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TOWARDS A DEFINITION OF PROPERTY RIGHTS

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ABSTRACT

The notion of property rights has undergone fundamental change recently as a result of the commodification of natural resources such as water and biota. All property rights result in the conferral of three qualities or capacities, namely a management power, and ability to receive income or benefits, and an ability to sell or alienate the interest.

However the transition from open access to property rights for natural resources has drawn attention to just how we define whether “particular rights” are in fact property 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 the notion of property rights are being shown to be only partial and incomplete visions.

KEYWORDS

Property rights; property; water property rights; biota property rights

INTRODUCTION

Mario Vargas Llosa, a Peruvian novelist recently observed that while the discipline most closely associated with globalisation is economics, other disciplines related to matters social, ethical and cultural act as reminders that regional cultures remain surprisingly robust, pointing out that:

*[g]lobalisation will not make local cultures disappear; in a framework of worldwide openness, all that is valuable and worthy of survival in local cultures will find fertile ground in which to bloom.*¹

This is a poignant reminder that customs and laws of many societies have only undergone incremental change throughout history, notwithstanding the sometimes violent precursors of such change. Anglo-Australian land law is one such complex amalgam, and recent studies of its roots in English custom and law reveal according to linguist Masson:

*... a curious and most marvellous gift for mutability and metamorphosis, rooted in a rich, complex and strange multilayered, multicultural history.*²

Further, Masson observes of this legal transmogrification that:

[t]he violence and bloodiness of part of this [Norman] conquest which, unlike the earlier Roman and Anglo-Saxon invasions, sought to extirpate an entire culture by destroying the upper reaches of the conquered society and assimilating the rest by incorporating them into a new system of law, are in many ways like the violent, bloody history of the frontier in Australia, combined with the more peaceful installing of colonial administration..

Further,

*[f]eudal Norman law, devised to firmly control both Norman lords and Anglo-Saxon populace through a complex system of obligation and responsibility, was grafted onto certain aspects of English law, which itself still had vestigial elements of both Roman and Celtic laws. The genius of the Normans was ever in their syncretism.*³

Inescapably property was of pivotal concern to those involved in conquest and dispossession, and hence once acquired the value of property crystallised in the hands of the conquering Normans. In keeping with other parts of Western Europe, the value of property was central to the maintenance of civilisation. While the Norman lords held rights to the land and economic benefits, these were conditional on service to the society. In particular, defense and civil order were funded from land rents. Intermediate lords enjoyed property titles that were burdened by both rental obligations to the higher lords, or the king, and service obligations to their vassals.

The connection between property ownership and obligation to the community was diluted over time, despite the continuation of the formal feudal tradition of tenure. Land value emerged explicitly as rental obligations to the sovereign and one's vassals were dissolved, leaving the benefit of property liberated for personal enjoyment. It is the concept of economic value, often

¹ Mario Vargas Llosa, "Locally speaking, global is good" *The Sydney Morning Herald* (10 February 2001) 3S

² Sophie Masson "Here today, gone yesterday" *The Sydney Morning Herald* (14 October, 2001) 8S

³ Ibid

linked to its political implications of power, which tends to lie at the core of most discussions of property rights, and as Ely observes in the North American context:

English common law provided the legal foundation for property ownership in the colonies. Common law was customary law, deriving its authority from long-established usage. Royal courts in England fashioned the common law into a body of rules that defined and protected property rights...

The high value attached to landownership by the colonists is best understood in terms of the English experience. In England, as in western Europe generally, land was the principal source of wealth and social status. Yet landownership was tightly concentrated in relatively few hands, and most individuals had no realistic prospect of owning land. Moreover, in theory no person owned land absolutely. All land was held under a tenurial relationship with the Crown. Although there was a bewildering variety of tenure arrangements, property ownership was conditional and involved continuing obligations to a superior.⁴

Conceptually, property rights and the concept of value necessarily emerged as the twin *liet motifs* of English property law, and its colonial American progeny. Anglo-Australian property law was also a legal sibling of this tradition.

A Concept of Value for Property Rights

The concept of value, especially when given monetary expression, involves the allocation of worth to a particular parcel of land, usually as an estimate of its capitalised future potentiality based on its current utility. The concept of ascribing monetary value to a natural resource such as land – has its roots according to Anderson in the:

...perdurable inheritance of classical antiquity. The Roman Empire, its final historical form, was not only itself naturally incapable of a transition to capitalism. The very advance of the classical universe doomed it to a catastrophic regression, of an order for which there is no real other example in the annals of civilization. The far more primitive social world of early feudalism was the result of its collapse, internally prepared and externally completed.⁵

Marxist writers such as Anderson see medieval Europe as a slow although inexorable transition to the “capitalist mode of production”, although this phenomena appears however to have been unique to Europe because:

⁴ James W Ely Jnr. *The Guardian of Every Other Right: A Constitutional History of Property Rights* 2nd ed Bicentennial Essays on the Bill of Rights (New York: Oxford University Press 1998) 10

⁵ Perry Anderson *Lineages of the Absolutist State* (London: Verso 1979) 420.

...the countryside of European feudalism also underwent an evolution that had no parallel elsewhere. The extreme rarity of the fief system as a type of rural property...was never known in the great Islamic states, or under successive Chinese dynasties, both of which had their own characteristic forms of agrarian land tenure.⁶

Anderson describes this feudal notion of property rights as follows:

[t]he pure feudal mode of production was characterised by conditional private property in land, vested in a class of hereditary nobles. The private or individual nature of this landownership demarcated it, as Marx saw, from a whole range of alternative agrarian systems outside Europe and Japan, where formal State monopoly of land, either original or durable, corresponded to much less strictly 'aristocratic' possessing classes than knights or samurai. But, once again, European development branched beyond that of Japan with the transition from conditional to absolute private property in land, in the epoch of the Renaissance.⁷

So, conditional private property in land was transformed to absolute private property with the result according to Anderson being as follows:

[t]he formula, however, contains a profound truth if applied in a somewhat different sense: the 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. In the long transitional epoch in which land remained quantitatively the predominant source of wealth across the continent, the consolidation of an unrestricted and hereditary private property in it was a fundamental step towards the release of the necessary factors of production for the accumulation of capital proper. The very 'vinculism' which the European aristocracy displayed in the early modern age was already evidence of the objective pressures towards a free market in land that was ultimately to generate a capitalist agriculture.⁸

Hence, private rights in property arose with the emergence of 'absolutist public authority', where according to Anderson:

The increase in the political sway of the royal state was accompanied, not by a decrease in the economic security of noble landownership but 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.⁹

⁶ Ibid 424

⁷ Ibid

⁸ Ibid 425

⁹ Ibid 429

The political emergence of absolutist public authority, especially as summarised in the principle of the supposed *divine right of kings*, necessitated a change in the theoretical foundation for private property. Early post-Roman feudalism of the Dark ages (500-800AD) was based on the exchange of property title for military protection and civil order. The Middle ages theory of property (800AD to 1100AD) was based on an organic understanding of Christian society with the king as the dispenser of the secular aspect of the will of God. The Medieval period (1100AD to 1500AD) developed a more flexible concept of property based on human nature. In that theory of property, the Aristotelian dual notion of private ownership with common use was developed. Feudalism fulfilled the dual aspects of property. Being owned by the king, property could be efficiently and responsibly managed, in a way that no socialist society has been able to match. However, the king held title on the condition that its income was used appropriately for the welfare of the community. This was the application of the benefit of property for the entire community, that is, managed common use. The transition to absolutism expressed in the *divine right of kings* subtly released the king from this obligation by giving him absolute authority over the use of the property with which he was entrusted.

Absolutism was primarily a political principle and was ushered in using a revised theory of authority. It effectively dissolved the theoretical foundation for property as it had existed for the previous millennia. The first attempts to rebuild a theory of property in an absolutist regime followed the Medieval strategy of appealing to the nature of things. John Locke is often considered the father of modern property theory when he reasoned:

"Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property."¹⁰

Locke accepted that a man's labour was naturally his own and hence not to have title to it would be a violation of natural justice. Since the farmer applies his labour to the land, if he did not have title to the land, then his natural title to his labour would be uncertain. Hence, private property is a necessary way to ensure natural justice. Locke's theory of property was consistent with his overall vision of politics and economics, but it was flawed. His theory could only validate partial title, based on the value of improvements. It would mean that a tenant clearing the virgin lands of a landlord would gain title to them. Moreover, Locke was mute on how much labour one would have to expend on property before title was warranted, on the contrary, he claimed:

"Thus the Grass my Horse has bit; the Turfs my serv ant has cut; and the Ore I have digg'd in any place where I have a right to them in common with others, become my Property, without the assignation or consent of any body"¹¹

The shortcomings of Locke's approach were recognised and later Enlightenment thinkers took another approach at demonstrating the natural origins of absolute private property. Following the revised notion of what constituted natural, the empiricists considered that human nature was revealed by observing unconstrained human action. Hume went so far as to claim that nothing more could be known of human nature than what was observed. On this basis, Hume's colleague,

¹⁰ Locke, John. 1693/1967. *Two Treatises of Government*. Edited by W. vonLeyden, *critical edn*. Cambridge: Cambridge University Press. [Bk.2 Ch.V, n27]

¹¹ *ibid* [II, ch V, n.28]

Adam Smith, observed that private property was a fact of English society, and that it was supported by English law. He emphasised the fact of possession and a legal/governmental framework supporting a particular institution of property. In this way he could assert:

*Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government.*¹²

Legally sanctioned possession was the Enlightenment understanding of property, which led to Smith's eighteenth century colleague, Lord William Blackstone, to summarise in his memorable definition of property as:

*"... that sole and despotic dominion which one man claims and exercises over the things of the world, in total exclusion of the right of any individual in the universe."*¹³

This view of property has not changed appreciably since the eighteenth century, despite the attack of the socialists. It now tends to be justified more on the basis of supposed economic efficiency than any recourse to the metaphysics of natures. It suits the absolutist approach, though recent decades have seen the success of various appeals to soften the strong implications of property being a *despotic* right.

With absolute private property, there emerged a concurrent need for definition of the territoriality of the rights and interests within:

*...[an] international state -system that defined and demarcated the continent as a whole.*¹⁴

With this need for accurate definition, came the need for concomitant valuation of the worth of the private property so defined. Murray usefully describes the concept of value, which has emerged to deal with private property as follows:

*Value in the economic sense means the benefit conferred by ownership, which includes not only the possibility of exchange for other commodities, but all the satisfaction that may arise from possession.*¹⁵

Further, he states that the valuer:

...normally has to deal only with that concept of value which is known as "value in exchange." In other words he has to measure the market value; that is to say, the relativity existing between the subject property and other properties and commodities.

¹² Smith, Adam. 1978. *Lectures on Jurisprudence*. Oxford: Oxford University Press. (p. 410)

¹³ Blackstone, William. 1979. *Commentaries on the Laws of England: A facsimile of the First Edition of 1765-69*. Edited by S. N. Katz. 4 vols. Chicago: Chicago University Press. (p. 2)

¹⁴ Ibid 431

¹⁵ John F N Murray *Principles and Practice of Valuation* (Sydney: Commonwealth Institute of Valuers), 1969

*The market value of land at a certain date may be defined as the amount of money that the land would bring in the open market by voluntary bargaining between vendor and purchaser, both willing to trade but neither of them so anxious to do so, that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land and the likelihood, as then appearing, to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.*¹⁶

This description of market value by Murray has its roots in a definition enunciated in *Spencer v The Commonwealth of Australia (1907) 5 CLR 418 at 441*, where Isaacs J applied the following test for market value:

To arrive at the value of the land at that date, we have...to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood as then appearing to persons best capable of forming an opinion, of a rise or fall for what reasons soever in the amount which one would otherwise be willing to fix as to the value of the property.

Jefferies usefully answers the question of what is value in the following way:

Value has many interpretations depending upon the definition and terminology used. There can be different types of value, such as replacement value, sale value, loan value, market value, insurance value....

For something to have value it must have utility, or be able to arouse desire for its possession to satisfy some need through its possession or use. Mere usefulness or even necessity on its own will not create value in an economic sense unless there is also the element of scarcity. A common example is air, which because it is in free abundance does not have a value in an economic sense, though having a very high utility. However, with some modern buildings and structures, such as fully enclosed shopping complexes and modern office blocks, specially conditioned air is supplied as part of a controlled environment which certainly adds value to the space for leasing purposes.

For something to be valued it must also be negotiable in a market, having the purchasing power to be exchanged for money.

¹⁶ Ibid

Therefore to be valued, property must have utility and scarcity, which arouses the desire of a purchaser who has the purchasing power and ability to acquire it and obtain its possession.

Real estate, has the added characteristic of permanence compared with other consumer goods which may be used up in satisfying the short-term needs or desires of the purchaser with possibly some residual waste for disposal, Real estate is durable property which has the almost unique characteristic of extending the benefits of its ownership over very long periods. The value of real estate arises out of its future benefits to the owner and therefore its value is the present worth of the future utility to be enjoyed from its possession in the future. As a result the value of real property must take into account the trends in the local and general economy, and should reflect the degree to which the market recognises future benefits. The utilities that real estate gives to an owner may include the anticipation that there will be some benefit in the use and occupation of the property; some profit in its rental; a potential for development into a higher and more intense use than present; or the anticipation that the real value will increase and provide the owner with a capital gain.¹⁷

In applying these definitions of market value, a body of valuation theory and practice has developed in Australia and New Zealand over the past century, and can be ascertained in classic works such as Murray¹⁸, Jefferies¹⁹ and Rost and Collins²⁰. Indeed, the activity of ascribing the worth of property can be traced back to at least biblical times according to Murray²¹, who notes that Ephron in selling his field to Abraham is quoted as saying:

My Lord, hearken unto me: the land is worth 400 shekels of silver; what is that betwixt me and thee? (Genesis xxiii)

However, the body of valuation theory and practice has been garnered from an understanding that the property rights to be valued are in the familiar guise of useful buildings constructed upon a basic site. This familiar union of human product, fused to a natural, and primevally common, resource blurs appropriate understanding of the underlying issues. There is a tenor of regularity, constancy, and fixity in such property, all of which comes from the site alone, reflecting a synergy of absolute private property, despotic control and enjoyment, territorial definition, and economic/legal value .

The extent of the rights of property are always a positive human convention. The development of absolute private property was a gradual accretion of private rights out of the public, or common domain. Rights such as exclusive possession tend to be necessitated first by agricultural people. The right to bequeath or sell land becomes a priority when either the land contains durable human

¹⁷ Rodney L Jefferies *Urban Valuation in New Zealand* Vol 1 (Wellington: New Zealand Institute of Valuers, 1978) 5-1.

¹⁸ Murray 76

¹⁹ Jefferies 1-1

²⁰ R.O. Rost & H.G. Collins *Land Valuation and Compensation in Australia* (Sydney: Australian Institute of Valuers) (1984) 18

²¹ Murray 14

products or the culture sanctions the private enjoyment of land rent. The separation and exclusion of certain rights to minerals within the land is a relatively recent development, driven by the relative value of these things and the recognition by the state that they have a worth not to be alienated lightly. Recent developments in urban organisation have necessitated focus on the right to construct improvements and the control and sharing of that right through urban planning statute and the use of easements.

The definition of land, a key component of the current property institution, is a human art that has a long history. Geometry was first developed for land definition in Egypt and land surveying grew as a specialisation of land administration in England parallel to the emergence of absolute private property. Land definition is possible because of the fixed nature of land and is facilitated by human artefacts, including fencing, buildings and other monuments. This is not so with the new forms of property rights which, due to the challenges that they present in terms of definition and control, are inherently land property *sui generis*.

The commodification of natural resources such as water and biota,²² and the recognition by the High Court in 1992 of native title²³ has resulted in changes to fundamental understandings of property rights.²⁴ Indeed, the interplay between indigenous and non-indigenous rights and interests has brought starkly into focus quite different values ascribed to property rights, all of which are nevertheless expressions of worth.²⁵

All non-indigenous 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. In particular, the transition from open access to property rights for natural resources has drawn attention to just how we define whether particular “rights” are in fact property rights.

Confounding this issue of transition is the long established pattern of self-regulation which according to Arrow²⁶ has resulted in the emergence of social institutions to meet this need, namely:

...private property rights, frequently hard to define, on the one hand, and the supervision of the state, on the other, [which] only begin to exhaust the list of social devices to balance individual initiative with prevention of injury to others.

A test for property rights

²² Rosemary Lyster “(De)regulating the Rural Environment” *Environmental and Planning Law Journal* 18:5 (2001) 447. See also Judson Agius “Biodiversity Credits: Creating Missing Markets for Biodiversity,” *Environmental and Planning Law Journal* 18:5 (2001) 490.

²³ *Mabo-v-Queensland(No.2)* (1992) 175 CLR 1

²⁴ Permits and licenses have in a number of cases been held to be property i.e. *Dovey -v- The Minister for Primary Industries* (1993) 119ALR108; *Western Mining Corporation-v-Commonwealth* (1994) 121ALR661; *Newcrest Mining (WA) Ltd -v- Commonwealth* (1997) 147ALR42.

²⁵ Lyster 455

²⁶ Kenneth J Arrow “Foreword” in *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment*, eds S Hanna, C Folke and K Maler (Washington: Island Press, 1996) xiv

In attempting to develop a test for property rights which accommodates new forms of “property”, it is important that the paradigm within which this test is to operate is interrogated and understood. To a large extent the development of a test for such property rights is an endogenous enterprise pertaining to a particular culture, which to be meaningful in Australia must emerge from the hegemonic epistemology of settled anglo-Australian land law.

Hence, any methodology used to value new forms of property rights, especially those in natural resources, will depend on the use to which the resource is to be put, and the purpose of the valuation. The likely reasons for attributing a value to such a property right has to do with maximizing the economic benefit of the resource, balancing social any aspects, compensation for loss of rights, access and the voluntary sale or purchase of property rights by private parties.

The ability of holders of property rights in natural resources to sell, or lease their rights is more limited than holders of more widely encountered property rights such as freehold or leasehold. In certain circumstances, property rights in natural resources may be inalienable, capable only of surrender to the Crown.

In this paper, the notion of property rights in natural resources will be discussed in generic rather than specific terms. Benefits are discussed in terms of their characteristics, rather than focusing on the physical nature of the resource, an approach rooted in consumption theory requiring a level of abstraction allowing the resultant advice to be applicable to a broad range of circumstances.

This prerequisite is especially important where there is regional variability in the use of natural resources such as water, and possible regional changes over time to such rights. This approach also accommodates the conceiving of different possible bundles of rights in natural resources as “property”, and the different forms in which such rights may be held including exclusive and non-exclusive. This aspect will be developed later in this paper in the context of fundamental characteristics, which must be evident for a property right to exist.

It is generally accepted in the literature that recognised grants of property define the range of privileges and responsibilities of holders to specified rights in natural resources. It is generally believed that such rights are either legal rights or economic rights, or both.²⁷ In attempting to construct a test to determine whether a right is indeed a property right, it is important that the different but necessarily interrelated notions of legal and economic rights are clearly understood.

When such rights are viewed as legal rights they involve an assignation by the State through legislation, common law or other means (e.g. custom) to an individual, group of individuals or organisation, of specified property rights that the State wishes to assign. Even when assigned, there is the question of regulation which can be critical to the value of the legal rights, which as Denman asserts lies in:

...the extent to which restraints can and should be imposed by the State on the use of the private property rights...Restraint may be severe and curtail the absolute rights of property to the near practical abolition of them; or the touch of the State power may be exceedingly light and leave near absolute power with the holders of the private property right.

²⁷ Yoram Barzel, *Economic Analysis of Property Rights*, (New York: Cambridge University Press 1997) 3

*Political debate in these circumstances centres round the extent and nature of the restraint to be imposed by the State over the exercise of property rights...*²⁸

However, regulation restraining the use of specified property rights is accepted as a necessary feature of their continued existence in society, as explained in *Mason-v-Tritton* (1994) 34 NSWLR 572 where Kirby P. (at 592-593) stated:

...[i]n the ordinary case, control and regulation of the rights and privileges associated with property ownership is consistent with continued property ownership. Indeed civilized societies demand that proprietary rights and interests be highly regulated.

The new forms of “property”, especially water, show that for these to be provided as legal rights they must now occur as a result of formal arrangements which derive from a subtle interplay between constitutional law, legislation, common law and case law. There is nowadays almost no recognition space in such formal arrangements for informal conventions and customs that may have developed over time in relation to access and usage of natural resources. This fact is highlighted by the inadequacies of water access rights in NSW which until recently relied heavily on the good will of the Minister and his Department for any real security and duration of tenure²⁹.

Economic rights depend on, and are subsidiary to, the capacity of legal rights to permit and allow the holder to enjoy as a benefit from the natural resource in question. In the past, the creation of a market for rights in natural resources has been impeded by the inability of holders to alienate. Over time, administrative structures for the allocation and use of such resources (in particular water) have developed, permitting an understanding (albeit poorly developed), of the economic worth of the resource notwithstanding the inchoate nature of these rights. This has also not prevented their valuation.

However, it is clear that the conceiving of such property rights remains at best conjectural, and possibly confused by sophistry. This is evidenced by the absence of a definition of “water property rights” in the *Water Management Act 2000* (NSW), notwithstanding assertions by the Department of Land and Water Conservation (DLWC) that the new legislation would:

*...maximize the specification and tenure of water entitlements whilst still being able to manage adaptively.*³⁰

This omission was also evident in the Second Reading speech to the *Bill* where the Minister merely stated that:

²⁸ Donald Denman, “Recognising the property right”, *The Planner* 67:6(1981) 161.

²⁹ The *Water Management Act 2000* (NSW) repeals the *Water Act 1912* (NSW), which licensed water users and access for the majority of the last century.

³⁰ DLWC, 13.

*[i]t is the term of a plan that really helps to define water rights, and the period of 10 years provides a much better basis for business confidence and investment.*³¹

Further, that:

*[t]he conditions of these water access licences will also be linked to the 10-year water management planning cycle. These amendments are more consistent with the Council of Australian Governments [COAG] requirement to specify water rights as clearly as possible. They also provide more certainty for water users.*³²

This simplistic view of the security to be provided to water users has been criticised by Crase, Dollery and Lockwood who point out that:

...successful water markets are predicated on the premise that “...buyers must feel confident that they will receive and be able to use the right purchased...[and]...well-defined and enforced mechanisms and criteria must be in place to assure that users are adequately compensated when their rights are confiscated or transferred to higher societal preferences”...By way of contrast, the Water Management Bill would appear to do little to allay the concerns of irrigators about the strength of their property rights in water.

*...We contend that the attenuation of property rights in this form constrains the capacity of the market to generate surplus by limiting the incentives to undertake trade.*³³

Further, irrigation water users have in their submission to the NSW Government argued that the legislation:

...completely lacks detail on the specification of water rights.

*...[E]ntitlements [must be] backed by separation of water property rights from land title and clear specification of entitlements in terms of ownership, volume, reliability, transferability and, if appropriate, quality.*³⁴

An inspection of the *Water Management Act 2000* (NSW) suggests that there has been a significant reluctance by the drafters of the legislation to provide detail as to the nature of water property rights. Also, contrary to the Minister’s assertions in the Second Reading speech, it would appear that the basic policy position for the implementation of water property rights proposed by

³¹ Richard Amery, Minister for Agriculture, and Minister for Land and Water Conservation, Second Reading speech, *Water Management Bill 2000*, 31 October 2000, 3.

³² Ibid.

³³ Lin Crase, Brian Dollery & Mike Lockwood, “Towards an Understanding of Static Transaction Costs in the NSW Permanent Water Market: An Application of Choice Modelling”, unpublished paper submitted to *Australian Journal of Agricultural and Resource Economics* (2000), 4.

³⁴ NSW Irrigators Council (NSWIC) *NSW Irrigators Council Submission to the Draft Water Management Bill*, roneo (Sydney, 2000) 1.

the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ)³⁵ has not been adequately implemented.

Research by Chant et al³⁶ into the efficiency of natural resource allocation shows that undesirable socio-economic and environmental impacts can be ameliorated if property rights are well defined. Based on the methodology of Coase, they claim that a “socially optimal result” can be achieved once property rights have security and are tradeable.³⁷

In addition, it is argued that when such rights are clarified and enforced, the market place will more readily provide the best allocation of property rights in natural resources. Furthermore, when property rights are held exclusively it is argued that the rationing of natural resources among competing users acts as a financial incentive to protect and use the asset because of the exercise of such property rights, albeit within an environmental protection legislative framework to prevent consequential adverse effects.

From the perspective of sustainable development, it is interesting that economists³⁸ argue that natural resources must be now paid and accounted for. Natural resources such as water have suffered damage because the cost has been traditionally borne publicly rather than privately. From this line of inquiry, it can be concluded that the specification of water property rights will create a market in water which provides incentives for greater stewardship by the holders of the resource.

As stated earlier, it is suggested that the extent of the property rights of all holders should be defined, together with the amount of resource (eg water) which should be reserved for environmental and community purposes. It is argued by ARMCANZ that a property rights framework in water would be created which incorporates environmental constraints within which these rights can be traded.³⁹

A fundamental flaw

It may seem prosaic in the extreme, but any discourse on “new property rights” ought to be embarked upon from the standpoint that such rights must meet a defensible test of what a property right is. If these property rights are to be meaningful to users, purchasers, and especially the banks and financial organisations that will use these rights as collateral for mortgage-based loans, then the test of whether they are indeed property rights is crucial.

³⁵ ARMCANZ) *Water Allocations and Entitlements: A National Framework for the Implementation of Property Rights in Water*, Task Force on COAG Water Reform Occasional Paper No.1 (Canberra: Standing Committee on Agriculture and Resource Management, 1995) October.

³⁶ John Chant, Donald McFetridge, Douglas Smith and John Nurick, “The Economics of the Green Society”, in *Reconciling Economics and the Environment*, eds. J. Bennett and W Block (West Perth: Australian Institute for Public Policy, 1991) 67, 69.

³⁷ Chant, McFetridge, Smith and Nurick, 66.

³⁸ 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, 175.

³⁹ ARMCANZ, 4.

In constructing such a test, it is essential to gain an appreciation of existing judicial considerations of the notion of “property”. Starke J. in *The Minister of State for the Army-v-Dalziel* (1944) 68 CLR at 290 (*Dalziel*) 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.

Starke J. (at 290) also comments that:

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

This approach to constructing a definition of “property” has been further strengthened in a recent decision *Yanner-v-Eaton* (1999) HCA 53 (unreported 7 October 1999) (*Yanner*), where the High Court took the opportunity to contrast property in the conventional sense with the “property” or “ownership” that the Crown 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”.*⁴⁰

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*⁴¹

Even previously accepted sovereign rights and interests over territory, such as sea lands, are no longer viewed as completely settled. For example, in the recent decision in *Commonwealth –v- Yarmirr* (HCA unreported 11 October 2001) it was held by the majority that while the waters

⁴⁰ *Yanner-v-Eaton* (1999) HCA 53, at 8 per Gleeson CJ, Gaudron Kirby & Hayne JJ.

⁴¹ *Ibid*, 11.

around Croker Island where internationally recognised as part of the territorial sea of Australia, such sea lands were not part of the original “territory” of England, and therefore not owned.⁴²

Nevertheless, as stated earlier in this paper, “*property*” is generally understood as a titled right to land or to exploit natural resources such as minerals. Commonly these property rights are referred to by the terminology “real estate”, with its emphasis on the immovable nature of the “property” concerned such as land, buildings and minerals.

The range of interests that are classed as “property” while limited only by our imagination, has however been restrained by the Courts of common law countries who 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 entitlements have also been recognised.

There has also been the very recent recognition of carbon as a property right, and legislation in various states is developing this concept.⁴³ 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. ⁴⁴

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 property if they are to be conserved. It is argued that the creation of such property rights would act as a “real economic incentive”⁴⁵ to sustainably utilise these natural resources. The current enquiry into bioprospecting by the House of Representatives Standing Committee on Primary Industries and Regional Services strongly suggests that:

...[t]he regulation of access to biological resources for research and exploitation has been problematical. ⁴⁶

⁴² The majority judges cited the decision in *R.-v-Keyn* (1876) 2 Ex D 63 (*Keyn's case*) as authority for this view that recognition does not necessarily result in ownership of territory.

⁴³ Jacqueline Bredhauer “Tree Clearing in Western Queensland— a Cost Benefit Analysis of Carbon Sequestration”, *Environmental and Planning Law Journal* 17:5 (2000) 389.

⁴⁴ *Ibid.*

⁴⁵ Nicole Veash “River of no Returns” *The Australian Magazine* (18-19 November 2000) 40. See also Zarsky 173.

⁴⁶ 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.

However, a common feature 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 territory⁴⁷, 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 as fishing rights and water entitlements may be attached to rights that are held in a parcel of land adjacent or nearby.

Common qualities or capacities of property rights

As previously stated, in varying degrees all “property rights” result in the conferral of three qualities (or capacities):

1. -a management power,
2. -an ability to receive income or benefits, and
3. -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 earlier in this paper, 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. The history of subsidised open access to fisheries has led to the view of 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.*⁴⁸

This transition from open access to property rights for natural resources is reflected in increasing attention by Australian courts to 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, 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:

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: -

⁴⁷ Denman, 161.

⁴⁸ Bob Beale, “Depths of Despair”. *The Sydney Morning Herald* (6 June 1998) 10s.

...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. However, the Court drew upon the definition of property as discussed in the Dalziel case which was referred to earlier in this paper, and noted that the approach in Dalziel was approved in *Australian Tape Manufacturers Association Ltd-v-Commonwealth of Australia* (1993) 112 ALR 53 at 65.

The Court 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).

Fundamental characteristics

It will be seen that 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 of the characteristics, determines the relative influence of the three qualities or capacities outlined earlier.

The concept of property rights arises from a need to address problems emerging from the actual requirements of society. Nowhere more apparent is this seen than in the recent commodification of increasingly valuable natural resources such as water, which in the conferring of a property rights regime is hoped, in line with other resources such as fisheries to become more sustainably used.⁴⁹

There is a significant history in the literature of attempts to identify the fundamental characteristics present in any property right. Hargreaves and Helmore⁵⁰ point out that the foundations of modern Western property rights lie in the legal “world of the Middle Ages”, however, like other branches of law, their present form is more dependent on the historical forces of the intervening centuries. Despite the radical demise of the social obligations of Medieval feudal property in the sixteenth century, the holder of property has never totally escaped a certain remnant of duties to the community:

There 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

⁴⁹ Beale, 10s.

⁵⁰ A.D. Hargreaves & B.A. Helmore, *An Introduction to the Principles of Land Law (New South Wales)* (Sydney: The Law Book Co, 1963) 4.

*duties imposed by statute on rural landholders...were not sufficient to disturb the emphasis upon private rights as the essential feature of ownership.*⁵¹

The despotic character of property probably reached its zenith in the eighteenth century, but since then the laissez faire view that private property rights were almost absolute has waned to the point that Teh & Dwyer could conclude:

*[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.*⁵²

The value of a property right may be considered as the net private benefit of the particular positive institution as it exists within a particular society. The benefit of the absolute right is partially negated by the concurrent restrictions. This led Gray & Gray to 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.*⁵³

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 such as water. It will be observed that a “characteristics” approach has been adopted by the courts in some 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 right to use

The right to alienate

The right to 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.⁵⁴

Given the above, a review of select literature 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 property rights can be constructed.

⁵¹ Hargreaves & Helmore, 155.

⁵² Gim Leong Teh and Bryan Dwyer, *Introduction to Property Law* 2nd ed. (Sydney: Butterworths 1992) 7.

⁵³ Kevin Gray & Susan Francis Gray, “The Idea of Property in Land”, in *Land Law: Themes and perspectives* eds Susan Bright and John Dewar (Oxford: Oxford University Press, 1998) 16.

⁵⁴ Teh & Dwyer, 8.

A definition of property rights

Part of the difficulty in defining property rights within a particular society is the fact that they are no more than a positive cultural artefact. The interesting question of *what property should be* is of little relevance to commerce in property where the pivotal issue is where legally defensible property rights are. Anthony Scott,⁵⁵ (1986) described a comprehensive specification of fundamental characteristics of a property right suitable for its inclusion in Western commercial exchange. Scott outlined a test for property rights which relies upon the identification of a minimum of six fundamental characteristics which he asserted to be present in any property right. His characteristics are especially directed to the economic value of property rights, and as such are applicable to societies such as the USA. As such they may be useful in developing a definition of property rights suitable for contemporary Australian society. They are as follows:

1. -duration,
2. -flexibility,
3. -exclusivity,
4. -quality of title,
5. -transferability,
6. -divisibility.

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 water property rights 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 water property rights:

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 water property rights 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, divisibility, highlighting that a property right should be susceptible to modification and/or alteration. In the context of water property rights, this aspect

⁵⁵ 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.

will almost certainly be a product of the particular regional circumstances within which the water entitlement and use occurs. In addition, water property 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.

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 water property rights.

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. The water entitlement and usage regime currently operative under the Water Act 1912 (NSW) is a threshold from which water property rights of greater quality of title can be constructed.

Transferability

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 water property rights, this characteristic could also be referred to as tradeability, and relies heavily upon the amelioration of current government constraints on transfers to other parties.

Divisibility

As regards the sixth characteristic, divisibility (which Scott sees as an aspect of transferability) this 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 water property rights, there will be limits to divisibility of access and usage, beyond which the right becomes degraded, almost certainly uneconomic, and devalued.

Interestingly, perusal of recent commentary on the Water Management Bill reveals that a number of these six fundamental characteristics of property rights have been identified, albeit in inchoate form. For example, it is noted that ARMCANZ has suggested that within the principles for a water property rights regime, inter alia:

—[t]hat water entitlements be clearly specified in terms of: -

- *rights and conditions of ownership tenure*
- *share of natural resource being allocated (including probability of occurrence);*
- *details of agreed standards of any commercial services to be delivered;*

- *constraints to and rules on transferability; and*
- *constraints to resource use or access.*⁵⁶

Further, ARMCANZ has suggested that such rights must evidence the following features for an effective market to be created:

...in demand – the market will be effective when competition exists for a set of rights that are limited in extent or availability;

- *well specified in the long-term sense – the market can interpret and depend on what the rights really mean;*
- *exclusive – benefits and costs associated with the rights are attributed to the right holders;*
- *enforceable and enforced – regulations and systems exist to ensure the rights are upheld; and*
- *transferable and divisible – regulations and systems are in place to allow the transfer of rights within defined limitations.*⁵⁷

Importantly, ARMCANZ⁵⁸ proposed that the tenure of water property rights should be perpetual, and yet significantly attenuated this recommendation proposing that conditions of access be subject to review to achieve acceptable levels of “planning certainty”⁵⁹.

Therefore as previously noted by Denman⁶⁰, regulation could if wished by government so severely curtail these rights as to make the tenure a chimera.

Importantly, the Working Group on Water Resource Policy has reported to COAG that for trading in water entitlements to be facilitated:

*...governments will need to ensure that property rights to water are clearly defined and specified in terms of ownership, volume, reliability, environmental flows and tenure. Conversion factors will also need to be specified between different areas of surface and groundwater systems and where catchments cross jurisdictional boundaries.*⁶¹

There are clearly elements of the six fundamental features of property rights present in both of the above writings, and are remarkably similar. It is posited that the six-point test as developed by Scott is a suitable tool applicable to a broad range of circumstances when a new form of property right is thought to have emerged.

Constraints on the Definition of Property Rights

⁵⁶ ARMCANZ, 8.

⁵⁷ ARMCANZ, 4.

⁵⁸ Ibid, 8.

⁵⁹ ARMCANZ, 5.

⁶⁰ Denman, 161.

⁶¹ The Working Group on Water Resource Policy, *Report of the Working Group on Water Resource Policy to the Council of Australian Governments* (1993?) 11.

It must be stressed that the notion of a “property right” is not a legal term, and the foregoing discussion is not an attempt (nor should it be) to provide legal advice. Indeed, as this paper has shown, there has been a long history of reluctance by the Courts to articulate what is “*property*” and a “*property right*”.

It is clear that the form of tenure for a specific property right such as water should be driven by a synergy of security and tradeability. Many permutations of tenure could doubtless be constructed which, drawing upon the six fundamental characteristics of property rights identified by Scott,⁶² would result in a tenure which could be utilised in a system of property rights.

However, it is recognised that both security and tradeability require that the form of tenure is capable of acting as collateral for a mortgaged based loan from a bank or other financial institutions. From this line of reasoning, it can be concluded that the tenure must evidence qualities which lenders are comfortable and familiar with.

Lenders are familiar with loans, which in the main are secured by way of a mortgage over freehold land, specifically land which is held under the Real Property Act. This enables a lender to have a registered first or second mortgage, or a caveat placed upon the public register of those land titles issued pursuant to that Act.

Usually tenure is unlimited in time, and guaranteed by the Act. There is security of tenure at the highest level, and the sale or transfer of the property rights held under this form of title can readily occur subject only to a restriction that stamp duty and statutory charges be paid at the time of sale or transfer.

While the utility accruing to the holder of the particular property rights is subject to restriction from the usual range of planning development and environmental controls, the basic six characteristics of a property right are not impugned. Clearly such a tenure would be the zenith for any intending holder or mortgagee of new “property rights”, however the nature of some natural resources is such that a perpetual tenure is unlikely to be granted by the Crown.

It therefore follows that a title for some property rights will be subject to a greater level of restriction than would a usual “land-based” real property tenure, and also be evidenced in a grant for a period of years rather than perpetuity. An analogy is the mineral rights granted under the Mining Act 1992 (NSW) for specific minerals permitting both rights to prospect and mine. Because the extraction of minerals is determined by the life of the ore body, these “property rights” are granted or renewed for up to 21 years or longer with concurrence, and are secure.⁶³ Such rights may or may not impinge upon the “property rights” of the surface landholder, and there may not necessarily be a nexus between the two holders of these quite different rights. Such a situation has similarities to the proposal in the Water Management Act 2000 (NSW) where water property rights and land are to be separated.

⁶² Scott

⁶³ David Farrier, Rosemary Lyster and Linda Pearson, *The Environmental Law Handbook: Planning and Land use in New South Wales*, 3rd ed. (Sydney: Redfern Legal Centre Publishing, 1999) 339.

Conclusion

The increasing recognition of neophyte property rights in natural resources such as water and biota has caused the notion of property rights to undergo fundamental change. As the anglo-Australian legal system moves closer to an omnibus definition of property rights, this process has already brought forth calls for a titling system for these new “property rights” which are reminiscent of the Certificate of Title issued under the Real Property Act, subject to the inescapable restrictions created by climate and other inherent natural risks.

Such an approach attempts to enshrine a tenure for these emerging rights, such that compulsory expropriation by the State cannot occur arbitrarily once the necessary tests as outlined by Scott for a property right have been met. Indeed, the failure to guarantee security of tenure has been recognised as the major shortfall of the Water Management Act 2000 (NSW) and its precursor, the Water Act 1912 (NSW).

The importance of this line of reasoning cannot be overstressed, given that in *North Sydney Municipal Council-v-Boys Radio and Electrical* (1989) 67 LGERA 344 at 345, Kirby J. stated that property cannot be arbitrarily expropriated, drawing upon previous decisions⁶⁴ and stating that this principle is:

...an essential idea which is both basic and virtually uniform in civilised legal systems.

For this very reason, the development of strata titles as a distinctive property right in the early 1960's resulted in amendments to the Real Property Act which were innovative in that a nexus was created between air space and the Crown guarantee of title residing in land. There now is a need for such an intellectual effort to occur afresh for the new emerging forms of property rights. Such an endeavour will take place within a plurality of indigenous and non-indigenous rights and interests, necessitating a rapprochement on managing such property rights.⁶⁵

History has shown that anglo-Australian land law can be amended to accommodate hitherto unknown forms of property (i.e. stratum, community titles, limited term strata title of Crown leaseholds), and it is the view of the authors that a well tested vehicle already exists wherein these new property rights could be titled.

⁶⁴ *Dorrestijn-v-South Australian Planning Commission* (1984) 59 AJLR 104

⁶⁵ Already, indigenous management approaches such as those by the Gandangara peoples are evidence of this *rapprochement* – see Healthy Rivers Commission of NSW *Independent Inquiry into the Georges River – Botany Bay System* Final Report (Sydney: September 2001) 56.

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