

## **FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY**

### **Australian Legal History Essay Competition**

#### **THE THIRD ANNUAL (2009) COMPETITION: A GENERAL OUTLINE**

**THE COMPETITION THEME:** A foundational objective of law in a modern democratic state is to serve, and protect, “the people” (all the people, not just a few) as the ultimate source of legal authority and, for that purpose, to adapt (in an orderly and principled way) to the changing needs of society.

**THE ESSAY TOPIC:** Land ownership, power and sovereignty (supreme authority in a system of government) as an example of law and society changing over time, and between places, with “new law” and “old” blending in ways imperceptible to a casual observer.

**THE ESSAY QUESTION:** *Who owns this land, anyway?... Discuss whether Australian history has any lessons for us, today, about the meaning or significance of “land ownership”. Do so by reference to one or more of: (a) Australia as a “settled” or “conquered” territory, and Aboriginal Land Rights; (b) the land titles system (known as the “Torrens System”) devised by Robert Richard Torrens; and/or (c) debate about whether Australia should, as a modern sovereign nation, be a republic.*

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#### **EXPLANATORY NOTES**

1. **Introduction:** The precise form of the Essay Theme, Topic and Question will be settled upon the formal launch of the 2009 Competition on or about Australia Day 2009. Within a month of the launch, the Society will publish on its website ([www.forbessociety.org.au](http://www.forbessociety.org.au)) a “Background Information Research Paper” as an aid to participants in the Competition.
2. **The Timing of the 2009 Competition:** The Competition will open, upon publication on the Forbes Society website of an announcement to that effect, on or about Australia Day, 2009. Subject to confirmation in that announcement, the deadline for the submission of Essays will be on Monday, 16 November 2009.
3. **Competition Categories and Prizes:** Subject to confirmation in the formal announcement of the opening of the Competition, prizes will be available for Essayists in separate categories for: (a) Junior High School Students and their Schools; (b) Senior High School Students and their Schools; and (c) Tertiary Students (being anybody enrolled in any course of study leading to the award of an undergraduate degree by a university or an equivalent course, such as a Legal Practitioners Admission Board course, approved for the purposes of the Competition by the Society), throughout Australia. Prizes will comprise a combination of cash and book vouchers, with the possibility of publication of Essays. All participants in the Competition will receive a certificate or some other formal recognition for their participation.
4. **The Purpose, Nature and Scope of the Background Information Research Paper:** The principal purpose of a Research Paper published with a Competition

Essay Question is to provide contextual information, and a survey of competing perspectives of the Question, for the benefit of all participants, wherever they live and whatever might be their personal circumstances. It is an attempt to create a “level playing field” by the provision of assistance available to all, and by a discussion of issues intended to de-mystify what might otherwise be thought to be esoteric legal concepts. It is intended to provide an aid, or guide, for any independent research undertaken by Essayists.

The Paper for the 2009 Competition will be accompanied by a Glossary of legal terms and, for each of the three topics the subject of the Essay Question, a Chronology of significant dates designed to place the topic in historical perspective.

A secondary purpose of any Competition Research Paper is to highlight the desirability – wherever possible – of basing judgements upon, and testing them against, evidence available from primary sources. The attention of students is drawn to accessible reproductions of primary records in publications such as the *Historical Records of Australia* and judgments of courts published in formal law reports. Extracts of primary records of central significance might be extracted in a Research Paper to draw particular attention to their importance, either as specific documents or as examples of sources of important information.

If it were an appropriate response to a particular Question, the Society would not exclude from consideration any Essay based upon original “oral history” research undertaken by a student, individually or as part of an education program. The 2009 Competition might be thought, in particular, to lend itself to such research insofar as it touches upon Indigenous Land Rights and the Republic debate. Many people, with a diversity of life experience, have been personally touched by what they perceive to be a struggle for the betterment of society in those areas. Torrens title land might not be thought, generally, to be a source of such inspiration; but even that might not be excluded. A personal story of somebody involved in litigation involving issues about the operation of Torrens title legislation might lend itself to adaptation in terms of the broad topic. Legal historians everywhere not uncommonly turn to exposition of a “leading case” to tell an entertaining tale about law and society. Recent examples of that are (internationally) *Landmark Cases in the Law of Contract* (Hart Publishing, Oxford, 2008) edited by Charles and Paul Mitchell and (closer to home) Professor A R Buck’s *The Making of Australian Property Law* (Sydney, 2006).

The availability of a Research Paper is intended to encourage Essayists to focus attention on thoughtful development of a story-telling facility based upon personal insights. It is not intended to be a template for Essays.

Because the Competition is directed to an audience that is large and diverse, there can be no guarantee that the Paper will cater for, or resonate with, everybody. Nevertheless, it might at least provide some assistance to Essayists, and, importantly, to the educators, parents and friends to whom supervision of an Essayist’s work might be entrusted. Hopefully, it might also demonstrate to educators the potential for adaptation of the Competition Question as a component in existing course work.

The three, apparently disparate topics referred to in the 2009 Essay Question will be tied together in the Background Paper by stories incorporating a discussion of: (a) the historical origins and legal nature of deeds, distinctions between legal concepts of “contract” and “property,” and the relevance of “purposes served by a law” to development of the law;<sup>i</sup> (b) John Batman’s attempted “purchase” of land at Port Phillip from Aborigines (by deeds executed on 6 June 1835), regarded by contemporary English legal opinion as a transaction of doubtful validity and disapproved by both Colonial and Imperial Governments;<sup>ii</sup> (c) the making of the “Treaty of Waitangi” between Maori Chiefs and the British Crown on 6 February 1840;<sup>iii</sup> (d) Robert Richard Torrens’ innovative legislation of 1858, which initially failed to define the effect of registration of land dealings by reference to the legal effect of a deed, but, upon amendment, did so;<sup>iv</sup> (e) the ceremony at Wattie Creek (Daguragu) in the Northern Territory on 16 August 1975, by which Prime Minister Gough Whitlam handed over Deeds of Lease to Vincent Lingiari, as a representative of the Gurindji People, adopting (at the suggestion of Dr “Nugget” Coombs) a symbolic reversal of the ceremony (livery of seisin) adopted by Batman in purported compliance with English land law as received in Colonial Australia;<sup>v</sup> and (f) perceived necessities for a reassessment of fundamental relationships inherent in the *Australia Acts* of 1986, the *Mabo* litigation (especially the High Court of Australia’s judgment of 3 June 1992) and debates about Australia as a “republic”<sup>vi</sup>. The discussion will highlight the availability of different perspectives on questions about “Land Ownership, Power and Sovereignty”.

The Paper will, in passing, refer to the association with Australia of the American, populist tax reformer, Henry George (1839-1897) – the author of *Progress and Poverty* (1879) – as an illustration of the importance attributed around the world to land ownership as a factor in modern economic and social development.<sup>vii</sup>

In discussing the reception of English law in Australia,<sup>viii</sup> reference will be made, *inter alia*, to *Blackstone’s Commentaries on the Law of England* (1<sup>st</sup> ed, 1765-1769);<sup>ix</sup> *Attorney-General v Brown* (1847) 1 Legge 312;<sup>x</sup> and the historical significance for English (and Australian) land law of England itself having been a territory “conquered” by the Normans in 1066.<sup>xi</sup>

Drawing together these various threads, the proposed Paper will invite conclusions that: (a) a function of the law is to serve, and to protect, “the People” as the ultimate source of legal authority in Australia as a modern democratic state; and (b) the interaction of law and society is such that “new law” and “old” often blend together in ways that are imperceptible to a casual observer.

In law, society and life many small streams make their contribution as a mighty river flows to the sea. When Gough Whitlam took up earth to pour into the hand of Vincent Lingiari in 1975, many might naturally have believed that ceremony to be an ancient Aboriginal rite. Without specific instruction, few would have identified its origins in the Norman Conquest of England in 1066. So strong was the symbolism of the event that many might prefer, even today, to embrace an inspirational myth rather than historical fact. Our tendency to do so colours perceptions of “historical fact” – past, present and future.

## 5. A Preliminary Survey of “Australian” Land, Law and History

Surprising though it might seem, a study of Australian land law can open doors to fundamental questions about the meaning of life, questions that beckon (or demand attention) at several levels of abstraction. For doubters, let this be a challenge: Can Australian law boast that, despite convict origins, Australia is a land that has never known, condoned, or facilitated slavery? Is the land law of Australia an example of how, in a modern democratic state, law and society can interact, with creative tensions, moving towards – but never quite attaining – reconciliation of those in conflict? What, if any, role does an orderly administration of land law play in the promotion of peace and prosperity for everybody, not merely a favoured few?

For those who seek answers to these questions, or questions of a similar ilk, the question, “Who owns this land, anyway?”, might be approached with four mysteries in mind, each one a conundrum to be solved, a riddle to be unravelled: (1) Why do Australians speak of “Crown Land” and “Crown Grants” when no King or Queen has ever lived here? (2) Why do the “title deeds” of most Australian home owners describe them as “the registered proprietors of an estate in fee simple”? (3) Is it important for Australians to know the origins of the expression “freehold land” – Was there ever a form of landholding that was “unfree”? (4) What is “Native Title”; when, how and why did the High Court of Australia come to recognise it; and why did the Australian Parliament come, as it did, to recognise, control and regulate it with legislation?

Informed answers to questions of this character might require consideration of esoteric concepts such as “the doctrine of tenure”, “the doctrine of estates”, “Torrens title land” and “sovereignty”, including “Aboriginal sovereignty”. They are esoteric, but not beyond common understanding.

The path to a full understanding of these ideas will be via a reconciliation of “old law” and “new”, “old society” and “new”. Somewhere along the way, an assessment might also need to be made about Australia’s place in the world.

On that score, the Second World War (1939-1945) remains of profound significance. In Australia, as elsewhere, it set in train a whole series of realignments in how the world was viewed. In 2008/2009 those realignments are still working themselves out. Sometimes we seek stability, sometimes we seek change. When we seek change, we are impatient for it. Sometimes, when it comes we are unsuspecting of it, it comes from a direction not imagined, and we recognise it only after it too has passed away.

Australian legal history is susceptible to analysis in these terms. The “historiography” of Australian legal history is itself revealing. “Historiography” is the “study of history”, the study of “how history is written” at different times in history, a study which invites the question, “Why does the storyline seem to have changed?” By studying changes in how our history is written, eyes can be opened to different perspectives of self, different versions of who we are.

There was a time when many Australians “still called England ‘home’”. That time slipped from view in the two decades or so following the end of the Second

World War in 1945. It was a fast, fading memory by 1970. The generations before then naturally viewed their world from a perspective that was comfortable with a commencement in or about 1066 (or, perhaps, Caesar's incursion into Britain in 43BC or the Romans' invasion of Britain in 55AD), working forward from there. That can be seen in the classic work of Australian legal history published by Sir Victor Windeyer. He served as a Justice of the High Court of Australia between 1958-1972. Before the Second World War, while still a "junior barrister" (ie, not a "Senior Counsel"), he published the first edition of his *Lectures on Legal History* (Sydney, 1938). A second edition was published in 1949, the year in which he became a Senior Counsel (then known, in the years before Queen Elizabeth II's ascension to the throne, as a "King's Counsel" or "KC"). In 1957, the year before he was appointed to the High Court, the "Second Edition (Revised)" was published. In each edition, "Chapter I" was entitled "Before the Norman Conquest". In each edition, the final chapter was entitled "The Introduction of English Law into Australia". Australian legal history was largely derivative, seen through an Anglo-Australian perspective.

In the years since Windeyer, the natural chronological perspective of many Australian legal historians has turned 180 degrees. They tend to commence with contemporary Australian society, with a focus on indigenous connections to the land, working backwards to points of contact between "European" and Aboriginal society, and from there delving selectively into English law so far as necessary to understand the perspectives of a colonial settler society.

This shift is, in part, a reflection of the foundational work undertaken by generations of Australian legal historians (including C H Currey, H V Evatt, Sir Victor Windeyer and others) dedicated to an investigation of "the facts" underlying Australian law and history. Pre-eminent in this since Windeyer's *Lectures on Legal History* have been Dr J M Bennett, the late Professor Alex C Castles and Professor Bruce Kercher.<sup>xiii</sup> Their meticulous research of primary records has uncovered "facts" and made them known to other workers in the field. This has empowered and inspired another generation of Australian legal historians. They all teach us that, whatever our preconceptions, it is vitally important to check our theories against facts, recognizing that the process of doing so will be likely to affect our perceptions of fact and theory alike.

It is important, nevertheless, not to forget the significance to contemporary Australian law of its roots in English history. Sir Victor Windeyer's writings remain instructive. A balanced overview of Australian legal history needs to be able to alternate between "starting at the start" (be it 60,000 years ago in the Aboriginal Dreaming, 1066 and all that, 1770, 1788 or 19<sup>th</sup> century Australasia) working forward and working backwards from the here and now.

The history of land law is, perhaps, unique in its demand that a "balanced" approach be adopted. That is because the law has evolved, and "new law" has "old law" deeply embedded in it. With that in mind, a study of contemporary Australian land law and modern concepts of sovereignty comes – by one route or another – to England. Not only to England as a colonial power, but to England as a colony.

Australians are so accustomed to viewing colonialism through the prism of a colony that it is easy to overlook the fact, and significance, of England's own experiences as a colony. The present importance of 1066 might be thought to lie in the fact that William the Conqueror did not merely defeat Harold at the Battle of Hastings. He claimed to be the lawful successor to King Edward the Confessor, and so justified his lordship over England by appeals to law. As King of England, he regarded himself as the legal owner of all the territory he controlled. That was a notion that he brought with him from his home in Normandy where, under the Sovereignty of the King of France, he was a Duke.

His concept of "ownership" was similar to the fundamental idea of *Dominium* (a word derived from the Latin word for "master" or "lord", *dominus*) known, at least conceptually, to Roman lawyers in ancient times. It meant, simply, that he could do what he like with the land,<sup>xiii</sup> and everybody in territory under his control held land subject to his sovereign will – by his grace and favour – after submitting to his authority. Directly or indirectly (or, as it is sometimes put, immediately or mediately), they held land "of their lord, the King". This basic idea that land was "held" of the King provided the conceptual foundation for the "doctrine of tenures", which continues to inform thinking about English (and Australian) law today. The word "tenure" is derived from the Latin word, *tenere*, meaning "to hold". The High Court has recognised that the doctrine remains a cornerstone of land law in Australia, albeit qualified by a recognition of "Native Title" to land.

The fact that the only form of feudal tenure found in Australia is "freehold tenure" is significant for two reasons: first, "freehold tenure" inherently embodies the idea that "freehold land" so held is held "of the Crown"; and, second, "freehold land" is held by a people not "unfree", not the "villians" or "serfs" of feudal England, whose highest aspiration as a "landowner" could only be to hold land, of their lord, in "copyhold tenure". That was, in essence, a licence (permission) to possess land under the control of a feudal lord. Australia may never have been without convicts or oppressed peoples; but, in law at least, it has never been possessed of feudal lords or feudal slavery. The profound significance of "copyhold tenure" is that Australian conditions were never conducive to its reception in Australian law.

In 1066 all government was, essentially, personal. The machinery of government, and law, depended on the personal will of a king, queen or some other "noble" personage. King William I implemented a system of government - to which we attach the label "feudalism" – not wholly unlike a centrist form of modern federalism. It involved a revocable delegation of power by a ruler who claimed, with military backing, to be "all powerful", rather than a division of power between institutions with equality of standing under a written constitution. It was nonetheless a power-sharing arrangement. Power was distributed to, and between, trusted subordinates. William's sovereignty over all (rendered real by military power) was based upon his claim to personal ownership of all land in the realm, with a hierarchy of landowners (Barons and lesser mortals) under him. These were people to whom he granted land as a reward ("fee") for services (including military service) rendered or due to him and from whom he demanded loyalty ("fealty") as a right.

The extent, or duration, of a land owner's tenure – the legal standing (status) that the land owner enjoys in relation to his or her fee – came to be called an "estate". Originally, because a "fee" was subject "escheat" on the death of a "Baron" ("the King's man), his estate was for his lifetime only. The word "escheat" derives from the Latin word, *excadit*, meaning "it falls from him". Because of the personal character of feudal landholding, the death of a "tenant" from the Crown (a "tenant in chief") led to land "falling back" to the Crown. The same would happen if, by an act of treason, a tenant in chief breached his duty of fealty. His land was forfeited to the Crown.

There were three types of freehold "estates". Land could be held for the life of a tenant or for the life of another person ("a life estate"). It could be held for a "term" (which we recognise as a "leasehold estate"). Or it could be held as an estate in "fee simple", to use modern terminology. The expression "fee simple" was an indication that land was originally granted to a landholder "and his heirs", so that the land was inheritable. These principles underlying the concept of an "estate" in land continue to have application in English (and Australian) land law under the label, the "doctrine of estates".

In its modern context, terminology about "tenures" and "estates" has become blurred. In Australia, because all land is (subject to Native Title entitlements) held "of the Crown", the word "freehold" has become synonymous with an "estate in fee simple"; the idea of a "life estate" is not unknown, but it is not as common a form of land ownership as an estate in fee simple; and a "leasehold estate" is generally known simply as a "lease". In the context of leases, there is, however, an echo of medieval terminology. By the end of the Middle Ages, a lessor was regarded as a lord ("the landlord") and the lessee as a "tenant" because, by virtue of the lessor's grant of a "term" (a period during which the land was "hired out" to the tenant) pursuant to a contract in which the tenant agreed to pay rent, the lessee was said to "hold" the land "of" the lessor.

These developments demonstrate how, over the years following 1066 (as land was "transferred" from one person to another, others acquired rights in land and monarchs themselves came and went) the "personal" character of rights and duties defined by reference to land ownership lost that character. People expected to be able to hold, enjoy and deal with land according to procedures that had become settled in custom. Expectations that custom would be respected evolved into customary "rules" and, via that route, binding "laws" governing exercise of otherwise discretionary powers. Development of the idea that an entitlement to land could pass by inheritance was important to development of the concept of land ownership in English Law.<sup>xiv</sup> Rights and obligations that had been "personal" became, instead, impersonal. Obligations to perform services were dispensed with, or commuted to an obligation to pay money, as social, economic and political relationships developed. Feudal rights and obligations based on land ownership gave way to legal entitlements and liabilities attached to land as an incident of land ownership.

Adapted to modern Australian conditions, this process has evolved to such an extent that nobody, and no (national, state or local) government, can be said, truly, to have, hold or enjoy absolute, unfettered ownership of land. The success of

Eddie Mabo against the Australian Government was an example of that truth, as was the enactment of Native Title legislation by the Australian Parliament in response to the Mabo Case. Everybody, and all land, is governed by the rule of law.

6. **The Competition Object:** As in previous years, the object of the 2009 Competition will be to encourage students to develop a facility for describing historical events and for recognizing their place in broader themes. The best essays will be lucid, entertaining and thoughtful. Independent research – beyond the Background Paper – is welcome, but not necessary. A greater premium is placed on the thoughtful telling of a story.

For Junior School Essayists, this emphasis on “story-telling” might reasonably focus attention, simply, on the personal or social history aspects of an encounter with “the law” in a particular setting. At the other end of the spectrum, senior tertiary students might reasonably be expected to exhibit a more abstract understanding of law and society: an appreciation that legal rules are contingent in time and space; that statements of legal principle, and observations of the law in operation, not uncommonly vary over time, and from place to place, in service of society; and that, in addressing the highest ideals of the law, allowance needs to be made for that reality. Whatever the differing levels of maturity of Essayists, a common factor required of them – consistently with their respective levels of maturity – is that they endeavour to ensure that a thoughtful story is told.

There is no expectation that students will necessarily to come particular conclusions, or express particular opinions, about problems they might identify or solutions they might offer. There is no “party line” in this respect.

Nor is there any expectation that Essayists will deal with all, or any number other than one, of the historical events used to illustrate the Competition Theme in the Background Information Research Paper. To require more than one or two of those events to be canvassed in an Essay would be to invite a degree of complexity not intended. They are discussed in the Research Paper to provide food for thought, not for Essayists to choke upon.

7. **The Competition Methodology:** Underlying the Essay Competition is a conviction that many questions characterised as “legal” or “historical” are able to be understood, analysed and addressed by a broad cross-section of the community with all its diversity. It is not necessary for any participants in the Competition to have specialist knowledge of law, history or legal history, however advantageous that might be. The Society’s hope is that everybody with a genuine spirit of inquiry might learn more than they know in the course of having fun.

In formulating each of its Essay questions, the Society has endeavoured to include three features: First, a selection of historical events of interest to the general community; Second, a selection of events designed to facilitate a constructive understanding of the respective contributions, and differing perspectives, of Indigenous and other citizens to development of a tolerant community; Third, a common characteristic of selected events that lends itself to an exploration of concepts that have both a legal and a more general flavour.



The inaugural (2007) Competition focused on the Rum Rebellion of 1808 and the Waterloo and Myall Creek Massacres of 1838 as historical events; and (at a time when the “War on Terror” was a dominant theme of national and international debate) on the tension between “military law” and “the rule of law”. The second (2008) Competition focused on the Dean Controversy of 1895-1896 and Tuckiar’s Case of 1932-1934 as historical events; and on ethical underpinnings of the law of legal professional privilege and the privileges, duties and dilemmas of a lawyer advocate. The third (2009) Competition will focus on the struggle for Indigenous Land Rights culminating in the Mabo Case of 1992, the internationally acclaimed land law reforms championed by Robert Richard Torrens in 1858, and debate about an Australian Republic (especially in the years following enactment of the *Australia Acts* of 1986 by Australian Parliaments and the UK) as historical events; and on the philosophical foundations of the law of property, the reception of English law in Australia, the development of an Australian legal system in its own right, and interrelationships between people, property and the constitution of a nation.

In each case, the Society’s aspiration has been, and is, to encourage an interest in Australian legal history: to help people, if only at a subliminal level, to learn about law, history and society by becoming familiar with broad themes and particular facts.

Each Essay question has been designed to speak at two or more levels of abstraction. At the most general (and, perhaps, even superficial) level lies a question upon which anybody might have an immediate opinion, albeit one that might evolve with the benefit of reflective thought. At one or more deeper, more particular levels lies a range of competing issues designed to accommodate an expression of opinions that might emerge upon reflection.

8. **Coping with Levels of Complexity:** The 2009 Essay Theme, Topic and Question are designed to accommodate layers of complexity appropriate to the different levels of maturity and understanding of potential Essayists. Whereas university students might be expected to tackle the intricacies of multiple, conflicting issues, High School students (particularly those in the Junior category) are not.

Nobody is required, or expected, to include in an Essay reference to more than one of the historical events used in the Background Information Research Paper to suggest ideas.

A convenient, and manageable, focus for High School students who propose to enter the Competition might be upon one or more of the particular events of 6 June 1835 at Port Phillip; 6 February 1840 at Waitangi; 16 August 1975 at Wattie Creek; and publication by the High Court of Australia of the judgment in *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1 on 3 June 1992. These events offer ample scope for colourful narrative, contrasting images and different perspectives of life experience.

Another convenient and manageable focus for High School Students could be the life and times of Robert Richard Torrens. His was a colourful personality. Although he is closely identified with South Australia, his work revolutionised the way land law was (and is) administered throughout Australia...and beyond. The

Torrens system of land title registration might, with justification, be characterised as one of Australia's gifts to the world.

Although potential Essayists of all descriptions might be tempted to enter Australia's debate about whether to become a "republic", that topic might prove to be more difficult than at first thought. The central focus of the Essay Question is on history, not on present aspirations or future directions. Although a study of the past may – one hopes – inform predictions about future developments, a solid foundation of analysis of historical fact might be thought necessary to qualify an Essayist to express a persuasive opinion about what course the country should, now or in the future, pursue. The "republic" question could be popular, but deceptively difficult. It might best be attempted by students studying political science, or constitutional law or history, at a tertiary level. Questions of sovereignty, which might be thought to be almost inevitably engaged by the topic, can be conceptually difficult.

All these observations (about what might be convenient, and manageable, for High School Students) apply equally to Tertiary Students. The difference is that Tertiary Students might reasonably be thought to require of themselves, and to be required, to approach each topic more thoroughly, more analytically and more conceptually. Each topic does have layers of complexity.

9. **Further Information:** For further information about the work of the Forbes Society or previous years' Essay Competitions, see the Society's website ([www.forbessociety.org.au](http://www.forbessociety.org.au)). For email contact with the Society, write to <[secretary@forbessociety.org.au](mailto:secretary@forbessociety.org.au)>

**Geoff Lindsay S.C.**  
**Secretary**

**22 December 2008**

### **END NOTES: RESEARCH SOURCES**

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<sup>i</sup> In Property Law texts the chapters relevant to the Essay Question are generally those dealing with: foundational concepts of property, possession, seisin and ownership; the doctrine of tenure and estates; leasehold land; land title under the Torrens system, as contrasted with the conveyance of title to land by deed under the general law; and Native Title.

Modern, accessible accounts of Australian property law, at three different levels of sophistication, are found in the writings of Dr Samantha Hepburn. In her "Nutshell" volume, *Real Property Law* (3<sup>rd</sup> ed, Sydney, 2008), see chapters 1-4, 7 and 8. In her text, *Principles of Property Law* (3<sup>rd</sup> ed, Sydney, 2006), see chapters 1-3, 6, 11 and 15. In her case book, *Australian Property Law: Cases, Materials and Analysis* (Sydney, 2008), see chapters 1, 2, 5, 7, 8 and 11.

A classic, historical description of the concept of a "deed" is found in *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 at 366E-369G. Classic accounts of the history of English land law (which still informs Australian law) are Sir William Holdsworth's *An Historical Introduction to the Land Law* (Oxford, 1927) and A W B Simpson, *An Introduction to the History of the Land Law* (Oxford, 1961). For purists, fundamental works are: T E Tomlins' *Lyttleton, His Treatise of Tenures*, first published in 1841 (London) and reissued in 1970 (New York); and Frederick Pollock and R S Wright, *An Essay on Possession in the Common Law*, first published in 1888 (Oxford) and reissued in 2000 (New York). A

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modern, more readable account of the different meanings, and significance, of “possession” is Mark Wonnacott, *Possession of Land* (Cambridge, 2006), especially chapters 1-4. Instructive primers on the connection between the history of English land law and Australian (particularly NSW) law are: A D Hargreaves and B A Helmore, *An Introduction to the Principles of Land Law (NSW)* (Sydney, 1963); and J Oxley-Oxland and R T J Stein, *Understanding Land Law* (Sydney, 1985).

<sup>ii</sup> The texts of Batman’s Deeds, accounts of the ceremony attending them and the reactions of Government and lawyers to them can be found in: C E Sayers’ 1973 (Melbourne) edition of James Bonwick’s *John Batman, The Founder of Victoria* (first published in Melbourne in 1868), especially at about pages 84-87; C P Billot, *John Batman: The Story of John Batman and the Founding of Melbourne* (Melbourne, 1979) at about pages 96-98; and William Westgarth, *Australia Felix* (Edinburgh, 1848) at pages 150-172 and 392-397. The historical setting is also described by reference to primary records in *Historical Records of Victoria* (Melbourne, 1981), Vol. 1, pages xiii-xv and 3-34.

<sup>iii</sup> John Batman’s “private enterprise” colonisation of Port Phillip in 1835 provided a backdrop to what occurred in the colonization of New Zealand over the following five years. There a principal player, as a purchaser of land, was W C Wentworth of NSW fame: Roger Therry, *Reminiscences of Thirty Years’ Residence in New South Wales and Victoria* (London, 1863; reprint, Sydney, 1974), chapter 17, especially page 303; Alex C Castles, *An Australian Legal History* (Sydney, 1982), pages 15 and 519; Claudia Orange, *The Treaty of Waitangi* (Wellington, 1987), chapters 1-5, especially pages 94-97. A complicating factor for the British authorities – which might serve to distinguish Australian and New Zealand legal history – was that on and following 28 October 1835 the British Government acquiesced in a “Declaration of the Independence of New Zealand” by Maori leaders meeting at Waitangi in the North Island of New Zealand. That led, in time, to a perceived need for a treaty with the Maori. The Treaty of Waitangi was made on 6 February 1840. The fact that it did not, in terms, apply to the South Island of New Zealand did not prevent the British from proclaiming their authority over the South Island on 21 May 1840. The texts of the Declaration of Independence and the Treaty of Waitangi are reproduced in Orange, *The Treaty of Waitangi* at pages 255-259.

<sup>iv</sup> An accessible account of the Torrens story generally is Dr Greg Taylor’s *A Great and Glorious Reformation: Six Early South Australian Legal Innovations* (Adelaide, 2005), chapter 2. A more recent account of the same story, with a Canadian perspective, is Dr Taylor’s *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto, 2008), chapters 1-2. Professor Ros Croucher’s 2008 Forbes Lecture, “150 Years of Torrens – Too Much, Too Little, Too Soon”, is in preparation for publication in the *Australian Bar Review*.

A standard provision in modern Australian Torrens legislation is that, *upon registration*, a dealing in land is taken to have “the effect of a deed duly executed by the parties who signed it”: *Real Property Act* 1900 (NSW), section 36(11); *Transfer of Land Act* 1958 (Vic), section 40(2); *Real Property Act* 1861 (Qld), section 35; *Real Property Act* 1886 (SA), section 57; *Transfer of Land Act* 1893 (WA), section 85; and *Land Titles Act* 1980 (Tas), section 48(7). This provision, which ties the “new” system of Torrens land titles registration to the “Old System” of Conveyancing (with its attendant reliance upon a “chain of title [deeds]” to prove title to land) under the general law, did not appear in the first Torrens statute, the *Real Property Act* 1858 (SA). The Act commenced operation on 1 July 1858. Contrast sections 31, 33 and Schedules B and H of it with its modern counterparts. The now standard provision explicitly adopting the analogy of a deed made its first appearance as section 19 of the *Real Property Law Amendment Act* 1858 (SA). That Act received Royal Assent on 24 December 1858. Section 2 of the Act (No. 16 of 1858) repealed sections 31 and 33 of the first Act (No. 15 of 1858), dealing with topics covered by section 19 (and section 20) of the later Act. Section 31 referred, not to a “deed”, but more generally to “instruments”. This legislative history, in combination with current law, suggests that attempts to define “new law” are sometimes compelled to acknowledge a need for continuity with ideas embodied in the “old”.

<sup>v</sup> Mr Whitlam’s speech of 16 August 1975 is extracted in his autobiographical work, *The Whitlam Government, 1972-1975* (Melbourne, 1985) at pages 470-471. The story of the struggle of the Gurindji People for a fair go – from a perspective pre-dating the Whitlam speech – was told by Frank Hardy in *The Unlucky Australians*, first published in 1968. The “Gold Star Edition” published by Nelson (Melbourne) in 1972 has a Foreword by Donald Horne and a preliminary “Author’s Note” that includes a useful chronology. A tribute was paid to the Aboriginal leader, Vincent Lingari, by the “Member for

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Lingari” (Warren Snowdon MP), in the House of Representatives of the Australian Parliament, on 20 March 2002. That speech provides a conspectus of events material to the Essay Question.

<sup>vi</sup> There is a vast literature on these topics. For a discussion of the profound implications of the *Australia Acts* of 1986, see Anne Twomey’s essay, “The Making of the Australia Acts 1986”, chapter 10 in George Winterton, *State Constitutional Landmarks* (Sydney, 2006); and chapter 12 (entitled “Popular Sovereignty and the True Foundation of the Australian Constitution”) in Michael Kirby’s *Through the World’s Eye* (Sydney, 2000). For discussion of the role of the Crown in modern government (including republicanism), see Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Sydney, 2006); chapter 14 (“The States and a Republic”) in Twomey’s *The Constitution of New South Wales* (Sydney, 2004); and Peter Boyce, *The Queen’s Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Sydney, 2008). For discussion of the *Mabo* litigation and its implications, see Frank Brennan, *One Land, One Nation: Mabo – Towards 2001* (Brisbane, 1995); Nonie Sharp, *No Ordinary Judgment: Mabo, The Murray Islanders’ Land Case* (Canberra, 1996); N Peterson and W Sanders (ed.), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Cambridge, 1998); P H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English- Settler Colonialism* (Sydney, 2006); E Johnston, M Hinton and D Rigney (ed), *Indigenous Australians and the Law* (2<sup>nd</sup> ed, London, 2008); and the writings of Henry Reynolds, including the *Law of the Land* (1<sup>st</sup> ed. 1992; 3<sup>rd</sup> ed, 2008) and *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Sydney, 1996). An alternative view (hotly contested by supporters of Henry Reynolds) is Michael Connor’s *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Sydney, 2005). For a geographically broader view of indigenous land rights, see Stuart Banner, *Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska* (Harvard, 2007); it develops themes also found in Banner’s *How the Indians Lost their Land* (Harvard, 2005). A text that predates *Mabo*, but examines jurisprudential concepts underpinning it, is Kent McNeil, *Common Law Aboriginal Title* (Oxford, 1989). Touted as a successor to McNeil’s book is Simon Young’s *The Trouble with Tradition: Native Title and Cultural Change* (Sydney, 2008).

<sup>vii</sup> Biographies of Henry George include *The Life of Henry George* (New York, 1901) by his son, Henry George Jnr and C A Barker, *Henry George* (New York, 1955).

<sup>viii</sup> Classic accounts of the reception of English law in Australia are those of the late Professor Alex C Castles, *An Australian Legal History* (Sydney, 1982) and Emeritus Professor Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Sydney, 1995). A broader, more international view of more recent origin is *The Reception of English Law Abroad* (Brisbane, 2007) by Dr B H McPherson, formerly a Judge of the Queensland Court of Appeal.

<sup>ix</sup> The influence of Blackstone’s major text in the late 18<sup>th</sup> century, and throughout the 19<sup>th</sup> century, is discussed in many law texts. The most recent biography of the man is Professor Wilfrid Prest’s *William Blackstone, Law and Letters in the Eighteenth Century* (Oxford, 2008).

<sup>x</sup> Discussed, with the law report produced as an appendix, in A R Buck, *The Making of Australian Property Law* (Sydney, 2006).

<sup>xi</sup> Images of England as a conquered territory are conveyed in J C Holt, *Colonial England, 1066-1215* (London, 1997) and George Garnett, *Conquered England: Kingship, Succession, and Tenure 1066-1166* (Oxford, 2007). The Domesday Book is available in a modern English translation published by Penguin Books as *Domesday Book, A Complete Translation* (London, 1992). “1066” might be the most famous of the occasions upon which England has been “conquered”, but it is not the only one. The Romans preceded William the Conqueror in 55AD (55CE), and the Glorious Revolution of 1688 brought with it the foreign connections of William and Mary.

<sup>xii</sup> The seminal work of J M Bennett and A C Castles includes their joint work, *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Sydney, 1979). Professor Castles’ *An Introduction to Australian Legal History* (Sydney, 1971) became, in its expanded second edition, *An Australian Legal History* (Sydney, 1982). In addition to his *An Unruly Child: A History of Law in Australia* (Sydney, 1995), Professor Kercher has supervised the “Colonial Case Law Project” of Macquarie University’s School of Law, accessible via the University’s website.

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*The Kercher Reports* (co-edited by Professor Kercher and Brent Salter), to be published by the Forbes Society in 2009, is an edited selection of the 18-19<sup>th</sup> century, NSW cases published on the website.

<sup>xiii</sup> The Roman law terminology for this form of ownership was *ius utendi, fruendi et abutendi*; the right of using, taking the fruits (or profits) of, and abusing (or wasting) the land: J Oxley-Oxland and R T Stein, *Understanding Land Law*, pages 3-4. In practice, ownership in Roman law was no more unlimited than it is in modern society; apart from the general principle that a person's rights over his or her property are limited by the rights of others, there were legislative restrictions on land use: W W Buckland and A D McNair, *Roman Law and Common Law: A Comparison in Outline* (2<sup>nd</sup> ed, revised by F H Lawson, Cambridge, 1965), pages 94-95; W W Buckland, *A Text-Book of Roman Law, from Augustus to Justinian* (3<sup>rd</sup> ed, revised by Peter Stein, Cambridge, 1963), pages 187-189, 196 and 204-205. The same might be said about Norman law at the time of William the Conqueror: E Z Tabuteau, *Transfers of Property in Eleventh-Century Norman Law* (North Carolina), pages 97-98. The closer one looks at the terminology of "ownership" – even the word, *dominium* – the greater is the need to recognize, or to accommodate, entitlements of others than the primary or ostensible "owner". Any concept of "full ownership" is, perhaps, illusory when placed in social context. Robinson Crusoe might have "fully owned" the island upon which he was marooned, but his "full ownership" meant nothing without the society of others with whom to share it. Introduce "others" and we see that the law conforms to social reality. Truly, as John Donne wrote, "No man is an island". Society demands that a range of "rights and obligations" be taken into account. Nevertheless, except against the State, *dominium* was perceived by Roman law, conceptually, to be absolute: J A Crook, *Law and Life of Rome, 90 BC-AD 212* (New York, 1976), pages 139-140.

<sup>xiv</sup> S F C Milsom, *A Natural History of the Common Law* (New York, 2003), page 47, in chapter 3 (entitled "Management, Custom, and Law").