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AQUA NULLIUS

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Abstract:

The fiction of *terra nullius*[1] is addressed in *Mabo & Ors v The State of Queensland (No 2)(Mabo) (1992)* 175 CLR 1, however the increasing commodification of water has raised the issue of whether a new form of indigenous dispossession is now subtly occurring. When the Crown abrogates its beneficial title in favour of private parties through Crown grants, it is now a legal maxim that any underlying Indigenous property rights are extinguished or at least diminished to the extent of the grant.

Since 2000, the granting of exclusive rights of access to water in the various States' water legislation, has arguably also extinguished or at least diminished surviving Indigenous water property rights. Scant research into this impact suggests that the uncrystallised quantum of compensation that may be attributable as a result of the granting of such private access rights has been deftly underestimated by policy makers.

[1] empty land or no man's land

INTRODUCTION

The creation of private property rights in water arguably impacts upon any pre-existing rights, notably Indigenous property rights and interests in water arising from the survival of native title. This issue has been given scant attention by legislators, and it is pertinent that acknowledgement of native title in the various States' legislation is usually a perfunctory reference to the existence of native title, but nothing more. For example, in the *Water Management Act 2000* (NSW) it is blandly stated at s.55(1) that:

> A *native titleholder is entitled, without the need for an access licence, water supply work approval, or water use approval, to take and use water in the exercise of native title rights.*

Further, at *s.55(2*) it is stated that:

> *This section does not authorise a native title holder:*
> *(a) to construct a dam or water bore without a water supply work approval, or*
> *(b) to construct or use a water supply work otherwise than on land that he or she owns.*

Furthermore, at *s.55(3)* in an extraordinary statement, this sub section limits the amount of water for "domestic and traditional purposes" that a native title holder can take annually in the following manner:

> *The maximum amount of water that can be taken or used by a native title holder in any one*
>
> *year for domestic and traditional purposes is the amount prescribed by the regulations.*

The constraints placed upon native title holders in *s.55 (3) Water Management Act 2000* (NSW) are somewhat surprising, given the likely impact of such constraints on the uncrystallized obligation for compensation which is to be paid by the States arising from abrogation if native title has survived. It is however recognised that the extent to which native title is diminished or extinguished by current non-tidal water management regimes such as the *Water Act 2000* (Qld) and the *Water Management Act 2000* (NSW) is yet to be clarified, and may or may not be significant depending on the circumstances.

If it is accepted that native title in water may have survived to varying degrees throughout Australia, then it would appear only prudent for an understanding to be sought as to the nature of these Indigenous rights and interests for the possible settlement of native title claims. If, for example Indigenous rights and interests can be recognised and incorporated into existing water management regimes, this expression of respect and recognition could beneficially impact upon subsequent assessments of compensation. Such course of action would seem prudent, rather than allow for an unknown and currently incalculable liability for compensation to accrue.

Indigenous water management regimes are increasingly recognised as providing non Indigenous managers with the prospect of "a level of understanding of sustainability and carrying capacity which has yet to be experienced."[2] Indeed it was recently noted that in Papua New Guinea and Indonesia, such traditional management is arguably more effective than government or non government efforts:

[2] Sheehan, J., (2001) "Indigenous property rights and river management" *Water Science and Technology* 43 (9), 241.

> *[t]raditional communities protect coral reefs better than governments or conservation groups do. A survey by Australian scientists of protected reef areas throughout Papua New Guinea and Indonesia has found that traditionally managed corals support larger fish than unprotected reefs, whereas most national marine parks or privately funded reserves do not.*[3]

In an endeavour to gain some recognition of Indigenous rights and interests in water, the NSW Aboriginal Land Council (NSW ALC) has negotiated with the Department of Land and Water Conservation (now the Department of Natural Resources) with a view to obtaining funding for a proposed Aboriginal Water Trust. In November 2002, the NSW ALC reported that:

> *[t]he Aboriginal Water Trust is one method to ensure that people and communities will have access to a small pool of funds over two years to help improve their water usage and efficiency. The Trust has not yet been established, but are looking at a Dec-Jan timeframe.*
>
> *The Aboriginal Water Trust is based on funds from consolidated revenue and the DLWC. It is important that any gains made by Aboriginal people and communities does not come at the direct expense of other stakeholders, such as irrigators and farmers, and thus the monies are part of a general budget, rather than levies and indirect taxes.*[4]

In 2001 $5 million[5] was allocated by the NSW Government for the Aboriginal Water Trust, however in response to a question in the NSW Legislative Council on 2 March 2006, the Hon. Ian MacDonald MP, Minister for Natural Resources stated that the funds in the Trust had already been allocated. In addition the Minister advised that discussions were being held with "the local communities" about the Trust, and indicated that he would provide "the full details" at a later date.[6]

The continuing reluctance of State Governments to recognise in a meaningful manner Indigenous rights and interests in water, does little to allay concerns regarding the uncrystallised obligation for compensation. Cavalier thinking is not an exercise which 21st century settler societies such as Australia appear to greatly admire, however pervasive prejudices and preconceptions about the nature and value of native title clearly requires a robust rethinking of existing water management regimes. There is hypocrisy in disregarding native title, and in those who regard native title as a distraction in the task of creating a market for newly commodified natural resources such as water. The respect that native title demands is necessary and equitable, irrespective of whether it may be tedious for those embarking upon market creation.

Hence, the title of this paper *Aqua Nullius* has been chosen as a counterfoil to *terra nullius*, which by analogy suggests that water is currently viewed as "no mans water", and that Indigenous rights and interests in water can be disregarded.

The following section of this paper canvasses the issue of the Crown's radical title, and how it expands to absolute ownership when native title is extinguished or surrendered. An alternate approach such as common property or *res communes* is also canvassed in the context of Indigenous property rights in water especially beyond the territorial limits of settler law.

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[3] *New Scientist* (2006) No 2562, "Local know best", (29 July) 5.
[4] NSW Aboriginal Land Council (2002) *Partnership Agreement Report for the Human Rights & Equal Opportunity Commission Aboriginal & Torres Strait Islander Social Justice Commissioner Bill Jonas* (Sydney: Strategic Policy and Planning Unit, NSW ALC), November, p. 3.
[5] NSW Legislative Council, 2 March 2006, *Hansard.* Question from Ian Cohen MP to the Hon Ian MacDonald on "Aboriginal Water Trust".
[6] NSW Legislative Council, 2 March 2006, *Hansard*. Reply from the Hon Ian MacDonald to Question from Ian Cohen MP on "Aboriginal Water Trust".

RADICAL TITLE AND WATER

The sovereignty of the state over the land within its domain is usually the beginning of civil order. Wars are fought to extend political control over land; they are spatially aligned and the resulting legal system has been poetically referred to as the *laws of the land*. Law and space are connected in human experience so intimately that it is difficult to recognise the depth of their connection or to disconnect them effectively. One of the challenges of the recognition of indigenous ownership is the way that it forces the dominant political system in a country to recognise that its laws may not extend to its land. Even more uncomfortable is the prospect that the occupying political system may have no land tenure at all. This is the issue that Australia and some other western countries, has had to grapple with in recent times.

The foundations of property have been extensively dealt with in recent times from general treatments of western thought on property, such as Reeve (1986), to specific enquiries into the nature of indigenous ownership in Small and Sheehan (2005). Reeve's summary of Western thought on property appears to be consistently grounded in Adam Smith's conclusion that property is simply that situation of possession that is supported by state sanction. This position assumes a state that has the authority to sanction the possession of property. However, recognition of indigenous ownership goes to the very heart of this legal assumption. It means that the state, through the legislature and the judiciary, has a primary obligation to provide justice between citizens, circumscribed within the more nebulous expectation of realising the common good. Within this primary obligation, the creation of property rights institutions follows as a consequential set of conventions that orders the relationships between persons following some notion of justice and the common good. However, where some citizens have genuine ownership of land that exists outside of the boundaries of the state's authority, this same primary obligation places an onus on the state to defend that ownership right. This legal principle is seen in the case of respecting the conventional rights of immigrants that were awarded by foreign authorities, say for example with respect to marriage and foreign proprety. It is now the case with indigenous ownership.

Small (2003) articulated the manner in which law was grounded in culture, and ultimately in metaphysics. Legal scholarship in this area, such as Hepburn (2005) implicitly asserts a similar position by accepting indigenous ownership, while simultaneously questioning the feudal conception of Australian property. The legal literature however tends to rely on premises from within its own domain, which is proving to be a weakness. Hepburn noted that Anglo-Australian property is based on a feudal convention that accepts all property as ultimately residing with the monarch, who then distributes it to citizens under various conditions. Her point is that this is conceptually problematic, and that allodial property created by the state would be a tidier and more defensible basis for the current circumstances. This turns on the question of whether the state (in the person of the crown) does own all property at the outset, or whether it merely creates conventional property rights as needs develop. The latter is better conformed to the facts, and that there is little basis for the claim of crown possession, while recognising that the state does have a central role in the recognition of property rights and their management. Using the allodial model, property rights are the result of the state's valid right to create differential privileges between citizens, as seems to be the case in the history of water property, but it implies a radical change in the very fundamentals of Australian property. Much turns on whether the state can claim to be fundamental owner of property.

Several possibilities exist in legal thought for the establishment of property. In the case of conquest, it is held that the new sovereign becomes the owner of all land. This fits with European history and practice, especially through the feudal era. Notionally, this approach may describe the positive circumstances and political realities, but it is proving problematic. Conflicts in various parts of the globe witness the reluctance of people to accept the outcomes of conquest and the ensuing struggles

that erupt to correct what are perceived as past wrongs. The tensions in Ireland reflect difficulties with acquisition by conquest, even centuries ago, and various parts of the Middle East, especially the Palestinian struggle to regain their land, are but some of the current instances. Australia has never been considered to have been won by conquest, though the Australian Law Reform Commission considered the proposition seriously (Hepburn 2005).

Beyond conquest, European history relies on Feudal systems of tenure, though these tend to be based on developments of the allodial ownership that preceded it, largely from the late Roman era (Stein 1999). Feudal ownership was originally a complex matrix of rights and obligations that are better understood as set of cultural mores than a legal structure, though today it is more common to examine only its legal aspects (Belloc 1920). Samantha Hepburn (2005) argued convincingly that the feudal basis for Anglo-Australian land tenure does not have the necessary historical antecedents and should therefore be abolished in favour of an allodial system, similar to the USA. While this may have certain practical benefits, especially considering the state of the feudal theory of Australian property law, it opens the question of why any particular claim of allodial ownership should be recognised in the first place. Nicolette Rogers (1995) asked this question of post-Mabo Australia and came to the conclusion that there was indeed little rational ground for the Australian government's claim of radical title over the lands of Australia. On one hand, recognition of limited instances of customary ownership, conveniently quarantined to lands that are not the freehold possession of white Australia, was perhaps all that was political possible at the time. On the other hand, once the notion of all land in Australia belonging to the Crown was challenged, the foundation of Australia's land title system was left without support.

Rogers explored the notion of radical title that has been put forward as the route by which land passes from indigenous owners to the Crown, effectively from the jurisdiction of one legal system into another. Rogers and Hepburn agree that it has no precedent and exists more as a convenient legal fiction than a defensible principle in law. More urgent than obscure enquiries into legal theory is the political reality that White Australia was established because it wanted access to the lands of Australia, it had the technology to exploit it more effectively than its indigenous population and the military superiority to displace the native inhabitants where ever conflict arose. White settlement has raised the efficiency of Australian land use, enabled the support of an incomparably larger population and consequently multiplied the value of Australian land property. Even if indigenous ownership were fully recognised, the contribution of western culture in raising land values could give rise to a just claim from western occupants for compensation for the massive increase in values that their effort, infrastructure, technology, and even urban populations have created (Small 1998). The value of water property is but one part of this set of property rights that constitutes Australia's land resources, and the grounding of its title system is tied up with these questions.

Behind the question of the legal grounding of property rights lies the grounding of the law itself. Australia is faced with the recognition and resolution of two competing legal systems: those of the indigenous inhabitants and that of the Anglo-Australian tradition. On what basis could one be considered superior to the other? Legal scholars are not particularly strong on this question, because it operates outside of the scope of legal thought, strictly considered. Small (2003) argued that a culture's legal system was grounded on its dominant ethical system, however this does not resolve particular questions pertinent to the legal recognition of water property. Three questions need attention, they are the question of where laws come from, this rests partly on the question of the relationship between law and ethics and finally, if law is related to ethics, on the nature of ethics itself. These questions will be dealt with in reverse order.

There are many systems of ethics and many ways of classifying them. For the purpose of understanding the intersection of indigenous and modern cultures, the most important distinction relates to the origin and fixity of ethical systems. Ethical systems can either be considered to be a

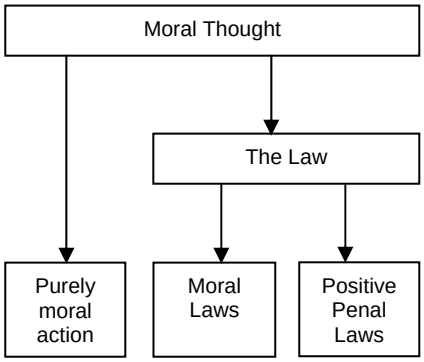
human artefact that is crafted to suit a particular situation, or an external entity that exists independently of human action and is progressively discovered through reason. Aristotle's virtue ethics is representative of the position that ethics has an existence that is outside of the moral actor, who is obliged to use reason to discover them. Plato also held a conception of ethics that made them something that had an existence outside of the moral actors to be discovered through reason The alternative, are systems of ethics that claim that ethics are no more than social, or personal, constructs and as such, will change with changes in the society or individual. In one way or another, modernity is characterised by the latter approach which sees ethics as relative to the individual or society and time. For modern people, ethics are fluid and the result of personal decision.

By contrast, indigenous people tend to view ethics as a received body of instruction for action that is either accepted or rejected. In most cases indigenous people link their ethics and culture to creation myths and often to instruction received from supernatural creative beings. If the myths are accepted, then the ethics they provide must follow unchanged. They do not change with situation or time, and have many characteristics that make them more like those of Aristotle, and certainly Plato. Plato in particular held a view that ethics originated from what he referred to as the *realm of the forms*. This realm is inhabited by pure concepts, not material, empirical beings. It contains the designs of all that can exist and their relationships. Considered at this level, ethics is the study of appropriate relationships between persons and can be built on the initial understanding of what the human person is. When indigenous people attempt to dialogue with western people regarding ethical issues, one of the difficulties is that western people tend to be more relativistic in their ethical outlook, which creates a fundamental difficulty for inter-cultural communication. Plato is part of the western tradition that has the capacity to bridge this gap. In Plato's work, *The Republic*, he pits Socrates against Thrashymarchus in a debate over the nature of justice. Socrates outlines the Platonic/Aristotelian view, while Thrashymarchus could well have been educated in the post-Enlightment west with his view that *justice is the will of the stronger party*. The history of the interaction between western and indigenous people would empirically confirm Thrashymarchus, while the recognition of indigenous ownership suggests that in the fullness of time, justice will follow Plato & Socrates.

The link between ethics and law is the second question critical to understanding the quality of a legal system. The basic question is priority: does what is right determine what should be legal, or does what is legal determine what is right? A little reflection reveals that the former appears obviously true, but it is challenged by the implications of ethics being only the personal determination of the moral actor. If there is no ethics outside of the decisions of the person, then what is legal becomes an important contribution to a person's personal ethics, and therefore determines what is right. This is a weak argument and even if relativistic ethics are accepted, the law can be seen to be a product of the collective ethical thought of the majority in a democracy. That is, the dominant moral view of the community becomes law through the process of democratic government. One way or another, what is right determines what is legal.

Some exceptions exist, and these are important when considering the origin of particular property rights. Driving on the left hand side of the road in Australia is legal, though it would be foolish to say it is derived from some notion of morality. It is simply an arbitrary convention adopted for the more efficient organisation of society. Every society has many laws that are purely conventional. These are sometimes referred to as *positive laws*, because they are merely posited, not adopted from some ethical deliberation. The force of positive laws lies not on their moral claim on compliance, but on the state's right to punish offenders sufficiently to discourage non-compliance. For this reason they are correctly referred to as *positive penal laws*, as contrasted to *purely moral laws* that derive their force from the moral consensus of the community. This arrangement is shown schematically in Exhibit 1:

Exhibit 1: Relationships between moral thought, the law, and various types of action and rules



The third question relates to the origin of the laws. Over the last century or two, debate in the theory, or philosophy, of law has concentrated on the question of whether law is somehow a fixed code that is discovered, or a fluid response to the needs of a particular society and time. The former position is known as natural law theory and traces its origins to Plato, with his theory of the forms, found in his writings such as the *Republic*. His dialogue known as the *Crito* is short and focused on respect for law. Taken together, Plato painted an image of the laws as something bigger than the individual, eternal, stable and deserving the respect of all people, even when they appear harsh.

The alternative theory, known as positive law theory is closely tied with modernity. This theory focuses on the existence of positive penal laws as an obvious example of valid laws that have no moral content, despite being useful for the ordering of a civilised society. It then extends the scope of positive law to include all laws, thereby freeing the law from its linkage to moral thought. The position is closely related to modern ethical thought, especially if one believes that there is no moral code outside of the personal moral calculus of the individual. The modern era has been dominated by the notion of the superiority of the individual, begun by John Wycliffe (d.1384), accelerated by Niccolao Machiavelli (d.1527) and systematised in the eighteenth century by the Enlightenment philosophers. In legal theory, William Blackstone (1769) Commentaries on the Laws of England reflected the modern inclination, while Friedrich Karl von Savigny (1814) established the German historical school on the premise that law was not a construct of reason but convention that responded to the society's needs of a time.

Positive law theory enjoyed rising support over the past half millennium, but the last half century has witnessed a return in interest in natural law theory. This may have been the result of a number of influences, including the explicit investigation of the implications of a strong positive law theory, but it seems that the history of the twentieth century itself has provided some powerful data on the integrity of the positive law position. When H.L.A. Hart (1977) set out to argue positivism and the separation of law and morals he was forced to use instances drawn from the experience of Nazi Germany as the most powerful instance of the separation of law and moral that the west has witnessed. Lloyd Weinreb (1987) noted that Hitler's Germany has become the test case for positive law theory, and one that powerfully points out its shortcomings. Lord Devlin (1977) observed that contemporary English law eventually reduces to the moral position of the average "*man on the Clapham bus*" suggesting that while a democracy will enact any law it chooses, the mandate to make law is ultimately grounded on the beliefs of the majority in the community, and those beliefs are moral, one way or another. Stephen Guest analysed Ronald Dworkin's theory of law and concluded that his *"… theory of law is that the nature of legal argument lies in the best moral interpretation of existing social practices"* (Guest 1997). This position is not quite natural law theory because it admits a vagueness in moral deliberation that natural law theorists would reject, but it does recognise the necessary connection between morals and law that positivism has sought to

sever. Charles Rice (1999) is representative of a growing number of legal theorists who accept Dworkins basic recognition, but then take it forward to demonstrate the logical consistency of a moral system based on a disinterested enquiry into Aristotelian natures leading to perennial principles to judge any legal system. It is only using external criteria such as these that the relative quality and merit of competing legal systems can be gauged. It is also useful in the case of indigenous legal systems since it admits an inquiry into the metaphysical premises as well.

The debate in the western theory of law is vitally important for the question of indigenous ownership. Indigenous ownership is best understood within the framework of natural law theory. This means that while the balance of western legal thought is dominated by the positive law paradigm, it cannot fully appreciate the mechanics of indigenous ownership. The Australian Native Title Act is an instance of positive law attempting to solve a pragmatic legal problem without engaging the underlying philosophical problem. It is very likely that the eruption of native ownership issues in this part of history is timely, as it comes at a point when the west is revisiting the very basis of its legal theory. Native ownership may be more evidence that the positive institution of property, as articulated by such as Lord Blackstone, is defective for the very reason that it rests on a defective understanding of law and morality. This is the point partly made by Hepburn (2005).

Exhibit 2: Summary of the three questions behind understanding the quality of a legal system.

Dominant cultural support	Indigenous people, Socrates/Plato/Aristotle Feudal Europe	Modern western culture
Ethical fundamentals	Ethics exists outside of the human person, fixed, received, uncovered	Ethics is a human construct that is subject to the community, times and personal circumstances of the moral actor.
Relationship between ethics and law.	Law comes from ethics or operates within it.	Law and ethics are independent.
Foundations of Law	Natural Law: Law follows from deductions drawn from understanding of natures.	Positive Law: Laws are merely positive conventions that must be obeyed under threat of sanction.

Hepburn's argument is methodologically moral, it argues for the best outcome for the community in the design of the legal framework of property. It recognises that radical title, the nascent title that Anglo-Australian law awards the state when indigenous ownership is extinguished, is a meaningless title whose only usefulness is to provide a channel for property to move into western dominion. Conversely, the Australian government is generally acknowledged to have the right to regulate the use of natural resources for the benefit of the country. Note that this right to regulate is a moral argument grounded on a Dworkin-like recognition that law should serve the dominant moral position of the society. The right to regulate necessarily creates property rights, which, as privileges, have commercial value. Ownership of these property rights does not necessarily mean ownership of the things that the rights refer to, only the ownership of the benefits of use, which the regulation permits. Reeve (1986) pointed out that this is consistent with the understanding of property that has dominated western thought for some centuries, though it tends to be ignored in the popular view.

This means that in general, western property is not ownership at all, but merely possession of use rights supported by state sanction. If the state is the ultimate owner of all property rights, as under the feudal model, then private allocation of property rights can be ownership by transfer, but Hepburn and Rogers have argued that this is not the case in Australia. Obviously, the existence of a genuine owner undermines this whole structure, since ownership suggests a priority of rights that makes state regulation of secondary importance only.

If the indigenous inhabitants of Australia are genuine owners of the continent, then they are owners of the water resources of the continent as well, even if some aspects of that ownership were not explicitly articulated in their customs. While the state has the right to regulate the use of water resources, the property rights that follow from that regulation will necessarily belong to the owners, if they exist. There will possibly be other regulatory rights that the owners will have *qua* owners, even if third parties hold the use rights. These would be analogous to the rights of a land owner over the activities of a tenant to limit the activities of the tenant beyond what is permitted by the state.

Exhibit 3: Relationships between moral thought, the law, and various types of action and rules

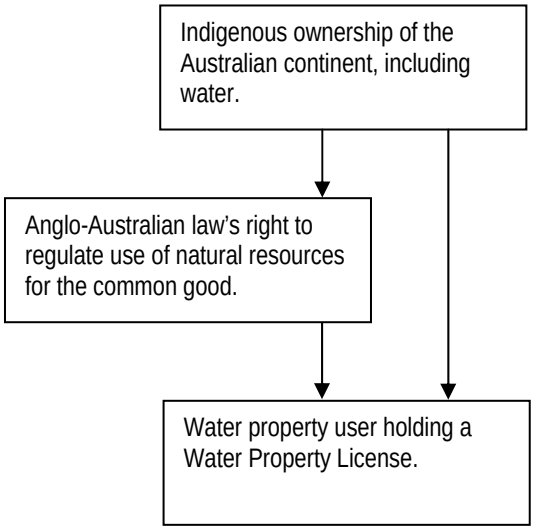


Exhibit 3 (above) schematically outlines the relationships between the parties involved in the ownership and use of water property. If the indigenous peoples claim ownership to water, which could be consistent with their customs and mythology, then they own the resource regardless of Anglo-Australian law. Anglo-Australian law does have the right to regulate the use of water resources, but this right is a right of license or veto to use, not to own. In this way, the western user of water may own the right to water as an allodial property right, but they do not own the water itself as the latter is owned by the indigenous customary owners. Despite not owning the water, the use of the water is a valuable privilege which now can be traded. What is yet to be determined is to what degree and to what value is the level of indigenous ownership. It is may be the case that the license to use water may be validly awarded by the state, but the rent from its use may belong, in some way and to some extent, to the indigenous owners.

The next section will explore the extent to which recognition of indigenous ownership of water rights have been recognised by Australian law. If it is a fact that instances of indigenous ownership has been recognised in particular cases, then it follows that it was the general case. The logic of the Mabo decision was that when the state used its licit right to create property rights, they extinguished indigenous property rights by double effect. There appears to be evidence that acceptance is rising for the opinion that this did not extinguish ownership, even though it extinguished property rights. The challenge for the present is to examine to what extent indigenous people understood ownership of water resources, and how the rights that follow from the use of these resources should be allocated in the light of this ownership.

PARLOUS PROSPECTS FOR COMPENSATION

The issue of compulsory acquisition of water access rights under legislation such as the *Water Management Act* 2000 (NSW), has raised the vexed question of compensation for these statutory rights which are personalty and not realty, with one exception in the NSW legislation. The manner in which non Indigenous rights to water are being dealt with provides important guideposts for Indigenous property rights in water.

Entitlement to compensation for the cancellation of water access is widely regarded as problematic, and unsurprisingly the *Water Management Amendment (Water Property Rights Compensation) Bill 2006* (NSW) was tabled in the Legislative Assembly on 6 April, 2006, as a private members bill. It proposes the inclusion of access licences as a defined *interest* under *s.4 Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

An earlier somewhat similar proposal amending the *Water Management Act 2000* (NSW) was suggested by the NSW Division of the Australian Property Institute in 2002, on the basis that:

> *…the current Act displays a continuing lack of clarity in relation to the existing, s. 79 Compulsory acquisition of access licences, and[the Institute] proposes that amendments should be made to this part of the Act.*
>
> *It is the Institute's view that the Act is quite limited in how compensation is to be determined, and it is considered that the relevant sections namely s.79 and s.87 should be amended to refer to the provisions of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW). This is a procedure which has been adopted in other legislation, and is regarded by the Institute as an overdue amendment to this Act, and would maintain conformity with other legislation.*
>
> *It was also noted that the Land Acquisition (Just Terms Compensation) Act 1991 does not include access licences as a registered interest in the definitions in s.4. The Institute considers that inclusion of access licence as a registered interest, could easily achieve this recognition, given that usefully access licence is already defined pursuant to s.4 in the Water Management Act 2000 (viz. s.56).*[7]

The 2002 proposal by the Institute was never adopted by the NSW Government, and it is interesting that the *Water Management Amendment (Water Property Rights Compensation) Bill 2006* (NSW) picks up the flavour of the original proposed amendments. There has been a unwillingness to amend the limited compensation provisions of the *Water Management Act 2000* (NSW), and this suggests that the current Government will not support the 2006 *Bill*.

However, access to water is not wholly confined to licences under the *Water Management Act 2000* (NSW), and *s.52* states as regards existing riparian rights, described as "domestic and stock rights" that:

> *(1) An owner or occupier of a landholding is entitled, without the need for an access licence, water supply work approval or water use approval:*
> *(a) to take water from any river, estuary or lake to which the land has frontage or from any aquifer underlying the land, and*
> *(b) to construct and use a water supply work for that purpose, and*

[7] Letter from John Sheehan, [then] President, NSW Division, Australian Property Institute to Ms Dominique Tubier, Senior Policy Advisor Legislation, Minister for Fair Trading and Land & Water Conservation, 28 November 2002.

> *(c) to use the water so taken for domestic consumption and stock watering, but not for any other purpose.*

Further, at *s.52 (3)* "domestic consumption" and "stock watering" are defined as:

> *Domestic consumption, in relation to land, means consumption for normal household purposes in domestic premises situated on the land.*
>
> *Stock watering, in relation to land, means the watering of stock being raised on the land, but does not include the use of water in connection with intensive animal husbandry.*

Clearly, *s.52* riparian rights demonstrate a connection with land, which is a compensable interest under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). In this Act, an interest in land means not only a legal or equitable estate, but also an interest which is "in connection with the land", and hence captures *s.52* rights to water. It is not surprising that such rights evidence connectivity with land given that this riparian doctrine can only be overturned if Government:

> *…commit[s] the common law heresy of granting property in water.*[8]

There are other sections of the *Water Management Act 2000* (NSW) which permit the Minister to revoke or cancel the access licence, and it is well recognised that as personal property the State of NSW could decide to acquire such licences without compensation. Whilst *s.79* provides for the compulsory acquisition of access licences however, *s.79(2)* states that a holder is:

> *…entitled to compensation for the market value of the licence as at the time it was compulsorily acquired.*

This is not compensation as envisaged in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), which takes into account not just the market value of an interest in land, but a whole raft of heads of compensation. Such matters arguably enable a package of compensation to be calculated which fully compensates the dispossessed owner for the loss arising from the compulsory acquisition.

Notwithstanding the provisions in *s.79(2)*, the State of NSW has no constitutional obligation[9] to pay compensation for the compulsory acquisition of realty, whereas the Commonwealth has an obligation to pay *just terms* compensation pursuant to *s.51 (xxxi)* of the Australian *Constitution.* Furthermore, valid compulsory acquisition by the Commonwealth is subject to fulfilling the compensation provision, whereas NSW is not similarly limited by its constitution.[10]

Raff observes that it would be "politically unacceptable"[11] for a State to confiscate private property, and not unexpectedly the various states have enacted legislation to provide for a right to compensation, albeit limited. In addition, NSW has in the past avoided or further reduced compensation through specific amending legislation, for example *s.18 City and Suburban Electric Railways Act, 1915 - 1967* (NSW) amends *s.124 Public Works Act 1912* (NSW) to limit the compensation to be paid for land acquired for the route of the Eastern Suburbs Railway to its value at 27 February 1967.

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[8] Clark, S & Renard, I. (1970) Riparian Doctrine and Australian Legislation. 7 *MULR* 475 at 489.
[9] Standing Committee on Law and Justice (2001) *A NSW Bill of Rights* Report 17 (Sydney: Legislative Council, October), 11.
[10] *New South Wales v Commonwealth* (Wheat Case) (1915) 20 CLR 54, per Griffith CJ at 66 and per Barton J at 77.
[11] Raff, MJ (2002) "Planning Law ad Compulsory Acquisition in Australia" in T. Kotaka and D. Callies (eds) *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* (Honolulu: University of Hawaii Press) 40.

In another example, *Clause 36 Schedule 1 Water Management Amendment Act 2005* (NSW), amended the *Water Management Act 2000* (NSW) through the provision of a new section *s.87AB* which provides that compensation is not payable by or on behalf of the Crown in respect to "relevant conduct" in relation to a water management plan arising from the following:

> (*a) any act or omission, whether unconscionable, misleading, deceptive or otherwise.*
> *(b) a representation of any kind, whether made verbally or in writing and whether negligent, false, misleading or otherwise.*

Interestingly, the President of the Law Society of NSW wrote to the Minister for Planning and the Attorney General in March 2006 regarding *s.87A*B stating as follows:

> *The effect of this amendment is to remove people's right to seek compensation for any loss they may suffer as a result of the creation of a management plan that reduces their valuable water allocation rights under circumstances where the loss arises from any act or omission in relation to the content of the plan, its effect or government policy in relation to it, even if such act or omission is inter alia unconscionable, deceptive, false or misleading. That is, a person is prevented from seeking compensation for a real loss suffered by them even if it results from deliberately false and misleading acts or omissions done in bad faith where are intended to cause the loss actually suffered.*
>
> *This is an unconscionable abrogation to the rights of individuals who suffer loss at the hands of the state or its agencies to recover compensation in circumstances where it is clearly deserved.*[12]

There is significant history detailing the avoidance by the State of NSW for payment of compensation, or reduction in compensation arising from compulsory acquisition, and there is little to suggest that amendments such as *s.87AB* will be repealed. Indeed, unwillingness to amend the limited compensation provisions of the *Water Management Act 2000* (NSW) strongly suggests that any future compensation for the extinguishment or diminution of native title in water can be expected to be scant indeed. Such melancholy observation is unsurprising given that *s.100* of the Australian *Constitution* forcefully reminds us of the strength of the States' water powers:

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

It will be recalled that *s.52 Water Management Act* 2000 (NSW) preserves existing riparian rights which can be considered as a compensable interest under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). While other non-Indigenous water rights do not have this connection with land, paradoxically native title rights and interests including those residing in water, are required by *s.223 Native Title Act 1993* (Cth) to demonstrate this connection with land in order to be recognised.

Research by Small[13] has provided a greater understanding of the notion of non Indigenous property rights, and whether certain interests can be construed as "property". Such notions have been further developed by Sheehan and Small[14] in direct application to understand the various facets which can

[12] Letter from President, the Law Society of NSW to the Hon Bob Devus MP, Attorney-General, 29 March 2006.
[13] Small, G (2001) "Past provides the future key to major contemporary issues" *Australian Property Journal* 36 (8) 737 – 741, 749.
[14] Sheehan, J.B. & Small, G. (2002) *Towards a Definition of Property Rights* Working Paper No 1.02 (Sydney: UTS Property Research Unit, Faculty of Design Architecture and Building, University of Technology Sydney) October.

comprise the "bundle of rights" present in a specific native title at a specific location. However, it is problematic whether some Indigenous rights satisfy *s.223*, which as stated above recognises only those incidents having a nexus with land.

Nevertheless, there is obviously a constellation of rights and interests in Aboriginal law and culture, which are not recognised by *s.223*, however those rights and interests which do meet the test of *s.223* are not limited to land, and almost certainly embrace water and possibly irreducibly complex. The following section of this paper considers the often overlooked issue of groundwater which is part of that intricate fusion which is native title in water.

INDIGENOUS GROUND WATER

The question of whether ground water is "property" from the non Indigenous standpoint was dealt with by Gray, Connolly and Marshall, JJ in their decision in the ACT Court of Appeal in *Environment Protection Authority v Rashleigh [2005]* ACTCA 42 (*Rashleigh*), stating that:

> *[t]his provision, ..seems to us to recognise the pre-existing common law right of a landowner to access groundwater. The legislature, it seems to us, has clearly evinced an intention not to interfere with these rights, even though, in our view, these rights do not amount to proprietary rights. To the extent that all landholders require a licence to operate a bore to access groundwater, whether or not they require an allocation to use that water, that requirement does not amount to an acquisition of property.*[15]

Rashleigh describes long settled common law, their Honours noting that:

> *[t]he position is well stated in Halsbury's Laws of England (4th ed 2004 reissue) Vol 49 (2): Water, at [47]:*
>
> *Although certain rights as regards flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody. Flowing water is only of public right in the sense that it is public or common to all who have a right of access to it.*[16]

Further, they observe that the various English authorities which stretch back to 1885:

> *…have been followed in Australia (Xuerab v Viola (1990) Aust Torts Reports 81-012 per Giles J), and establish that, at common law, while any landowner may extract groundwater, no landowner has property in that water. It follows that Parliament may intervene to regulate, in the public interest, access to that water, without interfering with an interest in property.*
>
> *Moreover, it seems to us that, even if the right to extract water percolating under land is anything more than one of the "bundle of rights" that go to make up "property" (Yanner v Eaton (1999) 201 CLR 351 at 366), the imposition by the Legislative Assembly of a regime to regulate access* to *underground water does not amount to an acquisition of any such property.*[17]

[15] *Environmental Protection Authority v Rashleigh* [2005] ACTCA 42 at [36]
[16] *Rashleigh* at [11]
[17] *Rashleigh* at [15-16]

Whilst non Indigenous rights to ground water are not viewed in *Rashleigh* as "property", native title in groundwater may be regarded as having some of the features of a species of property but not necessarily real property.[18] Furthermore, *s.223* requires that whatever the native title interest might be, a connection with land must be evident. Newell concludes that the common law right to ground water aside from native title leads to the fact that:

> *…the indigenous community owns the underlying title to the land means that (provided they do not live in South Australia) they possess a common law right to access groundwater resources for use as drinking water.*[19]

Whether non Indigenous rights of access to surface water or ground water are "property" remains problematic, however in respect of native title in water arguably the decision in *Yarmirr*[20] decided this issue. The following section of this paper discusses the complex that is Indigenous water property rights.

THE YARMIRR DECISION

The 2002 decision in *Yarmirr* enabled traditional owners to contemplate successfully asserting that part of their native title comprises water. Mary Yarmirr, a traditional owner of Croker Island which was the area of concern in *Yarmirr* explained Indigenous water property rights as follows:

> *My Mandilarri sea country is at the top end of Croker Island. When I use the word "country", I am talking about dry land, fresh water and the sea. And when I talk about sea country, I am not talking only about the waters of the sea.*
> *I am talking about the sea bed and the reefs, and the fish and animals in the sea, and our fishing and hunting grounds, and the air and clouds above the sea, and about our sacred sites and ancestral beings who created all the country.*
> *Our ancestors are still there. Our country, both land and sea, belongs to us, and we belong to it. For we cannot survive without the land and the sea, for it breathes, controls and gives life.*[21]

Clearly, traditional owners of sea rights such as Mary Yarmirr have a holistic view of the extent of their rights and interests, a view which is somewhat different to the current Anglo-Australian dissection into defined sectoral property rights of previously inchoate rights. There is difficulty for non Indigenous persons in understanding how sea country is not only about seawaters, but also seabeds, the flora and fauna in the sea, and fishing rights and apparently air rights. In addition, sea country has a metaphysical facet which is evidenced in the presence of sacred sites and heroic stories about creation beings.

The importance attached to rights to water by traditional societies is evident in other jurisdictions, and it is useful to consider the example of pre contact Hawaii, and even other legal traditions such as Islamic law.

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[18] *Commonwealth v Yarmirr* (2002) 208 CLR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [12]
[19] Newell, V. (2002) Á common law right to groundwater" in *Background Briefing papers* (Broome: Lingiari Foundation) February, 14.
[20] See at 16.
[21] Yarmirr, M,. (2002) "Sea Rights", *Land Rights Queensland* (June) 9.

TRADITIONAL WATER RIGHTS IN OTHER JURISDICTIONS

According to Hutchins in his classic 1946 treatise on *The Hawaiian System of Water Rights*: [22]

> *Water supply has long played a very important part in the agricultural, industrial and community development of the Hawaiian Islands …*
>
> *In the earliest historical days of Hawaii all land and water rights were owned and controlled personally by the King. Grants of certain land and water rights were made by the King, usually on a temporary basis, to various of his chiefs in payment for services, loyalty, favors, etc. From time to time, especially upon the occasion of the Mahele, water rights were changed or transferred by grants, inheritances and in devious other ways until today their ownership presents a somewhat complex pattern peculiar to Hawaii. Such early water rights, either those which may have had individual titles or those that were appurtenant to land titles, were almost entirely confined to surface waters with little consideration given to ground waters.*[23]

Hutchins further points out that:

> …possession of allotted land, though basically temporary and insecure even during the life of the holder, carried with it water rights, fishing rights, and the right to use forest products. This was essentially a feudal system, although the common people were not serfs tied to the soil and might move from the possessions of one chief to those of another; and the system was closely interwoven with the government which emanated from the king as absolute ruler and extended down through the chiefs and officials of various ranks to the great mass of common people.[24]

It is arguable as to whether these traditional Hawaiian water rights are in fact "property" however it is known that during the lifetime of the landholder possession also carried with it water and fishing rights, indicating a sophisticated tenurial rights regime covering a number of natural resources.

In a similar vein, Planck observes that Islamic law traditionally recognises the importance of water, in that:

> *…all agrarian reform legislations take into consideration existing water rights and traditional water laws*[25]

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[22] Hutchins, W., (1946) *The Hawaiian System of Water Rights. (*Honolulu: Board of Water Supply City and County of Honolulu, Hawaii).
[23] Hutchins, v.
[24] Hutchins, 22.
[25] Planck, U., (1987) "Issues of Water in Agrarian Reform Legislation of the Near East" *Land Reform, Land Settlements and Cooperation* 1/2 (1987), UNFAO Rome. 59.

With the current parlous state of Afghanistan, it is paradoxical Planck reported that in 1978, the Afghanistan Revolutionary Council initiated a reform of land and property stating that:

> *…[l]egal positions in irrigation matters, especially owner's rights on irrigation water [were guaranteed]*[26]

Other Islamic countries such as Egypt, Algeria, Iraq, and Iran, have for many years recognised the existence of land property and water property, and Planck points out that this situation exists because:

> [t]he outstanding importance of water is even part of the religious education which culminates in the words of Allah spoken by the prophet Mohammed in the Koran "…out of the water we made everything that lives…

> *All traditional and secular legislation systems concerning the ownership of water sources and the utilization of water initiate from these words of the Prophet. Differing interpretations by the representatives of different Islamic schools lead to divergent water rights. They vary from the fixed combination of water and land property to their complete separation. The different ratios of water and land rights do not only depend on regionally different customary laws, but also on the different origins of water used for irrigation purposes.* [27]

Clearly, water property rights are regarded as having great value in Islamic law and it is pertinent to note that any change in these traditional water rights in Islamic countries would be according to Planck:

> *…a much greater intervention than the confiscation of land, [and] it can be politically advisable to leave utilisation rights for water untouched…"*[28]

CONCLUSION

Long established traditions of access and proprietorship in water whether they are native title recognised by the Australian common law, traditional Polynesian law or within a tradition of Islamic law, obviously have great value to the holders. These rights cannot and ought not be swept away or ignored, and indeed culturally appropriate laws in many countries protect such rights.

The task for the Australian States who have constitutional responsibility for the management of water, is to ensure that indigenous water property rights are respected, and if a need arises for their diminution or expropriation, that meaningful compensation entitlements are met.

[26] Planck, 61.
[27] Planck, 74.
[28] Planck, 73.

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