

PROPERTY LAW TEACHERS: GATEKEEPERS TO A BROADER LEGAL UNDERSTANDING THROUGH THE RICH TAPESTRY OF PROPERTY LAW

PENNY CARRUTHERS* AND NATALIE SKEAD**

I. INTRODUCTION

In 1991 two editors of the *University of Michigan Journal of Law Reform* commented that ‘the influence of law professors extends well beyond the classroom. Law professors are both the gatekeepers and molders of the profession’.¹ Likewise, Lyman Johnson, of the University of St Thomas in Minneapolis, has commented that if ‘Law school is the “gate” through which students must pass if they wish to become lawyers’ then it follows that law teachers ‘are “gatekeepers” into the profession’.² It would seem, therefore, that as law teachers we accept the responsibility for being the intellectual gatekeepers to the legal profession. However, hand-in-hand with that responsibility comes the exciting opportunity that we, through our teaching, have the capacity to determine not only ‘the way in which our students understand the law’ but also, if not more importantly ‘what it is to be a lawyer’.³ This opportunity invites us to reflect upon how we, through our teaching, are able to shape how students ‘conceive of the intellectual and ethical parameters of the law’ and signal to students ‘what is important in learning about the law’.⁴

The purpose of this paper is to reflect on the ways in which Australian property law teachers can fulfil their responsibility as gatekeepers to the legal profession in their teaching of property law. The authors identify the opportunities open to property law teachers: first, to facilitate the development of the crucial skills and attributes our students will require if they are to make a meaningful and effective contribution to the legal profession; and second, to help forge our students’ broader understanding of the social, ethical and normative role of law, lawyers and legal practice. This paper is not intended to be an exhaustive treatment of all areas of property law where property law teachers may take on the role of ‘molders of the profession’. Rather, the paper seeks to provide food for thought as to how various skills and broader understandings may be embedded in the property law curriculum.

* Assistant Professor, Faculty of Law, University of Western Australia.

** Associate Professor, Faculty of Law, University of Western Australia.

1 Robert J Borthwick and Jordan R Schau, ‘Gatekeepers of the profession: An empirical profile of the nation’s law professors’ (1991) 25 (1) *University of Michigan Journal of Law Reform* 191, 193.

2 Lyman Johnson, ‘Corporate law professors as gatekeepers’ (2009) 6 (2) *University of St Thomas Law Journal* 447, 447.

3 See the 2013 ALTA Conference theme available at <http://www.alta.edu.au/2013-conference.aspx>.

4 See the 2013 ALTA Conference theme available at <http://www.alta.edu.au/2013-conference.aspx>.

II. PROPERTY LAW TEACHERS AS GATEKEEPERS

In order for law graduates to be admitted to legal practice in Australia they must have completed the 11 prescribed academic areas known as the Priestly 11.⁵ One of the prescribed academic areas is property law, which requires a lengthy list of topics to be covered:

[t]he topics should provide knowledge of the nature and type of various proprietary interests in chattels and land, and their creation and relative enforceability at law and in equity. Statutory schemes of registration for both general law land and Torrens land should be included. A variety of other topics might be included, e.g., fixtures, concurrent interests and more detailed treatment of such matters as sale of land, leases, mortgages, easements, restrictive covenants, etc.⁶

Despite the vast body of black letter law to be covered in a property law unit, Kevin Gray has noted:

The teaching of property law implants tremendously structural features in the mind of the student, and here can be included rigour of thought and analysis, the capacity for abstract manipulation of complex ideas, and some sense of the workability of entire bodies of statutory machinery ... Indeed, most of the classic dilemmas of private law are here – all human life is here, if we only choose to look.⁷

The many opportunities for the learning of generic, academic and professional skills in property law require property law teachers to shift their focus from ‘what’ substantive content may be covered in a property law unit to ‘how’ that content may be covered. The substantive content in the typical Australian property law curriculum⁸ lends itself to the development of, for example, critical thinking and statutory interpretation skills.⁹ It is our responsibility as gatekeepers to make the most of these opportunities for skills development. Some suggestions for how this may be achieved are given below.

In addition to skills, however, the property law landscape provides rich and fertile ground in which to plant the seeds from which broader intellectual, social and ethical understandings of law can grow. These broader understandings include ethical practice, recognition and understanding of human rights law, the normative role of law and the importance of the continued and continuous refinement and reform of law. All these seeds may be sown through what we, as property law teachers, ‘discuss and highlight and – equally powerfully – by what we do not discuss and thereby ignore’¹⁰ in our classes.

A. *Critical thinking*

Many of the areas covered in an Australian property law unit lend themselves to critical thinking and analysis. A recent survey of property law teachers¹¹ confirmed that the Torrens system and the related concept of indefeasibility of title is an important component of the property law unit in a professional law course. While a study of the Torrens system necessitates a focus on a plethora of statutory provisions and common law and equitable doctrines, it also provides an

5 The Priestly 11 academic areas are set out in the Law Admissions Consultative Committee (LACC) *Uniform Admission Rules* 2008, Schedule 1, see <http://www1.lawcouncil.asn.au/LACC/images/pdfs/212390818_1_LACCUniformAdmissionRules2008.pdf>.

6 Law Admissions Consultative Committee *Uniform Admission Rules* 2008, above n 5.

7 K Gray, ‘The Teaching of Property Law’, in Peter Birks (ed), *Examining the Law Syllabus: The Core* (Oxford University Press, 1992) 15.

8 For a detailed discussion on the substantive content covered in property law units across 16 Australian law schools see Penny Carruthers, Natalie Skead and Kate Galloway, ‘Teaching property law in Australia in the twenty-first century: What we do now, what should we do in the future?’ (2012) *Australian Property Law Journal* 57.

9 For a discussion on the range of skills teaching that can be incorporated into the teaching of property law see Penny Carruthers, Natalie Skead and Kate Galloway, ‘Teaching, Skills and Outcomes in Australian Property Law Units: A Survey of Current Approaches’ (2012) 12 (2) *Queensland University of Technology Law and Justice Journal* 66.

10 Johnson, above n 2, 448.

11 See Carruthers, Skead and Galloway, above n 8.

opportunity for a critical evaluation of the system as a whole, as well as a number of specific aspects of the system.

1. *The Torrens System: Macro-level Treatment*

Prior to the adoption of the Torrens system, the process of conveying and dealing with interests in land was cumbersome, lengthy, time-consuming and, due to the complex nature of the old conveyancing documents, required the engagement of specialist conveyancing lawyers who were skilled at reading and interpreting the old documents. However, even after this laborious task had been completed, persons dealing with land could not be assured of receiving a secure title due to the possibility that documents had been accidentally or deliberately removed from the chain of title, or for other reasons. This insecurity stemmed from what Sir Robert Torrens described as ‘the dependent nature of titles’.¹²

The Torrens system streamlined and simplified the conveyancing process and in so doing introduced a quick, inexpensive and publicly accessible system.¹³ Furthermore, by assuring the title of a non-fraudulent registered proprietor through the concept of immediate indefeasibility,¹⁴ the Torrens system created the certainty and security of title required of a system of conveyancing and registration.¹⁵ However, in providing this security and certainty, the Torrens system has the potential to operate harshly on innocent people. In particular, granting an indefeasible title to a current registered proprietor may result in loss of title to the former registered proprietor.¹⁶

The potentially harsh operation of the Torrens system is illustrated by the experience of Mr Mildenhall in Western Australia. According to media reports, Mildenhall was the registered proprietor of an investment property that was managed by real estate agents. In 2010, international scammers impersonating Mildenhall instructed the real estate agents to sell the property. Acting on these instructions the agents sold the property to an innocent third party purchaser. The purchaser became the registered proprietor of the property; the purchase price of \$485,000 was paid over to the scammers¹⁷ and the purchaser obtained an indefeasible title pursuant to the indefeasibility provisions in the *Transfer of Land Act 1893* (WA)¹⁸ (‘TLA WA’).

The first proponents of the Torrens system recognised this potential for loss. From the introduction of the very first Torrens statute in South Australia in 1858,¹⁹ provisions were included in the statutory schemes of each Australian jurisdiction to enable a person sustaining loss through the operation of the system to obtain compensation from an assurance fund.²⁰ While it is not known whether Mildenhall sought or was awarded compensation under the

12 Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859), quoted in Whalan, *The Torrens System in Australia* (Law Book Co, 1982) 14.

13 Theodore Ruoff, *An Englishman looks at the Torrens System* (LawBook Co, 1957), 16; Timothy Stutt, ‘Transition to Torrens: the six-fold path to the ideal land administration system?’ (2008) *APLJ* 115.

14 This concept of indefeasibility is enshrined in the core indefeasibility provisions of the Torrens statutes. The most significant is the ‘paramountcy’ provision: s 58 *Land Titles Act* 1925 (ACT); s 42(1) *Real Property Act* 1900 (NSW); s 188 *Land Title Act* 2000 (NT); s 184 *Land Title Act* 1994 (Qld); s 69 *Real Property Act* 1886 (SA); s 40 *Land Titles Act* 1980 (Tas); s 42(1) *Transfer of Land Act* 1958 (Vic); s 68 *Transfer of Land Act* 1893 (WA).

15 Stutt, above n 13.

16 In this way the Torrens system has preferred ‘dynamic security’, or security of transaction, over static security. See Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’ (2009) 13 *Edinburgh Law Review* 194, 198.

17 See, for example, <<http://www.abc.net.au/news/2010-09-21/house-scam-victim-can-see-compensation/2269164>>; <<https://sslcam.news.com.au/cam/authorise?channel=pc&url=http%3a%2f%2fwww.perthnow.com.au%2fnews%2fwestern-australia%2fscammers-con-real-estate-agent-into-selling-house%2fstory-e6f913u-1225918470678>> 13 September 2014; <<http://www.watoday.com.au/wa-news/agency-investigated-after-home-sold-without-owners-knowledge-20120525-1z8vm.html>>.

18 Sections 68, 134, 199, 202 *Transfer of Land Act* 1893 (WA).

19 *Real Property Act* 1858 (SA).

20 For a comprehensive discussion of the reasons for the inclusion of the compensation scheme, see, Carmel McDonald et al, *Real Property Law in Queensland* (Thomson Reuters 3rd ed, 2010), [12.50]. See also R A Woodman and P J Grimes, *Baalman on the Torrens System in New South Wales* (Lawbook Co, 2nd ed, 1974), 389; New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 May 2000, 5187 (Kimberley Yeadon, Minister for Information Technology); *Challenger Managed Investments Ltd & Anor v Direct Money Corporation Pty Ltd & Ors* (2003) 59 NSWLR 452; [68].

TLA WA for his loss, it is the authors' view that he would be entitled to compensation from the State under s 205 of the *TLA WA*.²¹ However, even if Mildenhall does receive monetary compensation, the reality is, that through no fault of his own, he has still lost the property. While monetary compensation may help ease the loss, it may not be adequate.²²

Illustrating the operation of the Torrens system through the simple vehicle of the Mildenhall saga – a real case, involving a real person who lost his property as recently as 2010 – makes the potentially harsh impact of a statute that is well over 100 years old all the more real for students. Using the Mildenhall example provides a useful and meaningful platform for a critical evaluation of the Torrens system generally: yes it is simple, cheap and quick, but it may result in an entirely innocent person losing his or her property. Do the benefits outweigh the drawbacks? And, yes, a person may be entitled to compensation for his or her loss, but is monetary compensation an adequate substitute for the land itself?

2. *The Torrens System: Micro-level Treatment*

At micro-level, a property law teacher may encourage critical thinking and analysis in teaching the Torrens system by focusing on one of the more contentious cases in the area. One example that the authors focus on in their teaching of real property is *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper*²³ (*Gosper*). *Gosper* deals with the so-called *in personam* exception to indefeasibility²⁴ and is an excellent teaching case because of the policy-laden yet distinctly different reasoning of each of the three appeal judges.

In *Gosper*, Mrs Gosper was the registered proprietor of land over which there was a registered mortgage in favour of the defendant. A variation of this mortgage, increasing the amount secured, had also been registered. Some years later Mrs Gosper's husband forged Mrs Gosper's signature to another variation of mortgage further increasing the amount secured by the mortgage. The defendant had no direct contact with Mrs Gosper in relation to this variation but was unaware of the forgery. The forged variation was registered. After Mr Gosper died, Mrs Gosper discovered the existence of the forged variation and sought a discharge of the mortgage on paying the amount that was secured by the initial mortgage and first variation. Despite the registration of the forged second variation and the fact that the defendant was a non-fraudulent registered mortgagee, the majority of the New South Wales Court of Appeal found for Mrs Gosper on the grounds of the *in personam* exception.

Each Appeal judge delivered a separate judgment. The contrasting judgments of Kirby P in the majority and Meagher JA in dissent are of particular interest and provide an excellent opportunity for critical analysis in the property law classroom.²⁵

In dismissing Mrs Gosper's claim, Meagher JA emphasised that 'the legal effect of registration of a forged mortgage on land held under the Torrens system is now well-settled',²⁶ and, following the judgment of Barwick CJ in *Breskvar v Wall*, that 'a registration which results from a void instrument is effective according to the terms of the registration'.²⁷ According to Meagher JA, Mrs Gosper was not entitled to:

21 For a detailed discussion of the operation of the compensation provisions under the *Transfer of Land Act 1893* (WA) see Penny Carruthers and Natalie Skead, '150 years on: The Torrens compensation provisions in the "last resort" jurisdictions' (2011) 19 *Australian Property Law Journal* 174.

22 The property may have been of particular sentimental value to Mildenhall, or it may have been part of Mildenhall's retirement plans, neither of which is easily substituted by way of a money payment.

23 (1991) 25 NSWLR 32.

24 For a detailed and critical discussion on the *in personam* exception and how it was applied in *Mercantile Mutual Life Insurance Co Ltd v Gosper*, (1991) 25 NSWLR 32, see Penny Carruthers 'Taming the unruly *in personam* exception: An examination of the *in personam* exception to indefeasibility of title' (Paper presented at the 62nd Annual ALTA Conference, University of Western Australia, Perth, September 2007).

25 *Ibid*, for a discussion on the decision of Mahoney JA in *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32,

26 *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 50.

27 *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 51 citing Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376, 386.

[A] right to discharge on tender of the amount contractually due but to have the discharge on tender of whatever amount is due by operation of law, and here what was due by operation of the relevant statute law was the amount specified in the registered instrument, void though it might be apart from the statute.²⁸

Although, from Mrs Gosper’s perspective, the outcome of Meagher JA’s decision may seem harsh, it is a principled decision that reflects the purposes and operation of the Torrens system. As noted by Butt, ‘indefeasibility of title – at least, “immediate” indefeasibility of title – is a harsh doctrine. That is its whole point. Any other approach diminishes the effectiveness of registration and compels that very investigation into the history of transactions and titles that Sir Robert Torrens was at pains to abolish’.²⁹

By stark contrast, rather than focusing on the effect of registration under the Torrens system and the principle of indefeasibility, Kirby P delivered a heavily policy-based judgment. In describing Mrs Gosper as ‘completely innocent’ and the defendant as ‘largely but not wholly innocent’,³⁰ His Honour emphasised that those ‘who operate upon an assumption that a spouse or partner (usually male) can impose legal obligations upon another spouse or partner (usually female) without the clear, express authority of the other, do so at their peril.’³¹ Kirby P considered that the practical issue of where the loss should fall in this case was clear: ‘[c]ommonsense, or a sense of equity as between the parties, would suggest that it should not fall on [Mrs Gosper]’.³² In His Honour’s opinion to hold otherwise would be ‘an astonishing result’.³³

It is not surprising then that Kirby P concluded that, despite the registration of the forged variation, Mrs Gosper had a personal equity to redeem the mortgage on paying only what was owing under the original mortgage and first variation. This decision has been criticised for ‘[ignoring] the overarching effect of registration’³⁴ of the forged variation and flies in the face of the concept of indefeasibility that is at the heart of the Torrens system.

The judgments of Kirby P and Meagher JA in *Gosper* provide property law students with a rare opportunity to explore the interface between principle and policy in a property law context. Which judgment is to be preferred? The judgment that adheres strictly to Torrens principles and thereby serves to reinforce the public confidence in a secure and certain registration system? Or the judgment that recognises and enforces the right of adult married women to own and deal with property independently of their husbands and denies the legitimacy of the archaic attitude of married men to regard their wives ‘as a mere extension of [their] property and financial interests’?³⁵

B. Statutory Interpretation

In recent years there has been an increased focus on the importance of statutory interpretation as a fundamental skill expected of law graduates. In 2003 Justice Kirby emphasised the importance of this skill in the practice of law, stating that ‘the construction of statutes is now, probably, the single most important aspect of legal and judicial work’.³⁶ Chief Justice French has also commented on the critical importance of introducing students to the principles and techniques of statutory interpretation.³⁷ The desirability of explicitly incorporating the teaching

²⁸ *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 52.

²⁹ Peter Butt ‘Indefeasibility and sleights of hand’ (1992) 66 *ALJ* 596.

³⁰ *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 35.

³¹ *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 36.

³² *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 35.

³³ *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 36.

³⁴ Butt, above n 29.

³⁵ *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 35.

³⁶ Justice Michael Kirby ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2003) 24 (2) *Statute Law Review*, 95–6.

³⁷ Chief Justice Robert French *Legal Education in Australia – A Never Ending Story* (Paper presented at the 2011 Australasian Law Teachers’ Association Conference, Brisbane, Australia). <<http://www.hcourt.gov.au/publications/speeches/current/speeches-bychief-justice-french-ac?print=1&tmpl=component>>, cited in Catherine Brown, Judith McNamara and Cheryl Treloar, ‘Australian Learning and Teaching Council, Good Practice Guide (Bachelor of Laws), Statutory Interpretation’, 2011, 2.

of statutory interpretation into a professional law degree is highlighted in the Law Admissions Consultative Committee's Statement of Statutory Interpretation published in February 2010.³⁸

Despite the acknowledged importance of statutory interpretation very few law schools offer a stand-alone statutory interpretation unit. For the most part, they seek to embed the teaching of statutory interpretation across the core teaching programme of a professional law course.

Property law, and real property law in particular, is statute-based. It follows that, in teaching and learning property law, teachers and students are necessarily engaging in statutory interpretation, although this is not always explicit. It is the authors' view, therefore, that a property law unit is an ideal repository for the more explicit development of students' statutory interpretation skills. Much of the content in real property law units in Australia focuses on the interpretation and application of the relevant jurisdictional Torrens statutes.³⁹ These statutes are generally very old, complex and difficult to fathom. With careful guidance and instruction on the relevant rules of statutory interpretation there is opportunity for students to engage in limited, discrete interpretation exercises on certain aspects of this legislation – including, for example, the compensation, indefeasibility or transfer provisions. This work may be done in pairs or groups, in an in-class exercise or perhaps by way of an online discussion board or forum overseen by the teacher.

But the opportunities for developing statutory interpretation skills in property law extend far beyond a focus on the dense and difficult Torrens statutes. For example, every Australian jurisdiction has legislation governing certain kinds of leases: residential tenancies, retail tenancies, and retirement village tenancies, to name a few. These statutes, which are drafted in relatively user-friendly terms, provide excellent scope for the development of broader and contextualised interpretation skills. In their teaching of Property Law and Land Law the authors set a self-directed statutory interpretation assessment exercise which require students to write a legal opinion on a hypothetical problem question based on the *Residential Tenancies Act 1987* (WA) or the *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA). Strata title legislation could also be used for this exercise. Students are not given any tuition on the relevant statute and are required, independently, to read, interpret and apply an entire statute. In this way, we as property law teachers are able to facilitate the development of statutory interpretation skills in our law students.⁴⁰

C. Human Rights

Despite Australia being a signatory to, and one of eight nations involved in the drafting of, the United Nations *Universal Declaration on Human Rights*, 1948 ('UDHR') it may be surprising to some that Australia does not have a federal Charter of Human Rights or Bill of Rights. However, Australia does have a Human Rights Commission ('HR Commission'). The HR Commission was established under the *Australian Human Rights Commission Act 1986* (Cth) (formerly the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)) and is a self-described independent human rights body 'work[ing] to find practical and long-term solutions to the human rights issues facing people in Australia, as well as to build greater understanding and respect for human rights in our community'.⁴¹ In addition the federal government has introduced a range of anti-discrimination statutes aimed at preventing discrimination of the basis of race,⁴² age,⁴³ disability⁴⁴ and sex.⁴⁵ The human rights landscape at state and territory level is far more fertile: the Australian Capital Territory introduced the first Charter of Human

38 <<http://www1.lawcouncil.asn.au/LACC/images/pdfs/StatementonStatutoryInterpretation.pdf>>. This Statement identifies the specific statutory interpretation skills a law graduate should demonstrate.

39 See Carruthers, Skead and Galloway, above n 8.

40 Since 2012 the Faculty of Law at the University of Western Australia has offered a stand-alone optional unit in statutory interpretation. This unit has proved very popular with LLB students, and has one of the highest enrolments of all the optional units offered at UWA.

41 <<http://www.humanrights.gov.au/publications/about-australian-human-rights-commission-2012>>.

42 *Racial Discrimination Act 1975* (Cth).

43 *Age Discrimination Act 2004* (Cth).

44 *Disability Discrimination Act 1992* (Cth).

45 *Sex Discrimination Act 1984* (Cth).

Rights in 2004 with the enactment of the *Human Rights Act 2004* and Victoria followed soon after, with its *Charter of Human Rights and Responsibilities Act 2006*.⁴⁶

Although Australia may not have a federal human rights statute, the issue of human rights is often at the fore of the broader political and legal agenda. It is not surprising then that many law schools offer units in their law courses examining human rights generally or various aspects of human rights, both nationally and internationally.⁴⁷ However, these units are often offered only as option units and a law student could conceivably graduate without encountering human rights perspectives in the course of his or her degree. It is, therefore, the responsibility of teachers in core law units, where possible, to raise students' awareness of the important role of fundamental human rights in the development and application of the law. In property law these opportunities are slim, but they are there. Two examples lie in the areas of reverse mortgages and the confiscation of proceeds of crime.⁴⁸

1. *Reverse Mortgages*

The teaching of mortgage law is part of the property law curriculum in most, if not all, Australian law schools.⁴⁹ In teaching this topic, a focus on the increasing prominence of reverse mortgages might be included to demonstrate the unsavoury practice of taking advantage of the financial vulnerability of aging Australians.

Burns has written extensively on the dangers of reverse mortgages for aging Australians. As Burns notes:

The reverse mortgage occurs later in a person's lifecycle, because generally reverse mortgages are created by mortgagors who are 60 years and older. Reverse mortgagors are seniors who have generally retired and consider that they need funds (in addition to the Age Pension or private sector annuities or pensions) for a variety of situations. The benefits of reverse mortgages have been widely touted and include the availability of much needed cash for emergency situations, urgent house maintenance and health care costs. However, they also have dangers including the permanent loss of equity in the home, the high compounding interest rates and the possibility that the amount finally owed will exceed the value of the house.⁵⁰

A discussion on the desirability of reverse mortgages and their potentially devastating impact on elderly property owners provides scope to highlight two fundamental human rights. The first relates to non-discrimination against persons on the basis of age. Section 3 of the *Age Discrimination Act 2004* (Cth) states that the objects of the Act include the 'eliminat[ion], as far as possible, discrimination against persons on the ground of age in the areas of work, education, *access to premises*, the provision of goods, services and facilities, *accommodation, the disposal of land*, the administration of Commonwealth laws ...'. (Emphasis added). Second, Article 17 of the *UDHR* states that '(1) Everyone has the right to own property alone as well as in association with others' and that '(2) No one shall be arbitrarily deprived of his property'.

Being directed primarily at the aged, and potentially resulting in the permanent loss of the retirement home, the granting of reverse mortgages principally to retirees may be regarded as a discriminatory practice requiring careful and constant regulation and scrutiny.

⁴⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁴⁷ At the University of Western Australia, for example, Human Rights and Equal Opportunities Law and International Humanitarian and Refugee Law are two optional units available to Bachelor of Laws students.

⁴⁸ Other examples of human rights issues arising in property law include: the lack of constitutional protection for the compulsory acquisition of land at state and federal levels; the potential for restrictive covenants to be used to encroach on human freedoms; and the human rights issues arising in relation to the regulation, through by-laws, of strata and community title developments. In this regard see Cathy Sherry, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title can Learn from Traditional Doctrines of Property' (2013) 36(1) *UNSW Law Journal* 280. See also the discussion below regarding *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and the reference to the *Racial Discrimination Act 1975* (Cth).

⁴⁹ A survey undertaken on the content of the core property law courses in 17 Australian law schools revealed that 79% of property law courses include 2 to 4 hours of tuition on mortgages and 29% include more than 6 hours of tuition. See P Carruthers, N Skead and K Galloway, above n 8, 66.

⁵⁰ Fiona Burns, 'Reverse Mortgages in Australia: An Exercise in Sustainability?' in Penny Carruthers, Sharon Mascher and Natalie Skead *Property & Sustainability: Selected Essay* (Thomson Reuters, 2011), 240.

2. Confiscation of Crime Legislation

One implied exception to a registered proprietor's indefeasible title is the 'overriding statutes' exception. Stated simply, a later inconsistent statute will give rise to an exception to indefeasibility where, on a proper construction of the later statute, an interest arising pursuant to that later statute is effective and enforceable against the otherwise indefeasible title of a registered proprietor under the earlier Torrens statute.⁵¹ The confiscation of the proceeds of crime statutes in place in all Australian jurisdictions provide interesting and topical examples when teaching the overriding statutes exception. They can also be used to highlight potential human rights violations. The proceeds of crime statutes allow for the confiscation of property in specified circumstances. These circumstances include where a person's wealth is unexplained,⁵² where property was used in, or derived from, the commission of a specified offence, and where property is, or was, owned by a declared drug trafficker.⁵³ By vesting title to confiscated property in the Crown, the confiscation provisions pose a significant threat, not only to the property rights of the defendant but also to innocent third parties who either hold an interest in the confiscated property or are dependent on the defendant's property ownership for a roof over their heads. The latter category of third parties includes dependant spouses, partners and – of greater concern – children.

Aside from human rights concerns arising under Article 17 of the *UDHR* outlined above, as a result of the deprivation of property on confiscation, the potential for dependent children of a defendant to be left homeless following confiscation may amount to a violation of Article 27 of the United Nations Children's Fund 'Convention on the Rights of the Child' of 1989, which was ratified by Australia in 1990. Under this Article, countries that are a party to the Convention agree that '[c]hildren have the right to a standard of living that is good enough to meet their physical and mental needs. Governments should help families and guardians who cannot afford to provide this, particularly with regard to food, clothing and housing'.⁵⁴

C. Ethical Practice

One of the academic areas prescribed by the Priestly 11⁵⁵ is 'ethics and professional responsibility', which requires an entry-level lawyer to 'act ethically and demonstrate professional responsibility and professional courtesy in all dealings with clients, the courts, the community and other lawyers'.⁵⁶

In addition, every jurisdiction in Australia has legal professional conduct rules⁵⁷ to ensure that solicitors are bound by 'professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons'.⁵⁸ These obligations and principles generally require solicitors to act honestly, competently, diligently and in the best interests of their clients. Solicitors are also required not to act in a manner that

51 For detailed discussions on the overriding statutes exception to indefeasibility see *City of Canada Bay Council v F & D Bonaccorso Pty Ltd* [2007] NSWCA 351; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472; Peter Butt, 'Indefeasibility and Council Consent Conditions' (2005) 79 *Australian Law Journal* 143; Pamela O'Connor, 'Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title' [1994] 19 *Melbourne University Law Review* 649.

52 For a detailed discussion of unexplained wealth confiscations in Australia see Natalie Skead, 'Unexplained Wealth: Indefeasibility and Proceeds of Crime Legislation in Australia' in Carruthers, Mascher and Skead, above n 50.

53 For a detailed discussion of drug-trafficker confiscations in Western Australia and the Northern Territory see Natalie Skead, 'Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far' (2013) 37 *Criminal Law Journal* 1.

54 UNICEF 'Convention on the Rights of the Child: Survival and development rights: the basic rights to life, survival and development of one's full potential', <http://www.unicef.org/crc/files/Survival_Development.pdf>.

55 Above n 5.

56 Above n 5, 11.

57 In Western Australia the rules are embodied in the *Legal Profession Conduct Rules 2010* (WA).

58 The Law Council of Australia *Australian Solicitors' Conduct Rules* (2011) 3, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AustralianSolicitorsConductRules.pdf>>. The Law Council of Australia adopted the Rules in 2011 in an effort to develop a single, uniform set of professional conduct rules for Australian solicitors. Law societies in the states and territories are working towards the adoption of the Rules.

would be prejudicial to, or diminish, the administration of justice or which would bring the legal profession into disrepute.

Accordingly, it is important that our students understand the nature of ethical conduct. The standard property law curricula in Australian law schools include case law and other circumstances where ethical issues arise and provide an opportunity for these issues to be recognised, discussed and in this way embedded within the property curriculum.

One interesting example worth highlighting for students is the circumstances surrounding the introduction of the Torrens system of land title registration into Australia. As noted earlier, the Torrens system has many advantages over the old system, including security and certainty of title, diminution of delay and expense, simplification of titles and dealings, and the setting up of a register that provides an accurate record of the description of land and the people claiming to have interests in the land.

Given these manifest advantages, one might have thought the legal profession would have embraced, with alacrity, these wide-ranging and progressive changes. However, this was not the case. As Whalan has commented, ‘There clearly was bitter opposition to the introduction of the system in South Australia from almost all members of the legal profession, including the judiciary’.⁵⁹ It may be that for some, this opposition related to genuine concerns about the potentially harsh operation of this radical new system. However, it is clear that for others the opposition stemmed from ‘the self-interest of lawyers, who (in [Torrens] view) devoted their energies to maintaining [the old system’s] mystique in order to preserve their own incomes and influence’.⁶⁰ This self-interested conduct by the legal profession provides our property students with a thought-provoking illustration of conduct that may not be regarded as ethical.

Another area where ethical issues arise is in the factual scenarios presented by the case law. The kind of scenario that is relevant for our property law students typically involves fraudulent or improper conduct by solicitors. It is important that these cases are identified, as they illustrate to students the unethical practices that have been adopted, for one reason or another, by solicitors. The case scenarios include: an articulated law clerk purporting to witness the signature of a mortgagor when in fact the signature was a forgery, resulting in loss of title for the victim;⁶¹ a solicitor applying for a loan in the name of another person, forging the mortgage documents and taking the loan funds;⁶² and a solicitor for a financier appointing the borrower as agent to obtain executed loan and mortgage documentation from the guarantor mortgagors and in this way enabling the borrower to forge the documents.⁶³

D. *Evolving nature of property law*

It is undoubtedly the case that laws evolve over time to meet changes in society. Although property law has deep historical roots, it is important that our students are also aware of the evolving nature of property law. There are numerous examples of changes in the property law curriculum that reflect this dynamism.

However, perhaps the single most significant property law case that illustrates the relevance of historical, social, economic and political factors at work in the law and in the way the laws respond to societal changes is the *Mabo (No2)* decision.⁶⁴ This reflects the fundamental importance of *Mabo (No 2)*, not just for its ground-breaking recognition of the existence of native title at common law as a burden on the Crown’s radical title, but also for the High Court’s

⁵⁹ Douglas Whalan, *The Torrens System in Australia* (Law Book Co, 1982), 5.

⁶⁰ Peter Butt, *Land Law* (Lawbook Co, 4th ed, 2001).

⁶¹ *Frazer v Walker* [1967] 1 AC 569 and *Russo v Bendigo Bank Ltd* [1999] 3 VR 376 (in this case, the clerk was not an articulated law clerk, rather a clerk in a solicitor’s office).

⁶² *Gibbs v Messer* [1891] AC 248, *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32; *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 529; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611.

⁶³ *Nathan v Dollars & Sense* [2008] 2 NZLR 557.

⁶⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Interestingly, in a recent survey of Australian property law teachers, this case was most frequently cited by the survey respondents as one of the most important property law cases: See Carruthers, Skead and Galloway, above n 8, 69.

comments on the nature of Crown ownership of land, the doctrine of tenure, the concept of possessory interests in land and the rejection of the doctrine of *terra nullius* (land of no-one).

The case also highlights the enormous impact international conventions have on local Australian law. In *Mabo (No 1)*⁶⁵ the High Court declared invalid the *Queensland Coast Islands Declaratory Act 1985* (Qld) which retrospectively purported to abolish all rights and interests the Murray Islanders enjoyed over their lands. The Act was invalid as it deprived the Murray Islanders of their rights yet left unimpaired the rights of others whose property rights did not originate from the laws and customs of the Murray Islanders. The Act was therefore in breach of s 10 of the *Racial Discrimination Act 1975* (Cth) which had been enacted pursuant to the *International Convention on the Elimination of All Forms of Racial Discrimination (1966)*, one of the first human rights treaties adopted by the United Nations, and ratified by Australia on 30 September 1975.

Other significant changes in the practice of property law concern ‘the advent of electronic titling and advanced survey technologies [which have] resulted in fundamental changes to the Torrens system and new forms of title’.⁶⁶ Over time, digitisation of title will make redundant many of the standard property law cases we currently teach our students including, for example, cases based on the possession or fraudulent use of the (duplicate) certificate of title.⁶⁷

Increasingly, given Australia’s need for higher density housing, people are living in semi-detached dwellings, units, community housing, strata title developments and retirement villages. With such a high proportion of the population occupying higher-density accommodation it may become imperative that property law curricula be updated to incorporate the law regarding these different forms of housing in addition to the traditional emphasis on the standard land transactions: mortgages; leases; easements and restrictive covenants.

There are many other examples of radical changes taking place in the practice of property law including: changes in personal property securities law; the increased imposition of statutory rights, restrictions and responsibilities on land owners; and the ever-present imperative of ecologically sustainable development with the consequential challenges for land use such as land degradation, biodiversity and efficient and just resource allocation.⁶⁸ Inevitably these changes will impact on the way we teach property law.

III. CONCLUSION

The property law landscape provides a rich and fertile ground for Australian property law teachers to fulfil their responsibility as gatekeepers to the legal profession by providing teachers with the opportunity and the challenge: first, to facilitate the development of crucial legal skills; and second, to help forge our students’ broader understanding of the social, ethical and normative role of law, lawyers and legal practice.

This paper has endeavoured to provide a number of select illustrations of the ways in which critical thinking, statutory interpretation, human rights, ethical practice and the evolving nature of law can be introduced into the teaching of property law.

The authors acknowledge the influential role of property law teachers in shaping our students’ understanding of the law and ‘what it is to be a lawyer’.⁶⁹ However, we also appreciate that these understandings are only obtained through what we, as property law teachers, ‘discuss and highlight and – equally powerfully – by what we do not discuss and thereby ignore’⁷⁰ in our classes.

⁶⁵ *Mabo v Queensland* (1989) 166 CLR 186.

⁶⁶ See Carruthers, Skead and Galloway, above n 8, 60.

⁶⁷ See, for example, *Gosper v Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 (unauthorised use of certificate of title); and *J & H Just Holdings Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546 (possession of certificate of title by prior unregistered mortgagee sufficient protection in a contest with a subsequent unregistered mortgagee).

⁶⁸ For an overview of some of the challenges for property law teachers of the twenty-first century see Carruthers, Skead and Galloway, above n 8, 59–63.

⁶⁹ See the 2013 ALTA Conference theme available at <<http://www.alta.edu.au/2013-conference.aspx>>.

⁷⁰ Johnson, above n 2, 448.