THE OOMBULGURRI EVICTION: PRACTICALITY OR ILLEGALITY?

by Tammy Solonec and Cassandra Seery

INTRODUCTION

In February 2011, the Western Australian government ('the WA government') announced its intention to close the remote Indigenous community of Oombulgurri, claiming that the community was no longer 'viable' following findings of significant social issues within it. This article explores the history of Oombulgurri, the eviction of its residents, Amnesty International's involvement and the legal issues arising from the eviction at domestic and international law.

BACKGROUND

Oombulgurri is a remote Indigenous community located on the banks of the Forrest River, 45 kilometres northwest of Wyndham in the Kimberley region of Western Australia ('WA').[1] Indigenous occupation of the area (also referred to as Forrest River) pre-dates European settlement[2] and is known for its resistance to settlement and assimilation.[3]

In 1913 an Anglican mission was established at Forrest River along with government initiatives to encourage residency in the area.[4] The lack of understanding and respect for the Indigenous peoples created tensions in the community which ultimately led to the Forrest River Massacre, a senseless attack on the community by a police party in 1926.[5] The Royal Commission that was held into the incident[6] is argued to have been a political tactic to ensure re-election,[7] and met with numerous complications. Ultimately it failed to provide answers or ensure accountability of the guilty parties. While the commission recorded 11 Indigenous deaths,[8] some journalists and academic historians believe that hundreds were slaughtered in the massacre.[9]

The occupation of Forrest River continued until the closure of the Anglican mission in 1968. In October 1973, with the assistance of the federal government, a group of about 30 Indigenous people moved from Wyndham to establish the self-managed community of Oombulgurri on the site of the closed Forrest River mission.[10] It was hoped that the new beginning would be a chance to build their future as an 'autonomous community living on tribal land'.[11]

In less than 40 years, however, Oombulgurri was in crisis, beset with severe social problems[12] which would trigger government intervention and, ultimately, the demolition of the community.

THE OOMBULGURRI EVICTION

Following the findings of the sexual assault taskforce Operation Sheepshank in 2007 and a coronial inquest in 2008 into four suicides that occurred in the community,[13] Oombulgurri was designated a priority community by the newly elected Barnett Government in 2008.[14] A total alcohol ban was introduced in November 2008 in an attempt to address the chronic alcohol use identified in the inquest,[15] however no services were provided to assist residents with alcoholism and as a result many left.

It was argued that no practical steps were taken by the WA government to ensure the longevity of Oombulgurri[16] despite an undertaking given in 2009 to address the causal effects of disadvantage and dysfunction and build social and economic sustainability.[17] By 2011 it became clear that the WA government no longer intended to support the community. It was not included in the women's refuge and suicide programs in the estimates hearings,[18] and initiatives such as funding for interpreter services and a report on stolen wages by the WA Stolen Wages Taskforce[19] which aimed to 'review the practices surrounding the control of Aboriginal people's monies and to provide advice to Government on future policy options'[20] were disregarded.

News of the intended closure soon reached the Oombulgurri community, without meaningful consultation with the residents and traditional owners.[21] Offers by independent bodies to assist in restoring the community went unanswered.[22] The WA government then began to close community services: Centrelink payments were no longer processed, leaving residents with no financial income; and the community store, health services and the school were closed, leaving those with children and health conditions no option but to leave.[23] In August 2011 the police station was closed[24] and shortly after essential services including power and water were terminated, with WA government officers removing

the fuses in each home to cut power.[25] Thirty residents stayed throughout the closure, with about 10 residents staying right until the end.

The formal announcement of the closure of Oombulgurri was made by the WA Minister for Indigenous Affairs, Peter Collier, in the Legislative Council on 29 September 2011.[26] The WA government cited the coronial inquest's questioning of the sustainability of the community in conjunction with the lack of residents as the reason for its unviability.[27] The claim that the community simply decided to leave has been deeply criticised, with Oombulgurri residents claiming they were systematically and forcibly evicted from their community.[28] Amnesty International concluded, based on a research visit, that the final residents were forced and coerced, against their will, to leave their homelands.[29]

AMNESTY INTERNATIONAL SITE VISIT AND CAMPAIGN

A team from Amnesty International visited Wyndham and Oombulgurri from 5–8 September 2014. As well as interviewing affected residents and community members, the team attended the Oombulgurri site with the assistance of the Ballangarra Aboriginal Corporation, the prescribed body corporate for the region.

Upon inspection, the team found many of the houses and much of infrastructure intended to be demolished to be in excellent condition, despite Minister Collier saying that the community was being demolished to prevent further vandalism.[30] Furthermore, there was evidence clearly consistent with a rushed departure, including children's named artwork still on the walls of the school and personal belongings including furniture, white goods, clothes, toys and even photographs left behind in houses.[31]

On 7 September 2014 Amnesty International held a community meeting in Wyndham, which was attended by approximately 20 people. A questionnaire was developed by Amnesty International to establish whether or not a forced eviction had occurred and a series of interviews were conducted. Following the site visit, a decision was made by Amnesty International to take urgent action in an attempt to stop the demolition and to raise awareness of the issues faced by the Oombulgurri community. On 11 September 2014, the National Director of Amnesty International Australia, Claire Mallinson, wrote to the WA government outlining concerns and asking it to immediately cease the demolition. Online action was launched a week later. By November 2014, over 20 000 people had participated in the action, urging ministers to immediately cease the demolition of buildings at Oombulgurri and to enter into a genuine consultation process that would lead to the return of the community to their homelands with the provision of adequate housing, education, health and other essential services and infrastructure.

The campaign was promoted on Amnesty International Australia's Facebook page[32] and a press release was issued in which Amnesty International's Indigenous Rights Manager, Tammy Solonec, stated:

> Overwhelmingly, the consistent message from affected residents we met was that they did not give their free, prior and informed consent for the eviction from their homes and closure of their community, and that they wish to return to their homes on their traditional lands.[33]

Briefings were also issued to parliamentarians and Indigenous leaders, calling for immediate action to stop the demolition, leading to a motion by Greens WA Senator Rachel Siewart in the Senate condemning the action.[34]

The Oombulgurri residents were displaced from their homeland in a way which disempowered the community, offered little resettlement and no compensation.

Despite strong support for the campaign, the demolition of Oombulgurri occurred between September and December 2014. The cost of the demolition, awarded to McMahon Constructions, was approximately $680,000 and it is estimated that the buildings and infrastructure destroyed were worth at least $30 million. This included dozens of houses, a school, a police station, a clinic, a shop, an office and power and water infrastructure. Rather than the refuse being taken from the site, items that could not be on-sold were buried in a hole, contrary to the wishes of the traditional owners.

A meeting between Amnesty International and a representative of the WA Department of Aboriginal Affairs did not occur until 3 December 2014, at which time the demolition was almost complete. It was disclosed that the WA government had no integration strategy for the residents or children following their eviction from Oombulgurri.

While most residents moved to Wyndham, the eviction had ripple effects across the Kimberley, contributing to overcrowding already experienced in the region.[35] The WA government only provided housing to the last 30 residents who had remained at Oombulgurri until the closure.

Without an integration strategy in place, residents were exposed to further harm. Community members told Amnesty International

that most of the displaced children no longer attended school, that alcoholism continued to be a chronic issue and that police incidents involving teenagers had increased.

Residents are permitted to return to Oombulgurri only as a 'self-sustaining' community, as state or federal assistance would not be offered, but with no barge owned by community members to access the seasonally isolated location, few have been able to go back. As yet no decision has been made regarding the future of the site.

LEGAL IMPLICATIONS UNDER DOMESTIC LAW

Housing management agreements, established under Part VIIA of the *Housing Act 1980* (WA) ('*Housing Act*'), are designed to enable the WA government 'to control and manage, on behalf of [an] Aboriginal entity, the letting and leasing of housing on the Aboriginal land.'[36] These agreements do not create an interest in land and only serve to facilitate protection and maintenance of housing assets. Oombulgurri had a housing management agreement in place that was entered into on 3 June 2011, which included 35 houses.[37]

Under the *Housing Act*, the *Residential Tenancies Act 1987* (WA) ('*RTA*') applies in relation to a lease unless explicitly stated in the *Housing Act* or the housing management agreement.[38]

While the demolition of Oombulgurri was approved by the Aboriginal Lands Trust, which is the relevant Aboriginal entity under the *Housing Act*, there are still questions as to the legality of the eviction of residents with respect to the *RTA*.

Under s 80 of the *RTA*:

> No person shall *except under an order of a competent court* enter premises or any part of premises of which a person has possession as a tenant under a residential tenancy agreement or a former tenant holding over after termination of a residential tenancy agreement for the purpose of recovering possession of the premises or part of the premises, whether entry is effected peaceably or otherwise (emphasis added).

In the absence of a court order and unless there is an agreement that renders the *RTA* inoperative—something which has yet to be produced by the authorities—it is possible that the WA government may have committed a serious breach of s 80.

LEGAL IMPLICATIONS UNDER INTERNATIONAL LAW

The WA government's actions are in conflict with a number of Australia's international human rights law obligations, including some of those under the *International Covenant on Economic, Social and Cultural Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

'Forced evictions' are unlawful under art 11.1 of the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[39] which has been binding on Australia since it ratified the treaty in 1975.[40] The article codifies the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and the right to the continuous improvement of living conditions.

The Committee on Economic, Social and Cultural Rights has determined that the right to adequate housing includes a protection against forced evictions.[41] The Committee General Comment 7 defines forced eviction under the *ICESCR* as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'[42] The Committee also identifies that Indigenous people 'suffer disproportionately from the practice of forced eviction'[43] and that victims of evictions are often vulnerable to further human rights violations.[44]

Further, under the *ICESCR*, governments have a 'fundamental obligation … to protect and improve houses and neighbourhoods, rather than damage or destroy them.'[45] Even where eviction can be justified, it must be carried out in 'strict compliance' with international human rights law and any measures must be reasonable and proportionate.[46]

The WA government has failed to meet these standards in several ways. First, they failed to take steps to ensure the viability of the community following the creation of the Oombulgurri Action Plan. Second, they failed to engage with independent bodies that offered their services to restore the community. Third, they removed the Oombulgurri people from their land against their will, without any access to legal or other protections. Finally, the government failed to put in place an integration strategy for Oombulgurri residents following the closure in 2011.[47]

Similarly, a breach can be substantiated under art 15 of the *ICESCR*. Article 15.1(a) recognises the right of everyone to 'take part in cultural life.'[48] This includes an obligation upon states parties to take steps to conserve and develop culture.[49] Instead of taking steps to ensure that the Oombulgurri residents were able to take part in cultural life, the actions of the WA government meant that the traditional owners were removed from their homelands without any recourse, severing their

connection to personal and community histories, sacred sites and burial grounds.

The Committee has indicated that it is appropriate for states parties to provide remedies, judicial and otherwise, to rights violations as a means of fulfilling their obligations under the *ICESCR*.[50]

Under arts 2(1) and 2(2) of *ICESCR*, states parties must 'take steps' towards the full realisation of the rights in *ICESCR*, and as a developed nation Australia must meet the core minimum obligations of the treaty including the provision of basic shelter. Unfortunately, there is no individual complaint mechanism within *ICESCR* that people can use where domestic remedies fail, meaning that domestic remedies where the rights within *ICESCR* have been implemented into domestic law are most important in this context. However, domestic implementation of *ICESCR* in Australia has been limited. With no constitutional entrenchment of these rights and no bill of rights, the best remedy for breaches of human rights in Australia is via conciliation by the Australian Human Rights Commission or their state and territory counterparts, and where that fails, judicial review. Unfortunately, however, the jurisdiction of these bodies to investigate alleged breaches does not extend to the rights within *ICESCR*, although there is some scope to argue that the decision to evict the residents was racially discriminatory, breaching the *Racial Discrimination Act 1975* (Cth). This is far from a satisfactory position, and it has been argued that the failure of Australia to provide effective remedies for breaches of *ICSCER* is in itself a breach of arts 2(1) and 2(2) of *ICESCR*.[51]

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Despite initial opposition to the Declaration,[52] the Australian government formally expressed its support in April 2009.[53] The aim of the Declaration is to ensure the rights identified therein 'constitute the minimum standards for the survival, dignity and wellbeing of the indigenous peoples of the world.'[54] Many of the articles of the Declaration are binding on states parties in existing treaties or at customary international law.[55] The WA government has not complied with a number of articles in the Declaration, thereby breaching Australia's international human rights obligations.

Indigenous peoples' right of self-determination[56] and rights to participate in decision-making[57] oblige states 'to consult with indigenous peoples about matters that affect them.'[58] The forced removal of residents is a direct violation of their right to freely pursue their cultural development, which is irrevocably connected to their relationship with the land.

The WA government may also be in breach of art 8 of the Declaration, which states that 'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture' and that 'States shall provide effective mechanisms for prevention of, and redress for … Any action which has the aim or effect of dispossessing them of their lands, territories or resources.'[59] In removing them from their land, the actions of the WA government have led to forced destruction of the Oombulgurri people's culture. The WA government's failure to prevent the dispossession of their land is in direct violation of the Declaration. The WA government may also have breached arts 12 and 31 of the Declaration which state that 'Indigenous peoples have … the right to maintain, protect, and have access in privacy to their religious and cultural sites.'[60] The Oombulgurri community are no longer able to maintain, protect or have access to their religious and cultural sites following the closure of Oombulgurri in 2011. The Oombulgurri residents were displaced from their homeland in a way that disempowered the community, offered little resettlement and no compensation. This is a direct violation of the Declaration.

Many are concerned that Oombulgurri is not simply an isolated incident, but that it is the beginning of a justification for the mass displacement of Indigenous peoples.

CONCLUSION

In September 2014 the Australian government announced 'historic agreements' between the federal and state governments that would see the transfer of responsibility for essential and municipal services in remote Indigenous communities in WA to the WA government.[61] In November 2014, the WA government announced that it may have to close a further 150 remote Indigenous communities, claiming that they, like Oombulgurri, lacked 'viability'.[62]

Many are concerned that Oombulgurri is not simply an isolated incident in a remote part of Australia, but that rather it is the beginning of a justification for the mass displacement of Indigenous peoples. The closure of Oombulgurri was a unilateral decision that resulted in a forced eviction of residents, and has been undertaken with no meaningful attempts to rebuild the community. Such action is possibly in violation of domestic and is clearly in violation of international law under which Australia has obligations. The closure raises serious questions about Australia's commitment to Indigenous peoples and human rights more generally. Steps, including appropriate monitoring of the reform

process underway by the federal government and civil society, must be taken to ensure compliance with international human rights law and to ensure that these horrific events are not repeated.

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1 Julian Yates, 'Federalism and disaster mitigation in remote Aboriginal communities in Western Australia' (1997) 12 *Australian Journal of Emergency Management* 25, 28.

2 Ibid.

3 Geoffrey Bolton, 'Reflections on Oombulgurri' (2010) 26 *Studies in Western Australian History* 176, 177.

4 Ibid 178–86.

5 Ibid 180.

6 Western Australia, Royal Commission of Inquiry into Alleged Killing and Burning of Bodies of Aborigines in East Kimberley, and into Police Methods when Effecting Arrests, *Report* (1927).

7 Bolton, above n 3, 186.

8 Ibid.

9 Ibid 176, 185–7.

10 Yates, above n 1, 28; D Dowsett, 'Schooling at Oombulgurri as part of the development of a community' (1974) 2 *Aboriginal Child at School* 16.

11 Dowsett, above n 10, 16.

12 In 2007, a sexual assault taskforce, 'Operation Sheepshank', commenced, following a compilation of a report on an alleged paedophile ring in the nearby Kalumbru community. It led to the arrest of four people from Oombulgurri; see also the coronial inquest ordered following four suicides in Oombulgurri in Alastair Hope, 'Annual Report 2008–09' (Office of the State Coroner, 30 June 2009) 41 <http://www.coronerscourt.wa.gov.au/_files/ar2008-09.pdf>.

13 Office of the State Corner (Western Australia), *Annual Report 2008–09*, 30 June 2009.

14 WA Department of Indigenous Affairs, *Annual Report 2009–10*, 16 September 2010.

15 Pursuant to the *Liquor Control Act 1988* (WA) s 175.

16 Western Australia, *Parliamentary Debates*, Legislative Council, 18 August 2011, 6137 (Hon Sally Talbot).

17 Joint Assessment for the East Kimberley Development Package, 2009 Summary Report, Nation Building Economic Stimulus Plan <http://regional.gov.au/regional/ona/files/JointAssessment_EastKimberleyDevelopmentPackage.pdf>.

18 Ibid.

19 Western Australia Stolen Wages Taskforce, 'Reconciling The Past Government control of Aboriginal monies in Western Australia, 1905-1972' (Report, WA Department of Indigenous Affairs, 2008) <http://www.daa.wa.gov.au/Documents/Stolen%20Wages/Report_of_the_Stolen_Wages_Taskforce_2008.pdf>.

20 Ibid.

21 This point is disputed by the Barnett Government. See Western Australia, *Parliamentary Debates*, Legislative Council, 29 September 2011, 7952c-7953a (Peter Collier, Minister for Indigenous Affairs).

22 ABC News, 'Oombulgurri residents unhappy at looming closure', 8 August 2011, *ABC* (online), 8 August 2011 <http://www.abc.net.au/news/2011-08-08/oombulgurri-closing-down/2828966>.

23 Tammy Solonec, 'The trauma of Oombulgurri's demolition will be repeated across Western Australia' *The Guardian* (online), 27 November 2014 <http://www.theguardian.com/commentisfree/2014/nov/27/the-trauma-of-oombulgurris-demolition-will-be-repeated-across-western-australia>.

24 Ibid.

25 Western Australia, above n 16 6138 (Hon Sally Talbot).

26 Western Australia, *Parliamentary Debates*, Legislative Council, 29 September 2011, 7952 (Peter Collier, Minister for Indigenous Affairs).

27 Western Australia, *Parliamentary Debates*, Legislative Council, 9 August 2011, 5247 (Peter Collier, Minister for Indigenous Affairs).

28 Western Australia, *Parliamentary Debates*, Legislative Council, 29 June 2011, 5088 (Hon Sally Talbot); Amnesty International Australia, 'WA Government must stop Oombulgurri demolitions after forcibly evicting community members' (Media Release, 23 September 2014) < http://www.amnesty.org.au/news/comments/35607/>.

29 Solonec, above n 23.

30 ABC News, 'Demolition starts on abandoned Oombulgurri,' *ABC* (online), 1 October 2014 <http://www.abc.net.au/news/2014-10-01/demolition-starts-on-abandoned-oombulgurri/5782228>.

31 ABC Television, 'Remote Hope', *Four Corners*, 12 May 2015 <http://www.abc.net.au/4corners/stories/2015/05/11/4231553.htm>.

32 See Amnesty International Australia, 'Stop the Demolition of this Homelands Community', released 16 September 2014 <https://www.facebook.com/AmnestyOz/photos/a.10150341512485632.581517.49453745631/10154581723540632/?type=1>.

33 Amnesty International Australia, above n 23.

34 Western Australia, *Parliamentary Debates*, Legislative Council, 2 October 2014, 1589 (Rachel Siewart).

35 Kimberley Development Commission, *Census 2011: Assessing Aboriginal wellbeing in the Kimberley* (Draft paper for public comment, September 2013) <http://kdc.wa.gov.au/wp-content/uploads/2014/09/3-Aboriginal-Wellbeing-A-Census-Analysis.pdf>.

36 *Housing Act 1980* (WA) s 62B(2).

37 See Western Australian Government's Department of Housing HMA map, 3 June 2011 <http://www.dhw.wa.gov.au/housingoptions/rentaloptions/remoteaboriginalhousing/Documents/HM%20Map%20with%20Community%20%20House.pdf>; Community Housing Limited, 'CHL secures important Indigenous housing project in The East Kimberley' <http://chl.org.au/News/news-item/CHL-SECURES-IMPORTANT-INDIGENOUS-HOUSING-PROJECT-IN-THE-EAST-KIMBERLEY/>.

38 *Housing Act 1980* (WA) s 62G(1).

39 *International Convention on Economic, Cultural and Social Rights* ('*ICESCR*'), opened for signature on 16 December 1966, 993 UNTS 3 (entered into force 23 March 1976).

40 Australia signed the treaty on 18 December 1972 and ratified the treaty on 10 December 1975.

41 UN Committee on Economic, Social and Cultural Rights ('CESCR'), General Comment No. 7: The right to adequate housing (art 11.1): forced evictions, 20 May 1997, E/1998/22, para 1.

42 Ibid para 3.

43 Ibid para 10.

44 Ibid para 16.

45 Ibid para 2.

46 Ibid para 15.

47 Western Australia, *Parliamentary Debates*, Legislative Council, 27 June 2013, 2396 (Josie Farrer).

48 *ICESCR,* 993 UNTS 3, art 15. See also art 27 of the *International Covenant on Civil and Political Rights*, 999 UNTS 171, and CESCR, General Comment No. 21: The right of everyone to take part in cultural life (art 15, para 1a of the *ICESCR*), 21 December 2009, E/C.12/GC/21.

49 *ICESCR,* 993 UNTS 3, art 15.2.

50 CESCR, General Comment No. 3: The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), para 4.

51 Dianne Otto and David Wiseman, 'In search of "effective remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7(1) *AJHR* 5.

52 *United Nations Declaration on the Rights of Indigenous Peoples*, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

53 Jenny Macklin, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (2009) 7(11) *Indigenous Law Bulletin* 6.

54 *United Nations Declaration on the Rights of Indigenous Peoples*, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991), art 43

55 Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 11(3) *AILR* 55.

56 *United Nations Declaration on the Rights of Indigenous Peoples*, 1650 UNTS 383, art 3.

57 Ibid, arts 5 and 18. This right stems from existing rights such as art 21(1) of the *Universal Declaration of Human Rights (1948)*.

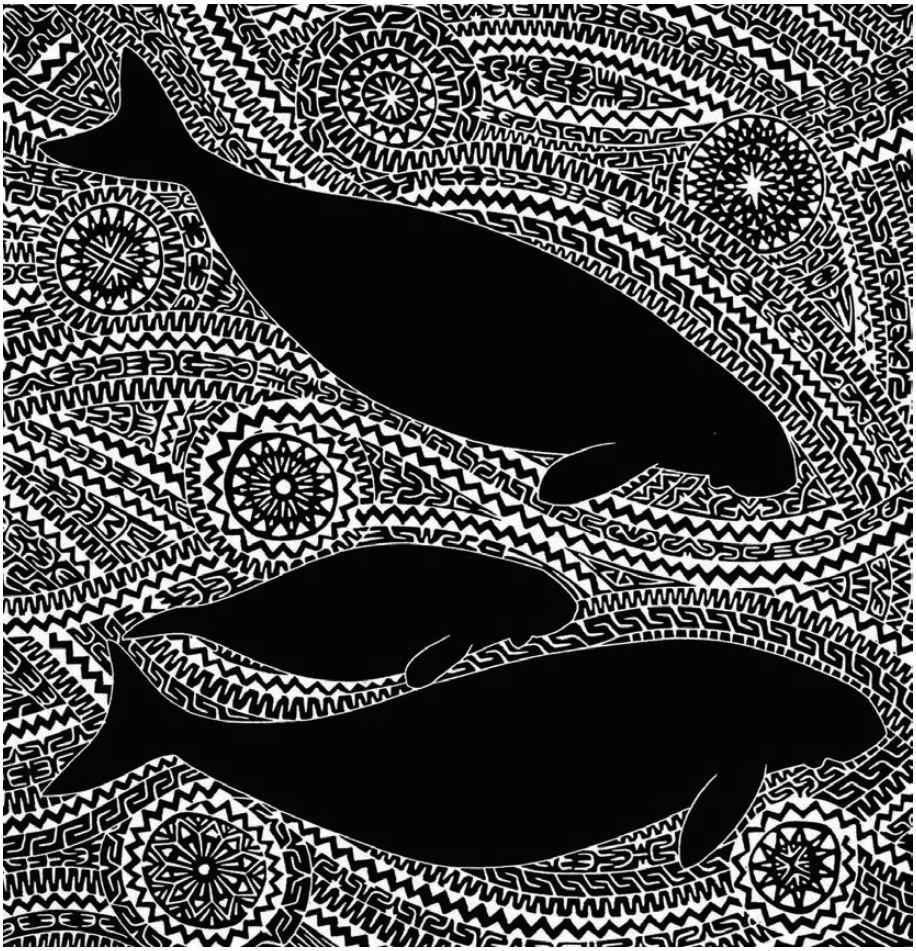
58 Special Rapporteur Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, A/HRC/12/34 (July 15, 2009), para 42 and 62.

59 *United Nations Declaration on the Rights of Indigenous Peoples*, 1650 UNTS 383, art 12.

60 Ibid. Article 31 states that: 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions … [and] oral traditions.'

61 Department of Prime Minister and Cabinet, 'Minister Scullion: Historic agreements reached for states to deliver municipal and essential services' (Media Release, 24 September 2014) <http://www.indigenous.gov.au/news-and-media/announcements/minister-scullion-historic-agreements-reached-states-deliver-municipal>.

62 ABC Television, '150 WA communities may close', *Lateline*, 20 November 2014 (Colin Barnett) <http://www.abc.net.au /lateline/content/2014/s4133138.htm>.



Omarskerr, 2013
Daniel O'Shane
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500mm x 500mm

Families of dugong are often seen off the shore on Cape York. Sometimes when fishing in the boat they stop beside us then suddenly disappear into the murky saltwater.