

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

**AUSTRALIAN LEGAL HISTORY ESSAY COMPETITION
2009**

***A TEACHER'S PERSPECTIVE:
A Synopsis of Background Research Papers***

INTRODUCTION

This Synopsis outlines key features of the four “Background Research Papers” which are part of the 2009 Australian Legal History Essay Competition. While the Papers are excellent resources, prospective Essayists (particularly secondary school students) may wish to focus on a specific section to frame their answers.

Some possibilities for focus may be: (1) In *Paper One: The Meaning of Property*; (2) In *Paper Two: The Role of English Law in Australia*; (3) In *Paper Three: Legal Aspects of James Cook’s “Discovery” of Australia in 1770; Legal Aspects of Governor Phillip’s Powers as a Representative of the Crown; or The Choice of a Date for, and the Notion of, “Australia Day”*; and (4) In *Paper Four: The John Batman Deeds, 1835; The Treaty of Waitangi, New Zealand, 1840; Robert Richard Torrens System of Title, 1858; or Wattie Creek, 1975*.

A GUIDE FOR STUDENTS AND NON-LAWYERS

The Four Papers give an overview of concepts, legislation and people of significance on the topics of property, the reception of English law in Australia, the nature of Australia’s identity and some key historical events. The Papers discuss the notion of “property”. They question the reasons behind the current choice of Australia Day as 26 January. They articulate ideas about the English origins of Australian law. And they profile some of the key people and events in the history of Aboriginal land rights and Australian property law.

Paper One: Living with “Property”: Living in “Community”:

Land law is a key part of our sense of community. Land has an almost spiritual connection for Australians generally. For indigenous Australians in particular, land is fundamental to their religious and cultural identity. Law is the means by which land is treated as property, governing how it is shared by people living in community. By means of law, land can be owned, developed, sold and inherited. Owners have rights and obligations which are defined by community agreement, articulated as “law”. In fact, for a modern lawyer “property” is generally a bundle of “rights” and “obligations”... “recognised by law”. The three concepts go together. Even then, such legal “rights” and “obligations” can be hard to define exactly. It is for that reason that the community relies upon especially, and trusts, the Courts to determine legal disputes fairly.

Associated with the concept of “property” are other legal concepts such as: having “title”; “enjoying” a right; and being in “possession”. These concepts are all explained in detail in the First Research Paper.

The Paper includes an abstract discussion of the nature and limits of law with reference to legal history. This section is particularly useful to those interested in legal research. It includes a philosophical, discursive discussion of concepts such as property rights, community and ownership.

Paper Two: Folklore Rules: The Origins and Growth of Australian Law

This Paper is a lengthy outline (of 47 pages) on the relationship of English law to Australian law.

Australian law is built on the foundations of English law brought here by British colonists. It is described as having been “received” by Australians, as if it was a “gift”, from England. More accurately, English law was adapted to local circumstances. Opportunities to refer legal disputes to England for final judgment lasted until 1986.

The Paper outlines the early close relationship between Britain and its colonies, and the way that influenced Australian history and law. History needs to be viewed as a mixture of “good” and “bad” elements. Australia’s British heritage conforms to that

norm but, on the whole, is more “good” than “bad”. Certainly, British sovereignty over Australia lasted a long time. Not until about 1986 did Australia seek to be, and become, fully independent of it as a matter of law. Once that occurred, the High Court of Australia had to rethink fundamental legal concepts.

The Paper describes some key cases in this process and cites the famous *Blackstone’s Commentaries* as an early influence on Australia. It was in the baggage of the Judge Advocate, David Collins when he arrived in the Antipodes. He was a soldier. No legally trained official arrived in the Australian colonies until 1798.

Blackstone spoke of English law as an integral part of the British “constitution”. The Paper describes the background to development of that constitution, then continues to explain how British constitutional principles were imported into Australia. The status of the legal system in the colony of NSW was for many years doubtful. Was it only a penal colony? Was it a free society? Could it be trusted to govern itself?

The first Chief Justice of NSW, Francis Forbes, believed in 1826 that the creation of a legislature was indicative of the time of “establishment” of a colony for the purpose of determining the point at which English law was “received”. It was not until 1828 that there was greater certainty in the status of English law in the fledgling colony. The treasured rights of British citizenship, such as trial by jury, came slowly as Colonists moved cautiously towards self-government.

The legal relations between the colonies and England were problematic. Britain gave freedom while also restricting it. For many years English courts were the ultimate arbitrators of colonial legal issues. Anglo-Australians freely acquiesced in their British connection. The Paper details the progress of this issue in pages 25 to 29, then moves into a discussion of Australia’s legal historiography.

For students wanting to use the Paper as background for their essays, the section on “Australia’s Land, Law and History”, starting on page 31, is particularly useful. The material covers the topic from the time of William the Conqueror, through early Australian colonial history, noting the influence of *Blackstone’s Commentaries* (with extensive extracts), and working towards the famous case of Eddie Mabo in 1992. It

mentions a recent paper on the history of Aboriginal Land Rights published by the current Chief Justice of the High Court, Robert French. That paper is highly recommended.

Paper Three: Australia Day

This paper outlines the debate over whether or not 26 January should be designated “Australia Day”. The actual details surrounding the Day have been subject to local variations, and questions about whether or not there are valid reasons for that date.

Using “Australia Day” as a starting point, the Paper canvasses alternative dates based on significant dates in Australian History. For example: Should it be 19 April, when Captain Cook first sighted land? Or 28 April, when *HMS Endeavour* landed at Botany Bay? Essayists may find the logic of the possible dates for Australia Day both accessible and manageable.

Following the section on Cook, and some interesting extracts from his Orders, there is a presentation of Governor Phillip’s powers as a representative of the Crown. His Commission as Governor illustrates the early legal framework for NSW: land belonged to the Crown, and could be granted to individuals by the Governor. An extract from Phillip’s Commission demonstrates the prevailing mindset of British Settlers.

The Paper outlines the early history of Australia, including its circumnavigation by Bass and Flinders. The Paper then extends the discussion into a reflection on the nature of Australia’s independence and the early relations with Britain as the “Mother Country”.

Paper Four : Episodes in Australasian Legal History

This Paper is likely to be the most readily comprehensible for secondary school students. It gives a very understandable definition of a “Deed” as a “solemn (that is, a very deliberate) promise, acknowledgement, statement of intention or grant of property”. The tradition of deeds extends back to the Norman Conquest of Britain. Discussion of that tradition provides a good lead into the story of John Batman’s dealings with Aborigines in 1835.

John Batman, 1885

The ceremonies and forms of Deeds used by Batman were steeped in English legal tradition. His correspondence and journal describe his dealings with Aboriginal leaders in some detail. The text of the “Treaty” (“Deeds”) he used demonstrate an attempt to gain an English-based title to land from the Aboriginal inhabitants. The government repudiated his claims, not (only) because they were unjust to Aborigines, but (primarily) because they were “against the rights of the Crown”. The Paper reproduces a contemporary legal Opinion to demonstrate that point.

Following Batman’s excursion to “Port Phillip”, there was a “large influx of Settlers, sheep and cattle” which “must have seemed to the Aboriginal inhabitants to have all the hallmarks of an invasion”. Violence erupted. European migration increased.

The Treaty of Waitangi, 1840

The Paper outlines the basic features of the Treaty of Waitangi in New Zealand, in 1840. Extensive extracts highlight differences between the New Zealand Treaty and Batman’s Deeds.

Torrens Title, 1858

In Australia, one of the most important land-related issues focuses upon the Torrens System of Title. Over 150 years since its introduction, it has progressively replaced the old means of property conveyancing via Deeds. The Torrens system changed the conceptual foundations for land ownership in dealings in Australian law. The old system of conveyancing was awkward, excessively reliant on masses of Deeds and exposed to fraud. The “Torrens system” dispensed with the need for a mass of Deeds and replaced these with a central Register. An entry in the Register is proof of ownership. Torrens introduced practical and enduring reform to an unwieldy system.

Wattie Creek, 1975

The final section of the Paper deals with Aboriginal land rights (and the Prime Minister, Mr E G Whitlam QC) in 1975. After a protracted industrial dispute involving Aboriginal stockmen and their employer, the Whitlam Government granted

a lease of land to the Gurindji People. It took the form of a Deed. The return of land to its traditional owners in this way was dramatically symbolised by Prime Minister Whitlam pouring earth into the hand of Vincent Lingiari. This was an important step on the path to Native Title. The symbolism of the ceremony looked back towards John Batman and old English land law, and forwards to the development of a distinctly indigenous Australian law of property. The next big watershed in this area was the famous Mabo decision of 1992.

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