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CONCEPTUALISING NATIVE TITLE AS AN ANALOGOUS PROPERTY RIGHT WITHIN THE ANGLO-AUSTRALIAN LAND LAW PARADIGM

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ABSTRACT

In the Pacific and elsewhere, indigenous property rights and interests and the associated traditional land use management systems have proved to be much more environmentally appropriate, multi faceted, and capable of survival than originally predicted. The exploitation of natural resources, especially land has seen the increased articulation by indigenous peoples in the Pacific and Southeast Asia of their fears about loss of land, and the concomitant loss of cultural identity.

Concomitant with these developments, there has been a growing recognition in common law countries such as the Philippines, Malaysia and Papua New Guinea, that when indigenous property rights are expropriated by the state, compensation must address the full range of losses born by indigenous people. To do otherwise, would expose the state to claims of discrimination counter to international expectations such as the United Nations Draft Declaration on the Rights of Indigenous Peoples.

Nevertheless, the assessment of compensation for the impairment or even extinguishment of indigenous property resources has proved to be a chimera for compensation law and practice in common law countries. It is alleged in some quarters that fundamental compensation issues have stubbornly resisted resolution because of the communal nature of many indigenous rights. The alleged conceptual difficulties have often been identified as an obstacle to the assessment of fair and just compensation, and of course a hindrance to the panacea of economic development.

Importantly, this pattern is also repeated in many other Pacific and Asian states such as Taiwan, which do not have this common law heritage, but who have an identifiable indigenous minority.

Nevertheless, the notion of compensation which has evolved in common law countries paradoxically offers significant hope for the development of a methodology which permits the assessment of compensation for the losses born by indigenous people when their property resources are partially or wholly expropriated. Landmark court decisions in Canada, Australia and Malaysia have been a watershed for the development of this conceptual framework.

As a result, there has been a wide-ranging academic and professional review of land administration practices in many common law countries, especially the area of compensation. The right to just terms compensation enshrined as Constitutional guarantees has provided a guidepost for the development of a more culturally appropriate and inclusive approach to the assessment of compensation for indigenous property resources.

The paper describes continuing research work in this area, which provides hope for a fairer and more just approach to compensation for indigenous peoples in the Pacific and Asia.

KEYWORDS

Compensation; indigenous property rights; native title; water property rights.

1. INTRODUCTION

Indigenous property rights and traditional management systems have proved to be much more environmentally appropriate, multi faceted, and capable of survival than originally predicted, Rudgley [1] observing that:

> *…[t]he process of correcting the chronology of cultural events leads to the inevitable conclusion that the present division between history and prehistory is not as solid as it may appear. This new view of our prehistoric past is continually being strengthened as both new discoveries and new investigations of long-neglected artefacts are undertaken. In the process more and more evidence is tipping the scales further back and is showing the prehistoric cultural achievements are more profound, complex and multifarious than has been hitherto suspected.*

Indeed, Western "scientific" land and water management techniques exhibit far less resilience and appropriateness which, according to White[2]:

> *…[are] resulting [in]…our land-use practices and our use of water resources…an endless list of changes…[resulting] from human activities.*

In support, Kristof states that:

> *…the environment is one of the bleakest prisms through which to view Asia, for it is becoming a brake on development and a challenge to the rest of the world as well. This environmental catastrophe is one reason to temper one's optimism about Asia.*[3]

British settlement in many parts of the Pacific and Asia resulted in the reception of not only the common law as it related to land but also imported management practices which had been developed over many centuries in England and Ireland. As mentioned above, the appropriateness of these practices is increasingly problematic, while indigenous resource management appears more sustainable because its basis lies in a *rapprochement* with natural cycles. In some Pacific island nations traditional practices have been given statutory recognition, as Pulea observes:

> *…traditional seasonal prohibitions for the protection of wildlife and marine life are embodied in various legislation in the Pacific, such as Vanuatu's law prohibiting the catching of female crayfish during the breeding seasons. The Wild Birds Protection Act (Solomon Islands) imposes seasonal restrictions and makes it an offense to kill, wound or take certain birds during*

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[1] Richard Rudgley *Lost Civilisations of the Stone Age* (London: Arrow Books 1998) 263.
[2] Mary E White *Running Down: Water in a changing Land* (Sydney: Kangaroo Press 2000) 261.
[3] Nicholas D Kristof "The Filthy Earth", in *Thunder from the East: Portrait of a Rising Asia* eds. Nicholas Kristof & Sheryl WuDunn (London: Nicholas Brealey Publishing 2000) 291

> *restricted periods. Traditional management practices incorporated into the legal system are not only complementary to modern management practices but can be effectively integrated, as both systems achieve the same goals*[4].

Therefore, it is somewhat surprising that there has been so little research undertaken into indigenous property rights in natural resources and the associated traditional management systems[5]. Also, Peterson and Rigsby note that there has been in some countries such as Australia an "ethnographic blind spot" regarding indigenous property rights in natural resources, observing that:

> *[t]his blind spot is not confined to Arnhem Land…but appears to apply to the whole continent*.[6]

The critical question for research is the predicted position of indigenous property rights and interests in natural resources. The use of the word "predicted" is appropriate given that there has been almost no recognition of indigenous property rights in natural resources, except for the Australian decision by the Federal Court in *Mary Yarmirr & Ors-v-Northern Territory of Australia & Ors (Yarmirr)* (1998) 1185 FCA (4 September 1998). In this decision, it was determined that native title exists in the sea and the seabed, however the decision was subsequently appealed to the High Court and heard on 6-9 February 2001, and should be decided later this year.

The hearing of the *Yarmirr* appeal has according to McIntyre[7] already usefully established parameters within which indigenous property rights in the sea and sea lands will have to be proved for predicted common law recognition, namely:

> *…it would not be unreasonable to presume the possibility that offshore rights may be limited to:*
>
> *(a) rights to take only particular species of marine resource which have historically been taken;*
> *(b) rights to protect from interference only geographically confined places historically regarded as of particular traditional significance…*

Further, McIntyre[8] opines that:

> *…evidence would need to be detailed as to particular resources exploited and the places where they have been exploited, and the location and dimensions of particular places requiring protection or to be accorded particular respect in accordance with tradition, and the necessity to exclude others in order to maintain the resource traditionally exploited or protect the place of traditional significance.*

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[4] Mere Pulea, "Integrating Traditional and Modern Management",(1984) *AMBIO* 13 (5-6) 356.
[5] See: *Indigenous Property Rights and River Management* Paper presented by the author at the *3rd International River Management Symposium,* Brisbane, 6 September 2000, and subsequently published as "Indigenous Property Rights and River Management in Australia" *Water Science and Technology* 43 (9). See also *Water Reform and Property Rights: The impact upon native title, and vice versa,* Paper presented by the author at the Royal Australian Planning Institute Central West Planning Group seminar, University of Sydney Orange Campus, Faculty of Rural Management, Orange, 1 December 2000.
[6] Nicholas Peterson and Bruce Rigsby "Introduction", in *Customary Marine Tenure in Australia,* eds. N Peterson & B Rigsby, Oceania Monograph 48, (Sydney: Oceania Publications, University of Sydney, 1998) 2.
[7] Greg McIntyre "The Ebb and Flow of Croker Island" (2001-2002) 5 *NTN* 22.
[8] Ibid

Both the decision in *Yarmirr* and the hearing of the subsequent Appeal suggest that for indigenous property rights to exist in natural resources, they must coexist with an intricate overlay of rights and interests some held by the State (Crown), and some by private holders, (i.e. fishing quotas). These interests clearly include both recognisable and inchoate property rights.
The position of such rights in natural resources can be fraught with uncertainty, given the problematic relationship between these rights and other interests held by the State, private holders[9], and indigenous property rights in specific natural resources such as water.

The following section of this paper canvasses the notion of property rights, while subsequent sections discuss the developing concept of indigenous property rights in natural resources in this multi layered property rights milieu, and the vexed issue of compensation.

2. CONCEIVING PROPERTY RIGHTS IN NATURAL RESOURCES

Property rights as generally understood are a titled right to land or to exploit natural resources such as minerals. Commonly these rights are referred to by the terminology "real estate", with its emphasis on the immoveable nature of the "property" concerned such as land, buildings and minerals.

The sorts of interests that are classed as "property" are limited only by our imagination, however the Courts of common law countries in particular have only recognised a few kinds of interests in land, which are regarded as usual property rights. Some of these rights will be readily recognised such as freehold and leasehold, however a few such as mining rights, fishing rights, and water rights have also been recognised.

There has also been the very recent recognition of carbon as a property right, and legislation in various countries such as Australia is developing this concept.[10] The objective in recognizing carbon as "property" is:

> *…to provide secure title for carbon sequestration rights through registration on the land title system. The practical effect of this will be that a carbon right attached to property will be held separately from the land ownership, and the carbon right attached to land will be viewable on a property title search, putting the world on notice of the obligations that flow with that land.*[11]

Even more recently, it has been suggested that the use of biota such as genetic botanicals may have to be not only regulated but also recognised as rights in property if they are to be conserved. Smeraldi argues that:

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[9] The substantial worth of private water entitlements is described as follows: "Since Sept 98 interstate trade in water has been allowed along the Murray downstream from Nyah (Victoria). SA farms have been net purchasers of 8.8m megalitres and Victoria and NSW net sellers of 2.7m and 6.1m respectively. Most of the water sold was not being used by the sellers and has now gone to grapes in SA. The returns per megalitres of water used are highest in vegetables ($1,800), fruit ($1,500) and grapes ($900) and lower for rice ($200), livestock, pasture and grains ($300), sugar ($400) and cotton ($600)." (June 2001) 419 *Australian Economic Trends* Misc. Item 12. See also Terry Murphy *Water Issues in NSW and how they affect Values.* Paper presented at API Rural Conference, Port Macquarie, 19 May 2001.

[10] Jacqueline Bredhauer "Tree Clearing in Western Queensland – a Cost Benefit Analysis of Carbon Sequestration", (2000) 17 *EPLJ* 389.

[11] Ibid. That carbon property rights have substantial value is confirmed as follows: "Cosmo Oil of Japan has paid Australian Plantation Timber Ltd $1m for an option to purchase the carbon sequestration rights in respect of 5,092 ha of its WA plantations." (July 2001) 420 *Australian Economic Trends* Misc. Item 6.

> *…if the acquisition of Brazil's botanic patrimony was not only regulated but legalised, it could even save the rainforest.*
>
> *"At the moment, we are not only giving the nations's plants away, we are also losing a real reason for people to engage in conserving the forest. If local people were encouraged to look after all the genetic material, and sell a portion on to interested groups in a legally approved manner, then they would have a real economic incentive to preserve the jungle …"*[12]

Biota property rights in company with other rights are asserted by indigenous people in many parts of the Pacific and Asia, for example the Kayan people of central Sarawak, state that:

> *…[w]e don't want to be separated from the land where our people have been living all these generations,…We have everything we need tor our life here. We can grow rice, we have fish in the river and we can hunt in the forest.*
>
> *Already things are changing too fast for our people. Before the logging companies came, the rivers and the streams around this area were very clear. It was very easy to catch fish and the water was sweet to drink. Now many of the fish have disappeared; it is harder to catch them. In the old times the wild game was abundant. Now the hunting has gone bad, too.*[13]

In Bangladesh, property rights to the Chittagong Hill Tracts have been claimed by indigenous peoples whose ownership has been described as follows:

> *All the land…traditionally belongs to indigenous people, but they don't have an ownership document…Land and forest is the main livelihood for indigenous communities in Bangladesh. It is their life.*[14]

The Taiwanese indigenous people also assert similar property rights, and claim that:

> *[h]istory reveals generations of colonial governments and immigrants… obtained land by means of force: almost no contractual arrangement or effort at obtaining the consent of the indigenous peoples was ever made. Even when such arrangements did take place, they inevitably were couched in a language foreign to the indigenous peoples and designed to deceive and swindle.*
>
> *After their ancestral lands were appropriated as national property, the indigenous peoples lost their claim to the very land on which their private homes were built…forested land has been assigned to the management of the Bureau of Forestry, land with mining potential has been claimed as national property, areas noted for their natural beauty and tourism potential have been designated national parks, and the Ministry of Defense has appropriated vast tracts of land from the indigenous peoples under the pretext of national security. The last pieces of land upon which the aborigines rely for their survival have been taken away and their consent was never sought in the process.*[15]

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[12]Roberto Smeraldi of Friends of the Earth cited in Nicole Veash "River of no Returns" *The Australian Magazine* (18-19 November 2000) 40. See also Lyuba Zarsky "Economy and Ecology: Sustainable Development", in *Economics as a Social Science: Readings in Political Economy,* eds G. Argyrous and F. Stilwell (Sydney: Pluto Press, 1996) 173.

[13] Huvat Bagi of Batu Kalo cited in "Damming indictment" *The Sydney Morning Herald* (21-22 April, 2001) 32

[14] Shah Alam Liton cited in "Bangladesh Indigenous minorities fight for their land" *Oxfam Horizons* 1:2 (June 2001) 9

[15] Alliance of Taiwan Aborigines I Chiang, Lava Kau "Report on the Human Rights Situation of Taiwan's Indigenous Peoples" , in *Indigenous Peoples of Asia* eds. R H Barnes, Andres Gray, and Benedict Kingsbury (Ann Arbor: The

In Australia, biota property rights are currently the subject of an enquiry into bioprospecting by the House of Representatives Standing Committee on Primary Industries and Regional Services, and it has been strongly suggested that:

> *…[t]he regulation of access to biological resources for research and exploitation has been problematical.*[16]

A feature of all of these property rights is that the interests in question are territorial, in so much as the right is contained only within defined boundaries. This is commonly achieved by way of a legal description of the boundaries, which have been defined by means of a cadastre. In addition, these rights are also proscribed in so far as what activities can occur within the territory[17] the manner in which the right is to be paid for, and other obligations incurred or limitations imposed.

Some of these usual property rights can be acquired outright, while some such water rights are attached to rights that are held in a parcel of land adjacent or nearby.

Nevertheless, in varying degrees all "property rights" result in the conferral of three qualities or capacities, namely a management power, an ability to receive income or benefits, and an ability to sell or alienate the interest. The degree to which these three qualities are evident in a particular property right depends on the mix of fundamental characteristics that the particular property right contains.

As stated at the outset, an understanding of these fundamental characteristics is crucial to ascertaining whether a particular right is a "property right". There have been significant attempts over the past few years by national governments to commodify natural resources, notably fisheries, through the creation of new property rights. Beale notes that the history of subsidised open access to fisheries has led to the view expressed by the American Fisheries Society that:

> *…transferable fishing quotas are coming into being as a way of conferring property rights on wild food (unfarmed) stocks in an effort to encourage more enduring harvests.*[18]

This transition from open access to property rights for natural resources is reflected in increasing attention by Australian courts on these less familiar forms of "property". A notable example of these judicial considerations is found in *Minister for Primary Industry and Energy and Australian Fisheries Management Authority-v-Davey and Fitti (1993) 119 ALR 108,(Davey and Fitti)* where the Court was asked *inter alia* whether the fishing capacity permitted for the Northern Prawn Fishery expressed in "units of fishing capacity" was in fact "property" within the meaning of *para.51(xxxi)* of the Australian *Constitution* which states that:

Association for Asian Studies, Inc, University of Michigan 1995) 367; see also Yu Sen-lin (1999) "A Vanishing tribe wants its heritage returned" *Taipei Times* (23 October*)* 1

[16] Information and Research Service of the Department of the Parliamentary Library *Bioprospecting and Regional Industry Development in Australia – Some issues for the Committee's Inquiry* Paper prepared for the House of Representatives Standing Committee on Primary Industries and Regional Services (Canberra: 2000) 2.

[17] Donald Denman [17] "Recognising the property right", *The Planner* 67:6 (1981) 161.

[18] Bob Beale, "Depths of Despair". *The Sydney Morning Herald* (6 June 1998) 10s.

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -*
>
> *…The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:*

In deciding whether the "units of fishing capacity" were property, it was noted by the Court that the limits of operation of *para.51(xxxi)* have not been determined precisely. The Court drew upon the definition of property as advanced by Starke J. in *The Minister of State for the Army-v-Dalziel (1944) 68 CLR at* 290 (*Dalziel*) where he indicated that such a definition:

> *…extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and chooses in action.*

Usefully, Starke J. (at 290) also comments that:

> *…to acquire any such right is rightly described as an acquisition of property.*

Further, the approach in *Dalziel* was approved in *Australian Tape Manufacturers Association Ltd-v-Commonwealth of Australia* (1993) 112 ALR 53 at 65. As a result, the Court in *Davey and Fitti* decided that the "units of fishing capacity" were property rights which were generated by statute, and were "property" for the purposes of *para.51(xxxi).*

The judicial construction of a definition of "property" has been further strengthened by the recent decision by the High Court in *Yanner-v-Eaton (1999)* HCA 53 (unreported 7 October 1999) (*Yanner)*, where the Court took the opportunity to contrast property in the conventional sense with the "property" or "ownership" that the State asserts over natural resources.

The Court stated that:

> *The word "property" is often used to refer to something that belongs to another…."property" does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights".*
>
> *But even this may have its limits as an analytical tool or accurate description, and it may be…that "the ultimate fact about property is that it does not really exist; it is mere illusion".*[19]

Also, the Court usefully stated that the common law position of natural resources was as follows:

> *At common law there could be no "absolute property", but only "qualified property" in fire, light air, water and wild animals*[20]

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[19] *Yanner-v-Eaton* (1999) HCA 53, at 8 per Gleeson CJ, Gaudron Kirby & Hayne JJ.
[20] *Ibid,* 11.

It is also worthwhile reflecting on how problematic legal maxims in this area of law have become, especially the notion that some natural resources such as flowing water cannot be owned. This issue was addressed in *Williams v Morley* (1824*)* 2 B & C 910, where it was decided that:

> *[f]lowing water is originally publici juris. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it…Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it.*

In the same vein, the commodification of natural resources can only occur through the conferring of comprehensive management powers upon government especially given the Australian decision in *Yanner*, and yet as Clark and Renard observe this can only occur if government:

> *…commit[s] the common law heresy of granting property in water.*[21]

However, the views expressed in *Williams–v-Morley* and by Clark and Renard have been confounded by recent admissions that such complex legal issues are now problematic, a reflection of the plurality of property rights residing in natural resources such as water described by Lane as follows:

> *[g]overnment or private rights in water can be just as difficult to define as native title rights, as they involve a complex web of intersecting relationships affecting landowners and occupiers, downstream users, government and private authorities, state land management and environment protection departments, industry, recreational users and conservation groups.*[22]

This discussion shows that it is essential to gain an appreciation of existing judicial considerations of "property" for while it may seem prosaic in the extreme, any discourse on property rights ought to be embarked upon from the *liet motif* that such rights must meet a defensible test of what a property right is. If property rights are to be meaningful then the test of whether they are indeed property rights is crucial.

The Australian National Competition Council (NCC) usefully attempts to describe a property right as follows:

> *A 'property right' exists when the community supports and protects the exclusive use and enjoyment of an entitlement and allows that entitlement to be traded for value. There are many instances where law creates property rights that provide for exclusive use or ownership. For example, land ownership has economic value only where laws limit others from enjoying the benefits of that land without agreement from the owner of the land.*
>
> *However, it is also common that there are limitations placed on the enjoyment of property rights such that they are rarely unqualified or absolutely certain. For example, land ownership is subject to by-laws and town planning approvals which affect the benefits provided by the right and its value.*

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[21] S Clark & I. Rennard "The Riparian Doctrine and Australian Legislation" (1970) *7MULR* 489
[22] Patricia Lane "Native Title and Inland Waters" (2000) *Indigenous Law Bulletin* 4 (29) 12.

> *Similarly, while a person owns a car, its use is qualified by the need to comply with road rules. Neither are rights absolutely certain. For example, governments may compulsorily acquire land.*[23]

Nevertheless, existing judicial considerations of the notion of "property" fall short of providing a defensible test of what a property right is. As stated previously, all property rights have the three qualities or capacities of management, income/benefit and alienation, each in varying combinations. At a more fundamental level, there are also characteristics which are present in any property right, and which depending on the blend and quality determines the relative influence of the three qualities or capacities outlined earlier.

The concept of property rights arose from a need to address problems emerging from the actual requirements of society. Nowhere more apparent is this seen than in burgeoning commodification of increasingly valuable natural resources such as water, which in the conferring of a property rights regime should, in line with other resources such as fisheries become more sustainably used.[24]

There is a significant history in the literature of attempts to identify the fundamental characteristics present in any property right. As Hargreaves and Helmore [25] point out, the foundations of property rights lie in the legal "world of the Middle Ages", a position quite different from other branches of law. In the transition from European feudalism to modern capitalism, Anderson argues that:

> *[t]he pure feudal mode of production was characterised by conditional private property in land, vested in a class of hereditary nobles…*
>
> *But, once again, European development branched beyond that of …*[other feudal societies] *with the transition from conditional to absolute private property in land, in the epoch of the Renaissance.* [26]

Further, Anderson states that:

> *[t]he transformation of one form of private property – conditional – into another form of private property – absolute- within the landowning nobility was the indispensable preparation for the advent of capitalism, and signified the moment at which Europe left behind all other agrarian systems.*[27]

Importantly, it is argued by Anderson that the emergence of the early modern European state was paradoxically accompanied by:

> *…a corresponding increase in the general rights of private property. The age in which 'Absolutist' public authority was imposed was also simultaneously the age in which 'absolute' private property was progressively consolidated.*[28]

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[23] National Competition Council *Water Property Rights* Background paper for 3rd tranche assessment framework (Canberra: March 2001) 2

[24] Beale, 10s. Alternatively, some commentators view commodification as part of globalisation, where "[e]very inch of the physical world and beyond has become an opportunity for [private property]"…*The Sydney Morning Herald* "Brand Conscience" (30 June – 1 July, 2001) 10s.

[25] A.D. Hargreaves & B.A. Helmore, *An Introduction to the Principles of Land Law (New South Wales)* (Sydney: The Law Book Co, 1963) 4.

[26] Perry Anderson, *Lineages of the Absolutist State* (London: Verso 1994) 424

[27] Ibid 425

[28] Ibid 429

Nevertheless, the rights of holders of private property have always been subject to certain duties, which Hargreaves and Helmore describe as follows:

> *[t]here has always been a thin trickle of public law which imposed duties upon landowners, but these duties – mainly concerned with sanitation, from the old public nuisance to the modern control by local government bodies of subdivision of land and building and the duties imposed by statute on rural landholders…were not sufficient to disturb the emphasis upon private rights as the essential feature of ownership.*[29]

Over time, the *lassez faire* view that private property rights were almost absolute has changed, and as Teh & Dwyer point out:

> *[t]here is now general acceptance that property in land must be subject to restrictions in the interests of preserving public safety, health, natural resources and social harmony.*[30]

Gray & Gray point out that:

> *…there may well be graduations of "property" in a resource. The amount of "property" which a specified person may claim in any resource is capable of calibration – along some sort of sliding scale – from a maximum value to a minimum value…Far from being a monolithic notion of standard content and invariable intensity, "property" thus turns out to have an almost infinitely gradable quality.*[31]

This view is of considerable interest in attempting to deduce those fundamental characteristics which are present in any property right, in particular in natural resources. It will be observed that a "characteristics" approach has been adopted by the Courts in some Australian cases such as *Milirrpum & Anor v Nabalco Pty Ltd & The Commonwealth* (1971) 17 FLR 141 when attempting to ascertain whether a particular interest could be regarded as a property right. This approach pivots on the identification of commonly encountered characteristics, namely the rights to use, alienate and exclude.

However, Teh and Dwyer note that this approach has been discredited as too limiting because some forms of property rights may fail to exhibit some of these characteristics, while other interests may exhibit the full range and yet not be true property rights.[32]

Given this penumbra of imprecision by the Courts, recent research by this author for this paper suggests that a more comprehensive tabulation of fundamental characteristics ought to provide a level of certainty such that a meaningful discourse for water property rights can be constructed. There is considerable attraction to a form of comprehensive specification of fundamental characteristics which appears to have been first described by Anthony Scott,[33] of the Department of Economics, University of British Columbia in 1986. He describes a test for property rights which relies upon the identification of a minimum of six fundamental characteristics

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[29] Hargreaves & Helmore, 155.
[30] Gim Leong Teh and Bryan Dwyer, *Introduction to Property Law* 2nd ed. (Sydney: Butterworths 1992) 7.
[31] KevenGray & Susan FrancisGray, "The Idea of Property in Land", in *Land Law: Themes and perspectives* eds Susan Bright and John Dewar (Oxford: Oxford University Press, 1998) 16.
[32] Teh & Dwyer, 8.
[33] Anthony Scott *Evolution of Individual Transferable Quotas as a Distinct Class of Property Right* edited version of a paper presented at the NATO Conference on rights-based fishing, Reykjavik, June 1988 and the APPAM Conference, Seattle, January 1989.

which he asserts to be present in any property right namely duration, flexibility, exclusivity, quality of title, transferability, and divisibility.[34]

Scott shows how, when just four of these characteristics are varied, the worth of a particular property right can change, given that the amount of any of the characteristics can be observable, measurable, and continuously variable. There is considerable attraction in this tabulation of characteristics which Scott suggests to be a minimum when attempting to describe property rights or interests which have been formed either by statute or even totally outside the common law.

However, these six characteristics require some analysis to explain their relevance to property rights in natural resources if we are to be afforded the benefit of Scott's initial research. It should be remembered that his research was undertaken in the context of the development of individual transferable fishing quotas as a property right. An interrogation of his description of each of the six characteristics has been undertaken and is separately described below in the context of a test for property rights in natural resources:

Duration

As regards duration, this first fundamental characteristic indicates the period usually in years that the property right is held, and hence represents a profit or saving to the holder. Scott's suggestion that this characteristic should be measured in numbers of years, may in the context of property rights in natural resources have to be extended to a much longer time interval to be meaningful.

Flexibility

The second characteristic, flexibility is not specifically explained by Scott however it perhaps is closely related to the sixth characteristic of divisibility, highlighting that a property right should be susceptible to modification and/or alteration. In the context of property rights in natural resources such as water, this aspect will almost certainly be a product of the particular regional circumstances within which the water entitlement and use occurs. In addition, such rights are constrained *ab initio* by the availability of the natural resource, and clearly it is conceivable that the full benefits of the right may under certain circumstances be constrained.[35]

Exclusivity

The third characteristic, exclusivity, is the inverse of the number of holders of the same or similar property right. Clearly, a reduction in the exclusivity will reduce the profit or saving enjoyed by the holder. This characteristic is directly relevant to property rights in natural resources.

Quality of Title

The fourth characteristic, quality of title, while not explained by Scott clearly refers to the descending level of security as the tenure falls away from the optimum of notional freehold.

Transferability

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[34] Some of Scott's six fundamental characteristics are evident in the NCC water rights specification, see NCC 8.

[35] A "certain volume" of water must be established as a right held by a water user if the entitlement is to qualify as a "right", presumably a water property right, according to Poh-Ling Tan, 164.

The fifth characteristic, transferability, is the measurement of the market for the sale or leasing of the particular property right. A high value would indicate that the demand reaches well beyond the original acquiring group, and that the mere creation of a market and hence tradability in itself enhances the value of the particular property right. In the context of property rights in natural resources, this characteristic could also be referred to as tradeability, and relies heavily upon the amelioration of government constraints on transfers to other parties.

Divisibility

Finally, as regards the sixth characteristic, divisibility (which Scott sees as an aspect of transferability) has a number of facets. The property right may be capable of being shared between a number of holders over one territory or the territory itself maybe subdivided and each new part held separately. It may also be possible for the holder to divide his right on the basis of seasons or in the case of fishing rights, on the basis of particular marine species.

In the context of property rights in natural resources, there will be limits to divisibility of access and usage, beyond which the right becomes degraded, almost certainly uneconomic, and devalued.

All of the above shows how classes of property rights such as fisheries and water are conceived both in law and in economics. Given that indigenous property rights in natural resources are a complex agglomeration of tenurial, utilitarian, spiritual and cultural interests, there is a particular value in the discourse on how property rights are conceived. It provides an understanding of the nature of the complex web of property rights and interests that already exist in natural resources.

Following this line of enquiry, the ensuing section of this paper canvasses the enormous breadth and sequential interrelationships residing in indigenous property rights in natural resources.

3. INDIGENOUS PROPERTY RIGHTS IN NATURAL RESOURCES

It is generally conceded that indigenous property rights may potentially be present in various natural resources such as fisheries and water. The issue is further complicated by the increasing attempts by the state to create private property rights in natural resources such as marine species stock (fishing property rights) [36] and non-tidal waters (water property rights), as discussed earlier in this paper.

In *Yanner,* the Court recognised that the State of Queensland had the necessary power to preserve and regulate the exploitation of important natural resources, a statutory vesting of ownership was held to not have occurred, because:

[36] Dermot Smyth "Fishing for Recognition: The Search for an Indigenous Fisheries Policy in Australia" (2000) *Indigenous Law Bulletin* 4(29) 8

> *[t]he Crown's property is property with no responsibility. None of these aspects of the Fauna Act concludes the question what is meant by "property of the Crown", but each tends to suggest that it is an unusual kind of property and is less than full beneficial, or absolute, ownership.* [37]

Further:

> *[I]n the light of all these considerations, the statutory vesting of "property" in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.* [38]

As previously stated, the large range of public and private property rights and interests residing in natural resources ensures that predicting the nature and extent of any surviving indigenous property rights poses significant practical difficulties. Because the creation of private property rights in natural resources remains problematic, current management regimes may not subsume indigenous property rights. For indigenous interests to not be fully abrogated, Lane opines that this must arise from:

> *…a conclusion that control and management regimes do not exhibit the necessary intention…*[39]

In support, Bartlett states that to abrogate indigenous interests in natural resources:

> *…requires the manifestation of a clear and plain intention to extinguish and thereby expropriate native title. The determination of that intention entails assessment of the same considerations relevant to the extinguishment of the right to hunt and fish by fisheries and wildlife legislation. Legislation which merely regulates the enjoyment of native title does not extinguish the native title right to water. 'Stringent regulation' will not be considered to extinguish the native title right…Extinguishment will only be found where it is necessary to achieve the object of the legislative scheme and eliminates any possibility of co-existence of the native title right.* [40]

However, Tan observes that:

> *[I]t is difficult to say with certainty whether native title to…[natural] resources has or has not been extinguished because of the extremely complex regulatory regimes in all jurisdictions. Therefore…[such] claims must be considered on a case-by-case basis*[41].

There is also the issue of impact upon indigenous property rights and interests where actions are undertaken on land adjoining natural resources such as water, and:

> *[a] central issue is that development along river banks has the potential to impair traditional spiritual relationships with the waters*.[42]

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[37] *Yanner* at 12
[38] Ibid
[39] Lane 12
[40] Richard Bartlett, *Native Title in Australia* (Sydney: Butterworths 2000) 253
[41] Poh Ling, Tan. "Native Title and Freshwater Resources, in: *Commercial Implications of Native Title*, eds. Horrigan & S. Young. (Sydney: The Federation Press, 1997) 198.
[42] Lane 12

Sharp usefully differentiates between these indigenous and non indigenous notions of water property rights in the following way:

> *[s]alt water peoples have a concept of sea property which is quite different from the European conception of territorial seas which is embedded in Anglo-Australia law.*[43]

Further, that:

> *[t]here are other major differences between salt water peoples around Australia. For instance, what constitutes salt water country varies. For mainland peoples it may extend inland for miles to country where the rivers cease being tidal and salty.* [44]

Another issue arising from the predicted survival of indigenous property rights in water is garnered from the long history of indigenous occupation, through which Lane states:

> *[a]boriginal people also have a claim to be considered experts in the history and characteristics of inland water systems. Many of the characteristic vegetation and fauna distribution patterns can be explained by reference to indigenous systems of land management and husbandry, of which the most obvious examples are fish traps and weirs, and the cultivation of food bearing plants in and around waterways.*[45]

This particular aspect of indigenous property rights highlights the significant conceptual differences between indigenous and non-indigenous notions of "property" in natural resources. Even prosaic activities such as fishing, show that there is disagreement between indigenous and non-indigenous viewpoints as to what constitutes "traditional cultural activity,"[46] as opposed to licensed recreational and commercial fishing. The *Fisheries Management Act 1994 (NSW)* as an Australian example states at *s287:*

> *This Act does not affect the operation of the Native Title Act 1993 of the Commonwealth or the Native Title (New South Wales) Act 1994 in respect of the recognition of native title rights and interests with respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect.*

It is reported that Aboriginal people consider the "specialised nature of indigenous fishing practices" to not be accommodated within the definition of "traditional cultural activity", and hence have stated:

> *…Aboriginal people employ a "circular" method of fishing where we fish for whatever is in season at the time. For example there are specific times of the year when prawns are plentiful and at that time of year we target prawns. It is the same with other species of fish such as mullet and so on. This method ensures sustainability of fish resources because by catching the species that are most plentiful at any given time, no species can become endangered.*

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[43] Noni Sharp, "Following in the Seamarks? The Salt Water Peoples of Tropical Australia" (2000) *Indigenous Law Bulletin* 4(29) 4.

[44] Sharp 5

[45] Lane 12

[46] Recreational fishing in NSW is subject to the payment of a fee, unless a person is a party to a registered claim under the *Native Title Act 1993 (Cwth.)*, or that the activity is identified as a "traditional cultural activity" under the indigenous fishing strategy of NSW Fisheries.

> *…The communal and supposedly "irregular"…way Aboriginal people generally conduct fishing does not necessarily fit in well with a licensing scheme based on the allocation of fish quotas to individuals.*[47]

In disputing the non-indigenous view of Aboriginal property rights in fishing, traditional owners assert that:

> *…indigenous people being prosecuted for taking fish the way they have been practising this activity long before any non-indigenous person laid foot on the continent?*[48]

Further, the utilisation of fisheries by Aboriginal people embodies intrinsic spiritual and cultural aspects which according to Small seemingly pervade all indigenous activities, observing that:

> *[a] survey of the relationships between various native peoples and their land reveals that the relationship has typically two dimensions. The first dimension is spiritual, or metaphysical, and the second is material, relating to the political economy of land.*
>
> *The metaphysical understanding forms the rational basis…[d]espite a great diversity of metaphysical interpretations of land and people…*[49]

This blend of Aboriginal utility, spirituality and culture is perhaps best personified by James's description of the work of the colonial painter John Glover where:

> *…he [Glover] was, it seems, prepared to picture Aborigines in a condition of Edenic – and therefore righteous - harmony with their ancestral environment*[50]

There is sound reasoning behind James's harmonious description of indigenous endeavour, not least being the recognition that resources are used by Aboriginal people in a sustainable manner.[51] Transmission of these resource management practices occurs through oral and art modes, often heroic narratives which according to Scott and Mulrennan:

> *[c]ulturally, constructions of property and territory are intimately and dynamically interwoven with broader constructions of place…Sea territories, additional to their importance as resource and subsistence areas, are thoroughly socialized spaces; comprised of knowledge of the 'location, pattern and interaction of marine things and processes…;'of places named and invested with narrative significance; and of social identities configured through this knowledge, these names and stories..*[52]

Further, they observe that:

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[47] Standing Committee on State Development *Report on Fisheries Management and Resource Allocation in New South Wales* Report No.17 (Sydney: Parliament of NSW, Legislative Council, November 1997) 323.
[48] *The Koori Mail* "Fishing laws and indigenous people" (29 November, 2000) 7.
[49] G Ric Small, "A Comparative Analysis of Contemporary Native and Ancient Western Cultural Attitudes to Land" Paper presented at the Pacific Rim Real Estate Society Conference, Massey University, New Zealand, January 1997. 1.
[50] Bruce James, "The big idyll" *The Sydney Morning Herald* (12-13 May 2001) 13s.
[51] Pulea, 356.
[52] Colin Scott and Monica Mulrennan "Land and Sea Tenure at Erub, Torres Strait: Property, Sovereignty and the Adjudication of Cultural Continuity" (1999) *Oceania* 70(2)150.

> *[i]f indigenous tenure systems are to be taken seriously in their own cultural terms, then, indigenous cosmologies and epistemologies are not merely epiphenomenal to more narrowly political and legalistic dimensions of spatially situated rights.*[53]

Importantly, Scott and Mulrennan conclude that the heroic narrative:

> *…thus situates a rational-empirical understanding of ecology and the custodial responsibilities of tenure in a social-spatial field of supernatural power and ancestral sacrifice.*[54]

In support, Gray explains that the conceptual differences between indigenous and non-indigenous notions of "property" are because:

> *…the dreamings and their role in the relationship of people and land that Aboriginal legal systems are inextricably linked with religion. Aboriginal societies tend not to divide the spiritual and the temporal in the way that societies like the Anglo-Australian have done…*[55]

However, Gray sees the prospect of an accommodation between indigenous and non-indigenous concepts of "property" as problematic given the:

> *... inevitable clash between indigenous and non indigenous modes or proof.* [56]

The eloquent spiritual and cultural aspects of a utilitarian activity like fishing demonstrates the conceptual void between indigenous and non-indigenous notions of "property", exemplified in the following description by Scott and Mulrennan:

> *[e]ffectively this means that whenever one dives for seafood, consumes wild fruit, or navigates by the stars, one shares in the 'essence' of other social identities – in short, the entire sensual world enters into incorporative circuits of social exchange.*[57]

However, it would be misleading to conclude that these aspects of indigenous property rights are completely alien to the common law. Indeed, in an echo of native title John Moore in his classic 1945 description of traditional English village life of fictitious "Elmbury" described the wastelands beyond the medieval village which were held as communal rights, as:

> *….something of a legal curiosity, and mixed up in its title-deeds were some of the principles of feudalism, capitalism, distributism, and communism. The hay crop belonged to a number of private owners, including the squire and the Abbey; their boundaries were marked mysteriously by means of little posts…*
> *But while the hay crop was private property, the meadow itself, the soil that grew the hay, belonged to "the burgesses"…[who] possessed no cows or sheep to graze upon it, so they too each season sold the aftermath by auction and distributed the proceeds, according to an ancient law…Nobody got*

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[53] Ibid
[54] Ibid, 155.
[55] Peter Gray "Do the Walls have Ears?: Indigenous Title and Courts in Australia." *Australian Indigenous Law Reporter* 5:1 (2000) 3.
[56] Gray 1
[57] Scott & Mulrennan 159.

> *more than a few shillings for his share; but at least every man, woman and child… had the right to walk and play in the field, which gave them a good possessive feeling about it.*" [58]

Spirituality pervaded medieval society, and it is not surprising that feudal land utilisation encompassed holistic notions such as soil conservation strategies, and village communism. Some of these rights, described in modern valuation terminology as *profits-a-prendre*[59] did not involve ownership of land and yet were viewed as valuable property rights. Such rights may be exclusive, or enjoyed in common with others, granted in perpetuity or for a fixed term. Moore also describes the exercise of other classes of use, such as the right to fish, in the following terms:

> *[f]rom the banks of the river jutted out numberless fishing-rods; little boys with willow-wands conjured up minnows… [fisherman] perched sedately on wicker creels ledgering for bream, while the more energetic ones, swift of eye and wrist, fished for roach, and the more adventurous wandered here and there, carrying a jar of minnows, live-baiting for perch….and the very old, and the very stupid, content with the mere dregs of angling, heaved enormous lobworms impaled upon enormous hooks into the deepest and stillest backwaters and then went to sleep until Fate, in the guise of a shiny yellow eel, accepted…*[60]

Clearly many of these rights may be problematic as *profits-a-prendre*, however it does show the enormous breadth of uses to which communal lands until very recently were put in non-urban England.

This ancient framework of property rights deserves better examination, and if it is subsequently shown that these sorts of rights do indeed have an indigenous analogy, then indigenous property rights might not be as enigmatic as first thought. Indeed, Rigsby opines that given the common law distinguishes common property from joint property, by analogy:

> *…most Aboriginal property rights in land are held jointly, not in common, not in severalty (individually), and not in division. We accept..[the] argument and the observations of other anthropologists regarding joint tenure in Aboriginal Australia, and we suggest that the communal property regime as an ideal type should be interpreted also as joint tenure.* [61]

From this line of enquiry, it is useful to summarise indigenous property rights in natural resources in a stratigraphic manner to allow a better understanding of their breadth and sequential interrelationship, especially where there is a prospect for identifying synergies with current or ancient anglo-Australian property rights. This stratigraphy is also useful where there is a prospect for impairment or extinguishment arising from government activity, such as compulsory acquisition.

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[58] John Moore *Portrait of Elmbury* Modern Authors Series reprint of 1945 edition (London: Collins 1964) 17.
[59] Alan Hyam *The Law Affecting Valuation of Land in Australia* 2nd ed (Sydney: The Law Book Company Limited, 1995) 29
[60] Moore, 18.
[61] Bruce Rigsby, "A Survey of Property Theory and Tenure Types", in *Customary Marine Tenure in Australia,* eds. N Peterson & B Rigsby, Oceania Monograph 48, (Sydney: Oceania Publications, University of Sydney, 1998)35.

The following heuristic table of layers has been prepared by the author to describe these rights evident in water (as a natural resource example), and the predicted content of the various rights has been interpreted based partly upon work by Small: [62]

INDIGENOUS PROPERTY RIGHTS	PREDICTED CONTENT[63]
Water (Tidal and non-tidal)	Communal territorial title to the water and the biota therein. Dominant spiritual and cultural component. Management responsibilities for access to, and use of water, and biota (esp. vertebrates and invertebrates.
Submerged tidal and non-tidal lands	Communal title to the territorial lands. Significant spiritual and cultural component. Management responsibilities for marine bed, and biota in or growing from the bed.
Management and husbandry of flora and fauna (tidal and non-tidal waters, and submerged lands)	Rights to exercise territorial management and husbandry held by senior cohort (can be different to the holders of communal territorial title). Significant spiritual and cultural component Access to rights subject to availability, and sustainability.
Land adjoining tidal and non-tidal water	Communal title to the territorial lands (can be different to the title holders of the water and the submerged lands) Significant spiritual and cultural component. Management responsibilities for access to, and use of land, and access over land to adjoining waters and submerged lands.

The structure of the above table does not in any way suggest that the four general layers of indigenous property rights associated with water are separate, indeed the spiritual (or metaphysical [64]) and cultural

[62] Small, 2, 6.

[63] Whether the communal territorial title, and rights of access to water, submerged lands and biota therein can be exclusive remains problematic pending the Appeal in *Yarmirr*, and according to McIntyre 24: "All members of the court seem very reluctant to conclude that native title may include a right to control access to an area of the sea. There is a strong preponderance of view towards drawing a distinction between the existence of such a right offshore and the possibility of a right to exclude onshore."

components of such rights ensure that the layers are diaphanous.

4. COMPENSATION FOR INDIGENOUS PROPERTY RIGHTS

In the earlier sections of this paper, there has been an attempt to highlight the contrast of indigenous values and anglo-Australian values, which are at their most visible at the interface of native title and existing land tenures and notions of property. We ought not fail to recognise that native title in all its complicated, unexpected forms could be impaired or even extinguished with serious implications for administrative efficiency, and possible liability for compensation which at this juncture, remains unquantifiable Furthermore, the recognition of indigenous values and management techniques may be important tools in the possible settlement of native title claims, and a fairer and more just resolution of fundamental compensation issues, which are rapidly demanding resolution. If indigenous rights and interests are incorporated into existing regimes of natural resources management, it could be argued that this expression of respect and recognition may evidence a greater accommodation within the now dyschronous (separate in time) paradigm of land law existing in Pacific and Asian countries having a British common law heritage.

There is almost no case law common law countries to guide decision makers as to the likely impact of indigenous property rights upon existing natural resources management regimes or visa versa. Indeed, the development of a method to assess compensation for the extinguishment or impairment of indigenous property rights arising from any executive fiat remains problematic, awaiting judicial guidance over the next few years.

However, there has been speculation by Altman[65] and Muir[66] that the Courts may be swayed that rights and interests contained within a particular indigenous property rights claim can never be successfully quantified by the non-indigenous legal system, and hence adequate compensation paid. Altman, in the Australian context considers that:

> *[a] fundamental dilemma, then, is how to work within a highly imperfect statutory regime? In particular:*
>
> - *How can native title rights and interests that are potentially affected by a future act be documented?*
> - *How can social impacts be documented, especially in the absence of baseline data?*
> - *How can other impacts be documented?*
> - *How can these impacts, if negative, be valued in monetary or other terms? and*
> - *How should the appropriate beneficiaries of compensation be defined?*[67]

Further, that:

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[64] Small, 1.

[65] John C Altman, *Compensation for Native Title: Land rights lessons for an effective and fair regime* Land, Rights, Laws: Issues of Native Title Issues paper no 20 (Canberra: Native Title Research Unit, AIATSIS, April 1998)

[66] Kado Muir, *"This Earth Has an Aboriginal culture inside:" Recognising the Cultural Value of Country* Issues paper no 23 (Canberra: Native Title Research Unit, AIATSIS, July 1998)

[67] Altman, 9.

> *[a]t present, there is also inadequate documentation and supporting evidence on the nature of impacts on native title that might require compensation. This might be partly because of a preoccupation with legal processes and insufficient attention to intended outcomes. There is also a lack of rigour in differentiating and defining inter-related economic, social and cultural components of loss experienced by indigenous landowners and affected communities (rarely as distinct entities).*[68]

In support, Muir states that:

> *...the Indigenous laws continue to operate regardless of the intrusions of Australian law. It continues to allocate rights and interests in country, dictate the nature of social interactions and acts as the basis of Indigenous social, cultural and political identity. The implications for land management, extinguishment and subsequent compensation is that acts which serve to extinguish the recognition of native title only really operate to extinguish recognition in the domain of Australian law. That is, a grant of an interest or a right under Australian law, which wipes out the recognition of native title over that land, may not necessarily do so under Indigenous law.*
>
> *...It is critical to understand that Australian law does not and simply cannot extinguish Indigenous law, however it does impact on the ability of Aboriginal and Torres Strait Islander peoples to maintain a way of life free of oppression, marginalisation and injustice. This impact on the life of Indigenous people then has compensable ramifications. Often the value of these ramifications is very difficult to quantify without a comprehensive assessment of way of life of the people affected, and the impact on that way of life.*[69]

Usefully, Muir opines that:

> *[t]he method of developing a formula for calculating compensation payments is not a simple matter…I hoped to bring to the discussion a perspective which says that one must guard against equating rights which flow from Indigenous laws and culture in a non-indigenous manner.*[70]

However, Altman in a divergent conclusion concedes that:

> *[u]ltimately, getting the appropriate compensatory framework is important, and working within the existing law is unavoidable. It is important for policy makers and representative organisations to strike the appropriate trade-offs in ensuring effective and fair compensation regimes.*[71]

There is another view advanced by Lavarch and Riding[72], Campbell[73], and Garnett[74] that suggests that a new paradigm will have to be constructed by the Courts completely outside of the current property

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[68] Ibid
[69] Mui,r 4.
[70] Muir, 8.
[71] Altman, 10.
[72] Michael Lavarch & Alison Riding *A New Way of Compensating: Maintenance of Culture through Agreement* Land, Right, Laws: Issues of Native Title Issues paper no.21 (Canberra: Native Title Research Unit AIATSIS, April 1998)
[73] David Campbell *Economic Issues in Valuation of and Compensation for Loss of Native Title Rights,* Land, Right, Laws: Issues of Native Title Vol 2, Issues paper no.8 (Canberra: Native Title Research Unit AIATSIS, October 2000)

compensation case law. This view suggests that quite unfamiliar and even unknown notions of property might have to be conceived by the Courts, utilizing case law and other principles from quite diverse areas. Lavarch and Riding state that:

> *[t]he exercise of identifying the legislative provisions about compensation can only take the inquiry into the meaning of 'compensation' so far. The provisions raise multifarious questions. What is meant by 'compensation for loss, diminution or impairment'? What is meant by 'just terms'?*
>
> *It is clear that the answers to how compensation is practically assessed will come from outside the relevant legislation. At this stage it will also come from outside the courts. There have so far been very few claims made for compensation. Compensation will only begin to concern the courts in a few years, once native title determinations begin to be made.*[75]

Further, they state that:

> *[t]o compensate for the loss of native title means to compensate for the loss of the ability to continue traditional laws and customs and the loss of the ability to shoulder responsibility for country. This cannot be achieved by payment of a lump sum based on freehold value. Compensation can be achieved by working out how the native title holders can continue to exercise their traditional laws and customs and by devising a way that native title holders can continue to shoulder their responsibilities…*
>
> *Some of these things must be costed and converted into money terms. However, the point is that the central feature of the exercise is not the payment of a lump sum based on freehold value. The object of the exercise is to identify how, practically, the native title holders can continue their traditional laws and customs and continue to shoulder responsibility for country.*[76]

In support, Garnett states that:

> *…[t]he losses suffered by the native title holders are different from the losses suffered by a holder of freehold. By extinguishing native title rights and interests, the losses are not purely economic losses for the loss of an interest in land which may be used for residential purposes, which is the main loss recognised by land acquisition law. Some of the losses suffered by the native title holders will be non-pecuniary…*
>
> *Non-pecuniary losses may be recognised in a similar way as in torts law where the courts have previously made determinations that monetary sums should be paid by way of compensation for loss of traditional rights of aboriginal people. In the area of personal injuries…these losses have been compensated under the head of damage of pain and suffering. However, not all losses which will be suffered by native title holders when their native title is extinguished could be*

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[74] Merrilee Garnett *Compensation for Extinguishment of Native Title.* Paper presented at the AIC "Working with Native Title and reaching Agreement" Conference, Sheraton Hotel, Brisbane, 30 April, 1998.
[75] Lavarch & Riding, 3.
[76] Lavarch & Riding, 6.

> *viewed as pain and suffering. The loss of a food source could not be viewed as pain and suffering.*
>
> *The heads of damage should be developed on the basis of the actual losses suffered by native title holders, not on the basis of trying to make native title rights and interests fit into traditional common law property rights.*[77]

Campbell also supports the view of Lavarch and Riding, stating that they:

> *…go to the crux of valuing native rights in observing that only the holders of rights are in the position to assess the value of these rights.*[78]

From this line of enquiry, Campbell proposes that to obtain a monetary estimate of the total value of indigenous property rights:

> *…depends on the special features of native title rights, in that cultural values are in most part restricted to place and to community, and that some of the choices made within the community affect the amount of monetary income. These outcomes do not require the separation of cultural and material benefits. Instead, all that is required is that along the margin the relative amount of cultural-to-material benefits can be altered.*
>
> *There are a number of difficulties in using opportunity cost to assess the value of compensation that are not addressed…A major difficulty is that different parts of a community's estate will differ in cultural significance and in their value to the community; it is not possible to apply an average value per unit area across the whole estate. One way of addressing this question may be to use the total value data in conjunction with estimates from community members of a ranking of different locations or areas within the estate.*[79]

However, there is another view – one which I believe to have considerable attraction and offering realistic prospects when attempting to assess the impact of interaction between indigenous property rights and government activity such as compulsory acquisition.

As mentioned earlier in this paper, the heritage of feudal land tenure in common law countries has been recognised as possibly providing a foundation for an understanding of many, if not most incidents of indigenous property rights. If it is accepted that these incidents may be, for the purposes of compensation, usefully compared with the closest non-indigenous property rights then there is a distinct possibility that the "bundle of rights"[80] comprising traditional tenure can be conceived in a manner which is not that unfamiliar. Strelein observes that:

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[77] Garnett, 10.
[78] Campbell, 4.
[79] Campbell, 9.
[80] The development by the High Court of the "bundle of rights" approach to native title is discussed in Lisa Strelein *Extinguishment and the Nature of Native Title Fejo-v- Northern Territory* Land, Rights, Laws: Issues of Native Title, Issues paper no. 27 (Canberra: Native Title Research Unit AIATSIS, February 1999)

> *[w]hile reaffirming that native title is neither an institution of the common law nor a form of common law title,… [the High Court] stated, succinctly, that while the existence of Indigenous law is necessary to establish native title, it is not sufficient. The existence of rights over land under Indigenous law will not be enough to receive recognition under the common law.*[81]

Further, Strelein considers that:

> *…to be enforceable under the common law, native title must fit within the cracks left by the Australian land tenure system.*
>
> *The High Court has made a distinction between native title which exists in fact and where it may exist in law. With this reasoning, native title has truly become a creature of the common law…As the Court moves to a bundle of rights approach, centred upon physical access, and continues to assert that the recognition of native title is dependent upon the common law, the idea that the source of the right lies in Indigenous law and society becomes difficult to reconcile with the doctrine that is developing*[82]

Nevertheless, the "bundle of rights" concept permits analogies to be drawn between indigenous property rights and feudal property rights within non-indigenous land law. Indeed, using this approach albeit imperfect, there have been some attempts by Courts in common law countries such as Malaysia to place a value on traditional lands, rights and interests however these cases have been rare and upon scrutiny reveal the assessment of compensation to have been very arbitrary. I recently observed that:

> *…Malaysia's Federal Court looked at indigenous rights and interests and followed the principles set out in Mabo and cases in other common law countries. However on closer inspection the methodology for the assessment of compensation for the group of Aboriginal people concerned could not be readily deduced from the case materials*[83].

Amounts of compensation in this and other cases have been adopted which, whether or not reasonable, do not appear to have been founded in any recognisable valuation methodology, notwithstanding that they have utilised the "bundle of rights" approach. Nevertheless, a formulaic valuation approach will be developed in time by the Courts, based in my view on the fact that:

> *[t]hese values can be divided in a manner which is not entirely arbitrary and through the adoption of a classificatory system based on material and non material components may assist in providing just compensation. In addition, the increasing trend to view such rights and values within the legal concept of a 'bundle of rights' need not necessarily produce an unjust compensatory package.*
>
> *Indeed, because the class of rights capable of being claimed is not closed under existing compensation and land law, such a classificatory approach may ensure that the Courts are fully appraised of the broad range of rights claimed.*

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[81] Strelein, 6.
[82] Ibid, 7.
[83] John Sheehan "The Economic Cost of Dispossession" *Land Rights Queensland,* (November 2000) 6

> *This is not to say that indigenous values are totally analogous to the various elements comprising the 'bundle of rights' in every situation. Indeed, to suggest this would be misleading.*
>
> *However, given that anglo-Australian law is attempting to accommodate an unfamiliar notion of 'caring for country' which is sui generis, it is clear that the impact upon indigenous values of impairment or extinguishment will require some interpretation. Indeed, for just terms to be achieved it may be that formal definition and recognition of native title rights in terms of anglo-Australian law will necessitate a degree of unpalatable transformation.*
>
> *To do otherwise may see the marginalisation of native title rights and indigenous values when compensation is claimed and litigated. This insistence upon legalities and other contextual requirements is necessary if the outcome for indigenous people is to be just.*[84]

In addition, we know that indigenous people are increasingly requiring that they be consulted when management regimes are being legislated over natural resources such as fish and water. It is reported that Australian indigenes consider that their fishing rights have not been adequately respected by the fisheries management regime in the State of NSW, and that:

> *If there are to be changes within the department regarding indigenous issues, then let the people who it affects have a bigger say in these issues…*
> *In the case of indigenous fishing rights, the State of New South Wales, if not the nation, should undertake such a vote because whatever decisions are made or whatever action is taken, we stand to lose another part of our culture.*[85]

Given the inexorable but not unexpected development of the legal concept of traditional tenure (native title) as a "bundle of rights", and increasing demands by indigenous people for recognition of their natural resources management skills, it clearly would be misleading to assume that the commodification of natural resources can occur without an impact upon indigenous property rights and interests.

Concomitant with expanding notions of property rights in areas such as fish stock and water, there has been an increasing recognition that when indigenous property rights are diminished or even expropriated by the state, compensation in one form or other, must address the full range of losses incurred by indigenous people. Lofgren observes that:

> *Native title holders, in common with all other members of the wider Australian community, possess a common law property right to negotiate with government prior to compulsory acquisition. Additionally, native title holders possess an aboriginal right to negotiate which enjoys Constitutional protection in so far as just terms has been interpreted by the courts as including a requirement for procedural fairness in government decisions affecting property rights and interests.*[86]

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[84] John Sheehan "Assessing Compensation for Native Title: A Valuation Perspective", (2000) *Pacific Rim Property Research Journal* 6(1)55.

[85] *The Koori Mail* " Fishing debate shows Govt's true side" (7 February 2001) 7.

[86] Neil Lofgren, *Compulsory Acquisition and the Right to Negotiate,* Land, Rights, Laws: Issues of Native Title, Issues paper no. 25 (Canberra: Native Title Research Unit AIATSIS, September 1998) 5

However, the assessment of compensation for such losses by indigenous people have proved to be a chimera. It is alleged in some quarters that fundamental compensation issues have stubbornly resisted resolution because of the communal nature[87] of many indigenous property rights and interests. Dowding usefully describes these rights in the legal language of native title as:

> *…the cluster of rights which were recognised by common law as being the rights of the various groups of people who occupied Australia prior to white settlement and indeed, continue to occupy the country…*
>
> *Aboriginal people have traditionally exercised their rights in a variety of ways: native title gives, in some cases, right to exclusive occupation, in other areas, it is a right to determine who will enter and occupy, it can be a right to control the resources of an area – the food, the ochre, the wood, the fishing rights and the like – and it can be the right freely enjoy a particular area of land. These rights are not frozen in time and can accommodate the different and changing rights and interests of a particular group.* [88]

From the standpoint of anglo-Australian land law, the alleged conceptual difficulties of indigenous communal property rights are often an obstacle to the settlement of claims, Bowen pointing out that:

> *[w]hilst western culture may use boundary fences to resolve this matter, an understanding of indigenous culture and their definition of country would indicate just how foreign and thus difficult it has been to address this requirement.*[89]

Indigenous peoples have little in the way of a pedagogical strategy for dealing with non-indigenous judgement and objectivity when required to evidence the nature and content of their property rights, because they rely on a more indirect approach, a manner Gaita usefully described as:

> *[s]omethings are better shown than stated*[90]

Hence, there has been a wide-ranging academic and professional review of many areas of land administration practice, notably the management of natural resources such as fisheries and water in the light of the growing recognition that indigenous property rights and interests can coexist with non-indigenous land tenures and land management practices. As mentioned earlier in this paper, there are a large range of public and private property rights and interests residing in natural resources, and any determination of the nature and extent of surviving indigenous property rights presents significant practical difficulties. As Lane observes:

> *[t]here are problems in defining the extent of common law recognition of native title, and the approach to be taken to extinguishment or regulation by governments. Where native title exists, there are doubts about the ability of the Native Title Act to protect it adequately.*[91]

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[87] In Mabo, The High Court described native title a number of times as being communal property, according to Rigsby, 30.

[88] Dowding, Peter Eddie Mabo's Legacy, (1997) *Australian Planner* 34 (2), 98.

[89] Peter Bowen. " Mapping, recording and analysing native title – Post Wik", Paper presented at MSIA/National Native Title Tribunal Seminar (25 July, 2000) 6.

[90] Raimond Gaita, "Three Rs and an L" *The Sydney Morning Herald* (23-24 June 2001) 2s.

[91] Lane, 13.

The breadth and depth of surviving indigenous property rights and is slowly being unveiled by the Courts of common law Pacific and Asian countries. Such property rights are increasingly being recognised as having their roots in notions of "property" which hitherto have been generally unknown in non-indigenous land law.

Nevertheless, experience is growing as to how the management of natural resources proceeds in a land law environment which must be inclusive of indigenous property rights. Of particular interest is the area of water property rights, which presents a number of previously unknown issues when dealing with indigenous rights and interest.

This recognition of indigenous values in recent Australian legislation is not unexpected given that the spatial extent of indigenous property rights and interests that may reside in water continues to be explored and extended. The pervasive extent of indigenous property rights in water is highlighted in developing case law such as *Yarmirr* which shows that native title in tidal waters can survive, even possibly to the outer reaches of Australia's sea lands.[92]

Perversely, legislative attempts to create private property rights in Australian natural resources may remain problematic, and hence current non-tidal water management regimes (such as the *Water Act 2000* (Qld) and the *Water Management Act 2000* (NSW)) may or may not significantly diminish or extinguish native title to the extent anticipated.

If it is accepted that indigenous property rights may have survived to varying degrees then it would appear only prudent for an understanding to be sought as to what these indigenous rights and interests can offer as a tool for the possible settlement of claims, and a just resolution of fundamental compensation issues, which are rapidly demanding resolution.

If, for example indigenous rights and interests can be incorporated into existing regimes of natural resources management, it could be argued that this expression of respect and recognition may beneficially impact upon any subsequent assessment of compensation. Such an action would only seem prudent, rather than allow an unknown and currently incalculable liability for compensation to accrue.

There is evidence that many common law countries are encountering similar issues relating to indigenous property rights in natural resources. In New Zealand the commodification of natural resources is continuing apace, and in relation to fishing property rights Heremaia observes that:

> *[t]he effect of the Fisheries Settlement has not been confined to fisheries. It has become the template for the management of resources by creating property rights in them that are not based in Maori law. As a result, the question of who originally held the property rights to those resources has not been properly determined.*[93]

Also, in Canada indigenous property rights have been recognised by the Courts as part of those aboriginal interests which are protected by the *Canadian Constitution Act*, 1982, *s.35(1):*

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[92] McIntyre, 24.

[93] Shane Heremaia, "Native Title to Commercial Fisheries in Aotearoa/New Zealand" (2000) *Indigenous Law Bulletin* 4(29) 16.

> *[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.*

Sutherland observes that:

> *Canadian First Nations are entitled to participate in fisheries and marine resource management consistent with treaties and customary rights protected by the Federal Constitution, court rulings, a Federal Aboriginal Fisheries Strategy and land and sea settlement agreements. These rights are less well recognised in Australia.*[94]

However, Aboriginal people in Canada dispute that their indigenous property rights are fully recognised, and the experience of the Innu people in Northern Labrador and Quebec suggests that:

> *…both the federal and provincial governments may 'infringe' aboriginal rights to the land under 'aboriginal title…'The limitations and 'infringements' placed upon this title, so magnanimously unveiled by the court, are so severe that they virtually negate the 'title' itself.* [95]

In the Pacific and Asian context, all of the foregoing strongly suggests that compensation for indigenous property rights will remain a vexed issue, with yet to be crystallised liabilities for compensation accruing to the State.

5. CONCLUSION

Indigenous property rights and interests surviving in natural resources are part of the unique challenge that the recognition of traditional tenure (native title) has placed before the legal systems of common law Pacific and Asian countries. In this paper, it has been shown that the complex overlay of public and private property rights that exist in natural resources, have been made immensely more complicated by coexistence with indigenous property rights.

Opportunities are however now available for a more eloquent discourse, one which rejects popular sophistry which silently denies that indigenous property rights may have survived. This discourse should now concentrate on the development of an endogenous approach to reach an accommodation between indigenous and non-indigenous notions of value and management practices, especially when dealing with natural resources.

On compensation, the impact of commodification of natural resources upon indigenous property rights remains barely recognised by existing governments, and is combined with a reluctance to address the prospect of a significant financial liability for future governments. There is a need for the development of a formulaic "bundle of rights" approach to the assessment of compensation which meets just terms, in all the collection of

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[94] Johanna Sutherland "The Coexistence of Sustainable Development and Aboriginal Fishing Rights in Canada (2000) *Indigenous Law Bulletin 4(29) 18.*

[95] Colin Samson, James Wilson & Jonathan Mazower *Canada's Tibet: the killing of the Innu* (London: Survival International, 1999) 45.

conjectures and thousands of permutations of rights and interests that traditional tenure (native title) may ultimately prompt.

Litchfield, in a useful summary of the issues to be addressed when attempting to assess compensation for these conjectures and permutations of indigenous "property" offers the following view:

> *...the challenge for property valuers is that while recognition of native title is not given value by other (Western) systems, the 'bottom line' must be the production of monetary expressions of value. The real difficulty for valuers is that it remains unclear as to how any method for valuation currently under consideration will be able to deliver the required compensation that actually stays 'true' to the character of native title.*[96]

[96] John Litchfield (1999) "Compensation for Loss and Impairment of Native Title Rights and Interests: An analysis of suggested approaches" (Part 1) 18 *AMPLJ* 263

REFERENCES

Alliance of Taiwan Aborigines, I Chiang, Lava Kau (1995) "Report on the Human Rights Situation of Taiwan's Indigenous Peoples" , in *Indigenous Peoples of Asia* eds. R H Barnes, Andres Gray, and Benedict Kingsbury (Ann Arbor: The Association for Asian Studies, Inc, University of Michigan) 357-372.

Altman, John C. (1998) *Compensation for Native Title: Land rights lessons for an effective and fair regime* Land, Rights, Laws: Issues of Native Title Issues paper no 20 (Canberra: Native Title Research Unit, AIATSIS, April)

Anderson, Perry, (1974) *Lineages of the Absolutist State* 5th reprint 1989. (London: Verso)

Australian Economic Trends 419 (June 2001) Misc. Item 12.

Australian Economic Trends 420 (July 2001) Misc. Item 4.

Beale, Bob. (1998) "Depths of Despair" *The Sydney Morning Herald* (6 June) 10s.

Bredhauer Jacqueline, (2000) "Tree Clearing in Western Queensland – a Cost Benefit Analysis of Carbon Sequestration", 17 *EPLJ 389.*

Campbell, David (2000) *Economic Issues in Valuation of and Compensation for Loss of Native Title Rights,* Land, Right, Laws: Issues of Native Title Vol 2, Issues paper no.8 (Canberra: Native Title Research Unit AIATSIS, October)

Clark, S. & Rennard, I. (1970) "The Riparian Doctrine and Australian Legislation" *7 MULR* 475, 489.

Denman, Donald (1981) "Recognising the property right", *The Planner* 67:6*,* 161.

Dowding, Peter (1997) Eddie Mabo's Legacy, *Australian Planner* 34 (2), 96-99.

Gaita, Raimond (2001) "Three Rs and an L" *The Sydney Morning Herald* (23-24 June 2001) 2s –3s.

Garnett, Merrilee. (1998) *Compensation for Extinguishment of Native Title.* Paper presented at the AIC "Working with Native Title and reaching Agreement" Conference, Sheraton Hotel, Brisbane (30 April)

Gray, Kevin & Gray, Susan Francis, (1998) "The Idea of Property in Land", in *Land Law: Themes and perspectives* eds Susan Bright and John Dewar (Oxford: Oxford University Press) 16.

Hargreaves, A & Helmore, B (1963) *An Introduction to the Principles of Land Law (New South Wales)* (Sydney: The Law Book Co) 4.

Heremaia, Shane. (2000) "Native Title to Commercial Fisheries in Aotearoa/New Zealand", *Indigenous Law Bulletin* 4(29), 15-17.

Information and Research Service of the Department of the Parliamentary Library (2000) *Bioprospecting and Regional Industry Development in Australia – Some issues for the Committee's Inquiry* Paper prepared for the House of Representatives Standing Committee on Primary Industries and Regional Services (Canberra) 2.

James, Bruce. (2001) "The big idyll" *The Sydney Morning Herald* (12-13 May) 6s-13s.

Kristof, Nicholas (2000) "The Filthy Earth" in *Thunder from the East: Portrait of a Rising Asia* eds. Nicholas Kristof, & Sheryl WuDunn (London: Nicholas Brealey Publishing) 291-313.

Lane, Patricia (2000) "Native Title and Inland Waters" *Indigenous Law Bulletin* 4 (29) 11-14.

Lavarch, Michael & Riding, Alison (1998) *A New Way of Compensating: Maintenance of Culture through Agreement* Land, Right, Laws: Issues of Native Title Issues paper no.21 (Canberra: Native Title Research Unit AIATSIS, April)

Litchfield, John. (1999) "Compensation for Loss and Impairment of Native Title Rights and Interests: An analysis of suggested approaches" (Part 1) 18 *AMPLJ* 263

Lofgren, Neil. (1998) *Compulsory Acquisition and the Right to Negotiate,* Land, Rights, Laws: Issues of Native Title, Issues paper no. 25 (Canberra: Native Title Research Unit AIATSIS, September)

McIntyre, Greg (2001-2) "The Ebb and Flow of Croker Island" 5 *NTN 22*.

Moore, John (1945) *Portrait of Elmbury,* Modern Authors Series reprint (London: Collins 1964)

Muir, Kado. (1998) *"This Earth Has an Aboriginal culture inside:" Recognising the Cultural Value of Country* Issues paper no 23 (Canberra: Native Title Research Unit, AIATSIS, July)

Murphy, Terry (2001) "Water Issues in NSW and how they affect values" Paper presented at Australian Property Institute Rural Conference, Port Macquarie (19 May)

National Competition Council (2001) *Water Property Rights* Background paper for 3rd tranche assessment framework (Canberra: March).

Peterson Nicholas and Rigsby Bruce, (1998) "Introduction", in *Customary Marine Tenure in Australia* eds. N Peterson & B Rigsby, Oceania Monograph 48, (Sydney: Oceania Publications, University of Sydney) 1-21.

Pulea, Mere. (1984) "Integrating Traditional and Modern Management*", AMBIO* 13 (5-6) 356.

Rigsby, Bruce. (1998) "A Survey of Property Theory and Tenure Types", in *Customary Marine Tenure in Australia,* eds. N Peterson & B Rigbsy, Oceania Monograph 48, (Sydney: Oceania Publications, University of Sydney)35.

Rudgley, Richard. (1998) *Lost Civilisations of the Stone Age* (London: Arrow Books).

Samson Colin, Wilson James & Mazower Jonathan (1999) *Canada's Tibet: the killing of the Innu* (London: Survival International) 45.

Scott, Anthony (1988/9) *Evolution of Individual Transferable Quotas as a Distinct Class of Property Right* Edited version of a paper presented at the NATO Conference on rights-based fishing, Reykjavik, June 1988 and the APPAM Conference, Seattle, January 1989.

Scott, Colin and Mulrennan, Monica (1999) "Land and Sea Tenure at Erub, Torres Strait: Property, Sovereignty and the Adjudication of Cultural Continuity" *Oceania* 70(2)146-176

Sen-lin Yu (1999) "A Vanishing tribe wants its heritage returned" *Taipei Times* (23 October*)* 1-3

Sharp Noni, (2000) "Following in the Seamarks? The Salt Water Peoples of Tropical Australia" *Indigenous Law Bulletin* 4(29), 4-7.

Sheehan, John. (2000a) "Assessing Compensation for Native Title: A Valuation Perspective"*, Pacific Rim Property Research Journal* August, 6(1) 43-55.

Sheehan, John. (2000b) *Indigenous Property Rights and River Management* Paper presented by the author at the *3rd International River Management Symposium,* Brisbane, 6 September 2000.

Sheehan, John. (2000c) "The Economic Cost of Dispossession" *Land Rights Queensland,* (November) 6, 12.

Sheehan, John. (2000d) *Water Reform and Property Rights: The impact upon native title, and vice versa,* Paper presented at the Royal Australian Planning Institute Central West Planning Group seminar, University of Sydney Orange Campus, Faculty of Rural Management, Orange, 1 December 2000.

Sheehan, John, (2001) "Indigenous Property Rights and River Management in Australia" *Water Science and Technology* 43 (9).

Small, G Ric. (1997) "A Comparative Analysis of Contemporary Native and Ancient Western Cultural Attitudes to Land" Paper presented at the Pacific Rim Real Estate Society Conference, Massey University, New Zealand, January.

Smyth, Dermot. (2000) "Fishing for Recognition: The Search for an Indigenous Fisheries Policy in Australia" *Indigenous Law Bulletin* 4 (29), 8-10.

Standing Committee on State Development (1997) *Report on Fisheries Management and Resource Allocation in New South Wales* Report No.17 (Sydney: Parliament of NSW, Legislative Council, November) 323.

Strelein, Lisa. (1999) *Extinguishment and the Nature of Native Title Fejo-v- Northern Territory* Land, Rights, Laws: Issues of Native Title, Issues paper no. 27 (Canberra: Native Title Research Unit AIATSIS, February)

Sutherland, Johanna. (2000) The Coexistence of Sustainable Development and Aboriginal Fishing Rights in Canada, *Indigenous Law Bulletin* 4(29), 18 –20.

Tan, Poh-Ling. (1997) "Native Title and Freshwater Resources". in *Commercial Implications of Native Title,* eds. B**.** Horrigan, & S. Young. (Sydney: The Federation Pres) 157-199.

Tan Poh-Ling (2001) "Irrigators come first: Conversion of existing allocations to Bulk Entitlements in the Goulburn and Murray catchments, Victoria" 18 *EPLJ* 155. (Sydney: Butterworths) 7.

Teh Gim Leong and Dwyer Bryan, (1992) *Introduction to Property Law* 2nd ed.

The Koori Mail (2000*)* "Fishing laws and indigenous people" (29 November) 7.

The Koori Mail (2001) " Fishing debate shows Govt's true side" (7 February) 7.

The Sydney Morning Herald (2001) "Brand Conscience" (30 June – 1 July) 10s.

The Sydney Morning Herald (2001) "Damming indictment" (21-22 April) 32 News Review.

Veash Nicole, (2000) "River of no Returns" *The Australian Magazine* (18-19 November) 40.

White, Mary E. (2000) *Running Down: Water in a changing Land* (Sydney: Kangaroo Press).

Zarsky Lyuba, (1996) "Economy and Ecology: Sustainable Development", in *Economics as a Social Science: Readings in Political Economy,* eds G. Argyrous and F. Stilwell (Sydney: Pluto Press) 173.