Indigenous property rights and river management

J. Sheehan
Australian Property Institute, National Secretariat, 6 Campion Street, Deakin, ACT 2600, and Land Tribunal, Level 9, 40 Tank Street, Brisbane, Queensland 4000, Australia

Abstract The presence of indigenous property rights and interests arising from the survival of native title in Australia presents unique issues in the management of rivers and riverine lands. Existing common law and statutory tidal and non-tidal rights are a complex overlay of public and private property rights which are themselves undergoing significant change through the commodification of many natural resources by Commonwealth and State governments, such as marine species stock and non-tidal water. The melding of indigenous values and management practices with existing management regimes for rivers and riverine lands offers considerable potential for both sustainability of resource utilisation, and respect and recognition of native title with resultant predicted benefits in the vexed area of compensation.

Keywords Compensation; indigenous property rights; management; native title; rivers; riverine lands

Introduction
Indigenous property rights and interests and the associated traditional land use management systems have proved to be much more environmentally appropriate, multi-faceted, and capable of survival than originally predicted. Indeed, Western “scientific” land management techniques have exhibited far less resilience and appropriateness.

In the face of mounting evidence of the detrimental environmental and climatic impact of Western management approaches to property resources, there is an increasing recognition of the need to introduce regimes of riparian land use management which meld those most evident desirable features of Western and indigenous approaches.

Concomitant with this change in attitude towards property rights, there has been an increasing recognition in common law countries such as Australia, that when indigenous property resources are diminished or even expropriated by the state, compensation (in one form or other) must address the full range of losses born by indigenous people.

Nevertheless, the assessment of compensation for the diminution or extinguishment of indigenous property resources has proved to be a chimera. It is alleged in some quarters that fundamental compensation issues have stubbornly resisted resolution because of the communal nature of many indigenous property resources. Dowding (1997 p. 98) usefully describes these resources in the legal form of native title as:

‘…the cluster of rights which were recognised by common law as being the rights of the various groups of people who occupied Australia prior to white settlement and indeed, continue to occupy the country…

Aboriginal people have traditionally exercised their rights in a variety of ways: native title gives, in some cases, right to exclusive occupation, in other areas, it is a right to determine who will enter and occupy, it can be a right to control the resources of an area – the food, the ochre, the wood, the fishing rights and the like – and it can be the right freely to enjoy a particular area of land. These rights are not frozen in time and can accommodate the different and changing rights and interests of a particular group.’

The alleged conceptual difficulties of such communal property rights from the standpoint of anglo-Australian land law have often been identified as an obstacle to the
settlement of claims, and of course a hindrance to the panacea of economic development.

As Bowen (2000, p.11) points out:

‘[w]hilst western culture may use boundary fences to resolve this matter, an understand-
ing of indigenous culture and their definition of country would indicate just how foreign
and thus difficult it has been to address this requirement.’

Notwithstanding, there has been a wide-ranging academic and professional review of
many areas of land administration practice, notably the management of rivers and riverine
lands (known collectively as riparian lands) in the light of the recognition of indigenous
property rights and interests. Current developments in this area of research show that
indigenous property rights can coexist with anglo-Australian land tenures and land man-
agement practices.

This paper describes ground breaking research work in this area, which provides hope
for a fairer and more just accommodation between indigenous property resources and the
management of riparian lands.

Conceiving property rights

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

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

A feature of all of these is that the interests in question are territorial, in so much as the
right is contained only within defined boundaries. This is commonly achieved by way of a
legal description of the boundaries, which have been defined by means of a cadastre. In
addition, these rights are also proscribed in so far as what activities can occur within the
territory, 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 rights are attached to rights that are held in a parcel of land adjacent or
nearby. Nevertheless, in varying degrees all “property rights” result in the conferral of a
management power, an ability to receive income or benefits, and an ability to sell or
alienate the interest. The degree to which these three qualities are evident in a particular
property right depends on the mix of fundamental characteristics that the particular
property right contains.

Scott (1989 p.52), usefully lists the six minimum characteristics which he believes are
found combined in any property right, namely: duration, flexibility, exclusivity, quality of
title, transferability, and divisibility. Scott shows how, when just four of these characteris-
tics 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.

As regards duration, this fundamental characteristic indicates the period, usually in
years, that the property right is held, and hence represents a profit or saving to the holder.
The second 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. The third characteristic, transferability, is the measurement of the
market for the sale or leasing of the particular property right. Scott points out that a high
value would indicate that the demand reaches well beyond the original acquiring group. Also, he notes that the mere creation of a market and hence tradability in itself enhances the value of the particular property right.

Finally, as regards the characteristic of divisibility, 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 may be 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.

All of the above shows how some classes of property rights such as fishing and water rights are conceived both in law and in economics. There is a particular value in this discourse as it provides us with an understanding of the complex web of property rights and interests that can exist in rivers and riverine lands.

Property rights in rivers and riverine lands
With European settlement, the continent of Australia received not only the common law as it related to land but also imported management practices which had been developed over many centuries in England and Ireland. The appropriateness of these practices is increasingly problematic as evidence mounts that modern “scientific” approaches to the management of natural resources such as rivers and riverine lands are unsustainable.

For both tidal waters such as the Brisbane River, and non-tidal waters, there is an intricate overlay of property rights residing in the waters and the beds of the waterways, some held by the Crown, some by private holders, and some through indigenous rights and interests arising from the survival of native title. In addition, some private holders of riverine lands also have, through the doctrine of accretion, the ability to increase their land holdings at the expense of the Crown when they adjoin tidal waters.

Hallmann (1973, p.188) observes that as a general rule:

‘[w]here lands are bounded by tidal waters, the common law rule is that the boundary is the mean high-water mark, i.e., the mean of all high tides including the spring and neap high tides taken over a sufficiently long period. The foreshore between mean high-water mark and the low-water mark belongs at common law to the Crown.’

Further, Hallmann observes that:

‘[a]t common law, riparian rights and the right to navigation of an owner of land having frontage to tidal water were natural rights, not easements, and these passed to him without express mention on transfer. Thus they form an exception to the indefeasibility conferred by Torrens title where notice of such adjoining rights did not appear upon the title folio for the owner of the bed of the tidal water…’

Because all natural boundaries can change due to the force of nature, the title to riverine lands as described on a cadastre are ambulatory if they change imperceptibly. Hallmann (p189) writes that:

‘[t]he doctrine asserts that where there is an acquisition of land from the sea or its inlets or from a stream by gradual and imperceptible means, the accretion is held to become part of the adjoining land so as to be included in the title. Conversely, where land is eroded away or is encroached upon gradually and imperceptibly by the sea or by a stream, the owner of the adjoining land loses title to that extent. The test to be applied in either case as to title is to establish that the change was gradual and imperceptible. If the gain or loss was sudden e.g., by a storm from the sea or by a flash flood cutting a new river channel, title is not affected, even though the change may persist for years thereafter.
Imperceptible in this context means not noticeable from day to day; it does not mean imperceptible after a lapse of some considerable time. The doctrine is based on the theory that “from day to day, week to week, and month to month, a man cannot see where his old line of boundary was”. The doctrine also requires that the change takes place naturally and unintentionally, i.e., was not assisted by the erection of works designed to bring the change about.’

There are also public rights over tidal waters, which are a form of public rights of way. Parry & Howes (1914, p. 24) describe these rights over tidal waters in their classic treatise on the Law of Easements as:

‘... privileges enjoyed by the community at large, to use the highway (and this term includes navigable rivers), or a path, for the purpose of going from one place to another. The right is not attached to the ownership of land, nor to any particular individual.’

Further, they state that (p. 146):

‘[w]here a river is tidal, that is, subject to the ebb and flow of the tide, the bed of such river belongs to the Crown, and the river is a public highway, and the public have the right to fish in it; but that portion of it above the influence of the tide belongs to the adjoining owners, subject, however, to the rights of passage of the public in boats.’

The position in relation to non-tidal waters is however somewhat different. Where riparian lands are bounded by a non-tidal waterway, the title boundary can be either the middle line of the waterway or the bank of the waterway. For the title of riparian land to extend to the centre of a non-tidal waterway, the common law presumption of usque ad medium filum aequae (“to the middle line or thread of the water”) must still exist. The presumption can only exist where it has not been statutorily abutted, and there is a requirement upon the owner of riverine lands to show that the presumption has not been excluded in its operation through the history of the land title since the Crown grant.

Hallmann (p.198) observes that:

‘[t]his is normally an almost impossible task and in view of these difficulties and of the fact the applicant if he owns the land ad medium filum will enjoy possession, whether or not the Registrar-General certifies title, very few applications are made, and if made, are successful.’

Finally, in this review of the intricate overlay of property rights residing in rivers and riverine lands a further right need to be discussed, namely water property rights. Such rights have traditionally been described as riparian rights. At common law the holders of riverine lands enjoy certain proprietary rights to the water flowing naturally in the abutting river or watercourse. These rights according to Hallman (p. 79) entitled the holder:

‘...to non-interference with the stream’s natural flow other than in exercise of similar rights of enjoyment by other owners fronting the stream, He was also entitled to use water for all ordinary and domestic purposes.’

These rights have however been considerably curtailed over the years in the various states with the riparian holders now retaining only a limited right (which can be suspended at any time by State agencies), to use water for domestic purposes and for stock and agriculture purposes only if in connection with a dwelling. The Water Act 1912 (NSW) for example provides riparian land holders with such limited rights, however in the recent White Paper on water reform (NSW DLWC 1999, p.13) it is noted that:

‘[n]o permit or authorisation is required for the works to divert this water. In areas of
intense rural residential development (eg through subdivision), the total use of riparian water can have a significant impact on the availability of water for other users and for environmental flow provision.'

It is a settled tenet of anglo-Australian land law that water property rights cannot be owned in gross, but must always be appurtenant to land. Common law riparian rights retain this feature, however with the increasing commodification of natural resources such as water, the nexus between land and water may be broken in new classes of licensed water entitlements. Water reform proposals in Australia are suggesting that such a property based restriction may be relaxed if the trading of water entitlements is to further develop (NSW DLWC, 1999 p. 12).

There is considerable concern that the breaking of this nexus in new forms of water entitlements could have unintended results; for example, the Australian Property Institute (2000, p. 8) in its submission on the NSW White Paper stated that:

‘[I]t is the Institute’s advice that agricultural production could suffer if water is not made available for irrigation, and simply traded like any other commodity. Investors could accumulate licenses and withhold them from the market place due to over valuation. The API is concerned that irrigation licenses have recently escalated to historically high levels, many of which are beyond the ability of agricultural interests to purchase.’

This complex overlay of property rights in riparian lands suggests that the management of rivers and riverine lands is a task which is fraught with uncertainty. As Lane (2000, p. 12) states:

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

Before turning to the issue of indigenous property rights and river management, it is worthwhile reflecting on how problematic legal maxims in this area have become. For example, the notion that the flow of water cannot be owned, as discussed in Williams v Morley (1824) 2 B & C 910:

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

In the same vein, the impending commodification of water can only occur through the conferring of comprehensive management powers on the States, and yet as Clarke and Renard (1970, p. 489) observe this can only occur if government:

‘… commit[s] the common law heresy of granting property in water.’

Clearly, there remain legal issues in both rivers and riverine lands, which are problematic, a reflection of the plurality of property rights residing in such lands and waters.

Indigenous property rights, and rivers and riverine land management
Indigenous property rights and interests arising from the survival of native title may potentially be present in tidal and non-tidal rivers and riverine lands.

In addition, in Mary Yarmirr & Ors-v-Northern Territory of Australia & Ors (Yarmirr)
(1998) 1185 FCA (4 September 1998), it was determined that native title also existed in relation to the seabed and the sea. The decision is currently subject to an application for special leave to appeal to the High Court, and may result in a final clarification of the geographic extent of Australia’s common law (Bowen 2000, p. 5).

The issue of indigenous property rights surviving in rivers and riverine lands is further complicated by the increasing attempts by State and Commonwealth governments to create private property rights in natural resources such as marine species stock (“fishing property rights”) and non-tidal waters (“water property rights”). As Clarke & Rennard (1970, p. 475) observe:

‘[f]or many years, governments have exercised an important role in the control, allocation and distribution of Australian surface water resources … [D]issatisfaction with the common law riparian doctrine…created the need for legislative intervention; [and a need] to examine the evolution of legislation conferring power on governments to control surface waters …’

This development of private property rights in water has in itself been further complicated by the recent decision of the High Court in *Yanner v Eaton* (1999) HCA 53 (unreported 7 October) (*Yanner*) at p. 12, where the question of ownership and the statutory vesting of “property” in the Crown was closely considered. The Court recognised that the State had the necessary power to preserve and regulate the exploitation of important natural resources, but significantly the statutory vesting of ownership of the natural resource was held to not have occurred, for the following reasons:

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

Further:

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

Because there are a large range of public and private property rights and interests residing in rivers and riverine lands, determining the nature and extent of any surviving indigenous property rights presents significant practical difficulties. As Lane (2000 p. 13) observes:

‘[t]here are problems in defining the extent of common law recognition of native title, and the approach to be taken to extinguishment or regulation by governments. Where native title exists, there are doubts about the ability of the Native Title Act to protect it adequately.’

As stated earlier, government moves to create private property rights in natural resources remain problematic, and hence current river and riverine land management regimes may not necessarily significantly diminish or extinguish indigenous property rights. As Tan (1997, p. 198) observes:

‘[I]t is difficult to say with certainty whether native title to water resources has or has not been extinguished because of the extremely complex regulatory regimes in all jurisdictions. Therefore, as with land claims, water claims must be considered on a case-by-case basis.’
Further, as Bartlett (2000, p. 253) points out, to abrogate indigenous interests in water:

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

If it is accepted that indigenous property rights in rivers and riverine lands may have survived to varying degrees throughout Australia, then it would appear only prudent for an understanding to be sought as to what these indigenous rights and interests can offer in terms of melding those most evident desirable features with current regimes of riparian land use management.

Rather than being viewed as a hindrance to economic development, the melding of indigenous land management values and techniques with anglo-Australian land management practices may just result in a level of understanding of sustainability and carrying capacity which has yet to be experienced. The long history of indigenous occupation prior to European settlement suggests, according to Lane (2000, p. 12), that:

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

If indigenous land management values and practices were to be melded with existing river and riverine land management techniques, Australia would fall into line with many other Pacific countries that have a complex body of traditional practices which coexist in varying degrees with “modern” land administration and management. These melded approaches have been the subject of much scholarly research and demand greater and careful consideration (Pulea 1984; Crocombe 1987; Pulea and Farrier 1994).

At another level, the recognition of indigenous land values and management techniques may be important tools in the possible settlement of native title claims, and a fairer and more just resolution of fundamental compensation issues, which are rapidly demanding resolution. If indigenous rights and interests are incorporated into existing regimes of riparian land use management, it could be argued that this expression of respect and recognition may evidence a greater accommodation within the now dyschronous (separate in time) paradigm of Australian land law.

Sharp (2000, p. 4) usefully differentiates between these indigenous and non-indigenous notions of water property rights in the following way:

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

Further, Sharp (p. 5) states that:

‘[t]here are other major differences between salt water peoples around Australia. For instance, what constitutes salt water country varies. For mainland peoples it may extend inland for miles to country where the rivers cease being tidal and salty.’
In addition, arising from the appeal in *Yarmirr*, the current hiatus over the geographic extent of Australia’s common law is creating an impetus for attempts to reach an accommodation between indigenous and non-indigenous notions of tidal water property rights. As Smyth (2000, p. 10) observes:

‘[a]t some point, however unwillingly, governments must respond to these initiatives. The current status of marine native title law, which recognises native title rights in the sea as coexisting in an inferior relationship with other rights, has lulled policy makers into inaction. It appears we must wait for a High Court decision to clarify Indigenous peoples’ legal claims to sea country and saltwater resources.’

Importantly, other discourses on indigenous property rights can also be found in different but somewhat similar form in New Zealand (Heremaia 2000) and Canada (Sutherland 2000), and show that a pluralist approach to natural resources such as rivers and riverine lands is both practical and achievable. However, what is required in Australia is a more eloquent discourse, one which rejects popular sophistry and concentrates on the development of an endogenous approach to the agglomeration of indigenous and non-indigenous riverine values and practices.

References


