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## PREFACE

This book is about a land case brought by members of a seafaring and gardening community who occupy three small islands in the Torres Strait at the northern end of the Great Barrier Reef. These three islands were named Murray's Islands by the captain of the *Pandora* in 1791. In Meriam Mir, the language of the inhabitants, the three islands are known as Mer, Dauar and Waier.

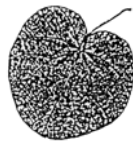
The distinctive approach here contrasts and compares Meriam and European Australian perspectives on land and culture as they presented themselves in spoken word and written document in a long legal battle. The courtroom became the meeting point of two seemingly 'natural', but nevertheless different, conceptions of rights to land and sea. It did so under conditions where the principles, definitions and rules of Anglo-Australian law were used to determine the property rights of the Meriam people. As this book attempts to show, Anglo-Australian law was unable to offer a suitable medium through which to express Meriam people's relationships to land. At the root of this 'badness of fit' lie Meriam interrelationships with land and sea which can not be compared with the idea of land as an economic item tradeable on the commodity market.

The judiciary were aware of the possible incompatibility of the rules of two parallel laws, and proceedings were set in train for a hearing of factual evidence from many Meriam witnesses before Justice Moynihan in the Supreme Court of Queensland. Great effort was made to ensure that all Meriam witnesses could be heard and members of the court made an expedition to Mer and Thursday Island to hear aged or sick Murray Islanders; where necessary the court sat in the open air beside the homes of witnesses. Nevertheless, this long hearing of Meriam claims to traditional title to certain lands, reefs and sea areas and the existence of a system of Meriam land law, was beset by distortion and trivialisation. The overall effect of this was often to diminish Meriam meanings and certain matters of profound meaning to the Meriam were bypassed. Even as the case moved into its tenth year, the High Court faced the question unresolved by the findings of this long inquiry into the facts concerning Meriam interests in land: what is the nature of those rights to land?

Relationships carrying the full weight of the cultural ensemble of the Meriam — the realm of their 'natural inheritance' — were those most often lost

on the court. 'I am born into the ownership of this land', said plaintiff Reverend Dave Passi. 'It is against our traditional law that we sell the land . . . it is trespassing against Malo's [our traditional god's] law.' Reverend Passi was speaking of a sacred endowment which attaches him to land through an indissoluble interrelationship which English speakers call inalienable; it knots together the spiritual and the material relationship between himself and the land and between himself and the generations who came 'first' with those who come 'after'.

The Meriam witnesses varied in age, in knowledge and in what they were asked about in court. The custodians of Meriam cultural tradition gave a sense of their fidelity to certain cultural principles which they themselves feel bound to follow and which they see as a guide to their children. What they see as the Meriam 'cultural way' has an underlying continuity with their pre-colonial past; it is a contemporary expression of a resilient and dynamic culture subjected to enforced change. Most witnesses identified the set of principles they follow as Malo's Law, an indigenous law which combines the religious and the secular. At its centre is what one Meriam leader called the 'Malo Law story', a hero myth which joined together the eight totemic clans of the Meriam, establishing a sacred centre on the eastern side of Mer and a hereditary 'priesthood'.



This book does not attempt to give cut-and-dried solutions to the dilemmas created by differences in cross-cultural meaning systems, but to explore these differences through a court drama. It seeks to clarify and correct misunderstandings within this cultural realm: some of the facts I present were not put to the court; some were understood incompletely by European Australian expert witnesses; others are corrections and reinterpretations of the conventional wisdom about the Meriam people, some of which go back to the work of A C Haddon and the anthropological expedition from Cambridge University to the Torres Strait in 1898. These include the belief that totems disappeared with the arrival of the Meriam gods Malo-Bomai, and in turn, that the beliefs and meanings associated with the latter and their laws were extinguished by Christianity. The cultural reality of the Meriam given expression in court is by no means agreed upon by its contemporary interpreters.

Between 1978 and 1984, I had completed the first stage of work focused on the interrelationship of processes of cultural continuity and change

in the Torres Strait Islands with special reference to the Meriam. That study took place within a context of a renascent culture, when the seeds of a renewal, barely visible in 1978, were sending up lively shoots in the 1980s. My conclusions, published in *Stars of Tagai: The Torres Strait Islanders* in 1993, owe a major debt to previous work, especially Haddon's six-volume *Reports of the Cambridge Expedition to Torres Straits* (1904–35). At the same time, it makes an explicit break with the widely accepted image of fading and fragmenting cultures in the Torres Strait Islands. It was the lively image of themselves, which I had observed, that the Meriam who appeared as witnesses projected forcefully, often eloquently in court. In placing these facts within the context of the reshaping of thought about Australian national identity in the post-*terra nullius* era, I attempt to show that the prospects for a re-formed Australia carry a debt to the *positive* side of some basic principles of Meriam society being upheld by most Murray Islanders. Paradoxically it is those principles, often lost in court and in real danger of being lost to Meriam culture, which strike a chord with many people in the wider Australian culture.

I am not alone in examining a land case in Australia from the standpoint of contrasting cultural perspectives. In a major study of the case brought by Yolgnu Aboriginal clans of Yirrkala on the Gove Peninsula (*Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* [1971]), Nancy Williams draws quite different conclusions to those of Justice Blackburn who heard the case in the Supreme Court of the Northern Territory. In her book, *The Yolgnu and Their Land: A System of Land Tenure and the Fight for its Recognition*, published in 1986, she concludes that the Yolgnu people's interests in land are proprietary and that their claim to continuous occupancy of certain lands was correct. Her experience of courtroom misunderstandings and her historical study of European concepts of property are distilled in this seminal study, which has a link with this book.

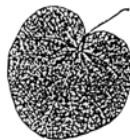
Nevertheless, *No Ordinary Judgment* has a rather different overall focus. Unlike that brought by the Yolgnu, the Meriam people's case secured court recognition of native title. This has led to public debate on questions fundamental to cross-cultural relations, to economic and social development and to the question of cultural identity in Australia. It has led also to national and some state legislation on native title.



This book is intended for any woman or man able to put aside the time to explore and contemplate the series of dramatic events which have begun to change the face of Australia. It has five parts. The first four focus on the beginnings, the progress and the outcomes of the case itself over a period of some 11 years; the fifth, on the period of recognition of native title in Australia, explores the implications of the High Court judgment for the reshaping of Australian national identity, and its expression in changes in public consciousness over the period since June 1992. Because of the cross-cultural nature of this exploration, the book does not follow a strictly chronological form and I suggest that you use the chronologies provided at the front of the book for some of the details.

The title of Part One, 'Interests of a Kind Unknown to English Law', is taken from the words of Lord Denning in the case of *Adeyinka Oyekan v Musendiku Adele* (1957) (Privy Council), and cited by three judges of the High Court in their final decision in the *Murray Island Land* case. The 'one guiding principle' followed by the Privy Council in that case was full respect for the rights of property of the inhabitants 'even if those interests are of a kind unknown to English law'. The Murray Islanders' case provided an opportunity for indigenous rights in land to become at least partly known in Australia. This theme carries through the whole book, which documents the way the proceedings both clarified and also obscured the nature of Meriam interests in land, and of native or traditional title in general.

Parts Two and Three explore the court contest over contrasting customs and laws, the validity of the spoken versus the written word in bequeathing land, the continuity of principles and changes in outward forms in the process of colonisation, and the identification of meeting points and common ground between two moral discourses. Part Four returns to the question of the limitation in European Australians' perceptions of a second 'category' of law — that is, indigenous law — and the related issue of the significance of the historic 3 June 1992 judgment in reclaiming the integrity of the common law.



Since 1978 I have developed close relations with members of the Meriam community both at the Mer Islands and among émigré Meriam people on the mainland. 'It's better if we make you our sister; then all the family will know what to call you', Etta Passi said when I arrived at Mer Island. In many other parts of the Torres Strait Islands and at Injinoo Aboriginal community at Cape York,

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I am shown the respect due to a senior community person, being addressed often as Aunty. The possibilities of a case were considered in association with Flo Kennedy, Eddie Koiki Mabo, Dave Passi, Sam Passi and other Meriam. I took part in the beginnings of the case, being a participant in an informal meeting of six people in August 1981 when plans for the case were made. My own contribution concerned the special difficulty which a court might find in sustaining the arguments advanced by Mr Justice Blackburn in 1971 for rejecting the Yolgnu plaintiffs' claims in relation to claims which might be brought by Meriam landowners. An eminent constitutional lawyer's estimate, obtained in Melbourne early in 1981, confirmed this view.

I assisted with the early stages of research for the case, especially at the Murray Islands, where I perused local court documents, collected oral evidence and participated in community meetings on land in 1982 and 1986 at Mer and in Townsville. I attended nine days of the first hearing of evidence in the Supreme Court of Queensland, and I prepared written evidence for the plaintiffs' (the Murray Islanders) legal counsel. In June 1992, my successful application to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) for a full-time study grant to carry out the work upon which this book is based was accompanied by written support from the chairman of the Mer Islands Community Council; in 1993 I was asked by the council to assist in documenting Meriam customary marine tenure.

I wish to thank AIATSIS for its financial support for this project over the period from 1 May 1993 to 30 April 1994. Personal thanks are extended to Jacquie Lambert for her personal interest and encouragement. I am most grateful for the many helpful suggestions of the referee and those of the director and senior editor of Aboriginal Studies Press; the staff offered their usual care, consideration and technical expertise. I was also assisted by a grant from the Australian Research Council for travel and other expenses associated with two visits to Townsville, Cairns, the Mer Islands, Thursday Island, Cape York Peninsula and Darwin, in February, May–June and July 1993. Travel funds from the Research Committee, School of Social Sciences, La Trobe University, assisted me in these research visits; I would like to thank this committee especially for its support in earlier years, which allowed me to carry out research upon which this project builds.

I thank Trevor Graham, director of the documentary film *Land Bilong Islanders*, Yarra Bank Films Pty Ltd, for photographs which appear in this book. I thank cartoonist Bruce Petty for the use of his cartoons on the challenge to the doctrine of *terra nullius*, national reconciliation and on hearsay

and traditional evidence. Russel Baader and Lindsay Howe at La Trobe University prepared the plates for the book with skill and patience. My Chronology II carries a debt to Kathy Whimp's chronology published in *Arena Magazine* 9, 1994, 17. Map 3, drawn by Andrew Passi for the Mer Islands Council in 1993, is re-published here from Mulrennan and Hanssen 1994, with the permission of the publisher. I thank Barbara Hocking for her gift of many of the pleadings; Bryan Keon-Cohen for lending me the transcripts of the remitter court hearings; Greg McIntyre for his advice during the writing of this book. This study impels me to commend the lawyers who fought the case and to note their determination, persistence, self-sacrifice, and at times, brilliant insights.

Beth Robertson of the School of Sociology and Anthropology, La Trobe University, not only typed most of the drafts of the book; she took a close personal interest in it; I thank her for her patience, her competence and her goodness of heart. Noelle Vallance encouraged and helped me with her professional knowledge and good offices. Elaine Young, Therese Lennox, Merle Parker assisted with word processing. Judy Carr gave her time and indispensable office skills. I thank the School of Sociology and Anthropology as a whole for its support, effort and imagination. I would like to thank the Australian National University North Australian Research Unit, in Darwin, for giving me material support during my stay there as a visiting research fellow in July 1993; special thanks go to librarians Sally Roberts and Colleen Pyne, who provided me with essential research documents promptly and miraculously. At different stages Jenny Sharp, Richard Hinkson and Geoff Sharp helped with newspaper items from May 1992 until April 1994. Parts of the book were written in the serene atmosphere of the Pajinka Wilderness Lodge; I thank all the staff there for their kindness and concern.

My special debt is to the Meriam people of the Mer Islands and Townsville communities. I thank the Mer Islands Community Council and senior Meriam people at Mer, Thursday Island and Townsville, for their generous support; Meriam family members, Dolly Nasslander, Reverend Dave Passi and Etta Passi, gave me emotional and intellectual support; and members of the community who entrusted me with this task sustained me by giving voice to that trust at unexpected times and places. I hope my presentation justifies their patience, their interest and their confidence. I thank Flo Kennedy who first made a public call for this case; Nugget Coombs and Judith Wright for their strength throughout the years it was being fought; Fiona Mackie for her intellectual and enduring moral support.

My gratitude goes again to Geoff whose inspiration, judgment and patient concern with the central moral issues of the case and this book have helped me to probe some of the deeper issues. For many years the group of people associated with *Arena* have been concerned with cultural identity and the rights of the indigenous peoples of Australia and its neighbourhood. *Arena* has provided the main public forum for articles I have written as the case proceeded and came to a climax.

Nonie Sharp