

1-1-2009

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### Recommended Citation

Siiri A. Wilson, Comment, *Entitled Against None: How the Wrongly Decided Croker Island Case Perpetuates Aboriginal Dispossession*, 18 Pac. Rim L & Pol'y J. 249 (2009).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol18/iss1/9>

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# ENTITLED AS AGAINST NONE: HOW THE WRONGLY DECIDED *CROKER ISLAND* CASE PERPETUATES ABORIGINAL DISPOSSESSION

Siiri Aileen Wilson<sup>†</sup>

*Abstract:* Australia's 1992 landmark case of *Mabo v. The State of Queensland* [No. 2] revoked the concept of *terra nullius* and for the first time since European colonization of the continent allowed indigenous Australians to obtain legal ownership of their traditional lands. The following year this groundbreaking decision became statutory law with the enactment of the Native Title Act (NTA) of 1993. The case law and the statutory act both failed, however, to adequately address the question of Aboriginal claims to sea properties. For many Australian Aboriginal groups, ownership of traditional lands does not abruptly end at a shoreline but extends to surrounding coast lines, intertidal zones, and offshore seas. This indigenous view is in stark contrast to Western concepts of property that have resulted in distinct bodies of law governing rights to the ownership of land versus rights to the ownership of sea.

The NTA recognizes exclusive Aboriginal property rights whether the traditional area is a land or sea property. The first case to test native title rights to sea property, *The Commonwealth of Australia v. Yarmirr* ("*Croker Island*") held, however, that native title can be recognized without the right to exclude. This precedential decision continues to bar exclusive Aboriginal ownership of sea properties and denies Aboriginal management of natural resources of the sea regardless of whether the group provides historical evidence of ownership and management. This Comment argues that the *Croker Island* decision does not comply with the NTA, is based in an erroneous understanding of Aboriginal law and custom, and should be overturned. This Comment further argues that where an Aboriginal group successfully provides evidentiary proof of a traditionally practiced right to exclude, native title must recognize and protect an exclusionary right to traditional sea properties. Granting ownership of traditionally held properties is central to rectifying harms caused by Australia's historic policy of dispossession of Aboriginal properties and is necessary to promote Aboriginal sovereignty.

## I. INTRODUCTION

The December 3, 2007 inauguration<sup>1</sup> of Australian Prime Minister Kevin Rudd renewed hope that national reconciliation between Aboriginal Australians and white Australians could begin anew.<sup>2</sup> Australia's

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<sup>1</sup> Prime Minister of Australia, *About Your PM*, [http://www.pm.gov.au/your\\_pm/index.cfm](http://www.pm.gov.au/your_pm/index.cfm) (last visited Sept. 18, 2008).

<sup>2</sup> See Nick Squires, *New PM Kevin Rudd to apologise to Aborigines*, THE DAILY TELEGRAPH ONLINE, Nov. 27, 2007, <http://www.telegraph.co.uk/news/worldnews/1570584/New-PM-Kevin-Rudd-to-apologise-to-Aborigines.html> (last visited Oct. 27, 2008) (describing not only Rudd's campaign promise to

Parliament first actively promoted reconciliation in 1991<sup>3</sup> after the Royal Commission into Aboriginal Deaths in Custody<sup>4</sup> argued that Australia's history of Aboriginal land dispossession produced the current state of indigenous disadvantage.<sup>5</sup> The Australian government's historic practice of dispossession created a cycle of poverty, poor health, and limited educational opportunities that trapped Aboriginal and Torres Strait Islander Australians in an existence very different from other Australians.<sup>6</sup> The report urged all political leaders and their parties to achieve reconciliation between Aboriginal and non-Aboriginal communities and to end community division and discord, as well as injustice towards Aboriginal people.<sup>7</sup>

Prime Minister Rudd made reconciliation a central promise of his election campaign.<sup>8</sup> For some, Mr. Rudd's speech on February 13, 2008, at the Commencement of the 42nd Parliament fulfilled this promise. On that historic day, Mr. Rudd delivered an official apology to all Indigenous Australians for the past injustices they suffered at the hands of the Australian government.<sup>9</sup> Mr. Rudd promised to achieve reconciliation for all Australians and to create a future based in mutual respect, mutual resolve, and mutual responsibility.<sup>10</sup> This goal, he said, would be achieved by

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promote reconciliation, but also former Prime Minister John Howard's standing refusal to apologize for the government's historic policy of dispossession and the Stolen Generation).

<sup>3</sup> The Australian government passed the Council for Aboriginal Reconciliation Act in 1991. Attorney-General's Department, Commonwealth Law, <http://www.comlaw.gov.au> (Quick Search for "Aboriginal Reconciliation Act") (last visited Sept. 18, 2008). The Act created a ten-year Reconciliation Council to improve relationships between Aboriginal and European Australians. *Id.* The Act, and the Council, ceased in 2001. *See id.*

<sup>4</sup> *See generally* Australasian Legal Information Institute, The Final Report of The Royal Commission into Aboriginal Deaths, <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/index.html> (last visited Oct. 27, 2008). Between October 1987 and November 1990, the Royal Commission into Aboriginal Deaths in Custody investigated the deaths of ninety-nine Aboriginal persons in police and prison custody. Kathy Whimp, *Final Report of the Royal Commission Into Aboriginal Deaths in Custody—Summary*, Summary, [http://www.austlii.edu.au/au/other/IndigLRes/rciadic/rciadic\\_summary/rcsumk01.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/rciadic_summary/rcsumk01.html) (Nov. 30, 2008). The Commission required investigation and reporting on the underlying social, cultural, and legal issues behind the deaths as well as the immediate circumstances surrounding them. *Id.*

<sup>5</sup> Whimp, *supra* note 4, at Part C, Ch. 19.

<sup>6</sup> The Council for Aboriginal Reconciliation, Finding Common Ground: Towards a Document for Reconciliation, 2. Reconciliation: A brief look at a long history, <http://austlii.law.uts.edu.au/au/orgs/car/docrec/relevant/docbook/p3.htm> (last visited Sept. 28, 2008). The disparity between Aboriginal Australians and their European counterparts is readily seen in their distinct life expectancies, to name but one example. *See* Jenna Gruenstein, *Australia's Northern Territory National Emergency Response Act: Addressing Indigenous and Non-Indigenous Inequities At The Expense of International Human Rights?*, 17 PAC. RIM L. & POL'Y J. 467, 467 (2008).

<sup>7</sup> *Id.*

<sup>8</sup> *See* Squires, *supra* note 2.

<sup>9</sup> Prime Minister Kevin Rudd, Speech at the Commencement of the 42nd Australian House of Parliament, *Apology to Australia's Indigenous People* (Feb. 13, 2008) (transcript available at [http://www.aph.gov.au/house/Rudd\\_Speech.pdf](http://www.aph.gov.au/house/Rudd_Speech.pdf) (last visited Sept 18, 2008)).

<sup>10</sup> *Id.*

creating “a future where all Australians, whatever their origins, are truly equal partners, with equal opportunities and with an equal stake in shaping the next chapter in the history of this great country.”<sup>11</sup>

Increasing Aboriginal ownership of traditionally held properties is critical to rectifying the harms caused by the Australian government’s policy of dispossession. The historic case of *Mabo v. The State of Queensland* [No. 2]<sup>12</sup> was the first step in establishing a form of Aboriginal title to property that was legally recognized and protected by the Australian government. Since the High Court of Australia<sup>13</sup> (“High Court”) handed down its ruling in that historic case, however, legal recognition for Aboriginal ownership of traditionally held properties has only become more elusive and more difficult to obtain. Nowhere is this more evident than for Aboriginal communities seeking recognition of rights in traditional sea properties. In the latest native title sea claim to reach the Federal Court, *Gumana v. Northern Territory*,<sup>14</sup> ownership of offshore sea properties was easily and summarily denied<sup>15</sup> based on precedent set by the High Court in the 2001 case of *The Commonwealth of Australia v. Yarmirr and Others* (“*Croker Island*”).<sup>16</sup>

Correcting the past injustices produced by Aboriginal dispossession of traditional properties requires revisiting the history of native title and its steady erosion from a mechanism for recognizing Aboriginal ownership to a mechanism for further dispossession. Such a review reveals that in the *Croker Island* case, the High Court erroneously applied the framework for determination of Aboriginal ownership of property. The same review further reveals that the *Croker Island* precedent erroneously interpreted the Aboriginal traditional law and custom that, as mandated by statute, defines native title rights.

This Comment argues that the *Croker Island* decision should be overturned in order to rectify the continuing dispossession of Aboriginal property. As it stands, this precedential decision negates the purpose of the

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<sup>11</sup> *Id.*

<sup>12</sup> *Mabo and Other Plaintiffs v. the State of Queensland* [No. 2] (1992) 175 C.L.R. 1.

<sup>13</sup> The High Court of Australia, which consists of a chief justice and six associate justices, is the country’s supreme court and the final court of appeal for both the federal and state court systems. See High Court of Australia, *Current Members of the High Court*, [http://www.hcourt.gov.au/justices\\_01.html](http://www.hcourt.gov.au/justices_01.html) (last visited Oct. 28, 2008) (listing the names of the Chief Justice and the six associate Justices).

<sup>14</sup> *Gumana v. Northern Territory* (2007) 158 F.C.R. 349.

<sup>15</sup> *Id.* at 395 (explaining that the *Gumana* claim need not be analyzed as the High Court had already determined that Native Title is inconsistent with the public right of access to fishing and navigation).

<sup>16</sup> *The Commonwealth of Australia v. Yarmirr and Others* (2001) 208 C.L.R. 1, 85 [hereinafter *Yarmirr*].

Native Title Act (“NTA”)<sup>17</sup> and continues to prevent the legal ownership of traditional sea properties that the NTA sought to effectuate. Part II analyzes the creation of native title as an exclusive property right to traditionally held land and sea properties. Part III elucidates how the subsequent decision in *The Wik Peoples v. The State of Queensland*<sup>18</sup> and the Native Title Act Amendments<sup>19</sup> began eroding this exclusive property right by first creating a model of shared or coexistent rights and then limiting the types of land that Aboriginal people can claim. Part IV explains how the High Court wrongly decided the *Crocker Island* case and created the untenable precedent of an entirely non-exclusive right to sea property. Part V argues that, had the High Court reviewed the factual record in *Crocker Island*, the Court would have correctly found evidence of the Aboriginal exercise of the right to exclude that supports recognizing an exclusionary property right. Finally, Part VI argues that the *Crocker Island* decision must be overturned in order to effectuate the purpose of the NTA, rectify the historic practice of dispossession, and promote Aboriginal sovereignty.

## II. NATIVE TITLE CREATED AN EXCLUSIVE PROPERTY RIGHT FOR TRADITIONALLY HELD ABORIGINAL LAND AND SEA PROPERTIES

For Aboriginal Australians, ownership of traditionally held land and sea properties only recently became a viable reality. The historical roots of the indigenous struggle for land rights begin in 1788 when Great Britain lay claim to Australia upon “discovery” of the continent.<sup>20</sup> At the time of their arrival in Sydney Cove, British naval forces landed on a continent containing an estimated 750,000 native inhabitants.<sup>21</sup> Despite this impressive native presence, the British declared the continent *terra nullius*, or unoccupied territory belonging to no one.<sup>22</sup> This colonial ideology prevented Aboriginal ownership of land for the next two hundred years.<sup>23</sup>

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<sup>17</sup> The Native Title Act 1993, 1993 (Austl.) (Cth), available at <http://www.comlaw.gov.au> (Quick Search for “Native Title Act 1993,” choose “Native Title Act 1993”) (“An Act about native title in relation to land or waters, and for related purposes”) [hereinafter The NTA]. The NTA codified the decision of the High Court of Australia in *Mabo* and created a framework for legal recognition of Aboriginal ownership of property. See PETER H. RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM* 287-88 (University of Toronto Press 2005).

<sup>18</sup> *The Wik Peoples v. The State of Queensland and Others* (1996) 187 C.L.R. 1.

<sup>19</sup> The NTA was significantly amended in 1998 in response to the *Wik* decision. See *infra* Part III.

<sup>20</sup> DAVID ANDREW ET AL., *ABORIGINAL AUSTRALIA AND THE TORRES STRAIT ISLANDS* 24 (2001).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Kamal Puri, *Copyright Protection for Aborigines*, in *MABO: A JUDICIAL REVOLUTION* 146, 87 (Maragaret Anne Stephenson & Suri Ratnapala eds., 1993).

Not until 1992 did the landmark case of *Mabo* revoke *terra nullius* and create native title law, or indigenous land ownership and property rights.<sup>24</sup>

The revocation of *terra nullius* created an opening for Aboriginal Australians to establish exclusive property rights in traditionally held land and sea properties. The federal NTA in 1993 quickly followed the ruling in *Mabo*.<sup>25</sup> Together, *Mabo* and the NTA created a new body of law, Australian Native Title, and gave the indigenous people of Australia legal recourse in their fight to obtain sovereignty over traditionally held properties.

A. *The Mabo Case Overturned Terra Nullius and Created an Exclusive Property Right for Aboriginal People*

Native title is a proprietary right to traditionally held Aboriginal land and sea property that is legally recognizable when shown to predate the 1788 acquisition of the Australian continent by Great Britain.<sup>26</sup> Proprietary property rights generally include the right to use and enjoy one's property, to alienate one's property, and to exclude others from the property.<sup>27</sup> Prior to the landmark decision in *Mabo* the indigenous people of Australia possessed no inherent or preexisting legal rights to land under Australian law.<sup>28</sup> Aboriginal possession and occupation of traditionally held land and sea properties did not, however, cease during the intervening years between 1788 and 1992. Instead, Aboriginal people lived and fought for recognition of their land and sea rights all the while possessing what Aboriginal activist Noel Pearson has called, "204 Years of Invisible Title."<sup>29</sup>

The Australian government perpetuated the concept of *terra nullius*—that the Australian continent was uninhabited at the time of European contact—to deny Aboriginal people the right to ownership of their traditional lands. Eddie Mabo, David Passi, and James Rice, three members of the Meriam people who traditionally occupied the Murray Islands of the Torres Strait, successfully challenged this legal fiction in 1982 by suing the State of Queensland and the Commonwealth of Australia.<sup>30</sup> Acting on

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<sup>24</sup> *Mabo*, 175 C.L.R. at 40-43.

<sup>25</sup> The NTA, *supra* note 17.

<sup>26</sup> See ANDREW ET AL., *supra* note 20, at 23-29.

<sup>27</sup> See Janice Grey, *Is Native Title a Proprietary Right?*, 9 MURDOCH U. ELECTRONIC J. L. ¶ 1, ¶ 20 (2002) (Issue 3), <http://www.murdoch.edu.au/elaw/issues/v9n3/gray93.html> (last visited Nov. 14 2008).

<sup>28</sup> Noel Pearson, *204 Years of Invisible Title: From the Most Vehement Denial of A People's Rights to Land to a Most Cautious and Belated Recognition*, in *MABO: A JUDICIAL REVOLUTION* 75, 75 (Margaret Anne Stephenson & Suri Ratnapala eds., 1993).

<sup>29</sup> *Id.*

<sup>30</sup> *Mabo*, 175 C.L.R. at 3.

behalf of all indigenous Meriam, Mabo claimed that the Crown's sovereignty over the islands of the Strait was subject to and burdened by the land rights of the Meriam based upon local custom and traditional native title.<sup>31</sup> In filing the case in the High Court, Mabo sought a declaration that the Meriam "are (a) owners by custom; (b) holders of traditional native title; and (c) holders of usufructuary rights with respect to their respective lands."<sup>32</sup> Mabo further sought a declaration to establish that the Meriam's native title rights had not been impaired by subsequent acts of the State since the acquisition of sovereignty.<sup>33</sup>

The State of Queensland responded to Mabo's legal challenge and enacted the Queensland Coast Islands Declaratory Act of 1985 ("Declaratory Act").<sup>34</sup> Under the Declaratory Act, the State of Queensland annexed all islands of the Torres Strait at the moment of statehood in 1879, extinguishing all previously existing rights, interests, or claims to the land.<sup>35</sup> The State argued that Australian law followed the precept that with the acquisition of state sovereignty came the ownership of all lands within the boundaries of the state.<sup>36</sup> As such, there was no room for the common law to recognize a preexisting indigenous law that conferred native title.<sup>37</sup>

In 1989, the High Court overturned the Declaratory Act as a violation of the federal Racial Discrimination Act ("RDA"), rejecting Queensland's supposition and upholding Mabo's claim to native title over the Murray Islands of the Torres Strait.<sup>38</sup> Enacted in 1975, the RDA, cited as Australia's first national human rights legislation,<sup>39</sup> declares it:

Unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental

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<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* at 5.

<sup>34</sup> HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *Landmark Cases Under the Racial Discrimination Act*, in VOICES OF AUSTRALIA: EDUCATION MODULE 39, 40 (2007) available at [http://www.hreoc.gov.au/education/voices/pdf/a5\\_landmark\\_cases.pdf](http://www.hreoc.gov.au/education/voices/pdf/a5_landmark_cases.pdf) (discussing the role of the 1985 Queensland Coast Island Declaratory Act in *Mabo*) [hereinafter HREOC RDA Cases].

<sup>35</sup> *Id.*

<sup>36</sup> *See* Grey, *supra* note 27, at ¶ 4.

<sup>37</sup> *Id.*

<sup>38</sup> HREOC RDA Cases, *supra* note 34, at 40.

<sup>39</sup> RUSSELL, *supra* note 17, at 52.

freedom in the political, economic, social, cultural or any other field of public life.<sup>40</sup>

The justices of the High Court found that “the right to be immune from arbitrary deprivation of property is a human right . . . and falls within section 9 of the [Racial Discrimination] Act.”<sup>41</sup>

Two findings in *Mabo* established that neither the federal Commonwealth nor the State had extinguished the Meriam people’s native title. First, the High Court found the Declaratory Act unconstitutional. In arguing their claim before the High Court of Australia, the State of Queensland stipulated that the plaintiffs’ native title claims existed unless the Declaratory Act extinguished their claims.<sup>42</sup> The State’s own stipulation recognized that the Meriam people practiced a system of land ownership prior to European colonization that undermined Australia’s long-held legal doctrine of *terra nullius*.<sup>43</sup> Relying on this logic, the High Court found that, under Australian common law, indigenous people have the right to legal recognition as the proprietary owners of their traditional lands.<sup>44</sup> On June 3, 1992, ten years after the *Mabo* case was first filed, the High Court of Australia held that “the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.”<sup>45</sup>

Second, in deciding *Mabo*, the High Court revoked the doctrine of *terra nullius*, further establishing that neither the Commonwealth nor the State had extinguished the Meriam people’s native title.<sup>46</sup> The High Court legally recognized exclusive rights to traditionally held Aboriginal land and sea property because Aboriginal property rights both predated and survived European colonization.<sup>47</sup> This ruling created a cause of action for indigenous Australians to pursue legal claims to ownership of traditionally held properties.<sup>48</sup> In creating this common law action, the High Court declared that only two exceptions would prevent native title recognition: 1) where to do so would “fracture a skeletal principle of [the] legal system,”<sup>49</sup> or 2) where recognition of title would be “so repugnant to natural justice,

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<sup>40</sup> The Racial Discrimination Act, 1975, § 9(1) (Cth.).

<sup>41</sup> *Mabo*, 175 C.L.R. at 216.

<sup>42</sup> See RUSSELL, *supra* note 17, at 208.

<sup>43</sup> See *id.* at 215.

<sup>44</sup> *Id.* at 210-11.

<sup>45</sup> *Mabo*, 175 C.L.R. at 2.

<sup>46</sup> See *id.* at 68-69.

<sup>47</sup> See *id.* at 69.

<sup>48</sup> *Id.* at 113 (discussing the judicial relief available to native title holders denied rightful ownership).

<sup>49</sup> *Mabo*, 175 C.L.R. at 43.



equity and good conscience.”<sup>50</sup> Without proof of one of these two exceptions, native title survives.

*B. The Native Title Act Codified Exclusive Property Rights in Aboriginal Land and Sea Properties*

In 1993, the NTA codified and confirmed the exclusive property rights of Aboriginal people to their traditional land and sea properties only one year after the High Court’s landmark decision in *Mabo*. According to the NTA’s Preamble, the legislation seeks “to rectify the consequences of past injustices . . . [by] securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders.”<sup>51</sup> The NTA aims to accomplish this advancement by ensuring that “Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.”<sup>52</sup>

The NTA establishes the framework for obtaining exclusive property rights to traditionally held land and sea properties. It defines native title as “the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters,” including protection of the rights to hunt, gather, and fish.<sup>53</sup> Section 223 of the NTA creates a tripartite system for establishing native title “rights and interests” capable of recognition under the Act.<sup>54</sup> All Aboriginal groups claiming native title ownership to land or sea property must demonstrate that their rights and interests: a) are possessed under relevant traditional laws and customs, b) have by law and custom a connection to the place in which the rights and interests are said to exist, and c) are capable of recognition under the common law of Australia.<sup>55</sup> Sections 223(a) and (b) are understood to encompass the core requirements<sup>56</sup> that must be factually proven, while

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<sup>50</sup> *Id.* at 61.

<sup>51</sup> The NTA at Preamble.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* § 223.

<sup>54</sup> *Id.* § 223(1)(a)-(c).

<sup>55</sup> *Id.*

<sup>56</sup> Justice Robert French, *Western Australia v. Ward: Devils (and Angels) in the Detail*, 7 AUSTL. INDIGENOUS L. REP. 1 (2002) (Issue 3), available at <http://www.austlii.edu.au/au/journals/AILR/2002/38.html> (original paper presented at the 2002 Native Title Conference in Geraldton, Western Australia).

section (c) provides that proven rights will be recognized unless antithetical to a fundamental tenet of the common law.<sup>57</sup>

To obtain native title, Aboriginal claimants must first prove that they have continually maintained a traditional association with the land or sea property that they are claiming because the NTA does not automatically recognize Aboriginal property rights.<sup>58</sup> In order to obtain legal recognition of the property rights conferred under the NTA, Aboriginal groups must negotiate a complex filing process initiated by applying to either the National Native Title Tribunal (“National Tribunal”) or an approved state or territory tribunal.<sup>59</sup> The government body created by the NTA, the National Tribunal, is the first arbiter of all native title claims.<sup>60</sup>

Aboriginal groups must further prove that no contravening property claims extinguish<sup>61</sup> their title and must identify all other existing interests in the claimed property.<sup>62</sup> Aboriginal groups bear this burden of proof because native title persists until extinguished by the clear and plain intent of the sovereign.<sup>63</sup> When a land holder or the State contests a native title claim, the National Tribunal will first attempt to mediate between the two parties.<sup>64</sup> Native title claims not resolved in mediation are referred to Federal Court for trial.<sup>65</sup>

### III. INDUSTRY LOBBYING THREATENS, AND ULTIMATELY ERODES, NATIVE TITLE’S EXCLUSIVE PROPERTY RIGHT

Since the enactment of the NTA, industry lobbyists and conservative politicians have continually attacked and successfully eroded native title’s exclusive property right.<sup>66</sup> In *The Wik Peoples v. Queensland*<sup>67</sup> (“Wik”), the

<sup>57</sup> The National Native Title Tribunal, *Yorta Yorta High Court Appeal*, NAT’L NATIVE TITLE HOT SPOTS NO. 3, at 4 (Dec. 2002), available at [http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Documents/Hot\\_Spots\\_Number\\_3.pdf](http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Documents/Hot_Spots_Number_3.pdf).

<sup>58</sup> See *Members of the Yorta Yorta Aboriginal Community v. Victoria* (2002) 194 A.L.R. 538, 423, 462-63.

<sup>59</sup> RUSSELL, *supra* note 17, at 308.

<sup>60</sup> The NTA §107.

<sup>61</sup> Extinguishment is the destruction or cancellation of a right, power, contract, or estate. BLACK’S LAW DICTIONARY 405 (Abridged 6th ed. 1991).

<sup>62</sup> RUSSELL, *supra* note 17, at 308.

<sup>63</sup> See *Fejo v. Northern Territory* (1998) 195 C.L.R. 96, 102.

<sup>64</sup> RUSSELL, *supra* note 17, at 308.

<sup>65</sup> The Federal Court of Australia, [http://www.fedcourt.gov.au/litigants/native/litigants\\_nt\\_what.html](http://www.fedcourt.gov.au/litigants/native/litigants_nt_what.html) (last visited Sept. 20, 2008) (explaining that native title claims that fail mediation are referred to the federal court of the state or territory in which the claim was first filed).

<sup>66</sup> Tyson Yunkaporta, *Land Rights Australia: Extinguishment of Native Title and Ongoing Attacks on Aboriginal Land Rights*, [http://aboriginalrights.suite101.com/article.cfm/land\\_rights\\_australia](http://aboriginalrights.suite101.com/article.cfm/land_rights_australia) (last visited Sept. 20, 2008).

<sup>67</sup> *The Wik Peoples v. The State of Queensland and Others* (1996) 187 C.L.R. 1.

High Court presented the pastoralist<sup>68</sup> industry with a compromise: coexistent rights to property where both native title and Crown-granted leases overlap.<sup>69</sup> Following *Wik*, the 1998 Amendments to the NTA further limited native title land claims.<sup>70</sup> Native title that predates Australian sovereignty calls into question and threatens the validity of all titles and privileges granted by the British Crown in the two hundred years since initial colonization.<sup>71</sup> In Western Australia, this realization resulted in talk of secession from the Commonwealth.<sup>72</sup> The mining industry similarly prophesized doom for the national economy.<sup>73</sup> Talk of secession and predictions of economic disaster ended in 1996 with the High Court's ruling in *Wik*.<sup>74</sup>

A. *The Wik Decision Divided Aboriginal Property Rights into Two Distinct Sets of Rights: Exclusive Rights and Coexistent Rights*

The High Court's decision in *Wik*<sup>75</sup> erroneously modified native title's exclusionary property right by creating a new model of shared or coexistent rights. By the slim majority of four to three, the Court held that while pastoral leases did not grant exclusive ownership to the leaseholder, where conflict between a pastoral lease and native title exists, native title rights must yield to the rights of the pastoralist.<sup>76</sup> The NTA explicitly extinguishes native title rights when another owner holds the claimed property in freehold title.<sup>77</sup> The *Wik* case, however, presented a new question of native title that neither *Mabo* nor the NTA definitively answered: whether a government-

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<sup>68</sup> The pastoral industry includes shepherds, herdsmen, and other workers directly involved in animal husbandry. THE AMERICAN HERITAGE DICTIONARY 908 (2nd College ed. 1991).

<sup>69</sup> See *Wik*, 187 C.L.R. at 2; RUSSELL, *supra* note 39, at 319-20.

<sup>70</sup> See *infra* Part III.B.

<sup>71</sup> See Noel Pearson, Paper presented at the High Court Centenary Conference, (October 9-11, 2003) (Paper, titled *Land Is Susceptible of Ownership*, available through <http://www.capeyorkpartnerships.com/team/noelpearson/papers/NPLandSUSCEPTIBLE2003.pdf> (last visited Nov. 28, 2008)); KENT MCNEIL, EMERGING JUSTICE? ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA 415 (Houghton Boston Printers 2001).

<sup>72</sup> SEAN BRENNAN ET AL., TREATY 18 (2005).

<sup>73</sup> *Id.*

<sup>74</sup> RUSSELL, *supra* note 17, at 306.

<sup>75</sup> *Wik*, 175 C.L.R. 1

<sup>76</sup> Maureen Tehan, *A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act*, 27 MELB. U. L. 523, 553 (2003).

<sup>77</sup> ANDREW ET AL., *supra* note 20, at 30. Freehold title is a property right granted to individuals by the Crown and is, in terms of ownership rights, analogous to U.S. ownership rights associated with title held in fee simple absolute. LISA STRELEIN, COMPROMISED JURISPRUDENCE: NATIVE TITLE CASES SINCE MABO 39 (2006).

issued pastoral lease was analogous to freehold title in its ability to extinguish contravening native title claims.<sup>78</sup>

The prevailing legal view was that government-granted pastoral leases extinguished native title.<sup>79</sup> In 1994, the Federal Court of Queensland confirmed this assumption in holding that conflicting pastoral leases extinguished the native title claim of the Wik People<sup>80</sup> after the Wik People filed suit seeking native title recognition of their exclusive ownership to more than 1600 square miles of land in Northern Queensland.<sup>81</sup> Justice Drummond, sitting for the Federal Court, held that pastoral leases conferred exclusive possession and ownership to the pastoralists and extinguished “all incidents of Aboriginal title or possessory title.”<sup>82</sup>

When a pastoral lease does not confer an exclusive property right to the pastoralist, however, the lease does not extinguish native title.<sup>83</sup> Instead, the two distinct sets of rights are capable of coexisting and sharing ownership rights to the property.<sup>84</sup> In *Wik*, the High Court reversed the Federal Court’s ruling and held that ownership rights to pastoral leases could coexist with native title rights to the same land.<sup>85</sup> The Court further held that shared property rights existed even where the government leases failed to predate Aboriginal title.<sup>86</sup> In *Wik*, the State of Queensland had granted leases to individual pastoralists, but failed to specify a right of exclusive possession in the leaseholder.<sup>87</sup> The High Court held that, for the sole reason that the pastoral leases did not grant an exclusive property right, the leases were not inconsistent with native title.<sup>88</sup>

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<sup>78</sup> RUSSELL, *supra* note 17, at 316.

<sup>79</sup> *See id.* at 318.

<sup>80</sup> *Wik*, 187 C.L.R. at 66.

<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Id.* at 66.

<sup>83</sup> *Id.* at 122.

<sup>84</sup> *Id.* at 3. This form of coexistent property rights is not unlike the property rights associated with *tenancy in common* under U.S. property law where each co-tenant has an undivided interest in the entire parcel. *See* JOSEPH W. SINGER, PROPERTY LAW, RULES, POLICIES, AND PRACTICES 640-41 (3rd ed. 2002).

<sup>85</sup> *Wik*, 187 C.L.R. at 3. Interestingly, the court did not definitively answer the question of whether a native title claim to land held under an expired pastoral lease could revert to exclusive Aboriginal ownership. *See* Garth Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998 (Cth)*, 22 U. N.S.W. L. J. 564, 569 (1999) (Issue 2) (explaining that the courts have yet to rule on whether native title can revive with the expiration of a pastoral lease).

<sup>86</sup> *Id.*

<sup>87</sup> Daniel Gal, *An Overview of the Wik Decision*, 20 U. N.S.W. L. J. 488, 490 (1997) (Issue 2), available at <http://www.austlii.edu.au/au/journals/UNSWLJ/1997/5.html>.

<sup>88</sup> *See Wik*, 187 C.L.R. at 757; Gal, *supra* note 87, at 490.

The High Court's decision subordinated native title property rights to the interests of the pastoralist industry.<sup>89</sup> The majority opinion emphasized the importance to Australians of maintaining and protecting the pastoral system.<sup>90</sup> When the opinion was issued, roughly forty percent of the Australian continent was under pastoral lease,<sup>91</sup> and the Court's decision clearly reinforced the status quo. The High Court's creation of coexistent rights to pastoral leases failed, however, to emphasize the NTA's mandate to uphold and protect the Wik people's native title rights.<sup>92</sup> Instead, *Wik* modifies *Mabo* and the NTA to create greater protection for Australia's pastoralists. Speaking for the majority, Justice Toohey explained that when the traditional laws and customs of the Aboriginal group claiming the right are inconsistent with the rights conferred on the pastoral lease grantee, "to the extent of any inconsistency the [pastoralists] prevail."<sup>93</sup>

*B. The Native Title Act Amendments Further Restricted the Ability of Aboriginal People to Obtain Property Rights*

The 1998 Native Title Act Amendments ("NTA Amendments")<sup>94</sup> deny Aboriginal people their full rights in asserting native title ownership of traditional land and sea properties. In response to the High Court's ruling in *Wik*, the Australian government began work on a series of amendments to the NTA.<sup>95</sup> When first unveiled in April of 1997, Prime Minister John Howard's proposed amendments consisted of a "Ten Point Plan" that provided greater security to pastoral and mining industry concerns regarding the expense and potentially adverse outcome of prolonged native title litigation.<sup>96</sup> This "Ten Point Plan" eventually evolved into more than three hundred pages of amendments to the NTA.<sup>97</sup>

The NTA Amendments substantially reduced native title rights and severely limited the ability of Aboriginal groups to secure ownership of

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<sup>89</sup> BRENNAN, *supra* note 72, at 18; MCNEIL, *supra* note 71, at 415 (arguing that it is time to acknowledge that the High Court's decision in *Wik* is more policy driven than supported by legal doctrine).

<sup>90</sup> BRENNAN, *supra* note 72, at 18.

<sup>91</sup> See RODNEY HARRISON, SHARED LANDSCAPES: ARCHAEOLOGIES OF ATTACHMENT AND THE PASTORAL INDUSTRY IN NEW SOUTH WALES 48 (2004) (explaining that pastoral leases are a form of title statutorily created in the nineteenth century to encourage the expansion of cattle and sheep farming into rural Australia).

<sup>92</sup> RUSSELL, *supra* note 17, at 319-20.

<sup>93</sup> *Wik*, 187 C.L.R. at 126.

<sup>94</sup> The Native Title Amendment Act 1998, 1998, No. 97 (Austl.) (Cth.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/791631F0ED68F5F1CA25734800007A65/\\$file/NativeTitleAmend1998.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/791631F0ED68F5F1CA25734800007A65/$file/NativeTitleAmend1998.pdf) [hereinafter NTA Amendments].

<sup>95</sup> RUSSELL, *supra* note 17, at 322.

<sup>96</sup> *Id.* at 324.

<sup>97</sup> Nettheim, *supra* note 85, at 576.

traditionally held land and sea properties. Among the most damaging of the amendments were the limitations placed on the right to negotiate prior to the enactment of future legislation, changes in the definition of what constituted “future acts” under the right to negotiate, and increased threshold requirements for the registration of new native title claims.<sup>98</sup> These limitations diminished both the area of land and sea claimable under native title and the spectrum of future uses allowed upon recognized land and sea properties.<sup>99</sup>

The NTA Amendments attempted, but ultimately failed, to clarify when Crown acts extinguish native title and require the government to provide just compensation to Aboriginal claimants. The NTA Amendments divide Crown acts into two new categories: 1) acts of previous exclusive possession and, 2) acts of previous non-exclusive possession.<sup>100</sup> Acts of previous exclusive possession, including Crown grants of freehold estates or the construction of public works, completely extinguish native title and may require just compensation.<sup>101</sup> Acts of non-exclusive possession, such as Crown grants of pastoral or agricultural leases, extinguish native title to the extent of any inconsistency and do not invoke a just compensation analysis.<sup>102</sup> Since the enactment of the NTA Amendments, however, the initial distinction between full and partial extinguishment has evolved into an uncertain array of possibilities for native title that now includes extinguishment, partial extinguishment, impairment, mere regulation, and Crown acts with no legal effect upon native title rights.<sup>103</sup>

The NTA Amendments codified *Wik*'s inconsistency test. Whether a land claim extinguishes a contravening native title claim depends on the property rights granted to the holder of the land claim.<sup>104</sup> If the land holder's property rights are non-exclusive, then there is no inconsistency between the rights of the land holder and the rights and interests of the native title claimant.<sup>105</sup> A land holder's non-exclusive property rights coexist with Aboriginal native title rights and the rights of each property owner are qualified only by the other co-owner. Neither set of property rights is diminished nor qualified as against third parties.

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<sup>98</sup> See Tehan, *supra* note 76, at 555.

<sup>99</sup> *Id.*

<sup>100</sup> NTA Amendments § 23A(2)-(3). Section 23A is under Division 2B, which is labeled “Confirmation of Past Extinguishment of Native Title by Certain Valid or Validated Act.” *Id.*

<sup>101</sup> *Id.* § 23J(1).

<sup>102</sup> *Id.*

<sup>103</sup> See Sean Brennan, *Native Title and the Acquisition of Property Under the Australian Constitution*, 28 MELB. U. L. REV. 28, 77 (2004).

<sup>104</sup> See The NTA § 23A.

<sup>105</sup> See *Wik*, 187 C.L.R. at 122; Gal, *supra* note 87, at 490.

Native title property rights are partially or wholly extinguished when a contesting land holder possesses an exclusive right in the same property.<sup>106</sup> The extent to which the conflicting grant extinguishes any part of the native title claim is determined by reference to the respective rights conferred—in the case of the land holder by the grant and in the case of the native title holder by the “traditions, customs and practices of the particular Aboriginal group” claiming the right.<sup>107</sup> This requires defining both the property rights of the land holder and the property rights of the native title holder to determine the extent of the conflict and the necessary extent of extinguishment of native title rights. Only under this extinguishment branch of the inconsistency test are the property rights of the native title holder diminished as against third parties.

#### IV. THE WRONGLY DECIDED *CROKER ISLAND* CASE CREATED A NON-EXCLUSIONARY PROPERTY RIGHT THAT PERPETUATES DISPOSSESSION

The High Court’s 2001 decision in the *Croker Island*<sup>108</sup> case effectively extinguishes native title rights to offshore sea properties by holding that such rights are entirely non-exclusionary. In 1994, Mary Yarmirr and other traditional owners representing five Aboriginal clans of the Yolngu People filed suit seeking recognition of their native title rights to the offshore seas of the Croker Island region of the Northern Territory.<sup>109</sup> This historic case was the first time Aboriginal people successfully brought a native title claim to traditionally held sea properties into the Australian court system.<sup>110</sup> Despite successfully proving native title rights and interests that included the traditional exercise of the right to exclude,<sup>111</sup> the High Court recognized entirely non-exclusive native title rights to the sea property.<sup>112</sup> The High Court reached this erroneous decision because they failed to follow the *Wik* precedent and ignored the mandate of the NTA.

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<sup>106</sup> See *Wik*, 187 C.L.R. at 124.

<sup>107</sup> *Id.* at 3.

<sup>108</sup> *Yarmirr*, 208 C.L.R. 1.

<sup>109</sup> The National Native Title Tribunal, *High Court’s Sea Decision Gives Go-Ahead to 120 Claims*, para. 8, Oct. 11, 2001, available at <http://ntru.aiatsis.gov.au/research/croker/NNTTnews.pdf> [hereinafter *Go-Ahead to 120 Claims*]

<sup>110</sup> See *id.*

<sup>111</sup> *Yarmirr and Others v. Northern Territory and Others* [No. 2] (1998) 82 F.C.R. 533, 576-586 [hereinafter *Yarmirr v. Northern Territory*]. The opinion of the federal court contains much of the original testimony of Mary Yarmirr and other traditional owners of the Yolngu clan on their ongoing exercise of the right to exclude others from their traditional homelands.

<sup>112</sup> *Yarmirr*, 208 C.L.R. at 3.

A. *The High Court Failed to Follow Wik's Inconsistency Test in Croker Island*

In 1994, Mary Yarmirr, together with five other Aboriginal claimants, lodged a native title claim seeking “ownership and exclusive possession, occupation, use and enjoyment”<sup>113</sup> of the seas of the Croker Island region.<sup>114</sup> The region, located in Australia’s Northern Territory, encompasses a series of islands and coral reefs that are the traditional home of the Madillarri-Ildugij, Mangalarra, Muran, Gadurra, Minaga, Ngayndjagar, and Mayoram peoples.<sup>115</sup> These Aboriginal clans, as with all Aboriginal people of the northeastern portion of Arnhem Land, collectively refer to themselves as the *Yolngu*, a word meaning “human being.”<sup>116</sup> For the *Yolngu*, the sea is an integral part of their traditional laws and customs.<sup>117</sup> The sea is represented in stories of ancestors who come from the sea and move onto the land, along the way creating the islands, reefs, and sandbars.<sup>118</sup> The *Yolngu* connection to the sea is further evident in their dependence upon fish and other marine resources as a source of food and nutrition, for ceremonies, and for barter and exchange.<sup>119</sup>

The Federal Court initially denied the *Yolngu*’s native title claim to exclusive ownership of the Croker Island region based on a finding of insufficient evidence. On appeal from the National Tribunal to the Federal Court, Justice Olney held that while native title to the sea properties did exist, the *Yolngu* had failed to provide sufficient evidence of the exclusivity of their ownership.<sup>120</sup> Justice Olney’s finding was based on the fact that the *Yolngu*’s native title rights were affected by, and had yielded to, the right of innocent passage and the common law right of the public to fish and navigate.<sup>121</sup> In his final ruling, Justice Olney applied the *Wik* inconsistency test and held that the rights of the *Yolngu* to the use their traditional lands

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<sup>113</sup> *Yarmirr v. Northern Territory*, 82 F.C.R. at 537.

<sup>114</sup> *Id.* at 539.

<sup>115</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, Offshore Native Title in Australia: The Crocker Island Case – *Yarmirr v. Commonwealth*, at ¶ 1, [http://ntru.aiatsis.gov.au/research/offshore%20native%20title/offshore%20native%20title\\_1.htm](http://ntru.aiatsis.gov.au/research/offshore%20native%20title/offshore%20native%20title_1.htm) (last visited Sept. 20, 2008) [hereinafter AIATSIS].

<sup>116</sup> World Culture Encyclopedia, *Murngin Orientation*, <http://www.everyculture.com/Oceania/Murngin-Orientation.html> (last visited Sept. 20, 2008).

<sup>117</sup> ABORIGINAL & TORRES STRAIGHT ISLANDER SOCIAL JUSTICE COMMISSIONER, NATIVE TITLE REPORT 2007 213-35 (2008), available at [http://www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport07/pdf/ntr2007.pdf](http://www.hreoc.gov.au/social_justice/nt_report/ntreport07/pdf/ntr2007.pdf).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Commonwealth v. Yarmirr* (1999) 101 FCR 171, 226 [hereinafter *Yarmirr, Full Federal Court*].

<sup>121</sup> *See id.* at 228.



existed to the “extent of the inconsistency” such that they could not prevent others from fishing or carrying out commercial activities in the area.<sup>122</sup> Justice Olney’s findings, on appeal, were upheld by the full Federal Court.<sup>123</sup>

On final appeal to the High Court, the Yolngu argued for a qualified exclusionary right to their traditional sea properties, but were again denied any degree of exclusivity based on the lower court’s finding that they had failed to assert their right to exclude non-Aboriginal people from the region.<sup>124</sup> The High Court, however, chose not to define the native title rights possible under a qualified exclusionary right, thereby failing to apply *Wik*’s inconsistency test to its analysis of the *Croker Island* claim. In so doing, the Court did not follow established precedent and did not provide a convincing rationale for its departure. The High Court did not define the exclusivity of the contravening maritime rights as either entirely exclusive or non-exclusive and refused to define the native title rights at issue as precedent required. Instead, in deciding *Croker Island*, the High Court created a new form of entirely non-exclusive ownership of Aboriginal property.

Entirely non-exclusive native title is a right in name only as it fails to confer significant property rights to Aboriginal people. The High Court based its decision on a finding that existing maritime regulations were inconsistent with, but did not extinguish, an indigenous exercise of the right to exclude.<sup>125</sup> This finding of inconsistency limited native title rights to personal, domestic, or non-commercial activities for subsistence or cultural purposes, and ensured access to areas of sea and the ability to protect places of cultural and spiritual import.<sup>126</sup> The Court affirmed native title rights associated with subsistence, but failed to recognize any rights associated with the management, ownership, and control of Aboriginal property. The new form of native title failed to include a right to trade in the resources of the sea, to manage these natural resources, or to prevent exploitation of those resources by others.<sup>127</sup>

The High Court denied the Yolngu the right to exclude others from their traditional offshore sea properties based on two erroneous presumptions. First, the Court held that an exclusive right in sea property

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<sup>122</sup> *Yarmirr v. Northern Territory*, 82 F.C.R. at 603.

<sup>123</sup> *Yarmirr, Full Federal Court*, 101 F.C.R. at 174.

<sup>124</sup> Denise Russell, *Aboriginal-Makassan interactions in the eighteenth and nineteenth centuries in northern Australia and contemporary sea rights claims*, 1 AUSTL. ABORIGINAL STUD. 3, 3 (2004) (Issue 1).

<sup>125</sup> *Id.*

<sup>126</sup> Ron Levy, *Native Title and the Seas: The Croker Island Decision*, 4 INDIGENOUS L. BULL. 17 (Jan. 1999) (Issue 17), available at <http://www.austlii.edu.au/au/journals/ILB/1999/8.html>.

<sup>127</sup> *See id.*

cannot be both legally recognized and qualified by maritime law.<sup>128</sup> Current examples of coexistent rights as well as examples of non-Aboriginal rights in offshore sea properties, however, refute this faulty conclusion. Secondly, the Court affirmed, without reexamining the evidence, that the Yolngu had failed to establish that they had historically exercised a right of exclusion in accordance with their traditional law and custom.<sup>129</sup> Had the High Court reviewed the Federal Court's findings of fact in a light favorable to Aboriginal people, they would easily have found proof of the traditional exercise of the right to exclude.

The High Court, in bypassing *Wik* and relying instead on these two erroneous presumptions, neither adequately explained nor supported its holding. The High Court deferred to the Federal Court's findings of fact that the Yolngu did not exercise a right to exclude while both acknowledging that maritime law could be qualified and refusing to decide whether the recognized native title "fractured a skeletal principle of the legal system" as required under *Mabo*.<sup>130</sup> Based on case law precedent and the NTA, the High Court had two available methods for deciding the Yolngu native title claim: 1) apply the *Wik* test and find that the rights coexist, or 2) where an inconsistency is found, apply the NTA's framework to determine whether native title had been extinguished. The High Court did neither, and its newly created, non-exclusionary native title dramatically departs from both of these two established methods.

The rights conferred under maritime law are not inconsistent with the exclusive rights traditionally exercised by the Yolngu. Native title and maritime law can coexist. The Court's analysis fails in refusing to consider the possibility of a qualified exclusionary right as put forth by the Yolngu in their appeal, and as supported by Justice Kirby in his dissent.<sup>131</sup> National and international maritime laws protect public rights of access to the sea. These public rights can coexist with a qualified exclusive native title right because native title can be termed legally "exclusive" while being effectively modified by both national and international maritime law.<sup>132</sup> The three maritime rights under contention, the public rights of fishing and navigation, and the international right of innocent passage, therefore, do not

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<sup>128</sup> *Yarmirr*, 208 C.L.R. at 68.

<sup>129</sup> *Id.* at 66.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 127 (Kirby, J., dissenting) (arguing that it is possible for a right to be recognized as legally exclusive, while technically qualified and limited by other legal rights).

<sup>132</sup> *See id.* at 128.

prohibit recognition of native title as a qualified, but legally exclusive, property right.

Native title, under a model of qualified exclusive possession, empowers traditional owners to exclude some people from their sea property while accepting those people genuinely exercising their public or international maritime rights.<sup>133</sup> National and international maritime laws have not proven to be a barrier for non-aboriginal owners and thus should not preempt Aboriginal ownership and native title to sea properties. For instance, the public right of fishing may be regulated or abrogated by the legislature.<sup>134</sup> Exclusive fisheries grant exclusive rights to fish in a given place qualified by the rights of navigation and innocent passage.<sup>135</sup> Australia recognizes exclusive rights in oyster beds as well as in leases of offshore sea-beds<sup>136</sup> that are qualified by the both the right of navigation and the right of innocent passage.<sup>137</sup>

Conflicting property rights either coexist with native title or partially or wholly extinguish native title. The High Court upheld the Federal Court Judge's findings of fact that effectively extinguished the Yolngu's native title rights.<sup>138</sup> In so doing, the majority went out of their way to create a new, unsupportable precedent. The majority explained that the public rights to navigate and fish and the right of innocent passage "are rights which cannot co-exist with rights to exclude from any part of the claimed area all others."<sup>139</sup> The *Croker Island* majority erred in reasoning that it was not necessary to examine the question of the right to exclude because such a right was not extinguished by, but was inconsistent with, maritime law. This ignores *Wik*'s precedent establishing that contravening property rights either coexist or partially or wholly extinguish native title.<sup>140</sup>

The fact that exclusive native title rights can be qualified and coexist with maritime law obligated the High Court to reexamine the Federal Judge's findings of fact regarding whether the Yolngu successfully established their right to exclude. The NTA requires defining the content of native title—the property rights conferred and protected—by the traditional laws and customs of the specific Aboriginal group seeking legal recognition of their title. Similarly, the High Court has stated that the content of native

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<sup>133</sup> *AIATSIS*, *supra* note 115.

<sup>134</sup> *Harper v. Minister for Sea Fisheries* (1989) 168 C.L.R. 314, 330.

<sup>135</sup> *Yarmirr*, 208 C.L.R. at 128.

<sup>136</sup> *Id.* at 22.

<sup>137</sup> *Id.* at 280.

<sup>138</sup> *Yarmirr*, 208 C.L.R. at 66.

<sup>139</sup> *Id.* at 67.

<sup>140</sup> *See supra* Part III.A.

title rights depends on traditional law determined by the evidence presented.<sup>141</sup> The High Court acknowledged that the Yolngu had successfully proven their native title rights and interests such that native title was recognized.<sup>142</sup> Defining this title without reference to the traditional law and custom of the Yolngu does not, however, comply with the mandate of the NTA. Because it is possible for a qualified exclusionary form of native title to coexist with maritime law, it was imperative that the High Court reevaluate whether the Yolngu in fact exercised an effective right to exclude.

*B. The High Court Failed to Uphold the NTA in Croker Island*

The High Court also failed to uphold the express purpose of the NTA in deciding *Croker Island*. The plain language of the NTA states that the purpose of the NTA is to protect Aboriginal ownership of traditional property, including inland waters and sea properties.<sup>143</sup> Instead of protecting Aboriginal property rights, however, the High Court not only denied recognition of the rights traditionally exercised by the Yolngu of Croker Island, but also labeled the effective extinguishment of those rights as mere regulatory inconsistency.<sup>144</sup> The Court wholly ignored the extinguishment branch of the inconsistency test and removed the possibility of just compensation.<sup>145</sup>

When Aboriginal claimants successfully prove the effective exercise of a right to exclude, courts should not consider recognition of native title absent this established right. Instead, the court should test the native title rights for any inconsistency with contravening property rights.<sup>146</sup> First, courts must define native title property rights by examining the traditional law and customs of the Aboriginal group seeking legal recognition of their property rights.<sup>147</sup> Second, in analyzing proof of the rights conferred by traditional law and custom, courts must accommodate Aboriginal perceptions of property and of the right to exclude.<sup>148</sup> The NTA mandates

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<sup>141</sup> *Fejo*, 195 C.L.R. at 102.

<sup>142</sup> *Yarmirr*, 208 C.L.R. at 3-4.

<sup>143</sup> The NTA § 1.

<sup>144</sup> See *Yarmirr*, 208 C.L.R. at 3.

<sup>145</sup> See *infra* Part VI.B for a discussion about the possibility of obtaining just compensation for the Yolngu's loss of exclusive rights in their sea property.

<sup>146</sup> See *supra* Part III.B.

<sup>147</sup> *Yarmirr*, 208 C.L.R. at 39 (stating that the relevant starting point is the factual determination of the rights and interests possessed under the traditional laws and customs of the Aboriginal claimants).

<sup>148</sup> See *infra* Part V.A.

this analysis.<sup>149</sup> Furthermore, case law clarifies that native title is Aboriginal law and is neither created nor defined by the common law.<sup>150</sup>

The High Court failed to effectuate the purpose of the NTA: to protect recognized native title rights. The NTA's Preamble states that the Act seeks to rectify the consequences of past injustices by "securing the adequate advancement and protection of Aboriginal and Torres Strait Islander peoples . . . ."<sup>151</sup> Section 3(a) defines one of the main objectives of the NTA as "the recognition and protection of native title."<sup>152</sup> The High Court has furthermore stated that the proper interpretation of Section 223(1)(c) of the NTA shows that "the Federal Parliament obviously set out to protect and uphold the rights and interests of Australia's indigenous people."<sup>153</sup>

Parliament clearly intended that the NTA include and protect Aboriginal ownership of traditional sea properties. The NTA expressly addresses and allows for the recognition of the native title rights and interests of indigenous Australians to traditionally held sea properties.<sup>154</sup> Part I of the NTA, the Preliminary Section, states that the NTA shall apply and "extend . . . to the coastal sea of Australia and . . . to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*."<sup>155</sup> This explicit language extends the reach of native title to the twelve-mile mark that delineates the boundary of Australian sovereignty over its coastal seas.<sup>156</sup>

The language of the NTA indicates Parliament's intent to protect native title rights to sea properties. In resolving a question of the determination of native title rights, courts should turn first to the plain language of the statute.<sup>157</sup> This requires that courts, in interpreting the NTA, read the Act as a whole and give regard to the NTA's purpose of protecting

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<sup>149</sup> *Id.*

<sup>150</sup> *Mabo*, 175 C.L.R. at 59 ("Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived.").

<sup>151</sup> The NTA, at Preamble.

<sup>152</sup> The NTA § 3(a).

<sup>153</sup> *Yarmirr*, 208 C.L.R. at 115 (Kirby, J., dissenting). Section 223(1)(c) of the NTA states "The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters, where: (c) the rights and interests are recognized by the common law of Australia." NTA § 223(1)(c) (emphasis in the original).

<sup>154</sup> *Id.* at 112.

<sup>155</sup> The NTA § 6.

<sup>156</sup> *The Seas & Submerged Lands Case* (1975) 135 C.L.R. 337, 338 (holding that the Seas and Submerged Lands Act of 1973, which extended Commonwealth sovereignty over Australia's territorial sea, was within the constitutional power of the legislature).

<sup>157</sup> *Yarmirr*, 208 C.L.R. at 111.

indigenous native title rights to traditionally held land and sea properties.<sup>158</sup> This commonly held logic was not lost on the entire High Court. Justice Kirby stated in his dissent in *Croker Island* that the language and apparent purposes of the NTA contradict the notion that the Act was “merely repeating, or blindly and unquestioningly reflecting, pre-existing English, Imperial, colonial or early Australian differentiations between land and sea for legal purposes.”<sup>159</sup>

The indigenous people of Croker Island successfully established that they possessed native title “rights and interests” as required by the NTA for legal recognition of Aboriginal ownership of sea properties.<sup>160</sup> Their claim asserted exclusive ownership, occupancy, possession, and use of 3300 square kilometers<sup>161</sup> of water, the subsoil beneath the waters, and all inherent natural resources.<sup>162</sup> The Aboriginal claimants satisfied Section 223 of the NTA and thereby proved their right to exclusive ownership by demonstrating that their rights and interests: 1) were possessed under relevant traditional laws and customs; 2) were, by law and custom, connected to the place in which the rights and interests existed; and 3) were capable of recognition under the common law of Australia.<sup>163</sup> For the Yolngu of Croker Island, these traditional laws and customs included protection of fishing, hunting, and gathering rights for both subsistence and trade purposes. Traditional law and custom further required that visitors and people from other indigenous groups gain permission prior to entering their land and sea country.<sup>164</sup>

Reducing recognized native title to entirely non-exclusionary ownership of sea properties fails to protect Aboriginal rights and negates the purpose of the NTA. The petitioners’ complaint in *Croker Island* asked the court to find that the indigenous people of the island had a recognized entitlement to possession, occupation, use, and enjoyment of the sea and seabed within the claimed area to the exclusion of all others.<sup>165</sup> In their complaint, the Aboriginal people of Croker Island recited their traditional laws and customs. These traditional laws and customs, particularly the right of consultation, defined the scope of their native title claim to include the right to exclude. Nonetheless, the High Court created a new form of native

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 112 (Kirby, J., dissenting).

<sup>160</sup> The NTA § 223(1)(a)-(c).

<sup>161</sup> *Go-Ahead to 120 Claims*, *supra* note 109, at para. 8.

<sup>162</sup> *See Levy*, *supra* note 126.

<sup>163</sup> *See* The NTA § 223(1)(a)-(c).

<sup>164</sup> *AIATSIS*, *supra* note 115.

<sup>165</sup> *Id.*

title, an entirely non-exclusionary right, which does not protect Aboriginal rights and interests. As a result, this non-exclusionary right “means that Croker Island traditional owners will have little say regarding developments on their sea country.”<sup>166</sup>

V. THE *CROKER ISLAND* DECISION IGNORED EVIDENCE OF THE ABORIGINAL LAW OF THE RIGHT TO CONSULTATION THAT IS ANALOGOUS TO THE RIGHT TO EXCLUDE

The Federal Court failed to recognize that the Aboriginal people of Croker Island exercised exclusive possession over their land and sea property because the Court narrowly focused on the Yolngu’s inability to exclude European colonists.<sup>167</sup> The Yolngu provided the Federal Court with extensive evidence of their traditional exercise of the right to exclude.<sup>168</sup> Had the High Court properly reviewed the findings of fact, it could have rectified this wrong by considering how Aboriginal traditional law and custom defines the right to exclude.

A. *The Evidence Reveals that the Aboriginal Law of the Right to Consultation is Analogous to the Right to Exclude*

For many Aboriginal groups, outsiders are expected to gain permission prior to entering another clan’s country. The process of asking and gaining permission is known as the “right to consultation” and is synonymous with the clan’s right to exclude.<sup>169</sup> This is true for the indigenous people of Croker Island who continue to assert their right to exclude, despite colonization, as the right to consultation in all decisions concerning the access to, and the use of, their country.<sup>170</sup> Unlike Australian law, Aboriginal customary law on the right to exclude others from traditional homelands defines the right in terms of holding, asserting, and exercising responsibility for the welfare of country.<sup>171</sup> Aboriginal land and sea “ownership” is caring for clan territory.<sup>172</sup> Deriving from this right to

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<sup>166</sup> The Northern Land Council, *Sea Rights: Claims—Native Title*, [http://www.nlc.org.au/html/land\\_sea\\_claims\\_nat.html](http://www.nlc.org.au/html/land_sea_claims_nat.html) (last visited Sept. 20, 2008).

<sup>167</sup> AIATSIS, *supra* note 115.

<sup>168</sup> See *Yarmirr v. Northern Territory*, 82 F.C.R. at 576-86.

<sup>169</sup> See PETER SUTTON, *NATIVE TITLE IN AUSTRALIA: AN ETHNOGRAPHIC PERSPECTIVE* 23-26 (2003).

<sup>170</sup> AIATSIS, *supra* note 133.

<sup>171</sup> SUTTON, *supra* note 169, at 26-27.

<sup>172</sup> Stephen Davis, *Aboriginal Tenure of the Sea in Arnhem Land, Northern Australia*, in *A SEA OF SMALL BOATS* 37, 44 (John Cordell ed., 1989).

care for country is the right to consultation about entry onto country and the right to allocate the use of country to others.<sup>173</sup>

Aboriginal clans enforce their right to exclude by requiring outsiders to gain permission prior to entering or using the resources of a territory belonging to another clan.<sup>174</sup> A clan's power to grant or deny entry to traditionally held land and sea property is, in actuality, greater than the mere right to exclude.<sup>175</sup> This is because the power to grant or deny permission includes not only the enforcement of proprietary rights to the land but also entitles an Aboriginal clan to determine all uses of the land and its resources, to define the cultural and ceremonial significance of the land, and to determine how the property will be transmitted to descendants.<sup>176</sup>

The Aboriginal right to consultation is a proprietary right to exclude analogous to the right held by property owners that possess fee simple or freehold title to their land. In exercising their right to consultation, Aboriginal clans are enforcing their right to use and enjoy their property, to alienate their property as they see fit, and to exclude others from accessing and using their land and resources. In property law, the exercise of these rights indicates the exercise of a proprietary right.<sup>177</sup> In exercising the right to consultation, Aboriginal people claiming exclusive native title to their traditionally held land and sea properties are asserting their right of entitlement to exclude as against all others.

The right to exclude, even when it exists as the Aboriginal right to consultation, requires the corollary ability to enforce that right. Aboriginal enforcement of the right to control access to clan homelands involves the placement of signs of occupation and the tracking of intruders.<sup>178</sup> While these methodologies become more difficult across vast tracts of land, they are nearly impossible to implement over sea country.<sup>179</sup> Instead, control of access to sea country relies on visual monitoring and the assumption that as travelers come into the enforcer's field of vision they will travel directly towards the enforcer to make their intentions known.<sup>180</sup> A traveler who fails to acknowledge the local right to consultation as the right to exclude is

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See SUTTON, *supra* note 169, at 25.

<sup>176</sup> *Id.*

<sup>177</sup> See Grey, *supra* note 27, at para. 44.

<sup>178</sup> See NICHOLAS PETERSON & BRUCE RIGSBY, CUSTOMARY MARINE TENURE IN AUSTRALIA 3 (The Univ. of Sydney Press 2006).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*



assumed to be acting with the malicious intent to commit trespass and will be punished in accordance with the traditional law of the Aboriginal clan.<sup>181</sup>

Native title as an exclusive, proprietary right is automatically extinguished where exclusive possession or occupation is interrupted for any reason.<sup>182</sup> Aboriginal claimants asserting a proprietary native title right are therefore required to prove that their exclusive possession or occupation of their property has been “asserted effectively.”<sup>183</sup> This requirement of the exercise of exclusive possession holds true even when it is the Australian government that has forcibly removed Aboriginal people from their land.<sup>184</sup> As explained by Aboriginal activist Noel Pearson, “Aboriginal people have hitherto been trespassers on their own land by virtue of the fact that their rights under the laws of white settlers have been obscured for two centuries.”<sup>185</sup>

Without recognized native title, Aboriginal communities do not have the autonomous power to enforce trespass actions under Australian law. The assessment of native title claims to traditionally held land and sea properties is based, in part, on both the historic and the modern ability to enforce trespass actions. Yet, any inability to prosecute and punish trespassers has led some Australian courts to accuse Aboriginal communities of failing to exercise their right to exclude.<sup>186</sup> This circular logic creates a conundrum for Aboriginal claimants that is only resolved by viewing their traditional right to consultation as analogous to the right to exclude. As Justice Kirby noted in his dissent in *Croker Island*, “continual assertion of rights to be consulted in decisions concerning access to, and use of, the claimants’ country may be the highest feasible level of assertion of control by a fishing-based society against Europeans where the latter were possessed of superior arms and legal power.”<sup>187</sup>

*B. Croker Island Demanded a New Requirement of Aboriginal Claimants that is Both Unjust and Unattainable*

The majority decision in the *Croker Island* case set new precedent by requiring that Aboriginal claimants not only have to prove the observance of

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<sup>181</sup> *Id.* at 4.

<sup>182</sup> RUSSELL, *supra* note 17, at 269.

<sup>183</sup> *Mabo*, 175 C.L.R. at 51.

<sup>184</sup> AIATSIS, *supra* note 115.

<sup>185</sup> See Pearson, *supra* note 28, at 87.

<sup>186</sup> *Yarmirr v. Northern Territory*, 82 F.C.R. at 585 (explaining that an Aboriginal claim for exclusive possession, occupation, use, and enjoyment could not be recognized because the evidence only demonstrated effective exclusion of other Aboriginal people).

<sup>187</sup> *Yarmirr*, 208 C.L.R. at 138 (Kirby, J., dissenting).

traditional laws and customs amongst themselves, but also have to prove the enforcement of such laws and customs against non-indigenous people.<sup>188</sup> The majority reached this decision because they refused to review the findings of fact made by the Federal Court judge.<sup>189</sup> The High Court deferred to the federal judge and relied on the findings of fact to reach their conclusion that the Yolngu native title should be defined without the right to exclude.<sup>190</sup> The Federal Court, however, had declared that the facts not only failed to establish the effective exercise of an exclusionary right, but intimated the Yolngu's native title rights were effectively extinguished.<sup>191</sup> The High Court deftly avoided the Federal Court's ruling, but refused to review the evidence of the Yolngu's exercise of the right to exclude on the record.<sup>192</sup> Confusingly, the majority appears to have rejected the Federal Judge's view that the Yolngu claim required proof of effective exclusion against Europeans by saying, "Nor is it necessary to identify a claimed right or interest as one which carries with it, or is supported by, some enforceable means of excluding from its enjoyment those who are not its holders."<sup>193</sup> Unfortunately, in affirming the Federal Judge's ruling, the High Court established that very precedent.

Only Justice Kirby, viewing the right to consultation as analogous to the right to exclude, appears to have at least considered that the High Court might be required to review the Federal Judge's erroneous findings of fact regarding the Yolngu's evidence of exclusivity:

To posit an obligation of the poorly armed forebears of the claimants to assert against the *balanda*<sup>194</sup> (and for that matter the Macassans) . . . a right of physical expulsion, in order to uphold their native title over their sea country, . . . is to define the problem in terms of a desired outcome that would always be unfavourable to the rights of persons such as the claimants.<sup>195</sup>

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<sup>188</sup> Paul Burke, *Analysis of the High Court's Decision in The Croker Island Case* (2001), [http://ntru.aiatsis.gov.au/research/croker/burke\\_analysis\\_h crt\\_croker.pdf](http://ntru.aiatsis.gov.au/research/croker/burke_analysis_h crt_croker.pdf) (last visited Sept. 20, 2008).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Yarmirr*, Full Federal Court, 101 F.C.R. at 174 (explaining that exclusive possession of, or right to control access to, the sea or tidal waters would fracture a skeletal principle of the common law). *Mabo* had previously clarified that where native title fractured a skeletal principle of the common law recognition of native title would be precluded. *Mabo*, 175 C.L.R. at 43.

<sup>192</sup> Burke, *supra* note 188.

<sup>193</sup> *Yarmirr*, 208 C.L.R. at 39.

<sup>194</sup> *Balanda* is a Yolngu word that roughly translates as "whitefella." *Id.* at 137.

<sup>195</sup> *Id.* at 140 (Kirby, J., dissenting).

Kirby argued that the ultimate purpose of the *Mabo* decision and the subsequent enactment of the NTA was to reduce and remove the discrimination against Aboriginal Australians that the law had previously condoned and that the High Court had declared unjustifiable. Ignoring evidence of the Yolngu's exercise of the right to exclude, Kirby explained, potentially reintroduced a discriminatory legal rule.<sup>196</sup>

Courts must first define and determine the rights exercised by Aboriginal claimants in accordance with their traditional law and custom when assessing native title claims to sea property.<sup>197</sup> This fact-based analysis includes accommodating Aboriginal concepts of the right to exclude and realistically considering the limitations of the exercise of such a right given more than two hundred years of colonization. In failing to correct the Federal Court's findings of fact, the majority in *Croker Island* erroneously defined a new form of title not based on the requirements of the NTA. Similarly, while Justice Kirby suggested that the findings of fact should have been reviewed, he failed to recognize that such a review was the necessary starting point for every analysis of native title recognition.

#### VI. THE *CROKER ISLAND* DECISION SHOULD BE OVERTURNED

Under native title law, Aboriginal claimants must successfully prove an effective assertion of the right to exclude to gain exclusive ownership of their traditionally held land or sea property.<sup>198</sup> This legal standard, reaffirmed by the High Court in 2002,<sup>199</sup> requires indigenous claimants to prove that their traditional laws and customs included the exercise of the right to exclude at the inception of Australian sovereignty. As explained by Justice Brennan in *Mabo*, native title originates in, and is given its content by, the traditional laws and customs observed by the indigenous people of a territory.<sup>200</sup> Native title rights are ascertained as a matter of fact by reference to their laws and customs.<sup>201</sup> The common law is, therefore, not obligated to recognize an exclusive property right if the Aboriginal claimants failed to effectively exercise their right to exclude.<sup>202</sup> Where the evidence does establish the effective exercise of the right to exclude, however, courts must include the right to exclude in the bundle of recognized property rights.

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<sup>196</sup> *Id.* at 119.

<sup>197</sup> *Id.* at 39.

<sup>198</sup> *Id.* at 137.

<sup>199</sup> See *Members of the Yorta Yorta Aboriginal Community*, 194 A.L.R. at 423, 485-86.

<sup>200</sup> *Mabo*, 175 C.L.R. at 58 (Brennan, J., concurring).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 51.

A. *Aboriginal Traditional Law and Custom Define the Native Title Rights That the NTA Must Recognize and Uphold*

The High Court recognized native title absent the ownership rights that the Yolngu traditionally exercised. The Yolngu of Croker Island proved that their traditional laws and customs defined their property rights to their sea country as proprietary.<sup>203</sup> Both the majority and Justice Kirby in his dissent held that the claimants had provided the court with sufficient evidence to establish that the Yolngu had maintained a “connection with the lands or waters,”<sup>204</sup> such that their native title “rights and interests are recognized by the common law of Australia.”<sup>205</sup> The NTA’s definition of native title stipulates, however, that native title is, “the rights and interests . . . possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples.”<sup>206</sup> The NTA thus requires that the recognized native title rights be defined by Yolngu traditional law and include proprietary ownership.

The *sui generis*, or unique legal status, of native title requires that it be defined by the traditional laws and customs of the Aboriginal group claiming title because it cannot be defined by Australian common law. Common law property rights do not create native title.<sup>207</sup> Native title originates from and is defined by the pre-contact legal order of Aboriginal people.<sup>208</sup> As explained by Justice Brennan in the *Mabo* decision, “Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law.”<sup>209</sup> Native title exists where it predates the acquisition of Australian sovereignty and has not been subsequently extinguished by the Crown. The role of the common law is, therefore, to recognize historically practiced Aboriginal laws and customs “as an embodiment of inherent and judicially cognisable bonds between Indigenous peoples and their ancestral lands.”<sup>210</sup>

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<sup>203</sup> *Yarmirr*, 208 C.L.R. at 138-41 (explaining that the evidence supported the conclusion that the Yolngu, in accordance with their traditional law and custom, did exercise the right to exclude others through the right to consultation); see *supra* Part VA.

<sup>204</sup> The NTA § 223(1)(b).

<sup>205</sup> *Id.* § 223(1)(b); *Yarmirr*, 208 C.L.R. at 3.

<sup>206</sup> *Id.* § 223(1)(a).

<sup>207</sup> *Wik*, 175 C.L.R. at 20.

<sup>208</sup> See Jeremy Webber, *Mabo and Australian Constitutionalism*, in *POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLE* 60, 69 (Duncan Ivison, Paul Patton & Will Sanders eds., 2000).

<sup>209</sup> *Mabo*, 175 C.L.R. at 59 (Brennan, J., concurring).

<sup>210</sup> TONY BLACKSHIELD & GEORGE WILLIAMS, *AUSTRALIAN CONSTITUTIONAL LAW AND THEORY* 179 (4th ed. 2006).

B. *A Non-Exclusionary Form of Title Not Based on Traditional Laws and Customs is Not Native Title and Perpetuates Aboriginal Dispossession*

Seven years after filing her native title claim to the offshore seas of Croker Island, Mary Yarmirr walked out of the High Court of Australia with a recognized native title that granted her fewer rights than she had previously exercised. While her traditional law recognized the right to exclude, the right to control use of and access to the natural resources of the sea, and the right to use those resources for both trade and commercial purposes, her newly recognized native title protected none of these historically exercised rights.<sup>211</sup> Instead, Mary Yarmirr and all the indigenous inhabitants of Croker Island received a form of recognized native title that merely affirmed their undisputed right to hunt, fish, and gather for subsistence purposes.<sup>212</sup>

Native title that is not defined by the traditional laws and customs of the Aboriginal group seeking recognition is not native title. Mary Yarmirr asserted and proved an exclusive native title right.<sup>213</sup> The creation of an entirely non-exclusive property right by the majority of the High Court in *Croker Island*,<sup>214</sup> much like their creation of coexistent property rights in *Wik*,<sup>215</sup> served countervailing political interests at the expense of Aboriginal rights.<sup>216</sup> By claiming that national and international maritime law made the exercise of an exclusive Aboriginal property right in the sea impossible,<sup>217</sup> the High Court chose to protect the rights of the fishing and pearling industry instead of adhering to the statutory language of Section 223 of the NTA.

The High Court's decision also deftly avoided the complicated question of compensation, which would have arisen had it held that national and international maritime law extinguished native title. The NTA's compensation regime for extinguishment of native title is extraordinarily complex.<sup>218</sup> Determination of compensation is governed by Section 13(2) of the NTA and only applies to extinguished native title.<sup>219</sup> To date, the first

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<sup>211</sup> See *supra* Part IV.A.

<sup>212</sup> *AIATSIS*, *supra* note 115.

<sup>213</sup> See *supra* Part V.A.

<sup>214</sup> *Yarmirr*, 208 C.L.R. at 3.

<sup>215</sup> *Wik*, 175 C.L.R. at 243.

<sup>216</sup> See *supra* Part III.

<sup>217</sup> *Yarmirr*, 208 C.L.R. at 67.

<sup>218</sup> *Jango v. Northern Territory* (2006) 152 F.C.R. 150, 165; see Minter Ellison, *Native Title Act Unclear on Approach to Compensation*, Apr. 12, 2006, [http://www.hg.org/articles/article\\_1373.html](http://www.hg.org/articles/article_1373.html) (last visited Sept. 20, 2008).

<sup>219</sup> *Jango*, 152 F.C.R. at 166.

and only case to reach the Australian courts on the question of compensation for extinguishment of native title is the 2006 case of *Jango v. Northern Territory*.<sup>220</sup> In *Jango*, a federal court denied the Aboriginal claimants compensation, finding that the evidence did not demonstrate a consistent and sustained pattern of observance of their traditional laws and customs.<sup>221</sup> The court denied compensation to the Yankunytjatjara and Pitjantjatjara people of the Northern Territory because they failed to prove the existence of their native title.<sup>222</sup>

The High Court recognized the existence of the Yolngu's native title rights to their offshore sea properties, but stripped valuable property rights.<sup>223</sup> Based on the recent holding in *Jango*, had the High Court extinguished the Yolngu's native title claim, instead of declaring it non-exclusive due to regulatory inconsistency, the claim could have undergone an extinguishment analysis. Such an extinguishment analysis could have resulted in the Yolngu receiving compensation for the loss of their property rights. Compensation, while not the ideal of obtaining exclusive ownership of traditional property, goes further towards ending Aboriginal dispossession than native title absent meaningful property rights. Instead of fulfilling the NTA's mandate to "rectify the consequences of past injustices,"<sup>224</sup> the High Court's decision in *Croker Island* perpetuates more than two hundred years of denying property rights to indigenous Australians.

*Croker Island* set an unjust precedent for all native title claims to sea properties.<sup>225</sup> Since its ruling in 2001, the High Court has not accepted another native title case involving an appeal of a sea property claim. In the most recent case to be ruled on, the 2007 case of *Gumana v. Northern Territory*,<sup>226</sup> the Federal Court effortlessly held that the recognized native title of the Aboriginal people of Blue Mud Bay did not confer an exclusive

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<sup>220</sup> Tina Jowett & Kevin Williams, *Jango: Payment of Compensation for the Extinguishment of Native Title*, NATIVE TITLE RESEARCH UNIT ISSUE PAPER, Vol. 3, No. 8 (May 2007), <http://ntru.aiatsis.gov.au/publications/2007pdfs/reports%20and%20other%20pdfs/Jango%20%5Bfinal%5D.pdf> (last visited Sept. 20, 2008).

<sup>221</sup> *Jango*, 152 F.C.R. at 151.

<sup>222</sup> *Id.*

<sup>223</sup> See *supra* Part III.

<sup>224</sup> The NTA at the Preamble.

<sup>225</sup> See Michael White & Ryan Goss, *Australian Maritime Law Update: 2004*, 36 J. MAR. L. & COM. 253, 275 (2005).

<sup>226</sup> *Gumana*, 158 F.C.R. 349.

property right.<sup>227</sup> The Federal Court's sole reason for its holding was the precedent established by the High Court in *Croker Island*.<sup>228</sup>

Nonetheless, Aboriginal peoples are continuing to fight for recognition of their native title rights to their traditionally held sea properties. As of December 31, 2007, the National Tribunal had eighty-four active native title claims that included sea properties.<sup>229</sup> The Aboriginal struggle for sovereignty and recognized ownership of traditionally held sea properties will continue until the High Court overturns *Croker Island*, the Australian government upholds the promise of *Mabo*, and until the NTA recognizes, respects, and legally protects Aboriginal law and custom.

C. *Reversing Croker Island Would Promote Aboriginal Self-Determination*

Land rights play a critical role in the fight for Aboriginal self-determination.<sup>230</sup> Viewed in light of this ongoing struggle for self-determination, native title claims to traditionally held land and sea properties are both an assertion of property rights and an assertion of sovereignty.<sup>231</sup> Prior to *Mabo*, the concept of *terra nullius* was the linchpin that recognized Crown ownership of all land and sea property across the Australian continent and acted to "dispossess, degrade and devastate the Aboriginal people."<sup>232</sup> Native title, properly applied, can rectify Aboriginal dispossession of land. Furthermore, native title can secure the advancement of Aboriginal and Torres Strait Islanders through recognition of Aboriginal law and sovereignty over traditionally held land and sea properties.<sup>233</sup>

Native title recognizes not just Aboriginal rights and interests in traditionally held land and sea properties, but also recognizes the autonomy of Aboriginal legal traditions.<sup>234</sup> Native title, under both the NTA and *Mabo*, is a property right defined by the traditional laws and customs of the

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<sup>227</sup> National Native Title Tribunal, *Appeal in Blue Mud Bay (Gumana)—Full Court*, NATIONAL NATIVE TITLE HOT SPOTS NO. 24, at 7 (May 2007), available at [http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Documents/Hot\\_Spots\\_number\\_24.pdf](http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Documents/Hot_Spots_number_24.pdf).

<sup>228</sup> *Id.*

<sup>229</sup> Native Title Research Unit, *Native Title Applications*, [http://ntru.aiatsis.gov.au/research/resourceguide/national\\_overview/national04.html](http://ntru.aiatsis.gov.au/research/resourceguide/national_overview/national04.html) (last visited Nov. 30, 2008).

<sup>230</sup> See generally Ronald P. Hill, *Blackfellas and Whitefellas: Aboriginal Land Rights, The Mabo Decision, and the Meaning of Land*, 17 HUM. RTS. Q. 303 (1995).

<sup>231</sup> See *id.*

<sup>232</sup> *Mabo*, 175 C.L.R. at 104.

<sup>233</sup> See Bradford W. Morse, *Land Rights and Customary Law: A Comparative Analysis*, in LAND RIGHTS NOW: THE ABORIGINAL FIGHT FOR LAND IN AUSTRALIA 185 (International Work Group for Indigeneous Affairs 1985).

<sup>234</sup> Webber, *supra* note 208, at 62.

Aboriginal group asserting legal recognition.<sup>235</sup> Formal recognition of native title therefore promotes Aboriginal sovereignty by acknowledging distinct indigenous interests in land and sea properties and facilitating self-determination.<sup>236</sup> To fulfill the purpose of the NTA and rectify past injustices committed against Aboriginal and Torres Strait Islander peoples, native title must, therefore, promote Aboriginal sovereignty.

Overturing the *Croker Island* decision would promote Aboriginal sovereignty and help end Aboriginal dispossession. Since *Wik*, the High Court has continually eroded native title property rights in response to industry lobbying and the efforts of conservative politicians.<sup>237</sup> This assault on native title perpetuates dispossession and fails to uphold the promise of *Mabo* and the mandate of the NTA. In order to fulfill his election promise of ensuring reconciliation between Aboriginal and white Australians, Prime Minister Kevin Rudd must do more than merely apologize for past injustices—he must end the current, ongoing dispossession of property from Aboriginal people. The High Court continues to adhere to the erroneous analysis of Aboriginal law and custom established in *Croker Island*.<sup>238</sup> Parliament, guided by Prime Minister Rudd's vision of an Australia where all citizens are equal,<sup>239</sup> must reaffirm that when an Aboriginal group successfully provides evidentiary proof of a traditionally practiced right to exclude, native title will recognize and protect that exclusionary right to ownership of both traditional land and sea properties.

## VII. CONCLUSION

Aboriginal property rights extend not only to land, but to surrounding coastlines, intertidal zones, and offshore seas. This title is not a title of mere occupancy but includes the right to exclusive use of the sea property, its inherent resources, and the right to exclude others. Where an Aboriginal group can successfully prove that its traditional laws and customs include the effective exercise of the right to exclude, native title should confer proprietary rights to the claimed area whether the traditional area is a land or sea property. Recognition of native title based on traditional law and custom

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<sup>235</sup> See *infra* Part V(B).

<sup>236</sup> John Bern & Susan Dodds, *On the Plurality of Interests: Aboriginal Self-government and Land Rights*, in *POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLE* 163, 164 (Duncan Ivison, Paul Patton & Will Sanders eds., 2000).

<sup>237</sup> See *Yunkaporta*, *supra* note 66.

<sup>238</sup> See *Gumana*, 158 C.F.R. 349.

<sup>239</sup> Prime Minister Kevin Rudd, *supra* note 9.



upholds the purpose of the NTA and is the clear mandate of the NTA based on the plain language of the statute.

Court decisions, such as the *Croker Island* decision, that recognize a form of title that is entirely non-exclusionary do not recognize native title. Instead, such decisions effectively extinguish Aboriginal rights that predate European colonization. This extinguishment threatens Aboriginal sovereignty, impedes reconciliation between Aboriginal and white Australians, and fails to rectify more than two hundred years of Aboriginal dispossession. Overturning the *Croker Island* precedent would be a small but necessary step towards creating a new Australia where indigenous and European cultures are equally valued.