JUSTICE FOR ALL: A CONCEPTION OF COMPETING INTEREST IN THE WATER DEBATE.

By Shaun Berg

Water is a commodity in Australia. It has been privatised and handed over by successive governments to commercial interests. In doing this the government has unpacked the concept of water. It has deferred responsibility for water allocation to the marketplace. There is collateral damage by this act to things that are inextricably connected to water, for example, the reality of a flowing river, the environment, the impacts upon the communities living beside and dependent upon these water bodies and the cultural and spiritual practices of Indigenous People. These disconnections have created tensions between and within differing stakeholders groups. The impacts of these disconnections have differing effects in their different domains. It is a classic example of privatising profits and socialising losses.

The purpose of this paper is to talk about justice and some of the challenges that the Courts will face in thinking through these complex matters. The framework I will use to discuss those matters will be to outline two broad categories of competing interests and to analyse them in a legal context. I do not consider that those interests that can be satisfied by compensation are relevant to this discussion. In those cases it is simply a matter of determining an appropriate quantum.

I acknowledge in articulating these broad categories that I am bringing into sharp focus a dichotomy that may be better described as a continuum of interests. I also acknowledge that the dichotomies that I am identifying are not new and that they are firmly entrenched in ancient patterns of human relationships to land and with nature. By highlighting these concepts I will provide a contrast between the principles that will likely dominate the attention of the Courts in considering the issue of justice in relation to water.

The first concept I wish to discuss represents, amongst other, the interests of developers, miners, irrigators, recreational vehicle owners, and commercial fishers. Its agenda includes the lifting of restrictions on the commercial exploitation of private property. According to this view, all lands and waters should be available for human exploitation. It sees the issues associated with lands and waters solely in terms of human exploitation. Taken to its logical end, such exploitation would include all national parks, wildlife refuges, wilderness areas and other protected areas to development. This concept tends to provide a sanctuary for otherwise disparate interest groups. In its purest form it is blind to the inherent value of land or water other than what it may yield for human use. It minimises the
moral significance of land and waters into compartments of insensible components and inanimate mechanisms. This approach uses the language of resource use and management. Its rhetoric creates a polarity between the priorities of economic activity against concerns for the well being of the environment and it tends to be without ethical complication.

In this concept the value of water is always subsidiary to the forces of the market. It has simply a derivative value capable of being identified by the uses to which humanity applies it. In this concept no problems arise from the recognition of, or respect for, the innate worth or integrity of the environment or nature as being and containing living things. When conflicts do arise from the competing claims of the varying human interests over the disposition of water, they are rendered wholly domestic and servile through the convention of property interests. This concept which exists under the guise of management of resources is a strident assertion of proprietary interest in lands and waters as the fundamental conception which defines human relationship to land. Its focus is upon the uses of water and it is grounded in an assumption that land and water exists in a condition of servitude.

The owner of property is given authority over it; to possess, enjoy, use and dispose of it, as an incident of the right of ownership. The extent to which water can in reality exist as part of a different set of values, for example, as a broad range of things capable of evoking respect and care in themselves, is diminished and threatened by the concept of property rights. Any awareness of, and concern for, the environment as being a place where all things are connected and have an integrity by those connections, is challenged by this proprietary mentality. Once property concepts are privileged, the participants advocating for them, in one way or another, are appropriated to defend such proprietary concepts. It will be difficult for any government that has endorsed the allocation of water by market forces to defend the inherent value of the environment. They are compromised because they support the proposition of property rights existing within water. This will also be a significant challenge for the Courts which in many senses can be described as the ultimate protector of individual property rights.

In my view, the privilege provided to the protection of property rights and the concepts of property rights is significant to where the environment is located in the river debate. Property rights are a reflection and codification of a certain type of cultural orientation toward land and the environment. As we grow more aware of the environmental consequences of the practises we undertake as a population we are being challenged to reflect more upon the intrinsic value of the environment. The Courts will be challenged to re-consider its deeply entrenched, culturally persuasive instinct toward property and the protection of proprietary right in delivering justice in relation to water.
The Courts will need to ensure that it does not reduce water to an abstract concept of property rights isolated from their context and having value only in their derivative uses. It will need to consider the implications of privileging those concepts of property over different conceptions of lands and waters, for example, the cultural and spiritual conceptions of Indigenous People. These conceptions tend to align to principles of the nature and environment existing as a living interdependent totality beyond the physical identity of place. For Indigenous People the cultural and spiritual significant of water will challenge the Courts and represent a competing conception of water to the property based conceptions. I should make the point that the Indigenous conception I am referring to here is different than an environmental conception because there is a cultural or spiritual perspective embedded into the landscape for Indigenous People.

The cultural perspective for Indigenous People may be conceived by them as a tangible manifestation of absolute reality or as divinely ordained and sustaining cultural landscape. These perspectives have significance, dignity and value beyond the mere utilitarian purposes or uses of land or waters. These cultural traditions are responding to the plight of the environment and nature by reanimating it from within their respective spiritual cosmologies and evoking a transformed human consciousness of nature as a different conception. These conceptions will need to engage the moral sensitivity of the Court in their determination of principles of justice that afford continuing protection of these values.

A Court which follows the unremarkable proposition that actions which do not prohibit the culture, nor prevent, censure or hamper the activities of that culture, do not violate that culture will be unequipped to deal with the complex issues that will arise in a legal case about water. The Courts will be challenged in cases of water justice because the actions of government (or other) and the making of government policy itself will interfere with Indigenous People's cultural and spiritual belief. It is on this point that the Courts will be most challenged and will be confronted by a plurality of cultural beliefs, namely the conception that water is property and that its value lies in its use, and the competing conception that water has inherent cultural and spiritual significance. The Courts will be challenged not to confine themselves to a simplistic focus upon cultural practices or activities but will need to engage with the fundamental cultural beliefs and the spiritual character of the land that evokes and inspires those cultural practices and activities. If a Court does not engage with this issue, then government actions or the actions of others that changes the natural state of the land, while not directly preventing the cultural or spiritual practices, will in effect stop them from continuing to occur.

It will not be a sufficient response for a Court to say that Indigenous People are still free to practise their culture as they wish. The Courts will be confronted with a need to censure a jurisdiction that is
overwhelming in its simplicity, and significant in its effect, based upon the concept of the inherent value of nature. If a Court cannot or will not do this then they will be open to the claim that they cannot or do not deliver justice for Indigenous People. If the Court does not deliver justice for Indigenous People they cannot purport to deliver justice for all. In those circumstances a Court may simply be an instrument that strips the land of its cultural and spiritual significance to Indigenous People.

To deliver justice the Courts must not abdicate their responsibility to weigh competing claims which are grounded in different perceptions and values, or to arrive at final determinations through the application of law and principles of justice, that evaluate those competing interests. Notwithstanding, it would be a macabre situation if a Court were to be confronted with an argument that attempts to demonstrate that there are compelling interests of such paramount significance that the act of the destroying an Indigenous People’s culture were justified. It would be hard to fathom what this argument could be. It is hard to imagine how such arguments could be consistent with Australian principles of justice, the Racial Discrimination Act, or Australia’s international human rights obligations.

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