The 'geography issue': Regulatory space, Indigenous rights and environmental governance of sea country

Introduction

Indigenous legal rights to sea country have recently been brought to the fore by the native title decision of *Akiba v Commonwealth of Australia* (2013) 250 CLR 209 (*Akiba*) in Australia's highest court. This claim was the largest native title claim to the sea in Australian history – 40 000 square kilometres of sea in the remote Torres Strait at the tip of Queensland (see Figure 1). However, native title rights to the sea are limited by certain common law rights (public rights to navigate and to fish) and international law obligations (the right of innocent passage). It can be argued that these limitations seek to sustain a certain Eurocentric view of the marine environment as open and owned by no-one, irrespective of place or particular actors in the space. It is perhaps because of such prominent legal cases, that the legal academic literature about Indigenous peoples and sea country has generally concentrated on case law and legislation, rather than other interrelated aspects such as environment, people, social institutions, informal rules, norms and lore (Bartel et al 2013).[1] This focus suggests that 'law', in the 'traditional' sense of case law and legislation, is the most important tool in determining who governs sea country. Also inherent in this literature is a state-centric approach to legal rights as recognised by the western legal system; this approach is separated from place and just one component of the regulatory space.

Indigenous communities have been at the forefront of governing large and important terrestrial areas in Australia for decades (for example, Uluru). This paper is seeking to explore Indigenous governance of the sea and, in particular, to undertake a desktop (pre-fieldwork) exploration of how this space can be more accurately conceptualised. The wider project, of which this paper forms an introductory part, was prompted by some time I spent working in the Torres Strait as a legal researcher on the *Akiba* native title case. Although I could clearly see the value and importance of native title rights, I came to wonder whether the governance models that communities themselves were implementing 'on-the-ground', and the relational aspects involved, were in fact more important in determining who governed sea country. This was particularly striking given the remote location of the Torres Strait.

Simultaneously, I realised that these governance models were being implemented in a very complex 'regulatory space', with international, national, state and local Indigenous laws being just the tip of the relevant 'regulatory tools'.

Marine and coastal environments together traverse typical 'boundaries' – they are both land and water; can be urban or remote; and have potential actors ranging from Indigenous traditional owners, every level of government (local, State, Commonwealth) and even the casual swimmer or walker. Although the focus in this paper is on governance of the sea, both the coast and the sea must be considered, as the coastal environment has a large impact on accessing the sea. Further, although the 'law' characterises the sea and the land differently, this division is not so clear-cut. In northern Australia large tides result in vast areas of 'intertidal land' (land between the high and low water mark which is sometimes 'wet' and sometimes 'dry'). More importantly, Indigenous peoples have a holistic view of land and sea (de Koninck, Kennett & Josif 2013: 5).

It is important to identify three different concepts that underpin this paper – the environment, the regulatory space and the place. The coastal and marine *environment* - as a landscape - has an impact on law. Aside from simple physical observations that impact how law operates, such as the changing tides and the freedom of movement of fish, there are also strong social aspects of the coastal and marine environments' relationship with law. This includes the Australian notion of the beach (both the sand and the water) as being open and accessible to the public. The coastal and marine *regulatory space* will be used as the generic setting in this paper. The regulatory space is partially material, in that it is impacted by (and anchored to) the environment – the sea as a constantly flowing and moving environment that cannot be controlled in the same way as terrestrial areas. However, the regulatory space is also relational, as actors and regulatory tools within the space must be understood according to their interactions. The regulatory space is produced by a combination of law, the environment, time and place. *Places* then are specific, such as particular communities. In this paper they are referred to as illustrations (in this sense, similarly to the techniques of Pruitt (2014)). Although regulatory spaces will have commonalities, each place has the potential to have quite a different regulatory space, often due to who the relevant actors interacting with it are. For example, in remote coastal and marine

environments there may be a lack of 'government' actors visibly 'on-the-ground', leading to other actors filling any perceived governance gaps. It is also apparent that Indigenous communities are not active in relation to all coastal and marine environments. Perhaps this could be said to be an argument that place influences actors influences space.

The concepts of environment, space and place have the potential to be considered from an essentially western paradigm. From an Indigenous perspective, all environments (whether wet, dry or somewhere in between) have their own laws, knowledges, sacred sites and creation stories (Kwaymullina & Kwaymullina 2010). Places are 'both alive and conscious', they have both physical and metaphysical characteristics and should not be viewed as 'inanimate, non-living and non-feeling' (Kwaymullina & Kwaymullina 2010). Similarly, law in its many manifestations is 'alive in all places' (Watson 2002). Part of the challenge is to draw all these elements into a shifting regulatory space. Having said that, in relation to Indigenous laws and knowledges, not everything can be or should be known (or fully known), particularly by a Western researcher. Coming to terms with this is part of acknowledging the complexities of the regulatory space, and thinking about how we responsibly frame our knowledge as 'experts'.

This paper therefore seeks to draw from and add to legal geography scholarship using regulatory space theory. It proposes a new hybrid that uses legal geography approaches to highlight place and regulatory space theory to strengthen the analysis of law as regulation. Regulatory space theory has struggled to find a 'home' and its usefulness as a separate theory has been questioned (Fisher, Lange & Scotford 2013). Meanwhile, it has been said that legal geographers need to pay careful attention to how they think about the term 'law' and acknowledge that the common law ('the mainstay of legal geography research') is just one of many legalities (Braverman et al. 2014). Further, that if we focus on law as the social, we can miss a deeply ingrained set of legal and bureaucratic knowledges and practices that come with more 'traditional' legal tools (Braverman et al. 2014). The notion of regulatory space can provide us with a way to map both 'traditional' legal tools and broader governance mechanisms.

This paper is challenging regulatory theorists to think more about place and legal geographers to think more critically about law. In the Australian coastal and marine regulatory space, the state may be seen as a 'default' regulator and Indigenous organisations, along with other actors, as being regulated. However, an exploration of the regulatory space starts to reveal that Indigenous organisations are trying to influence people and groups to gain more control over governance. First, this paper will explore why theories of regulation are useful tools for this analysis, before moving to consider regulatory space theory more specifically. Given that regulatory spaces can be defined in many different ways, this paper then starts to conceptualise the coastal and marine regulatory space.

Why use theories of regulation and governance?

As a legal scholar, when I began this project, I started by looking for ways to see law in a broader context. In particular, I wanted to look at how actors might influence the space, even if they did not have strong legal rights. I was first drawn to regulatory theories and only later came to realise the potential intersections between these approaches and legal geography. Ideas of regulation and governance are being adopted, re-imagined and reinterpreted by scholars from a variety of disciplines, including looking at law 'through a regulatory lens' (Parker et al. 2004). There are different ways to apply this regulatory lens and varied meanings of law, regulation and governance. Here the term 'law' is western law. The description 'western law' is deliberately used as a way to acknowledge that there are other tools operating that may also be described as law (such as laws that form part of Indigenous legal systems). In the case of the marine environment that is close to the coast (as opposed to the 'high seas'), it is subject to a predominantly domestic legal jurisdiction. The 'law' is the statute and case law of the Commonwealth and States and Territories of Australia. There is also limited international law that is relevant, such as the right of free passage in respect of some 'Australian waters'. Viewed in this way, law is state-centric (even at that international level) and incorporates both legislative instruments and decisions of courts. However, these different aspects of law are just one strand of regulation and how law interacts with other forms of regulation needs to be considered.

Both regulation and governance can broadly be defined as 'influencing the flow of events' (Parker et al. 2004). Influencing may involve 'mechanisms of standard setting, information gathering and

behaviour modification' (Black 2002). Regulation and governance are different to 'government', which relates to a 'political authority/state auspice', and the terms transcend 'the state to include civil society organisations and the private sector' (Holley, Gunningham & Shearing 2012). It is acknowledged that there still seems to be a lingering distinction in some literature between the terms 'regulation' and 'governance' (Parker & Braithwaite 2003 and Kotzé 2012). Governance has traditionally been regarded as broader than regulation. Historically, the term regulation has been viewed as state-centric and associated with the 'classic model' of command and control regulation (Baldwin, Scott & Hood 1998). This model is 'hierarchical, state-centric, bureaucratic… and expert-driven' (Karkkainen 2004). It does not encourage participation by those being regulated and is generally based on a one-size-fits all approach at the national, rather than regional or local level – in this sense, it is placeless. Command and control models have been heavily criticised and, while they clearly still exist as an instrument or technique of regulation, we have seen a shift in many areas to more decentralised or fragmented approaches.[2]

The term 'regulation' is now seen as going beyond the state and involving a variety of non-state actors. It seems that any distinction between regulation and governance is at least narrowing or has disappeared (Parker & Braithwaite 2003). Further, it appears that in the area of environmental regulation, the nomenclature has shifted towards the term governance, particularly in the context of 'new environmental governance' (which proposes a new way to govern the environment by overcoming the limitations of the state and market approaches).[3] Louis Kotzé (2012), writing in the international environmental law area, states that the 'only conceivable difference between governance and regulation in a broad sense might be that governance is a more modern and socio-politically acceptable term than regulation, which is instead part of an older jargon' (Kotzé 2012). While environmental governance of the sea has less of a history than terrestrial areas, these ideas of new environmental governance have also filtered into the marine environment.

For Indigenous peoples, 'good governance' is part of the language used in Article 46 (clause 3) of the *UN Declaration on the Rights of Indigenous Peoples* (UN DRIP) and given specific consideration as

the special theme of the 2014 annual session of the UN Permanent Forum on Indigenous Issues (UNPFII).[4] The UNPFII has stated that:

> Good governance is about who has access to decision-making and authority with regard to lands, territories and resources that result in revenue and services to peoples' (UNPFII 2014).

Colin Scott (2001) also suggests that the 'regulatory space' approach, to which this paper soon turns, 'locates the understanding of regulation closer to dominant approaches to governance within political science'. More generally, this exploration of any potential difference between the terms has started to reveal why regulatory theory is useful.

Regulatory theories do not 'dislodge' the state, rather they raise questions about the relationships between the state and other actors (Morgan & Yeung 2007). In this way, it challenges us to see 'control, power, and ordering' in 'unsuspected places, and as affected by unsuspected actors' (Black 2001). Here we are raising questions about the regulatory relationship in the coastal and marine regulatory space – in particular, the relationships between agencies of the state (including government departments and other state based agencies) and Indigenous organisations in relation to governing the marine environment. Regulatory theorist Julia Black (2002) notes that 'success' is not assumed in regulation. This may sound somewhat trite, but is useful to keep in mind as we assess how Indigenous organisations are trying to have influence and what 'success' they have. Some attempts at influence by Indigenous organisations may involve significant change to law and could therefore be seen as quite ambitious. Success does not necessarily mean achieving every aspect of what an Indigenous organisation is trying to influence.

Regulatory space theory

Although the broad concepts of regulatory theories have been explained above, there are many ways in which regulation and governance can be analysed. Increasingly, the idea of regulatory space has become an important tool for legal academics in analysing law, regulation and governance (Lange 2003). Regulatory space can be said to be part of the 'family' of theories that focus on pluralism (Scott 2001). Also, as noted by Scott (2001), regulatory space has a family relationship with theories

that challenge hierarchical conceptions of governing using spatial metaphors, citing Nicholas Blomley's (1994) focus on 'local legal knowledge'. The critiques of regulatory theory are also its strengths. Normativity, seeing regulation through spatial dimensions does not 'offer any clear prescription as to what structures and processes will have the desired behaviour modification effects in any particular policy domain' (Scott 2001, also see Fisher, Lange & Scotford 2013). This lack of clear prescription gives capacity to draw perspectives that question capabilities of law and regulation and more broadly interrogate the 'experience of regulation' (Scott 2001).

It has also been argued that for regulatory space to be its own separate theory, it needs to tell us something *more* than we already know about decentered regulation (Fisher, Lange & Scotford 2013). The regulatory space which is the focus of this paper, goes beyond exposing the decentered nature of regulation in the coastal and marine environment, and suggests that Indigenous organisations located in specific places are mobilising knowledge and capacity and creating the resources needed to influence other actors, particularly the state, in the space. Therefore, this paper starts with the assumption that regulation is decentred and moves from there to consider how to characterise social relations between actors in the space, factors which lead to the development of networks, and particularly, factors 'which contribute to the institutionalization of linkages' (Hancher & Moran 1989).

In relation to Australia's large marine area, the Australian Government (and State and Territory governments) have broadly expressed the importance of taking into account Indigenous values in relation to marine governance.[5] However, Indigenous organisations are not seeking to actively govern the whole of Australia's marine environment. There is no overarching Indigenous organisation dedicated to marine governance.[6] Although there will be some common elements of the spaces (for example, certain Commonwealth laws will be applicable), each of these particular places will have their own configuration of actors, regulatory tools, geographical features (such as remote versus urban) and associated power relationships that will impact on the potential for an Indigenous organisation to influence the space.

A number of Indigenous organisations have 'Sea Country Plans' that detail the types of relationships that the Indigenous organisations seek to have with other actors in the space. These Sea Country Plans have, according to the Commonwealth Department of Environment, 'no legal implications',[7] but they seek to have influence by identifying other relevant actors (some of whom are physically in the place, others are not but are part of the regulatory space), establishing common ground between actors and then detailing aspirations for a particular way of governing. One example is the Thuwathu/Bujimulla Sea Country Plan (Carpentaria Land Council Aboriginal Corporation 2006). The place that this plan relates to is the marine area of the Wellesley Islands and adjacent mainland in the southern Gulf of Carpentaria in the far north-west of Queensland (bordering the Northern Territory) (see Figure 1). This plan details goals in relation to a diverse range of issues such as fisheries zoning, environmental monitoring, permissions to access sea country and cultural heritage management. It identifies stakeholders and details how each particular stakeholder can contribute to the achievement of the Indigenous community's goals. In seeking to govern their place according to their own aspirations, the plan identifies that:

> '…there are no government environmental or natural resource management agencies based within our Sea Country. We believe that … the *absence* of government management agencies provides us with unique challenges, responsibilities and opportunities to take a leading role in caring for our Sea country' (emphasis added). (Carpentaria Land Council Aboriginal Corporation 2006)

This idea of a place that physically may not have other actors 'based within' it, is just one aspect of how place configures relationships in the regulatory space. Interestingly, the absence of government ('lawlessness'?) of remote areas is seen as an opportunity, rather than as something lacking (which is sometimes the connotation of rural/remote work particularly in the criminal law jurisdiction – see Pruitt 2014).

Defining the regulatory space

There is no one way to apply regulatory space theory; space can be defined in many ways. Both actors and issues can be 'organised into, or organised out of' the regulatory space and there are no natural

limits (Hancher & Moran 1989). In this sense, defining the regulatory space can be highly contested. We have already considered the concepts of 'environment' (as a physical geographical idea), 'place' (both as a physical geographical idea and a determinant of particular actors) and law. These 'parts' are not disparate, but rather they overlap and link together. In defining our space, we are going to start with law as 'having a profound effect on the formation of normative expectations' (Perez 2002a).

'Law' as one part of the marine regulatory space

If we just take 'law' in its most traditional (and Western) sense, this space is subject to international, Commonwealth, State and Territory laws. As a general proposition, State or Territory laws apply up to the three nautical mile mark and after that Commonwealth laws apply (Rothwell 2011). Due to international law, Commonwealth laws only apply up until either 200 nautical miles offshore or the end of the continental shelf. Further, again due to international law, in between the territorial sea baseline (where the sea 'legally' starts) and the 200 nautical mile mark, different levels of legal powers can be exercised. Australia's Constitutional arrangements also play a part, depending on what subject area the law relates to. Certainly for fish, these 'boundaries' in the ocean are lines on a map rather than physically relevant - fish may move between the waters of the States and the Commonwealth and from international waters into Australian waters. However, as we shall see, these jurisdictional distinctions are not so clear-cut.

As well as diversity of regulatory responsibility, laws relating to the sea include diverse subject areas such as pollution, fishing, shipping, conservation, migration and recreation. Native title laws that relate to Indigenous rights to the sea are just one part of this complex regulatory map. Native title laws are laws of the Commonwealth, but they can impact on State or Territory waters. There have been four key litigated native title cases relating to the sea.[8] All of these cases have been in the northern waters of Australia in what can be regarded as remote areas (northern Queensland, northern Western Australia and the Northern Territory). This is a point worth emphasising, but as explained in the introduction, the legal rights relating to native title and Indigenous 'land' rights legislation have already been explored in other articles (Butterly 2014). Therefore, this section enriches the map by exploring just one other 'area' of regulation: fisheries.

Broadly, fisheries legislation relates to matters such as 'rights of access to fisheries, size and catch limits, closed seasons and quotas' (Baird 2011). 'Rights' are also granted, such as statutory fishing permits or other entitlements. Fisheries legislation can be State, Territory or Commonwealth. As noted above, in general, State or Territory laws apply up to the three nautical mile mark and then Commonwealth laws apply. However, it is not that clear-cut due to agreements pursuant to the Offshore Constitutional Settlement (OCS) (Baird 2011a). The OCS provided for various arrangements of joint authority between Commonwealth and States or Territories or specific arrangements that can be agreed upon. These joint authorities and other arrangements can determine that although a fishery is located within State/Territory waters, it is to be managed by the laws of the Commonwealth, or vice versa. If a fishery is to be managed by the laws of the Commonwealth, pursuant to the *Fisheries Management Act 1991* (Cth), statutory management plans are required to be prepared (pursuant to s 17). These plans are prepared by the Australian Fisheries Management Authority (AFMA) (pursuant to s 7(1)(a)) - a Commonwealth statutory body.

One example is the Northern Prawn Fishery (NPF) which stretches over the whole coast of the Northern Territory and parts of Queensland and Western Australia and includes both State coastal, Commonwealth territorial and Exclusive Economic Zone waters ((*Northern Prawn Fishery Management Plan 1995* (Cth)). The NPF is managed by AFMA by 'limiting how many boats can fish and regulating how much gear they can use' (Australian Fisheries Management Authority n.d.). Closures are also used to restrict fishing at particular times and in specific areas. The NPF covers the marine area subject to the Dhimurru Aboriginal Corporation (Dhimurru) Sea Country Plan. The place of this plan is Arnhem Land on the remote north-east coast of the Northern Territory (see Figure 1). The plan particularly notes that the NPF is a 'significant component' of the north Australian economy (Dhimurru Aboriginal Corporation 2013). However, just because a fishery covers a particular marine area does not indicate whether any actual fishing is taking place. The Dhimurru Sea Country Plan identifies all of the fisheries that potentially operate within their sea country (Dhimurru Aboriginal Corporation 2013: 29 & 32), including the NPF. There is also a column headed 'current fishing' in the Indigenous Protected Area (the area of the plan).[9] This gives an indication that Dhimurru is well

aware of the importance of identifying whether or not particular fisheries are operating in their sea country. Such information gives an indication not only of particular actors operating within a place, but also of their volume (ie. the difference between a small number of commercial fisherman and a large number of commercial fisherman).

As well as demonstrating the complex nature of Commonwealth, State and Territory laws that make up the marine regulatory space, this section highlights the unique nature of fisheries law in a fluid environment. Further, it also draws attention to the information gathering processes of Indigenous organisations to identify what fisheries are actually operational in their sea country as a means of understanding the actors in the space.

Place influences actors influences space

A broad brush reveals the principal actors in the generic marine regulatory space as state regulatory agencies, commercial fishers, recreational fishers, other recreational users, tourism operators, Indigenous organisations involved in marine management, Indigenous traditional owners, marine researchers, environmental non–government organisations, organisations involved in natural resource management (such as community-based organisations like Coastcare) and local government. State regulatory agencies include State, Territory and Commonwealth government departments and related bodies.

The interests, aspirations, expertise and roles of actors can be determined in a number of ways. For example, with Commonwealth statutory bodies (such as AFMA) it can be viewed though the objectives of the legislation which establishes them (again here considering the 'law'). AFMA is established under the *Fisheries Administration Act 1991* (Cth) (FA Act) 'with functions and responsibilities relating to the management of fisheries on behalf of the Commonwealth' (s 3). Pursuant to the FA Act, the objectives of AFMA are wide-ranging and include 'implementing efficient and cost-effective fisheries management on behalf of the Commonwealth', ensuring fisheries are conducted in a manner consistent with principles of ecologically sustainable development, ensuring compliance with international law and 'ensuring accountability to the fishing industry and to

the Australian community in the Authority's management of fisheries resources' (s 6(a), (b), (bb) and (d)). The functions of AFMA also include 'to consult, and co-operate, with the industry and members of the public generally in relation to the activities of the Authority' (s 7(c)). Though, AFMA did note in a 2013 submission to a government fisheries law review that 'fisheries management is currently made more difficult by the lack of a national or Commonwealth policy on resource sharing between recreational, indigenous and commercial users of fisheries resources in Commonwealth waters' (Australian Fisheries Management Authority 2013).

This focus on the 'law' only gets us so far. We can see that neither AFMA's objectives nor functions contain any specific requirements in relation to consultation of Indigenous peoples or organisations, nor any accountability to Indigenous peoples or organisations above and beyond their place in 'the Australian community'. However, in relation to the NPF in particular, AFMA specifically provides in its NPF Handbook that the Dhimurru Sea Country Plan 'will facilitate each organisation with responsibilities and authorities including AFMA and NPF to carry out their work with coordination across' the area (Australian Fisheries Management Authority 2015: 37). Here we can see an actor in this particular place, influencing the space.

This aspect of regulatory space is relational, flowing and dynamic. It is about the relationships between actors and how they use tools of regulation. Each different place has different actors. We might almost think of the relationship as a kind of network approach (even more specifically 'nodal governance') focussing on locally mobilising capacity and knowledge to influence the space and other actors within the space.[10] This really is a sub-set of regulatory theory which has a natural affinity with regulatory space and its focus on the local demonstrates an affinity to legal geography approaches. This focus helps us to explain how Indigenous organisations are putting themselves at the centre by, for example, using Sea Country Plans to detail how other actors can contribute to the achievement of their goals.

Taking Dhimurru Aboriginal Corporation as an example, the traditional owners who formed Dhimurru have a set of rights pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) that, *at a minimum*, provide a method for exerting influence. Resources in terms of finances are

problematic for Dhimurru as they rely heavily on sponsors (including government sponsors) and get some revenue from access permits (Dhimurru Aboriginal Corporation n.d.). However, resources should be viewed broadly including various types of social capital (Burris, Drahos & Shearing 2005). For Dhimurru, their sponsors reveal the social capital Dhimurru has acquired. The sponsors include a range of government departments, universities, mining companies, tourism operations and local communities groups (Dhimurru Aboriginal Corporation n.d.). It is useful to conceptualise Indigenous organisations as trying to place themselves at the centre and 'tie' together the network by making other actors aware of their common interests. In doing so, they create a structure which allows them to mobilize resources to influence the behaviour of other actors.

Sea Country Plans have sought to 'codify' aspects of Indigenous organisations' expertise and interests, as well as aspirations. For example, Indigenous organisations are putting their laws 'on the table' and, in that sense, seeking to disrupt the linear definitions of 'law' and define the regulatory space. Indigenous laws are also inherently place-based. For example, Dhimurru Aboriginal Corporation shares some of its cultural values and laws through their Sea Country Plan and interpretative signage. This includes explaining the five dimensions of Yolŋu Rom (law) as wäŋa (home, land), dhäwu (stories, history), maikay (clan songs), gurruṯu (kinship) and miny-tji (art, designs) (Dhimurru Aboriginal Corporation 2013). At the same time, some law is kept private due to cultural protocols. Such expertise is put forward to assist other actors (and the wider community more generally) to understand the traditional owners' obligations to their Sea Country, so that they can 'better support' the efforts of Dhimurru. As well as putting forward Indigenous law as part of the regulatory space, Dhimurru sets out actions to incorporate Indigenous law on a practical level, such as continuing to map cultural sites, collaborating with the Aboriginal Areas Protection Authority to register additional sites (as directed by Traditional Owners), managing information on cultural values, producing communication material for the community and developing Codes of Conduct for professional and recreational fishers. These Indigenous laws are linked to particular places – not only in the sense that the laws are particular to place but that the particular actor and their actions are linked to place.

In another example, the Thuwathu/Bujimulla Sea Country Plan (referred to above – located in the Wellesley Islands Region of the Gulf of Carpentaria) notes in relation to fisheries 'zoning' that the community 'welcomes' the establishment of zones as they help to protect and manage Sea Country (Carpentaria Land Council Aboriginal Corporation 2006). However, such 'lines' have been established without consent of the community and without involvement in either management or enforcement. The Sea Country Plan states that the zones do not currently reflect cultural values of sea country (and, in particular, infringe privacy of certain coastal areas), calls for the buffer zones to be re-drawn and puts forward an example of a modified zoning system. Further, the plan states that there is no desire to 'exclude commercial or recreational fishers or others from all our Sea Country' and that on 'many occasions our people have observed and reported the presence of potentially illegal foreign fishing vessels in our Sea Country…' (Carpentaria Land Council Aboriginal Corporation 2006). This is particularly raised in the context of the geographical isolation of the area and the lack of any permanent 'government' representation. To implement such a re-zoning, the plan seeks to negotiate, with government agencies, commercial fishers, recreational fishers and tourism operators, a specific zoning system for the Wellesley Islands region. As part of this, the plan suggests a review of the boundaries and governance arrangements within the existing zones and to explore options for establishing and managing marine protected areas within that sea country (Carpentaria Land Council Aboriginal Corporation 2006).

What we can see here is an attempt to demonstrate common ground, such as a common interest in effective management of fisheries and the role that Indigenous organisations can play in detecting illegal fishing, while still asserting the particular interests of the Indigenous organisation. This demonstration of common ground is combined with an attempt to influence and gain resources. Rezoning of fisheries is clearly quite an ambitious goal, involving multiple actors and changes to law. Although the Thuwathu/Bujimulla Sea Country Indigenous Protected Area was declared in 2013, it is not clear whether any significant rezoning has taken place in response (Scullion 2013). However, this in itself is not the only potential measure of success. Another measure may be how actors now relate to each other which may lead to positive changes in the future.

As noted at the beginning of this section, Sea Country Plans are putting Indigenous organisations at the centre of the network. In this way, Indigenous organisations are seeking to tie the network together so as to 'gain capacity to govern the course of events' (Burris, Drahos & Shearing 2005). In putting forward these Sea Country Plans, Indigenous organisations are seeking to identify common ground with one or more actors on specific issues. After establishing this common ground, the Indigenous organisations are seeking to influence other actors by mobilizing capacity and knowledge so as to achieve the Sea Country Plan goals. They are seeking to disrupt the linear and rational definitions of 'law' about the marine regulatory space in particular places.

Conclusion

By creating a hybrid of regulatory theory approaches to space and legal geography approaches to place, we can see how space and place play a part in mapping the complex regulatory narrative. This paper sought to start to explore how we might more helpfully and accurately conceptualise the marine regulatory space. The portrait that emerges from our discussion on a theoretical level has revealed key aspects of space and the importance of place. For example, although certain laws may apply ('on the books') to the marine regulatory space, they may not be operational in a particular place. This in turn impacts on the actors who are active in each place and how they interact with each other. In relation to Indigenous organisations in the marine regulatory space, we see active promotion of aspirations in place-based Indigenous laws by communicating these to other actors. Further, we see the use of Sea Country Plans to locate Indigenous organisations at the centre of a network by identifying common ground between actors. After this common ground is established, Indigenous organisations then work to influence other actors by mobilizing capacity and knowledge so as to achieve their goals.

The themes we have explored demonstrate that focusing on place can help us to understand and analyse the coastal and marine regulatory space far more deeply; and that regulatory theory can help us get a full picture of law broadly defined. As explained by Indigenous (Palyku) academics, Ambelin and Blaze Kwaymullina (2010), all relationships are part of place and place is part of all relationships. The regulatory space, as a series of relationships governed to some degree by 'law', therefore cannot be separated from place.

Bibliography

Australian Fisheries Management Authority n.d., Northern Prawn Fishery, viewed 17 May 2015, <http://www.afma.gov.au/fisheries/northern-prawn-fishery/>.

Australian Fisheries Management Authority 2013, Submission to the Review of the *Fisheries Management Act* 1991 and *Fisheries Administration Act* 1991, viewed 17 May 2015, <http://www.afma.gov.au/wp-content/uploads/2012/12/Submission-to-the-Review-of-the-Fisheries-Management-Act-1991-and-Fisheries-Administration-Act-1991.pdf>.

Australian Fisheries Management Authority 2015, Northern Prawn Fishery Directions and Closures, viewed 17 May 2015, <http://www.afma.gov.au/wp-content/uploads/2014/08/NPF-Directions-and-Closures-2015.pdf>.

Bartel, R, Graham, N, Jackson, S, Prior, J H, Robinson, D F, Sherval, M and Williams, S, 'Legal Geography: An Australian Perspective', *Geographical Research*, vol 51, iss 4, pp. 339 – 353.

Baird, R 2011, 'Fisheries Management', in R Baird & D Rothwell (eds), *Australian Coastal and Marine Law*, Federation Press, Sydney, NSW, pp. 122 – 150.

Baird, R 2011a, 'The National Legal Framework', in R Baird & D Rothwell (eds), *Australian Coastal and Marine Law*, Federation Press, Sydney, NSW, pp. 45 – 66.

Baldwin, R, Cave, M & Lodge, M 2012, *Understanding Regulation: Theory, Strategy and Practice,* Oxford University Press.

Baldwin, R, Scott, C & Hood, C 1998, 'Introduction' in R Baldwin, C Scott & C Hood (eds), *A Reader on Regulation,* Oxford University Press, pp. 1 - 55.

Black, J 2001, 'Decentring Regulation: Understanding the role of Regulation and Self-Regulation in a 'Post-Regulatory' World', *Current Legal Problems,* vol 54, pp. 103 - 146.

Black, J 2002, 'Regulatory Conversations', *Journal of Law and Society,* vol. 29, no. 1, pp. 163 – 196.

Blomley, N 1994, *Law, Space and the Geographies of Power*, Guilford Press, New York.

Braverman, I, Blomley, N, Delaney, D & Kedar, A 2014, 'Expanding the Spaces of Law', in I Braverman, N Blomley, D Delaney & A Kedar (eds), *The Expanding Space of Law: A Timely Legal Geography*, Stanford Law Books, Stanford, California, pp. 1 – 29.

Burris, S, Drahos, P & Shearing, C 2005, 'Nodal Governance', *Australian Journal of Legal Philosophy,* vol. 13, pp. 30 – 58.

Butterly, L 2013, 'Clear Choices in Murky Waters: *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*', *Sydney Law Review,* vol. 35, no. 1, pp. 237 – 252.

Butterly, L 2014, 'Changing Tack: *Akiba* and the Way Forward for Indigenous Marine Governance', *Australian Indigenous Law Review,* vol. 17, no. 1, pp. 2 – 22.

Carpentaria Land Council Aboriginal Corporation (CLCAC) 2006, Thuwathu/Bujimulla Sea Country Plan, viewed 17 May 2015, <http://www.environment.gov.au/indigenous/publications/pubs/thuwathu-bujimulla-plan.pdf>.

Dhimurru Aboriginal Corporation 2013, Dhimurru Yolŋuwu Monuk Gapu Wäŋa IPA Sea Country Management Plan 2013 – 2015, viewed 17 May 2015, <http://www.dhimurru.com.au/uploads/8/9/3/6/8936577/dhimurru_sc_plan_2013.pdf>.

Dhimurru Aboriginal Corporation n.d., About, viewed 17 May 2015, <http://www.dhimurru.com.au/about.html>.

Fisher, E, Lange, B & Scotford, E 2013, *Environmental Law: Text, Cases and Materials,* Oxford University Press.

Hancher, L & Moran, M 1989, 'Organising Regulatory Space', in L Hancher & M Moran (eds), *Capitalism, Culture and Economic Regulation,* Oxford University Press, pp. 271-299.

Holley, C, Gunningham, N & Shearing, C 2012, *The New Environmental Governance* , Earthscan, New York.

Karkkainen, B 2001-2, 'Collaborative Ecosystem Governance: Scale, Complexity and Dynamism', *Virginia Environmental Law Journal,* vol 21, pp. 189 - 244.

Karkkainen, B 2004, 'Reply: "New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping', *Minnesota Law Review*, vol. 89, no. 2, pp. 471 – 497.

de Koninck, V, Kennett, R & Josif, P 2013, National Indigenous Sea Country Workshop Report (Knowledge Series, No 14, North Australian Indigenous Land and Sea Management Alliance), viewed 18 May 2015, <http://www.nailsma.org.au/sites/default/files/publications/2012%20NISCW_Report_web.pdf>.

Kotzé, L 2012, *Global Environmental Governance: Law and Regulation for the 21st century,* Edward Elgar, Cheltenham.

Kwaymullina, A & Kwaymullina, B 2010, 'Learning to read the signs: Law in an Indigenous reality', *Journal of Australian Studies,* vol. 34, no. 2, pp. 195 – 208.

Lange, B 2003, 'Regulatory Spaces and Interactions: An Introduction', *Social and Legal Studies,* vol. 12, no 4, pp. 414 - 423.

Morgan, B & Yeung, K 2007, *An Introduction to Law and Regulation,* Cambridge University Press.

Parker, C & Braithwaite, J 2003, 'Regulation', in P Cane & M Tushnet (eds), *The Oxford Handbook of Legal Studies,* Oxford University Press, pp. 119 – 145.

Parker, C, Scott, C, Lacey, N & Braithwaite, J 2004, 'Introduction', in C Parker, C Scott, N Lacey and J Braithwaite (eds), *Regulating Law,* Oxford University Press, pp. 1 - 12.

Perez, O 2002, 'The Many Faces of the Trade-Environment Conflict: Some Lessons for the Constitutionalisation Project', *European Integration Online Papers,* vol 6, pp. 1 – 23.

Perez, O 2002a, 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts', *Journal of Law and Society,* vol 29, no 1, pp. 77 - 110.

Pruitt, L 2014, 'The Rural Lawscape: Spaces Tames Law Tames Space', in I Braverman, N Blomley, David Delaney & A Kedar (eds), *The Expanding Space of Law: A Timely Legal Geography*, Stanford Law Books, Stanford, California, pp. 190 – 214.

Rothwell, D 2011, 'The International Legal Framework' in R Baird & D Rothwell (eds), *Australian Coastal and Marine Law,* Federation Press, Sydney, pp. 21 – 44.

Scott, C 2001, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design', *Public Law* (summer), pp. 329 – 353.

Scullion, Nigel (The Hon) 2013, Thuwathu/Bujimulla (Wellesley Islands) protected (Media Release), viwed on 17 May 2015, <http://minister.indigenous.gov.au/sites/default/files/media/2013-11-25_wellesley_ipa_release.pdf>.

United Nations Permanent Forum on the Rights of Indigenous Peoples 2014, *Report on the thirteenth session (12-23 May 2014)*, Economic and Social Council, Supp No. 23, E/2014/43-E/C.19/2014/11 (6 June 2014).

Watson, I 2002, 'Buried Alive', *Law and Critique*, vol. 13, no. 3, pp. 253 – 269.

[1] See, for example, the literature referred to in Butterly (2014: 7-11).

[2] For examples of some of the criticisms of command and control see: Baldwin, Cave & Lodge (2012: pp. 107 – 110).

[3] See for example: Kotzé (2012: 82), Holley, Gunningham & Shearing (2012) and Karkkainen (2001-2).

[4] *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007). Article 46 contains three distinct clauses. The third clause, which is also the final clause of the UNDRIP, states: '3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, *good governance* and good faith' (emphasis added). Articles 40 – 46 of the UNDRIP can be viewed as implementation provisions which explain how states and international bodies should recognise the rights in the UNDRIP.

[5] For example, Commonwealth Government, Department of Environment 1998, Australia's Ocean Policy: Caring, understanding, using wisely (vol 1), viewed 18 May 2015, <http://www.environment.gov.au/archive/coasts/oceans-policy/publications/pubs/policyv1.pdf>, p. 8.

[6] However, there are broader organisations that promote Indigenous involvement in marine governance such as the North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA): http://www.nailsma.org.au/.

[7] Commonwealth Government, Department of Environment 2012, Sea Country Indigenous Protected Areas, viewed 18 May 2015, <http://www.environment.gov.au/indigenous/ipa/sea.html>.

[8] *Yarmirr v Commonwealth* (2001) 208 CLR 1, *Lardil Peoples v State of Queensland* [2004] FCA 298, *Gumana v Northern Territory* (2005) 141 FCR 457 and *Akiba*.

[9] At this stage, the Dhimurru Sea Country Plan notes that the current fishing under the NPF in their sea country is 'to be advised'.

[10] Nodal governance is a particular 'elaboration' of contemporary network theory. Within this approach, a 'node' has four essential characteristics: a way of thinking about the matters it governs ('mentalities'), a set of methods for exerting influence ('technologies'), 'resources' to support this exertion and 'institutions' which enable mobilisation of mentalities, technologies and resources (Burris, Drahos & Shearing 2005).

REVIEWER COMMENTS

Reviewer: 1

Comments to the Author

This paper addresses an important issue, the way in which Australia's coastal areas and resources are governed, and the role or potential role of Indigenous peoples in this governance. It argues, correctly, that the role of Indigenous peoples is significant and potentially influential, and that an analysis based on traditional understandings of 'law', i.e. European law, or formal regulation would not necessarily reveal this fact. The paper is logically structured and is written with admirable clarity.

However the paper has a substantial problem in that it does not demonstrate that its major theoretical concept, that of 'regulatory space', is in fact a theory, or a 'separate theory' as stated at pp. 6-7. Indeed it is not at all clear from the paper that the conept of 'regulatory space', as articulated by the author, has any theoretical (i.e. explanatory or predictive) power. The clearest expression of regulatory space 'theory' is the statement that 'Indigenous organisations in specific places are mobilizing knowledge and capacity and creating the resources to influence other actors, particularly the state, in the space'. But this is a factual claim, not a theoretical statement, and one that can easily be verified through empirical analysis, for example of the role of Yorta Yorta people in management of the Murray Darling Basin, of Kimberley Aboriginal people in land management and carbon trading, or of Cape York Aboriginal organisations in service delivery. The author provides further supporting examples in the latter stages of the paper and while this useful, it hardly constitutes an original or theoretical contribution; the recent Native Title Report of Australia's Social Justice Commissioner, for example, presents more substantial evidence in this regard.

The important questions that a theoretical insight might address include: why are some Indigenous groups mobilising knowledge successfully and others are not? (Remoteness, one possible explanation suggested by the author, cannot in itself be an explanation, as indicated by the Yorta Yorta examples and others that could be provided in relation for instance to North Stradbroke Island, a 30 minute boat trip from Brisbane's CBD, and to South West Western Australia.) What are the 'legal' and 'regulatory' conditions which create the 'space' for such mobilisation? What determines the degree of influence Indigenous groups are able to achieve? What is shaping the response of the state (which is in fact highly variable) to Indigenous efforts to exert influence? If the author could outline how 'regulatory space' helps answer these questions and explain relevant outcomes, this would greatly enhance the contribution of the paper. However as currently stated the 'theory' of regulatory space appears unable to contribute in this regard.

The author needs to do considerably more to persuade the reader of the theoretical content and power of the concept of 'regulatory space'. I have indicated the need for a 'major revision' not because what the author has provided needs substantial rewriting, but rather because what she/he has not provided constitutes a 'major' omission.

Reviewer: 2

Comments to the Author

The article demonstrates a clear and perceptive analysis of indigenous marine governance drawing upon the intersecting concepts of law, space, and 'geography'. However the analysis while offering an

important new dimension from which to engage with ideas of indigenous rights in marine areas could benefit from some further examination of how indigenous law engages with the various scales at which western orders of law operate. The concept that indigenous organisations are at the centre of a network of other frameworks for organising the spaces of the marine environment and its governance is an important insight that could be developed a little further in the article. The discussion of how indigenous groups build capacity to influence formalised governance in arrangements could also be expanded upon as these insights about the grounded operation of intersecting realms of law and governance are important. The examples of sea country mapping are well developed but a little more analysis of how these instruments ' cross boundaries' would add another dimension to the article. Another aspect that could benefit from some further analysis is the distinction between concepts of law, regulation and governance. The overview of the literature is useful but the analysis requires some further matching to the ideas developed later in the empirical analysis. For example, there is a conflation of regulation and governance adopting Kotze view -are the two truly synonymous? The analysis finally comes down in favour of a relational model of space and governance which is well suited to the empirical analysis of sea country mapping etc. However the discussion of the law/space theory could be analysed in more depth to draw out some finer distinctions between concepts. The other area that may warrant attention is the concept of indigenous 'sovereignty'. A useful discussion can be found in Marcia Langton,s work; especially with respect to the idea that indigenous sovereignty and governance exists in the interstices of formal western legal models where as a matter of substance western law does not have resonance or even practical capacity to be implemented. There is also the question of interrelationships expressed through trade and associated cultural practices as a form of indigenous environmental governance. Western concepts distinguish commerce and non commercial - does this distinction apply to indigenous marine governance eg do native title rights include rights in personaam? Overall, the article is well written and clearly supported by research. Some minor refinement of the analysis in the theory section and some further detail around the discussion of the manner in which indigenous governance is transjurisdictional and even transcultural will add to an already pertinent and innovative analysis of geography, law and space in terms of indigenous marine governance.