Water law, the High Court and techniques of judicial reasoning

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The status of rights and interests in relation to water has never been unambiguous. Are they rights of access, of use or of property? Is the status of individual rights the same as the status of the statutory rights of the State to the use and control of water? Much depends upon which stage of the hydrological cycle is relevant: water in its natural state, water stored in a reservoir, water piped to a distant destination, or water contained in a receptacle. The High Court has recently addressed some of these issues in the context of s 51(xxxi) of the Commonwealth Constitution restricting acquisition of property to acquisition on just terms. In undertaking this analysis the High Court has revealed an interesting range of approaches to legal reasoning. This article seeks to review some of these issues.

INTRODUCTION

It is rare for the High Court of Australia to be given an opportunity to comment upon the doctrinal foundations of the legal arrangements for managing water resources in Australia. The evolution from a common law system, based upon individual rights of access to water, to a statutory system, based upon the right of the Crown – now the State – to the use and control of water resources, was addressed by the High Court in 1955[1] but not again until its decision in the *ICM Agriculture* case in 2009.[2] The conferment of such a right upon the State introduced indirectly into Australia the concept of the public domain in relation to water resources – a concept well recognised in civil law jurisdictions with their distinctive techniques of legal reasoning. This laid the foundations for the strategic management of water resources by the executive in exercise of this statutory right.

The form, structure and language of the law relating to the environment and its natural resources in Australia have changed dramatically over those five decades. In 1955 the focus of the law was the facilitation of the use and development of natural resources. The later decades of the 20th century saw increasing emphasis being given to the protection of the environment and the conservation of its natural resources. In the 1990s ecologically sustainable development was seen by many as the concept that would bring together the development of natural resources and the protection of the environment in achieving the economic, social and ecological objectives of the community. Indeed, the Vice-President of the International Court of Justice identified the principle of sustainable development as the principle that would "harmonise" the needs of development and the necessity to protect the environment.[3] Ecologically sustainable development is thus emerging as the standard that informs the exercise of public rights and private rights and the discharge of public duties and private duties.[4] Accordingly, it impacts upon the strategic and regulatory functions of the public sector as well as the strategic and operational functions of the private sector. In this way, it underpins responsibility for past activities, current activities and future activities that relate to the use and development of the natural resources of the environment. This applies to water resources as it does to natural resources generally.

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[1] *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317.

[2] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87.

[3] *Judgment in the Case Concerning the Gabcikovo-Nagymaros Project* (1998) 37 ILM 162 at 205.

[4] In relation to natural resources generally, see Fisher DE, *Australian Environmental Law: Norms, Principles and Rules* (2nd ed, Thomson Reuters, 2010) Chs 6 and 7, and in relation to water resources, see Ch 7 at pp 170-172.

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THE EMERGENCE OF A PUBLIC DOMAIN REGIME

The right of the State – originally the Crown – to the use and control of water resources in Australia emerged towards the end of the 19th century. One of the earliest examples was the *Water Rights Act 1896* of New South Wales. In 1955 Fullagar J in the High Court said this about "the real object" of this Act:

> [It] was to enable the Crown, in a country in which water is a comparatively scarce and important commodity, to exercise full dominion over the water of rivers and lakes and to undertake generally the conservation and distribution of water.[5]

The use of the word dominion is significant. It means something in the nature of rights of political control or of sovereignty: an inchoate public domain regime. How did the High Court characterise the right of the State to the use and control of water resources in 2009? In this way:

> The vesting of rights to the "use" and "control" of water constituted an exercise of sovereignty in the sense that the rights so vested were based on the political power of the State.[6]

The exercise by the State of its rights is accordingly an exercise of political power, in the sense that the rights are exercisable for the public benefit or in the public interest. But what is for the public benefit and what is in the public interest are often matters of controversy. However, in 2009 the High Court explained clearly and concisely what this means:

> The term "in the public interest" is one of broad import. When used in a statute, the term classically imports a discretionary value judgement to be made by reference to undefined factual matters confined only by the subject matter, scope and purpose of the statute in question.[7]

Interestingly, the "only" restrictions are the subject matter, scope and purpose of the legislation. These are – in the context of environmental law – substantial restrictions.

A MATRIX OF INSTRUMENTAL RULES

The ecologically sustainable development of water resources does not stand alone in the legal arrangements for their management. It may be seen to sit at the apex of the system or to underpin it. Either way, it is one among a number of emerging rules which govern how water resources are managed. These rules perform different functions and assume different forms. For example:

- statements of value or principle;
- strategic rules;
- regulatory rules;
- liability rules; and
- market rules.[9]

Statements of value express the fundamental concepts and principles upon which the system is based. Strategic rules indicate the broad direction of decision-making or operational activity in the management of water resources. Regulatory rules explain how decisions about the future use and development of water resources are to be made and activities to be undertaken. These include the imposition of procedural obligations and operational obligations. The former state how decisions are made, eg the range of matters that must be considered, any priorities associated with these and the expected outcome of the decision-making process. The latter include restrictions upon activities without authorisation or requirements about the terms and conditions on which such operational activities are able to be undertaken. Then there are liability rules, which indicate directly or indirectly the consequences of a failure to comply with any of these regulatory rules. For example, the breach of a duty may lead to an injunction, the imposition of a penalty, an award of damages, an administrative order for compliance, a combination of these or others. Then there are market rules, which support the use of economic and commercial instruments as mechanisms for managing water resources. For

[5] *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317 at 331 per Fullagar J.

[6] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [54] per French CJ, Gummow and Crennan JJ.

[7] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [20] per French CJ, Gummow and Crennan JJ.

[9] See Fisher, n 4, pp 11-13.

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example, the creation of water entitlements in a way and in a form which lead to their intrinsic capacity to be traded. In other words, the creation of what economists call property rights or rights in the nature of property rights. Whether they are rights of property for the purposes of the law is a controversial issue and one which attracted the attention of the High Court in this case in 2009.

THE FUNCTIONS OF INSTRUMENTAL RULES

The rules described in the previous paragraph perform different functions within the legal system. They are all rules in the sense that they set standards of decision-making or standards of behaviour or of conduct. Some are relatively general, while some are relatively specific. A number are specific to the point of enforceability in the traditional sense of this expression. But what is important is the relationship between each of them. The tendency of environmental legislation in Australia is to state the relationship between all of these different types of rules, to recognise that they perform different functions and, accordingly, to afford to them different normative values. Some are directly enforceable. Others are not. But each informs the others. For example, a decision whether to grant a water entitlement cannot ignore the stated objects of the legislation and these include aspects of ecologically sustainable development. One of the principles of ecologically sustainable development is the precautionary principle. Accordingly, a failure to consider it or apply it – depending upon the nature of the obligation – may endanger the validity of the decision and render it liable to a declaration of nullity. Similarly, the assessment of what penalty to impose for the commission of an offence, such as the pollution of water, may need to address the principles of ecologically sustainable development.

All of these rules or at least some of them will play a part in judicial reasoning in any particular set of circumstances. How the legislation is structured, how the rules are structured and the language according to which they are structured are beginning to impact significantly upon the processes of reasoning adopted by the courts. Traditionally, courts in common law jurisdictions have adopted forms of inductive reasoning moving from the particular to the general. Courts in civil law jurisdictions have tended to apply general statements in codes in particular sets of circumstances through processes of deductive reasoning. The structure of environmental legislation as a variegated set of rules along the lines discussed indicates a form of deductive reasoning. But it is not as simple as that. Each of the several provisions in the legislation needs to be set off against the others in contrapuntal fashion. Accordingly, new processes of reasoning are beginning to emerge. The decision of the High Court in 2009 in the *ICM Agriculture* case is an example of this. Let us now turn to an examination of the issues in this case.

THE CONTEXT OF THE DECISION

The National Water Initiative (NWI) of 2004 – in the form of an intergovernmental agreement – is designed to achieve the sustainable use and development of all water resources in Australia by means of appropriate planning, regulatory and market arrangements.[10] As the High Court itself noted, "one of the key objectives of the NWI was to return currently over-allocated or overused water systems to environmentally sustainable levels of extraction".[11] This is directed particularly but not only at the water resources of the Murray Darling basin. The implementation of the *Water Act 2007* (Cth) will eventually enable the Commonwealth to become more directly involved in how the water resources of the Murray Darling basin are managed through the formulation and implementation of the Murray Darling basin plan and its associated water resources plans. However, it remains a matter essentially for the States to ensure compliance with the 2007 Act and its associated plans in accordance with the laws of each of the four basin States.

It is open, and indeed it always has been open, to the Commonwealth to influence the management of water resources in the States through the provision of funds in support of particular projects or particular policies. In the *ICM Agriculture* case the issues revolved around the funding

[10] See generally Fisher DE, "Delivering the National Water Initiative" in Hussey K and Dovers S (eds), *Managing Water for Australia: The Social and Institutional Challenges* (CSIRO Publishing, 2007) pp 113-126.

[11] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [12] per French CJ, Gummow and Crennan JJ.

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arrangements between the Commonwealth and, in this case, New South Wales, the relevant statutory and regulatory arrangements in New South Wales and the relationships between them. There was accordingly no opportunity for the High Court to consider the provisions of the *Water Act 2007* (Cth). However, it was the involvement of the Commonwealth as the provider of funds that led to a detailed analysis of whether there had been an acquisition of property other than on just terms contrary to s 51(xxxi) of the Commonwealth *Constitution*. It was this context – the acquisition of property on just terms – that provided the opportunity of the High Court to analyse in detail the legal characteristics of water resources, water and water entitlements.

How did these issues arise? A group of agriculturalists in New South Wales held statutory bore licences enabling the extraction and use of groundwater for irrigation under the *Water Act 1912* (NSW). The Commonwealth, acting through the National Water Commission in accordance with the *National Water Commission Act 2004* (Cth), entered into an agreement with New South Wales, according to which the Commonwealth provided funds for State-based schemes. In this case Commonwealth funds were made available to New South Wales to bring about the reduction of water available for irrigation in the area of these agricultural activities in New South Wales. Although the Commonwealth partially funded the scheme, operationally it needed to be implemented by varying the relevant water plans in New South Wales. Accordingly, the bore licences held by this group of agriculturalists were replaced with aquifer access licences under the *Water Management Act 2000* (NSW). The water plans determining the quantity of water available under the aquifer access licences were varied so that the amount of water able to be extracted from the relevant aquifer was substantially reduced. The irrigators received structural adjustment payments in consequence of these changed arrangements. The irrigators, however, claimed that their property had been acquired otherwise than on just terms contrary to s 51(xxxi) of the *Constitution*.

A number of these issues had earlier been litigated in the courts in New South Wales.[12] However, these proceedings were in the form of proceedings commenced in the original jurisdiction of the High Court. The High Court itself presented the issue in this way:

> The plaintiffs [the irrigators] contend that the steps taken under the 2000 Act to reduce their access to groundwater amount to an acquisition of their property otherwise than on just terms, contrary to the constitutional guarantee found in 51(xxxi) of the *Constitution* and interpreted by decisions of this Court. Pursuant to r 27.08 of the *High Court Rules 2004* there is before the Full Court a special case posing five questions for determination.[13]

The six of the seven justices responded in this way:

> The replacement of the plaintiffs' bore licences did not constitute an acquisition of property within the meaning of s 51(xxxi) of the *Constitution*.[14]

While the funding was provided partially in this case by the Commonwealth, the instruments achieving the reduction in the amount of water available were governed by the law of New South Wales. How did s 51(xxxi) of the *Constitution* become relevant?

THE RELEVANCE OF S 51(XXXI) OF THE CONSTITUTION

The judicial analysis focused in this respect upon ss 96 and 51(xxxvi) and their relationship with s 51(xxxi). Section 96 enables the Parliament to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. Section 51(xxxvi) enables the Parliament to make laws with respect to matters in respect of which the *Constitution* makes provision. The issue of significance in this case was whether these legislative powers and in particular the power in s 96 were limited by the "constitutional guarantee" in s 51(xxxi). Three of the justices put it this way:

> The question argued in this matter…is whether s 51(xxxi) intersects in some relevant manner with s 96. More particularly, in fixing "such terms and conditions as the Parliament thinks fit" for the grant of

[12] *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196; 163 LGERA 429.

[13] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [8] per French CJ, Gummow and Crennan JJ.

[14] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [89] per French CJ, Gummow and Crennan JJ and at [155] per Hayne, Kiefel and Bell JJ.

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> financial assistance to a State under s 96, may the Parliament fix a term or condition that requires compulsory acquisition of property by the State otherwise than on just terms?[15]

What, then, were the terms and conditions attached to the grant of financial assistance in this case? This was the detailed answer:

> By the Funding Agreement the State agreed to carry out "the Project". So far as immediately relevant, it is enough to notice that "the Project" required the State (A) to convert all water licences in the Lower Lachlan Groundwater System to licences under the Water Management Act 2000; (B) to develop a method for reducing water entitlements to the Groundwater System that took into account a licence holder's historical extraction of water from the relevant system; and (C) once that method had been agreed by the Prime Minister and Premier of New South Wales, to achieve a reduction of 56 percent in water entitlements in respect of the Lower Lachlan Groundwater System by 1 July 2016.[16]

Significantly, this imposes an obligation upon the State. Can the Commonwealth impose such an obligation upon the State or does such a requirement contravene the constitutional guarantee in s 51(xxxi) of the *Constitution*? The High Court responded by acknowledging in a traditional fashion without changing the established approach that there is a connection between ss 96 and 51(xxxi). Accordingly, without going into the subtleties of these constitutionally-based arguments, the conclusion reached by the High Court was clear. Namely:

> The result is that the legislative power of the Commonwealth conferred by s 96 and s 51 (xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms. The plaintiffs' [irrigator's] case, to that extent, should be accepted.[17]

Section 51(xxxi) of the *Constitution* was accordingly relevant. It applied to the way New South Wales implemented its obligations under the agreement with the Commonwealth. This led to the review by the High Court of the principles underlying water law in New South Wales and in Australia.

THE DOCTRINAL FOUNDATIONS OF WATER LAW

Property

The High Court proceeded immediately to the next issue.

> But that is not the end of the matter. It is necessary now to consider whether the replacement of the plaintiffs' bore licences issued under the 1912 Act involved the acquisition of property other than on just terms within the meaning of section 51 (xxxi).[18]

As we have already noted, six of the seven justices decided that there had been no acquisition of property. The reasons for reaching this decision not only illuminate the fundamental doctrines of law as they relate to water resources but also highlight the tensions in how natural resources generally are managed; in this case, the tension in relation to water resources between, on the one hand, the public interest in ensuring that water resources are used and developed sustainably for the future and, on the other hand, the need to protect private interests in the use of water resources in the context of the rights of existing users – in this case, irrigators. In other words, how do you achieve a balance within the context of the law which seeks to protect two potentially conflicting aspects of the public interest: the interest of the community in the sustainable management of water resources; and the interests of individual members of the community in having their rights protected? Let us now move away from the subtleties of the *Constitution* to consider the doctrinal foundations of water law in Australia as they have emerged.

The acquisition of property on just terms is a complex concept involving three interrelated elements – property, acquisition, and just terms. Property is a difficult concept. Hohfeld, for one, has suggested that the confusion between non-legal and legal conceptions arises from "the ambiguity and

[15] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [136] per Hayne, Kiefel and Bell JJ.

[16] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [99] per Hayne, Kiefel and Bell JJ.

[17] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [46] per French CJ, Gummow and Crennan JJ.

[18] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [47] per French CJ, Gummow and Crennan JJ.

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looseness of our legal terminology". Property is an example of this. Thus:

> Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights [and] privileges relate; then again – with far greater discrimination and accuracy – the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a "blended" sense as to convey no definite meaning whatever.[19]

Notwithstanding the width of the concept of property, whether it relates to a physical object, a legal interest or a set of legal relations, its distinctive characteristic is that it exists in relation to a clearly identifiable institution or person. Its original meaning is derived from the Latin adjective proprius. The subject matter may be as wide or as narrow as can be but, whatever the subject matter, it is linked legally to this clearly identifiable institution or person and no other institution or person. The institution or person in question may, of course, change in consequence of a transfer or some other form of dealing.

So what is the subject matter of dispute – the property – in this case? There are at least three possibilities:

- water in its natural location – in an underground aquifer as in this case or flowing through a watercourse;
- water confined – probably artificially confined – within identifiable boundaries such as an enclosed lake, pond or container; and
- an interest in the water recognised or granted by a rule of law either in accordance with the common law or in accordance with legislation.

To extrapolate these to the circumstances of this case, the three are:

- the water located naturally in the aquifer in question;
- any water extracted from the aquifer and located either on the surface of the land, in an artificial channel, in a pipe or in some other conduit; and
- the licence to extract and use the water.

Much of the judicial analysis in this case began with the status of water under the common law and then its status under the inchoate public domain system created by the legislation in Australia. This proved to be particularly significant when the High Court then went on to discuss what is acquisition. But let us leave that issue aside for the moment.

Water resources as common property

The development of the common law was by no means clear and uncontroversial. However, "by the middle of the 19th century, the English common law had settled many of the issues about rights to the use of water that had emerged during the industrial revolution".[20] The mature riparian doctrine applied to water flowing through a watercourse. It was essentially a right of access to the water. The High Court noted that "the underlying proposition was that water, like light and air, is common property (for the common benefit of man)".[21] In other words, it is a legal relationship between the community and its water resources. There is no identified or indeed identifiable institution or person. The same – at least by implication – is true of the common law in relation to groundwater. The owner of the surface of the land has no more then a right of access to any water stored or flowing underground. The importance of this emerges from this comment:

> The settlement in the 19th century of these common law rules about riparian rights and use of groundwater must not be permitted to obscure some important underlying ideas that find reflection in the rules that were established.[22]

[19] Hohfield WN, "Fundamental Legal Conceptions" (1913) 23 *Yale Law Journal* 16 at 21-22.

[20] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [109] per Hayne, Kiefel and Bell JJ.

[21] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [109] per Hayne, Kiefel and Bell JJ.

[22] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [111] per Hayne, Kiefel and Bell JJ.

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This takes us to the fundamental principles underlying the doctrines of the common law. What were these?

Two appear to be particularly significant. Here is one:

> First and foremost there was then, and still must be, a clear recognition of the difficulty of applying notions of ownership or property to water in the ground or in a flowing stream. What exactly would be the subject of property rights? While still allowed to flow, no part of the water that flows in the stream can be isolated and tagged as the water "owned" by some person. And water in the ground may move more slowly but there is no less difficulty in identifying what would be the subject of the proprietary rights.[23]

Then there is this second issue:

> Next, even if these difficulties of identifying the object in respect of which proprietary rights were to exist could be overcome, should any private proprietary right be recognised?[24]

The analysis went on to emphasise that water is provided naturally for the common benefit of humankind. Accordingly, while the common law recognised individual or private rights of access in relation to water, they were based upon water as common property in the sense described. These rights of access existed in the absence of any institutionalised system for their recognition or creation. They simply existed by virtue of these rules of the common law.

A public domain system is intrinsically different. In this case rights of access to water are granted in accordance with an institutionalised set of arrangements. We have suggested that the conferment upon the State of a right to the use and control of water resources in Australia has created something like a public domain regime. Has this in any way affected the fundamental principles upon which the system – either common law or public domain – is based? The answer was this:

> Finally, it is of the very first importance to recognise that the common law principles established in the 19th century were directed to the adjustment of rights between landowners. The issue in this case arises, not because there has been some adjustment of those rights, but because the polity has sought to regulate generally the access allowed to a common resource.[25]

In other words, the common law regulated access to a common resource. Now the polity regulates access to a common resource. Three of the justices specifically examined the text of the legislation in New South Wales from its creation in 1912 until its reformulation in 1986 and then in 2000. Thus:

> It will be noted the language…is the same as the language used in respect of surface water in the late 19th century as described earlier; it is language consonant with a recognition that water is a common resource.[26]

So under the common law, water fundamentally is a common resource; and under the legislation in Australia, water is fundamentally a common resource. While this may not be the language of the legislation, it is the effect of the legislation. In other words, concepts of property are not helpful – certainly not helpful in relation to the fundamental principles upon which the water law is based. Perhaps concepts of property are more helpful once rights of access have been exercised and the water is lawfully and clearly within the control of an identifiable institution or person.

Water entitlements as property

The property, which the irrigators claimed New South Wales had acquired with funds provided by the Commonwealth, comprised the bore licences granted under the 1912 Act and substituted by the acquifer access licences granted under the 2000 Act. To express the issue more generally – are statutory water entitlements property? This question had never been answered judicially, it would seem, but over recent years there have been judicial analyses of these issues in relation to other natural

[23] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [112] per Hayne, Kiefel and Bell JJ.

[24] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [113] per Hayne, Kiefel and Bell JJ.

[25] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [115] per Hayne, Kiefel and Bell JJ.

[26] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [73] per French CJ, Gummow and Crennan JJ.

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resources, eg minerals and fisheries.[27] However, the characterisation of the nature of interests in one resource cannot necessarily be extrapolated to another resource. What is important is the nature of water resources and of water; in particular, its fugacious nature and consequently its unpredictability and uncertainty – issues directly addressed by the High Court in this case.

The unpredictability and uncertainty of water resources are confounded by the unpredictability and uncertainty of the statutory arrangements for the management of water resources in the context of this emerging public domain regime. The criteria according to which rights are described as rights of property are reasonably well established. These include:

- the capacity of the right to be legally protected;
- the definition of the substance of the right;
- the identification of the holder of the right;
- the exclusive use and control of the right by the holder;
- the capacity of the right to be transferred; and
- the permanence, stability and security of the right.

It is suggested that in practice it is the last that is probably the most important and indeed controversial. Apart from suspension and cancellation, water entitlements generally are inherently susceptible to variation in accordance with the legislation. There is no doubt that statutory water entitlements are valuable and tradeable. Indeed they are traded. This occurs notwithstanding their inherent susceptibility to variation and change. Three justices concluded that it was unnecessary in the circumstances "to determine whether the bore licences were of such an insubstantial character as to be no more than interests defeasible by operation of the legislation which called them into existence".[28] However, three other justices readily accepted "that the bore licences that were cancelled were a species of property".[29] On the other hand, Heydon J positively rejected "the contention that the bore licences were not property on the ground that they conferred only rights which were inherently susceptible to modification or adjustment".[30] Accordingly, overall, the legal status of statutory water entitlements remains somewhat equivocal.

Acquisition

The judicial analysis then proceeded to respond to the question of whether in the circumstances there had been an acquisition – on the assumption that the water entitlements were either property or a species of property. The approach to this question was clear. Having noted that the licences were "a species of property", the argument then proceeded along these lines:

> That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so. [That is, that they are a species of property.] It must also be accepted, as the fundamental premise for consideration of whether there has been an acquisition of property, that, until the cancellation of their bore licences, the plaintiffs had "entitlements" to a certain volume of water and that after cancellation their "entitlements" were less. Those "entitlements" were themselves fragile. They could be reduced at any time, and in the past had been. But there can be no *acquisition* of property unless some identifiable and measurable advantage is derived by another from, or in consequence of, the replacement of the plaintiffs' licences or reduction of entitlements. That is, another must acquire "an interest in property, however slight or insubstantial it may be."[31]

The analysis has subtly switched from an analysis of the status of licences to an analysis of the status of the entitlements to certain volumes of water associated with these licences. It is a question neither of ownership of the water nor of ownership of the licence giving access to the water. The question that has emerged is whether the entitlement to a specific volume or quantity of water to which there is access constituted an interest that could be acquired. Or, in the more traditional language used in this

[27] See eg Fisher DE, "Rights of Property in Water – Confusion or Clarity" (2004) 21 EPLJ 200 at 211-214.

[28] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [80] per French CJ, Gummow, Crennan JJ.

[29] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [147] per Hayne, Kiefel and Bell JJ.

[30] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [215] per Heydon J.

[31] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [147] per Hayne, Kiefel and Bell JJ.

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context, whether the State had received "some identifiable and measureable advantage" from the changes that it had made to the interests – whatever their nature might be – of the irrigators. Three of the justices of the High Court responded in two ways. First:

> The four considerations set out earlier in these reasons (the replaceable and fugitive nature of groundwater; that the licences in issue are a creature of statute and inherently fragile; that groundwater has not hitherto been thought to be a subject of property; and that the rights vested in the State are statutory rights for the purpose of controlling access to a public resource) all point towards the conclusion that the State gained no identifiable or measurable advantage from the steps that have been taken with respect to the plaintiffs' water licences and entitlements.[32]

From the point of view of both of the irrigators and of the State, nothing had changed. Secondly:

> Since at least 1966 no landowner in New South Wales has had any right to take groundwater except pursuant to licence. The rights the plaintiffs had under their bore licences (in particular, their right to extract certain volumes of water) did not in any sense "return" to the State upon cancellation of the licences. The State gained no larger or different right itself to extract or permit others to extract water from that system. It gained no larger or different right at all.[33]

Three other justices commented consistently but perhaps even more powerfully in these words:

> However, in the present case, and contrary to the plaintiffs' submissions, the groundwater in the LLGS [Lower Lachlan Groundwater System] was not the subject of private rights enjoyed by them. Rather, and as these reasons have sought to demonstrate, it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. The State exercised that power from time to time by legislation imposing a prohibition upon access to and use of that natural resource, which might be lifted or qualified by compliance with a licensing system. The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an "acquisition" by the State in the sense of s 51(xxxi). Nor can it be shown that there has been an acquisition in the necessary sense by other licensees or prospective licensees. They have at best the prospect of increasing or obtaining allocations under the new system applying to the LLGS.[34]

Quite clearly, therefore, there was no acquisition of property. Even if the licences were a species of property, the State had acquired nothing, The State was and always had been – certainly under the arrangements by which the State exercises its exclusive right to the use and control of water resources – able to control the use of water resources as the common resources or common property of the community. This had probably been the position under the common law and certainly was the position under the legislation. The legislation simply institutionalised and controlled the procedures according to which the State exercised this right, which has been and remains the fundamental principle upon which the whole system is based. Accordingly, the State, acting in accordance with the legislation, can and in this case had interfered with the rights of the irrigators by reducing the quantity of water available. This was the policy of the Commonwealth and the policy of the State. The implementation of the policy was funded by the Commonwealth and implemented by the State. The constitutional guarantee for an acquisition of property to be on just terms had not been infringed. This was fundamentally and simply because there was no acquisition within the meaning of this provision.

The reasoning process

What is interesting is that this conclusion was reached by a process of deductive reasoning along these lines:

- the fundamental principle of water resources as common resources or common property;
- the function of the State to be the guardian or the steward of these water resources;
- the institutionalisation of how this function is performed by the enactment of the statutory right of the State to the exclusive use and control of water resources;
- the original grant of the bore licences under the 1912 Act;

[32] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [149] per Hayne, Kiefel and Bell JJ.

[33] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [150] per Hayne, Kiefel and Bell JJ.

[34] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [84] per French CJ, Gummow and Crennan JJ.

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- the amendment of the water plans to require the reduction of water available for irrigation in the area;
- the grant of acquifer access licences accordingly in substitution for the bore licences; and
- the reduced quantity of water available to the irrigators in question in the locations specified.

Let us bear in mind that the irrigators in this case received structural adjustment payments but no compensation for interference with their rights. Whether compensation should be payable is another matter. Since there was no acquisition of property, the issue did not arise.

THE CRITICAL FUNCTION OF PROPERTY

Doctrinal foundations

The analysis undertaken by Heydon J was remarkably different. His Honour's analysis focused upon the critical function played by property in the social and economic affairs of the community and the importance of compensating for any expropriation or extinguishment of valuable rights relating to property. An extensive range of reasons supported this approach.[35] These included:

- the need for unambiguous statutory language to enable expropriation without fair compensation;
- payment of compensation is a matter of justice;
- payment of compensation is an element of the rule of law;
- compensation for expropriation is economically efficient and desirable;
- compensation for expropriation has been a fundamental principle of the common law and of the civil law – eg by reference to Magna Carta, the writings of Blackstone, the writings of Grotius, the French Declaration of the Rights of Man and of the Citizen of 1789, the French Constitution of 1791, the French Civil Code, and elements of many constitutions;
- the protection of property rights essential to the liberalism of Locke, Bentham and Maine;
- the importance of private property rights in the debates on the formulation of the Commonwealth *Constitution*; and
- the way in which the High Court has interpreted and applied s 51(xxxi) of the *Constitution* over many years.

This led to the endorsement by Heydon J of the proposition that "one should lean towards a wider rather than narrower concept of property, and look beyond legal forms to the substance of the matter".[36]

Property

Against this background, Heydon J proceeded to answer the question whether the bore licences granted under the *Water Act 1912* (NSW) were property. The rights associated with the licences were not common law rights but statutory rights. They were "a form of property". The reasons were clear:

> A bore licence was definable. It was identifiable by third parties. It had a considerable degree of permanence and stability. Once granted, it could not be terminated, except for cause, before its lapse or expiry. The Ministerial Corporation was under a duty to renew it on payment of a prescribed fee. And it was capable of assumption by third parties either by transfer with the land to which it was connected or by transfer separately from the land.[37]

In this respect there was much common ground between the views of Heydon J and those of the other six justices.

What perhaps emerges as a critical distinguishing factor is the degree of security or stability afforded to these licences. Clearly the legislation enables their modification and adjustment. What appears to be important, however, is the degree of security or stability associated with the licences.

[35] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [175]-[189].

[36] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [189] quoting Gummow J at *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* (1990) 22 FCR 73 at 121.

[37] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [197] per Heydon J.

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Heydon J's response to this was clear. First:

> Some key characteristics of the bore licences must be borne in mind. Not only were the bore licences renewable, non-cancellable and transferable. Not only could the water allocations under the bore licencees not be reduced at will. But they had other relevant characteristics as well.[38]

These characteristics reflect what may be described as commercial as well as legal perspectives. Thus:

> Bore licensees were persons who in some cases had paid consideration for a transfer; in all cases had paid fees; in all cases were entitled to rely on the licences as increasing the value of their land; in many cases were obliged, in order to maintain the licences, to sink bores; in many cases relied on the licences as having sufficient practical content to justify investment by sinking bores, introducing and maintaining equipment capable of extracting water from those bores, developing surface irrigation channels, and buying overhead sprinkler systems (in the case of the first two plaintiffs, $7.5 million worth); in many cases had used the licences as security for loans; and in that respect had dealt with lenders who were entitled to have relied in good faith on the continuation of the licences.[39]

While the irrigators did not have any right to "an immutable quantity of water",[40] the legislation did not confer "an uncontrolled discretion to reduced allocations at will".[41] There accordingly emerged an array of private interest considerations as well as public interest considerations in addressing the degree of security or stability attached to these licences. The final conclusion reached by his Honour was thus:

> The powers [of intervention in the public interest] did not render the bore licenses so "slight" or "insubstantial", or so "inherently susceptible to modification or extinguishment", that they were incapable of being property. The breadth of the powers might affect the value of the property, but they were not so broad as to prevent it being categorised as property.[42]

The licences were for this purpose categorised as property. But had it been acquired by New South Wales?

Acquisition

The concept of acquisition has been analysed on many occasions by the High Court and much appears to have depended upon how the relevant legislation is characterised. Whatever the niceties and subtleties of these arguments, Heydon J appears to have been concerned to ensure that the constitutional guarantee in s 51(xxxi) of the *Constitution* would not "sink to the depths of a purely formal provision".[43] Accordingly, his Honour went directly to what was described as "the heart of the scheme".[44] Namely:

> The expropriation of bore licences was not a mere "incident" or "consequence" or "subservient" feature of the legislative scheme. It was at the heart of the scheme. The scheme could not have operated without a reduction in the entitlements of the bore licensees, and it depended on abolishing those entitlements and replacing them with different and lesser ones.[45]

This appears to strike at the practical outcomes of what had happened rather than the more formal legal outcomes of what had happened. In other words, a reduction in the actual amount of water available. This appears to focus upon the water as the subject matter of the licence rather than upon the legal relationship between the holder of the licence and the water as the subject matter of the licence. In this sense, what had happened could be seen to be a direct rather than an indirect reduction in the amount of water available. This, of course, was very much the contention of the irrigators.

[38] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [207] per Heydon J.

[39] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [207] per Heydon J.

[40] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [208] per Heydon J.

[41] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [208] per Heydon J.

[42] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [208] per Heydon J.

[43] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [218] per Heydon J.

[44] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [223] per Heydon J.

[45] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [223] per Heydon J.

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But the question remained – had New South Wales acquired something that it did not have prior to the implementation of these arrangements? Whether or not there was an acquisition thus depended "on the identification of some advantage accruing to New South Wales".[46] It had been argued that "the benefit gained by New South Wales is not water but the serving of certain public interest purposes".[47] There were three reasons to reject this approach. The first was that New South Wales had regained "complete control over water resources, namely the difference between the actual allocations licensees' entitlements and the allocations under the acquifer access licenses".[48] Secondly:

> The existence of the bore licensees' rights entailed a liability in New South Wales not to interfere with them unlawfully. The extinguishment of the bore licensees' rights relieved New South Wales of those liabilities. By the extinguishment of that liability, New South Wales obtained "relief from suit by the holders of the bore licences, and the obtaining of that relief was an acquisition of property by New South Wales."[49]

Then there was the third reason. This was what was described as the contingent increase in the capacity of New South Wales to take or grant rights to water. Since there was no way of knowing whether the quantity of water available under the acquifer access licences had been over-allocated or under-allocated, this created the possibility that New South Wales would have "gained something" that it did not have before the changes to the allocations – namely "a capacity to take more water itself or to issue more rights to others without damaging the goal of sustainability".[50] If that were to happen, it would be a benefit or advantage that New South Wales had acquired.

And then Heydon J made this interesting observation:

> The possibility that that capacity will be gained is a presently existing, direct and identifiable benefit or advantage accruing to New South Wales as a result of the extinguishment of the bore licensees' rights, even though it may not be proprietary in a conventional sense: it is thus acquisition of property by New South Wales.[51]

While this benefit or advantage was an acquisition of property, it was not perceived as a proprietary interest "in a conventional sense". It thus remains a paradox what is property in the conventional sense. Property is perhaps no more and no less than the existence or recognition of a power to control whatever is its subject matter. It may be a power to control vested in a public institution or in a private institution or person. In that sense it does not matter. The purposes for which the power may be exercised derive from other elements of the legal system. Property in this sense is an instrument recognised by the law, which identifies the holder of the right and the subject matter of the right. The legal relationship between these two and between other institutions or persons affected is governed by the wider legal arrangements – both common law and statutory – that govern how the right to control is exercised.

Conclusion

The several analyses undertaken by the High Court in the *ICM Agriculture* case address indirectly, it has been suggested, the tensions involved in managing natural resources, including water resources: the tensions between the public interest in ensuring the sustainable use and development of water resources for the future, on the one hand; and the need to protect existing private interests in the use of water, on the other hand. In other words, how to balance the public interest and the range of private interests involved. The issue arose in the particularly difficult and controversial context of the constitutional guarantee in s 51(xxxi) of the *Constitution*. This involves three difficult concepts: property, acquisition, and just terms. Although these concepts are elements of the legal system, they are also reflective of a wide range of potentially conflicting social, economic, cultural and political

[46] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [228] per Heydon J.

[47] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [230] per Heydon J.

[48] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [232] per Heydon J.

[49] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [234] per Heydon J.

[50] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [235] per Heydon J.

[51] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 84 ALJR 87 at [235] per Heydon J.

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values. The terminology of the constitutional guarantee does not allow the High Court to sidestep these issues. Words such as "acquisition" and "property" appear in judicial determinations in accordance with the common law, in legislation, and, of course, in constitutions. Their meaning in any particular set of circumstances may well reflect the context in which they appear – one or more of these three possibilities. For example, property in the context of the constitutional guarantee may not necessarily have the same meaning as in legislation about the environment, natural resources or commercial assets. In relation to water, for example, we have already identified water as a natural resource in situ, water as the subject matter of a right of access – common law or statutory – or water as a commodity confined in one way or another and able to be identified as such.

These issues have been addressed indirectly in relation to water in this case. What is particularly interesting about the judicial reasoning in this case is the point of commencement of the rationalisation process. Six of the justices based their reasoning upon the fundamental principle of water resources as common resources or common property. Heydon J based his reasoning upon the fundamental importance of property as a social and economic institution as well as a legal institution and hence the need for its protection from interference. It is no surprise that the application of these principles led to different results. In other words, where did the balance lie – with the public interest in ensuring the sustainable management of water resources or with the protection of private rights of property? Whether or not it should be a function of a court to resolve these issues, the way in which the constitutional guarantee has been formulated effectively imposes upon the High Court this responsibility. While the point of commencement of any analysis is the text of the constitutional guarantee, the way in which it is interpreted and applied in a particular set of circumstances reveals – as in this case – the fundamental principles underlying the legal arrangements for the management of water resources in Australia. The High Court has told us that water resources – either from the point of view of the common law or of the public domain regime created by legislation – are quintessentially common resources or common property. Any private interests in or in relation to water derive from that source and from no other source.


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