COMMON OWNERSHIP AND COLONIAL MENTALITY: THE CONCEPTUAL BARRIERS TO EFFECTIVE MANAGEMENT OF SEA COUNTRY

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For the coastal Aboriginal peoples of Australia, the dominant legal system's recognition of pre-existing Indigenous rights to land has been undercut by its failure to fully recognise and protect the rights to sea which run with them. Despite some surface-level acknowledgement of rights attached to sea country, the non-Aboriginal vision of the sea and its resources remains largely unchanged. This vision centres on the notion that the sea and its contents are national common property. The concept of the sea as commons has been linked to colonial mechanisms of controlling country which continue to influence the extent to which Indigenous rights and management systems are recognised, both legally and socially, by non-Indigenous Australia. Through a case study of attempts by Yolngu clans in north-east Arnhem Land to engage the Northern Territory and Australian governments in a marine protection strategy for Manbuynga ga Rulyapa, the Arafura Sea, this article suggests that politically and ecologically effective management of sea country is unlikely to be achieved until non-Indigenous stakeholders are prepared to actively work towards understanding Indigenous management systems in a context of mutual respect and on the basis of a firm recognition of pre-existing rights.

Sea as Common Property

The Anglo-Australian conception of sea space is inherited from the dominant notion in modern European thought of 'freedom of the seas', handed down to the colony through its imperial founders as 'somehow natural and certainly sacrosanct'.[1] Central to this doctrine, popularised by Grotius' *Mare Liberum* in the seventeenth century, is the idea that the sea and its resources are common property. As Sharp has noted, this concept was used to redefine seascapes in accordance with the economic imperatives of powerful European nations: while 'commons' on land were enclosed and divided in an emerging system of absolute individual ownership, marine territories were divested of all individual and group ownership 'in the name of public rights of all citizens of absolutist states' to freely traverse and exploit the sea and its resources.[2] These

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[1] Nonie Sharp, 'Why Indigenous Sea Rights Are Not Recognised in Australia…: "the Facts" of *Mabo* and Their Cultural Roots' (1997) 1 *Australian Aboriginal Studies* 28, 33.

[2] Nonie Sharp, 'Reimagining Northern Seascapes in Australia: Open Access, Common

conceptual foundations of property in land and sea, naturalised in European thought by the end of the seventeenth century, were the basis on which the British intruders' system of ownership in the land they named Australia were built.

In the Anglo-Australian popular consciousness, the notion of the sea as common space – in contrast to privately owned and alienated land – remains intact. Changes in the doctrine of freedom of the seas in the last half-century in response to the assertion by coastal states of interests in increasingly extensive areas of sea and sea-bed do not reflect a conceptual change in regard to sea 'ownership',[3] but rather changing global circumstances in the decline of imperial expansion and the rise of the nation-state. Equality of interest in the sea has come under challenge only insofar as nation-states are asserting interests in the sea – and rights to control it – on behalf of their citizens as a whole. The concept of 'ownership' in the sea by individuals or small groups remains as foreign to the dominant system of property as it ever was. Likewise, the emerging discourses of conservationism and sustainability, and with them the growing awareness of the need to place some control on the exploitation of sea resources, proceeds on the basis that management rights are vested in the government on behalf of the whole community.[4]

Conceptual approaches to the sea in the property systems of the Aboriginal owners of Australia, always continuing to govern Indigenous relationships with country despite the surface assertion of control by the Anglo-Australian system, operate on a fundamentally different basis to that of *mare liberum*. While differing from place to place, the systems of coastal Indigenous peoples generally encompass clan ownership of, and identification with, areas of sea – known as 'sea country'.[5] Relationships to country are passed down through clans, the fundamental social unit of most coastal Indigenous societies, and are intricately connected to their very existence. Clan members are owners of their country, belong to it, identify and are identified with it, and have delineated responsibilities for its care.[6] Sea country is not merely additional to a landed estate, but rather forms part of an indissoluble whole estate, which is

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Property and the Return of Responsibility?' (Paper presented at the Seventh International Conference for the Study of Common Property, *Crossing Boundaries*, Vancouver, 10-14 June 1998) 10.

[3] See Sir Anthony Mason, 'The International Concept of Equality of Interest in the Sea as it Affects the Conservation of the Environment and Indigenous Issues' (Issues paper no 16, Volume 2, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, June 2002).

[4] See Dermot Smyth, 'Management of Sea Country: Indigenous People's Use and Management of Marine Environments' in Richard Baker et al (eds), *Working on Country: Contemporary Indigenous Management of Australia's Lands and Coastal Regions* (2001) 60.

[5] See ibid; see also Gary Meyers et al, *A Sea Change in Land Rights Law: the Extension of Native Title to Australia's Offshore Areas* (1996) 3-17.

[6] See Dhimurru Land Management Aboriginal Corporation, *Dhimurru Yolnguwu Monuk Gapu Wana Sea Country Plan: A Yolngu Vision and Plan for Sea Country Management in North-East Arnhem Land, Northern Territory* (2006) 6-13; Nancy Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition* (1986) 92-104.

not necessarily contiguous.[7] Both sea and land bear the footprints of their sacred ancestral creators,[8] who allocated estates to the clans and with them responsibilities for their care and maintenance.

The Anglo-Australian legal system, recently having come to recognise the continuance of Aboriginal systems of land ownership in the concept of native title, has – despite its claim that native title does not depend on Anglo-Australian law for its recognition –[9] been reticent in including acknowledgment and protection of rights to sea country. The much lauded displacement of the doctrine of *terra nullius* is considerably limited in its effectiveness for coastal Indigenous peoples by the pervasiveness of that of *mare liberum*.

Early recognition of Aboriginal property ownership in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), considered by many to be among the most successful attempts at recognition by Anglo-Australian law,[10] gives some recognition of Aboriginal rights to sea country in its provision for the Northern Territory legislature to make laws regulating activities in waters of the sea and providing 'for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition', and even to prohibit the entry of others into such waters through 'sea closure'.[11] However, such regulation – apart from giving only limited control to Indigenous owners themselves – may only extend into waters of the territorial sea of Australia adjoining and within two kilometres of recognised Aboriginal land. The limitation of such recognition in relation to ownership systems which may extend as far as Indonesian territorial waters, and which recognise rights in relation to waters not contiguous with clan lands, is felt deeply by the coastal Aboriginal peoples of the Northern Territory.[12]

The alternative, the *Native Title Act 1993* (Cth), allows for the possibility of native title rights to sea, explicitly extending to the coastal sea of Australia and its territories, and to waters over which Australia asserts sovereign rights.[13] However, this possibility has been limited by judicial interpretation, which has recognised native title rights over sea but severely limited their scope. Such rights have been held to be incapable of conferring a

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[7] See Galarrwuy Yunupingu, *We Know These Things to Be True*, The Third Vincent Lingiari Memorial Lecture (1998); Williams, above n 6, 76-8; Geoffrey Bagshaw, '*Gapu Dhulway, Gapu Maramba*: Conceptualisation and Ownership of Saltwater Among the Burarra and Yan-nhangu Peoples of Northeast Arnhem Land' in Nicolas Peterson and Bruce Rigsby (eds), *Customary Marine Tenure in Australia* (1998) 154-177.

[8] See Nancy Williams and Daymbalipu Mumunggurr, 'Understanding Yolngu Signs of the Past' in Robert Layton (ed), *Who Needs the Past?: Indigenous Values and Archaeology* (1989) 70, 77-80.

[9] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 60; *Native Title Act 1993* (Cth) s 223.

[10] See eg Galarrwuy Yunupingu, above n 7; Galarrwuy Yunupingu, *From the Bark Petition to Native Title: 20 Years of Land Rights* (1996).

[11] s 73(d).

[12] See Ginytjirrang Mala Steering Committee, *An Indigenous Marine Protection Strategy for Manbuynga ga Rulyapa* (November 1994) <http://members.iinet.net.au/~profile2/Mgrstrategy.htm>; Dhimurru Land Management Aboriginal Corporation, above n 6.

[13] s 6.

legal right to exclude people and speak for waters, and are required to yield to other rights and interests, including the right of the general public to fish and navigate.[14] The potential of the *Native Title Act* to protect Indigenous sea rights is further weakened, as Glaskin has argued, by the absence of the 'right to negotiate' offshore.[15] While most registered land claims afford claimants a right to be notified and to negotiate where government acts will affect the land, country beyond the high water mark is excluded from this procedure.[16] Thus even if a claimant group has been able to get its claim registered – a difficult procedure which involves proving a prima facie case –[17] acts may be done in relation to the claimed country that extinguish native title under the *Act*, leaving claimants with no legal rights except possibly that of compensation.

The inadequacy of legal protection for Indigenous rights to sea country, particularly in comparison to the more extensive protection given to interests in land, arguably reflects a continuing mentality based on *mare liberum*. Even in *Mabo v Queensland (No 2)* (*'Mabo'*), the landmark decision recognising the existence of native title rights (which have been considerably limited and circumscribed by subsequent decisions),[18] this inconsistency was evident. While the court purported to be recognising rights which do not depend for their existence on the common law but have their 'origin in and [are] given [their] content by the traditional laws acknowledged by and the traditional practices observed by the indigenous inhabitants of a territory',[19] its discounting of the sea component of the Meriam people's 'land-sea' claim belied the suggestion that Indigenous property systems were being recognised on their own terms.[20] Native title law has treated property in land and property in sea as quite distinct, with the latter seen as lesser, and has been unable to recognise rights of control or exclusion over waters. The continuing mindset of *mare liberum*, and the attendant practical difficulties of recognition of sea ownership in a system that does not contemplate it, have seen Indigenous systems rejected as 'fundamental[ly] inconsisten[t]' with public rights of navigation and fishing and the right of innocent passage.[21]

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[14] *Cth v Yarmirr; Yarmirr v Northern Territory (Croker Island Case)* [2001] HCA 56 (11 October 2001).

[15] Katie Glaskin, 'Limitations to the Recognition and Protection of Native Title Offshore: the Current "Accident of History"' (Issues paper no 5, Volume 2, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, June 2000) 4.

[16] *Native Title Act 1993* (Cth) s 26(3).

[17] *Native Title Act 1993* (Cth) s 190A, 190B.

[18] See generally Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523.

[19] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 60 [Brennan J]. Similar wording was adopted in the *Native Title Act 1993* (Cth) s 223, which now defines native title rights.

[20] See Sharp, above n 1.

[21] *Cth v Yarmirr; Yarmirr v Northern Territory (Croker Island Case)* [2001] HCA 56 (11 October 2001) [98] Gleeson CJ, Gaudron, Gummow and Hayne JJ.

Sea and Colonial Control

Under Anglo-Australian law, control of 'territorial waters' was vested in the government through 'successive assertions of sovereignty' in the nineteenth century.[22] These 'assertions' also gave to the Australian public the rights of fishing and navigation, and to international vessels the 'right of innocent passage'.[23] Thus, unlike Indigenous rights to exclusive possession of land, which under native title law continued to exist in the absence of an inconsistent exercise of sovereign power in relation to the specific land in question, it seems that the possibility of Indigenous peoples' 'possession' of areas of sea is inconceivable under Anglo-Australian law: the concept of historical 'assertions of sovereignty' is of itself 'antithetical' to such rights.[24] This claim to automatic sovereignty over 'territorial seas' is linked not only to the concept of *mare liberum*, but also to colonial anxieties about controlling the new territory. Catherine Robinson has discussed these anxieties under the rubric of the 'frontier mentality': the 'colonial imperative to create a *Home* on the New World *frontier*'.[25] At the centre of this imperative can be seen both a need to create boundaries between '"civilised" and "savage" landscape and culture',[26] and a need to draw the 'savage' into the 'civilised' through assertions of colonial control.

In the Northern Territory in the nineteenth century, as Robinson notes:

> … the conceptualised colonial Home had become uncertain on a frontier where boundaries that defined "civilised" and "savage" landscape and culture were confused. The only law and society that was known to exist intact in the north was the law of the "wild tribes" that lived on the coast, and that law governed a cultural landscape that was not considered part of Australia.[27]

In the absence of control over land on the coast of the Northern Territory, control over its waters had added importance as a means of bringing the area under the central control of the Crown. The existence of a well-established trading system between the Yolngu of north-east Arnhem Land and the Macassans, pursuant to which 'the Macassan seafarers recognised the native ownership of the land and the surrounding waters, and paid tribute to the members of the local clans for the fishing rights',[28] posed an insidious threat to

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[22] Ibid, [99].
[23] Ibid.
[24] Ibid.
[25] Cathy Robinson, *Indigenous-Settler Interactions on Frontier Coasts: the Development of Co-Management in Australia's Northern Territory and in British Columbia, Canada* (D Phil Thesis, Monash University, 1999) 22 [emphasis in original].
[26] Ibid, 38.
[27] Ibid.
[28] Donald Thomson, 'Arnhem Land: Explorations Among an Unknown People: parts I, II, III', *Geographical Journal*, 1948/49, vol. 112, p. 146; vol. 113, p. 1; vol. 114, p. 53. As cited in Djon Mundine, 'Saltwater' in Buku-Larrnggay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (1999) 20, 21. See also Raymattja Marika, 'The 1998 Wentworth Lecture' (1999) 1 *Australian Aboriginal Studies* 3, 4.

colonial control. In 1907, the government excluded Macassan traders from the coast of Arnhem Land and began to issue fishing permits to Japanese pearlers and trepangers 'who did not have the same courtly diplomacy or appreciation of Yolngu sovereignty as the Macassans'.[29] The official termination of the Yolngu trading relationship with the Macassans was a demonstration by the British colonial power to both parties that the new sovereign controlled the area.

Control was also asserted in a less direct way through the colonial traditions of naming and mapping. Ignoring highly developed Indigenous systems of maritime nomenclature and cartography, the colonial power drew up its own maps and imposed its own names. The sea off northern Arnhem Land, known to Yolngu broadly as Manbuynga ga Rulyapa,[30] was at some stage given the name 'Arafura Sea', the origins of which are uncertain, but are likely to be Portuguese or Dutch.[31] Matthew Flinders named the bays and rivers of Arnhem Land after British Sea Lords and British Colonial Office officials.[32] The giving and recording of European derived names to Yolngu owned territories erased in the official records – and in the colonial psyche – the Aboriginal identities of the waters.

Feeling for Country

For the Yolngu, no rights in respect of sea country have ever been ceded. Traditional systems of ownership and management continue to govern Yolngu dealings with land and sea. Yolngu speak of having 'feeling' for country, conveyed and developed through songs, stories and ceremonies which reflect 'unique ancestral patterns that can be sensed in the speed of the currents, the smell of the ocean, the sounds of water movements, and the visible residue of water-marks left on the rocks'.[33] Thus Gawirrin Gumana explains:

> … the deep sea is not without whatever significant things exists there... for there lies stories and songs, feelings. These our feelings. We can feel the water as it goes out and as it comes in. That is why we love the saltwater and sea country.[34]

Waters and everything within them are named and identified as belonging to one of the two complementary moieties into which the Yolngu universe is divided, Dhuwa and Yirritja, and as relating to certain clans who are responsible for them: 'the saltwater country has names for each clan or tribe. For the sea country there are people who know about their country, about the

[29] Mundine, above n 28, 21.

[30] Manbuynga ga Rulyapa refers to two main bodies of water, Yirritja and Dhuwa. Within these bodies of water are many other named sections of sea and geographical features.

[31] Ginytjirrang Mala Steering Committee, above n 12.

[32] Ibid.

[33] Fiona Magowan, 'Ganma: Negotiating Indigenous Water Knowledge in a Global Water Crisis' (Summer 2002) *Cultural Survival Quarterly* 18, 18.

[34] Gawirrin Gumana, 'Declaration', in Buku-Larrnggay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (1999) 13.

deep sea and over to where the clouds stand'.[35] A clan's ownership of sea country entails extensive knowledge and the inherent right and responsibility to protect and pass on this knowledge of country to the next generation.[36] Within this body of knowledge 'are embedded the principles and prescriptions for the management of the environment... people regard the environment as sentient and as communicating with them',[37] and these communications direct appropriate interactions with country.

Responsibility to look after sea country is felt deeply by Yolngu people, whose identities are inextricably linked with it. As Muluway Dhamanyjani says, 'gapu, or water, the sea, its we believe that our spirit came from these waters and all the symbol of these connections with water give us life'.[38] Many people bear names associated with sections of sea,[39] and have an individual spiritual affiliation with places or creatures,[40] as well as a shared group connection with 'totem' species, such as crocodiles, sharks, turtles, whales, and dolphins, in which a clan's ancestral essences might inhere. As Marcia Langton notes, 'persons with inherited spiritual essence shared with non-human beings share the world of those beings, including their natural habitats, as a most personal responsibility'.[41] The effects of outside interference with country and the beings which inhabit it have thus been deeply distressing to its Yolngu owners, who 'truly *feel* much pain' for their country.[42]

Caring for Country

The environmental degradation caused by outside interference with Yolngu country in recent years has necessitated the official coming together of clan groups to address regional environmental issues, 'contemporary

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[35] Djambawa Marawili, 'Declaration', in Buku-Larrnggay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (1999) 14, 15. See also Dhimurru Land Management Aboriginal Corporation, above n 6, 6-13. On the significance of names and naming in Yolngu society, and the interrelationship between names and relationships with country, see Williams, above n 6, 57-74.

[36] See eg Narritjin Maymuru, (Speech delivered at the Conference on Ethnographic Film, Australian Institute of Aboriginal Studies, Canberra, 1978). Cited in Howard Morphy, 'Title to Their Land' (September 1978) *Quadrant* 36, 36.

[37] Nancy Williams, forthcoming, cited in Marcia Langton, *Burning Questions: Emerging Environmental Issues for Indigenous People in Northern Australia* (1998) 22.

[38] Speaking as a member of the Ginytjirrang Mala Steering Committee in Northern Land Council, *1976-1996 20 Years of the Land Rights Act: "We Have Survived"* , Land Rights Views No 7, VHS (June 1996).

[39] 'Every small bit of sea has a name. That is how we chose our names'. (Djambawa Marawili, above n 35, 14).

[40] 'A child's spirit can come from the saltwater. It can reveal itself for the first time by adopting the form of a creature from the sea like a turtle or a fish bringing unexpected good fortune'. (Lanangi Marika, 'Declaration' in Buku-Larrnggay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (1999) 19, 19).

[41] Langton, above n 37, 28.

[42] A Manggalili woman, speaking in Ian Dunlop, *Pain for This Land*, The Yirrkala Film Project, Episode 1, VHS (1970).

expression[s] of the traditional responsibility of "caring for country"'.[43] The most prominent of these, the Dhimurru Land Management Aboriginal Corporation, was established in 1992 in response to the negative impacts of recreational use of Yolngu land in the vicinity of the growing mining town of Nhulunbuy.[44] The establishment of the mine itself had caused significant damage about which the Yolngu had rarely been informed, far less consulted.[45] In particular the knocking over of a sacred tree at a local beach and a hill in the Nhulunbuy area, both of which had been associated with Wuyal, the ancestral creator of most of the country around Nhulunbuy, greatly upset local people, who came together after these incidents to argue the unsuccessful *Millirrpum v Nabalco and the Cth* (*'Gove Land Rights Case'*).[46] Toxic chemicals were poured into Yolngu waters,[47] and the mine, described by Gumatj leader Mungurrawuy Yunupingu as a 'thing with claws',[48] significantly altered the coastal land. As the mining township grew, more extensive damage was caused by recreational use of Yolngu land, particularly beaches.[49]

With legal ownership of most of the land sections of their estates recognised under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Yolngu have attempted to redress and control some of the damage to country through the Dhimurru Corporation. Dhimurru, on behalf of estate owners, engages in a 'two-ways' management program, 'a synthesis of Indigenous and non-Indigenous resource management approaches, with final decision-making resting with the relevant traditional owners'.[50] Government authorities such as the Northern Territory Parks and Wildlife Commission have cooperated with Dhimurru on this basis, and the declaration of the Dhimurru Indigenous Protected Area in 2000 by the Commonwealth Department of the Environment and Heritage gave the Corporation official control of the environmental management of fairly extensive areas of coastal land, as well as

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[43] Kevin Leitch, 'Protecting Dhimurru' (Summer 2000) 84 *Chain Reaction* 32, 32. See also Djawa Yunupingu, 'Preface', in Dhimurru Land Management Aboriginal Corporation, above n 6, 3.

[44] Ibid.

[45] See Wandjuk Marika and Jennifer Isaacs, *Wandjuk Marika Life Story: As Told to Jennifer Isaacs* (1995) 95-108.

[46] *Millirrpum v Nabalco and the Cth* (1971) 17 FLR 141. See Marika and Isaacs, above n 45, 105; Julie Fenwick, *Worrying About Our Land: Conceptualising Land Rights 1963-1971*, Monash University Publications in History No. 36 (2001) 27-29; Galarrwuy Yunupingu, above n 10, 6; Galarrwuy Yunupingu, above n 7, 2-6.

[47] Martin Mulligan, 'Reading Storied Landscapes: Recognising Land Rights' (February-March 1999) 39 *Arena Magazine* 39, 40-41.

[48] Speaking in Dunlop, above n 42.

[49] Having been granted legal ownership of most of their land estates under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Yolngu estate owners had made available to Nhulunbuy residents and visitors a range of designated recreation locations.

[50] Leitch, above n 43, 33. See also Cathy Robinson and Nanikiya Munungguritj, 'Sustainable Balance: A Yolngu Framework for Cross-cultural Collaborative Management' in Richard Baker et al (eds) *Working on Country: Contemporary Indigenous Management of Australia's Lands and Coastal Regions* (2001) 92.

some limited extensions of sea country above the low water mark.[51] Dhimurru engages in a variety of fairly successful programs to rehabilitate beaches, and to protect threatened species such as marine turtles.[52]

In contrast to the substantial success of the Dhimurru Corporation's push to regain control for Yolngu people over management of Yolngu land and coastline, attempts to exert influence over more extensive tracts of sea country have been far less successful. Some limited native title rights in a tract of sea country at Blue Mud Bay were recently recognised in a Federal Court decision Yolngu estate owners have described as 'important but disappointing'.[53] The decision confirmed cultural rights to hunt, fish, gather and use resources; and to access, travel over, and use the area in accordance with traditional laws and customs, but predictably defined such native title rights as non-exclusive.[54] The 'inconsistencies between our rights and responsibilities under our customary law and those recognised under contemporary Australian law' present continual problems for Yolngu estate owners 'struggling to have our sea rights recognised in the same way as our rights on the land are recognised'.[55] In its recently released 'Sea Country Plan', Dhimurru expressed its frustration with this continuing struggle: 'We still have difficulty seeing how the rights to fish – only recently exercised by non-Indigenous people in our sea country – can sit equally with our requirements of cultural survival and wellbeing'.[56] While attitudes appear to be slowly changing – with greater investment in Indigenous marine ranger programs across Arnhem Land a particularly positive step –[57] government, industry, and the wider non-Indigenous community have yet to fully acknowledge that control and management of the marine environment of north-east Arnhem Land is as inherent a right and responsibility of the Yolngu as management of coastal land. A continuing *mare liberum* mentality, and traces of an underlying coloniser's need to retain official control over the area – both untrammeled because of the absence of effective legal protection for Yolngu rights – have impeded progress on joint management of the sea.

In late 1994, in much the same way that clan groups had come together to form Dhimurru, leaders of various saltwater clans met after the death of dozens of whales and dolphins beached on Elcho Island to form the

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[51] See 'Dhimurru Indigenous Protected Area (2000 -)', *Agreements, Treaties and Negotiated Settlements Project* Online Database <http://www.atns.net.au/biogs/A000453b.htm>.

[52] See Dhimurru Land Management Aboriginal Corporation, *About Dhimurru Land Management*, <http://members.iinet.net.au/~dhimurru/about.htm>; Langton, above n 37, 61-3; Robinson, above n 25, 166-74.

[53] Dhimurru Land Management Aboriginal Corporation, above n 6, 14. The case was *Gawirrin Gumana v Northern Territory (No 2)* [2005] FCA 1425 (11 October 2005) ('*Blue Mud Bay Case*'), substantially upheld on appeal in *Gawirrin Gumana v Northern Territory* [2007] FCAFC 23 (2 March 2007).

[54] *Blue Mud Bay Case*, above n 53, [8].

[55] Dhimurru Land Management Aboriginal Corporation, above n 6, 14.

[56] Ibid.

[57] See generally Northern Territory Government Department of Primary Industry, Fisheries, and Mines, *Indigenous Marine Rangers* (2006) <www.nt.gov.au/dpifm/Fisheries/Content/File/Indigenous_Marine_Rangers_Handbook.pdf>.

Ginytjirrang Mala Steering Committee.[58] The deaths were the ultimate of a series of mounting concerns about the degradation of Manbuynga ga Rulyapa, known officially as the Arafura Sea, by the incursions of the fishing industry. The influence of 'totemic affiliation', described by Langton as 'the primary ethic which can be deduced from the application of traditional cultural values to new situations',[59] provided a strong impetus for the development of a marine protection strategy for the area. David Yanygarring, a member of the Steering Committee, said of the beaching incidents: 'it's hurt us, because what we see when we see something like that is that's part of us… whale, dolphin, you find on the beach dead, it's to us Yolngu like hurting the person'.[60] The group wanted to develop a 'two-way' strategy for the area's management, as Dhimurru had:

> … if we can start around the table, and respect each other, and listen what our beliefs are, and listen what their beliefs are, surely we can come to some agreement, and surely we can get something that will benefit all Australians, black and white.[61]

Unfortunately, the Marine Protection Strategy document written by the Steering Committee at its formation and updated in 2000 – 'to persuade the Australian people and their governments that our law and traditions about management of the seas should be the publicly endorsed and legally sanctioned marine protection strategy' –[62] has had barely any impact on the management of Manbuynga ga Rulyapa. Yolngu people continue to 'strongly support' the Marine Protection Strategy, now hopeful that its recommendations 'will be seriously considered' in the current development of the Northern Marine Bioregional Plan by the Commonwealth Department of Environment and Heritage.[63]

The Northern Territory Government recognised the Manbuynga ga Rulyapa Steering Committee at a surface level in the official establishment of the Manbuynga ga Rulyapa Fisheries Consultative Committee in August 1997. However, its claim that this Committee 'appears to be meeting the needs of the

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[58] The Committee includes representatives from a range of clans of both moieties, including the Wangurri, Gumatj, Dhalwangu, Gupapuyngu, Ritharrngu, Djambarrpuyngu and Galpu. (Ian McIntosh, 'Yolngu Sea Rights in Manbuynga ga Rulyapa (Arafura Sea) and the Indonesian Connection' in J Finlayson and D.E. Smith (eds), *Native Title: Emerging Issues for Research, Policy and Practice* (Research Monograph No. 10, Centre for Aboriginal Economic Policy Research, Australian National University, 1995) 9, 9.

[59] Langton, above n 37, 27.

[60] Speaking in Northern Land Council, above n 38. The whale, Mirrinyungu, is a major totem for the Warramiri clan. It was described by David Burrumarra, a deceased Warramiri leader, as 'a product of the sea itself… salt water given physical form', and when Yolngu followed its law 'they could call themselves Nyomba, meaning "living for the whale, living for the sea"' (McIntosh, above n 58, 14).

[61] Keith Djiniyini, Ginytjirrang Mala Steering Committee, speaking in Northern Land Council, above n 38.

[62] Ginytjirrang Mala Steering Committee, above n 12.

[63] Dhimurru Land Management Aboriginal Corporation, above n 6, 16. See Commonwealth Department of Environment and Heritage, 'Marine Bioregional Planning in the North', online at <http://www.environment.gov.au/coasts/mbp/north/index.html>.

local people'[64] has been contradicted by the perceptions of the group's members. Scott's 2003 report on the minutes of the Committee's meetings indicates that the group's initial enthusiasm for the Committee as a forum for joint discussion on fisheries management, with a message to the government that 'we do it together',[65] has since been replaced by frustration and disappointment. At a meeting in November 2002, members of the Committee 'expressed disillusionment with the limited outcomes of the consultative process'; lack of funding, legislative barriers and poor responses to complaints about over-fishing and by-catch had all hampered progress. The only substantive outcome had been the introduction of possession limits for the Northern Rock Lobster Fishery, and one Committee member complained that even these were not being adequately enforced.[66] The broader recommendations outlined in the Committee's Marine Protection Strategy document appear to have been entirely unheeded thus far.

Arguably, a significant reason for the recommendations having little chance of being implemented through mutual agreement is their deeply rooted basis in an Indigenous knowledge system: they are threatening to authorities and agents of a young colonial state, and offensive to the *mare liberum* notion that the sea is the 'ours' of a unified nation. The Marine Protection Strategy document begins:

> Manbuynga ga Rulyapa are two currents that come together to form the seas off our homelands.[67] In the course of their journey through and under the water they separate and come together again. Our law says that those waters "play" with each other in this way because inside the water are the two major elemental forces. Within these waters are our sacred totems, song cycles, ceremonies and the pathways of creation beings. Responsibility for them is apportioned throughout our community.

This explanation of the Aboriginal identity/ies of the waters poses a threat at the outset, which is heightened by the subsequent recommendation that the 'offensive' colonial names ascribed to Yolngu waters be officially changed, and new maps created 'showing visitors where they can go, which places are dangerous, and what the proper names for places are'.[68] Similarly, the suggestion that the delineated national territorial sea boundary 'cuts across our ceremonial song cycles and our law', and that Indonesia should be engaged in a bilateral co-management arrangement, is a reminder of the long association

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[64] Northern Territory Government, Department of Business, Industry and Resource Development, *Aboriginal Fisheries Consultative Committees: Manbuynga ga Rulyapa Consultative Committee* <http://kakadu.nt.gov.au>.

[65] Terry Yulumbul, Manbuynga ga Rulyapa Consultative Committee. Cited in G Scott, *Fisheries Management: Issues of Concern to Aboriginal Traditional Owners in the Northern Land Council Region 1995-2003*, Draft Report to the Northern Land Council (2003). As cited in Australian Government, National Oceans Office, *Living on Saltwater Country* (2004) 133.

[66] Scott, above n 65.

[67] Manbuynga refers to the Yirritja moiety body of water, Rulyapa to the Dhuwa (McIntosh, above n 58, 9).

[68] Ginytjirrang Mala Steering Committee, above n 12.

of the Yolngu with 'the people and the places to our north'.[69] This history, which for some coastal Yolngu goes back to a distant contact with 'dark-skinned people' who followed similar laws, followed by the Bayini and then the Macassans,[70] underwrites the European 'discovery' of Australia, and thus threatens the 'frontier' mythology central to the national identity. It is thus fairly unsurprising that governments have not, as recommended in the Marine Protection Strategy, acknowledged and supported the application of Yolngu law throughout Manbuynga ga Rulyapa, worked actively to secure Yolngu ownership and operation of commercial fishing in the area, or given Yolngu an active voice in the regulation of fishing, applications for seabed mining, and safety standards of ships using the waters.

In the absence of fuller recognition of pre-existing Yolngu rights over sea country, the tendency of non-Yolngu parties to sea management negotiations to rely on – and maintain the security of – the values and principles of the dominant system will likely continue to impede genuine co-management dialogue. Economic imperatives also operate to sideline Indigenous rights and responsibilities. In the absence of enforceable rights to exclude others from their sea country, Yolngu estate owners feel powerless in the face of 'unlawful intrusion, overfishing, habitat damage and disruption to our coastal communities', and they struggle to bring other stakeholders to the negotiating table.[71] As Terry Yulumbul stated at the November 2002 meeting of the Manbuynga ga Rulyapa Consultative Committee, consultation is always 'one way',[72] and the voices of Yolngu owners tend to go ignored. The committee's expression of a desire for a total closure of Manbuynga ga Rulyapa waters to fishing at that meeting,[73] a last resort in frustration at the failure of the attempted co-management dialogue, was unenforceable and ineffective in forcing government and industry parties to the negotiating table.[74]

Dhimurru's recent Sea Country Plan, while expressly stating that '[i]t is still our wish to engage in a positive way and in a spirit of good will with those

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[69] Ibid.

[70] See McIntosh, above n 58, 15-18; McIntosh, 'Sacred Memory and Living Tradition: Aboriginal Art of the Macassan Period in North-Eastern Arnhem Land' in Sylvia Kleinert and Margo Neale (eds), *The Oxford Companion to Aboriginal Art and Culture* (2000) 144.

[71] Dhimurru Land Management Aboriginal Corporation, above n 6, 14.

[72] Scott, above n 65.

[73] Ibid.

[74] Although there is some scope for 'sea closure' in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), sea closure options are neither very expansive physically, nor very secure. Aboriginal owners, the Northern Land Council, and academic commentators have noted various limitations of the sea closure process. Particular problems are that 'closure' does not extend to holders of already existing commercial fishing licenses, who are a major cause for many of the environmental concerns, and also does not explicitly empower the Aboriginal owners to enforce the closure. The sea closure process is also costly and lengthy, and does not give owners any involvement in resource management of the area, or provide for them to utilise resources in a commercial fashion. (See Australian Government, National Oceans Office, above n 65, 131; McIntosh, above n 58, 19).

who share the sea with us',[75] expresses a litany of continuing concerns of Yolngu estate owners. These include lack of recognition and respect for ownership rights and ongoing customary management practices; lack of Indigenous representation on government decision-making bodies; uncontrolled access to sites of cultural importance and/or environmental sensitivity; overfishing and high mortality levels of turtles and other wildlife; contamination from bauxite mining and pollution and introduction of pests during shipping operations; lack of 'a systemic, coordinated and independently verifiable regime' to monitor threats to sea country; and the limited understanding of Yolngu aspirations and marine conservation issues, which 'can be seen from official levels in government, other users of marine resources and the wider community'.[76]

Yolngu peoples do not doubt their rights. Since time immemorial they have held their country through marr, the power of the ancestors which engenders 'confidence or certainty with regard to one's belief and purpose in life', [77] and will continue to do so regardless of the dictates of Anglo-Australian law.[78] However, as long as there is no official recognition of their rights, either in legal tenure or an entrenched co-management system, Yolngu are relatively powerless to prevent damaging and unsustainable use of their country. Non-Indigenous authorities generally seem not to respond to Yolngu attempts to teach outsiders 'to understand and see this water through our eyes'.[79] As Mowarra Ganambarr stated in the publication *Saltwater* – 'a major artistic, educative and political initiative of ours to share our knowledge of sea country',[80] which accompanies an exhibit of 80 paintings telling the stories of Yolngu relationships with sea country – 'we show these barks and yet they still belittle our Law. They send their fishing boats to these waters without permission…'[81]

Yet the application of Indigenous ecological knowledge to management of marine environments, aside from being an inherent right of Aboriginal owners of coastal estates, has substantial intrinsic value in the context of the wider drive for sustainable resource use. Conservation of resources is 'a conscious concern' to Aboriginal estate owners,[82] and is embedded in the body of knowledge governing their relationships to country. In contrast to the dominant system, which operates on the basis of apportionment to individuals of rights in the marine 'commons' through quotas and licenses – 'exploitation governed by external notions of sustainability'[83] – Indigenous knowledge is

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[75] Dhimurru Land Management Aboriginal Corporation, above n 6, 14.
[76] Ibid, 18-19.
[77] See McIntosh, above n 58, 11; see also Howard Morphy, 'From Dull to Brilliant: the Aesthetics of Spiritual Power Among the Yolngu' (1989) 24(1) *Man* 21, 30, 36-8.
[78] See Galarrwuy Yunupingu, above n 7.
[79] Terry Yulumbul, speaking in Northern Land Council, above n 38.
[80] Dhimurru Land Management Aboriginal Corporation, above n 6, 6.
[81] Mowarra Ganambarr, 'Declaration', in Buku-Larrnggay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (1999) 16, 18.
[82] Williams, above n 6, 93.
[83] Ginytjirrang Mala Steering Committee, above n 12.

localised and operates primarily on the basis of responsibilities. In north-east Arnhem Land, for owners of sea county:

> … the nature of the sea, its flora and fauna and the interaction between its various elements can be described in great detail by our elders. This knowledge is based on accumulated information gathered and refined by generations of observers and students of the sea. The holders of the knowledge and those who are responsible for our management processes are also the users, or have a prescribed social relationship with the users.[84]

Yolngu management principles are based on an extensive, localised understanding of the interactions between species and the environment, and between species and other species, which tells people what impact environmental changes might have. Moreover, people are all 'related as kin to the sea', and 'have access to and use the sea in accordance with our law which derives from these kinship ties'.[85] These embodied reciprocal interrelations may, as Sharp argues, 'point towards practical alternatives to those based solely on individualism'[86] in the drive for sustainable management of Australia's marine environments. In Manbuynga ga Rulyapa, for example, the Yolngu principles of djaagamirr (owner's manager) and djaamamirr (law-owner), designated roles for 'looking after' resources, might be extended to govern wider access to the area.[87] The Ginytjirrang Mala Steering Committee's as yet unheeded proposal suggested the development of processes to make Manbuynga ga Rulyapa 'sustainably accessible to non-Yolngu through the development of a visitation management plan' in accordance with their established system of control and delegation of responsibility.[88]

Conclusion: Ganma and the Need for Balance in Co-Management Dialogue

Sustainable management of Yolngu sea country will require a genuine co-management dialogue between Yolngu owners, government, and non-Yolngu stakeholders. An apt metaphor for the process that needs to be engaged in, fundamental to Yolngu society because of its emphasis on balance and complementarity, is ganma, the constant renewal created by the mixing of freshwater and saltwater.[89] Traditionally, the ganma metaphor evokes the balance in Yolngu society between Yirritja and Dhuwa, and between competing interests through the kinship, or gurrutu, system. In recent times, it has often been used as a metaphor for the balance that needs to be achieved

[84] Ibid. See also Williams, above n 6, 92-104.
[85] Ginytjirrang Mala Steering Committee, above n 12.
[86] Sharp, above n 2, 11.
[87] Ginytjirrang Mala Steering Committee, above n 12.
[88] Ibid.
[89] Mandawuy Yunupingu, 'Yothu Yindi: Finding Balance' (1994) 35(4) *Race and Class* 113, 118.

'between black and white in Australia' –[90] or more specifically here 'the "coming together" of diverse frames of ecological and cosmological knowledge' from both Yolngu and Anglo-Australian perspectives.[91]

However, what will be required for a true ganma dialogue is a less unequal negotiating table: 'reimagining sea space calls on the intelligence, perceptiveness and especially, on the good will and mutual respect between cross-cultural groupings, who hold different perspectives on marine space'.[92] Moreover, as the Ginytjirrang Mala Steering Committee asserted in their Marine Protection Strategy document, understanding and cooperation by non-Yolngu people of Yolngu management systems will require commitment (raypirri) and real effort (woburr):[93] 'if you don't understand or don't want to put in the effort, you might as well forget about it, because you would find it all too complex'.[94] Currently, non-Yolngu officials and stakeholders in the area sometimes seem to lack even the requisite good will and mutual respect, let alone the raypirri and woburr.

Since the official recognition of prior rights to country, the direction of government, industry, and the wider non-Indigenous public 'seems to have been to restrict the scope and impact of that recognition... the habits of 200 years are proving difficult to break'.[95] The widespread reluctance to recognise rights to sea country exemplifies this failure to break with the dominant tradition. While attempts at dialogue continue to be underwritten by non-Indigenous stakeholders' refusal to genuinely attempt to understand and respect pre-existing Aboriginal systems, there can be no real 'dynamic interaction of knowledge traditions' in the spirit of ganma: 'there must be balance; if not... one will be stronger and harm the other'.[96] It is with this metaphor in mind that we should move seriously towards offering real protection for Indigenous rights in relation to sea country, and towards the possibility of genuine management partnerships between Indigenous and non-Indigenous stakeholders – before this generation of holders of sea country die, as their parents did, still waiting.[97]

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[90] Ibid; see also Mundine, above n 28, 20.
[91] Magowan, above n 33, 19.
[92] Sharp, above n 2, 12.
[93] Woburr literally means sweat, but also means 'real effort and actual work'. (Ginytjirrang Mala Steering Committee, above n 12).
[94] Ibid.
[95] Lisa Strelein and Larissa Behrendt, 'Old Habits Die Hard: Indigenous Land Rights and Mining in Australia' (Spring 2001) *Cultural Survival Quarterly* 51, 53.
[96] Raymattja Marika, *Workshops as Teaching, Learning Environments* (Paper presented to Yirrkala Action Group, Yirrkala Community School, Yirrkala, 1992). Cited in Magowan, above n 33, 19-20.
[97] The Ginytjirrang Mala Steering Committee's *Indigenous Marine Protection Strategy* was launched at the funeral of Warramirri leader David Burrumarra by his son, Committee member Terry Yulumbul, who spoke of his father's 'lifelong wish that Aboriginal rights to the sea be acknowledged by Australian and Northern Territory authorities'. (See McIntosh, above n 58, 11).