

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

BACKGROUND RESEARCH PAPER No. 2

***FOLKLORE RULES: The Origins and Growth of
Australian Law***
By Geoff Lindsay S.C.

INDEX

**BACK TO THE FUTURE: THE “RECEPTION” OF ENGLISH
LAW IN AUSTRALIA**

- **English Law in Australia: “Received,” “Introduced” or “Adapted”?**
- **Tempering Judgements in History: The British Empire in Context**
- **The Australia Acts, 1986: Legal Independence**
- **A New “Common Law” for Australia**
- **An Implication of 1986: No Need for “Settled” or “Conquered” Territory Status**
- **How Our Anglo-Australian Forebears Thought: Centrality of the Crown**
 - **The “Constitutional Rights” of a Subject of the Crown**
 - **Blackstone’s Commentaries**
 - **The Common Law of England as a Constitutional Safeguard**
 - **Britain’s Emergence as a World Power, Governed by a Constitutional Monarchy**

- **The Anglo-Australian Legal Framework: The Formative Years**
 - **Colonial Government via The Royal Prerogative**
 - **Constitutionalism Stirs in the Colonies**
 - **Blackstone Clarified: *The Australian Courts Act 1828* (Imp)**
 - **Growth Pains in Development of Legal System**
 - ***The Colonial Law Validity Act, 1865* (Imp)**
 - ***The Statute of Westminster 1931* (UK)**
 - **The Doctrine of Precedent and Uniformity of Law Across Boundaries**
 - **Blackstonian Jurisprudence Resilient in the Privy Council**

AUSTRALIAN LEGAL HISTORIOGRAPHY

“AUSTRALIAN” LAND, LAW AND HISTORY

- **“Property Law” and Large Questions about Life**
- **The Feudal Origins of Australian Land Law**
- **A Ghost of Feudalism in Australian Colonial Land Law**
- **Eddie Mabo as an Australian Ghostbuster**

**FRANCIS FORBES SOCIETY FOR AUSTRALIAN
LEGAL HISTORY
(ACN 099 158 620)
AUSTRALIAN LEGAL HISTORY ESSAY COMPETITION
2009
BACKGROUND RESEARCH PAPER No. 2
FOLKLORE RULES: The Origins and Growth of
Australian Law
By Geoff Lindsay S.C.**

**BACK TO THE FUTURE: THE: “RECEPTION” OF ENGLISH LAW IN
AUSTRALIA¹**

English Law in Australia: “Received”, “Introduced” or “Adapted”?

The law that serves, and governs, Australia in the twenty-first century is built upon the foundations of the law of England adapted by British colonists in the late eighteenth and the nineteenth centuries. In legal history texts it is often spoken of as having been “received” by Australia as if a gift from England. When one contemplates the freedoms Australians enjoy – freedoms underwritten by the rule of law in the Common Law tradition of England – perhaps it was indeed a “gift” of sorts. If so then, like so much of Australia’s rich heritage of contractions and ambiguous certainties, it was, for some Australians, a gift of the same character as that of the wooden horse given by the Greeks to the Trojans in ancient European mythology. For transported convicts and Aboriginal Australians, the gift of English law upon which our future hopes of national community then rode carried with it

¹ Classic texts on this topic include Alex C Castles, *An Australian Legal History* (Sydney, 1982); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Sydney, 1995) and “Judges and the Application of Imperial Law in Eastern Australia, 1788-1836: Resistance and Reception” in David Lemmings (ed), *The British and Their Laws in the Eighteenth Century* (Boydell Press, 2005); W.J.V. Windeyer, *Lectures on Legal History* (2nd ed revised, Sydney, 1957) chapter 37; B.H. McPherson, *The Reception of English Law Abroad* (Brisbane, 2007). Classic essays on the topic include H V Evatt, “The Legal Foundations of NSW” (1938) 11 *Australian Law Journal* 409; Sir Victor Windeyer, “A Birthright and Inheritance: The Establishment of the Rule of Law in Australia” (1961) 1 *Tasmanian University Law Review* 635; A C Castles, “The Reception and Status of English Law in Australia” (1963) 2 *The Adelaide Law Review* 1; R Else-Mitchell, “The Foundation of NSW and the Inheritance of the Common Law” (1963) 49 *Royal Australian Historical Society Journal* 1; Enid Campbell, “Prerogative Rule in NSW, 1788-1823” (1964) *RAHS Journal* ... and “The Royal Prerogative to Create Colonial Courts” (1964) 4 *Sydney Law Review* 343.

disorientation backed by brute force. The idea that English law was “received” in Australia obscures the context in which it was “imposed” on those “recipients” whose “consent” to “receive” it was non-existent, illusory or less than fully informed.

English Law was certainly “introduced” into “Australia” by the arrival of the British; but the word “introduction” and its derivatives say little, if anything, about the process by which the Law of England came to be applied in Australia.

A better understanding of how Australian law developed as it did can be encapsulated in the idea that, when charged with the responsibilities of government in an unfamiliar land, the “law” that the British applied in their Australian Colonies was an “adaptation” of the law that was most familiar to them (the law of England), the law of a community from which they continued to draw material and spiritual sustenance, the law of their political masters and military protectors. Things that were new to them they saw through the prism of what was to them known, thought about in terms of a world that was to them familiar, and adapted as best they could to live and grow.

The process involved in adaptation of English law to Australian conditions was not unlike what happens today throughout Australian suburbia each time a family adapts the rules of international cricket to a very different game that recognisably remains “cricket”. In the absence of stumps, a garbage bin will do. Without bails atop stumps, any ball that hits the bin is enough to declare a “batsman” – a “batter” to a new generation – “out”. Any catch is “out”. Over the fence is “six and out”. Everyone has a turn at batting and bowling. Everyone has to obey “the rules”. Any dispute that cannot otherwise be resolved is submitted to Mum, Dad or the nearest adult acting as umpire. The “received wisdom” of unread, formal rules of cricket are adapted to local conditions by a local community.²

Tempering Judgements in History: The British Empire in Context

The people living in the 18th and 19th centuries – in the European “Old World” and in the colonised “New World” alike – were not living life like a game of cricket. Life

² This “Backyard Cricket” analogy is not as far-fetched as it might seem. In *Cricket and the Law: The Man in White is Always Right* (London, 2005) Professor David Fraser explored the ambiguities of cricket, law and the meaning of life in a volume in the Routledge Studies in Law, Society and Popular Culture.

was hard, for most people, in many places. They were engaged in fair-dinkum life and death struggles.

In judging our forebears, and inviting the judgment of history upon ourselves, a rush to judgment should be resisted. Justice and Mercy ought to be partners, measure for measure. William Shakespeare's play, *Measure for Measure* (1604) bears thinking about. His theme was taken from the Sermon on the Mount (Matthew Chapter 7, verse 2; Mark Chapter 4 verse 24): "... *in the same way you judge others, you will be judge others, you will be judged, and with the measure you use, it will be measured to you*". One of the insights Shakespeare added to this appears in Act V Scene 1 of his play: "*They say best men are moulded out of faults, And, for the most, become much more the better For being a little bad: so may [those we are called upon to judge]*".

In fairness to all (ourselves included), Australians need especially to forebear from hasty, hash opinions of the "British Empire". On the whole, we have fared well from our connection with what was "the Empire" and is now "the Commonwealth". To the extent that we might not have done as well as we could, or should, have done from that connection, the ball is now well and truly in our court as an independent nation. That is so, and is likely to remain so, whether Australia ever does, or does not, declare itself to be a "Republic".

As we continue to build our nation, we should not overlook the challenges faced by other nations in present or past times. An understanding of our own history depends, in part, on our understanding of British history, as well as the history of Aboriginal Australians. If we start from the premise that Britain is and was at all material times, and in all respects, an omnipotent superpower, any assessment we make of events in Australia could be sadly mistaken. Britain enjoyed a pre-eminent position in the world for Australia's formative years after the defeat of Napoleon, first at sea (at the Battle of Trafalgar in 1805) and then on land (at the Battle of Waterloo in 1815), but even then it had to cope with social, economic and political turmoil in the aftermath of war, with industrialisation apace, and with Europe living on the edge of revolution (1830 and 1848) or war.

At the time "Australia" was "settled" by the British in the late 18th century and in the early years of the 19th, the "Imperial" Government had its own fair share of problems.

No government is an all-powerful monolith. The British who came first to Australia in 1788 came from a country little more than 100 years removed from civil war. They chose to call themselves “the United Kingdom” following the Union of the two Kingdoms of England and Scotland in 1706, but opposition to the Union bubbled underneath the surface. In 1745 the Unionists brutally suppressed the “Jacobite Rising” by Scottish supporters of the Catholic House of Stuart. Post-Reformation tensions between Catholics and the Anglican Establishment in the United Kingdom remained in Scotland and seethed in Ireland. The reality of those tensions can be seen, today, in the form of the Oaths of Loyalty to the Crown that Governor Phillip was required to take upon establishment of the Colony of New South Wales in 1788. In the years following 1788 the convicts transported to “Botany Bay” included Scottish and Irish political prisoners, martyrs to their compatriots. “Botany Bay” was chosen as a site for convicts in the first place because, with French assistance, American colonists of British origin fought and won a “War of Independence”. It could just as easily have been characterised as a civil war. The assistance given by the French to the Americans was, however, part of a larger pattern of war between the English and French throughout the 18th Century, which came to an end only with the defeat of Napoleon in 1815. At home Britain had a restive population living in harsh conditions – as the pace of industry quickened – intoxicated by tales of opportunity in a New World as an escape from the rigours, and despair, of the Old. There was a diaspora in waiting, receptive to the idea of colonisation in a world in which brutality, war and pestilence were accepted as a way of life.

For the British, at home and abroad, the 19th century was a time for building. Public infrastructure had to be built. A capacity for administration had to be developed. Old feudal relationships strained under the pressures of commerce, industrialisation, democracy and the development of professionalism in public service. The Colonial Office – much criticised as an inefficient centre of power in far away colonies – did not begin to emerge into the light of the 19th century until its re-organisation in 1813. It grew as Britain’s “Second Empire” grew in the years that followed.

The “land hunger” that drove “Europeans” in the New World throughout the 19th century needs to be assessed in a framework that looks beyond Australia. The dispossessed of Europe looked to the New World in much the same way as the

dispossessed of war torn societies today look to places like Europe, Australia and North America.

The plight of Aboriginal Australians living in their own life and death struggle (and having to confront a contagion of British Settlers in the years following John Batman's Port Phillip Settlement in the mid-1830s) was captured in a Colonial Office Minute dated 22 July 1839 written by Under Secretary James Stephen:

*"We take possession of their Country, introduce amongst them the most profligate habits and the severest Law of Europe – and having tainted them with our vices, and oppressed them with our injustice, we execute against them all the severity of our own Law merely for having too well learnt the lessons we have taught them."*³

In the 19th century, European visions of a "land of opportunity" were, quite literally, focussed on land. Their moral compass was, at times, blinded by it. Edward Gibbon Wakefield (1796-1862) never visited the Australian colonies, but in 1829 he published under an assumed name a popular book entitled *A Letter from Sydney, the Principal Town of Australasia*, that inspired schemes of colonisation throughout the Empire, particularly in South Australia, New Zealand and Canada.⁴ Central to Wakefield's thinking was the idea that colonisation could be financed by the sale of colonial "wasteland". Belief in the existence of "wasteland" in Australia has lost currency since the High Court's recognition of Aboriginal Native Title in the *Mabo* decision of 1982.⁵ It was, however, a widely held belief outside the Aboriginal community in the 19th century.

The colonisation schemes of Wakefield eventually acquired the support of Jeremy Bentham and were facilitated by the work of Robert Richard Torrens, who was

³ Paul Knaplund, *James Stephen and the British Colonial System, 1813-1847* (Madison, 1953), page 21.

⁴ The book was published under an assumed name because Wakefield was a convicted criminal. He had deceived a schoolgirl heiress into a runaway marriage. His experience in prison turned him back to his Quaker roots, and into a social reformer. After *Letters from Sydney* (1829) he published *The Punishment of Death* (1831) and other works intended for improvement of the masses, notably *A View of the Art of Colonisation* (1849). He died in New Zealand. See R C Mills, *The Colonisation of Australia (1829-1842): The Wakefield Experiment in Empire Building* (1915; Facsimile Edition with a Note by S J Butlin, Sydney, 1974); E G Wakefield, *A Letter from Sydney and Other Writings on Colonisation* with an Introduction by R C Mills (Everyman, London, 1929).

⁵ *Mabo v Queensland [No. 2]* [1992] 175 CLR 1.

himself the promoter of such schemes.⁶ The guiding light of Bentham's philosophy was the "Greatest Happiness Principle", according to which "*increase of happiness should be the sole object of both the legislator and the moralists*".⁷

[Bentham was highly influential in his lifetime, but not beyond eccentricity. Upon his death in 1832 his body was preserved by a taxidermist, in accordance with his Will, and placed in a glass cabinet in University College, London. There it remains to this day, on public display.]

In the latter part of the 19th century, as industrial growth moved the World – "Old" and "New" – towards socialist thought an American journalist, Henry George (1839-1897), briefly popularised the idea that a "single tax" on land could effect much needed reforms in the relationship between labour and capital. His most famous work, *Progress and Poverty*, was published in 1879. Although little known today, it might be credited with causing land hungry societies of the 19th century to pause for thought about the economic and social justice of land ownership.⁸ From an Australian perspective, it should be noted: unlike Wakefield, he did visit Australia. He was married to a Queenslander.⁹

At every point of Australian history there can be found countervailing forces of "good" and "bad". We must cultivate an ability, with Justice and Mercy, to recognize both before any balance is weighed. We would do well to remember the example of James Stephen (1789-1859), the Chancery lawyer whose career was given over to development of Britain's Colonial Office. His painstaking administration of British's Empire was governed by a well-intentioned paternalism for those in his charge; a desire to protect Indigenous peoples and to abolish slavery everywhere; respect for local administrators; and a concept of colonial communities as a family growing toward independence¹⁰. He was a major influence in Australia's formative years. Through his efforts, and those of likeminded reformers such as

⁶ Lionel Robbins, *Robert Torrens and the Evolution of Classical Economics* (London, 1958), pages 166-167.

⁷ A W B Simpson, *Biographical Dictionary of the Common Law* (London, 1984), pages 44-46.

⁸ The notoriety of Henry George was such that his philosophy was thought to have been the subject of an Encyclical Letter issued by Pope Leo XIII (dated 15 May 1891) warning against excessive adherence to it. George responded with a book, *The Condition of Labour: An Open Letter to Pope Leo XIII* (dated 11 September 1891). Both documents can be found in the covers of an edition of the book published by The Henry George Foundation of Great Britain (in London) in 1934.

⁹ The principal biography of Henry George was written by his son Henry George, junior. It was published as *The Life of Henry George* (New York, 1901).

¹⁰ Paul Knaplund, *James Stephen and The British Colonial System, 1813-1847* (Maddison, 1953)

William Wilberforce, Slavery was “abolished” without war in the British Empire between 1833-1838, 25-30 years before the United States “abolished” it after a bloody Civil War.

The Australia Acts, 1986: Legal Independence

Australians who think of themselves as a young country should, perhaps, reflect upon the significance of the fact that, as a matter of law, the land we know as Australia lived under British sovereignty, in some form or another, from 1770 (when Captain James Cook mapped the east coast of Australia) or, at least, 1778 (when Governor Phillip established a penal colony at Port Jackson, Sydney Town) until 3 March 1986.

3 March 1986...? Yes, 1986. In law, Australia is a younger country than we perhaps are accustomed to think. At 5.00 a.m. “Greenwich Mean Time” (a world-wide standard for time-keeping centred upon London) on 3 March 1986 the *Australia Acts* of 1986 commenced operation. One of those Acts (*Act No. 142* of 1985) was an Act of the Parliament of the Commonwealth of Australia, enacted pursuant to the Australian *Constitution* at the request and consent of the respective Parliaments of all Australian States. The other was an Act (1986, *Chapter 2*) of the Parliament of the United Kingdom, enacted at the request and with the consent of the Parliament and Government of Australia, with the concurrence of all Australian States. The “long title” of the *Australia Act* 1986 (Cth) was: “*An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth Australia as a sovereign, independent and federal nation*”. The “long title” of the UK Act was: “*An Act to give effect to a request by the Parliament and Government of the Commonwealth of Australia*”.

The two Acts were in substantially the same terms. Because of the historical relationship between Australia and the United Kingdom a joint effort was necessary, or at least desirable, to give legal efficacy to the object of the legislation. For those who care to dwell on the ambiguities of Australia’s “independence”, a careful reading of the legislation as would a technical lawyer demonstrates that Australian independence was given effect by the UK Act, not that of Australia. We remain evolutionists, not revolutionaries. The object of the *Australia Acts* was to confirm “in law” the independence that Australia had “in fact” enjoyed for many years since an

indeterminate, earlier date. Australia grew to maturity as a nation, and was recognised as an adult, without being required, necessarily, to move out of the “home” in which it had been nurtured as a member, first, of the British Empire and, more recently, the “(British) Commonwealth of Nations”.

By the *Australia Acts*, all residual limitations on the legislative powers of the Australian and State Parliaments, in favour of the Parliament of the United Kingdom were abolished. The powers formerly exercised by the Executive Government of the United Kingdom over the Executive Governments of the Australian Commonwealth and States were renounced; the Crown in right of the Commonwealth of Australia, and in the right of Australian States, became more distinctly Australian. The High Court of Australia became, for all purposes, Australia’s final appellate court, with all appeals from all Australian courts to the Privy Council abolished. Whatever might be the future of any debate about an Australian “Republic”, the continuation of “Constitutional Monarchy” in Australia or the recognition that Australia already enjoys a “third way” of governing its peoples without “Old World” labels, Australia became legally independent courtesy of the *Australia Acts* in 1986.

A New “Common Law” for Australia

That led to a need, recognised by the High Court, to re-think fundamental legal concepts. Before the passage of the *Australia Acts* one could never quite lose sight of the fact that the Australian *Constitution* is part of an Act of the Parliament of the United Kingdom (63 & 64 *Victoria Chapter 12*) and the Constitutions of each Australian State were first enacted as legislation of that same “Imperial” Parliament. The fact that the Imperial Parliament acted in consultation with the Australian people, and the Australian *Constitution* was in substantially the same terms as approved at referenda held throughout Australia in the 1890s, could not obscure the fact that the legal authority underpinning the *Constitution* was conferred by the Imperial Parliament. With the passage of the *Australia Acts*, the High Court recognised the profound significance of the shift in sovereignty that had taken place.

In *Australia Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106 at 137-138, the then Chief Justice, Sir Anthony Mason, wrote the following:

“The very concept of representative government and representative democracy [such as Australia enjoys] signifies government by the people through their representatives. Translated into constitutional terms, it denote that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the case of the Australia Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people’s inherent authority to constitute a government, notwithstanding that it was adopted, subject to minor amendments, by the representatives of the Australian colonies at a Convention and approved by a majority of the electors in each of the colonies at the several referenda. Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the proposed amendment is approved by a majority of electors and a majority of electors in a majority of States.... And, most recently, the Australia Act 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people. The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.”

To like effect, in *McGinty v Western Australia* (1996) 186 CLR 140 at 230 Justice McHugh wrote the following:

“The Constitution is contained in the statute of the United Kingdom Parliament. In the late twentieth century, it may not be palatable to many persons to think that the powers, authorities, immunities and obligations of the Federal and State Parliaments of Australia derive their legal authority from a statute enacted by the Imperial Parliament, but the enactment of that statute containing the terms of the Constitution is the instrument by which the Australian people have consented to be governed. Since the passing of the Australia Act (UK) in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia. But the only authority that the people have

given to the Parliaments of the nation is to enact laws in accordance with the terms of the Constitution

The Constitution contains no injunction as to how it is to be interpreted. Any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself. But since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that meaning must be determined by the ordinary techniques of statutory interpretation and by no other means. It must therefore be interpreted by late twentieth century Australians according to the ordinary and natural meaning of its text, read in the light of its history, with such necessary implications as derive from its structure.”

With the abolition of Privy Council appeals by the *Australia Acts*, the High Court became the final arbiter of Australian law in all cases. In *Cook v Cook* (1986) 162 CLR 376 at 390 the Court recognised one consequence of that: although the reasoning of UK Courts might continue to be persuasive in particular cases, no decision of a UK Court could any longer, as such, be binding on an Australian Court. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562 *et seq* the Court went further. It did so against the background that in 1988, section 80 of the *Judiciary Act 1903* (Cth) was amended to recognize that Courts exercising federal jurisdiction were required to apply “the common law in Australia”, an expression substituted for a previous reference to “the common law in England”. All members of the Court joined in a unanimous declaration that there is a single common law in Australia, not a series of state-based concepts of the common law:

“With the establishment of the Commonwealth of Australia [in 1901], as with that of the United States of America (established with a ‘Declaration of Independence’ in 1776], it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution, the outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and to subject to different authoritative interpretations [562-563].

...The Constitution, the Federal, the State and Territorial laws, and the common law in Australia together constitute the law of this country and form 'one system of jurisprudence'. [By its terms the Constitution is expressed to be] 'binding on the Courts, judges, and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State'. Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.

Conversely, the Constitution is itself informed by the common law...[564]."

An Implication of 1986: No Need for "Settled" or "Conquered" Territory Status

The decision of the High Court in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 to recognise Aboriginal title subsisting in land otherwise generally thought to be "Crown land" by reason of the annexation of Australian soil to the British Crown in colonial times was a concrete example of the development of Australian law as an adaptation of the common law of England to local conditions in modern times.

In embracing that change the Court discharged its obligation to administer the law, with due regard to the past, for the benefit of the Australian people today and in days to come. By that decision, taken early in the life of a newly independent system of jurisprudence, they undermined any contemporary, legal utility in debate about whether Australia was a "settled" or "conquered" territory for the purpose of determining the operation of "the common law of England" in Australia. That was a debate fuelled not only (or even so much) by competing views about the rights of Aboriginal Australians to land, but also controversy about the significance of the origins of much of colonial society in a penal colony and associated battles for trial by jury and representative government.

How we view any "law" depends upon our perceptions of the purposes to be served by "law" and its utility in the service of those purposes. We are, in that sense, much the same as our forebears.

How Our Anglo-Australian Forebears Thought: Centrality of the Crown

The "Constitutional Rights" of a Subject of the Crown

With the light given to us by the *Australia Acts* to examine the history of Australian law afresh, and at a time when Australians continue to debate the desirability or otherwise of a “Republic” or a “Bill of Rights”, modern-day Australians might learn something about themselves and their future by an inquiry into how, and why, their forebears thought as they did. Issues increasingly discussed today in terms of “Human Rights” were once discussed by Anglo-Australians in terms of a “right to liberty” enforceable under the Common Law of England. In the two centuries following the “Civil Wars” and the “Glorious Revolution”, of 17th century England (culminating in the English *Bill of Rights*, 1689) these rights were spoken of as “constitutional” rights.

When colonies were established in Australia by the British Government, the understanding of the colonists was that, under the unwritten constitution of the United Kingdom, they were entitled to the rights and privileges of English law as the “birth-right” of every subject of the Crown.

Blackstone’s Commentaries¹¹

That understanding was founded in no small part on the following passage published in Sir William Blackstone’s *Commentaries on the Laws of England*:

“Besides [islands adjacent to the coast of mainland England], our more distant plantations in America, and elsewhere, are also in some respects subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already, already cultivated, they have been either gained by conquest, or ceded to us by treaty. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it has been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. But this must be

¹¹ Blackstone’s book is one of the most influential legal texts on English law ever published. It began life as a student text at Oxford. The first edition was published in four volumes between 1765-1769. It was particularly influential in the British Colonies and the United States of America between the time of its first publication and the mid-19th century. A recent biography is Wilfrid Prest’s *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford, 2008), a companion volume to Wilfrid Prest (ed), *The Letters of Sir William Blackstone, 1744-1780* (London, 2006).

understood with very many and very great restrictions. Such colonies carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and diminutions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject the revision and control of the king in council: the whole of their constitution being also liable to be new modelled and reformed by the general superintending power of the legislature in the mother-country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century [that is, the 17th century] either by right of conquest and driving out the natives (with what justice I shall not at present inquire), or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother-country, but, distinct (though dependent) dominions. They are subject, however, to the control of the parliament; though...not bound by any acts of parliament, unless particularly named.”¹²

A copy of *Blackstone* travelled with the “First Fleet”, bound for Botany Bay, in 1787-1788. It was one of the books in the baggage of the Judge Advocate, David Collins.¹³

Collins was not a lawyer, but a soldier by training. The colonists were not graced by a lawyer amongst their officials until May 1798, when Richard Dore, the first lawyer to hold a commission as Judge Advocate, arrived in Sydney. It was only after the arrival of Francis Forbes as Chief Justice of NSW and John Pedder as Chief Justice of Van Dieman’s Land, coupled with the establishment of the beginnings of representative

¹² This extract is taken from pages 78-79 of Volume 1 of Dr Wayne Morrison’s “Modern Edition” of *Commentaries on the Law of England* (Gt Britain, 2001). It is found in the classic, 9th edition of *Blackstone* (published in 1783) at pages 107-108 of Volume 1.

¹³ John Currey, *David Collins A Colonial Life* (Melbourne, 2000), page 54 n 29; *Historical Records of NSW* (Sydney, 1893), Volume 2, pages 339-340.

government, that there was an intensification of pressure to resolve doubts about the status of English law in colonial Australia.

Blackstone's understanding of the law relating to the establishment of colonies was in accord with that of his mentor, Lord Mansfield in *Campbell v Hall* (1774) 98 *English Reports* 1045, albeit that the first edition of *Blackstone's Commentaries* was published between 1765-1769. The broad similarity of the terms in which they stated the Law of England suggests that, as abstract law, it was then the subject of consensus in England. But, as English history itself demonstrates, the law was in a constant state of adaptation to changing conditions, and as many difficulties arose in its application to particular facts as in its formulation.

The Common Law of England as a Constitutional Safeguard

Blackstone's *Commentaries* spoke of English law as an integral part of the "Constitution" of English men (by which, they meant English men, women and children and, indeed, "subjects" of the Crown of England, people we would describe as "citizens"). That "Constitution" was forged in popular imagination by the victory, in the 17th century, of the Common Law over the arbitrariness of rule by Royal Prerogative sponsored by the House of Stuart. It was informed by the experiences of Blackstone's forebears, going back at least to the 17th century – when King James VI of Scotland became also King James I of England upon death of Queen Elizabeth I (the last Tudor monarch) of England.¹⁴ James was the first of the Stuart Kings. They carried, and acted upon, a vision of monarchy was not shared by the people within their realm(s). They imagined that they were, in a formal sense, God's agents on earth, answerable only to God in discharge of their duty to govern their people wisely and well. Sadly for them, "their people" did not universally share their belief in the divine right of kings. With persistent cross-border irritation between England and Scotland, England drifted into civil war under Charles I, the son of James I. Between 1642 and 1648, the Royalists lost to Parliamentary forces two wars separated by an uneasy peace. Charles I was executed in 1649 after a "show trial" conducted by men later condemned as "Regicides".¹⁵ England experimented with republicanism, first

¹⁴ Alex C Castles, *An Australian Legal History* (Sydney, 1982), Chap 1 ("The Laws of Empire").

¹⁵ Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold* (London, 2005). A transcript of the trial can be found in J.G. Muddiman's, *Trial of King Charles the First* (Edinburgh, 1928), a volume in the British Noteable Trial Series.

under the rump of a Parliament that was unresponsive to the people and, then, under the Protectorate of a successful army general, Oliver Cromwell as their “Lord Protector” (1649-1658). After Cromwell’s death, his son Richard acquiesced in the Restoration of the Monarchy (in the person of Charles I’s son, James II) by elements of the Army acting in concert with the upper echelons of English society (1660).

After an indifferent performance by James II, and a worse one by his younger brother as Charles II, Parliament deposed the Stuart kings in the “Glorious Revolution” of 1688. It invited William of Orange (a Dutchman) and his wife Mary (a Stuart by birth) to take up the English throne. Technically, they “invaded” England and Charles II fled, but for all practical purposes they arrived in England with the acquiescence of Parliament. At the commencement of their reign Parliament enacted (in 1689), a “Bill of Rights” that stands on a par, in popular imagination, with the *Magna Carta* of 1215 as a foundational document of the generally “unwritten” Constitution of England.

The *Magna Carta* (Latin for the “Great Charter”) represented a treaty of sorts by which the Barons of King John came to an understanding with him about the importance of government acting only with their consent as nobles. The Bill of Rights, in which William and Mary acquiesced, represented another treaty of sorts between Parliament and the Monarchy: an understanding that an English monarch had to govern with the consent of Parliament. It was not until the 19th century, with the experience of a loss of England’s American colonies following a Declaration of Independence (1776-1783) and the Napoleonic Wars following a Revolution in France founded upon a “Declaration of the Rights of Man” (1789-1815), that the Parliament of the United Kingdom was reformed (in 1832 and 1867) as an instrument of democracy. But it was in the 17th century that the pace of change towards a democratic state began to quicken.

Britain’s Emergence as a World Power Governed by a Constitutional Monarchy

The reign of William and Mary changed the face of England. After Mary’s death in 1694, William reigned alone until his own death in 1702. Building upon foundations laid by him his successor, Queen Anne, presided over the decision of England and Scotland (in 1707) to put aside their differences to the extent necessary to form the

“United Kingdom”. That decision set the stage for the emergence of Britain as a world force.

After the revolutionary 17th century, Britain settled down to the task of making money. It lost its “First Empire” with the loss of its American Colonies, but it did retain (importantly for Australia) Canada and it learnt from its experience in the Americas as it constructed its “Second Empire”. It turned towards the East, where rested the Great South Land, “Terra Australis”. It learnt that, in a public-private partnership for the colonisation of far away lands, freedom of enterprise needed to be fostered with a firm hand, but a light touch. The “joint venture” model of colonisation that characterised the First Empire gave way to the development of a professional bureaucracy co-ordinated by a paternalistic “Colonial Office”.

In asserting their authority at home the Parliamentarians of the 17th and 18th centuries were for the most part content to leave colonial affairs to the Crown acting with the advice of Ministers: the Executive. Having established its Supremacy at home and abroad, Parliament did not begin to assert its authority over the Crown abroad until Jeremy Bentham (1748-1832) campaigned against what he perceived to be the misplaced complacency of the unwritten laws of England. Australian government was a beneficiary of his campaigns.

The Anglo-Australian Legal Framework: The Formative Years

Colonial Government via The Royal Prerogative

When the “First Fleet” arrived in the area now known as Sydney in 1788, the Crown was a more dominant feature of the UK Constitution (and, hence, colonial government) than it became. The UK Parliament was more quiescent than it became. The lessons to be learned from Britain’s loss of the American War of Independence remained to be learned.

The flavour of the legal framework that serviced the “First Settlement” can be tasted in the *Report from the Select Committee of the House of Commons on Transportation* (London, 1838) that led to the cessation of “transportation” of convicts to NSW. The following is an extract from the Report of what is known as the “Molesworth Committee” after the name of the Chairman of the Select Committee:

“The punishment of transportation is founded on that of exile, both of which are unknown to common law. Exile, according to the best authorities was introduced, as a punishment, [by the English Parliament in 1597]; and the first time that transportation was mentioned was in an Act of 18 Charles I Chapter 3 [1643], which empowered the judges to exile for life [some people convicted of offences against the Crown], to any of his Majesty’s possessions in America. The punishment authorised by this Act, is somewhat different from the one now termed transportation, inasmuch as the latter consists not only of exile to a particular place, but of compulsory labour there. It appears, however, to have been the practice of an early period to subject transported offenders to penal labour and to employ them as slaves on the estates of the planters, and [the Act cited as 4 George I Chapter 11 (1718)], gave to the person who contracted to transport them, to his heirs, successors, and assigns, a property and interest in the services of such offenders for the period of their sentences. The great want of servants in the colonies was one of the reasons assigned for this mode of punishment, and offenders were put up to auction, and sold by the persons, who undertook to transport them as bondsmen for the period of their sentences....

With the War of Independence, transportation to America ceased. Instead of taking that opportunity for framing a good system of secondary punishments..., the Government of the day unfortunately determined to adhere to transportation. It was not, however, deemed expedient to offer to the colonies that remained loyal to America [that is, the Canadians] the insult of making them any longer a place of punishment for offenders. It was determined, therefore, to plant a new colony for this sole purpose; and an Act was passed in the twenty fourth Year of George the Third [‘The Transportation Act’, 24 George III Chapter 56 (1784)], which empowered His Majesty in Council [that is, the Executive Government, led by the Prime Minister] to appoint to what place, beyond the seas, either within or without his Majesty’s dominions, offenders shall be transported; and by two orders in Council, dated 6 December 1786, the eastern coast of Australia and the adjacent islands were fixed upon. In the month of May 1787, the first band of convicts departed, which, in the succeeding year of New South Wales.

To plant a colony, and to form a new society, has ever been an arduous task. In addition to the natural difficulties arising from ignorance of the nature of the soil and of the climate of a new country, the first settlers have generally had to contend with the innumerable obstacles, which only undaunted patients, firmness of mind, and constancy of purpose, could overcome. But, whatever the amount of difficulties

attendant on the foundation of colonies, those difficulties were greatly augmented, in New South Wales, by the character of the first settlers. The offenders were who were transported in the past century to America, were sent to communities, the bulk of whose population were men of thrift and probity; the children of improvidence were dropped in by dribblets amongst the mass of a population already formed, and were absorbed as they were dropped in. They were scattered and separated from each other; some acquired habits of honest industry, and all, if not reformed by their punishment, were not certain to be demoralised by it.

In New South Wales, on the contrary, the community was composed of the very dregs of society; of men proved by experience to be unfit to be at large in any society, and who were sent from the British gaols, and turned loose to mix with one another in the desert, together with a few task-masters who were to set them to work in the open wilderness; and with the military, who were to keep them from revolt. The consequences of this strange assemblage were vice, immorality, frightful disease, hunger, dreadful mortality among the settlers; the convicts were decimated by pestilence on the voyage, and again decimated by famine on their arrival; and the most hideous cruelty was practised towards the unfortunate natives. Such is the early history of New South Wales....[Emphasis Added]”¹⁶

After “the Eastern Coast of NSW” and adjacent islands were appointed by Orders in Council¹⁷ as the location of penal colony, the UK Parliament passed an Act (27 George III Chapter 2 (1787)) to authorise the Crown to establish a Court of Criminal Judicature in the proposed penal colony.

On 2 April 1787 the Crown issued “Letters Patent” that became known, colloquially, as “the First Charter of Justice for NSW”. By that document the Crown constituted not only a “Court of Criminal Jurisdiction” but also a “Court of Civil Jurisdiction”.¹⁸ The Court of Civil Jurisdiction had no statutory foundation. It was established, and governed, by the Letters Patent as an exercise of “the Royal Prerogative”, an expression used to describe the discretionary powers of the Crown.

¹⁶ J M Bennett and A C Castles, *A Source Book of Australian Legal History* (Sydney, 1979), pages 1-2.

¹⁷ An “Order in Council” was a form of “subordinate legislation” made under a delegation from Parliament authorised by an Act of Parliament (P H Winfield, *The Chief Sources of English Legal History* (Harvard, 1925) page 7) or, perhaps more accurately, a written instrument executed by Executive Government to give effect to an Act of Parliament. The reference to “Council” was a reference to the Crown “in Council”: The Crown acting through its Council of Ministers. In modern parlance this was the Government’s “Cabinet” or something similar.

¹⁸ *Op cit*, pages 19-22.

The expression “Letters Patent” was the formal name given to what might otherwise be described as an “Open Letter” by a Monarch addressed to the public. In *The Chief Sources of English Legal History* (Harvard, 1925), Professor P H Winfield offered this description:

*“In their contents, [Letters Patent] resemble charters, as they contained the more public directions of the kings, had the Great Seal attached to them, and were delivered open (hence their name). But they differ from charters in being witnessed usually by the king himself..., and in their mode of address ‘to all to whom these presents come’”.*¹⁹

Constitutionalism Stirs in the Colonies

Some reforms in the administration of law in the penal colony of NSW were effected by Letters Patent dated 4 February 1814, known colloquially as “the Second Charter of Justice for NSW”.²⁰ However, uncertainty about the status of the legal system operated in the Australian Colonies continued in the absence of comprehensive legislation, and that uncertainty continued beyond the promulgation of further Letters Patent dated 13 October 1823, known colloquially as “The Third Charter of Justice for New South Wales”, still operative today.²¹

The pressures for a firm legislative foundation for the Australian Colonies stemmed, in part, from the publication of Jeremy Bentham’s pamphlet, *A Plea for a Constitution*, published in 1803.²² In part, also, it was associated with the need to develop a firmer foundation for civil government following the Rum Rebellion (1808)²³ and agitation by colonists for trial by jury and other civil rights associated

¹⁹ Page 123.

²⁰ Bennett and Castles, *ibid*, pages 31-38.

²¹ Bennett and Castles, *ibid*, pages 53-58.

²² Extracts from Bentham’s book are set out in Appendix B (at pages 883 et seq) of Volume 1 of the *Historical Records of Australia* (Series IV).

²³ H V Evatt, *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Sydney, 1938); Ross Fitzgerald and Mark Hearn, *Bligh, Macarthur and the Rum Rebellion* (Sydney, 1988); John Ritchie (Introduction), *A Charge of Mutiny: The Court Martial of Lieutenant Colonel George Johnston for Deposing Governor William Bligh in the Rebellion of 26 January 1808* (Canberra, 1988); and G C Lindsay, *The Rum Rebellion: A Lesson in National Building* (available on the Forbes Society website, www.forbessociety.org.au). The first episode of the Australian Broadcasting Commission’s recent TV documentary, *Rogue Nation* depicts the story of the Rum Rebellion.

with the idea of being an “Englishman”.²⁴ With the benefit of three Reports by a “Commission of Inquiry”, conducted by Commissioner J T Bigge (who investigated the circumstances of the Australian colonies in 1819-1821 and submitted his Reports to the Imperial Parliament in 1822-1823),²⁵ Parliament enacted an Act, formally cited as 4 George IV Chapter 96, colloquially known as the *New South Wales Act 1823* (Imp). That Act authorised the establishment in NSW and Van Dieman’s Land of the Courts now known as the Supreme Court of NSW and the Supreme Court of Tasmania respectively. It also provided for the first Australian legislature, the “Legislative Council for New South Wales”.²⁶

Blackstone Clarified: The Australian Courts Act, 1828 (Imp)

The establishment of the rudiments of constitutional government in the Australian colonies left uncertain the terms upon which English law was to be taken as having been “received” by the Colonies. Blackstone’s statement of the law explained principles to be applied, depending on the type of colony, upon establishment of a colony. It did not include any statement of principles to be applied on consideration of when a colony might be taken to have been established. This was important in the context of New South Wales and Van Dieman’s Land (and, via New South Wales, Victoria and Queensland) because, in origin, they were “penal colonies” administered by the Crown’s Armed Forces. In theory, it might have been unclear whether, and when, they might be taken to have been “established” so as to attract Blackstone’s identification of the law to be applied. In practice, debate was focused on whether the penal colonies were ready for civil society. The first Chief Justice of New South Wales (Francis Forbes) was inclined to the opinion that the creation of a colonial

²⁴ David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, 1991); Ian Barker QC, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (Sydney, 2003), now published electronically on the Forbes Society’s website.

²⁵ Bigge’s three Reports were respectively entitled, *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales* (1822), *Report of the Commissioner of Inquiry on the Judicial Establishment of New South Wales and Van Dieman’s* (1823) and *Report of the Commissioner of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales* (1823). Facsimiles of the Reports were published by the Libraries Board of South Australia in 1966. See also Dr John Ritchie’s *Punishment and Profit, The Reports of Commissioner John Bigge on the Colonies of New South Wales and Van Dieman’s Land 1822-1823; Their Origins, Nature and Significance* (Melbourne, 1970), *The Evidence to the Bigge Reports: New South Wales Under Governor Macquarie* (Melbourne, 1971), Vol. 1 (The Oral Evidence) and Vol. 2 (The Written Evidence).

²⁶ Bennett and Castles, *ibid*, pages 42-53.

legislature was indicative of the true “establishment” of a colony. On 4 December 1826 he wrote to his friend, Wilmot Horton, in the Colonial Office as follows:

“The loose manner in which the books lay down the principle upon which the statutes of England are to be applied in the colonies, occasions continual differences of opinion here [in Sydney] ... as matter of fact, the courts here do apply the English Acts of Parliament, in all cases where they can. [... but, in my opinion, the ‘true criterion’ for the application of British statutes not extending by paramount force to the colony is] the institution of a local legislature as the true date when English Statutes cease to bind”.²⁷

There was plenty of room for argument about such matters in a colony in transition from a “penal colony” to a “free society” in which ordinary civil rights such as a right to trial by jury had been withheld from colonists. There was need of legislation to clear the air. Greater certainty in the administration of the law came with the enactment of 9 George IV Chapter 83 (which, by virtue of the *Short Titles Act* 1896 (Imp), is now known as the *Australian Courts Act 1828*). Section 24 of that Act was in the following terms:

“...And be it further enacted, that all laws and statutes in force within the Realm of England at the time of the passing of this Act [25 July 1828], (not being inconsistent herewith, or with any Charter or Letters Patent or Order in Council which may be issued in pursuance hereof) shall be applied in the administration of justice in the courts of New South Wales and Van Dieman’s Land respectively, so far as the same can be applied within the said colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the Governors of the said colonies respectively, by and with the advice of the Legislative Councils of the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf: Provided always that in the meantime, and before any such ordinances shall be actually made, it shall be the duty of the said Supreme Courts, as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceedings before

²⁷ This extract is taken from J.M. Bennett and A.C. Castles, *A Source Book of Australian Legal History* (Sydney, 1979), page 269.

them, to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively...[Emphasis Added].”²⁸

Although the *Australian Courts Act* 1828 remained in force for only a limited time, its operation was preserved by other legislation. And when Victoria (1850) and Queensland (1859) separated from New South Wales the selection of 25 July 1828 as the “cut-off date” for determining the state of English law “received” in the Eastern Colonies of Australia was preserved.

The same basic idea of a “cut-off date” was adopted for Western Australia (18 June 1829) and South Australia (28 December 1836), but those dates represented the dates of their proclamation as colonies.²⁹ Established as colonies of “free settlers”, their “reception” of English law according to Blackstone’s statement of the law was unattended by the uncertainty experienced in the “penal colonies” of determining the dates upon which colonists should be regarded as having received the “liberties of an Englishman” as a “birth right”.

Growth Pains in Development of Legal System

Even as the Australian colonies moved towards responsible government in the mid-19th century,³⁰ two types of problems about the operation of English law in Australia remained. One related to the operation of Imperial legislation, after the colonial “cut-off dates”, that appeared to be applicable to the colonies. The other related the independence of mind of colonial courts, and the possibility that the judgments of colonial courts might proceed upon legal principles incompatible with the principles enunciated in the judgments of English courts.

The first problem was addressed by legislation of the Imperial Parliament. The *Colonial Laws Validity Act* 1865 (Imp), confirmed both the law-making powers of British Colonies “within limits” and the power of the Imperial Parliament to define those limits. In that way, Britain gave the colonies a sense of freedom and circumscribed it as well.

²⁸ Bennett and Castles, *ibid*, page 74.

²⁹ Bennett and Castles, *ibid*, pages 256-258 and 269.

³⁰ John M Ward, *Earl Grey and the Australian Colonies, 1846-1857: A Study of Self-Government and Self-Interest* (Melbourne, 1958); Alex C Castles, *An Australian Legal History* (Sydney, 1982); David Taylor, *The States of a Nation: The Politics and Surveys of the Australian State Borders* (NSW Dept of Land, Bathurst, 2006).

The second problem was addressed, over time, in four ways: (a) First, by establishing a “Judicial Committee of the Privy Council by legislation the British Government allowed the Council (one of the Crown’s sources of advice generally) to develop as an ultimate court of appeal for the British Empire;³¹ (b) Second, in practice, there was an overlap between the membership of Judicial Committees of the Privy Council and the House of Lords so that the Privy Council’s advice to the Crown about colonial appeals naturally gravitated to determinations of the House of Lords sitting in its judicial capacity as the ultimate Court of Appeal for Britain’s domestic litigation; (c) Third, Courts “at home and abroad” were brought into line by rulings of the Privy Council and the House of Lords strengthening the “Doctrine of Precedent”, a judicial practice whereby courts follow previous judgments and judgments of other courts higher than them in their particular hierarchy; and Fourth, the Privy Council directed colonial courts to apply the law determined by English courts even though there was no right of appeal from the colonial courts to those English courts.

The Colonial Laws Validity Act 1865 (Imp)

Doubts about the competency of colonial Parliaments to enact statutes inconsistent with (or, as it was said, “repugnant” to) English law arose largely as a result of judgments of Mr Justice Boothby in South Australia.³² He struck down colonial laws because, he held, they were “repugnant” to the Law of England – meaning that, in his opinion, they were fundamentally inconsistent with English Law. One of the statutes he impugned was the *Real Property Act* of 1857 (SA) which introduced the Torrens System in South Australia. The Imperial Parliament resolved doubts about “repugnancy” by enactment of the *Colonial Laws Validity Act 1865 (Imp)* formally cited as 28 and 29 Victoria Chapter 63. *Sections* 2 and 3 of the Act were in the following terms:

“2. Any Colonial Law [defined to include Laws made for any Colony either by a Colonial Legislature or by the Crown in Council] which is or shall be in any respect

³¹ P.A. Howell, *The Judicial Committee of the Privy Council, 1833-1876: Its Origins, Structure and Development* (Cambridge, 1979).

³² Benjamin Boothby (1803-1868), *Australian Dictionary of Biography*, Volume 3, pages 194-196 (cited as 3 ADB 194); D B Swinfen, *Imperial Control of Colonial Legislation, 1813-1865* (Oxford, 1970); R M Hague, *Hague’s History of the Law in South Australia, 1837-1867* (Adelaide, 2005), Volume 1, Chapter 5.

repugnant to the Provisions of any Act of [the Imperial] Parliament extending to the Colony to which such Law relate...shall be read subject to such Act..., and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No Colonial Law shall be or be deemed or be deemed to have been void or inoperative on the ground of repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament [or subordinate legislation or a government order made under the authority of such an Act of the Imperial Parliament].”

When the Australian *Constitution* came into force, as an Act of the Imperial Parliament, on 1 January 1901 it was subject to *sections 2 and 3 of the Colonial Laws Validity Act, 1865 (Imp)*.

The Statute of Westminster 1931 (Imp)

The next step in Australia’s constitutional development was the enactment by the “Imperial Parliament” of the *Statute of Westminster 1931 (Imp)*. It was enacted to give effect to resolutions passed by “Imperial Conferences” of Representatives of the British Empire in 1926 and 1936. It represented the evolutionary step by which the “British Empire” became “the British Commonwealth of Nations”. Australia was one of the self-governing, former colonies described in the Statute as a “Dominion”. The Statutes’ central provisions included the following sections:

“2.(1) The Colonial Law Validity Act shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion. ...

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation insofar as the same is part of the law of the Dominion. ...

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that

Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented, the enactment thereof. ...

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9. Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter with the authority of the Parliament or the Government of the Commonwealth of Australia. ...

10(1) None of the following sections of this Act, that it is to say sections 2, 3, 4, 5 and 6 [of which we have extracted only sections 2 and 4], shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in sub-section (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.”

Australia did not adopt the Statute of Westminster 1931 until 1942, at which time it deemed the Statute to have applied since the beginning World War II on 3 September 1939.³³

The apparent reluctance of Australians, before World War II, to break their legal ties with the United Kingdom is not readily understandable in the early 21st century. However, a majority of Australians did not, before World War II, feel oppressed or overawed by the power of the British Empire. School children in Australia routinely celebrated “Empire Day” (and “Cracker Night”) on 24 May (Queen Victoria’s birthday) each year. Australia was an integral part of the Empire, a Commonwealth

³³ The *Statute of Westminster Adoption Act* 1942 (Cth) commenced operation on 9 October 1942, but section 3 provided that sections 2, 3, 4, 5 and 6 of the *Statute of Westminster* 1931 (Imp) were adopted with effect from 3 September 1939.

of Nations. In its heyday, the Empire was, at least for those who saw themselves as part of it, something similar to the United Nations, founded for the world-at-large after World War II. Legislation enacted by the UK Parliament, for the UK, was routinely re-enacted by colonial parliaments.

The Doctrine of Precedent and Uniformity of Law Across Boundaries

Throughout the 19th century the Empire was increasingly held together, not only by the co-ordinate legislation of “self governing” jurisdictions, but also by a stronger “Doctrine of Precedent” that bade colonial courts to follow the legal rulings of English courts even if there was no right of appeal to those courts. In *Trimble v Hill* (1879) 5 Appeal Cases 342 the Privy Council (which, in substance, was an English “Court” that advised the Crown on appeals to it from colonial courts) directed colonial courts to follow English case law when considering colonial legislation in the same terms as an Imperial statute. As the Law Lords observed, it was “*of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same*”. The orderly administration of Government, and the conduct of trade, made that imperative.

Blackstonian Jurisprudence Resilient in the Privy Council

Whatever independence of mind had earlier led Australian colonial judges into wayward behaviour had been restrained by the time the Privy Council delivered judgment in *Cooper v Stuart* (1889) 14 Appeal Cases 286. In that judgment the Law Lords published a classic statement of the principles governing the “reception” of English Law in the Australian colonies:

“The extent to which English Law is introduced into a British Colony, and the manner of its introduction, must necessary vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settle more, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to

possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often-quoted observations of Sir William Blackstone (1 Comm.107) appear to their Lordships to have a direct bearing on the present case.

[The judgment then set out a quotation from volume 1 of Blackstone's Commentaries that is extracted earlier in this Research Paper. They then continued.]

Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant Colony [of the kind described by Blackstone as an 'uninhabited country']. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the colonial legislature."³⁴

This view of Australia's inherence of English law prevailed, more or less, until, following the commencement of the Australia Acts in 1986, the High Court of Australia swept aside *Cooper v Stuart* and the Blackstonian analysis in *Mabo*.

After 3 March 1986 it was necessary for Australian lawyers to think anew about Australian law, society and community.

AUSTRALIAN LEGAL HISTORIOGRAPHY

The Second World War (1939-1945) remains of profound significance for the study of Australian Legal history. In Australia, as elsewhere, it set in train a whole series of re-alignments in how the world was viewed. In 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.

³⁴ At pages 291-292.

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 Kercher³⁵ 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.

"AUSTRALIAN" LAND, LAW AND HISTORY

"Property Law" and Large Questions About Life

Surprising though it might seem, a study of Australian property 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 Australia is a land that has never known, condoned, or facilitated slavery? Did annexation of "Australia" to the British Crown "enslave" dispossessed peoples: in particular, Transported Convicts or Aborigines ("the First Australians")? Are people "property"? Is the property 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 property 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

³⁵ 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. *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 18-19th century, NSW cases published on the website.

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.

It is important, nevertheless, not to forget the significance to contemporary Australian law of its roots in English history. 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 19th century Australasia) working forward and working backwards from the here and now.

The Feudal Origins of Australian Land Law³⁶

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

³⁶ **Further Reading:** 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). A more recent account is John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford, 1994). 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 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).

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.³⁷ 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 to have received an "oath of fealty" (a sworn promise of loyal service) from Harold, his rival for the English Crown. By these means, he 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,³⁸ 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",

³⁷ J C Holt, *Colonial England 1066-1215* (London, 1997); George Garnett, *Conquered England: Kingship, Succession and Tenure 1066-1166* (Oxford, 2007).

³⁸ 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* (2nd ed, revised by F H Laswson, Cambridge, 1965), pages 94-95; W W Buckland, *A Text-Book of Roman Law, from Augustus to Justinian* (3rd 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.

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.³⁹ 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.

³⁹ A limit was set upon the creation of evermore complicated, lower levels of feudal tenure by the prohibition of “subinfeudation” by the *Statute Quia Emptores* (1290): W J V Windeyer, *Lectures on Legal History* (2nd edition (revised), Sydney, 1957, pages 98-99); J H Baker, *An Introduction to English Legal History* (4th edition, London, 2002), pages 225-226, 242 and 300.

The quasi-religious flavour of a medieval oath of fealty is conveyed in J R R Tolkien's *The Lord of the Rings*, in both the book and the film,⁴⁰ when the halfling (hobbit) Pippin dedicates himself to the service of Denethor, the Lord and Steward of Gondor. To the medieval mind the distinctions we draw between obligations of law and religion were merged in personal obligations owed by a subject to a ruler ordained of God. An hierarchical view of authority then bound society, and its notion of government, from the lowliest soul to the highest. Modern, democratic egalitarianism has swept away much (but not all) of that style of thought.

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 to “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

⁴⁰ In the book, see Chapter 1 of Book 5 – being the first chapter of the third volume of the book, entitled *The Return of the King*. There were 2 editions of *The Lord of the Rings* published during Tolkien's lifetime. The first was published in 1954-1955, the second in 1966. The incident is shown in the third episode of Peter Jackson's trilogy, entitled *The Return of the King*.

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.⁴¹ 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.

A Ghost of Feudalism in Australian Colonial Land Law

Throughout the 19th century most lawyers practising in the Australian colonies were trained in England, and the judges presiding over the Supreme Courts of the

⁴¹ S F C Milsom, *A Natural History of the Common Law* (New York, 2003), page 47, in chapter 3 (entitled “Management, Custom, and Law”).

Australian Colonies were trained as Barristers in England. Having received their formative training in England, they remained deeply influenced by the thought patterns of an English lawyer.

The significance of that fact is difficult to comprehend without an endeavour being made to get inside the minds of the Colonial judges. Accordingly, an attempt to do just that is here made by setting out: (a) extracts of two early decisions of the Supreme Court of New South Wales; and (b) an extract from *Blackstone's Commentaries on the Laws of England* that would have been available (in one edition or another) to the Judges and so much a part of legal folklore that it must have governed their subconscious. The cases are *R v Cooper* (Forbes CJ, 12 February 1825) and *Attorney-General v Brown* (Stephen CJ, Dickinson and Therry JJ, 10 February 1847). In both cases the Crown instituted proceedings asserting title to land against a (non-Aboriginal) "subject" who claimed a right of property in land. The relevance of the absence of an Aboriginal party to the proceedings is that there was no party before the Court in whose interest it was to argue that "ownership" of land in Australia was vested in Aboriginal communities, not the Crown.

In *R v Cooper* Chief Justice Forbes was reported in newspapers of the time to have explained the law to a jury in the following terms:

"The law of England must govern this, as well as every other court. To constitute a right to lands there must be a regular grant, with the appendage of the great seal. It is to be regretted that such solemnity has been departed from. The Crown can only make a grant in a formal way, and nothing short of the actual possession of the grant can warrant a defence [against a claim by the Crown to land]. Local usages must not derogate from the laws of the land, neither must they derogate from the prerogative of the Crown. No such local custom, as has been stated, can be legally existing. The Governor cannot himself make a valid title, unless in conformity with His Majesty's Instructions. The Instructions of the Crown are not to be dispensed with. The court must not adopt the loose practice that has been regarded in this colony.

It did not appear to His Honour that anything like a legal title had been made out for the defendant. In point of fact, the Governor had never given his consent to the bestowment of this ground for the defendant. Neither did it appear that the Surveyor-

*General had been privy to the transaction. It could not even be looked upon as a licence of occupation, the Governor having refused his sanction*⁴².

These observations were made by the Chief Justice in the first civil jury empanelled in what was then the newly constituted Supreme Court of New South Wales. An examination of contemporaneous reports shows that, although Forbes explained the law in formal, “black letter” terms, he invited the jury to view the facts of the case through a prism that was more favourable to the defendant and more in tune with the practicalities of Colonial business. In court proceedings tried (ie, heard) by a judge sitting with a jury, the judge determines “the law” and a jury determines “the facts”, based on evidence adduced during the trial.

Attorney-General v Brown was a “test case” for determination of the law governing the entitlement, if any, of the Crown to reserve mining rights to itself when making grants of land within the Colony. It was decided emphatically in favour of the Crown. Delivering Reasons for Judgment on behalf of the Full Court, Chief Justice Stephen made the following observations:

“... the waste lands of this colony [an expression used by the British to refer to land that appeared, to them, to have been for ever uncultivated] are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date, (in point of legal intendment,) --- in the Sovereign’s possession; and that, as his or her property, they have been and may now be effectually granted, to subjects of the Crown.

The territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have been taken possession of by British subjects, in the name of their Sovereign. They belong, therefore, to the British Crown. For this we need not refer merely to history. The fact of the settlement of New South Wales in that manner, and that it forms a portion of the Queen’s dominions, and is subject to and governed by British laws, may be learned from public colonial records, and from Acts of Parliament. ... It was maintained, [by counsel for the Defendant, Mr Brown] that this supposed property in the Crown was a fiction. Doubtless, in one sense it is so.

⁴² This extract is taken from pages 268-269 of J.M. Bennett and A.C. Castles, *A Source Book of Australian Legal History* (Sydney, 1979) which, in turn, is taken from *The Sydney Gazette*. A different, and perhaps more complete, report on the Case was published in *The Australian* newspaper. It is published as part of the *Kerchner Reports* (www.lab.edu.au/scnsw/html/r_v_cooper1825.htm).

The right of the people of England to their property, does not in fact depend on any royal grant; and the principle, that all lands are holden mediately or immediately of the Crown, flows from the adoption of the feudal system merely. That principle, however, is universal in the law of England; and we can see no reason why it shall be said not to be equally in operation here The Sovereign, by that law, is (as it is termed) universal occupant. All property is supposed to have been originally, in him. *Though this be generally a fiction, it is one “adopted by the constitution, to answer the ends of government, for the good of the people”.* But, in a newly discovered country, settled by British subjects, the occupancy of the Crown, with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation; the ‘moral personality’ (as Vattel calls him, *Law of Nations*, book 1, chap.4.), by whom the nation acts, and in whom for such purposes its power resides. *Here is a property, depending for its support on no feudal notions or principle.* But if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what ground shall it be said not to be law in New South Wales? *At the moment of its settlement, the colonists brought the common law of England with them. So much, at all events, they introduced, as was consistent with their then condition;* - “such, for instance,” says Blackstone, “as the general rules of inheritance.” The same has indeed been said of the statute law; but this is not now in question. Speaking of the exceptions, he observes that the artificial refinements and distinctions, incident to the property of a great and commercial people, are not in force in the colonies, as being neither necessary nor convenient for them. No such observation, however, can apply to *a rule so convenient, if not so essential, (even though founded solely on a fiction, or a technicality,) as that which vests the property in waste lands in colonies in the Sovereign.* But Blackstone, we apprehend, in the place cited, was considering the applicability of the statute, not the common law; and the feudal principle of which we speak, we have no doubt, is as much in force in colonies, as the law which provides for the succession of the eldest son. Enough has, perhaps, been said on this point. We will refer, however, to precedents, and to Acts of the legislature, both at home and in this colony.

... *[The] title to lands in this colony is in the Crown, equally on constitutional principles, as by the adoption of the feudal fiction.* ... [emphasis added] ”⁴³

⁴³ This extract is taken from pages 145-159 of A.R. Buck, *The Making of Australian Property Law* (Sydney, 2006), which reproduces the judgment as published in the law reports known as the “Legge Reports” after the editor of them. Its formal citation is (1847) 1 Legge 312.

The tone of these observations suggests that, for the Supreme Court judges, their long-established orthodoxy was obvious. It was justified “in principle” and as an empirical fact. The British Government (the executive arm of the Crown) was, in fact, in control of the land the subject of dispute. The Judges certainly reflected *Blackstonian* learning, and allude to it expressly.

Like the Judges, Blackstone was prepared to accept that the “feudal law” of property was based upon a fiction about the role of the Crown. Like the Judges, Blackstone viewed the law of property through the prism of “constitutional principles”. Nevertheless, there is something more than that to be found in *Blackstone’s Commentaries* for a modern Australian reader.

That additional “something” is an illustration of a repressed sense of frustration that can be experienced, even by a person “learned in the law” who admires the rule of law, when analysing the course of history, and development, of law affecting fundamental cultural ties. It mirrors the frustrations of campaigners for Indigenous Land Rights in Australia. So much of our research is based upon consultation of “secondary sources” that we overlook what might be found in “primary sources”. Modern Australians might have more in common with William Blackstone than they realize. Some Australians bristle against their nation’s British heritage, and seek refuge in hopes of constitutional reform. He bristled against Britain’s Norman (French) heritage – aided, perhaps, by ongoing wars between Britain and France – and he lauded constitutional safeguards hard won by the British people. Seven hundred years after the “Norman Conquest” of 1066 he harboured a deep resentment against the dispossession of Anglo-Saxons in England by the Normans, as some in Australia harbour resentment against the British in Australia. One hundred years after the “Glorious Revolution” of 1688 brought an end to civil war and royalist strife in England (and the *Bill of Rights* 1689 in the wake of the Glorious Revolution) he treasured advances in civil liberties secured by the British Constitution as he saw it. All this emerges in an apparently dry, dispassionate discussion of the feudal origins of the law of property.

In chapter 4 of volume II of his *Commentaries* Blackstone described the history of the feudal origins of English land law:

“The constitution of feuds had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same officina gentium ... poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called feoda, feuds, fiefs, or fees; which last appellation in the northern languages signifies a conditional stipend or reward. Rewards or stipends they evidently were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wards, to him by whom they were given; for which purpose he took the juramentum fidelitatis, or oath of fealty: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments, thus acquired, naturally engaged such as accepted them to defend them: and as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each others possession. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to and under the command of this immediate benefactor or superior; and so upwards to the prince or general himself. And the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories were always ready enlisted, and mutually prepared to muster, not only in defence of each man’s own several property, but also in defence of the whole, and of every part of this newly-acquired country; the produce of which

constitution was soon sufficiently visible in the strength and spirit, with which they maintained their conquests. ...

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or similar plan of policy. For whereas, before, the possessions of their subjects were perfectly allodial (that is, wholly independent, and held of no superior at all), now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military realty. And thus, in the compass of a very years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs so that the feudal laws soon drove out the [Roman Law], which had hitherto universally obtained, but now became for many centuries lost and forgotten ...

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman. ...

This introduction however of the feudal tenures into England, by King William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions, which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seised on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word conquest; which in its feudal acceptation, signifies no more than acquisition:

and this has led many hasty writers into a strange historical mistake, and one which upon the slightest examination will be found to be most untrue. However, certain it is, that the Normans now began to gain very large possessions in England; and their regard for the feudal law, under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle that in the nineteenth year of king William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless: which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation; the immediate consequence of which was the compiling of the great survey called doomsday-book, which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person. This may possibly have been the era of formally introducing the feudal tenures by law ...

This new polity therefore seems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a beneficium or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degree all the allodial estates in France were converted into feuds and the freemen became the vassals of the crown. The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually

by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation.

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, 'that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man does or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services'. ... [By] thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, as if they had received their lands from his bounty upon these express conditions, as pure, proper beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding: and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations, as if the English had, in fact as well as theory, owed everything they had to the bounty of their sovereign lord.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation of truth. However [William the Conqueror], and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines: but their successor, Henry I. found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or ancient Saxon system; and accordingly, in the first year of his reign granted a charter whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till the reign of King John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him: which at length produced the famous great charter at Runing-mead, [the Magna Carta], which, with some alterations, was confirmed by his son Henry III. And, though its immunities

(especially as altered on its last edition by his son) are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles [King Charles II, restored to the throne in 1660 after the death of Oliver Cromwell] were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms".⁴⁴

Had he lived in twenty-first century Australia instead of eighteenth century England, could Sir William Blackstone possibly have been a "Republican"? He might, at least, have understood the course of Australian debate.

To describe Sir William Blackstone as anything other than a conservative lawyer of his time would be unconvincing. He was conservative. And he was a man of his time. However, the way lawyers think about problems, and go about solving them, has a degree of constancy about it. Blackstone's appeals to legal history, and his appreciation of the connection between "property" and the "constitutional" rights of a society, are worthy of note even by those far removed from the society for whom the Commentaries were written. For modern day Australians, the idea that they might after all have something in common with a Conservative 18th century lawyer might itself be a Radical thought.

Eddie Mabo as an Australian Ghostbuster

If the "Ghost of Feudalism" were thought to have haunted Australian property law before publication of the judgment of the High Court of Australia in *Mabo v*

⁴⁴ This extract is taken from pages 37-43 of Dr Wayne Morrison's "Modern English" edition of the Classic 9th edition of *Blackstone* published in 1783. It follows on from the passage extracted in Background Research Paper No. 1 (Footnote 9).

Queensland [No. 2] (1992) 175 CLR 1, the plaintiffs in that case – led by Eddie Mabo – might equally be thought to have been Ghostbusters.

The leading judgment of the Court was delivered by Justice Brennan⁴⁵, whose professional experience in dealing with the topic of Aboriginal Land Rights reached back (at least) to 1973 when he was invited to represent the Northern Land Council in the Royal Commission into Land Rights in the Northern Territory conducted by Sir Edward Woodward.⁴⁶

Emeritus Professor Bruce Kercher has described Sir Gerard's *Mabo* judgment as "possibly the most important judgment in [Australia's] legal history" and "a great illustration of the way in which legal history informs the decisions of Australia's highest court."⁴⁷

In more recent times the current Chief Justice of the High Court (Robert French) has published a paper outlining the history of Aboriginal Land Rights, in which he has placed the *Mabo* decision in historical context and contemplated future directions. Its title is "Native Title – A Constitutional Shift?" It is accessible on the Court's website.⁴⁸

In that paper, the Chief Justice summarised in the following terms the "common law rules underpinning the recognition of native title and the rules governing its recognition as set out" in *Mabo*:

"1. *The colonisation of Australia by England did not extinguish rights and interests in land held by Aboriginal and Torres Strait Islander people according to their own law and custom.*

⁴⁵ Sir Gerard Brennan was appointed to the Court in 1981. He served as its Chief Justice between 1995-1998. See Tony Blackshield, Michael Coper and George Williams (ed), *The Oxford Companion to the High Court of Australia* (Melbourne, 2001), pages 66-70.

⁴⁶ Sir Edward Woodward, *One Brief Interval: A Memoir* (Melbourne, 2005), page 135.

⁴⁷ Comments upon introducing Sir Gerard Brennan at the Awards Ceremony for the 2008 Australian Legal History Essay Competition, published as a Note to Sir Gerard's speech on that occasion: reproduced on the Forbes Society website (www.forbessociety.org.au).

⁴⁸ www.highcourt.gov.au/speeches/frenchcj/frenchcj24mar09.pdf.

2. *The native title of Aboriginal and Torres Strait Island people under their law and custom will be recognised by the common law of Australia and can be protected under that law.*
3. *When the Crown acquired each of the Australian colonies it acquired sovereignty over the land within them. In the exercise of that sovereignty native title could be extinguished by laws or executive grants which indicated a plain and clear intention to do so – eg. grants of freehold title:*
4. *To secure the recognition of native title today it is necessary to show that the Aboriginal or Torres Strait Islander group said to hold the native title:*
 - (a) *has a continuing connection with the land in question and has rights and interests in the land under Aboriginal or Torres Strait Islander traditional law and custom, as the case may be;*
 - (b) *the group continues to observe laws and customs which define its ownership of rights and interests in the land.*
5. *Under the common law, native title has the following characteristics:*
 - (a) *it is communal in character although it may give rise to individual rights;*
 - (b) *it cannot be bought or sold but can be surrendered to the Crown;*
 - (c) *it may be transmitted from one group to another according to traditional law and custom;*
 - (d) *the traditional law and custom under which native title arises can change over time and in response to historical circumstances.*
6. *Native title is subject to existing valid laws and rights created under such laws.”*

As French CJ’s paper demonstrates, the implications of the *Mabo* decision continue to unfold, revealing new insights into Australia’s history and exposing fresh challenges for Australian community.

Date: 16 April 2009 (Version 1)

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”.