

**FRANCIS FORBES SOCIETY FOR AUSTRALIAN
LEGAL HISTORY (ACN 099 158 620)
AUSTRALIAN LEGAL HISTORY ESSAY COMPETITION
2009**

BACKGROUND RESEARCH PAPER No. 1

***LIVING WITH “PROPERTY”: LIVING IN
“COMMUNITY”***

By Geoff Lindsay S.C.

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PARAMETERS OF THE COMPETITION

The 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.*

A PRELIMINARY PERSPECTIVE

Australian property law is an important part of the nation’s “body politic”. It is part of the social glue that holds the country together, allowing people sufficient flexibility to move and grow. It is a living system, constantly subject to change. At a “macro level” (focusing upon a larger view of the world), it forms part of the nation’s constitutional or political arrangements; it helps to regulate national affairs. At a “micro level” (focusing upon smaller things, like individual people and individual transactions), it provides a regulatory framework that allows people to hold, enjoy and deal with property as their own. The stability,

rationality and fairness of property law underwrites the security of the nation and all its people.

A major component of the law of property is “land law”. Land is not the only form of property. Historically, and culturally, there has long been a distinction in Anglo-Australian law between “real property” (land) and “personal property” (all other forms of property, including personal items and money). Nevertheless, land is special. It includes the earth we occupy, the air we breathe, the water we drink and, ultimately, the very “dust” we are. The desire to own land is ingrained in the Australian psyche.

When communities debate large issues about “land” they often slip, naturally and unconsciously, into a debate about “people”. “Land” can be a metaphor for “people”, at least in debates at a macro-level. That can be seen in contemporary debates about “Indigenous Land Rights” and “Native Title”. They provide a focus for a broader debate about the welfare of Aboriginal Australians or an even broader debate about “Human Rights”. It can be seen also in debates about whether Australia should become a “Republic”. Those debates move quickly into questions about what it means to be an Australian, and whether the sovereignty of Australia is vested in the person of monarch domiciled overseas or the people who inhabit Australian shores. Debate about “land” is often a debate about “people” living in community.

ASSOCIATED IDEAS: OWNERSHIP, PROPERTY, COMMUNITY AND LAW¹ **The Importance of “Community”**

An answer to the question, “Who owns this land, anyway?”, reveals something of the community in which we live or wish to live. Ultimately, “community” is a core concept in almost any deep, abstract discussion of the question.

The “community” in which Australians live today owes something to a variety of influences. In the context of “property law” those influences go back, in one stream, to the Norman (French) conquest of England in 1066 and, beyond that, to still earlier Roman times. In another stream, perhaps more ancient still but yet only recently recognized as an influence by Australian law, runs the culture of Aboriginal Australia. “Law” may influence the

¹ Most legal texts do not dwell upon abstract definitions of property. They are mostly content to contrast “property”, “contract” and other legal concepts in the context of legal relationships, and to discuss particular types of property. For a more abstract discussion of property, see Peter Garnsey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge, 2007).

development of land but, with equal or greater force over time, the physical attributes of “land” can also influence development of the law governing any community it sustains.

The evolution of Australian property law reflects developments in Australian community. Australia in the 21st century is not the same community as England in the 11th century, or any community in ancient Rome. Yet much of the terminology we use to discuss concepts in modern Australian law remains tethered to an historical legacy. Inherent in most thinking about the law of property is a need for continuity that, over time, renders even supposedly “revolutionary” ideas into an “evolutionary” pattern of thought.

If the past can be relied upon as a guide to the future, the nature and content of Australian property law will change – “adapt” is, perhaps, a better word – with changes in the realities, and our perceptions, of Australian community. As all inhabitants of the world increasingly “communicate” with each other they (we) will necessarily readjust prevailing ideas of “community”. In all its forms, the word “commune” implies a coming together of people. And with “community” comes both a need and a desire to share. Take away all legalese: the “law of property” is in essence a set of rules about how resources can be shared, effectively and fairly, by people living together in community.

“Ownership” and “Property”

The concept of “ownership” is closely related to that of “property”. It can be expressed as a noun (“ownership”) or as a verb (“to own”). A person who “owns” property is said to be an “owner”. The word “ownership” implies the existence of “property” and an “owner” or “owners” of property. The word “of” is, in each case, symptomatic of a relationship between “property” and one or more “owners”. The concepts of “ownership”, “property” and “owner” are inter-related to the extent that identification of one of them is incomplete unless and until the others are accounted for.

More than we realise, this process of identification is related to our use of language. There is a distinctive language of “property”. The terms we use to describe the process of ascertaining whether property exists (and, if it does, its characteristics) sometime betray an intuitive judgment that property does exist and does have particular characteristics. Our empirical observations are to that extent affected by value judgments that lead us gently, unconsciously to particular conclusions. Our opinions and perceptions of fact are more

closely related than we might think. At heart, however, all our judgments are perhaps based on an intuitive understanding of the differences between something that is “yours”, something that is “mine”, something that is “ours” and something that is “theirs”. Those differences often mark out the territory occupied by the concepts of “ownership” and “property”.

The relationship between “property” and an “owner” generally casts the owner in the dominant role. The sentence, “This owner owns that property”, illustrates that dominance. The sentence turns on the verb “own”. The owner is the subject of the verb. The property is the object. The owner does something affecting the property: ie, the owner “owns” the property. A verb is, after all, a “doing” word.

The idea that an owner plays the dominant role in a relationship with property is not universally true. Just as an owner can “own” property, property can “own” an owner. Aboriginal Australians sometimes speak of “the land” owning them in the sense of making demands on them, placing them under particular obligations of a cultural kind. Environmentalists of all descriptions increasingly bring similar insights to public attention. Theologians and philosophers have always warned us of dangers inherent in ownership of property. The property we own is capable of owning us. It contributes to a sense of identity.

A Lawyer’s Meaning of “Property”: Know What I Mean?

To say of “property” that it is whatever “the law” defines it to be is to convey a profound, but unhelpful truth. Ultimately, at least to a lawyer, “property” is indeed whatever the law declares, or treats, as property; but the reasoning (the “how” and “why”) that gets the law to that point is critically important if “the law” is to be anything more than arbitrary stipulations, no true law at all.

“Property”, to a lawyer, can be an elusive concept. For the most part people might feel intuitively that they know what it is, its every measurement, by “metes and bounds” as old conveyancers used to say. For the most part, they might be right. Community understanding of the concept, and shared expectations of rights and obligations associated with it, are even more fundamental to it than the subtleties and equivocations of lawyers. If there is a market for something – with somebody prepared to pay money to acquire it, another body prepared to sell it at a price and both of them prepared to attribute value to it – chances are a lawyer can be found to call that “something” by the name of “property”. A lawyer’s

job is half done if real people see value in the creation, acquisition or holding of a thing. The other, and more significant, half of the lawyer's job is to craft rules (consistent with the proper administration of justice, in a legal system worthy of the name) that enable valuable "things" to be held, passed between people by gift or trade, or inherited in an orderly manner. A capability to be held, passed between people and inherited is an important consideration in determining whether something is "property".

One of the most confronting features of the famous American novel, *Uncle Tom's Cabin* (1852) by Harriet Beecher Stowe, is its demonstration of the evils of slavery. A legal system that purports to allow some people to "own" other people, and to allow "ownership" of "slaves" to pass in trade or by inheritance, is destructive of the humanity of master and slave alike. Stowe demonstrated this by exposing the misconception that slavery was benign: if slaves were property, even a "happy family" of masters and slaves living in a single household could be broken up by the hard edge of the law. If a "master" became bankrupt, "ownership" of his "slaves" passed, by law, to his creditors...and slave families could be dispersed far and wide in a brutal process with brutal outcomes. For present purposes, however, the history of slavery illustrates five fundamental points about "law" and "property": First, although the integrity of a legal system is ultimately dependent upon its being constructed upon a firm moral foundation, there is sometimes a discontinuity between "the law" and what is right; Second, the "law of property" depends on what lawyers say is "the law", and what they see as "property", at a particular time and from time to time; Third, in contemplation of "the law", anything of value to people is at risk of being dealt with as "property"; Fourth, fundamental to the notion of "property" is the existence of something that can be "held" and passed between "owners" (by gift or trade) or inherited; and Fifth, in a just society, humanity cannot be "owned" .

A personal legal right (such as a "licence"; or permission, to enter upon land owned by another) – something unable to be transferred to another person – is generally not regarded by a lawyer as "property", valuable though it might be to the person entitled to it. A "lease" of land – which, subject to conditions, is generally able to be transferred to another – customarily

stands in contrast to a mere “licence” to enter land. It is universally regarded by lawyers as “property”.²

Oftentimes lawyers focus attention on the margins, where black and white merge in grey. Nevertheless, to do even that with anything approaching clarity compels an examination of what is black, what is white and shades of difference in between. To a lawyer the concept of “property” can be approximated in definition, and classification, but never quite tied down in analytical terms. More often, it is “defined” (or, perhaps more accurately, described) by reference to common usage. Something can be identified as “property” if a community recognises, describes, values, trades, devises and inherits it as property. A “legal” meaning of “property” cannot be stated exhaustively, or without resort to custom, imperfect analogies, loaded terminology and commonplace examples designed to engage communal intuition.

There is a tendency in lawyers to think of “property” as something that can be protected by an order of a court. There is an element of truth in this, but it only takes analysis so far. It does not, of itself, explain why a court can or should make an order to protect something. Occasionally, the inter-dependency of “legal right” and “legal remedy” which is at the heart of a circular process of reasoning by lawyers exposes the courts’ communal role in defining “property” at its margins: acting on behalf of the community, judges must explicitly decide whether something novel is, or is not, “property”.³ More often, the customary availability of court orders in a particular factual setting can nurture the gradual development of a widespread expectation that comes, in time, to be thought of as “property”.⁴

² In Australian law the classic treatment of the difference between a “Lease” and a “Licence” in the context of land is *Radaich v Smith* (1959) 101 CLR 209. A “lease” is a grant of rights of “property” in land that include a right of “exclusive possession” to the land. A “licence” is generally a grant of “permission” to enter, or use, land without conferral of a property right or a right of exclusive possession. In practice, the difference between a “lease” and a “licence” can be paper-thin because each form of transaction may have a contractual element, and the parties to a contract can generally, by agreement, define the terms of their relationship to suit themselves.

³ Two examples: (1) The availability of an injunction to protect the “confidentiality” of information, or other equitable remedies for an appropriation of “confidential information”, raises questions about whether there is “property” in “confidential information”: *Wheatley v Bell* [1982] 2 NSWLR 544; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 143-144 [118]-[120]. (2) In *Burns Philp Trustee Co v Viney* [1981] 2 NSWLR 216 a court had to consider whether the common law incapacity of a capital felon to institute curial proceedings carried with it the consequence that a felon – unable to obtain a court order to enforce an interest in a deceased estate – had to be treated as having forfeited any proprietary right to estate assets.

⁴ Professor S F C Milsom is an exponent of the idea that, in the development of English land law, the development of customs and expectations about how discretionary decisions about land would be made led, in time, to the Common Law’s recognition of property rights: see *The Legal Framework of English Feudalism* (Cambridge, 1976) and *A Natural History of the Common Law* (New York, 2003).

Conceptually, “property” as perceived by a lawyer is at core a “thing”. In Latin the word res is used in the same basic way that modern English uses the word “thing”. That is important to know for two reasons: first, it provides linguistic confirmation that we are dealing with a foundational word, a building block of language; and, second, it provides a reminder of the historical and cultural origins of some of the language still used, in English and Australian law, to describe “property”. Lawyers sometimes speak of a “right in rem” (as opposed to a “right in personam”) to describe a right in property as distinct from a purely “personal right”, a right enforceable against a person but not property; the word rem is a Latin form of the word res. Everybody speaks of “real property” or “real estate” to refer to land. The word “real” in this context has its origins in the Latin word res.

In the context of “property”, the word “thing” is a noun, not a verb. That is not unimportant to an understanding of what “property” is. To adopt the reasoning of grammatical rules, “property” is essentially a noun rather than any other form of speech. It is a “substantive” word that conveys the idea that something of substance exists. It is not a “doing” word, as is a verb. Its place in a properly constructed sentence is as the “subject” or “object” of a verb. Property does something or has something done to it.

This exploration of language is a useful diversion insofar as it focuses attention on the idea that “property” is something that “exists” in time: past, present or future. It might exist over a continuous period of time, but that is not necessarily the case. In the common imagination (although not necessarily in law) rainwater falling into the backyard tank of a family home might illustrate the point. Like manna from heaven, the water comes. For a time the householder has a pool of water that might be thought of as his or her property. Then it is lost to evaporation.

The Language of “Property” Law

The language of property law reflects the nature of “property” in a lawyer’s mindset. Property rights are typically “granted”, “transferred” or “reserved”. These words appear in the form of verbs, nouns, adverbs and adjectives with only minor adaptations. Typically, a person actively creating, transferring or giving a right is identified by the suffix “-or”, and a person receiving the benefit of a transaction in which a right is created or given is identified by the suffix “-ee”. Thus a “grantor” of a property right grants it to (or creates it in favour of) a “grantee”, and a “transferor” transfers (assigns) a property right to a “transferee” (assignee).

A grantor or transferor who grants or transfers something less than the whole of the property right that he, she or it holds is said to “reserve” some part of the right to himself, herself or itself.

In transactions of older lineage there is often a recital that the person to whom property is granted or transferred is intended to “have and hold” the property right for the “use” of him, her or itself or for the “use” of another. The word “use” has a history all of its own – related to the modern concept of a “trust” – and can be passed over for the time being. However, the expression “to have and hold” is worthy of particular notice. The concept of “holding” property is fundamental to Australian land law. It can be seen, in both ordinary and legal language, in words such as “landholding” and “landholder”.

Like the words “grant”, “transfer” and “reserve” these expressions contemplate something that has an existence in time, at a particular time or times. An accountant or economist might think most naturally of a “property right” as an “asset” and a legal obligation attaching to a property right as a “liability”. These are concepts that focus on one or more snapshots of time. They might have implications for rights and obligations (such as a right to receive income, profits or other benefits or an obligation to pay expenses or bear costs or the burden of doing something) measured over time, but their characteristic focus is upon a point in time.

A non-lawyer need not be flummoxed by legal terminology. In each case, lawyers and non-lawyers alike need to engage in a critical appraisal of what is meant by whatever terminology is used.

“Property” as a Bundle of Legal “Rights” and “Obligations”

For a modern lawyer, “property” is generally a bundle of “rights” and “obligations” (more or less corresponding one with the other) cognisable, and recognised, by the law. One characteristic of a lawyer’s concept of “property” is that it is, or includes, a “right” (representing the embodiment of an expectation shared with, and enforceable by, a community) to “something” – a lawyer might use the expression “subject matter” – able to be held and enjoyed, if not in fact held and enjoyed, at a particular time and, usually, over time. Another characteristic of property in the eyes of a lawyer is that that right (to “have and hold” something) is respected by “the whole world” in the sense, at least, that the entitlement to have and hold is respected, not only by people involved in creation or transfer of the right, but

also by everybody (or, at least, virtually everybody) who might be in a position to interfere with it were they minded to do so.

Many concepts confidently spoken of by lawyers as a “legal right” or a “legal obligation” cannot, with confidence, be defined or, at least, defined exhaustively. They can, at most, be approximated by a description governed by assumptions underlying them and some purpose for which they are formulated. The very fact that the expressions “right” and “obligation” are comfortably qualified by the word “legal” suggests that rights and obligations might be viewed through a lens other than that of the law. Most people are equally, or more, comfortable with the concept of a “moral” right or obligation, for example. Some people might be more inclined to view the word through politics, religion, sociology or culture. The list of potential qualifiers is limited only by the human imagination and may vary over time and space. What happens at one time in one place can (and often does) differ from what happens at that time in another place or in the same place at a different time. What happens, or what is seen to have happened, depends (is “contingent”) upon time and place.

A lawyer is comfortable with notions of “rights” and “obligations” because those concepts are the stock-in-trade of lawyers, and they lend themselves to the language of rectitude and enforcement. The existence of a “legal right” or a “legal obligation” depends often upon the existence of some means – usually found in, or backed by, the machinery of government – to enforce that right or obligation. This language is the natural dialect of institutions in whose care, custody and control is administration of the common wealth of a society. In a well-ordered, modern democratic society those institutions are the institutions of parliament (the legislature), the public service (the executive) and the courts (the judiciary)⁵. In Anglo-Australian tradition, they evolved from a customary allocation of decision-making tasks to associates of a personal ruler (a monarch, a crowned king or queen) who exercised power as surrogates of the monarch. Lawyers are comfortable, above all, with the courts. There they play leading roles as judges and advocates. The “law” is the world they inhabit, the world to which they react, the world they mould.

⁵ In political philosophy the concept of a “separation of powers” of government – balancing power between three branches of government – is attributed to Montesquieu, *The Spirit of Laws* (1748). That book greatly influenced the makers of the U.S. *Constitution*, in particular. Australia was influenced in its turn. The three branches of government are dealt with explicitly in the Australian *Constitution*. Chapter I is headed “The Parliament”; Chapter II, “The Executive Government”; Chapter III, “The Judicature”.

Stripped of all their finery, institutions of this character are no more, or less, than ordinary people: people who make decisions about particular disputes, or general policy, based on facts within their knowledge and resources within their keeping. Their ability to make decisions, and the authority with which they do so, depends ultimately upon their having, and retaining, the respect of their community. From them emerges whatever passes for “law” in their community; and a person is entitled to a legal right, or bound by a legal obligation, because “the law” says that to be so.

Property Law: “Enjoyment”, “Title” and “Possession”

At the core of lawyers’ language about property is an idea that property exists to be “enjoyed”. The enjoyment of property occurs over time, as property is used or abused by somebody entitled, at each point of time, to the right to enjoy it or (as is sometimes said) the “benefit” of such a right. The corollary of somebody “enjoying” a right to property is found in the concept of a person “bearing the burden” of an obligation relating to property. Property rights and obligations are sometimes thus spoken of in terms of “benefit” and “burden”.

A right to property that carries a legal entitlement to enjoyment of the property is sometimes described as being “title” to the property. A person who holds title to property has a right to enjoy it that it is recognized by “the whole world” in the limited sense of that expression already identified.

This brings us to two other characteristics of “property” in a lawyer’s scheme of the world. The first is the concept of “quiet enjoyment”. The second is the concept of “possession”.

A person who holds a property right normally expects, as an incident of that right, to be able to “enjoy” it without interference by others. This idea is reflected in expressions such as a “right to quiet enjoyment” found most typically in a lease of land. If a person grants or transfers a property right to another, the grantee or transferee normally expects to be able to enjoy that right without interference from the grantor or transferor in particular. So it is that a grantor/transferor is sometimes said to give a “promise”, “warranty” or “covenant” of “quiet enjoyment” or, at least, to be under an obligation not to interfere with “quiet enjoyment” of the property by the grantee/transferee. That language focuses on the positive right of the grantee or transferee to enjoy property. Something of the same idea is conveyed by an

obligation on the grantor/transferor not to “derogate” – not to attempt to detract, or to take something away, from – a property right that is granted or transferred. This obligation is sometimes expressed summarily as an obligation of “non-derogation”. A grantor/transferor is not readily permitted, in a single transaction, to give something with one hand and to take it back with the other.

However, it is one thing to hold “title” to property. It is another to be “in possession” of the property. Amongst lawyers, the concept of “possession” can have shades of meaning. One person might be said to “own” property – and be entitled to be described as “the owner” – at the same time as another person might be said to be entitled to “possess” it, even to the exclusion of the owner. The classic example of that situation in Anglo-Australian law is where land is “leased” (that is, hired out) by an owner (described in a lease as a “lessor” or “landlord”) to another person (described as a “lessee” or “tenant”) for a limited period of time. The hallmarks of a lease are the existence of a lessee who has an “interest” in land (not full ownership of it) and an entitlement to “exclusive possession” of the land, which carries with it an entitlement to “quiet enjoyment” during the currency of the lease.

Not everybody who is, in fact, in “possession” of land is entitled, in law, to possession of it. A person who is in fact in possession of land, without any greater legal entitlement to it, is sometimes described as an “occupier” of land. To a non-lawyer this might seem like hair-splitting, and sometimes it is. Nevertheless, the distinction can be important. A person in “occupation” of land might not have an entitlement to “possession” of it, and an entitlement to possession might be something less than full ownership of it.

Two examples might illustrate the point. First, take the example of a “licensee”. The word “license” here means “permission”. A “licensee” is a person who has permission to do something. A “licensor” is a person who gives a licensee permission to do it. A member of a family of the lessee of a house might be an example of a “occupier” of land (with the permission or “licence” of the lessee) who has no entitlements to “possession” of the land. Were a visitor to the house to knock on the door it might well be a matter of no moment to know whether the person responding to the knock should be classified as a person in “occupation”, as distinct from “possession” of the land. However, if the visitor happened to be the lessor, and the lessor wanted to reclaim the land as his or her own, the distinction could

be important. A licensee's right to be on the land could be no greater than that of the lessee who granted him or her a licence.

As a second demonstration, take the example of a trespasser. A person might be in occupation of land without any legal interest in the land, and without permission of a person entitled to possession of it. Such an occupier might be said to be trespassing on the ownership rights of another or, more particularly (an Anglo-Australian lawyer would say), the right of another to possession of the land. The word "trespass" is an old French word (imported into English law, following the Norman Conquest of England in 1066, as "law French") meaning "to pass beyond", to go beyond one's own legal rights, passing across the rights of another without that other's consent. The sense of wrongdoing it conveys was captured for generations of Anglo-Australians by its use in some versions of the Lord's Prayer: God was asked to "forgive us our trespasses as we forgive those who trespass against us".⁶ A trespasser on land is a person who is on, or occupies, the land wrongfully – that is, without the consent of a person recognised, in law, as entitled to the possession of land.

The Meaning of "Community" in a Property Law Context

The importance of the concept of "community" to the concepts of "ownership" and "property" can be demonstrated by contemplation of the absence of community. In a very limited sense the concept of "ownership", and the relationship between an "owner" and "property", can exist outside a community of people. A person might well think of a thing as "mine" without the presence of any other people to take the parts of "ours", "yours" and "theirs". Marooned on a deserted island, Robinson Crusoe might well have thought of his few worldly goods as his own before he found his companion, Friday. However, when he and Friday met they intuitively accepted that some things belonged to (were owned by) one of them, some things belonged to the other and some things belonged to them both, communally.⁷ Together they constituted a community. They accepted the existence of these

⁶ Scripturally, the Lord's Prayer is found in *Matthew*, chapter 6, verses 9-13; *Luke*, chapter 11, verses 2-4. The word "trespasses" was used in the 1662 edition of the Anglican *Book of Common Prayer*, upon which the British Empire was built. Most English versions of the Bible speak of "debts", "sins" or "wrongs" rather than "trespasses". The versions in common use in Roman Catholic Churches have for many years used the word "trespasses": *The Knox Translation* (in Matthew, not Luke); *Catechism of the Catholic Church* (2nd Aust & NZ ed, 2003), page 661 (paragraph 2759). William Tyndale's seminal English translation of the New Testament, published in 1526, used the word "treaspases" in Matthew and "synnes" in Luke.

⁷ This is the sanitised, modern view of Robinson Crusoe. There is a tendency, in the modern mind, for any idea that Friday was Crusoe's "slave property" to be screened out or minimised. Daniel Defoe's *Robinson Crusoe* (1719) had layers of complexity deeper than modern mythology.

“property” relationships between them as people and “things” as property. They respected those relationships. They conducted themselves on the basis of an expectation that those relationships would be respected. On the basis of that acceptance, respect and expectation they endeavoured to enjoy their allotted property without interference of the other’s enjoyment of his property.

To the extent that enjoyment of some property might naturally detract from enjoyment of other property, it might be practically impossible for a person never to interfere with another’s enjoyment of property. Nevertheless, to the extent that such interference is inevitable, the notion that a property right is accepted, respected and expected carries with it an agreement (or at least an acquiescence) that interference is to be kept within “reasonable” or “due” limits. That acquiescence is a necessary part of the give and take of living in a community.

Here is a fundamental truth about property: beyond the world of a Robinson Crusoe experience in living alone in total isolation, the concept of “property” depends on the enjoyment of “rights of property” being accepted, respected and expected by a “community”. Even “private property” depends, at least, upon the “public” acquiescence of a community. In the world most people inhabit – let us call it the “real world” – the concept of “ownership” implies more than the existence of “property”, “owner” and a relationship between them. It also implies the existence of a “community”, and a relationship between “property”, “owner” and “community”.

The Existence of “Community” Implies the Existence of “Law”

The existence of community implies the existence of rules governing relationships between people, and between people and property. Those “rules” might be characterised as social, religious, political, economic, legal or otherwise by reference to some such descriptive label. The hallmark of “legal rules” is that, at some point or another, particular “rules” might be enforced, with physical force if necessary, against the will of one or more members of the community, by one or more other members of the community acting in the name of the community. The “law” is an abstract expression of a set of “legal rules” for the people or interests that enforce them.

The Nature of Law

The meaning of the word “law” is elusive, elastic and dependent upon context. Philosophers, theologians and rulers have debated the subject, fought wars about it and searched in vain for agreement on the topic. For some people, it is a command from on high. For others, it is the sum total of social custom built up over time. Perspectives differ, again, over time and space. Generally, however, a common characteristic of a legal right or a legal obligation is that it involves an expectation shared with, and enforceable by, a community. Legal rights and obligations cannot meaningfully exist independently of society. They exist because society accepts that they might do so, or expects them to exist, allows them respect and sustains them by a determination to enforce them.

That two people might never agree upon a particular definition of “law” is no impediment to an examination of its field of operation. Lawyers often (and for good reason) caution clients that “the proper administration of justice” is no guarantee of “justice”. In this life, as distinct from the next, administrators of the law can only attain an approximation of the abstract “justice” ideal. Nevertheless, experience of the word teaches the importance to peace, prosperity and general happiness of a common belief in the existence, and utility, of “the rule of law” as an alternative to violence, poverty and widespread misery. Dedication to “the law” in service of “people” is a worthy pursuit, even if nothing more than a rough approximation of an ideal legal system is within reach.

The Limits of Law

In considering its role in society, in investigating its content and in laying it down for our times and times to come, care should be taken not to expect too much of law. That is not to say that idealism has no place in law. It certainly does have a place. Many hard-bitten, mean-spirited, crusty old lawyers, scarred by experience of litigious battles won and lost, can sustain their work over the long term, with all the drudgery of wrestling with “the devil in the detail” that entails, only because of core belief in the importance of that work. And it is important. But it has its limits. It can give people every chance of peace, but it cannot stop all wars. It can regulate human behaviour; it cannot repeal human nature. It can be moulded to meet the convenience of today, but there is no guarantee that tomorrow will not find it extremely inconvenient.

When Australian law-makers, and those who administer the law in Australia, turn up for work each day and set themselves to whatever task is at hand, it is only fair to acknowledge that, on

the whole, their intentions are good. Philosophers might debate the meaning of “good”, and realists might call attention to the feet of clay pounding the path towards righteousness, but the abiding strength of the Australian legal system is that, for the most part, it is administered by people whose motives are pure. Nevertheless, those who administer the law, cannot do more than the law itself is capable of doing. It is an imperfect instrument.

This needs to be borne in mind when searching for the underlying “purpose” of any law and effectiveness by the standards of its times, or ours.

Despite an appearance of purposeless irrationality that they sometimes wear with obstinate pride or indifference, legal rules generally have a rational foundation. Sometimes it is plainly in view. Sometimes it is recast by successive generations without any appreciation of change. At other times it is exposed to view only through the work of legal historians working, like archaeologists, to strip away layers of sedimentary misconceptions. In his classic work, *The Forms of Action at Common Law* (1909), Professor F W Maitland offered this insight into that phenomenon :

*“So continuous is legal history that the lawyers do not see that there has been a new departure [in the law] until this has for some time past been an accomplished fact; their technical terminology will but slowly admit the fact that [a fundamental change has occurred]”*⁸

Speaking of the phenomenon in the context of the writings of the 18th century legal writer, Sir William Blackstone, Maitland wrote in the same book: “...any one who would give a connected and rational account of the legal system [as it operated in England in the 18th century] was obliged – as Blackstone found himself obliged – to seek his starting point in a very remote age.”⁹

Property, Constitutional Government and Legal History

In Volume II of his *Commentaries on the Laws of England* (writing generally “Of the Rights of Things” and, in that context, “Of the Feudal System”) Blackstone made the following observations about the connection between the law of property, constitutional law, legal history and feudalism:

⁸ F W Maitland, *The Forms of Action at Common Law* (Cambridge, 1909; reprint, 1968) page 43.

⁹ *Op cit*, page 5.

“It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: a system so universally received throughout Europe, upwards of twelve centuries ago, that sir Henry Spelman [a renowned English legal historian of the 17th century] does not scruple to call it the law of nations in our western world. ... And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour [Emphasis Added].”¹⁰

The Nature of Legal, and Legal History Research

In thinking about “law”, and “legal history”, there are several insights into how the process of finding it operates that call for attention.

First, it is desirable, if not necessary, to be aware of a difference in legal thought between “is” and “ought”. When called upon to formulate a legal proposition most people experience a temptation to respond with a statement of “the law” as they believe it “ought” to be, rather than as it actually exists. That temptation should be resisted, at least to the extent necessary to be aware that a value judgment about what should exist has a quality different from an empirical observation about what does exist. Articulation of a law reform proposal gains force from a candid acknowledgment of the law that is said to require reform. The vice to be avoided is not support for law reform, but a failure to distinguish between “is” and “ought” in exploration of a legal question.¹¹

¹⁰ This extract is taken from page 37 of volume II of Dr Wayne Morrison’s “Modern Edition” of *Commentaries on the Law of England* (Great Britain, 2001). It is found in the classic, 9th edition of *Blackstone* (published in 1783) at page 44 of volume II.

¹¹ Kent McNeil’s *Common Law Aboriginal Title* (Oxford, 1989) is an example of a fine, scholarly and influential legal text that manifests a tendency to skip any distinction between “is” and “ought”, and to reason from intuitive “conclusions” to perceptions of “fact” and back again to rationalised conclusions. It is also an example of advocacy that has proven persuasive. Much of what Professor McNeil wrote before *Mabo* has

Second, a legal researcher needs to be wary of a tendency to be caught up in debates about “absolute” truths and the “relativism” of “subjectivity”. There is need of a caution against acting upon a belief that there are no “absolute” truths in law, that all law is “subjective”. In the practice of law there is a temptation to believe that all judgements are necessarily the personal, subjective opinions of the people who happen to have responsibility for making particular decisions. That tendency is reinforced by daily experience in the advocacy of competing cases that could be decided either way. However, whatever might be the merits of philosophical debates about the existence or otherwise of “absolute truths” or the “relativity” or “subjectivity” of all opinions, law practice requires an appreciation that there can be an approximation of “absolute truth” and “objective” standards. That approximation lies in the fact that the “law” is generally the sum-total of the conscientious, professional opinions of a community of lawyers striving for a “right answer” to particular problems, not the whimsical views of isolated, unconnected individuals. To overlook that fact is to run the risk of thinking that one’s own, personal opinions about law are necessarily correct. Legal research calls upon an inquiring mind to look outwards for empirical facts and signs of law interacting with them, more than introspective contemplation. Development of the law cannot dispense with “dreamers” who think of things as they ought to be, rather than as they are; but, in its day to day practice, the law depends more often on the vigilance of those who are wide awake to the possibility that they are “wrong” or, at least, that their “opinions” are not shared by others.

Third, a lawyer should have, or develop, an ability to look for both “the big picture” and “the devil in the detail” in identification of a problem to be solved, the formulation of alternative solutions to the problem and the selection of an appropriate solution. There is a need for balance between “macro” and “micro” perspectives. Big ideas need to be grounded in factual reality to stop them floating away. On the other hand, too great a focus on particular facts can bury any problem and potential solutions too deep to see the light of day. Two contrasting cases illustrate the point. In 1835 John Bateman secured the execution of two Deeds of doubtful validity from Aborigines at Port Phillip. Part of his plan appears to have been to attempt to force government authorities to acquiesce in the prospective settlement that became Melbourne. He wanted to force the hand of government. He reasoned from “the particular” to “the general” to achieve an object collateral to the particular transaction. Even though the “Deeds” were of doubtful validity, they provided a “colour of right” for settlers

become legal orthodoxy since *Mabo*. Every law reformer’s dream is that his or her “ought” will become everybody’s “is”.

who proceeded to squat on Aboriginal land. The settlers jumped into a dirty pool of controversy in the hope, and expectation duly realised, that government would jump in to save them. More honourably, in 1975 Gough Whitlam reasoned from “the general” to “the particular”. His Government could not immediately legislate for Aboriginal Land Rights because of political constraints. In this case, general policy was served by a particular form of transaction, a Deed of Lease.

Fourth, a researcher needs to understand the power of “precedent” in legal reasoning at all levels. In their problem-solving methodology lawyers of all descriptions tend, at some point or another, to ask questions such as: “Has this problem ever arisen before? How has it been dealt with before? Can we adapt a proven solution to the current problem?” This methodology is particularly apt to a study of property law. Property lawyers have a strong tendency to build on past success, to adapt thinking that has worked in the past. An example of this is found in the use of “Deeds” in property transactions: From very different perspectives, each of John Batman (1835), Robert Richard Torrens (1858) and Gough Whitlam (1975) had resort to the Law of Deeds.

Fifth, legal research requires an understanding of the strengths and weaknesses of legal advocacy. In reading about the arguments of lawyers, a measure of analytical detachment is necessary. Advocates tend to marshal their arguments (including their summaries of fact) by working towards a pre-ordained purpose. In pursuit of a purpose they argue that “is” and “ought” coincide in a particular case. For that reason, it is sometimes helpful, if not necessary, to identify an advocate’s “purpose” before accepting without reservation contentious statements made in pursuit of it.

An Attempt at a Conceptual Definition of “Property”

In the Anglo-Australian, “common law” tradition there is not uncommonly a distrust of abstract, conceptual analyses of the law. “Distrust” might be too strong a word in a society in which (increasingly since the mid-19th century) law has been articulated in terms of “principles”, written about in those terms in text books, and taught in universities dedicated to treating it as a “scientific” discipline. It might be more accurate to say that, insofar as the common law tradition of building up law case-by-case compels lawyers to inquire into the particular facts of particular cases as a primary focus, lawyers have “reservations” about the utility of broad statements of principle based on abstract, deductive reasoning. A lawyer’s

life experience is that the “facts” and “law” that govern the outcome of a particular case can, with even a small shift in perceptions of the “facts”, take on a completely different hue. Furthermore, and, as “general statements of principle” are, almost by definition, subject to “exceptions”, there is often room for debate about the application of a “principle” in a particular case: Does the case fall within the principle embodied in a particular legal rule or an exception to it? Has an exception become so significant as to constitute a new rule? Even lawyers predisposed to deductive reasoning about legal principles are driven, by a need to examine particular facts and to accommodate legal precedents, to think inductively. When this case is compared to that, and some other case that might reasonably be expected to emerge, the law must sensibly be taken to be..., or so a lawyer thinks. That is the mind-set of the common law tradition.

None of that means that an attempt should not be made to think of the law in “conceptual” terms. It means only that the limits of conceptual analysis of law require acknowledgment.

With all these warning bells ringing in our ears, an attempt is here made at a “conceptual” definition of “property” in the mind of a lawyer.

Conceptually, “property” as perceived by a lawyer is “something” (ie, “a thing” or, in Latin, *res*):

- a. capable of being represented as a set, or a bundle, of rights and obligations.
- b. capable of being held, and enjoyed, by one or more people.
- c. capable of being held, and enjoyed, at a particular time or times, if not continuously over time.
- d. the holding and enjoyment of which are each capable of being:
 - i. passed between people (by grant, transfer or inheritance) in whole or part.
 - ii. recognised, respected and (if need be) enforced by the community in which the thing is held or enjoyed, as the case may be.

- e. the holding and enjoyment of which is recognised, respected and (if need be) enforced by the community as a “property right” of the person who, for the time being, is entitled to hold or enjoy the thing.

Legal Pragmatism: By Accident or Design

To some extent the generations of lawyers from whose work the “Common Law” as Australians know it emerged avoided conceptualising the law of property by a heavy focus on: (a) procedural rules in the conduct of litigation; and (b) an emphasis on practical outcomes. According to their lights, they proceeded rationally and purposively. Nevertheless, it often appears to a modern mind that, instead of working from the premise that “every ‘right’ (or ‘wrong’) should have a remedy” that is attractive to us, they were moved by a contrary way of thinking. Perhaps because we do not fully understand either their substantive law or the procedures by which their law was enforced, we generally imagine that they were motivated by the idea that “nobody has a legal right unless they first have a legal remedy”. In our imagination, they moved from “remedy to right”, as we imagine that we move from “legal right to legal remedy”. In reality, most lawyers probably think intuitively in terms of “rights”, “wrongs” and “remedies” as an organic whole, each concept interdependent with the others. Any tendency in that direction is reinforced by the fact that, although an advocate’s argument moves forward from “complaint” to “desired outcome” in presentation, most advocates prepare a case by marshalling facts and arguments, working backwards from a desired outcome – in the way that the shortcut solution to a maze is found by working backwards from the end point to the point of entry.

In the context of property law, early English lawyers did not focus on abstract questions about “rights of ownership”.¹² They focused on more pressing questions about the terms upon which a person might “hold” land “of” his or her “lord” – to whose person a duty of “fealty” (loyalty) was owed – and the existence of a right to possession (“seisin”) of land to which were attached obligations of “service” (often, initially, military service) to the lord. The question, “Who owns this land”? was not on everyone’s lips. More commonly, medieval society asked questions such as: “Who is the lord of this land? Who is seised (lawfully in possession) of the land? Who holds it of the lord? What estate does the tenant (landholder) hold? What service is due to the lord as an incident of holding the land?” The immediate

¹² A W B Simpson, *An Introduction to the History of the Land Law* (Oxford, 1961), page 1.

focus was on the “holding” and lawful “possession” of land. Over time, as landholdings became more settled, and as a market economy developed, these basic concepts supported more abstract notions of “ownership” and “property rights and obligations”, and obligations of “service” were commuted to obligations to pay money.

A Return to the Concept of “Community”

For the purpose of understanding the concept of property, a “community” might be thought of as a grouping of people who are: (a) bound together by shared assumptions, beliefs, expectations or experience; and (b) identified, by themselves, as a community.

In the context of “property”, the limits of “community” might be thought to be at any point beyond which a person could not, even if he or she would, interfere with the enjoyment of property by a member of the community. The relevance of this limitation is that a hallmark of “property” is conventionally said, by lawyers, to be that a property is held “against all the world” and not merely *vis a vis* people associated with its creation or its passing between owners. The expression “all the world” is hyperbole of lawyers. It conventionally distinguishes the concept of “property” from the concept of “contract”. A “contract” is essentially an agreement between parties identified or identifiable; “property” is something which everybody in “the world” is “bound” to acknowledge even if not a party to any agreement relating to it. The expression “all the world” cannot be taken literally in a world comprising a multiplicity of communities, some of them divided by enmity and a refusal to recognise the legitimacy of one or more other communities. Thankfully, the limits of “community” and corresponding limits of “property” generally need no exploration. It is enough to notice that it is in the nature of “property” that not everybody in “the real world” might acquiesce in its existence or claims to ownership of it. In this negative sense, as well as a positive one, the concept of “property” depends upon the acquiescence of others rather than any person who asserts ownership.

Another feature of “property” that reflects its connection with “community” is that, conceptually, property is generally divisible. That is another way of saying that it is able to be shared. It can be “owned” in different ways and by different people. The one physical object might be “owned” at one and the same time, or over time, by a multiplicity of people. What lawyers might describe as the “divisibility” of property – the capacity of property to be divided between people – others might prefer to describe by use of the word “share”.

Property that is divided between people might, colloquially at least, be thought of as being shared between them.

The idea of property being “shared” brings to mind not only the character of “things” (ie, property able to be “shared”), but also the character and organisational structure of “people” who share. At the highest “macro” level of discussion about “society”, the whole community shares all property owned by a member of any community, even if only to the extent that some members of the community acquiesce in other members claiming private, personal “ownership” of particular things. At lower levels of focus than this, a community consists of a variety of “sub-communities” in which people with common interests congregate. The most predominant form of those sub-communities, across time and space, is “the family”. What is meant by that expression can vary over time and space – with greater diversity than is sometimes imagined – but at its core lies a set of personal relationships (most conventionally involving a man, a woman and one or more children, connected by deep social or religious ties) living in community with each other as an identifiable group. Much property law has been generated, and continues to be generated, by attempts to favour or protect the interests of “families”.

Other forms of social organisation long recognized in Anglo-Australian law include two broad categories. The dividing line between them is defined by reference to whether groups of individuals are, or are not, recognized in law as having the status of a single “corporate” body. First, “unincorporated associations” are sometimes described as “voluntary associations” of people; that term embraces clubs, churches and a variety of professional, trade and labour associations, at least in cases in which membership is not compelled by law. Second, “incorporated associations” are generally called “corporations”. The term “company” is, without more, ambiguous. It can refer to an unincorporated association such as a business partnership, or even to a sole trader. It can just as readily serve as a synonym for the word corporation. Everything depends on context. Sometimes the law attributes “corporate status” even to a lone individual (usually the holder of some public office that needs continuity of existence in order to transact business in the ordinary course), not merely to an association of people. An individual who has corporate status is called a “corporation sole”. On the whole, the purpose of an attribution of corporate status to one or more people is to facilitate long-term arrangements for the holding of property and clear lines of communication in the transaction of business. Although a corporation can be said to have a

“birth” (when it is created or incorporated) and a “death” (when it is dissolved according to law, as in the case of a company that is “wound-up” or “liquidated”), it can, in theory, live for ever; its existence is not necessarily co-extensive with the life and death of an individual, “natural” person.

Insofar as a “sub-community” collectively interacts with people within its broader community, it might exhibit some of the characteristics of an individual, and act and be acted upon as if it were an individual. On the other hand, within a sub-community the people who comprise it are ordinarily governed, with more or less formality depending on context, by rules about personal relationships, ownership of property and rights and obligations that reflect what happens in the broader community.

Community and “Public” Recognition of Property

The interdependency of concepts of “ownership”, “property”, “community” and “law” manifests itself in recurrent ideas about how “public” and “private” interests can be accommodated. There needs to be a balance between what is known and recognised as “public” and what can be left to the “privacy” of individuals living in a community. Over time, communities will, and can, exist only if most people in them are satisfied or accept that there is an appropriate balance between “public” and “private”.

For that reason, legal systems generally prescribe a variety of formalities for the ownership of property and dealings with it. Those formalities not uncommonly include a requirement for: (a) “writing”, as in legislative provisions based upon, or analogous to, the *Statute of Frauds* 1677 (Eng);¹³ (b) a particular form of writing such as a “Deed”; (c) public ceremonies, such as the old ceremony of “Livery of Seisin”, the modern idea of a “public notice” published in a “government gazette” or newspaper, or certification or registration by a public official;¹⁴

¹³ The *Statute of Frauds* 1677 (Eng) provided, in effect, that six classes of contract had to be in, or evidenced by, writing if they were to be enforceable at Law. One of those classes of contract related to contracts for the disposition of land. The *Statute* was part of the English law “received” into Australian law in the 19th century. Although local legislation may have repealed or modified the *Statute*, it has served as a model for other legislation. Depending upon the terms of such legislation, Courts exercising Equitable jurisdiction might enforce rights arising from “informal” contracts in some circumstances. In that event they sometimes say that the *Statute of Frauds* (which was designed to reduce the incidence of fraudulent dealings in the wake of the English Civil Wars cannot itself be used as “a cloak for fraud”.

¹⁴ The substantive purpose of “Livery of Seisin” as a public ceremony was implicitly acknowledged in colonial legislation that effectively “abolished” it as a requirement for a legally effective conveyance of land. Section 20 of the *Registration Act* 1842 (NSW) – now re-enacted as section 31 of the *Conveyancing and Law of Property Act* 1898 (NSW) – provided that a “Deed of Feoffment” (a deed of conveyance) would be taken as the equivalent of “livery of season” if registered in a public register.

and/or (d) a formal system for the registration of Deeds, or of title, designed to ensure that property ownership and transactions are verifiable. In one form or another, the law generally also requires a formal assertion of an entitlement to ownership of property, or an entitlement to transact business affecting property, to be supported by a deliberate formal statement (such as an oath or a declaration) which, if proven to be false, can expose the maker of the statement to a penalty imposed by law.

All these mechanisms are designed to ensure that there is “truth” in assertions of property ownership and in dealings with property. A legal system that does not aim at pursuit of “truth”, and is not administered in a manner that achieves a fair approximation of “truth”, ultimately sacrifices its own integrity and, with that, the confidence of the community it serves.

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NOTES:

- 1. This Research Paper has been prepared for a specific purpose: To help participants in the 2009 Australian Legal History Essay Competition to enjoy a positive, constructive learning experience in an engagement with: (a) Australian law, history and society; and (b) the idea that, wherever possible, everybody should endeavour to base personal judgments upon empirical observation, an independent consideration of “primary evidence” and an appreciation of a variety of “secondary” materials.**
- 2. The paper is subject to amendment from time to time as further research is undertaken, and the comments of others are taken into account. Public comment is invited. Any comments should be addressed to the author, via email, at secretary@forbessociety.org.au**

Any amendment of the paper will be marked, and dated, as a subsequent “version”.