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INDIGENOUS WATER PROPERTY RIGHTS: A INTERNATIONAL PERSPECTIVE

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ABSTRACT

Indigenous water property rights arise today generally from the survival of customary tenures in postcolonial common law countries. These rights and their associated river management regimes present unique challenges for both developing and developed countries. Existing common law and statutory tidal and non tidal rights are a complex overlay of public and private property rights which are themselves undergoing significant change through the commodification of many natural resources, such as marine species stock and non-tidal water. The melding of indigenous river management practices with existing non indigenous management regimes has throughout the common law world shown that there is considerable potential for both sustainability of resource utilisation, and respect for indigenous water property rights. Even in non common law countries with a tradition of Islamic law there is evidence that indigenous water property rights have been respected both now and in the past, providing increasing proof that there are core principles which permit both indigenous and non indigenous rights to exist co-operatively.

INTRODUCTION

The notion of property rights has undergone fundamental change during the past decade as a result of the recognition of indigenous property rights (native title) by the High Court in *Mabo v Queensland (Mabo No 2) (1992) 175CLR1 (Mabo)*. This case and the subsequent decision in The *Wik Peoples-v-The State of Queensland and Ors* (1996) 141 ALR 129*(Wik)* has led to a concomitant recognition that traditional rights and interests in natural resources such as water cannot be ignored.

Indeed, the growing commodification of natural resources such as water and marine species stock require that we have a better understanding of what indigenous and non-indigenous property rights really mean. 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 alienate in some manner the interest.

However, the conceptual leap from anglo-Australian tenures to Aboriginal law, and the transition from open access to property rights in natural resources has drawn attention to just how we define and measure particular "rights." Property in the more familiar sense of land and buildings conveys a tenor of regularity, constancy, and fixity – this is not so with the "new" forms of property which are inherently *sui generis*.

As knowledge is gained as to the nature of these less familiar property rights, accepted truths regarding spatial information and property rights are being shown to be only partial and incomplete visions. It is the intention of this paper to provide a better discourse on these visions.

INDIGENOUS WATER PROPERTY RIGHTS IN AUSTRALIA

After the handing down by the High Court of the decision in *Wik* there was much debate as to the impact of indigenous property rights upon existing anglo-Australian tenures. There were assertions that the recognition of these ancient rights at such a late date in the Australian history of European settlement would be a serious impediment to investment. However a more considered view of the changes in land law arising from *Mabo* and *Wik* was that published as editorial opinion by *The Canberra Times* shortly after the *Wik* decision, namely:

> '[a]ll the High Court has so far resolved is that it is possible that such [Aboriginal] rights represent a form of right or title. Whether they do in any particular case depends on the exact words of title instruments. Any such rights would be quite limited and would begin only where the other occupier's rights end.'
> (*The Canberra Times*, 5 January 1997, p.6)

Further, it was accepted that:

> '[m]ost Aborigines gained no legal rights from the *Mabo* or the *Wik* decisions. What they did gain was a significant moral victory which followed from legal recognition

that they had had rights which the law ought to have respected, with a slim possibility that a limited number might persist. This has given Aborigines a significant political platform from which they can argue a case for compensation.'
(*The Canberra Times*, 5 January 1997, p.6)

The decision of the High Court in *Ben Ward & Ors-v-The State of Western Australia* (High Court of Australia, 8 August 2002, unreported) (*Ward*) indicates that indigenous property rights arising from the survival of native title are possibly not as expansive as originally thought, and more in line with the above comments. However, prior to the decision in *Ward* some commentators suggested that the High Court might concur with the original Federal Court judgment, deciding that natural resources residing in native title land might be owned by Aboriginal people. It was also viewed that:

'…such a decision could see Queensland native titleholders eligible to receive…royalties…'
(*The Courier Mail* 26 July 2002, p.6)

The decision in *Ward* covers an area of 790 square kilometres of land and waters in the East Kimberley, and has particular relevance to indigenous water property rights as discussed in this paper. The speculation on *Ward* was not completely correct, and the Court was again tempted to conceptualise native title as a "bundle of rights" both metaphorically and contextually through existing anglo-Australian land law. There was concern that such a view albeit of assistance to understanding the rights and interests present in a particular native title should not lead to bland analogous assertions, the Court stating that it could be misleading by drawing attention:

'…to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.'
(*Ward* [89])

Further, the Court held that the various "rights" within a specific native title:

'…are not to be understood as confined to the common lawyer's one-dimensional view of property as control over access reveals that steps taken under the sovereign authority asserted at settlement may not affect every aspect of those rights and interests. The metaphor of "bundle of rights" which is so often employed in this area is useful in two respects. It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several kinds of rights and interests in relation to land that exist under traditional law and custom. Not all of those rights and interests may be capable of full or accurate expression as rights to control what others may do on or with the land."
(*Ward* [95])

Importantly, the Court took the opportunity to briefly restate the position of indigenous property rights in an undoubted allusion to international human rights, approving earlier views expressed in *Mabo-v-Queensland [No.1](1988)* 166CLR 186 at 217, and stating that:

> "[i]n *Mabo [No 1]* the "right" referred to was "the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property). "Property" in this context includes land and chattels as well as interests therein and extends to native title rights and interests."
> (*Ward* [116])

In *Ward,* the Court found that the Crown had appropriated to itself an interest in defined minerals as described at s.*115 Mining Act* 1904 (WA) (*MA*) as authorized by *s.117 MA* and *s.9 Petroleum Act* 1936 (WA) (*PA*). This finding supported the full Federal Court decision which had found that the interest held by the Crown.

> "...amounts to full beneficial ownership, and that accordingly any native title that may have existed in relation to minerals or petroleum has been extinguished."
> (*Western Australia-v-Ward (2000)* 99 FCR 316 at 452 [525] – [526])

Aboriginal people had dug and used ochre which is not a mineral as defined by *s.115 MA* and this fact was not in contention in *Ward*, and any right in native title that may exist was not disturbed by the *MA* or the *PA*. Because the Crown has specifically vested minerals and petroleum in itself, this action was held to be unlike the fauna legislation in *Yanna-v-Eaton* ((1999) 201 CLR 351) with *Ward* stating that:

> "The vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources. Vesting of property and minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land."
> (*Ward* [384])

Ward therefore holds that native title rights and interests in minerals and petroleum as per the *MA* and *PA,* do not exist with the Court unequivocally stating:

> "[n]o native title right or interest in minerals or petroleum was established."
> (*Ward* [385])

Subsequent analysis of this part of the *Ward* decision by Strelein suggests that:

> "[t]he Courts reasoning in this instance was troubling. It was the only foray the Court took into discussing the proof of particular rights and interests. They seemed to suggest that because the native titleholders had not demonstrated use of minerals in the past that there would be no native title right. Their reasoning here seems to reflect a 'frozen in time' approach.

> In any event, the Court found that had native title rights to minerals existed, they were extinguished by legislative act.
> (Strelein 2002, p.7.)

Importantly, where other native title rights and interests exist and they are not in conflict with the grant of a mining lease, these indigenous rights can coexist on land which is the subject of a mining lease, in a manner similar to that as outlined in *Wik* (Strelein 2002, p.6).

The decision in *Ward* provides us with a timely reminder of the complexity of native title legislation in Australia, however the case also provides support for the view that some incidents of native title such as indigenous water property rights (specifically fishing) may indeed survive European settlement and must be recognised. In *Ward,* the right to fish in inter-tidal waters within the claim area was dealt with in the following manner:

> "If the evidence otherwise established that the claimants had, under traditional law and custom, an exclusive right to fish in tidal waters, that exclusivity has been extinguished. As has been explained in the joint reasons in *The Commonwealth v Yarmirr* [(2001) 75 ALJR 1582 at 1604 [96] – [98]; 184 ALR 113 at 144 – 145 (*Yarmirr)*], there is a fundamental inconsistency between a native title right and interest said to amount to a right to occupy, use and enjoy waters to the exclusion of all others or a right to possess those waters to the exclusion of all others and public rights of navigation over and fishing in those waters. Likewise, there is a fundamental inconsistency between the public right to fish in tidal waters and a native title right and interest said to amount to an exclusive right to fish those waters."
> (*Ward* [388])

In *Yarmirr* it was shown that non-exclusive indigenous rights to fish did indeed exist, however these rights did not extend to an exclusive indigenous fishery due to the common law recognition of a public right to fish and navigate in tidal waters. This point was made again in *Ward* (at [388]) reaffirming the Court's view in *Yarmirr.*

In summary, indigenous water property rights that do not run counter to the reasoning in *Yarmirr*, and which do not contain any mineral and petroleum rights within submerged lands, remain as part of native title being a valuable form of "property" as described in *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 437 *(Native Title Act Case)*).

The following section of this paper examines the increasing commodification of natural resources such as water, and how traditional rights to water are being impacted upon by this flawed process. An international comparison is also attempted

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AN INTERNATIONAL PERSPECTIVE

Recent work by Small (2001) has provided a greater understanding of the notion of property rights, and hence whether certain rights and interests can be construed as genuine property rights. Subsequent research by Sheehan and Small (2002) has direct application to any attempt to gain a greater understanding of the various facets which may make up the "bundle of rights" present in a specific native title at a specific location.

It is problematic as to whether some rights asserted by traditional owners fulfill the requirements of *s.223 Native Title Act 1993 (Cwth.)*, which recognises only those incidents, which have a nexus with land. There is almost certainly a whole constellation of rights and interests, which may exist within Aboriginal law and culture which are held by traditional owners, but which are not recognised by *s.223*. Nevertheless, those rights and interests arising from the survival of native title, which do meet the test of s.223, are not limited to land property rights.

Water property rights are not exclusively the domain of anglo-Australian land law, and it is known that many indigenous communities throughout the common law world have systems of water rights. According to Hutchins (1946 p.v),

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

Hutchins (1946, p.22) further points out that:

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

Whether these traditional Hawaiian water rights are in fact water property rights is arguable, however we do know that in the Australian context the *Yarmirr* case decided this issue, providing an avenue for native title holders to assert that part of their "bundle

of rights" is indigenous water property rights. Mary Yarmirr, a traditional owner of Croker Island has stated:

> My Mandilarri sea country is at the top end of Croker Island. When I use the word "country", I am talking about dry land, fresh water and the sea. And when I talk about sea country, I am not talking only about the waters of the sea.
>
> I am talking about the sea bed and the reefs, and the fish and animals in the sea, and our fishing and hunting grounds, and the air and clouds above the sea, and about our sacred sites and ancestral beings who created all the country.
>
> Our ancestors are still there. Our country, both land and sea belongs to us, and we belong to it. For we cannot survive without the land and the sea, for it breathes, controls and gives life."
> (*Yarmirr* 2002, p.9.)

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

It will be recalled that in *Ward* the Court was at pains to emphasise that some of the rights and interests present in native title, presumably including spiritual and cultural attachment are such that:

> [n]ot all those rights and interests may be capable of full or accurate expression…
> (*Ward*, 95)

With the commodification of natural resources such as water, the creation of water property rights by the States of NSW and Queensland raises the question of whether such rights crystallised out of the Crown's radical title, also impact upon any surviving indigenous water property rights. Surely if water entitlements in the form of property rights are only now being created by the State out of radical title, native title rights and interests must be reduced or diminished in some manner or other. There is support for this proposition from the indigenous community who assert that their rights and interests in water have been ignored in the commodification process.

Collings (2002, p.9) describes this situation as a "water grab", asserting that this legislation:

> "…fails to accommodate and respect the rights and interests of Indigenous peoples who have been cut out of the deal. Licences are unreachable in economic terms, and

there whilst there is compensation for land-holders who are out of pocket there is no talk of compensation for Indigenous peoples, dispossessed of both land and waters.

Further, that:

> …in developing its written policy position, COAG makes no reference to Native Title or any other form of Indigenous entitlement that might require recognition and accommodation when developing principles designed to turn current water entitlements into full property rights which will form the basis for inter-jurisdictional trade.

In addition, Collings argues that:

> …it is questionable whether this process of representation is effective and representative, and capable of safe-guarding the inherent and fundamental human rights of Indigenous peoples that attach to land water.
>
> The rights and interests of their people are not being properly addressed nor recognised, nor their depth of knowledge and experience embraced.
>
> Indigenous peoples have a unique status amongst other stakeholders. Their rights and interests that attach to land, seas and waters are inherent, and reflected international human rights treaties to which Australia is a signatory; economic, social, cultural, political."

The *Water Management Act 2000 (NSW)* refers to native title in terms of the requirements under the *Native Title Act 1993 (Cwth.)*, however a dispassionate perusal of the State legislation suggests that the recognition is little more than a perfunctory exercise. Collings (2002, p.9) observes that:

> "[t]he only State or Territory in Australia that has made reference to Aboriginal people in legislation is NSW, which has turned out to be tokenistic. In all other states and territories there is no direct reference to Indigenous interests in waters in legislation.
>
> This failure is a direct result of the initiating COAG water reform agenda overlooking any Indigenous interests in waters."

The creation of statutory water property rights notably in NSW and Queensland appears to be causing a converse diminution of indigenous water property rights, and creating a liability for compensation for the State. The quantum of compensation is yet to be determined, but will not be nominal.

However, the failure to recognise indigenous property rights in natural resources such as water is a global phenomena, and according to Gray (1995, p.48) throughout some continents such as Asia:

> "…resources that lie within the lands of indigenous and tribal peoples are taken without their consent. Land that has belonged to them for hundreds, and sometimes thousands, of years is appropriated for forestry and mining."

Gray (1995, p.49) points out that the more notorious examples of this expropriation of indigenous property rights in Asia has been undertaken without consultation, compensation, and that:

> "[t]he effects will be environmental degradation, pollution, and dislocation of the indigenous…communities…"

It is generally agreed that Aboriginal descendents of original inhabitants are those peoples:

> "…that were taken over by a settler form of colonization, and which aboriginal and non aboriginal peoples are clearly distinguished: namely, the Artic, the Americas, Australia, New Zealand, and parts of the Pacific such as Hawaii and Kanaky. Aboriginal is also a term used in Asia, particularly in reference to the tribal peoples of India and Taiwan."
> (Gray 1995, p.38)

Throughout Asia and Oceania, the property rights of Aboriginal peoples remain problematic, Gray (1995 p.76) observing that:

> "[t]he assertion of indigenous rights and the transfer of resources back to local communities is being, and will continue to be, resisted by those who benefit most from the present development strategies."

In the case of indigenous water property rights, the growing commodification of this increasingly scarce natural resource has also placed indigenous stakeholders and nature conservation advocates in a difficult position. In the Australian context, the Nature Conservation Council of NSW in its recent *Water Access Entitlement Statement (NCC 2002,* p.1*)* indicates that it:

> "…does not support the creation of unlimited private water property rights, as such rights may create a right of compensation on the holders making it costly and difficult for the community to return water to streams and aquifers in order to meet environmental or other public purposes."

Further, the Council proposes that one mechanism to ensure environmental water requirements is:

> "[t]he compulsory reduction without right of compensation of 5% of entitlement at the end of the term of each license, with the withdrawn volume going towards environmental flows.
>
> *NCC* does not recognise or support any claims for compensation for private interest users as a consequent of the reduction of their access to water, or the withdrawal of their access

to water, or the non-renewal of their entitlements to water, when these actions arise from the proper operation of statutory or administrative rules for the protection of the environment."

(*NCC 2002*, p.2*)*

All of the above suggests that indigenous property rights in water remain vulnerable to diminution and even extinguishment from viewpoints, which range from the commercially opportunistic to the environmentally sustainable.

The next section of this paper attempts to draw together the vexed issue of recognition of indigenous water property rights with the need to respect that such rights both now and in the past provide increasing proof that there are core principles, which can permit both indigenous and non-indigenous property rights to exist cooperatively.

A RESOLUTION?

As stated earlier in this paper, in Australia and elsewhere indigenous water property rights are being impaired and even diminished irrespective of common law and legislative protection. Compensation for these actions is provided for in the Constitutions of all common law countries, and in other legal traditions, such as Islamic law. Indeed, the importance of water in arid countries in Asia and the Middle East is evident according to Planck (1987, p.59) in that:

"…all agrarian reform legislations take into consideration existing water rights and traditional water laws."

Paradoxically Planck (1987,p.61) reports that in 1978, the Afghanistan Revolutionary Council initiated a reform of land and property stating that:

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

Other Islamic countries such as Egypt, Algeria, Iraq, and Iran, have for many years recognised the existence of land property and water property, and Planck (1987, p.74) points out that this situation is because:

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

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

Clearly, water property rights are regarded as having great value in Islamic law and it is pertinent to note that any change in these traditional water rights in Islamic countries would be according to Planck (1987, p.73):

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

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

The task for Australia is to ensure that indigenous water property rights are respected, and if a need arises for their diminution or expropriation, that compensation entitlements be met.

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