a legal concept in the first terrestrial Aboriginal land rights case: *Milirrpum v Nabalco Pty Ltd*.[68] As noted above, across many Traditional Owner groups in the NT, Aboriginal laws require non-Traditional Owners (whether Aboriginal people or non-Indigenous people) to seek permission to enter country including sea country. An important part of permission principles is explaining the requirements for 'strangers' to seek permission to enter sea country. Strangers are people who do not know the place: '[W]hen a person enters a territory for the first time, he is "someone who does not

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extended its territorial sea to 12 nautical miles: Brian Opeskin and Donald Rothwell, 'Australia's Territorial Sea: International and Federal Implications of its Extension to 12 Miles' (1991) 22(4) *Ocean Development and International Law* 395, 395.

62 NLC, *Submission to Aboriginal Land Rights Commission* (n 58) 129.

63 Ibid.

64 *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*').

65 The states and the Commonwealth negotiated what has become known as the Offshore Constitutional Settlement: 'Offshore Constitutional Settlement', *Attorney-General's Department* (Web Page, 2023) <https://www.ag.gov.au/international-relations/international-law/offshore-constitutional-settlement>. The key provision was s 5 of the *Coastal Waters (State Powers) Act 1980* (Cth). This was extended to the NT through separate legislation: *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) (and coastal waters were defined as being three nautical miles out to sea: s 4(2)).

66 NLC, *Submission to Aboriginal Land Rights Commission* (n 58) 129.

67 Butterly, 'Reconciling Indigenous and Settler-State Assertions' (n 8) 70–3.

68 *Gove Land Rights Case* (n 45) 181–2.

know"'.[69] Someone who is not familiar with country may find themselves in danger. As explained by Djambawa Marawili (and summarised by Marcus Barber): 'if those spirits do not know people, then they may be hostile to them, and strangers are likely to get lost, injured, into trouble, or even die because of this unfamiliarity'.[70]

Before examining Justice Woodward's recommendations, it is useful to note that the NLC's submission to the Woodward Commission contained fewer than 10 paragraphs on sea country over the 175 pages of the submission. This is not a criticism of the NLC, as the submission must be viewed in the wider context of the complexity and novelty of the issues the NLC was dealing with. However, this small amount of information was coupled with a submission for exclusive rights over an area of sea out to the 12-mile limit. This combination provided a particular challenge for Justice Woodward in making his recommendations.

B *Justice Woodward's Recommendations on Sea Country: Buffer Zone*

Justice Woodward's major recommendation about sea country was that land rights should be 'extended' out to sea to provide a buffer to protect Aboriginal land. The critical decision then was how far such a buffer would stretch. Justice Woodward recommended that a buffer zone of up to two kilometres (approximately one nautical mile) off Aboriginal land should be automatically closed.[71] Notably, this did not stretch to the boundary of the three nautical mile mark of the territorial seas then controlled by the Commonwealth and later the NT. In explaining why two kilometres was chosen, his Honour stated that 'some arbitrary figure [had] to be arrived at',[72] and that the 'legitimate interests' of Aboriginal people would be protected if

> their traditional fishing rights are preserved and their right to the privacy of their land is clearly recognised by the establishment of a buffer zone of sea which cannot legally be entered by commercial fishermen or holiday makers. An exception would have to be made in cases of emergency.[73]

The 'privacy of … land' reasoning entrenched the idea that there was strong control and governance over land by Aboriginal people, and that this must be protected by the buffer zone. The sea that was included in this buffer was presented almost as a by-product of that land ownership. In terms of the distance, Justice Woodward noted that all fishing by Aboriginal people was done by using nets or handlines in 'comparatively shallow water' and, therefore, the two kilometres should 'suffice'.[74] This method of picking a distance, without any previous reference being made to it, and not a number that had a particular meaning in the marine space, was curious. It

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69 Stephen Davis, 'Aboriginal Claims to Coastal Waters in North-Eastern Arnhem Land, Northern Australia' (n 39) 239.

70 Marcus Barber, 'Where the Clouds Stand: Australian Aboriginal Relationships to Water, Place, and the Marine Environment in Blue Mud Bay, Northern Territory' (PhD Thesis, Australian National University, 2005) 151–2.

71 *Woodward Commission Second Report* (n 46) 23 (recommendation (vi)).

72 Ibid 81 [424].

73 Ibid 80–1 [423].

74 Ibid 81.

suggested a discomfort with and uncertainty around the legal issues. Nonetheless, this appears to be the first articulation of such a dialogue by a settler-state mechanism in relation to the marine space in Australia. It recognised Aboriginal peoples' assertions of being able to control who entered sea country to the detriment of settler-state assertions of governmental authority.

C *Conclusions on the Woodward Commission*

The NLC's submission used the word 'compromise': as in 'a compromise between the claims of the traditional owners and the holders of existing legal interests'.[75] Justice Woodward's recommendation of a buffer zone was a compromise. Although the two-kilometre buffer zone ultimately recommended was much smaller than the NLC's proposed 12 miles, it was still a strong articulation of Aboriginal control over entry to seas. In the context of discussions about mineral ownership, Justice Woodward noted that he felt limited in what he could recommend, because

> the whole of Australian mining law is based on the assumption that minerals belong to the Crown. To provide otherwise in a particular case could well create problems and sorting these problems out could delay necessary legislation.[76]

Taking this sentiment and applying it to sea country, although the legal assumptions are not so clear cut, one way to understand Justice Woodward's approach to limiting the buffer zone is as an act motivated by concern for how much time would be lost if 12 miles was put forward.[77] Such a large distance out to sea would have instantly raised a red flag to legislators concerned about fishing and mineral access and exploitation, and could have slowed down legislative recognition of Aboriginal land (and sea) rights.[78]

IV The Drafting of and Debate around the *ALRA*

Initially, the Whitlam Government took up the recommendation of the two-kilometre buffer zone. However, the buffer zone was pared back after the Dismissal in 1975. As will be seen in this Part, the fact that even the two-kilometre buffer zone caused a high level of concern in the Commonwealth Parliament seems to bear out the sense that anything to the 12-mile limit could have had a more dramatic, unintended adverse impact on Aboriginal land and sea rights going forward.

A *The Whitlam Bill: 1975 Bill*

When the original Aboriginal Land (Northern Territory) Bill 1975 (Cth) ('1975 Bill') was introduced into the Commonwealth Parliament on 16 October 1975, it prescribed the two-kilometre buffer zone.[79] The Second Reading Speech did not

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75 NLC, *Submission to Aboriginal Land Rights Commission* (n 58) 50.
76 *Woodward Commission Second Report* (n 46) 115.
77 Ibid 80, 103.
78 Ibid.
79 Aboriginal Land (Northern Territory) Bill 1975 (Cth) cll 73–4 ('1975 Bill'); Northern Land Council, Submission to Joint Select Committee on Aboriginal Land Rights in the Northern Territory (1977) 1 ('*Submission to Joint Select Committee*').

provide detailed commentary on the sea country aspects of the Bill. It was simply stated by Les Johnson, Minister for Aboriginal Affairs, that: 'The Bill gives Aboriginals control over entry onto their land and the 2 kilometres of sea adjoining it.'[80] This seems very understated given the Bill's significance as the first legislative recognition of Aboriginal control of entry over an area of sea. However, the context of the *ALRA* must be kept in mind as terrestrial land rights were also significant.

On 11 November 1975, there was a sudden change of government when Gough Whitlam was controversially dismissed, and Malcolm Fraser became Prime Minister. The 1975 Bill consequently lapsed.[81] In the month between the introduction of the 1975 Bill and the Dismissal, there was little time for debate on the sea country elements. The only mention of the sea country issues appearing in Hansard is by Bob Ellicott, then member of the Opposition who went on to become Attorney-General in the Fraser Government.[82] Ellicott suggested that the two-kilometre buffer zone 'could give rise to considerable concern' in the wider community, as non-Indigenous people would be excluded from beaches and rivers to which they previously had access.[83] His comments were premised on the suggestion that if Aboriginal people were 'entitled to be free from interference with their traditional fishing rights' that should be enough, and there would be no need for the proposed larger scale exclusions.[84] This seemed to shift the focus of conversation away from Aboriginal peoples' control of entry to sea country, and instead onto the narrower idea of protection of traditional fishing rights. However, as will be discussed in the next section, the Commonwealth would go on to leave the broader issue of regulating entry to the NT. Ellicott was focused on asserting governmental authority by protecting non-Indigenous public rights and this was reflected in the Aboriginal Land Rights (Northern Territory) Bill 1976 ('1976 Bill').

B *The Fraser Bill: 1976 Bill and the Passing of the* ALRA

The 1976 Bill did not provide the automatic two-kilometre buffer zone.[85] Instead, the legislation provided powers to the NT Legislative Assembly to make reciprocal laws. Clause 73(1)(d) of the 1976 Bill provided that the NT Legislative Assembly had the power to make

> Ordinances regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of, Aboriginal land …

It was much later noted by the High Court (without a reference) in *Risk v Northern Territory*[86] — an unsuccessful native title claim to the seabed below the low-water

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80 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 October 1975, 2222 (Les Johnson, Minister for Aboriginal Affairs).

81 Leon Terrill, *Beyond Communal and Individual Ownership: Indigenous Land Reform in Australia* (Routledge, 2016) 73.

82 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 November 1975, 2753 (Bob Ellicott).

83 Ibid.

84 Ibid.

85 *Blue Mud Bay Case* (n 12) 90 [133].

86 *Risk v Northern Territory* (2002) 210 CLR 392.

mark surrounding Darwin — that attempts to amend the 1976 Bill to reintroduce the automatic buffer zone recommended by Justice Woodward were rejected.[87] In particular, Johnson, who was now an Opposition member, raised the issue of sea country on several occasions during the parliamentary debates.[88] He noted that the omission has 'upset a large number of Aboriginal communities as it offers them no protection of their fishing and religious rights of their land'.[89] There were also about 70 standard form petitions presented to the Senate and the House of Representatives that stated, inter alia, that the NT Legislative Assembly should not be granted power to pass legislation about seas adjoining Aboriginal land and fishing rights of 'non-Aborigines' within two kilometres of Aboriginal land.[90] In passing the *ALRA*, the Commonwealth Parliament asserted its sovereignty through governmental authority to legislate, by prioritising provision of non-Indigenous public rights and by protecting economic exploitation.

The issues to do with sea country were still being ventilated in parliamentary debates right up until, and in fact beyond, when the *ALRA* was assented to on 16 December 1976. In mid-November 1976, Ian Viner (Commonwealth Minister for Aboriginal Affairs) announced the establishment of the Commonwealth Joint Select Committee on Aboriginal Land Rights in the NT to report no later than 31 May 1977.[91] In relation to sea country, the Committee was tasked with making recommendations on the NT reciprocal legislation.

C *The Joint Select Committee on Aboriginal Land Rights*

The Committee was appointed to examine, inter alia, 'the adequacy of provisions of the laws of the Northern Territory relating to … entry to seas adjoining Aboriginal land'.[92] The provisions of the Aboriginal Lands and Sacred Sites Bill 1977 (NT) ('NT Aboriginal Lands Bill') were used as a baseline for the Committee's discussion.[93] Instead of an automatic sea closure (as proposed in the 1975 Bill), the NT Aboriginal Lands Bill put forward a process whereby Aboriginal communities could apply to have their seas closed for specified reasons: 'Those reasons may be to prevent exploitation, to preserve the sanctity of places of particular meaning or significance to Aboriginals or to preserve the breeding ground of a particular food

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87 Ibid 406 [35].

88 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2789 (Les Johnson); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 1976, 3081 (Les Johnson).

89 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2789 (Les Johnson).

90 These petitions were presented between early October 1976 and early December 1976: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1976, 2839 (Norman Fry, Les Johnson and Les McMahon). Due to the way these petitions were recorded in Hansard (as being from a certain number of 'citizens of Australia'), it is difficult to tell who the submissions were from, and whether they represented Aboriginal people. However, they do indicate that these sea country issues were noticed and commented on by the public.

91 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2781 (Ian Viner).

92 Joint Select Committee on Aboriginal Land Rights in the Northern Territory, Parliament of Australia (Report, 1977) iv ('*Report of Joint Select Committee*').

93 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 March 1977, 62 (Goff Letts, Majority Leader).

source.'[94] This was quite a significant move away from Justice Woodward's focus on the sea as a buffer to protect Aboriginal land. In effect, this was recognition from the settler state that sea country, separate to its relationship to land, was important to Aboriginal people in relation to use rights and protection of places of significance. The reference to preventing exploitation suggested that Aboriginal people should be able to have some control over non-Indigenous fishing and use of their sea country. The corollary to this separation of land and sea was that there was no longer an automatic two-kilometre buffer, a mechanism that would have likely led to there being large areas of waters to which Aboriginal people could control entry. This created the need for another type of application process specific to the sea.

If an Aboriginal community wanted to apply to close their seas, they would apply to the Administrator[95] who could then refer the application to the Aboriginal Land Commissioner for investigation. After investigation by the Commissioner, the results would be given to the Administrator and 'discussed with [the] owners who made the request'.[96] As part of that process, the Aboriginal community would specify the 'type and degree of protection requested, from total closure to … closure against a form of fishing'.[97] In making the decision, the Administrator could either totally close the waters, implement particular forms of exclusion, or reject the application altogether.[98] This provided recognition that Aboriginal communities would have different relationships to the sea that required varied types of closures. There was a clear sense that exclusion could go beyond just preventing fishing.

In putting the provisions about sea closures forward, the Majority Leader of the NT,[99] Goff Letts, used the language of compromise:

> It is no secret that this [sea country issue] was the most difficult area in which we and the draftsmen had to attempt to do something … What we finished up with is a type of compromise which will still *preserve* a good deal of the waters off the coastline available for use. … It will provide for the *preservation* of both traditional and need rights for Aboriginals in the proximities of their communities.[100]

The use of the sentiment of 'preserving' in two different ways here is relevant. Aboriginal 'traditional and need' rights would be preserved, and use of a 'good deal' of waters would also be preserved for non-Indigenous people. This latter use of the sentiment gives a normative sense that those waters were already open and should remain so; the status quo of the settler state's assertion of protecting open access should be preserved. In terms of Aboriginal use rights, while 'traditional rights' was a common phrase, 'need rights' was unusual. Perhaps it was meant to have a similar meaning to subsistence, which might imply that 'traditional' had a broader meaning akin to spiritual authority. The ability to apply for a 'full closure' suggests that there

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94 Ibid.

95 A role similar to that of a state Governor.

96 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 March 1977, 60 (Goff Letts, Majority Leader).

97 Ibid.

98 Ibid.

99 The term used for the leader of the government prior to the NT gaining self-government.

100 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 March 1977, 59 (Goff Letts, Majority Leader) (emphasis added).

was an understanding that in some areas total control by Aboriginal people of who could enter was appropriate and, therefore, that assertions of control by Traditional Owners, and requirements of permission, could sometimes have priority over the settler state's assertions of open access.

The NT Aboriginal Lands Bill continued to be debated in the NT Legislative Assembly alongside the Committee's work. The Committee noted in its final report that the witnesses who gave evidence to the Committee 'generally did not support the provisions' of the NT Aboriginal Lands Bill relating to sea country, but for vastly different reasons. Aboriginal witnesses strongly supported 'preserving' the automatic two-kilometre buffer that Justice Woodward had recommended;[101] while another group of witnesses ('mainly non-Aboriginals') argued that the 'seas [should] remain open to all Australians'.[102]

The NLC submitted that in Australia there was a 'generally held belief that all people have a free and unrestricted right to the use of the sea and inland waters'.[103] However, this statement was used as an anchor for the point that, in fact, the sea is 'not freely available to all Australians' — the government can place restrictions on commercial fishing and other recreational pursuits by exercising its assertion of sovereignty through governmental authority.[104] It seems likely that these submissions were made to answer specific arguments about the potential for 'racial tensions' if seas were closed.[105]

Submissions were made, 'mainly by non-Aboriginals', that the seas should remain open to all because '[d]iscrimination in favour of one race is the basis for racial tension'.[106] The undertones of this 'racial tensions' argument were apparent throughout the Committee's report, including in references to the potential for 'ill-feeling between the communities'.[107] There is a certain type of race politics — one based on arguments of formal equality, that Aboriginal people and non-Indigenous people should have equal rights — that is part of a particular non-Indigenous NT cultural identity.[108] One way in which this narrative played out was in the view that Aboriginal land rights led to a 'lack of equality' for (non-Indigenous) 'Territorians'.[109] Aboriginal land rights divided the (imagined) community rather than uniting it.[110] Advice was sought from the Attorney-General, who at that stage was Ellicott, about the impact of the *Racial Discrimination Act 1975* (Cth). Ellicott stated that there was 'no legal substance' in suggestions that any form of sea closure

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101 The NLC also made this submission: NLC, *Submission to Joint Select Committee* (n 79) 30 (draft Aboriginal Land and Sacred Sites Ordinance 1977 cl 9(1)).
102 *Report of Joint Select Committee* (n 92) 55–7.
103 NLC, *Submission to Joint Select Committee* (n 79) 18.
104 Ibid.
105 *Report of Joint Select Committee* (n 92) 57.
106 Ibid.
107 Ibid 60.
108 Robyn Smith, 'Arcadian Populism: The Country Liberal Party and Self-Government in the Northern Territory' (PhD Thesis, Charles Darwin University, 2011) 201; David Carment, *Territorianism: Politics and Identity in Australia's Northern Territory 1987–2001* (Australian Scholarly Publishing, 2007) 8.
109 Smith (n 108) 7.
110 Ibid 10–1.

would be contrary to that Act.[111] Given that there were no legal issues here in relation to racial discrimination, these arguments could be interpreted as another way of expressing the choice of priorities.

On the other hand, international law threw up some substantive legal considerations. There were some suggestions that any ordinance made by the NT Legislative Assembly would be inconsistent with the provisions of the *Seas and Submerged Lands Act 1973* (Cth).[112] Ellicott advised that any ordinance made would be 'merely a legislative exercise of [the] sovereignty' declared by the Commonwealth over the territorial sea.[113] However, Ellicott noted that a problem might arise in relation to Australia's international obligations to provide a right of innocent passage to ships of all nations. Ellicott's advice was that if regulations were made closing waters, then a regulation exempting vessels in transit should be made.[114] Therefore, the settler state could give some control to Aboriginal people to determine who entered sea country, but limits were placed by international law on the settler state's own assertions of sovereignty over the sea.

The final recommendation of the Committee was that sea closures were to be negotiated between the NT executive and the appropriate Aboriginal land council, and could be negotiated either for protection of waters or as a buffer zone to protect Aboriginal land.[115] If there was an absence of agreement, then either party could apply to the Aboriginal Land Commissioner (the 'Commissioner'); however, there was no detail about what authority any decision of the Commissioner had on such a dispute.[116] Beyond that, all waters should be 'open to the general community for recreational use, including non-commercial fishing'.[117] These proposals were generally in line with the NT Aboriginal Lands Bill. However, in the Bill it was clear that the NT executive made the final decision after considering the Commissioner's reasons. This gave a lot of power to the NT executive.

Overall, the final proposal of the Committee demonstrated the choice to use governmental authority to prioritise the settler state's asserted obligations to provide public rights and promote economic exploitation.[118] The application process for Aboriginal people to close the sea was uncertain and did not seem accessible and fair given that the NT executive wielded so much power. However, the Committee's proposal did recognise Aboriginal assertions of sovereignty by providing the opportunity for Aboriginal people to apply to control, to some degree, entry to certain areas of sea country.

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111 *Report of Joint Select Committee* (n 92) 100.
112 Ibid 99 app 6 ('Letter from Attorney-General').
113 Ibid 99–100.
114 Ibid 100.
115 Ibid xi.
116 Ibid.
117 Ibid.
118 See also Ian Keen, 'Aboriginal Tenure and Use of the Foreshore and Seas' (1984) 5(3) *Anthropological Forum* 419, 426.

V First Sea Closure: Application, Process and Practical Reality

The reciprocal legislation that was enacted by the NT Legislative Assembly followed the general approach of the Committee's proposals. The *Aboriginal Land Ordinance 1978* (NT)[119] — which became the *AL Act* after the NT gained self-government[120] — provided that an application could be made by Aboriginal people to close seas out to two kilometres adjacent to Aboriginal land. Although the term was not used in the legislation, these became known as 'sea closures'.[121] The title of the relevant section in the legislation was 'Control of entry onto seas adjoining Aboriginal land'.[122] This gave an overarching description of what 'control' meant: control over entry. In effect, this was a form of the requirement of permission. However, there were major limitations on whose entry Aboriginal people could control and on what enforcement mechanisms were available if someone entered the sea closure in circumstances where they should not have.

The *AL Act* prescribed an application process through which Aboriginal people could apply to close the seas up to two kilometres adjacent to Aboriginal land.[123] The legislation took the option that normatively favoured underlying settler-state control, with an opportunity for Aboriginal people to apply to close the seas. The final decision-maker on whether seas would be closed was the Administrator (effectively, the NT executive).[124] There was also a process by which the Administrator could, but was not required to, request the Commissioner to inquire into, and report on, certain matters.[125] As will be examined below, the legislative parameters for the Commissioner's inquiry put the concepts of 'Aboriginal tradition' and 'strangers' at the forefront.[126] The other element of the inquiry was consideration of whether anyone would be disadvantaged by the sea closure.[127] Given the Commissioner's role here (inquiring, not making a recommendation), there was no sense of how the disadvantage would be weighed up in the final decision.

Only two sea closures have ever been declared: one in the Milingimbi, Crocodile Island and Glyde River area; and the other in the adjacent Howard Island and Castlereagh Bay area. Both were referred to the Commissioner, and two respective inquiries were conducted and reports delivered to the NT executive.[128]

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119 The *Aboriginal Land Ordinance 1978* (NT) was assented to on 9 November 1978 and commenced on 1 February 1979.

120 *Northern Territory (Self-Government) Act 1978* (Cth) s 73.

121 See, eg, Bergin (n 7) 172. See also Maggie Brady, 'Sea Rights — The Northern Territory "Sea Closure": A Weakened Law' (1985) 1(15) *Aboriginal Law Bulletin* 8.

122 *AL Act* (n 5) pt III.

123 Ibid s 12.

124 Ibid s 12(1).

125 Ibid s 12(3).

126 Ibid ss 12(3)(a)–(c).

127 Ibid ss 12(3)(d)–(e).

128 Commonwealth, Office of the Aboriginal Land Commissioner, *Final Report: Closure of Seas: Milingimbi, Crocodile Islands and Glyde River Area* (1981) 14 ('*Final Report: Milingimbi Sea Closure*'); Commonwealth, Office of the Aboriginal Land Commissioner, *Final Report: Closure of Seas: Castlereagh Bay/Howard Island Region of Arnhem Land* (1988) ('*Final Report: Castlereagh Bay Sea Closure*').

These sea closures were both affirmed by NT Country Liberal Party executives, led by different Chief Ministers, in 1983 and 1989 respectively.[129] The Commissioners' inquiries provided a space where discussions about Aboriginal relationships to sea country could take place, and the associated (publicly available) reports produced played an important role in documenting Aboriginal assertions of sovereignty over sea country. This Part will particularly focus on the Milingimbi, Crocodile Island and Glyde River sea closure as this was the first application.

Milingimbi is a Yolngu community in Arnhem Land. It is about 350 km east of Darwin and is itself an island. The Crocodile Islands are a group of islands to the north-east, about 50 km out to sea from Milingimbi. The Glyde River is to the south-east of Milingimbi on the mainland. This first sea closure application was, in many respects, an experiment for all the parties and the Commissioner. There was no requirement in the *AL Act* for a hearing, but it appears the approach was adopted from the *ALRA* land rights claims process.[130] Including preliminary matters, the first sea closure hearing took place over nine days in 1980 and 1981. Two of these days were on country at Milingimbi. The rest of the hearing was conducted by the Commissioner in the NT Supreme Court in Darwin. Justice Toohey stated in the introduction of his report that the 'inquiry was carried out in a fairly informal way'.[131] Submissions were presented by the NLC (on behalf of the Milingimbi community), the Commonwealth, the NT, the Australian Fishing Industry Council, Amateur Anglers (representing recreational fishing), NT Police, and two individuals (including a non-Indigenous person, Roger Stigson, who had worked in Milingimbi). The hearing revealed issues that went beyond the restrictive legislative framework of sea closures, as well as some practical challenges of applying the legislation.

A *The 'Claim' to Control and the Pre-History of the Milingimbi Sea Closure Application*

The practice directions drafted for the inquiry required the parties to make their pre-hearing written submissions at the same time.[132] As a result, Counsel Assisting the Commissioner had a role in identifying the issues that needed to be addressed at the hearing. On the first day of the substantive hearing, Counsel Assisting stated that, having read the 'claim book',[133] it seemed that the Yolngu 'applicants' were seeking

> closure so as to give themselves control but they would not, after the closure was made, prevent commercial fishing; rather, they would seek to regulate it

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[129] Successive Administrators referred sea closure applications to the Commissioner: Elizabeth Ganter, 'Indigenous Participation in Coastal Management in the Northern Territory, Australia: Issues and Options' (1996) 33(1–3) *Ocean and Coastal Management* 193, 200.

[130] There was a lack of guidance in the *AL Act* (n 5) about how the Commissioner would undertake the inquiry: *Final Report: Milingimbi Sea Closure* (n 128) 29. See also Graeme Neate, *Aboriginal Land Rights in the Northern Territory: Volume 1* (Alternative Publishing Co-Operative, 1989) 155.

[131] *Final Report: Milingimbi Sea Closure* (n 128) 7.

[132] Justice Toohey issued practice directions for the application: *Final Report: Milingimbi Sea Closure* (n 128) 28–9.

[133] It is evident from the transcript that there was discomfort around the term 'claim book' given sea closures were not heard as 'claims': Transcript of Proceedings, *Closure of Seas: Milingimbi, Crocodile Island and Glyde River Area* (Aboriginal Land Commissioner, Toohey J, 27 June 1980) 125 (M Maurice) ('*Milingimbi Sea Closure Hearing Transcript*').

> in a way which they saw as being consistent with their own interests. What is proposed here is to give themselves some sort of bargaining power over the manner of the use of the seas in the areas very proximate to the places at which they live.[134]

It seems that control was not about excluding all persons from the sea closure but about regulating who entered. In effect, it was about having decision-making authority to determine who entered the sea closure and for what purposes. The use of the term 'bargaining power' by Counsel Assisting also suggested that having such decision-making authority would enable the Yolngu community at Milingimbi to negotiate with non-Traditional Owners who sought to enter their sea closure about potential commercial benefits or opportunities. This sort of assertion of control went beyond what the sea closure framework could provide given the commercial fishing exemptions (discussed below). In a sense, this represented the mismatch between what the *AL Act* offered, in terms of a compromise between assertions of sovereignty, and the type of compromise that the Yolngu people wanted.

The application for the sea closure was only pursued after the Yolngu community at Milingimbi had made requests over several years for 'some form of control over the seas'.[135] With respect to lodging the application, Yolngu witness Jacky Munyarrir stated:

> What other way could we fight for our rights? We have fought and fought in the past six years, yet we don't have any rights given by the government and you people. Is there any way we can control the sea?[136]

Another Yolngu witness, John Weluk, noted that balanda[137] and Yolngu people now 'have this one government', but that it is 'hard when Yolngu are not hearing anything from the government and balanda are giving pressure to the government and they are getting something back'.[138] This revealed a complex relationship between 'government' (including NT Police and NT Fisheries) and the Yolngu community at Milingimbi that was evident throughout the sea closure hearing. Reaching out to government bodies to negotiate control over sea country appeared to be both an assertion of Yolngu control and an acknowledgement of the co-existing power of settler-state governmental authority.

Prior to 1970, the Yolngu community at Milingimbi did not have 'too many problems with balanda mob coming in and using this sea', but commercial barramundi fishing licence numbers peaked in 1974.[139] In 1978, the Yolngu community at Galiwinku, another island about 100 km from Milingimbi, organised a fishing conference and issued invitations.[140] The conference was attended by members of the Yolngu communities, representatives from the NT government, and the Commonwealth departments of Aboriginal Affairs and Fisheries.[141] Evidence was given during the inquiry that relevant representative bodies of commercial

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134 Ibid 126 (M Maurice).
135 Ibid (18 February 1980) 32 (M Dreyfus).
136 Ibid (20 October 1980) 142 (J Munyarrir).
137 Yolngu word for whitefella.
138 *Milingimbi Sea Closure Hearing Transcript* (n 133) 143 (J Weluk).
139 Ibid 137 (D Parsons).
140 Ibid (23 June 1981) 250 (R Stigson).
141 Ibid 249.

fishers had declined the invitation to the 1978 conference.[142] However, there was also evidence given of other 'very positive' meetings with the Commercial Fishermen's Association ('CFA').[143] Part of the negotiations with commercial fishers included the Yolngu community proposing 'reserved' areas where no-one – Yolngu people or balanda – could commercially fish.[144] Richard Slack-Smith from NT Fisheries gave evidence that he attended a negotiation as an 'observer–adviser'.[145] He stated that the parties were attempting 'to come to some agreement on certain areas … in the sea that the fishermen seemed to be relatively happy to avoid if they did not cut out all the fishing area'.[146] From Slack-Smith's perspective, if such an agreement had been made, he 'would be able to approach [his] department and the Minister and finally the Administrator in an attempt to implement the recommendations that would come out of such a meeting'.[147] This was an acknowledgement by a government official that agreements between Aboriginal people and commercial fishers could be put into action through settler state–based institutions.

This negotiation process concluded with a report, attaching a map with the proposed reserved areas, being sent by the Milingimbi Council to the CFA, with copies to the NLC and the Commonwealth Department of Aboriginal Affairs. The CFA's response to this report was that the 'claims lodged are not acceptable to this association and … we do not feel that they are genuine and we are not satisfied that the true traditional owners are the people making the claims'.[148] Negotiations were then 'broken off' and the Yolngu community at Milingimbi applied for a sea closure.[149]

This multi-party negotiating process that was instigated and led by Yolngu people appears to be an assertion of Yolngu decision-making authority. It also again articulated the type of control that the Yolngu community were seeking: the ability to negotiate who entered sea country and on what terms. These interactions demonstrated that governments and commercial fishers were at least ostensibly willing to negotiate and to recognise a level of authority in Aboriginal people. However, as in this case, the commercial fishers still had the power to walk away.

The negotiating process was only one part of the interactions between commercial fishers, government and the Yolngu community. The Yolngu community also reported and approached fishers that were causing problems to their community.[150] These attempts to exercise a level of control over non-Indigenous fishers not only appeared as an implicit assertion of Yolngu sovereignty but also revealed a complex relationship between Yolngu laws and settler-state laws in relation to fishing.

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142 Ibid.
143 Ibid 250.
144 Ibid 252.
145 Ibid (24 June 1981) 384 (R Slack-Smith).
146 Ibid.
147 Ibid.
148 Ibid (23 June 1981) 258 (R Stigson).
149 Ibid.
150 See, eg, *Milingimbi Sea Closure Hearing Transcript* (n 133) (21 October 1980) 151–2 (R Stigson), (23 June 1981) 248–9, 258–9 (R Stigson).

B *Aboriginal Tradition and Strangers*

Section 12(3)(b) of the *AL Act* required the Commissioner to inquire into whether the use of the seas by strangers was interfering with the 'use of those seas in accordance with Aboriginal tradition'.[151] Aboriginal tradition in the *AL Act* was defined as having the same meaning as in the *ALRA*.[152] The *ALRA* defined it as 'the body of traditions, observances, customs and beliefs of Aboriginals', including 'as applied in relation to particular persons, sites, areas of land, things or relationships'.[153] It was not restricted in the way that the phrase 'traditional laws and customs' has become in the context of native title law where the tradition must have continued to be observed uninterrupted from a time prior to European colonisation.[154] This meant that the way Aboriginal tradition was explored in the sea closure hearings related to both the historical context of tradition and how it was interpreted in the contemporary sense. There was no need to strictly prove how they related.

The use of the term 'strangers', and the notion of restricting them from accessing seas, was powerful given the legislative context. It strongly suggested that those strangers did not belong, whereas Traditional Owners did belong and had laws that entitled them to enter and use the seas, and to prevent others from entering certain areas of sea. The term 'strangers' was not given a technical definition in the legislation. It was an anthropological term that had become familiar in the land rights debates.[155] It was consistently stated that 'strangers' 'carried its original significance of someone who does not belong to a place or someone unknown to those who live in a place'.[156]

Evidence was presented of the many messages (telegrams, letters, phone calls) of Yolngu people reporting the actions of non-Indigenous fishers.[157] These messages were sent both between Yolngu communities as a warning and, separately to NT Fisheries, the NT Police or the CFA as complaints. There were also examples of both Yolngu people and non-Indigenous people who worked within the community approaching fishing boats to ask them to leave, putting signs up asking fishers not to fish in certain places and collecting evidence (such as photographs) of commercial fishers who were causing 'problems'.[158] These assertions were not made without risk. There was evidence of the abuse that Yolngu people, and non-Indigenous people working within Yolngu communities, sometimes faced when they confronted commercial fishers.[159] Making such assertions despite, and in the face of, such abusive behaviour, demonstrates how important these actions were to the Yolngu community.

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151 *AL Act* (n 5) s 12(3)(b).
152 Ibid s 3.
153 *ALRA* (n 4) s 3. See also Justice Toohey's discussion: *Final Report: Milingimbi Sea Closure* (n 128) 13.
154 *Talbot v Malogorski* [2014] NTSC 54 [65].
155 Butterly, 'Reconciling Indigenous and Settler-State Assertions' (n 8) 70–3.
156 *Final Report: Milingimbi Sea Closure* (n 128) 14; *Final Report: Castlereagh Bay Sea Closure* (n 128) 4.
157 See, eg, *Milingimbi Sea Closure Hearing Transcript* (n 133) (21 October 1980) 151–2 (R Stigson), (23 June 1981) 248–9, 258–9 (R Stigson).
158 See, eg, ibid (21 October 1980) 155 (R Stigson), (22 June 1981) 205 (J Munyarirr).
159 See, eg, ibid (24 June 1981) 336–7 (S Davis).

The types of actions and problems that might cause the community to report or approach commercial fishers did not appear to be based on settler-state law. There were references in the evidence to 'illegal fishing', but it was not apparent exactly what this meant.[160] The use of the term 'illegal' might be presumed to be related to the settler state–based legal context of not complying with fisheries legislation. Slack-Smith noted in his evidence that he had received several reports of 'illegal fishing' from the Milingimbi community.[161] However, Slack-Smith stated that he found it difficult, at times, to determine 'what was a report of illegal fishing … and what in fact was purely legal fishing under the *Fisheries Act*'.[162] Counsel for the NLC put a direct question on this issue to Slack-Smith:

> Mr Parsons: Correct me if I am wrong — You would have heard complaints of acts that may well have been quite legal, but you would have presumably heard when you went to Milingimbi people complaining about what in fact were legally proper things to do but which were concerning the community?
>
> Mr Slack-Smith: That is true.[163]

This exchange suggests that defining illegal fishing according to settler-state law was not the main issue for the Yolngu community at Milingimbi. Rather, the issue was whether it was concerning to the community, and whether the community did something about it, for example by trying to talk to the fishers or making a complaint to NT Fisheries. One interpretation here is that the term 'illegal' provides a notion of right or wrong derived from Aboriginal law, rather than settler-state law. Again, these discussions appear to reveal an implicit assertion of Yolngu sovereignty with respect to attempting to exercise a level of control over non-Indigenous fishers at the interface of Yolngu law and settler-state law.

Justice Toohey was satisfied that, in accordance with Aboriginal tradition, strangers were restricted in their right to enter the seas.[164] Further, his Honour was satisfied that the operations of commercial fishers were causing interference with the use of the seas in accordance with Aboriginal tradition.[165] With respect to the finding of causing interference, the Australian Fishing Industry Council submitted that the only requirement of Aboriginal tradition, in relation to entry of seas, was seeking permission.[166] There was an overtone to this submission that seeking permission was not a restriction of consequence. Justice Toohey interpreted this as an argument that permission was 'something of a formality'.[167] In addressing this argument, his Honour stated: '[T]here was an emphasis in the present inquiry on the need to ask permission, even though that requirement may have been relaxed from time to time in the case of particular persons or classes of persons'.[168] This indicates that from Justice Toohey's perspective, outside of the exemptions of the sea closure framework, permission requirements did apply to non-Indigenous fishers.

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160 See, eg, ibid (24 June 1981) 380 (R Slack-Smith).
161 Ibid (24 June 1981) 380 (R Slack-Smith).
162 Ibid 381.
163 Ibid.
164 *Final Report: Milingimbi Sea Closure* (n 128) 13–15, 26.
165 Ibid 26. See also at 15–16.
166 Ibid 14.
167 Ibid.
168 Ibid.

C *Identifying Disadvantage That Would Be Caused by a Sea Closure*

The Commissioner was also required to consider whether any person would be disadvantaged by a sea closure.[169] The *AL Act* provided an overarching offence provision that a person 'shall not enter onto or remain on closed seas unless [the person] has been issued with a permit to do so'.[170] Permits to enter sea closures were to be granted by the relevant Aboriginal land council or by the Traditional Owners.[171] Therefore, the power to give or deny permission to enter sea country was vested in Aboriginal people. This was recognition, through settler-state legislation, of the notion of permission under Aboriginal laws. However, a range of classes of people were exempted from requiring a permit.

The most significant of these exemptions related to commercial fishers who held licences at the time a sea closure was declared. This was also the exemption that demonstrated the clearest choice in the legislation to prioritise non-Indigenous use rights and settler state–sanctioned economic exploitation. The original provision in the Aboriginal Land Bill provided a two-step test to determine if a commercial fisher could continue to fish in a sea closure: first, the fisher had to be the holder of a licence issued under the *Fisheries Ordinance 1965* (NT); and second, they had to establish that prior to that sea closure they had 'carried out fishing operations for a reasonable period of time within the area of closed seas', and that their 'livelihood may be placed at risk by the closure of those seas'.[172] If these conditions were met, then the Administrator could grant a permit to allow the fisher to enter and fish in the closed seas.[173]

The legislation as passed modified the test to require only that the fisher hold a pre-existing fishing licence.[174] Commercial fishers were not required to prove that they had fished within the area of that particular sea closure, or that their livelihood would be placed at risk. This was a stark legislative choice that symbolised a shift away from seeking to prevent disadvantage only to those who had previously fished in an area, to a much wider prioritisation of non-Indigenous commercial fishing interests. Further, the exemptions for commercial fishers were described in the legislation as 'protecting existing rights'.[175] This harks back to the debate in Hansard in relation to the NT Aboriginal Lands Bill about preserving the so-called status quo of open access for non-Indigenous people.[176]

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169 *AL Act* (n 122) ss 12(3)(d)–(e).

170 *AL Act* (n 122) s 14.

171 Ibid s 15.

172 Aboriginal Land Bill 1978 (NT) cl 18. This Bill is not available on the *Northern Territory Legislation* website <https://legislation.nt.gov.au>, but can be located at: Northern Territory Legislative Assembly, *Bills Introduced: 28 February to 9 March 1978*, Serial 31 <https://parliament.nt.gov.au/__data/assets/pdf_file/0019/367111/PR03-Bills-28-February-1978-9-March-1978.pdf>.

173 Aboriginal Land Bill 1978 (NT) cl 18.

174 *AL Act* (n 5) s 18. One issue that was not clear was how these provisions operated with renewal of fishing licences. Justice Toohey determined, on the basis of both legislative intention and statutory interpretation, that renewals were included: *Final Report: Milingimbi Sea Closure* (n 128) 19. However, if the licence was transferred, that was not a licence granted prior to the sea closure: at 19.

175 *AL Act* (n 5) s 18.

176 See text accompanying n 100.

The commercial fishing exemptions also functioned to potentially disincentivise commercial fishers from responding to Aboriginal peoples' concerns. For example, some of the major issues for Yolngu communities, as expressed in the sea closure applications, were things like fishers putting nets up across rivers that blocked access to certain places, leaving broken nets, throwing away large amounts of fish (which as well as being a waste[177] had the potential to attract sharks), taking particular fish in the 'wrong' season meaning that they would not get the chance to 'breed up', and catching animals that were totems which resulted in making 'some of the older people' sick in the community.[178] These issues did not relate to 'illegal' fishing (in the settler-state context), but instead related to a mixture of Aboriginal laws and the practical reality of co-existing. They required negotiation of sorts to be resolved. However, the exemption meant that commercial fishers did not have to engage with the communities. In effect, the commercial fishing exemptions entrenched the problems, and conflicts, that Yolngu communities had with commercial fishers and limited the 'capacity of the commercial fishing industry to respond to Aboriginal concerns'.[179]

There were also general exemptions for transit and for entry of certain government and parliamentary personnel.[180] Section 20 of the *AL Act* provided an exemption for 'bona fide' transit of a 'vessel through seas which are otherwise open to that vessel'. In effect, this was the provision that was inserted to protect the international right of free passage as referenced by Ellicott (and discussed above).[181] Although this might appear to be a pragmatic provision from the settler state's perspective, it undermines the sea closure significantly. Any vessel, at any time, and in any part of the sea closure, could transit through. Conversely, even though licensed commercial fishers were exempted, they were required to give notice to Traditional Owners. Such notice provisions, at least, gave Traditional Owners the ability to know who was in their sea closure (and perhaps would have made it easier to identify transgressors).

Justice Toohey's inquiry into who would be disadvantaged by a sea closure was restricted by the types of submissions that were presented. For example, Justice Toohey had no evidence before him of any disadvantage to recreational fishers. The only evidence given about recreational fishing was from the 'small number of Europeans living in the communities' who noted that they sought and received permission from Traditional Owners already.[182] Therefore, they did not submit that they would be disadvantaged.[183] This was an example of the permission principle in action. It also represents the way in which the Yolngu community expressed their

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177 Dermot Smyth, *A Voice in All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone* (Report, Coastal Zone Inquiry, Revised Edition, November 1993) 62.

178 *Milingimbi Sea Closure Hearing Transcript* (n 133) (22 June 1981) 200–10 (J Memawuy, J Mawunydjil, J Munyarirr, T Binalany, D Marpiyawuy, M Gaykamanu, A Djupandawuy, P Dhakuwarr and R Gatikatiwuy). See also (23 June 1981) 248–9 (R Stigson) (referring to a statement of R Gatikatiwuy).

179 Ganter (n 129) 202.

180 *AL Act* (n 5) ss 16–17.

181 See text accompanying n 114.

182 *Final Report: Milingimbi Sea Closure* (n 128) 21; *Final Report: Castlereagh Bay Sea Closure* (n 128) 11.

183 Ibid.

assertion to control access to their sea country in the first sea closure application hearing.

The disadvantage that commercial fishers might face was discussed at length in Justice Toohey's first sea closure report.[184] However, Justice Toohey determined that there was not considerable disadvantage to commercial fishers in declaring a sea closure over this area. Justice Toohey also made some poignant broader reflections on fisheries policy. His Honour noted that the policy of government was 'in any event to preserve fishing resources through reduction of licences, restrictions on net lengths and seasonal closures' and that, more generally, the 'picture [was] one of ever-increasing control and restriction upon commercial fishing'.[185] This gave a sense that it was not unusual for commercial fishers to be restricted, and that, in fact, such restrictions would likely increase in the future. Justice Toohey's comments were general in nature, but they could broadly be read as suggesting that fishers should expect more restrictions, and that such restrictions could be made for a variety of reasons including prioritising Aboriginal fishing interests.

D *Enforcement of Sea Closures*

The issue of enforcement of sea closures was raised by the NT Police in their submission. This submission stated that the NT Police were 'totally unequipped to police the [sea closure] legislation' and did not know of any other government agency that would be in a position to enforce sea closures, and further that 'in terms of enforcement the legislation would be totally ineffective'.[186] This was a stark admission, and beyond the scope of Justice Toohey to address given that the 'provision of facilities necessary to enforce closures is largely a matter for government'.[187] However, his Honour noted that there was 'obvious scope for co-operation between the law enforcement authorities and the communities affected'.[188] This option to cooperate was not pursued by the NT government.

Pursuant to the *AL Act*, the settler state was asserting that sea closures would provide a particular type of reconciling of interests. Aboriginal tradition would be given limited recognition by settler-state law so that Aboriginal communities could control entry of certain classes of people into the sea closure. However, from the outset, the settler-state law seemed incapable of ensuring that sea closures could operate in this way. It appeared that restrictions on entry could not be enforced by the allocated settler-state agency. Aboriginal people did not have a formal role in enforcement despite suggestions that this could be beneficial. In this context, the settler-state law was not able to deliver the compromise of interests that it had set out in the legislation. Further, the settler state was not willing to consider ways in which marine governance models could be usefully modified to involve participation of Aboriginal people in enforcement.

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184 *Final Report: Milingimbi Sea Closure* (n 128) 16–20.
185 Ibid 20, 26.
186 Ibid 23.
187 Ibid.
188 Ibid.

E *Practical Reality of Sea Closures*

From the perspective of potential applicants for a sea closure, the exemptions had to be weighed alongside what proved to be a very involved, lengthy and expensive application process. Justice Toohey attempted to make the first application process as simple and responsive as possible, but given the legislative framework and the novelty of the matters, it still involved nine days of hearings and the associated preparation.

Several academics in fields such as politics and anthropology as well as government officials have critiqued both the application process and effectiveness of sea closures.[189] Their overall critique is that the process to apply for a sea closure was 'long and costly' and that Aboriginal people got very little in return.[190] In 1985, after the process had concluded for the first sea closure application, anthropologist Stephen Davis stated that most applications, if they proceeded in the same manner, 'could be expected to cost between half and one million dollars each'.[191] Yet, Davis noted: 'The "successful" Milingimbi and Glyde River Sea Closure Application resulted in little change for the protection of marine areas for the Aboriginal applicants'.[192] Commercial fishing could continue and government personnel were exempted; therefore, the main potential restrictions would be on tourist boats, recreational fishers and future applicants for commercial fishing licences.[193] The sea closure framework would allow Aboriginal people to control entry to this latter class through the permit system.

The sea closure provisions in the *AL Act* remain in force. The only two sea closures ever declared still exist, although there is little information available about them, and little sense that they have had, or continue to have, any impact.[194] It was submitted in the 2005 annual report of the Office of the Aboriginal Land Commissioner that '[t]o a large extent the original [sea closure] applications have been *subsumed* by applications under the [*ALRA*] and native title claims'.[195] The word 'subsumed' takes the focus away from the potential shortcomings of the sea closure mechanism, and instead puts it on Traditional Owners positively choosing to pursue other options, such as recognition of native title. As an example, the Croker Island sea closure application was lodged but not pursued, and instead the native title claim of *Yarmirr v Northern Territory* was lodged.[196] Further, the first sea closure

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189 See, eg, Ganter (n 129); Bergin (n 7); Stephen Davis, 'Aboriginal Sea Rights in Northern Australia' (1985) 21 *Maritime Studies* 12; Stephen Davis, 'Indigenous Maritime Claims on the North Australian Coast' (1989) 1(2) *Marine Policy Reports* 135, 146–49; Keen (n 118) 427–30.

190 Ganter (n 129) 200. See also Bergin (n 7) 182; Davis, 'Aboriginal Sea Rights in Northern Australia' (n 189) 17.

191 Davis, 'Aboriginal Sea Rights in Northern Australia' (n 189) 17.

192 Ibid.

193 Ibid; Bergin (n 7) 173.

194 These are two of the few contemporary mentions of sea closures: 'Milingimbi', *East Arnhem Regional Council* (Web Page, 2023) <https://www.eastarnhem.nt.gov.au/milingimbi-detailed>; 'Sea Country Rights', *Northern Land Council* (Web Page, 2023) <https://www.nlc.org.au/our-land-sea/sea-country-rights>. It is possible, but not known, whether some of the commercial fishing licences have been transferred or expired in the intervening years, meaning there could be some areas where there is now limited (or no) commercial fishing.

195 *Land Commissioner Annual Report 2005* (n 7) 7 (emphasis added).

196 Ibid 42; *Yarmirr FC* (n 10) 580 [105].

application ever lodged (Bathurst and Melville Islands) was not pursued because the Traditional Owners (represented by the Tiwi Land Council) decided that they would negotiate arrangements with fishers.[197] More broadly, at a conference on Indigenous rights to the sea in 1993, after *Mabo v Queensland [No 2]*,[198] politicians from both the NT Government and NT Opposition, and a representative of the NLC, clearly stated that sea closures had not been effective and needed to be reconsidered.[199]

VI Conclusion

An examination of the Woodward Commission, the initial legislative debates about sea rights and the first sea closure application demonstrates that there was a genuine sense, from the settler-state perspective, that Aboriginal relationships in sea country were valid and worthy of recognition. However, the drafting of the first land rights Bill by the NT Legislative Assembly and the submissions to, and recommendations of, the Joint Select Committee on Aboriginal Land Rights in the NT, saw the emergence of the prioritisation of assertions of governmental authority (by requiring Aboriginal people to apply for sea closures, and not allowing automatic grants) and obligations to provide certain classes of people with open, third-party access without requiring permission. The final recommendations of the Committee revealed the choice made to ensure settler-state control of marine areas and prioritise non-Indigenous third-party interests.

The sea closure framework was the settler state's first attempt at negotiating the reconciling of Aboriginal and non-Indigenous assertions of sovereignty in the sea in the NT. It was also the first legislation in the broader Australian context that provided significant settler state–based legal recognition of Indigenous rights over an area of sea.[200] The legislation was significant in the way that it recognised Aboriginal tradition as underlying an entitlement to use the seas and to have some control over who entered sea country. Yet only a restricted form of control was on offer: the ability to control entry of limited classes of persons into the sea closure. The exemptions, general and for commercial fishing, significantly undermined the ability of Aboriginal communities to control who entered the sea closure. These exemptions were assertions of overarching settler-state governmental authority in the marine space and a clear prioritisation of settler state–sanctioned economic exploitation.

Sea closures are still law 'on the books'. We can say that sea closures were (and are), effectively, a legal and policy failure. However, the legislative debates and, in particular, the first sea closure inquiry played a vital role in articulating the reconciling of Aboriginal assertions of sovereignty to sea country and settler-state assertions of sovereignty to marine areas. In the first sea closure hearing, the Yolngu

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197 Bergin (n 7) 179–80. See also Davis, 'Aboriginal Sea Rights in Northern Australia' (n 189) 18.

198 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

199 Steve Hatton, 'Peoples and Sea Rights' in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights 14 July–16 July 1993* (Northern Territory University, 1993) 1, 2 ('*Turning the Tide*'); Wes Lanhpuy, 'Marine Management for 40,000 Years: A Yolngu View of Sea Rights' in *Turning the Tide* at 4, 5; David Allen, 'Some Shadow of the Rights Known to Our Law' in *Turning the Tide* at 53, 57.

200 Smyth (n 177) 136.

community at Milingimbi articulated Yolngu relationships and laws relating to sea country (and their interaction with settler-state laws), contemporary Yolngu use rights (both subsistence and commercial) and the type of control the Yolngu community were seeking.

Through the 1990s and into the 2020s there have been significant further developments with respect to other aspects of Aboriginal sea rights in the NT. As foreshadowed in the introduction these include, in particular, the recognition of sea country native title in *Commonwealth v Yarmirr* and the determination in the *Blue Mud Bay Case*. The latter decision sparked the Blue Mud Bay negotiations which are, to some extent, still ongoing as at March 2023.[201] The impetus to push further, to try other avenues to 'claim' sea country rights, seems to have been grounded in the failure of sea closures to address what was fundamentally at stake in reconciling these assertions of sovereignty. However, post-*Mabo*[202] there was a sense that native title might not be able to deliver the type of control that Aboriginal communities were seeking over sea country.[203] This cautious approach was warranted.

Commonwealth v Yarmirr limited native title rights to sea country to non-exclusive rights due to the competing international right of innocent passage and public rights to fish and navigate.[204] Therefore, the native title holders could use their sea country, but they could not prevent others from using those seas (or require people to ask permission). The majority in the High Court described the settler state's assertion of sovereignty as a right to legislate (somewhat akin to the assertion of governmental authority), but the outcome relied heavily on the settler state's asserted obligation to provide open access.[205] This was a prioritisation of third-party, non-Indigenous rights in the sea. Justice Kirby (in his separate judgment) offered up a form of 'qualified exclusivity' whereby it was accepted that third-party rights would have priority over the native title holders' otherwise exclusive rights.[206] However, the majority were not open to considering this form of more sophisticated reconciliation.

A legal turning point came with the *Blue Mud Bay Case* — a case that was specifically about the intertidal zone. The legislative context of the *ALRA* meant that the public right to fish went from being an all-encompassing reason to reject exclusive native title rights in the *Yarmirr* cases, to a historical doctrine that was abrogated in the contemporary context.[207] The outcome in the *Blue Mud Bay Case* effected a legal reconciliation of Aboriginal assertions of sovereignty with third-party interests that disturbed the contemporary structure of authority in the intertidal zone. Yet, the outcome of this case did not precipitate any immediate practical response in the intertidal zone. The protracted Blue Mud Bay negotiations continue,

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201 See (n 13).
202 *Mabo* (n 198).
203 Smyth (n 177) 53; Greg McIntyre, '*Mabo* and Sea Rights: Public Rights, Property Rights or Pragmatism' in *Turning the Tide* (n 199) 112.
204 *Yarmirr HCA* (n 11) 68 [98].
205 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2006) 54.
206 *Yarmirr HCA* (n 11) 127–30 [286]–[291].
207 *Blue Mud Bay Case* (n 12) 58 [28].

to some degree, and the legal rights over the intertidal zone have been used as a bargaining chip to negotiate broader legal and governance opportunities.[208]

The challenge for the settler state in the contemporary law and governance paradigm is to see Aboriginal assertions of sovereignty over sea country and reconcile them with settler-state assertions of sovereignty. The history of sea closures is important to this contemporary task because it reveals that these Aboriginal assertions of sovereignty over sea country have been clearly put before the settler state since at least the Woodward Commission in the early 1970s.

[208] See n 13 above. See also 'History Made with Aboriginal Sea Company Incorporation', *Northern Land Council* (Media Release, 25 February 2022) <https://www.nlc.org.au/media-publications/history-made-with-aboriginal-sea-company-incorporation>.