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WATER PROPERTY RIGHTS IN AUSTRALIA

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ABSTRACT

The commodification of natural resources such as water, and the resultant creation of property rights in water (in NSW and Queensland) has raised questions as to the manner in which we currently define, measure and value property rights.

The transition from open access to property rights in water has drawn attention to just how we ascertain whether “particular rights” are in fact legal 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 property rights in water, which as a class of property are inherently sui generis.

We have only a partial and incomplete vision as to how water property rights are defined, measured, and particularly ascribed worth. Arguably, current valuation practice breaks down when applied to “new” property rights such as water, and is potentially a deforming force of convention. There is a need to overturn as well as disturb our current complacency in valuation practice, and to develop the tools to properly ascribe worth to water as a property right

KEYWORDS

Property rights, *sui generis*; valuation practice, water property rights.

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INTRODUCTION

When the *Martu people* were recently held by the Federal Court to be the traditional owners of 136,000 square kilometres of the Great Sandy Desert, the Deputy President of the National Native Title Tribunal Fred Chaney raised in respect of Aboriginal law and custom the following question:

*What is the relationship between that system and our own? We are being put in a situation where we must deal with that question.*¹

The issue of indigenous property rights is however only part of the discourse which is now enveloping Australian property law and practice. Paradoxically, the decision of the High Court in *Mabo v Queensland (Mabo No 2) (1992) 175CLR1* cast a light on previously veiled questions of what we understand to be anglo-Australian “property rights”. The great intellectual tension evidenced in *Mabo* between the two legal systems that Chaney speaks of, was arguably an allusion to our parlous understanding of property rights *per se*. The subsequent decision in *Yanner-v-Eaton (1999) 201 CLR 351* shed considerable light on exactly what was meant by private property rights *vis a vis* the regulatory fiat of the Crown.

Before we attempt to interrogate indigenous property rights and ascribe worth to the rights and interests therein, it is necessary that we understand the “bundle of rights” that comprises what was originally known as land property. Very recent research by Sheehan and Small² attempts to elucidate what a definition of property rights might look like, however there remains much work to be done in this area as pointed out by the authors:

*[t]he 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.*³

The need for a fresh intellectual effort to occur for these emerging forms of property rights has all the elements of a psychological spring-cleaning for Australian property law and practice. Existing notions of land property are outdated, and probably incapable of wholesale modernisation to accommodate these neophyte rights. In the area of valuation practice, while there are obviously elements of current practices which we may want to retain, and even refine on the grounds of familiarity, their appropriateness for the valuation of “new” property rights is questionable.

¹ Fred, Chaney (2002) cited in *The Sydney Morning Herald* “A great chunk of country – and it’s theirs” (28-29 September) 7 News.

²John Sheehan & Garrick Small (2002) *Towards a Definition of Property Rights* UTS Property Research Unit Working Paper No 1.02. (Sydney: Faculty of Design Architecture & Building, University of Technology) October.

³ Sheehan & Small 36.

The efforts over the last six years by the Australian Property Institute to encourage a discourse on the development of a culturally sensitive methodology for the assessment of compensation for the compulsory acquisition of indigenous property rights has revealed how difficult such tasks are⁴. This effort shows that no valuation practices are as immutable as thought, and habituation can be quite restraining, with the unpalatable prospect that the involvement of the valuation profession in forthcoming native title compensation cases could have been very limited indeed.

To overcome such constraints when dealing with these “new” property rights it is necessary to adopt with vigour the necessary psychological spring-cleaning of valuation practices, Steven Pinker usefully observing that:

*...no matter how important learning and culture and socialisation are, they don't happen by magic. There has to be innate circuitry that does the learning, that creates the culture, that acquires the culture, and that responds to socialisation...*⁵

The next section of this paper canvasses the inherent plurality of the natural resource which forms the basis of the conceiving of water property rights.

WATER AS A PROPERTY RIGHT

In dealing with one such class of the “new” property rights, namely water property rights it is important that we recognise not only new valuation practices will have to be created, but also a taxonomy of appropriate expressions, Furedi usefully observing:

*[h]uman beings have always required a vocabulary that helped them to make sense of unexpected events...*⁶

Water property rights display a penumbra of imprecision as to definition, fixity and quantification, of which the current language of property law and practice does not permit full expression. Such rights cannot be made into a simulacrum of land property, because they are only a part of the “bundle of rights” which were originally within the conspectus of land property. Water property rights are arguably the most vaporous of these neophyte property rights, and they are distinguished because the properties and behaviour of water is irregular, not fixed, changeable, and cyclically manifested.

All of the above suggests that a *rapprochement* with current notions of property law and practice is needed. The inherent plurality of the properties and behaviour of the natural resource encompassed by the concept of water property rights suggests that any State or Territory based titling system will only coincide with a national reductive stereotype that posits water property rights at a level of abstraction which allows the resultant stereotype to be

⁴ John Sheehan (2000) “Assessing Compensation for Native Title: A Valuation Perspective” *Pacific Rim Property Research Journal*, 6(1) 43-56.

⁵ Steven Pinker (2002) cited in *The Sydney Morning Herald* “Great minds think unlike” (October 12-13) 5s; see also Steven, Pinker (2002) *The Blank Slate: The modern denial of human nature* (London: Alan Lane).

⁶ Frank, Furedi (2002) “Paranoid and proud of it” *The Sydney Morning Herald* (4-5 May) 5s.

applicable to a broad range of circumstances. Arguably, this stereotype ought to accord with the general characteristics approach for defining property rights as suggested by Sheehan and Small.⁷

This approach also accords with the developing methodology for the assessment of compensation for another “new” property right, namely indigenous property rights. There are thousands of permutations of the rights and interests that an indigene may assert as a holder of native title, and valuation practices are being developed which seek to give definition to what are only partial and incomplete visions of these ancient rights.⁸

Interestingly, such ancestral rights including property rights in water are now the subject of constitutional protection in many countries, for example amendments in 1998 to the Ecuadorian national constitution prompted Yeomans to observe:

*[i]mplicit in this new language was the Indians’ right to protect their territory and natural resources.*⁹

Such protection also recognises that these ancestral property rights might not easily fit into western notions of land-titling which are focussed on the individual rather than the group, Ganjanapan observing that:

*...the effects of land-titling in a district in Northern Thailand ...increased disputes among family members. Unlike in traditional land-ownership systems, where property can be held collectively...*¹⁰

The other aspect of water property rights is the vexed issue of how we ascribe a monetary value to a natural resource which prior to commodification was treated as common property.¹¹ Hanna and Jentoft observe that:

*[w]e imbue natural resources with value because of their potential to contribute to other things we value, such as economic production, social identification, cultural symbolism, aesthetic appreciation, evolutionary potential, and biodiversity.*¹²

⁷ Sheehan & Small, 18.

⁸ John Sheehan (2002) “The race for relevance: some introductory thoughts on compensation for native title” *Australian Property Journal* 37(1) (February) 18.

⁹ Matthew Yeomans (2002) “The people who disconnect from a wired world” *The Weekend Australian Financial Review* (November 23 – 24) 46.

¹⁰ Anan Ganjanapan (2002) cited in *Far Eastern Economic Review* “Land-titling initiatives lead to cheaper and longer-term loans: Thailand sets an example” (9 May) 40.

¹¹ Susan Hanna, Carl Falke, & Karl-Goran Maler (1996) “Property and the Natural Environment” in Hanna S, Falke C, & Maler K (eds) *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Washington: Island Press) 2.

¹² Susan Hanna & Svein Jentoft (1996) “Human Use of the Natural Environment: An Overview of Social and Economic Dimensions” in Hanna S, Falke C, & Maler K (eds) *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Washington: Island Press) 42.

Further, they posit that:

[t]he value of a natural resource has different components that are based in both use and non-use. Use value has three parts: direct value (e.g., harvesting for food) indirect value (e.g., contributing genetic diversity to reproduction), and option value (e.g., the potential for future contribution). Non-use value derives from a resource's existence and intrinsic value as a source of aesthetic pleasure, a bequest to future generations, or a contributor to the general feeling about the environment.¹³

Such a multifaceted analysis of natural resource values is clearly of relevance to water given its ephemeral nature and as part of the ancient commons. In support, McCay indicates that common property has the following features:

... "sub-tractability", or characteristics that make it likely that one person's use will affect the amount or quality available to another; and "non-excludability," or difficulty keeping others from using the same resource... Typical examples are large bodies of water, flowing rivers, vast savannas and forests, aquifers and oil and gas reservoirs, fish stocks, flocks of migratory birds, and wild animal herds.¹⁴

The ascribing of monetary value to natural resources has its roots according to Lie in the development of commodity markets, which in England between 1550 and 1750 revealed that:

[p]rices and outputs were not determined by the law of supply and demand but, rather, by social norms and the vagaries of production.¹⁵

Over the interregnum, the values ascribed to natural resources are still subject to Lie's amalgam, the social psychologist Mackay observing that:

[t]he tension between economic pressure and moral values is as old as trade itself...¹⁶

With particular relevance to the commodification of water and the conceiving of water property rights, Lie points out that historically:

...the commodification is the indicator of market expansion.¹⁷

In early English market society, this expansion was particularly evident in water for which growth relied, Lie pointing out that access to navigable water required:

¹³ Hanna & Jentoft, 43.

¹⁴ Bonnie McCay (2000) "Property Rights, The Commons, and Natural Resource Management" in Kaplowitz, M. (ed) (2000) *Property Rights, Economics, and the Environment* (Stamford: JAI Press Inc.) 71.

¹⁵ John Lie (1993) "Visualizing the Invisible Hand: The Social Origins of "Market Society" in England, 1550-1750" *Politics and Society* 21(3) 283.

¹⁶ Hugh Mackay (2002) "Free trade comes with strings attached", *The Sydney Morning Herald* (23-24 November) 35.

¹⁷ Lie, 278.

*...a right to access, a right of passage and a right to acquire land for workers on the river. Such rights could only be acquired by consent of the riparian landowners, which was difficult to achieve, or by royal grant or by Act of Parliament.*¹⁸

The difficulties encountered in acquiring these water rights by the States are described by Lie as follows:

*...it would be an exaggeration to claim that these changes proceeded smoothly. River improvements continued to be resisted by riparian landowners.*¹⁹

Concurrent with the acquisition by the State of “water rights” presumably with compensation, there was also the developing market for riparian lands which contained within the “bundle of rights”, access to “rights to water”. These access rights would have been transferred in early English market society utilising an oral contract because in line with most transactions in this market, according to Lie:

*The predominantly oral nature of these businesses explain the scarcity of written documents....The interpersonal and oral nature of business transactions emphasized traditional cultural norms in carrying out business transactions. Thus prices continued to be dictated largely by communal expectation, being cost based and habitual, rather than by the “law of supply and demand”.*²⁰

Interestingly, the current market for water access licences in NSW reveals that whilst flawed as property rights, administrative structures for the allocation and use of water have developed permitting an understanding albeit poorly developed of the economic worth of such licences. Despite the inchoate nature of the “water right”, the valuation of water has not been seriously inhibited.

Sales of these “water rights” have occurred on occasion for many millions of dollars, with a contractual basis debatably little better than the oral contracts of early English market society. Whilst arguably the most vaporous of property rights, water property rights when constructed in accord with the general characteristics approach for defining property rights²¹ should provide:

*...both security and tradeability[which] require that the form of tenure is capable of acting as collateral for a mortgage based loan from a bank or other financial institution. From this line of reasoning, it can be concluded that the tenure must evidence qualities which lenders are comfortable and familiar with.*²²

¹⁸ Lie, 285.

¹⁹ Lie, 293.

²⁰ Lie, 289.

²¹ Sheehan & Small, 18.

²² John Sheehan (2002) *Property rights: The Pursuit of a Definition and a Method of Valuing Water*.

Unpublished paper presented at the Murray Valley Community Action Group Water Summit: “Water – What’s it Worth” Deniliquin RSL, Deniliquin (21 November) 17.

UNDERSTANDING EPHEMERAL QUALITIES

The ephemeral nature of water would appear at first sight to inhibit the conceiving of property rights in this natural resource. Many incidents of indigenous property rights arising from the survival of native title also exhibit ephemeral qualities, however this has not restrained the High Court from declaring in *Mabo* that native title was a valuable property right. Nevertheless, there are also a number of incidents of these ancient rights which are similitudes of existing anglo-Australian land tenures or land management practices. One example is the manner in which Aboriginal people have managed their cultural and physical landscape through systematic burning, Langton observing that these traditional custodial duties:

*...have used fire for millennia to adapt and reproduce the environment for economic resources as well as land management purposes.*²³

Modes of land management such as that described above might appear alien to those more comfortable with the European agricultural milieu, however popular natural historian David Attenborough points out that the current landscape of Europe except the topography:

...is there as a result of the actions of man and his animals

*...Such transformations have now affected almost every part of Britain. Man's responsibility for them, however, is often forgotten....The heather-covered grouse moors of the Scottish Highlands were once pine forests, and were cleared in some instances as recently as 200 years ago. Man promoted the growth of heather in their stead in order to increase the number of grouse, which feed on heather leaves, and he maintains them in this condition by systematically burning every part of the moor once every ten to fifteen years.*²⁴

REFLECTIONS

The lesson contained in the above example is that the inherent features of water property rights will of necessity exhibit both familiar and unfamiliar incidents. The emergence of water property rights in Australia has raised issues of the appropriateness of established valuation practices which have their origin in centuries of case law throughout the common law world. There is a misconception that the valuation of these “new” rights can occur through the comfortable incremental development of valuation case law and practice, whereas such a view has a distinct risk of undermining hard-won professional integrity, realising that:

*[I]t is an easy mistake to seek quick answers within existing law and practice, rather than accept that valuation of “new” property rights is indeed valuing on the edge.*²⁵

²³ Marcia Langton (1998) *Burning Questions: emerging environmental issues for indigenous peoples in northern Australia* (Darwin: Centre for Indigenous Natural and Cultural Resource Management, Northern Territory University) 41.

²⁴ David Attenborough (1984) *The Living Planet: A Portrait of the Earth*, (London: Fontana Collins) 295.

²⁵ John Sheehan (2002) “Environmental Issues and their impact on Australian Real Estate” *Australian Property Journal* (37(4) (November) 294.

Finally, the required psychological spring-cleaning of property law and practice (especially valuation practices) should result in a definition of water property rights and the development of a methodology for the valuation of these “new” property rights.

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