A WEB OF ABORIGINAL WATER RIGHTS

BY DR VIRGINIA MARSHALL

FOREWORD

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In chapter 8 of this important work, Dr Virginia Marshall quotes the United Nations *Water Development Report* of 2006 as making the self-evident comment that:[1]

> *"Water is power, and those who control the flow of water in time and space can exercise this power in various ways"*

The recognition of this fact provides part of the explanation as to why this book is important to the law and justice in Australia. However, the importance long precedes the work of the United Nations, and the adoption of universal human rights law to safeguard the basic entitlement of people everywhere (and indigenous people in particular) to have access to, and use of, water. Water is one of the essential elements: a precondition to human and other life forms, to the existence of planet Earth, and to the very beginnings of the universe itself.

Scientists tell us that water is a by-product of the formation of stars. Long millennia before the beginnings of human society on Earth, water emerged from the fusion of hydrogen and oxygen so as to create

[*] Justice of the High Court of Australia (1996-2009); Australian Human Rights Medal, 1991; Gruber Justice Prize, 2010.

[1] Ch 9.2 citing UNESCO, the Second United Nations World Water Development Report, *Water, a Shared Responsibility*, UNESCO, Paris, 4 October 2006.

gigantic clouds of water vapour that exist in the universe, not only in our galaxy but inferentially in galaxies beyond our imagination.

Without water, life in its myriad forms could not exist. Liquid water covers more than 70% of the Earth's surface. Two planets, Earth and Mars, have or have had significant oceans. When humans peer into the universe at celestial bodies, they are constantly searching for evidence of water. Without water, human beings, with their developed brains and consciousness, could not survive. The human body is constituted of up to75% water. Some water is ingested through food. Humans can live for a time without food. But without water, we quickly die. We need a lot of it. Much of the effort of the global community since the Millennium Development Goals of 2000, has been directed to ensuring reliable and ready daily access to safe drinking water that has, until now, been denied to billions of human beings.

Water is not only essential to the lives of individual human beings. It is crucial to human society. It is necessary to washing and purification, transport, the growth of agriculture, recreation and the development of enterprise and industry. Water is thus a chief ingredient to the survival and prosperity of the communities that allow humans to live together in relative peace and with access to water.

We know all these facts in a general way in Australia because our continental country is all too often subject to drought and severe water shortages. The first words of this book begin with reminders of the claims by political leaders, media and others that a particular drought is the 'worst for a hundred years' or the 'worst in living memory'. This recurring issue is important for us all. But most of us live in a relatively

narrow strip of land not far from the coastline of our huge country. The indigenous people, especially Australian Aboriginals, live, and have lived for millennia, in remote dry areas of the country rarely visited by their fellow citizens. This is the Australia that is rarely seen, except from a seat of an aeroplane traversing the Red Centre on the way to more hospitable places, where drinkable and safe water flows freely at the turn of a tap.

The mention at the outset of Dr Marshall's book of the great droughts to which Australia is prone, affords an immediate metaphor for a drought of a different kind. I refer to the gaps in the law of Australia that have afflicted indigenous peoples, especially the Aboriginal people, ever since the beginnings of European settlement. For nearly a hundred and fifty years after the establishment of the British penal colony in Sydney in 1788, the law of Australia did not recognise, or acknowledge in any way, rights in law belonging to the people native to the land.[2] Neither to land nor to water. In 1847, the Supreme Court of New South Wales stated "that [title to] the wastelands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown".[3]

This title of the Crown was originally held to be "inconsistent with any interest of the ancient owners… the aboriginal inhabitants".[4] Quite quickly, every colony in Australia went on to develop, institutions involving various forms of democracy, a by-product of the lessons learned by the British Government from the loss of the American settlements following their revolution of 1776. It is a sombre reflection

[2] *Attorney-General (NSW) v Brown* (1847) 2 SCR (NSW) (app) 30, applied *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971), 17 FLR 14, per Blackburn J.
[3] *Brown* (1847) 2 SCR (NSW) (APP) 30 at 33 per Stephen CJ.
[4] *Ibid*, 34-35.

on the limitations of legislative democracy, as it has operated in Australia, that none of the elected parliaments, colonial, state or federal, saw fit, during the long drought of the law, to repair and correct fully the fundamental legal principle that stood in the way, like a mighty dam, to enforce the hypothesis of "terra nullius". None released the healing waters of reform to the parched lands below. That action was taken, in the end, not by elected parliaments of the Australian nation. It was taken by a majority of Justices of the High Court of Australia[5] in *Mabo v Queensland [No.2]*.[6]

In order to comprehend the dimensions of the change in the understanding of the common law of Australia on this subject, it is essential to appreciate the foundations for the change. The first was the acceptance that a *factual* mistake had been made by the earlier judges in assigning the "indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in lands".[7] The second was a *legal* conclusion that withdrawing recognition of such rights could now be seen as an "unjust and discriminatory doctrine of [a] kind that could no longer be accepted".[8] Important for the thesis which Dr Marshall advances in this book was the way in which Justice Brennan founded this legal conclusion in the developing notions of the law of the civilised international order, respecting universal human rights.[9] What the judges in 1847 had declared, the judges in 1992 could revise and re-declare. Which is what they did. And although the new declaration was expressed in terms of "land", to the extent that evidence, and factual

[5] Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting.
[6] (1992) 175 CLR 1.
[7] *Ibid* at 58, per Brennan J (Mason CJ and McHugh J concurring).
[8] *Ibid* at 42, per Brennan J.
[9] *Ibid* at 42, per Brennan J.

analysis, demonstrated that the same considerations were true, in at least some cases, of "water", the same conclusions would necessarily follow as a simple matter of logic and consistent principle.

The *Mabo* decision was extremely controversial at the time. The judges in the majority were attacked as exceeding their function and altering a basic premise of the law on property rights in Australia, without democratic legitimacy. Attempts were quickly made by powerful interests to head off the impact and the reach of the *Mabo* principle. This resulted in further litigation before the High Court of Australia and other courts. Even before *Wik,* particular challenges arose in respect of claims to water rights in or over or near water, including offshore sea rights.[10]

However, the first substantial challenge before the High Court was rejected repelling the substantial effort to turn the clock back. The survival of "native title" in land, subject to State pastoral leases, was upheld in *Wik Peoples v Queensland*.[11] The majority on that occasion was smaller.[12] But having been decided, a series of further cases followed. They endorsed and applied the *Mabo* principle. Where the source of any proposed extinguishment of native title was said to be an Australian statute, it would not be given that meaning unless no other meaning was open in the circumstances.[13] Conceptually, the developing

[10] *Mason v Tritton* (1994) 34 NSWLR 572 at 579-582, per Kirby P. See also Mark Cullen, "Rights to Offshore Resources after Mabo 1992 and the Native Title Act 1993 (Cth)" (1996) 18 Syd LRev 124. Cf M.Storey, "The Black Sea" (1996) 3 *Aboriginal Law Bulletin* 4 and J. Carter (ed) *Native Title and Land Law* (The Laws of Australia, Thomson Reuters, 2016, 24-25). See also at 104 [1.3.1250] with references to the *Native Title Act* 1993 (Cth), s 17 (2) subsection 17 (3) states that if the entitlement arises only because one, but not both of paras (a) and (b) of sub s (2) is satisfied, the entitlement relates only to the effect of the native title in relation to the onshore place or the offshore place.

[11] (1996) 187 CLR 1.

[12] Toohey, Gaudron, Gummow and Kirby JJ; Brennan CJ, Dawson and McHugh JJ dissenting.

[13] *Wik* case (1996) 187 CLR 1 at 126-127, 130-131 per Toohey J, 221-226, per Kirby J; also at 85 per Brennan CJ (diss). See now *Queensland v Congoo* (2015) 89 ALJR 528; [2015] HCA 17 [34], per French CJ and Keane

jurisprudence was not limited to interests in land as such. It extended (where it could be proved) to interests in water, including seawater, off shore water, rivers, streams and other water sources.

To bring greater order and justice into the developing statutory and case law, particular issues have been referred to, and reported upon, by the Australian Law Reform Commission.[14] The focus of this book is upon how the Australian legal system should introduce into its developing principles on this topic logical concepts derived from common Aboriginal and indigenous notions about water policy and law. In considering how this might be done, the author has afforded access both to the actual way, factually, that indigenous (and especially Aboriginal) communities have traditionally addressed water rights and interests and how international human rights law often provides criteria for a framework for legal developments addressed to rights in water, its management, use and access.

A great strength of Dr Marshall's work is that is goes beyond purely factual (anthropological and social) descriptions, although these are examined. Dr Marshall deliberately restricts her recommendations to the law impacting Aboriginals. She does not examine water rights and interests affecting Torres Strait Islanders. Dr Marshall, as herself Aboriginal, offers insights and guidance in respect of her own community. She defers to other indigenous peoples and groups to speak for themselves. But much of what she has written will be relevant and helpful to the rights and interests of other Australian indigenes.

J. Contrast at [60]-[66] per Hayne J; [87]-[89] per Kiefel J; and [130]-[131] per Bell J. also [156]-[159] per Gageler J.

[14] Australian Law Reform Commission, *Connection to Country: Review of Native Title Act 1993* (Cth) (ALRC 126), 2015.

Dr Marshall's research confirms the nexus that exists between Aboriginal health and well-being and access to water. Health improves when economic development and cultural rights are exercised by Aboriginal communities. It is on this footing that she argues that a 'reserved water right' would ensure legal and economic certainty for Aboriginal communities, given that native title rights to water, as such, will often be of non-economic value.

Many of Dr Marshall's recommendations[15] call on Australian Governments to introduce statutory regimes, to review current laws, and to implement informed public policies. Given the state of the present Australian statutes, laws and policies impinging on water rights, these are inevitable proposals. This book should stimulate public enquiries and effective follow-up in the Federal, State and Territory legislatures. However, the abiding lesson of the great legal drought in Australia that preceded the decision in the *Mabo* case of 1992, and of the instances of injustice in legislation since that decision, render the outcome of legislation in Australia problematic. Certainly, it is a subject lacking the sense of urgency that this book seeks to promote.

Years ago, in the Australian Law Reform Commission, I engaged with an early project to consider Aboriginal customary law.[16] The Commissioner of the ALRC in charge of that report, at the time it was delivered, was Professor James Crawford. A lawyer of the greatest distinction, he now serves as a Judge of the International Court of Justice. His report described the slow and only partial approaches to the recognition of land

[15] The recommendation are contained in Ch 10 *infra*.
[16] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law* (ALRC 31, 1986) (2 vols).

and like rights at that time, essential to the economic empowerment of Aboriginal Australians. An addendum in the report recorded that in March 1986, the Federal Minister for Aboriginal Affairs had announced[17] the decision of the Hawke Labor Government that it had abandoned the earlier declared proposal to introduce a federal statute for the recognition of such rights, based on in the new constitutional power of the Federal Parliament to enact special laws for the people of any race (including the Aboriginal race).[18] Substantially the legislation proposed by the ALRC report has also not been enacted.

Nevertheless, of all the many important reports of the Australian Law Reform Commission, the one on *Aboriginal Customary Law* receives the most visits on the Commission's website. It is the most frequently downloaded. Immediately following its delivery, it began to influence civic discourse in the Australian indigenous, legal and general communities. It raised a level of appreciation of the injustice of the then state of the law. It compelled the urgent need to address that injustice. It affected the *Zeitgeist* of the nation on this topic. I believe that it had an influence on the thinking of the High Court Justices when they came to write their reasons in the *Mabo [No.2]* decision six years later.

Law reform in Australia sometimes works in mysterious ways. In this case, the ALRC report demonstrated injustices, and gaps, in the law. These affronted a basic tenet of our national make up, as well as our human sense of rationality and order. Just as the Australian Law Reform Commission report of 1986 may have expedited the arrival of land rights for Australia's indigenous peoples, so I believe Dr Marshall's

[17] *Commonwealth Parliamentary Debates (House of Representatives)*18 March 1986, 1475 (Hon. Clyde Holding MP).
[18] *Australian Constitution*, s 51 (xxi), amended by Act No. 55 1967.

book will influence the future of water rights as they affect Aboriginal and other indigenous peoples in Australia. Looked at from the perspective of history, we are definitely on a path to correct the injustices and silences of the past. Dr Marshall can be proud of the contribution she has made to the rights of her people by writing this book. Its impact is now a challenge before all Australians. We can only be proud of ourselves if we accept the challenge and act upon it

Sydney
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