

CHANGING TACK: AKIBA AND THE WAY FORWARD FOR INDIGENOUS GOVERNANCE OF SEA COUNTRY

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‘The Torres Strait Regional Authority (TSRA) Acting Chairman, Mr Aven Noah ... welcomed the [Akiba] decision handed down after ten years of legal proceedings as a significant victory for the original claimants, the people of the Torres Strait and the future application of native title Australia wide.’¹

‘The recognition in Commonwealth law that our people have native title rights over the sea, as determined in the *Blue Mud Bay case* is important but disappointing.’²

The two quotes above indicate the two perspectives informing this article. On the one hand, native title presents exciting opportunities in the coastal marine environment. The recent decision of the High Court in *Akiba on behalf of the Torres Strait Regional Sea Claims Group v Commonwealth of Australia* [2013] HCA 33 (‘Akiba’) related to the largest native title determination to the sea in Australia’s history.³ It was also the first time that commercial fishing rights have been recognised in a litigated native title determination.⁴ On the other hand, the doctrine of native title is known for its limitations and complexities and, in relation to the marine environment in particular, it can only be non-exclusive due to the rights of the public to fish and navigate and the international right of passage.⁵ As expressed above, in the context of the earlier native title decisions relating to Blue Mud Bay in the Northern Territory (*Gumana v Northern Territory* (2005) 141 FCR 457 (‘Gumana’) and *Gumana v Northern Territory (No 2)* [2005] FCA 1425), native title has been ‘important but disappointing’.

A different paradigm is needed to consider Indigenous governance of sea country.⁶ We need to ‘change tack’ and promote a discussion that straddles Indigenous rights (including native title) and governance and environmental

law and governance. In this space, native title rights are complementary but are not the focus. Rather, they are one of a number of blocks to build upon. Most importantly, the approach needs to be flexible and allow for the diverse aspirations of Indigenous communities to be at the fore.⁷ In saying this, it is vital to acknowledge that it is superficial to consider sea country separately from country, given that they are intimately interconnected.⁸ However, the differences in the way that Eurocentric laws have treated the marine environment necessitate this separation:

The lack of formal title on sea makes things complicated, and while people might understand that Yolngu have sea country interests, it is largely seen as a ‘common’ with no group having primacy over others.⁹

This new paradigm should, in the short term, work towards increasing involvement of Indigenous communities in management of sea country while, in the long term, work to highlight the superficiality of the country/sea country distinction and move forward to consider ways of integrating land and sea management. This ‘two-step’ approach can be seen already in Australia as communities who often already have successful terrestrial management models, first work towards involvement in sea country and then towards integrated management of both areas.¹⁰

Conversations about Indigenous management of sea country are taking place around Australia in many contexts.¹¹ They are taking place in an innovative inter-disciplinary space with contributors from a wide variety of Indigenous communities, as well as academics, government and representatives from other sectors such as the commercial fishing industry and environmental groups.¹² Yet, there is a distinct lack of legal commentary in this broader conversation.¹³ This is not to

say that 'law' has all the answers; far from it. Rather, it is to suggest that law can facilitate as well as regulate in this area. Further, and more importantly, it is also to suggest that there is crucial work to be done in exploring the relationship between legal mechanisms and other approaches to governance of sea country and the relationship between Indigenous rights and environmental regulation. It is an exciting time as we are seeing an explosion of different mechanisms to promote Indigenous involvement in sea country, but it is vital at this stage to unpack all these mechanisms to ensure we know how they fit together and to understand what vulnerabilities there may be if one or more are amended or even removed. This is particularly true at this point in time when changes in government can lead to shifts in policy direction.

This article seeks to suggest a new direction for the conversation about Indigenous governance of sea country from a legal perspective. It draws together diverse issues such as 'governance and law'; 'regulation and rights'; international law relating to Indigenous rights over resources; and the impact of 'new environmental governance'. It also considers more well-trodden areas, from a legal doctrinal perspective, such as native title and 'land' rights legislation. This mixture of issues, which cross legal and non-legal lines, presents challenges to legal scholars, lawyers and law students. However, moving beyond doctrinal law is a crucial part of engaging 'law' in this conversation. This particular article does not intend to interrogate the relationship between law, governance, rights and regulation on a theoretical level. Rather, it seeks to provide an overview of these multiple layers, encourage consciousness of their integration and foreshadow that sea country governance in Australia is a key ground for further research (particularly empirical research) into this broader emerging area. The aim of the article is to explore 'the way forward' in terms of how legal researchers might analyse and think about sea country governance.

The article is arranged in three parts. First, an introduction to 'governance' and, more specifically, Indigenous governance within the environmental context is provided. Second, an overview is given of what rights have been recognised in sea country pursuant to 'law' (native title and 'land' rights legislation), but also what rights have not been recognised and how both categories are useful going forward. Part II will have a particular focus on the *Akiba* decision given it is the most recent sea country determination and has recognised the largest area and variety of rights.¹⁴ Finally, Part III considers an example of a broader marine governance

structure that is already operating in Australia: the Dhimurru Sea Country Indigenous Protected Area. This is located in north-east Arnhem Land in the Northern Territory and was the first Sea Country Indigenous Protected Area to be proclaimed in Australia. We will consider this case study as a practical example of the relationship between legal and non-legal mechanisms.

I Indigenous Governance within the Environmental Governance Context

Broadly, governance means 'influencing the flow of events'.¹⁵ The concept of governance can be seen in many areas such as corporate governance and international (or global) governance. Governance is different to 'government', which relates to a 'political authority/state auspice', governance 'transcends the state to include civil society organisations and the private sector'.¹⁶ The term governance is 'vague and amorphous' and the relationship between law and governance is complex, interconnected and subject to varied interpretations.¹⁷ Law can be a tool of governance and so can non-legal mechanisms such as non-legally binding agreements or community norms. In this way, governance can be seen as an overarching concept incorporating both legal and non-legal mechanisms. New approaches to governance, which we will briefly explore in this Part, encourage innovations such as increased participation by a diverse range of groups in decision-making processes. These new approaches often 'co-exist' with legal mechanisms and we are now seeing emerging scholarship on the 'varieties of coexistence'.¹⁸

For the purposes of this article, attention is drawn to the distinction between the legal rights that have been formally recognised to sea country (such as through native title and 'land' rights legislation) and other mechanisms that have evolved to make decisions about sea country management as part of the movement towards participatory governance. In this way, similarly to the work of Professors David Trubek and Louise Trubek, this article uses 'stylised concepts' of law and broader governance mechanisms.¹⁹ It contrasts 'top-down control' through use of statutes and litigated decisions ('law'), with 'a wide range of alternative methods to solve problems and affect behaviour' (broader mechanisms of 'governance').²⁰ Two quotes, both from the Dhimurru Indigenous Protected Area Sea Country Plan, demonstrate this division in the sea country context:

While we hope cases such as the *Blue Mud Bay* sea rights case will ultimately strengthen our legal tenure over the shoreline, river beds, reefs and parts of the open ocean, we are seeking to strengthen our surveillance and enforcement capacity to address the disrespectful actions of a few.²¹

...

As Yolŋu people, we will continue to struggle to align our ownership and control of sea country with tenure similar to the *Aboriginal Land Rights (Northern Territory) Act 1976*. While Dhimurru [the relevant Aboriginal Corporation] and this plan is not the vehicle for that struggle, Dhimurru hopes to play a role in developing relationships and access agreements with recreational fishers that respect Yolŋu rights in sea country and help develop a sustainable recreational angling industry in the region.²²

Both of these quotes demonstrate the importance of law (the *Blue Mud Bay* case and Aboriginal land rights legislation) but also the broader governance mechanisms that, in these examples, may facilitate opportunities beyond law. For example, strengthening of surveillance and enforcement capacity and developing relationships with recreational fishers.

The relationship between law and governance about sea country is also influenced by the prominence of 'rights' in this context. Indigenous rights can be formally recognised through Australian law and can also be seen as emerging customary law in the international law sphere, but simultaneously, they are recognised within Indigenous communities through Indigenous legal systems.²³ They are also collective, rather than individual rights.²⁴ Further, in relation to recognition by domestic and international law, these rights have come through a particular historical context of 'gradual and, in many cases, grudging recognition'.²⁵ As has been identified by Professor Bronwen Morgan, the relationship between rights and regulation is another area where we are seeing scholarship emerging in a broad variety of contexts.²⁶ In the case of Indigenous peoples' involvement in sea country, we are also considering the relationship of rights and regulation across two different spheres - Indigenous rights and environmental regulation.

Briefly, the author suggests that law and governance are operating in a complementary way with respect to sea country in Australia, where 'each is operating at the same time and contributing to a common objective but the two have

not merged'.²⁷ However, the 'common objective' referred to above needs to be considered in light of Indigenous legal rights to marine areas, the comparative security that these rights entail (compared to other mechanisms) and the broader historical context and nature of such rights.²⁸ Further, there may also be elements of a 'transformative' relationship where law provides a 'safety net' (the rights) and then governance provides broader opportunities.²⁹ Yet, as we shall see, the 'law' safety net is not Australia-wide and cannot be accessed by all Indigenous communities. A question of normative or threshold content of Indigenous marine governance also arises which needs to be explored going forward (as will be further considered in Part III of this article).

As explained in the introduction, this article does not seek to engage in a deeply theoretical exploration of governance or its relationship to law, rights and regulation. Rather, it seeks to provide an overview of the multiple layers of sea country governance. With this in mind, Part I provides an introduction to Indigenous governance within the environmental governance sphere. In this context, the article refers back to the use of the term 'governance' broadly to include both legal and non-legal mechanisms. It will give a brief outline of Indigenous governance, but will move quickly to consider the environmental context with a focus on the intersections between Indigenous participation in decision-making and 'sustainable development'. Such an introduction is important because, in order to analyse the current legal and non-legal mechanisms operating in Australia, one must have an understanding of the broader context in which they sit. These issues are considered with reference to the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*')³⁰ signed by Australia in 2009. Although this is a non-binding declaration, it has strong moral value and its focus on 'participation, engagement and consultation' provides a useful frame within which to discuss Indigenous management of the environment.³¹

A 'Good Governance' and the *UNDRIP*

The *UNDRIP* contains an overarching provision relating to governance. Article 46 requires that the *UNDRIP* be interpreted in accordance with principles of 'good governance'. The meaning of good governance is varied, and depends on the type of governance and the parties involved.³² For Indigenous people, governance can be 'particularly challenging because it involves working across Indigenous and western ways of governing'.³³ In

light of this, ‘people from different cultures have their own ways of judging what is “good” governance or not, [and] problems can arise when one society or group imposes their view of what is “good” governance onto another’.³⁴ However, it is generally accepted that good governance mechanisms are participatory. In the Australian context, the Indigenous Community Governance Research Project³⁵ identified several characteristics that help produce effective Indigenous governance, which included genuine decision-making power, practical capacity and participation.³⁶

The *UNDRIP* also provides more specific articles relating to decision-making. Article 18 states that Indigenous peoples have the right to participate in decision-making ‘in matters that would affect their rights’. More specifically, Articles 26 and 32 provide that Indigenous peoples have the right to lands, territories and resources that they have traditionally owned and the right to determine and develop priorities and strategies for the development or use of these lands, territories and resources. Article 29(1) states:

Indigenous peoples have the right to the conservation and protection of the environment *and* the productive capacity of their lands or territories and resources...

As noted by Professor Megan Davis, the ‘cornerstone’ of the *UNDRIP* is the right to self-determination and the *UNDRIP* itself is a ‘very clear exercise in translating the right to self-determination from international law into the domestic context’.³⁷ Self-determination can be linked to rights to protect the environment for future generations and to development in accordance with Indigenous communities’ ‘own needs and interests’.³⁸ There is obviously the potential for divergence between ‘conservation and protection’ and ‘productive capacity’, and these themes demonstrate the complexity of Indigenous governance within the environmental context.

B Potential For Tensions: Indigenous Peoples’ Aspirations and the ‘Environmental Agenda’

The western concept of nature conservation has historically been linked to concepts of ‘wilderness’ and ‘separating nature from humankind’.³⁹ Historically, ‘conservation measures’ have also often involved the evictions of Indigenous inhabitants.⁴⁰ Aside from the historical impact Western environmental-consciousness has had, the reality is that the ‘environmental agenda’ and the aspirations of Indigenous peoples do not always match.⁴¹ Professor Ciaran

O’Faircheallaigh stated, in the context of two Australian debates (to which we will return) that:

Aboriginal leaders such as the Kimberley’s Wayne Bergmann and Cape York’s Noel Pearson say Green groups’ determination to maintain “wilderness” areas – distant from the comfortable suburbs in which most of their supporters live – are depriving Indigenous people of the economic opportunities they need to end poverty and social marginalisation.⁴²

There are examples around the world of Indigenous peoples ‘resisting creation of national parks and other conservation initiatives’.⁴³ Of course, reasons for resisting what are broadly defined as conservation initiatives are complex and can often relate to a lack of consultation. Further, as is the case in all communities and is depicted in both examples that follow, Indigenous people within communities will have a wide variety of opinions.

Two highly politicised Australian examples of the potential for tension between Indigenous peoples’ aspirations and the ‘environmental agenda’ are the Wild Rivers debate in Queensland and the negotiations and litigation associated with James Prices Point in Western Australia.⁴⁴ Broadly, the Wild Rivers debate related to the enactment of conservation legislation that limited certain development activities in particular zones.⁴⁵ James Prices Point was the location of a proposed ‘gas hub’ off the coast of the Kimberley in far north Western Australia which raised issues of environmental impacts but also development opportunities for the Indigenous community.⁴⁶ Both of these examples involved some Indigenous community members demonstrating broad support for the ‘environmental agenda’, and others supporting development (or the opportunity for development).

The use of parenthesis in relation to ‘environmental agenda’ is deliberate. Of course, one must always question who is defining that agenda in each context. In the Wild Rivers debate, Indigenous leader Noel Pearson stated that: ‘[w]e believe that there is a way forward for conservation, development and Aboriginal land rights’, but in respect to the proposed legislation he expressed his view that it was ‘concocted by green groups in Brisbane in return for green preferences’.⁴⁷ O’Faircheallaigh observes that ‘conflict between Indigenous (“Black”) and environmental (“Green”) groups is a growing feature of Australia’s political

landscape'.⁴⁸ One potential concern raised by this 'conflict' is that, if the legitimacy of Indigenous governance in the wider community rests on certain 'environmental values', such conflicts could negatively impact on future opportunities for Indigenous governance.

Professor Benjamin Richardson states that '[w]hatever approach is taken to empower [I]ndigenous peoples... it is not to be interpreted as a freedom to engage in unsustainable uses of the environment'.⁴⁹ Returning to Noel Pearson's comments, and also noting the overwhelming support of the Premier of Western Australia for the James Price Point development, the factors at play in both of these situations were not about 'unsustainable uses of the environment'. Rather, they were highly complex debates about participation, representation and competing meanings of 'sustainable development'. Benjamin Richardson goes on to note that '[n]evertheless, international environmental law affirms the need for effective participation of [I]ndigenous peoples in determining how to achieve sustainability'.⁵⁰ Where effective participation measures are in place, we see examples in Australia of the environmental aspirations of Indigenous communities aligning, through a process of consultation and negotiation, with local environmental groups. As noted in the Dhimurru Yolŋu Monuk Gapu Wāṅa Sea Country Plan:

There are several non-government organisations with an environmental focus that either work or have interests in the Northern Territory.... We share many goals and aspirations for marine conservation and management with these non-government organisations.... A shared approach to many issues should be possible...⁵¹

C Sustainable Development and Indigenous Participation in Environmental Decision-Making

It is vital to consider the relationship between participation of Indigenous people in environmental decision-making and the concept of 'sustainable development'. The language of environmental law and policy is now firmly focused on 'sustainable development'.⁵² This started at an international level in the late 1980s and has filtered down to the domestic level in Australia.⁵³ The phrase was popularised by the 1987 *Brundtland Report* that defined sustainable development as: 'development that meets the needs of the present without compromising the ability of future generations to meet

their own needs'.⁵⁴ Exactly what 'sustainable development' means is widely debated, but its aspirations have heavily influenced ideas of environmental governance.⁵⁵

Prior to the *UNDRIP*, a number of key international environmental law documents noted the importance of Indigenous peoples in achieving sustainable development. The 1992 *Rio Declaration on Environment and Development*, one of the key documents relating to sustainable development to this day, declared that Indigenous people have a vital role in environmental management and that nations should recognise and support their effective participation.⁵⁶ There is only one reference to sustainable development in the *UNDRIP*. The reference is in the preamble and reads:

'...respect for indigenous knowledge, cultures and traditional practices contributes to *sustainable and equitable development* and proper management of the environment...'⁵⁷

The dual themes of 'sustainable' and 'equitable' development bring us back to the right to conserve and the right to development.

In recent decades, the focus on sustainable development has led to two related changes in environmental governance, including in marine governance. First, a move away from 'fortress' style conservation as the only form of effective conservation: 'fortress' style conservation involved the declaration of large areas as protected areas in which scientific research and recreation were the predominant activities.⁵⁸ Second, and interconnected to the first change, a move towards community participation in decision making about environmental management. Historically, western governments have had a 'command and control' approach to environmental governance.⁵⁹ The 'command and control' approach involved the government setting environmental targets, monitoring compliance with those targets and then penalising wrongdoers if the targets were not met. However, in the last decade, criticisms of the 'command and control' approach have led to a call for new approaches to governance.⁶⁰ Environmental decision-making can now be said to involve participation of, and collaboration between: governments; community groups; Indigenous peoples; academics; and local, national and international non-governmental organisations. Such participatory decision-making can be undertaken in a variety of forms including, for example, joint or co-management arrangements.

Recently, the Australian government has played a key role in pulling together the themes of sustainable development and participatory environmental governance by promoting Indigenous land and sea management on the international stage. The World Indigenous Network ('WIN') Conference was held in Darwin in May 2013.⁶¹ The WIN was launched at the United Nations Conference on Sustainable Development ('Rio +20' – marking 20 years since the Rio Declaration') in 2012 by the then Australian Prime Minister, Julia Gillard and representatives of Brazil, New Zealand and Norway.⁶² The aim of the WIN is to 'bring together Indigenous Peoples and Local Communities' land and sea managers to share stories, knowledge, cultural experiences and ideas to better manage ecosystems, protect the environment and support sustainable livelihoods'.⁶³ As well as bringing land and sea managers together at the conference, the WIN program includes exchanges between countries to share ideas and experiences.⁶⁴

At the close of the conference, the Australian government 'handed over' the management of the initiative to the *United Nations Development Programme Equator Initiative* ('*Equator Initiative*').⁶⁵ The *Equator Initiative* aims to bring together the United Nations, 'governments, civil society, businesses and grassroots organizations to recognize and advance local sustainable development solutions for people, nature and resilient communities'.⁶⁶ In working towards this, the *Equator Initiative* recognises the success of initiatives, creates opportunities to share knowledge about these successes, informs policy about community action in the environment and develops capacity to 'scale-up' the impact of local initiatives.⁶⁷ This gives Indigenous communities in Australia a chance to be part of a larger discussion, to gain and share ideas about management of sea country. The WIN could be said to be a form of 'network governance', with the aim of linking communities together to transfer knowledge and build capacity.⁶⁸

The *UNDRIP* underpins the proactive work of initiatives such as the WIN, by providing that nation states 'shall establish and implement assistance programs for [I]ndigenous peoples for such conservation and protection'.⁶⁹ Despite this, the extent to which Indigenous participation will be recognised:

... is open to debate with a spectrum of rights possible, running from the narrow right to share fisheries, to a broader bundle of collective rights such as the right to habitat protection and to be involved in regional planning and international allocation agreements.⁷⁰

In the domestic context, the 'spectrum of rights' possible continues to be highly influenced by, and linked to, those rights already recognised through legal instruments such as native title. This is why, as identified above, attention is drawn to the division between the legal rights, that have been formally recognised to sea country, and other mechanisms that have evolved to make decisions about sea country management as part of the movement towards participatory governance. Part II will provide an overview of the legal rights that have been recognised in sea country. It is crucial to understand these legal rights as they provide us with clues regarding some of the challenges we may face when trying to implement a new paradigm. The corollary to this is that they also provide secure rights which many broader non-legal mechanisms currently rest upon and may not exist without.

II Overview of Legal Rights that have been Recognised in Sea Country

In Australia, the two legal mechanisms that have yielded the broadest range of rights to marine areas are native title and 'land' rights legislation in the Northern Territory. There is much academic commentary in the area of native title rights to the sea (both before and after the first recognition of native title rights to the sea in *Yarmirr v Commonwealth* (2001) 208 CLR 1 ('*Yarmirr*')) and in relation to the intertidal rights recognised pursuant to land rights legislation in the Northern Territory.⁷¹ This Part provides an overview of what legal rights have been recognised, but its analysis is primarily focussed on what we can take from these cases going forward. In considering this, the section asks: what has been recognised, what has not been recognised and what can we learn from both?

Before launching into these questions, two issues should be noted for completeness. First, more specific rights to marine areas, such as the right to manage registered sacred sites or to fish 'in a traditional manner', have also been recognised.⁷² These rights also form part of the legal mechanisms that underpin Indigenous management of marine areas. This article focuses on the broader rights that have been recognised through the two legal mechanisms identified. However, it must be acknowledged that these more specific rights are important, particularly where broader rights have not been recognised. In fact, the case study in Part III of this article demonstrates the vital role that these specific rights can play where there is no recognition of broader rights.

Second, this article considers only the Aboriginal land rights legislation from the Northern Territory. All Australian states, other than Western Australia, have land rights legislation.⁷³ The land rights legislation in the Northern Territory, which was implemented by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA'), is the most comprehensive land rights legislation in Australia. Further, as we shall see, it is the only legislation that has incorporated a separate mechanism for sea country. There is further work to be done in considering whether sea rights may be claimed in other jurisdictions pursuant to land rights legislation.

A Land Rights Legislation in the Northern Territory

The *Aboriginal Land Act 1978* (NT) ('AL Act') was enacted pursuant to the ALRA. The basis for this Commonwealth legislation was the recommendations of Justice Woodward in the 1974 *Report into Aboriginal Land Rights*. In relation to sea country, Justice Woodward recommended that a buffer zone of up to two kilometres (from low tide) of sea water could be 'closed' to protect Aboriginal land.⁷⁴ In his report, Justice Woodward noted that: '[c]ertainly Aborigines generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land', but stated that an 'arbitrary figure, in this case two kilometres, had to be arrived at'.⁷⁵ When the original Bill was introduced to Commonwealth Parliament it contained such a buffer zone, however, there was a change of Government and an amended bill did not provide this buffer zone.⁷⁶ Instead, the legislation provided powers to the NT Government to make reciprocal laws regulating or prohibiting the entry of persons into waters that were within two kilometres of Aboriginal land.⁷⁷ In response, the AL Act provided for 'sea closures' out to two kilometres and these sections are still in the current legislation.⁷⁸ Yet, although the sea closures would appear to have great potential, they have not had a widespread impact on Indigenous rights to sea country. There have been nine applications for sea closures with two being declared (both are located off the coast of Arnhem Land: Milingimbi, Crocodile Island and Glyde River and Howard Island/Castlereagh Bay).⁷⁹

Pursuant to section 12(1) of the AL Act, the Administrator may:

... close the seas adjoining and within 2 kilometres of Aboriginal land to any persons or classes of person, or for

any purpose other than to Aborigines who are entitled by Aboriginal tradition to enter and use those seas and who enter and use those seas in accordance with Aboriginal tradition.

The legislation does not provide for a specific reason for a closure to be granted, but does require identification of the 'purpose' for which it is closed.⁸⁰ It also provides that the Administrator may (or shall in certain circumstances) refer the sea closure application to the Aboriginal Land Rights Commissioner for investigation into a number of matters.⁸¹ These include whether 'in accordance with Aboriginal tradition, strangers were restricted in their right to enter those seas' and 'whether the use of those seas by strangers is interfering with, or may interfere with, the use of those seas in accordance with Aboriginal tradition by the Aborigines who have traditionally used those seas'.⁸² The Administrator must also inquire into issues such as whether any person would be disadvantaged by a closure and the commercial, environmental and recreational interests of the public in the area.⁸³

A significant limitation of the legislation is that persons who hold current fishing licences are exempt.⁸⁴ Dr Anthony Bergin suggests that only 'recreational fisherman, future applicants for commercial fishing licences or touring yachts' would be subject to the closure.⁸⁵ Further, a report produced for the National Oceans Office stated that there are no enforcement mechanisms as the sea closures do not 'empower local Traditional Owners to manage the area or to control access by others, other than by reporting incidents to the police'.⁸⁶ In this vein, it has also been identified that sea closures do not 'necessarily confer management resources or support to local Aboriginal people' and therefore, do not 'bring good management'.⁸⁷

However, the Northern Territory legislative regime provides further rights in relation to the intertidal zone. The intertidal zone is land between the high and low water mark. In areas of northern Australia it can stretch for vast distances and contain rich fishing grounds. *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 (the *Blue Mud Bay* case) concerned the definition of 'Aboriginal land' under the ALRA. Specifically, whether intertidal land was Aboriginal land and therefore, whether a person holding a fishing licence could fish in those waters without permission of the Aboriginal Land Trust.⁸⁸ The High Court confirmed that fishing licences did not authorise the holders

to fish within Aboriginal land and that the intertidal zone was included in the definition of 'Aboriginal land'.⁸⁹ This decision gave clear rights to *exclude* others and created 'unprecedented opportunities' for the traditional owners to become involved in marine management.⁹⁰ As we will see in the case study in Part III, the area over which the *Blue Mud Bay* case was decided is now incorporated into the Dhimurru Sea Country Indigenous Protected Area.

The rights granted in *Blue Mud Bay* are much stronger, in terms of exclusivity, than we have seen in native title. However, it is only related to the intertidal zone. The *Blue Mud Bay* case also had a related native title claim under the *Native Title Act 1993* (Cth) ('NTA') which this article referred to at the beginning. In *Gumana v Northern Territory* (2005) 141 FCR 457 ('*Gumana*'), non-exclusive rights to the sea (as well as the intertidal zone) were recognised.⁹¹ The introduction of this article focussed on the relationships between legal and non-legal mechanisms; however, these cases demonstrate that there are also relationships between different legal mechanisms to be considered.

B Native Title

The *NTA* provides that native title can be claimed over both land and waters.⁹² Waters are defined to include the sea, a tidal inlet, a bay, an estuary, a harbour, the bed or subsoil under, or airspace over any waters and the shore (the shore is between the high water and low water mark).⁹³ Pursuant to section 6, the *NTA* applies to coastal sea and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth).⁹⁴ One of the general requirements of the *NTA* is that the rights have to 'find their origin in pre-sovereignty law and custom'.⁹⁵ Claims made with respect to some waters have raised a different scenario which Justice Finn in *Akiba v Queensland [No 3]* (2010) 204 FCR 1 ('*Akiba FC*') called the 'progressive acquisition of territorial jurisdiction'.⁹⁶ Justice Finn held that the determination of native title rights should be made at the time in which Australia acquired the area.⁹⁷

There have been four key litigated native title cases relating to the sea: *Yarmirr*, *Lardil Peoples v State of Queensland* [2004] FCA 298, *Gumana* and *Akiba*.⁹⁸ All of these cases have been in the northern waters of Australia. Broadly, these cases have recognised non-exclusive native title rights to areas of sea. It is important to recognise that non-litigated outcomes through consent determinations and Indigenous Land Use

Agreements ('ILUAs') have also yielded non-exclusive rights over waters.⁹⁹ This section will focus on *Akiba* as it is the largest sea claim in Australia's history and demonstrates the most diverse range of rights, including the first recognition of commercial rights.¹⁰⁰ In this regard, it will be necessary to concentrate on *Akiba FC*, as much of the sea claim was decided at trial and not challenged. As we will see, the only issues that came before the High Court were commercial fishing rights and reciprocal rights. However, prior to 'diving into' *Akiba FC*, a brief introduction to *Yarmirr* is required as it was the first recognition of sea rights and has had a strong continuing influence on the development of native title law.

Yarmirr established that native title rights to the sea could not be exclusive.¹⁰¹ This was because native title rights could not be inconsistent with the public right to fish and navigate or the international right of free passage.¹⁰² Recognition of non-exclusive rights essentially means that rights to control access to the exclusion of others will not be recognised. The language of exclusive and non-exclusive rights has been created in the native title space. It also represents some of the broader elements of the Eurocentric views of the marine area that must be 'worked through' in assessing the options for Indigenous involvement in marine governance. However, as Justice Finn recognised in *Akiba FC*, just because a native title right is not recognised does not mean it is 'extinguished':

The native title society can continue to acknowledge and observe its laws and customs. What it cannot do, absent common law recognition, is enforce in the Australian legal system such rights and interests possessed under those laws and customs....¹⁰³

This quote is particularly important to note as we consider what rights were recognised in *Akiba FC* and what rights were not. The rights that were *not* recognised are not 'extinguished';¹⁰⁴ but they can be used to inform discussions about Indigenous involvement in management of sea country.

(i) The Rights Recognised in *Akiba FC*

When the *Akiba FC* claim was originally lodged in 2001, it appears from the reasons for judgment that rights to exclusive possession were sought.¹⁰⁵ However, the claim was amended to seek non-exclusive rights.¹⁰⁶ The claim related to an area of 44,000 square kilometres of sea in the Torres Strait (at the tip of far north Queensland) which included beaches,

reclaimed areas and intertidal zones.¹⁰⁷ There were three groups of rights claimed. These were rights to:

1. enter, remain, use and enjoy;
2. access and take resources (and to a livelihood based upon accessing and taking); and
3. protect resources, habitat and places of importance.¹⁰⁸

Resources included all living and inanimate things that 'are within or comprise' waters, other than minerals and petroleum.¹⁰⁹ This includes sea water. In upholding this aspect of the definition, Justice Finn particularly noted that: '[i]n a country prone to water shortage we now have a burgeoning desalination industry and an appreciation that one of the great "resources" of the sea is sea water itself'.¹¹⁰

The applicants also claimed 'reciprocal rights' between people in different societies. Justice Finn held that while there was one society in the Torres Strait, the members of this society did not hold the rights communally.¹¹¹ Rather, laws and customs determined who could exercise interests in particular areas.¹¹² Reciprocal rights, therefore, were rights involving relationships between native title holders in different areas that allowed various forms of 'reciprocal' use.¹¹³ Justice Finn held that although he was satisfied such relationships existed and created rights and obligations, they were not rights 'in relation to land and waters' as was required by section 223 of the *NTA*.¹¹⁴ Therefore, they could not be recognised. This finding was cross-appealed by the applicants to the Full Federal Court and appealed to the High Court, but was unsuccessful at both instances. The rights and obligations in relation to these reciprocal rights can, of course, still continue.¹¹⁵ They provide an interesting context to consider the interconnections between different communities and how these could be represented in broader marine governance mechanisms.

At trial, Justice Finn found non-exclusive rights to access, use and take resources for *any* purpose, subject to traditional laws and customs, over approximately 37,800 square kilometres.¹¹⁶ For 'any purpose' included commercial purposes. With respect to livelihood, Justice Finn rejected the applicants' arguments that there were laws and customs relating to livelihood.¹¹⁷ Further, he stated that 'a right to livelihood...is no more than a doubtless hope or expectation founded upon the traditional rights to access and take', and that such a right is actually encompassed within a right to take.¹¹⁸ Justice Finn also rejected the 'rights to protect',

noting that they were the most contentious rights claimed.¹¹⁹ This article now turns to consider the findings in relation to those 'contentious' rights to protect and the first recognition of commercial native title rights.

(ii) The 'Rights to Protect'

Justice Finn stated that the claimed 'rights to protect' had 'elusive content'.¹²⁰ However, Justice Finn did acknowledge that there was evidence that the 'Islanders engaged and do engage in resource conservation measures and have an awareness of the intergenerational need for this'.¹²¹ This links to the themes of sustainable development discussed in Part I. Justice Finn also noted that there was evidence of 'lawful remonstrations' against outsiders who were engaged in practices that might deplete resources or cause habitat harm.¹²² It was also stated that:

In oral evidence the Islanders were questioned about a range of hypothetical actions taken by others which were detrimental to the marine environment (eg breaking crayfish houses) or else were otherwise an affront to them and their ways (eg shooting or netting dugong). The responses were understandable and predictable but they hardly betrayed the existence of traditional rights of the types claimed. At best they reflected the need for some responsive but lawful action to be taken, the object of which was to avert, or to bring to an end, the offending conduct.¹²³

The main focus of Justice Finn's decision was that these rights appeared to be based on having exclusive territorial control. Justice Finn stated that the rights were an 'unelaborated entitlement' to do whatever is appropriate to protect.¹²⁴ While the applicants did concede that they did not seek such territorial control, Justice Finn held that rights claimed cannot be emasculated and dismembered so as to create different rights to secure recognition.¹²⁵ It was held that the rights to protect claimed in this case were 'far removed' from non-exclusive rights to maintain and protect that have been claimed in other cases that involve protection of particular areas (such as sacred sites) or particular practices (such as checking for damage).¹²⁶ In this context, Justice Finn noted he was having difficulty understanding what 'protect' meant including what 'places of importance' were for the purposes of this case.¹²⁷

Native title rights to protect are a concept that requires further analysis. While the case of *Sampi v Western Australia*

(2010) 266 ALR 537 identified examples that Justice Finn regarded as ‘far removed’ from those being claimed here, that case also indicated that rights would not be rejected on the basis that they ‘lacked sufficient precision’.¹²⁸ This article does not intend to undertake this analysis (which needs to go beyond sea country), but does seek to highlight that the rights to protect claimed and evidence presented can be considered through a different lens that is not limited by the prescriptions of native title. In doing so, it provides another avenue where we might seek assistance in defining what may be included in Indigenous marine governance.¹²⁹ We will return in Part III to discuss how these ‘rights to protect’ might be similar to some of the aspirations of the Dhimurru Sea Country Indigenous Protected Area.

(iii) First Recognition of Commercial Rights

As stated above, Justice Finn granted native title rights to access, use and take resources *for any purpose*. Justice Finn held that this included commercial purposes. This finding was overturned by the majority in the Full Federal Court and then became the main ground of appeal to the High Court. Justice Finn’s decision was historic. It was the first time we have seen native title rights to commercial purposes recognised in a litigated outcome. These rights are, however, subject to the relevant fisheries legislation. It was not disputed at trial that the applicants would need to secure the necessary licences to engage in commercial fishing. This left Finn J to state that this question was ‘narrow and seemingly barren’.¹³⁰

The High Court unanimously affirmed that commercial rights could be recognised. The question came down to one of whether the legislative regimes of the Commonwealth and Queensland extinguished native title rights or merely regulated them. The High Court decision does not require the government to reallocate licences. However, it does give the native title holders a seat at the table in relation to the lucrative commercial fishing industry in the Torres Strait. As the author has previously noted, this is not to say that Torres Strait Islanders did not have a significant role before.¹³¹ Through the Protected Zone Joint Authority, which manages both commercial and traditional fishing in the Australian part of the Torres Strait Protected Zone, the Torres Strait Regional Authority has ensured involvement of Torres Strait Islanders in commercial fishing.¹³² Involvement of Torres Strait Islanders in commercial fishing demonstrates how Indigenous people can work within the Australian

legal system (both with respect to fisheries legislation and now also recognised by native title) to secure involvement in marine management.

C Where Does That Leave Us?

Akiba is certainly an exciting step forward, particularly in terms of the size of the claim and the new commercial rights. However, in some ways, it still leaves us where we were before - with non-exclusive native title rights to the sea. The *Akiba* decision has certainly brought more national attention to Indigenous rights in sea country in recent months. Although the aim of this article is to suggest movement towards a different paradigm where legal rights are not necessarily paramount, there is no doubt that litigated decisions in the High Court capture the nation’s attention more than other Indigenous marine governance mechanisms.¹³³ As the author noted prior to the *Akiba* decision, regardless of the outcome, ‘the decision should signal the start of a timely reconsideration of the approach Australia has taken to recognising Indigenous marine governance’.¹³⁴ We have in recent years seen the beginnings of broader marine governance mechanisms. However, these mechanisms are, more often than not, intertwined with the underlying recognition of native title or rights under the *ALRA*. Part III takes one case study and briefly explores the relationship between emerging non-legal governance mechanisms and ‘legally recognised’ rights.

III Case Study of an Indigenous Marine Governance Mechanism Operating in Australia: Dhimurru Sea Country Indigenous Protected Area

The new mechanisms emerging to enhance Indigenous participation in management of sea country vary significantly. Availability of some mechanisms is limited to specific jurisdictions,¹³⁵ while others are Australia wide. However, the implementation of all mechanisms is heavily impacted and influenced by local factors. This article does not intend to undertake a review of all the Indigenous marine governance mechanisms currently operating in Australia. Rather, it seeks to provide an example that can further the conversation about the relationship between governance mechanisms in the context of sea country.¹³⁶ Part III aims to give a practical example that draws together the themes of participatory governance and sustainable development from Part I and the legal rights that were discussed in Part II. As

foreshadowed, the example is the Dhimurru Sea Country Indigenous Protected Area ('IPA'). This case study has been chosen as it demonstrates an array of both legal and non-legal mechanisms. Further, it was Australia's first Sea Country IPA and had its area significantly expanded in 2013.

A What is a Sea Country IPA?

The Dhimurru Sea Country IPA is located in north-east Arnhem Land.¹³⁷ As identified above, it incorporates the areas subject to the *Blue Mud Bay* and *Gumana* decisions. The original Dhimurru IPA (including both land and sea) was declared in 2000 and included 920 square kilometres of sea country.¹³⁸ During the WIN conference discussed in Part I, the then Commonwealth government, the Northern Territory government and the Dhimurru Aboriginal Corporation announced the expansion of the Dhimurru Sea Country IPA to cover 4000 square kilometres of sea country.¹³⁹

IPAs facilitate Indigenous involvement in management of land and sea country. According to the Commonwealth Department of Environment's website, an IPA is 'an area of *Indigenous-owned* land or sea where traditional owners have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation.'¹⁴⁰ The first IPA was declared in 1998 and, for the most part, IPAs have been terrestrial.¹⁴¹ In recent years, the Commonwealth government has been funding Sea Country IPA planning through a pilot program.¹⁴² There are now a number of Sea Country IPAs throughout Australia however, 'there is no legal/policy threshold'.¹⁴³ Therefore, there is no certainty going forward as to government support. It was noted in May 2012, at the National Indigenous Sea Country Workshop, that there seemed to be a 'hiatus' on the declaration of new Sea Country IPAs.¹⁴⁴

Sea Country IPAs (as well as terrestrial IPAs) are also part of a broader international scheme of protected areas. Protected areas are defined by the International Union for the Conservation of Nature ('IUCN') as:

'... a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.'¹⁴⁵

The IUCN is an international environmental organisation and Australia is a Member State.¹⁴⁶ There are six different

categories (Category I to Category VI) of management for IUCN reserves. The categories are not a 'simple hierarchy in terms of quality, importance or naturalness', rather they are based on the objectives for management of the area.¹⁴⁷ The Dhimurru Sea Country IPA is a Category V Protected Area.¹⁴⁸ A Category V Protected Area is where the interaction of people and nature is vital to protecting the area and its conservation and other values.¹⁴⁹ According to the IUCN *Marine Protected Area Guidelines*, marine protected areas must be secured by 'legal or other effective means'.¹⁵⁰ These guidelines (which are an international document) use the Dhimurru Sea Country IPA as an example of 'other effective means' such as 'agreements with indigenous groups'.¹⁵¹

The key word is 'agreement'. The Sea Country IPA agreements are voluntary. It states on the Department of Environment's website that Sea Country IPAs have 'no legislative basis'.¹⁵² While this may be true more broadly, in the case of Dhimurru, the agreement with both the Northern Territory and Commonwealth governments has been 'formalised' through a section 73 agreement pursuant to the *Territory Parks and Wildlife Conservation Act 2006* (NT). This was the first section 73 agreement made in relation to an IPA and it agrees to 'management and administration arrangements for the IPA'.¹⁵³ Section 73 of the *Territory Parks and Wildlife Conservation Act 2006* (NT) provides for agreements with Aboriginal Land Councils or other Indigenous organisations to be made for 'the management of the land to protect and conserve wildlife on the land and protect the natural features of the land'. In section 9 of the Act, 'land' is defined to include: 'the sea above any part of the sea bed of the Territory'. In the case of Dhimurru, underpinning this agreement are legal rights to the sea, including native title rights and rights to the intertidal zone pursuant to the *ALRA*.

In this context, it is interesting to note the use of the phrase 'Indigenous-owned' in relation to both land and sea on the Department of Environment's IPA website.¹⁵⁴ It can be observed that terrestrial IPAs are likely to be underpinned by 'more secure' Indigenous land rights than are available in the sea.¹⁵⁵ As we saw in Part II, while the rights to intertidal areas may be exclusive pursuant to the *ALRA*, native title rights to the sea are not. The Dhimurru Sea Country IPA was declared in 2000, many years before *Blue Mud Bay* and *Gumana*. Dr Dermot Smyth posits that the reason the Dhimurru Sea Country IPA was the first to incorporate marine areas was due to the registration of marine sacred sites. Smyth states that the formal recognition of marine sites under the *Northern*

Territory Sacred Sites Act 1989 (NT) was 'sufficient' for the area to be included in an IPA.¹⁵⁶ This was 'even though Traditional Owners' management authority over marine sites is not as strong as over Aboriginal-owned land'.¹⁵⁷ This notion of marine sacred sites being 'sufficient' to trigger a Sea Country IPA introduces a threshold or normative context that is not further explained. There is no clear-cut criteria to 'qualify' for a Sea Country IPA.

Sea Country IPAs may also interact with Commonwealth or State/Territory marine reserves. This is relevant due to the comparative legal security of such marine protected areas. In this case, there are no Northern Territory marine reserves in the area of the Dhimurru Sea Country IPA.¹⁵⁸ However, the 2013 expansion of the Dhimurru Sea Country IPA means that it now overlaps with a Commonwealth marine reserve - the Wessel Commonwealth Marine Reserve.¹⁵⁹ Commonwealth marine reserves such as Wessel are part of the National Reserve System of Marine Protected Areas ('NRSMPA'). The NRSMPA consists of marine protected areas in Commonwealth, State and Territory waters.¹⁶⁰ The Commonwealth 'component' of these marine reserves (marine protected areas in Commonwealth waters) came into effect on 17 November 2012.¹⁶¹ A number of draft management plans detailing how these areas would be managed were due to come into effect in July 2014.¹⁶² However, the newly elected government has set aside these management plans and instituted the Commonwealth Marine Reserves Review.¹⁶³ The timing of this review is still yet to be finalised and members of the review and the terms of reference will be announced early in 2014.¹⁶⁴ Even with this uncertainty, it is useful to look at the management plans that have now been set aside to get an idea of how such plans may interact with Sea Country IPAs. The overarching guidelines for the NRSMPA include the goal of providing for 'recreational, aesthetic and cultural needs of indigenous and non-indigenous people' and that in developing the NRSMPA, the interests of Indigenous people should be 'recognised and incorporated'.¹⁶⁵

The relevant management plan for the area overlapping the Dhimurru Sea Country IPA was the North Management Plan. Strategy six of the North Management Plan aimed to support involvement of Indigenous communities in management of Commonwealth marine reserves. The Dhimurru Sea Country IPA Management Plan emphasises the enthusiasm and commitment of the Traditional Owners to be involved in management of the Commonwealth reserve area.¹⁶⁶ The

Wessel Marine Reserve contains 1,632 square kilometres of IUCN Category II Marine National Park and 4,276 square kilometres of IUCN Category VI Multiple Use Zone (which is an area managed for sustainable use of natural resources).¹⁶⁷ It should be noted that the Commonwealth Marine Reserves Review will include a review of the zoning types.¹⁶⁸ The Dhimurru Sea Country IPA Management Plan notes that this designation of the IUCN categories by the Commonwealth government is 'compatible' with the goals of the IPA. However, the Management Plan also notes that the Traditional Owners are:

... committed to retaining the Category V designation for the entire IPA...[including the area of overlap]... in order to respect the holistic view of land and sea country and to highlight the interdependence of people, culture and environment that is central to the Category V designation'.¹⁶⁹ This is a practical demonstration of the tension between the government's characterisation of an area managed for sustainable use of natural resources and the IPA's characterisation as an area where the interaction of people is vital to the environment.

Sea Country IPAs do not form part of the NRSMPA.¹⁷⁰ As the author has previously noted, the overlap in the Dhimurru Sea Country IPA 'muddies the waters'.¹⁷¹ A key characteristic of marine protected areas under the NRSMPA is that they 'must have secure status which can only be revoked by a Parliamentary process'.¹⁷² Clearly, this is not the case of Sea Country IPAs given they are a voluntary agreement. Interestingly, as has been pointed out by Smyth, this is not the case for the 'land-based' equivalent, the National Reserve System, of which terrestrial IPAs are part.¹⁷³ The overlap of the Dhimurru Sea Country IPA area brings into focus the opportunity to seek legal recognition of Sea Country IPAs in line with the NRSMPA.

This section demonstrates that Sea Country IPA agreements are not 'legal', but they are underpinned by a variety of secure legal mechanisms. Although the *Blue Mud Bay* rights to the intertidal zone were exclusive, it is clear Sea Country IPAs do not rely on 'exclusive' rights to the sea. However, some underlying exclusive rights make the underpinnings of the agreement 'stronger', or put another way, if the IPA was removed, only those underlying legal rights would remain. In this regard, it is also clear that Sea Country IPAs are vulnerable to changes in policy direction. This makes the underlying rights crucial. With this in mind, the next section

considers the content of the overarching Sea Country IPA agreement.

B Content of the Dhimurru Sea Country IPA

The Dhimurru Sea Country IPA is described as a 'governance and management partnership'.¹⁷⁴ The Dhimurru Sea Country IPA Management Plan describes each organisation (for example, government, traditional owners) as bringing a 'backpack' that contains 'their unique combination of commitment, authority, responsibility, and capacity to contribute towards achieving the goals of the IPA'.¹⁷⁵ The Dhimurru Sea Country Management Plan has two 'Sea Country Goals':

1. Conservation of natural and cultural values of the Dhimurru IPA; and
2. Sustainable Indigenous, commercial and recreational use of the Dhimurru IPA.¹⁷⁶

The Management Plan also notes the commitment of the traditional owners to 'protecting, caring for, and sustainably using' their sea country.¹⁷⁷ This again reconnects us to the themes of conservation and sustainable use discussed in Part I. In a practical sense, we can see here that conservation and sustainability are part of a conversation between traditional owners, governments, commercial and recreational interests, academics and environmental groups.

The Management Plan sets out a wide variety of values, actions and targets. Examples include:

- developing a communication package to explain cultural values to tourism operators;¹⁷⁸
- consultation with mining and shipping operators regarding their 'willingness and capacity to contribute to achieving IPA goals and objectives';¹⁷⁹
- contributing to 'all fisheries management planning and consultative opportunities to address potential impacts on IPA values';¹⁸⁰
- participating in the 'development of Codes of Conduct with professional and recreational fisheries';¹⁸¹ and
- continuing to build capacity of the 'Dhimurru rangers to monitor and manage sea country'.¹⁸²

Returning briefly to the *Akiba FC* claim of 'rights to protect', it appears the broad themes of sustainability and some level of 'enforcement' (through Codes of Conduct, contributing

to planning and ranger programs) can be accommodated in the Sea Country IPA model as there is no need for exclusive rights. The Management Plan also sets out the impressive management and research capacity of the Dhimurru Sea Country rangers, who undertake a number of roles including assisting with research and collaborating with other agencies such as universities and government departments.¹⁸³

Some of the actions and targets can be regarded as 'aspirational'. This is not to detract from their importance (or potential efficacy). One of the key successes of the Sea Country IPA program is allowing Indigenous groups to put forward their aspirations to government and other groups. It creates a forum for discussion 'where no such forum previously existed'.¹⁸⁴ It also allows these parties, and the public at large, to understand the importance of sea country and the cultural values underpinning the need for Indigenous involvement in management. However, evaluations of Sea Country IPAs, conducted in 2006 and 2011, found that Sea Country IPAs needed further recognition and support.¹⁸⁵ It has also been noted that some of the aspirations may be able to be implemented quickly but others may require 'lengthy negotiation and [law and policy] reform'.¹⁸⁶ This latter comment in particular draws attention to the non-legally binding nature of the overarching IPA agreement and the limitations associated with this.

C Integration of Mechanisms in Dhimurru Sea Country IPA

It is now important to very briefly consider the practical relationship between law, governance, rights and regulation. Smyth has previously noted in the context of Sea Country IPAs that:

This mixture of management mechanisms is not dissimilar to the mixture of techniques used to achieve effective management of government-declared national parks, marine parks and world heritage areas. In these protected areas, the greatest management effort is directed towards non-legal mechanisms, such as education, monitoring, research, communication and interpretation, with less effort directed at strictly legal mechanisms such as enforcement.¹⁸⁷

These ideas are similar to those of Trubek and Trubek noted in Part I, that in some situations a hybrid system develops where 'innovation, negotiation and self-monitoring are fore-grounded, and regulatory enforcement remains in the

background as a default option'.¹⁸⁸ Yet, the discussion above reveals that the Dhimurru Sea Country IPA relies heavily on the 'rights-based' legal mechanisms identified in Part II for its legitimacy. While such legal mechanisms do not 'limit' broader management objectives, if they were removed, the IPA would lack its underpinning. Similarly, if the broader non-legal mechanisms seen in the Management Plan were removed, only the limited rights would remain.

IV The Way Forward

This article started with two quotes about native title, noting that native title provides both opportunities and limitations. In Part I, we then took a journey through concepts of 'governance and law'; 'regulation and rights'; international law relating to Indigenous rights over resources; and the impact of 'new environmental governance'. These concepts provided the basis for 'changing tack' to a paradigm that is broader than 'law'. However, Part I also emphasised that we need to be conscious of the distinction between legal and non-legal governance mechanisms. Then, in Part II we returned to 'law', noting that legal rights influence what 'spectrum of rights' may be available through broader governance mechanisms. Finally, in Part III we considered a case study that demonstrates both legal and non-legal mechanisms. This case study gave a practical example that drew together the themes from Part I and the legal rights that were discussed in Part II. Part III also drew attention to the opportunities of combining legal and non-legal mechanisms, but also encouraged consciousness of the integration of the two.

The example of the Dhimurru Sea Country IPA is in some ways simple as it involves a focus on legal (native title and 'land' rights) 'versus' non-legal (Sea Country IPA). However, even the Sea Country IPA has legal aspects (the 'section 73 agreement') and there are many other combinations that can be explored, including where there are multiple non-legal mechanisms operating in the same area as one or more legal mechanisms. Further, this case study was a desktop study and did not involve obtaining an 'on the ground' understanding of how the mechanisms are working together.

We are currently at a crucial time for development of mechanisms to secure Indigenous involvement in the governance of Sea Country and are seeing a proliferation of mechanisms that demonstrate potential. At this time, we need to unpack different mechanisms to ensure we know how

they fit together and to understand what vulnerabilities there may be if one or more are amended or even removed. This is particularly true when the recent change in government could lead to shifts in policy direction.

As noted in Part I, this article does not seek to interrogate the relationship between law, governance, rights and regulation on a theoretical level. Rather, the author seeks to foreshadow that sea country governance in Australia is a key ground for empirical research into this broader emerging area. There is no doubt that combining legal rights with broader non-legal mechanisms, such as IPAs, can provide beneficial management opportunities for Indigenous communities. However, it is vital at this stage of the debate to do our 'groundwork' and explore this integration so we understand its limitations as well as benefits.

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1 Torres Strait Regional Authority, 'Sea Claim Win a Cause For Traditional Owner Celebration' (Media Release, No 512, 13 August 2013) <http://www.tsra.gov.au/_data/assets/pdf_file/0009/4203/Media-Release-No-512-Sea-claim-win-a-cause-for-traditional-owner-celebration.pdf>.

2 Dhimurru Land Management Aboriginal Corporation, *Dhimurru Yolŋu Monuk Gapu Wāŋa Sea Country Plan: Yolŋu Vision and Plan for Sea Country Management in North-east Arnhem Land* (Report, 2006) 14 <<http://www.territorystories.nt.gov.au/bitstream/handle/10070/214469/DhimurruSeaCountryPlan.pdf?sequence=1>>. The footnote for this quote in the document is to *Gumana v Northern Territory of Australia* (No 2) [2005] FCA 1425. This was the judgment following the reasons for decision in *Gumana v Northern Territory* (2005) 141 FCR 457. The quote mentions the '*Blue Mud Bay case*' which at the time referred to those cases. However, now the '*Blue Mud Bay case*'

- most commonly refers to the latter case of *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 which related to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). All of these cases will be discussed in Part II of this article.
- 3 For a map of the area of *Akiba* (also known as the Torres Strait Regional Sea Claim) see: National Native Title Tribunal, *Torres Strait Regional Sea Claim Area* (29 June 2010) <http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title/Documents/20100629_QC01_042_Media%20map_A3L.PDF>. It is important to note that much of the sea claim was decided in the Federal Court in *Akiba v Queensland [No 3]* (2010) 204 FCR 1 (*'Akiba FC'*). The only issues that came before the High Court were commercial rights and reciprocal rights. See, Lauren Butterly, 'Clear Choices in Murky Waters: *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*' (2013) 35(1) *Sydney Law Review* 237, 238 - 242.
- 4 A number of consent determinations to land in the Torres Strait have included a right to trade or use natural resources for economic purposes in accordance with traditional laws and customs. See, eg, *Mualgal People v Queensland* [1999] FCA 157; *Kaurareg People v Queensland* [2001] FCA 657.
- 5 *Yarmirr v Commonwealth* (2001) 208 CLR 1 (*'Yarmirr'*), 56 [61], 60-1 [76], 67-8 [94]-[100]. In *Yarmirr*, Kirby J dissented on the 'exclusivity' point and instead 'attributed a "qualified exclusive" nature to the rights: Ulla Secher, 'The Crown's Radical and Native Title: Lessons from the Sea — *Yarmirr* and Beyond' (Pt 2) (2011) 35 *Melbourne University Law Review* 1099, 1113. This approach has not gained traction. See also Samantha Hepburn, 'Native Title Rights in the Territorial Sea and Beyond: Exclusivity and Commerce in the *Akiba* Decision' (2011) 34 *University of New South Wales Law Journal* 159, 168. We will return to this issue in more detail in Part II.
- 6 The term 'sea country' or 'saltwater country' refers to: 'An estate of sea as well as land, containing sacred sites; created, named and inhabited by Ancestral beings; existing in both the physical and spiritual world': Dhimurru Aboriginal Corporation, *Sea Country* above n 2, <<http://www.dhimurru.com.au/sea-country.html>>. This article does not detail the importance of sea country to Indigenous peoples. Much has been written in this area and it is vital to understanding the need for Indigenous involvement in managing sea country. See, eg, North Australian Indigenous Land and Sea Management Alliance (for National Oceans Office), *Living on Saltwater Country: Review of literature about Aboriginal rights, use, management and interests in northern Australian marine environments* (2004) 12–13 <<http://nailsma.org.au/sites/default/files/publications/Living%20on%20Saltwater%20Country%20Literature%20Review.pdf>>.
- 7 It goes without saying that: 'The perspectives held by Aboriginal peoples of Australia are many and varied, informed as they are by the specific Aboriginal country from which we each come, the people to whom each of us belong, and our individual and collective experiences...': Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 43(2) *Journal of Australian Studies* 195, 196.
- 8 At the National Indigenous Sea Country Workshop in May 2012, it was noted that: 'The strongest and most basic desire is recognition of the Indigenous view of holistic land and sea management that includes people and culture; in other words, sea country is more than just 'sea': Vanessa de Koninck, Rod Kennett and Paul Josif, 'National Indigenous Sea Country Workshop Report' (Knowledge Series, No 14, North Australian Indigenous Land and Sea Management Alliance, January 2013) 5 <http://www.nailsma.org.au/sites/default/files/publications/2012%20NISCW_Report_web.pdf>.
- 9 *Ibid* 18.
- 10 For example, as we shall see in Part III of this article, the Dhimurru Indigenous Protected Area (IPA) was declared in 2000 over both land and sea in north-east Arnhem Land. In 2006, the Dhimurru Yolŋu Monuk Gapu Wāŋa Sea Country Plan was released. Recently, an expansion to the sea country area was announced and the Dhimurru Yolŋu Monuk Gapu Wāŋa IPA Sea Country Management Plan 2013 - 2015 was launched. One of the purposes of this Management Plan is to '[s]et out management priorities for the next three years until an integrated land and sea IPA Management Plan is developed in 2015 following the expiry of the current IPA Plan of Management (2008-2015)': Dhimurru Aboriginal Corporation, *Dhimurru Yolŋu Monuk Gapu Wāŋa IPA Sea Country Management Plan 2013 – 2015* (2013) 2, 6 <<http://www.dhimurru.com.au/sea-country-ipa-management-plan-launch.html>>.
- 11 For just one example, see: North Australian Indigenous Land and Sea Management Alliance, *National Indigenous Sea Country Workshop 2012* <<http://nailsma.org.au/hub/events/national-indigenous-sea-country-workshop-2012>>.
- 12 *Ibid*; Department of Environment, Commonwealth Government, *Sea Country* (5 August 2011) <<http://www.environment.gov.au/indigenous/seacountry/index.html>>. Dr Dermot Smyth, an Adjunct Principal Research Fellow, School of Environmental Research, Charles Darwin University, is a key commentator and contributor in this area. Smyth prepared the Dhimurru Yolŋu Monuk Gapu Wāŋa IPA Sea Country Management Plan 2013 - 2015 (see above n 10). See also: Dermot Smyth, 'Just Add Water? Taking Indigenous Protected Areas into Sea Country' in Dermot Smyth and Graeme K Ward (eds), *Protecting Country: Indigenous governance and management of protected areas* (Australian

- Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 2008) 95 <<http://www.aiatsis.gov.au/research/publications/ProtectingCountry8.pdf>>.
- 13 As we shall see in Part II, there is much legal commentary on native title to sea country and also claims under 'land' rights legislation, but not the broader involvement of Indigenous peoples in managing sea country.
- 14 Since the *Akiba* decision, another decision relating to native title and fishing has been handed down by the High Court: *Karpany v Dietman* [2013] HCA 17. This decision is very important, but can be differentiated from the *Akiba* decision in terms of its scope and content. *Karpany* was a prosecution where the 'native title defence' in s 211 of the *Native Title Act 1993* (Cth) ('NTA') was used in relation to a charge of taking undersized abalone. The case was not a broader claim to native title rights in sea country. Cases such as *Karpany* certainly play a part in the 'bigger picture' discussions in this area, especially how such issues (ie, the taking of undersized abalone by native title holders) might be approached in a more holistic way. For a summary of the *Karpany* case see: Lauren Butterly, "For the reasons given in *Akiba*...": *Karpany v Dietman* [2013] HCA 47' (2014) 8(10) *Indigenous Law Bulletin* 23.
- 15 Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP, 2003) 119, 119.
- 16 Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Earthscan, 2012) 6; United Nations Management Development and Governance Division, *Reconceptualising Governance: Discussion Paper 2* (January 1997) 11 <<http://mirror.undp.org/magnet/Docs/!UN98-21.PDF/!RECONCE.PTU/!sec1.pdf>>.
- 17 Louis Kotze, *Global Environmental Governance: Law and Regulation in the 21st Century* (Edward Elgar, 2012) 52, 150-184.
- 18 David Trubek and Louise Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation' (2006/2007) 13 *Columbia Journal of European Law* 539, 543.
- 19 Ibid. Trubek and Trubek note that these stylised concepts obscure much complexity. As will be seen, this article does not shy away from this but rather suggests that there is much more research to be done in this area.
- 20 Ibid.
- 21 Dhimurru Land Management Aboriginal Corporation, above n 2, 44.
- 22 Ibid.
- 23 With respect to customary international law, see Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439, 465. In relation to Indigenous legal systems, see Kwaymullina and Kwaymullina, above n 7, 205.
- 24 Erik Larson, 'Regulatory Rights: Emergent Indigenous Peoples' Rights as a Locus of Global Regulation' in Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate, 2007) 107, 108, 111.
- 25 National Marine Protected Areas Center (United States), *MPA Connections: Special Issue on Tribal and Indigenous Peoples and MPAs*' (July 2013) <http://marineprotectedareas.noaa.gov/pdf/helpful-resources/connections/connections_jul13.pdf>. The acronym 'MPA' stands for 'Marine Protected Area'. We will return to this term in Part III.
- 26 Bronwen Morgan, 'The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship' in Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate, 2007) 1, 1-10, 15-19.
- 27 Trubek and Trubek, above n 18, 543.
- 28 In this context, it is also interesting to consider the differences between joint or co-management (of which there are many different types) and sole management by Indigenous communities (ie, Indigenous Protected Areas). For an interesting practical exploration of this see Toni Bauman and Dermot Smyth, *Indigenous Partnerships in Protected Area Management in Australia: Three case studies* (2007, AIATSIS) <<http://www.aiatsis.gov.au/research/docs/partnerships.pdf>>.
- 29 Trubek and Trubek, above n 18, 548-9.
- 30 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007) ('UNDRIP').
- 31 Davis, above n 23, 470.
- 32 The characteristics of good governance defined in 'societal terms remain somewhat elusive': United Nations Management Development and Governance Division, above n 16, 19.
- 33 Indigenous Governance Toolkit (Reconciliation Australia and Centre for Aboriginal Economic Policy Research), *The Important Parts of Governance* <<http://governance.reconciliation.org.au/toolkit/1-1-indigenous-governance-2>>.
- 34 Ibid.
- 35 Partnership between the Centre for Aboriginal Economic Policy Research (ANU) and Reconciliation Australia (2004-2008).
- 36 Indigenous Governance Toolkit, above n 33.
- 37 Davis, above n 23, 461.
- 38 UNDRIP, Preamble.
- 39 Benjamin Richardson, 'The Ties that Bind: Indigenous Peoples and Environmental Governance' in Benjamin Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 337, 338: This book contains an excellent overview of themes in this area and also a typology of different environmental governance

- approaches. See also Marcia Langton, 'What do we mean by wilderness? Wilderness and terra nullius in Australian art: Address to The Sydney Institute on 12 October 1995' (Summer 1996) 8(1) *Sydney Papers* 10, 20: 'The popular definition of "wilderness" excludes all human interaction within the allegedly pristine areas, even though they are and have been inhabited and used by [I]ndigenous people for thousands of years. Like the legal fiction of terra nullius which imagined us out of existence until the High Court decision in the Mabo case, popular culture imagines us out of existence'.
- 40 Benjamin Richardson, above n 39, 338.
- 41 Ibid 337: '[p]utting aside the contrary historical record – when European colonisers plundered Indigenous lands, exterminating herds of buffalo, damming the rivers, and felling the forest - the supposedly heightened environmental-consciousness of modern Western societies has not necessarily assuaged Indigenous peoples'.
- 42 Ciaran O'Faircheallaigh, 'Green – Black Conflict Over Gas Development in the Kimberley: A Sign of Things to Come?' (18 October 2011) *The Conversation* (online) <<http://theconversation.com/green-black-conflict-over-gas-development-in-the-kimberley-a-sign-of-things-to-come-3539>>.
- 43 Benjamin Richardson, 'Indigenous Peoples, International Law and Sustainability' (2001) 10(1) *Review of European Community & International Environmental Law* 1, 3.
- 44 Although, it should be noted that both of these debates also demonstrated tensions between government and environmental groups.
- 45 For a brief outline of the Wild Rivers debate, see Timothy Neale, 'Whatever Happened to Queensland's Wild Rivers controversy?' (1 June 2012) *The Conversation* (online) <<http://theconversation.com/whatever-happened-to-queenslands-wild-rivers-controversy-7360>>. See also Jon Altman, 'Wild Rivers' (June-July 2010) 106 *Arena Magazine* 11 and Timothy Neale, 'Duplicity of Meaning: Wildness, Indigeneity and Recognition in the Wild Rivers Act Debate' (2011) 20(2) *Griffith Law Review* 310.
- 46 For an overview of the James Price Point development see Ciaran O'Faircheallaigh, 'Extractive Industries and Indigenous peoples: A changing dynamic?' (2013) 30 *Journal of Rural Studies* 20, 23-29. In relation to the 'debate' see: O'Faircheallaigh, above n 42; Ciaran O'Faircheallaigh, 'Indigenous Rights, Political Mobilization and Indigenous Control over Development: Natural Gas Processing in Western Australia' (Paper presented at European Consortium for Political Research Sessions, St Gallen, Switzerland, 13-16 April 2011) 21-23; and Victoria Laurie, 'Dividing the Territory' (October 2010) *The Monthly* 32, 35-38.
- 47 Sarah Elks and Rosanne Barrett, 'Wild Rivers Act crushes Aborigines: Pearson', *The Australian* (online), 5 November 2011 <<http://www.theaustralian.com.au/national-affairs/state-politics/wild-rivers-act-crushes-aborigines-pearson/story-e6frgczx-1226186208583>>.
- 48 O'Faircheallaigh, above n 42.
- 49 Benjamin Richardson, above n 43, 11.
- 50 Ibid.
- 51 Dhimurru Land Management Aboriginal Corporation, above n 2, 50: Prior to this statement, the Plan noted: 'We are concerned about the overly romantic sentimental concern for charismatic marine animals shown by some sections of the environment movement. They need to look at the bigger picture – in which we respect and revere many marine creatures'.
- 52 Erika Techera, *Marine Environmental Governance: From International Law to Local Practice* (Routledge, 2012) 12.
- 53 Ibid.
- 54 World Commission on Environment and Development, *Our Common Future* (1987) (annex to Report of the World Commission on Environment and Development, UN Doc A/42/427) 41 <<http://www.un-documents.net/our-common-future.pdf>>.
- 55 For a short exploration of key themes, see Techera, above n 52, 24-25.
- 56 *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/6/Rev. 1 (1992), Principle 22.
- 57 *UNDRIP*, Preamble (emphasis added).
- 58 Techera, above n 52, 96.
- 59 Holley, Gunningham and Shearing, above n 16, 1-2 and Donald Rothwell and David Vanderzwaag, 'The Sea Change Towards Principled Oceans Governance' in Donald Rothwell and David Vanderzwaag (eds), *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (Routledge, 2006) 5.
- 60 Holley, Gunningham and Shearing, above n 16, 2, 4.
- 61 World Indigenous Network, *WIN Conference Darwin 2013* <<http://www.worldindigenousnetwork.net/win-conference-darwin-2013>> and Commonwealth Department of Environment, 'World Indigenous Network Conference to tackle big environment issues' (Media Release, 25 May 2013) <<http://www.environment.gov.au/minister/archive/burke/2013/mr20130526.html>>.
- 62 World Indigenous Network, *About the WIN* <<http://www.worldindigenousnetwork.net/about-the-win>>.
- 63 Ibid.
- 64 World Indigenous Network, *WIN Exchanges* <<http://www.worldindigenousnetwork.net/category/win-exchanges>>.
- 65 Commonwealth Department of Environment, 'World Indigenous Network takes to the international stage' (Media Release, 27 May 2013) <<http://www.environment.gov.au/minister/archive/burke/2013/mr20130527.html>>; Michael Kenny, 'Australian

- Indigenous rangers join UN network', SBS News (online), 29 May 2013 <<http://www.sbs.com.au/podcasts/Podcasts/radionews/episode/269636/Australian-Indigenous-rangers-join-UN-network>>.
- 66 Equator Initiative, *What We Do* <http://www.equatorinitiative.org/index.php?option=com_content&view=article&id=47&Itemid=849>.
- 67 Ibid.
- 68 For a brief explanation of network governance see Kotze, above n 17, 142–145.
- 69 UNDRIP, Art 19.
- 70 Donald Rothwell and David Vanderzwaag, above n 59, 7.
- 71 For recent examples see Ulla Secher, 'The Crown's Radical Title and Native Title: Lessons from the Sea, Part One – The Position Before *Yarmirr*' (2011) 35 *Melbourne University Law Review* 523; Secher, above n 5; Hepburn, above n 5; Samantha Hepburn, 'Native Title in Coastal and Marine Waters', in Rachel Baird and Donald Rothwell (eds), *Australian Coastal and Marine Law* (Federation Press, 2011) 296; Sean Brennan, 'Wet or Dry, It's Aboriginal Land: The *Blue Mud Bay* Decision on the Intertidal Zone' (2008) 7(7) *Indigenous Law Bulletin* 6; Butterly, above n 3.
- 72 See, eg, s 53 *Fisheries Act* 1988 (NT); *Northern Territory Aboriginal Sacred Sites Act* 1989 (NT). The definition of 'land' in s 3 of the *Northern Territory Aboriginal Sacred Sites Act* includes 'land covered by water (including such land in the Territorial sea) and the water covering land'. Sacred sites legislation can also apply to large areas. The Aboriginal Areas Protection Authority ('AAPA') (which is an independent statutory body established pursuant to the *Northern Territory Aboriginal Sacred Sites Act*) notes that they can 'range in size from a single stone or plant, to an entire mountain range': Aboriginal Areas Protection Authority, *Aboriginal Areas Protection Authority* <<http://www.aapant.org.au/>>. The AAPA also notes that: 'The AAPA sees collaboration with land and sea ranger groups as being important to the protection of sacred sites in the Northern Territory. Collaboration with the AAPA not only supports the activities of these groups, but also empowers custodians to protect their sacred sites and actively engage in formal planning processes and investigations of damage to sacred sites': Aboriginal Areas Protection Authority, *Fact Sheet: Working with Aboriginal Land Management Groups* <http://www.aapant.org.au/images/aapaDocs/Fact_Sheet/land_mgt_groups.pdf>.
- 73 *Aboriginal Land Rights Act* 1983 (NSW); *Aboriginal Land Act* 1991 (QLD); *Torres Strait Islander Land Act* 1991 (Qld); *Aboriginal Lands Trust Act* 1966 (SA); *Pitjantjatjara Land Rights Act* 1981 (SA); *Maralinga Land Rights Act* 1984 (SA); *Aboriginal Lands Act* 1995 (Tas); *Aboriginal Lands Act* 1970 (Vic).
- 74 *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 ('*Blue Mud Bay*') 87 [121] - [122]. See also Brennan, above n 71, 6-7.
- 75 *Blue Mud Bay* (2008) 236 CLR 24, 87 [121].
- 76 Ibid 90 [133] - [134].
- 77 Ibid 90 [134].
- 78 *Aboriginal Land Act* 1978 (NT) s 12.
- 79 John Toohey (Aboriginal Land Commissioner), *Closure of seas: Milingimbi, Crocodile Islands and Glyde River area: Report* (1981); William Kearney (Aboriginal Land Commissioner), *Closure of seas: Castlereagh Bay / Howard Island region of Arnhem Land: Report* (1988); Howard Olney (Acting Aboriginal Land Commissioner), *Report for the year ended 30 June 2005* (September 2005) <http://www.dss.gov.au/sites/default/files/documents/05_2012/alc_ar_0405.pdf>; East Arnhem Shire Council, *Milingimbi* (2012) <<http://www.eastarnhem.nt.gov.au/milingimbi/>>. See also Department of Families, Housing, Community Services and Indigenous Affairs, Commonwealth Government, *Local Implementation Plan – Milingimbi* (30 May 2012) <<http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/communities-regions/local-implementation-plans/local-implementation-plan-milingimbi?HTML>>.
- 80 *Aboriginal Land Act* 1978 (NT) s 12(2)(c).
- 81 In practice, all sea closure applications are referred to the Commissioner.
- 82 *Aboriginal Land Act* 1978 (NT) s 12(3)(a); (b).
- 83 *Aboriginal Land Act* 1978 (NT) s 12(3)(e).
- 84 *Aboriginal Land Act* 1978 (NT) s 18.
- 85 Anthony Bergin, 'Aboriginal Sea Claims in the Northern Territory of Australia' (1991) 15 *Ocean and Shoreline Management* 172, 173.
- 86 North Australian Indigenous Land and Sea Management Alliance (for National Oceans Office) above n 6, 41.
- 87 Northern Land Council (for National Oceans Office), *Living on Saltwater Country: Goulburn Island to the QLD Border Sea Country Management Needs and Issues* (2004) 23 <<http://www.environment.gov.au/system/files/resources/e2ab2bd2-6698-4297-82a3-15519623069f/files/losc-goulburn.pdf>>.
- 88 *Blue Mud Bay* (2008) 236 CLR 24, 51 [5] ; 52 [8].
- 89 For further analysis of this decision see: Brennan, above n 71.
- 90 Ibid 6; 8.
- 91 *Gumana* (2005) 141 FCR 457, 462 [3]. For the appeal see *Gumana v Northern Territory* (2007) 158 FCR 349.
- 92 *Native Title Act* 1993 (Cth) s 223(1).
- 93 *Native Title Act* 1993 (Cth) s 253.
- 94 For a discussion of whether rights could be recognised beyond the territorial sea: see Hepburn, above n 71, 317 – 319.