TEACHING LAND LAW — AN ESSAY

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In 2011, fellow property teachers Penny Carruthers, Natalie Skead and Kate Galloway conducted a valuable and comprehensive survey of the teaching of the compulsory property law unit in Australian law schools. Their published findings provided rich empirical data on our practices,[1] and aimed to 'stimulate discussion and foster the further exploration of the challenges that confront property law teachers in teaching property law in the twenty-first century'.[2] This essay takes up that discussion. First, the essay contains observations made and lessons learned over a twenty year career of teaching property and writing curricula, at both undergraduate and postgraduate level, in compulsory subjects and electives, in a large law faculty, in a research-intensive university. Second, it is an attempt to drill down into a specific property curriculum, teaching methods and assessment, fleshing out detail on issues raised by Carruthers, Skead and Galloway's research. The essay is intended as a conversation with property teachers of all varieties; those of us who have taught the subject for considerable time, but also younger teachers who, in accordance with time-honoured tradition, may have been press-ganged into teaching property as a condition of their employment. No minor challenge.

I was not quite press-ganged into teaching property, but I suspect like many others, I came to teach property via a crooked path. The path began with the good fortune of being taught by the extremely capable Diane Skapinker,[3] and Professor Rosalind Croucher,[4] and to have the absolute privilege of Emeritus Professor Peter Butt being my tutor.[5] At 8.15 am every Friday morning for a semester, I would turn up bright-eyed and bushy-tailed to revel in Professor Butt's expertise, as he patiently and clearly explained the application of property doctrine to

[1] 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) 21 *Australian Property Law Journal* 57; P Carruthers, N Skead and K Galloway, 'Teaching, Skills and Outcomes in Australian Property Law Units: A survey of current approaches', (2012) 12(2) *QUT Law and Justice Journal* 66; Penny Carruthers, Natalie Skead and Kate Galloway, 'Assessment in the Law School: Contemporary Approaches of Australian Property Law Teachers', (2012) 5 (1&2) *Journal of Australasian Law Teachers Association* 1; Penny Carruthers and Natalie Skead, 'Property Law Teachers: Gatekeepers to a broader legal understanding through the rich tapestry of property law', (2013) 1 *Journal of Australasian Law Teachers Association* 189.

[2] Carruthers et al, 'Teaching property law', 58.

[3] Former Associate Professor, Faculty of Law, University of Sydney, now partner in the Sydney office of international law firm K&L Gates.

[4] President, Australian Law Reform Commission.

[5] Emeritus Professor, Faculty of Law, University of Sydney and author of seminal texts: P Butt, *Land Law 6th edition*, Sydney, Thomson Lawbook Co., 2010; P Butt and R Castle, *Modern Legal Drafting (2nd edition)*, New York, Cambridge University Press, 2006; P Butt and J Aitken, *Piesse - The Elements of Drafting (10th edition)*, Sydney, Lawbook Co., 2006; P Butt, *Mabo, Wik and Native Title*, Australia, Federation Press., 2001; P Butt, *Woodman & Nettle, the Torrens System in New South Wales*, North Ryde, N.S.W., LBC Information Services, 2001.

problem questions. If anyone answered a question incorrectly, Professor Butt would say, 'You could look at it that way, or you could look at it this way', and go on to provide the correct answer. In doing so, he taught me not only a lot of property law, but my first key lesson in teaching. Never tell a student directly that they are wrong. If a student has been brave enough to offer an opinion in a subject like property, they should be given every encouragement to continue to do so. Educational research would refer to this as creating a 'warm classroom climate', which in turn motivates students to learn.[6]

When I was interviewed for my first academic position, my eyes set on a high flying and worthy career as an international lawyer, I was asked the standard question asked of all junior staff – which core subject would you be prepared to teach? Owing to my good teachers, property seemed less terrifying than other options. However, I had cause to question my judgement when every colleague, without exception said, 'Property? Rather you than me!' Not an encouraging start to an academic career.

Twenty years later I am still teaching property, quite voluntarily. I teach the compulsory land law course in the undergraduate and JD curriculum, as well as a specialised elective, 'Land, People and Community', which explores the role of private property law, (as opposed to public planning law), in the development and regulation of rural and urban land. Topics include utopian communes, the high rise redevelopment of slums, urban farming, the role of residency in schooling and the limits of private governance. I also teach a postgraduate course on strata and community title. However it is the compulsory land law course that I find the most satisfying, and perhaps surprisingly, the subject that my students seem to most enjoy.

This essay focuses on that compulsory land law course. It explores ways to pique students' interest in the most consistently dreaded subject in the curriculum; the necessary (and unnecessary) content of property courses; the considerable benefit of technology in teaching land law; and ideas for experiential learning, as well as varied, legitimate assessment. In doing so, the essay aims to continue Carruthers, Skead and Galloway's discussion, and pass the baton on to the next colleague.

Half the battle – explaining why property matters and is interesting

One of the great advantages of a crooked path to teaching property is that at some stage we may have shared our students' horror of the subject matter. This stops us from assuming that our students will automatically find our subject fascinating, (an easy trap for teachers who had an instant and enduring passion for their specialty), and prompts us to explain *why a subject matters* and why it might consequently be interesting. Not assuming that your

[6] Briggs argues that 'The climate of learning establishes the motivational context; positive feelings are necessary if not sufficient conditions for deep learning, whereas stress and cynicism usually lead directly to surface learning…The teacher needs to create a warm classroom climate first, and then attempt to get the student interested in the particular task', J B Biggs, "Approaches to the enhancement of tertiary teaching", (1989) 8(1) *Higher Education Research and Development* 7, 17.

students share your enthusiasm for a subject is consistent with a student-centred, rather than teacher-centred approach to teaching and learning.[7]

Explaining why property matters and why it might be interesting is surprisingly easier than it may seem. As Laura Underkuffler has noted,

> We might never personally engage a constitutional question; we might never try to enforce a contract; we might never be involved in a personal action or replevin. But every one of us will possess property that we wish to shield from the claims of others. Whether it is land, bank accounts, chattels, body parts, personal information, ideas, or other objects or interests, we *will* personally and vitally care about the law of property. The property teacher luxuriates in the unfolding of this important and inescapable idea.[8]

Students new to property may never have thought about the fact that everything we do in our lives, and everything that matters to us - our personal relationships, our work, our recreation – occurs on a piece of land that ideally we have a legal right to occupy. I have put two seminal property quotes on the welcome page for our land law course, to start students thinking about the fundamental nature of property, in particular land. The first is from Joseph Singer's book *Edges of the Field: Lessons on the Obligations of Ownership*, in which Singer highlights the way in which property gives us the means to thrive, 'to exercise autonomy, to enjoy our liberties, to shape our destiny, to form relationships with others, to live a human life'.[9] The second is from Jeremy Waldron's article on homelessness and the necessity of property for people to be able to perform the most basic functions such as sleep and ablution, and to consequently be human. Waldron says,

> Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location.[10]

Students who come to the first class expecting to be confronted with technical, commercially-oriented statutes and doctrine, are invariably (pleasantly) surprised to discover that property

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[7] With 'a student-centred understanding, academics' attention is focused on what the *students* are experiencing in any teaching–learning situation and the potential impact of teachers' actions upon student experience. A student-centred understanding of teaching is consistently…regarded as more sophisticated than a teacher-centred understanding.': G Akerlind, 'A phenomenographic approach to developing academics' understanding of the nature of teaching and learning', (2008) 13(6) *Teaching in Higher Education* 633, 633-4.

[8] L S Underkuffler, 'Teaching Property Stories', (2005) 55(1-2) *Journal of Legal Education* 152, 152, (emphasis original).

[9] 'Property concerns things needed for human life. At the most elemental level, property gives us a place to be: a place to work. It gives us the means to thrive: food to eat, clothing to wear. It gives us things that make life enjoyable, meaningful, and fun. But property does not only provide our material needs. It enables us to exercise autonomy, to enjoy our liberties, to shape our destiny, to form relationships with others, to live a human life. We cannot live our lives without the means to do so', Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, 2000), 27.

[10] Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Review* 295, 296.

might have more in common with human rights than corporate law.[11] One variation on the 'I never expected property to be so interesting!' comment I have heard from students on countless occasions, was from a student who worked for a women's legal service. She admitted that the first question that all women fleeing domestic violence ask is about housing. She conceded that while she had been dreading land law, she now realized how essential it was to human safety, security and well-being. Communicating this to students at the beginning of semester not only piques their interest, but provides an underlying explanation for the inevitable technicality that they will confront. Property law, particularly land law, is technical because the stakes are so high. Land is not an optional commodity; it is essential and it is finite. As a result, judges and the legislature work hard to create general rules for the orderly regulation of property, but qualifications, exceptions and discretion are crucial so that people do not lose rights to resources that may be essential for survival.[12] The endless back and forth rules for forfeiture of a commercial lease, (breach, statutory notice, waiver, unequivocal demand for possession, relief against forfeiture), make a lot more sense to students when they understand that a person's livelihood, career, material needs and personal destiny may be at stake.

Native Title

Perhaps the best way for students to appreciate the high stakes nature of property is to study native title. With the exception of a short introduction on fees simple, leasehold estates and Crown grants which is necessary to understand *Mabo v Queensland*,[13] native title is the first topic in our land law course. This is because native title is the earliest form of land ownership in Australia, and the logical starting point for an Australian land law course, pre-dating William's conquest of England by tens of thousands of years. The devastating consequences of land loss for Aboriginal and Torres Straits Islander people hopefully concentrates students' minds on the fundamental nature of land for survival and human flourishing.

As Melissa Castan and Jennifer Schultz note, teaching native title presents multiple challenges. These include student marginalisation of the material; a lack of knowledge of indigenous perspectives, culture and law on the part of staff and students; duplication of *Mabo* in the curriculum, and the technicality of property concepts like the doctrines of tenure and estates, and 'radical title'.[14] From my own perspective, I struggle with student resistance to 'doing *Mabo* again',[15] my concern for any discomfort, distress and/or justifiable anger that Indigenous students may feel during discussion, but above all else, a consistent lack of knowledge of Australian history on the part of students. Although Australian history is compulsory in the New South Wales school curriculum,[16] it is taught relatively early in high school, and most students will not have studied history at all, let alone Australian history, in

[11] See Carruthers et al, 'Property Law Teachers', 189, for a discussion of the way in which property cases offer opportunities for discussion of human rights, discrimination, and ethical legal practice.
[12] Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000), 30-1.
[13] *Mabo v Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).
[14] Melissa Castan and Jennifer Schultz, 'Teaching Native Title', (1997) 8 *Legal Education Review* 75.
[15] Land Law is a fourth year subject in our combined law degree and a second year subject in the JD. Students will have done *Mabo* in introductory compulsory courses.
[16] 'First Contacts', History K-10, Stage 2, BOSTES, https://syllabus.bostes.nsw.edu.au/hsie/history-k10/content/803/.

their final years of school or at university. As a result, many have little or no knowledge of the dispossession of Indigenous people of their land 'parcel by parcel'[17] for the development of the pastoral, timber, cane, mining and other industries; the Stolen Generations; the function of missions and reserves; the consequences of the Commonwealth Conciliation and Arbitration Commission decision on equal wages for Aboriginal workers in the pastoral industry;[18] or the long-standing land rights movement. All of these events remain centrally relevant to native title law. The knowledge gap is intensified with increased numbers of international students who often have no knowledge of any Australian history or contemporary reconciliation debates. Not wanting to hypocritically point the finger at the student body, many staff, myself included, struggle with an insufficient knowledge of Australian history from our own education, which we may or may not have been able to ameliorate through legal and other research. In our land law course, we are in the process of trying to fill some of this knowledge gap in native title classes by providing students with additional readings and a live or video presentation by an Indigenous community leader.

While teaching native title is hard, particularly the fundamental injustice of forcible dispossession leading to extinguishment, it can be a positive experience, establishing the importance of land to Indigenous people and their on-going, successful battles for recognition of property rights. Further, native title and the common law technicality of the *Mabo* judgment present an opportunity to nip any veneration of property doctrine in the bud.

Firstly, native title invites students to consider the fact that there is no society on earth that does not have property law. All human beings need land for survival, and being a finite resource, we can either spend our time continually fighting over land, (an all too common occurrence), or we can create agreed rules to share land. Those rules might be that I have this acre of land and you have that acre over there, and we never venture on to each other's land; however, unless we live on rich soil with a reliable rainfall, those property rules will simply ensure our mutual starvation. As a result, all communities create laws in relation to land with reference to topography, soil, climate (and culture). Not surprisingly, with radically different land and climate, Indigenous land law in Australia differed from land law in England, but – and this is the important point for students – the fact that Indigenous land law was different, does not mean it is not land law. That reasoning is akin to saying a car is a form of transport and thus anything that does not conform with the attributes of a car, such as a bus or a train, is not transport. This is the flaw in the reasoning in *Milirrpum v Nabalco Pty Ltd* when Justice Blackburn acknowledged that the,

> evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system

[17] *Mabo* per Brennan J at [82].
[18] Thalia Anthony, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 'Equal' Wage Case for Aboriginal Station Workers', (2007) 93 *Labour History* 15.

> could be called "a government of laws, and not of men", it is that shown in the evidence before me,[19]

but then went on to conclude that because the system of property law did not match the attributes of English land law, it could not be land law. The benefit of explaining the differing but universal nature of land law is that it discourages students from venerating Anglo-Australian property doctrine, hopefully reducing their potential to be intimidated by it.

The doctrine in *Mabo* itself presents a second opportunity in this regard. At this point, I should admit that I find the declaratory theory of the common law as convincing as the existence of the tooth fairy. I have no difficulty with the notion that all property law is made up at some point, either by judges or legislatures, and that it has no inevitable content.[20] As the progressive property theorists argue, property is both an idea and an institution designed by people with reference to plural and incommensurable values. Choices about the content of property are 'unavoidable' and those choices confer power.[21] Different communities and legal systems make different choices.

Rather than allowing students to get too fixated and anxious about the doctrine in *Mabo*, (tenure, 'radical title' etc), I try to emphasise that the High Court was doing its best to construct a workable version of the common law that was no longer premised on a racist assessment of Indigenous Australians as being 'so low in the scale of social organization' that their property rights could be disregarded.[22] In other words, the High Court was taking existing law, which was itself made up, (by the invading Normans in 1066, (the doctrine of tenure), and by invading European powers in the colonial era, (the classification of colonies, radical title etc)), and making up a new version.[23] The High Court tried to do so in an orderly and justifiable manner, without fracturing the 'skeleton of principle which gives the body of our law its shape and internal consistency',[24] but it is pointless and unnecessary to pretend that the Court was doing anything other than carrying on a centuries' old tradition of constructing property law. As I say to my students, 'property law does not fall out of the sky; it is made by people, for people, to serve economic, social and political ends'. With that lesson learned, we are ready to tackle whatever doctrine the land law syllabus throws at us.

What to teach?

As Dale Whitman has observed, property courses have shrunk.[25] In the past, most law schools would have taught an entire year of property law, while many now teach only a

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[19] (1971) 17 FLR 141, 266-7.
[20] Hanoch Dagan, 'The Limited Autonomy of Private Law' (2008) 56 *American Journal of Comparative Law* 809, 814.
[21] Gregory S Alexander, Eduado M Penalver, Joseph William Singer and Laura S Underkuffler, 'A Statement of Progressive Property' (2008) 94 *Cornell Law Review* 743.
[22] *In re Southern Rhodesia* (60) (1919) AC 211, 233-234, cited in *Mabo* by Brennan J at [38].
[23] See for example, Ulla Secher's explanation of the way in which the High Court's concept of radical title differed from earlier authorities: 'The Meaning of Radical Title: The Pre-Mabo Authorities Explained — Part 1' (2005) 11 *Australian Property Law Journal* 179 and 'The Meaning of Radical Title: The Pre-Mabo Authorities Explained — Part 2' (2005) 11 *Australian Property Law Journal* 209.
[24] *Mabo*, [29].
[25] Dale A Whitman, 'Teaching Property – A Conceptual Approach', (2007) 72 *Missouri Law Review* 1353, 1353.

semester, with small sections of property covered in other courses. Given the demands on space in the modern curriculum, I am supportive of a semester course, although by course, I mean 'real property' or 'land law.'

Personal property has always presented a challenge for law schools. Although an understanding of personal property is essential, it has never quite justified a course of its own, and is often coupled with land law, in a general property course.[26] I am a firm advocate of teaching land law separately from other property for the simple reason that our unavoidable physical presence on land makes it different from all other property. While some personal property, like food and sufficient money, is necessary for survival, much personal property is not; it is optional. Land is never optional, and as a result of its unique nature, land has its own well-established register, whose mechanisms and principles operate wholly unconnected to other forms of property. Having taught a mix of personal and real property, (as well as equity), for many years, I never found personal property a helpful addition.[27] This is not simply because as Kevin Gray has argued, a mix of personal and real property might make sense to 'the seasoned veteran of property law' but not to an inexperienced student,[28] it is because in Australia, to draw connections between personal and real property is arguably wrong. While possession was once fundamental to both personal and real property, it is no longer fundamental for real property, at least in relation to title.[29] We live in a highly literate community, in an affluent democracy, that has long been able to afford to maintain a public land register. Our register, a Torrens register, does not record pre-existing titles; it *creates* title. Thus, to teach Australian students that title to land has its roots in possession is liable to mislead them; title by possession is a narrow, rare exception to the general rule that title to land comes from registration or some dealing with a registered proprietor. The Torrens system was not an incremental development of land law; it was revolutionary. Although this seems to be unusual in Australia,[30] I would argue that adverse possession is a topic that can be sacrificed in a modern property curriculum. While the topic is fascinating, adverse possession is too rare an event in property practice to justify space in a limited curriculum.[31]

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[26] Penny Carruthers et al, 'Teaching property law', 67-8.

[27] William Swadling argued vigorously for 'the total integration of the law of personal and real property' in the property syllabus: 'Teaching Property Law: An Integrated Approach', in Peter Birks (ed) *Examining the Law Syllabus: The Core*, Oxford University Press, 1992, 23-25. I would counter his arguments by suggesting that continual comparisons between personal and real property might be illuminating for academics, but deeply confusing for students. Students, (including good students), with no knowledge of property law struggle to process the basic rules. Expecting students to simultaneously digest not just one set of rules, but two, is unrealistic. The result would be the all too common result at law school – by teaching students too much detail that they cannot understand, we end up teaching them nothing.

[28] Kevin Gray, 'The Teaching of Property Law', in Peter Birks (ed) *Examining the Law Syllabus: The Core*, Oxford University Press, 1992, 18.

[29] Students need to understand the concept of possession, for example to understand that a tenant is legally in or is entitled to possession of land, but that is not the same as teaching students that possession vests or is evidence of title, (which is rarely the case today).

[30] 100% of respondents to a survey of Australian property teachers said that they covered possession, including adverse possession in their course(s). 64% spent 1-2 hours on it, while 36% spent 4 hours: Carruthers et al, 'Teaching Property Law', 66.

[31] Readers who disagree with this sentiment may take satisfaction from the fact that at the exact moment I wrote that sentence, a journalist emailed asking me to comment on an adverse possession claim reported in that morning's paper: S Williams, 'Redfern squatter seeks to take ownership using arcane law', *The Sydney Morning*

Along with adverse possession, I would suggest that perpetuities, determinable limitations, conditions subsequent, reversions, remainders, and uses can all be safely cut from the core curriculum. While all property systems need a rule against perpetuities, teaching it is often an exercise in diminishing returns. I have always suspected that the vast majority of students have little or no idea of what we are talking about even before we mention fertile octogenarians, and there are other areas, such as freehold covenants, that allow students to consider the dangers of predecessor control of land. In relation to the other topics, while most property courses no longer spend substantial time on them, it seems that most attempt some, albeit minor, coverage.[32]

This illustrates a risk that we all face when teaching property: simultaneously teaching too much and too little detail. That is, feeling obliged to at least flag particular issues in land law, like reversions, remainders and uses, but not providing our students with enough detail for them to genuinely understand the doctrines. We consequently run the risk of simply spending an hour frustrating and confusing them. Roger Cotterrell highlights this problem when discussing the difficulty of isolating the social and policy context of some property rules. He points out that a rule may be several steps removed from the original policy concerns and that,

> current patterns of legal doctrine may be appropriately seen as embodying the accumulation of layers of fossilized policy choices and compromises – fossilized in the sense that once vital aims or issues may have become lifeless forms in the process of re-interpretation, elaboration, evasion or modification of the doctrine that expressed them. In such circumstances, the processes of development of legal doctrine are such that it is difficult to know how far and in what way explanation of a specific rule or rule-cluster should refer to some 'external' context, and indeed whether the internal-external dichotomy presupposed by typical assumptions about 'context' is intelligible.[33]

This certainly describes my experience of teaching contingent remainders or shifting uses. Although I have tried, I have never been able to attain a detailed or confident understanding of the economic and social policy behind all of the nuances of the rules, and I believe that it is impossible to genuinely understand legal rules without their social and economic context. As a result, I have always found teaching these areas of property extremely unsatisfactory.

Further, if the policy rationale for a property rule is lost in the mists of time, partly because the policy concerns are no longer pressing, we need to ask why we are teaching the rule at all. For example, should we ever teach students that X can leave Blackacre to his wife, remainder to his eldest son, contingent on the son never marrying a Catholic, when there is a vanishingly small chance that students will ever meet a man who wants to do this via his will,

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Herald, 9 June, 2016, http://www.domain.com.au/news/redfern-squatter-seeks-to-take-possession-of-terrace-using-arcane-law-20160608-gpcp8t/.

[32] Carruthers et al, 'Teaching Property Law', 66.

[33] Roger Cotterrell, 'Context and Critique in Law Teaching (With Reference to Property and Trusts)', in Peter Birks (ed) *Examining the Law Syllabus: The Core*, Oxford University Press, 1992, 29.

let alone *inter vivos*? We also need to question why we still teach relatively random sections of succession in land law courses. In an advanced capitalist society with widespread distribution of freehold titles, the majority of people acquire land through their own transactions for value, not via inheritance. The limited hours most property teachers spend on these topics suggests we are in furious agreement about their relevance;[34] I am simply suggesting that we have the courage of our convictions and confidently excise them from our courses entirely.

The inclusion of historic material comes at a cost, and it is not just confusion of students. Like property itself, the content of property courses involves choices which have distributive effects; including some material, even if it is only an hour, is at the expense of other material. As a researcher of strata title,[35] not surprisingly, I would argue that teaching students the basics of strata schemes should take priority over historic material. Strata title is the fastest growing form of property title, and there are now close to two million strata lots in Australia.[36] Despite this, 71% of property courses teach less than an hour on strata title,[37] our own included. One of the most persistent problems in strata schemes is a lack of resident understanding of the title they have leased or purchased, which can no doubt partly be traced to a lack of understanding of strata title in the legal profession. By teaching all law students the fundamentals of strata title, law schools would be contributing to a more informed profession and general public, which may in turn reduce tension and dispute in strata schemes. In South East Queensland apartment stock increased by 76 per cent between 2001-2006,[38] and the New South Wales government predicts that by 2030 half of the state will live or work in a strata scheme.[39] In Queensland and New South Wales at least, strata will be an unavoidable part of students' property practice.

Despite my general enthusiasm for removing historic detail from the curriculum, there are two historic topics to which I am happy to devote a little time. The first is Old System title, but only to the extent that it facilitates a proper understanding of the Torrens system and indefeasibility. Like other academics who teach indefeasibility regularly, I am uncomfortable with the extent to which the doctrine, in conjunction with an unnecessarily limited definition of statutory fraud, has encouraged irresponsibility in property practice, and allowed

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[34] Carruthers et al, 'Teaching Property Law', 66.

[35] C Sherry, *Strata Title Property Rights: Private governance in multi-owned communities*, Routledge, Abingdon, 2016, forthcoming; C Sherry, "Land of the Free and Home of the Brave? The Implications of United States Homeowners Association Law for Australian Strata and Community Title", (2014) 23 *Australian Property Law Journal* 94; C Sherry, "Building Management Statements and Strata Management Statements: Unholy Mixing of Contract and Property" (2013) 87 *Australian Law Journal* 393; C 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.

[36] Hazel Easthope, Bill Randolph and Sarah Judd, 'Governing the Compact City: the Role and Effectiveness of Strata Management' (CityFutures Research Centre, 2012), 11.
[37] Carruthers et al, 'Teaching property law', 66.
[38] Bureau of Infrastructure, Transport and Regional Economics, *Cities: Population growth, job growth and commuting flows in South East Queensland*, Research Report 134, (Australian Government, 2013), 105, 343.
[39] NSW Fair Trading, 'Strata & Community Title Law Reform Position Paper' (November 2013) 2.

undeserving parties to retain title to land.[40] Almost all states have had to fix these judicially-created problems with verification of identity provisions imposing obligations on mortgagees to identify the mortgagor. The Torrens system was not designed to allow people to take no responsibility for the transaction in which they are acquiring land. It was designed to eradicate inherent risks in derivative title. A short explanation of Old System priorities sets students up to better understand the mischief that the Torrens statutes were attempting to remedy, and to critically assess some of the current case law on indefeasibility.[41]

The second historic topic that I teach very briefly is the fee tail. Although abolished a century ago, put in context fees tail offer an excellent opportunity to show students the way in which property rights serve the social, political and economic needs of a society. Like Cotterrell, I am of the firm belief that 'legal education should systematically present law in a broad social context', highlighting the 'enduring moral, political and other issues' that law creates and reflects.[42]

Students are generally delighted and interested when a teacher explains that this strange property doctrine, the fee tail, is the basis for one of their favourite novels and/or TV shows - Jane Austen's *Pride and Prejudice* and ITV's *Downton Abbey*.[43] Most students already understand the social dilemma well – Mr Bennet and the Earl of Grantham would like to be able to provide for their daughters in their wills, but their estates are entailed respectively on the male line to the 'odious Mr Collins' and Matthew Crawley, a Manchester solicitor. In a feudal society where status was assigned by virtue of birth and land was the primary source of wealth, fees tail served the social and financial purpose of protecting family property from being dissipated among people unrelated by blood. However, in the process, they seriously limited the current entail holder's ability to economically exploit their land. Leases could not be granted for longer than the entail owner's life,[44] the fee tail could not be mortgaged,[45] nor could it be alienated in its entirety.[46] It is not hard for students to understand that a property interest that is contingent on someone not falling off their perch is economically precarious. The economic limitations of the fee tail simultaneously constituted limitations on personal liberty, preventing individuals from dealing with land as they pleased. Economic limitations

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[40] See S Rodrick, 'Forgeries, False Attestations and Impostors: Torrens System Mortgages and the Fraud Exception to Indefeasibility', (2002) 7(1) Deakin Law Review 97; S Boyle 'Fraud against the registrar: Why the 'De Jager line' of authority is incorrect, and how unfairness in the Torrens system caused it to arise', (2015) 24 *Australian Property Law Journal* 305; N Skead and P Carruthers, 'Fraud against the Registrar - An Unnecessary, Unhelpful and Perhaps, No Longer Relevant Complication in the Law on Fraud under the Torrens System' (2014) 40(3) *Monash Law Review* 82; P O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13(2) *Edinburgh Law Review* 194.

[41] Eg *Russo v Bendigo Bank Ltd & Reichman* [1999] VSCA 108 (30 July 1999); *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2 (4 February 2015).

[42] Cotterrell, 28.
[43] Jane Austen, *Pride and Prejudice* (T Egerton, 1813) and ITV, *Downton Abbey*, 26 September 2010.
[44] A W B Simpson, *A History of the Land Law* (Clarendon Press, 2nd ed, 1986), 90–1.
[45] Ibid 90.
[46] The statute *De Donis Conditionalibus 1285*, 13 Edw 1, c 1; see Butt, *Land Law* (Thompon, 5th ed, 2006), 125–6.

were ultimately antithetical to modern capitalism, and social limitations were antithetical to post-Enlightenment individualism. As a result, by the early 19th century, Mrs Bennet's frustration with the fee tail is palpable, although her husband is more sanguine; one hundred (fictional) years later, the fee tail is regarded as an anachronism by everyone other than the Earl of Grantham, (because he is himself an endearing anachronism).[47] Consistent with the values of modern capitalism and democracy, fees tail were dealt a fatal legislative blow in early 20th century.[48] A brief and generally enjoyable discussion of fees tail, Jane Austen and Downton Abbey helps students to see the social, economic and political values embedded in property doctrine. This allows them to later identify the democratic and capitalist values that drive much modern property doctrine,[49] and to understand that doctrine more readily as a result.

Technology in teaching

Technology has revolutionised my teaching of land law. This is not because I am particularly technologically-inclined, I am not, but rather because land law lends itself so well to online material as a result of the publicly accessible, computerised Torrens register.[50] Technology has not reduced our face-to face teaching; it merely supplements it.[51] We use Moodle, a free, open-sourced software learning system, which is largely intuitive and requires little technological expertise.[52] The Moodle site for our land law course performs three primary functions – it allows us to provide students with real legal documents; it contains easily alterable, very plain language introductions to topics, and it facilitates novel formative and summative assessment.

The capacity of Moodle to provide students with real documents is invaluable in land law, as most cases turn on judicial discussion of documents that students cannot see and may never have seen. For example, the crux of the decision in *Breskvar v Wall* is that the appellants handed Petrie documents which 'armed [him] with the power to deal with the land as owner'.[53] If students have never seen these documents – a transfer form and certificate of title - it is extremely difficult for them to actually understand the case. Moodle allows us to provide students with hyperlinks to New South Wales Land and Property Information online transfer forms so that students can see the section of a similar form that the Breskvars left

[47] C Sherry, 'Downton Abbey: Melodrama, frocks….and property law?' *The Conversation*, 29 June, 2012, https://theconversation.com/downton-abbey-melodrama-frocks-and-property-law-7874
[48] For example, in New South Wales, fees tail were converted to fees simple by *Conveyancing Act* 1919 (NSW) ss 19, 19A. *Law of Property Act* 1925 (UK) s 1 allowed only fee simples or terms of years to exist at law.
[49] Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society Essay' (2008) 94 *Cornell Law Review* 1009.
[50] The practising profession judged the land law Moodle site as having value for teaching: C Sherry, Winner, Individual Category, Legal Innovation Index 2015.
[51] Moodle supplements classes and the set text, B Edgeworth, C Rossiter, M Stone and P O'Connor, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013). Our classes are not recorded and the Faculty has an 80% attendance rule. This seems to be contrast to the vast majority of property teachers, 87% of whom report that their classes are recorded, and most of whom believe that the majority of students listen to recorded lecturers instead of physically attending: P Carruthers et al, 'Teaching, Skills and Outcomes', 73.

[52] Moodle, https://moodle.org/
[53] (1971) 126 CLR 376, per Gibbs J at [5].

blank, as well as a mock certificate of title.[54] This helps to ground students' understanding of the doctrine, and to comprehend precisely what the Breskvars did to make their equitable interest in land less meritorious than that competing purchaser's.

In addition to hyperlinks to online Torrens forms, our Moodle site provides students with real dealings from the Torrens register.[55] The publicly-accessible, computerised register, in combination with an online course site is quite simply a gold mine in this regard. It has never been feasible to provide 350 students with a hard copy of a 40 page commercial lease, but it is feasible to upload a digital copy of a publicly-accessible registered lease to an online course site. Rather than *describe* to students the typical covenants in a hypothetical commercial lease, we can *read a real* lease governing land that students know. I use the site of the local take-away chicken shop down the road from our law school, on the assumption that many undergraduates may be familiar with it.[56] However, when a dispute between high-profile Sydney restauranteur Justin Hemmes and his landlord was reported in the press, in relation to Hemmes' newest pub-venture near the University, Moodle and the computerised Torrens register allowed me to quickly upload both the media reports[57] and the lease of the site, so that students could see how the doctrines they were studying might be regulating the relationship of parties with respect to valuable commercial land.

Our Moodle site includes the actual easements and covenants that were being considered in the cases we read,[58] so that students can see the 'look and feel' of the real documents, as well as their full content, in preference to the truncated extracts in the judgments. It also contains hyperlinks to Google Maps, so that students can see the streetscapes that restrictive covenants create, (i.e. their function), and I have uploaded a picture of the unprepossessing, but costly driveway that was the subject of *Westfield Management Limited v Perpetual Trustee Company Limited*.[59] Pictures remind students that property law is not a muddle of esoteric doctrine, but rather land-use rules that are continually regulating physical space that they work on, live in, and move through on a regular basis. The Moodle site also includes deposited plans and strata plans, a fundamental aspect of the Torrens system that is traditionally overlooked in property courses. Suburban deposited plans and strata plans show

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[54] Land and Property Information, 'NSW certificate of title security features' http://www.lpi.nsw.gov.au/__data/assets/pdf_file/0018/141147/NSW_Certificates_of_Title_security_features.pdf.

[55] These documents have been collected gradually over a number of years, but their number was greatly increased as a result of a Faculty Learning and Teaching Grant, C Sherry, 'Connecting to the real world: novel use of Moodle for an authentic understanding of law', 2015.

[56] Research on student centred-learning suggests that students learn better when content is placed in a familiar context: J Biggs and C Tang, *Teaching for Quality Learning at University: What the student does*, 4th edition, McGraw-Hill, Maidenhead, 2011, 67. Common sense also tells us that students are more likely to relate to and thus understand the regulation of a take-away in their own city, than the regulation of rural land in England circa 1825.

[57] Kate McClymont, 'Bar baron Justin Hemmes faces eviction from Coogee Pavilion', *Sydney Moring Herald*, 11 May, 2015, http://www.smh.com.au/nsw/bar-baron-justin-hemmes-faces-eviction-from-coogee-pavilion-20150510-ggyahg.html.

[58] Eg *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2011] HCA 27 (3 August 2011), s88B instrument attached to DP 834629; *Levi and Anor v Spicer* [2003] NSWSC 183 (20 March 2003), s88B instrument attached to DP733700.

[59] [2007] HCA 45 (3 October 2007).

students how most Torrens titles now come into existence via the subdivision of a larger Torrens title, as our cities grow in size and density. Plans also provide a logical starting point for easement classes, as they allow students to see clearly the way in which easements for pipes and wires cross multiple parcels of land.

The real documents and hyperlinks are embedded in exceptionally plain language explanations of the topic we are covering. We use the case book method of teaching, and while there is no substitute for students mastering the skill of extracting legal principles from relatively dense and difficult case law, plain language explanations of topics help students to see the overall picture of a topic before they potentially get lost in the detail of cases. Students failing to see the wood for the trees is a perpetual risk in all law courses, but a particular risk in land law. The following is a sample of the way in which hyperlinked documents, forms and statutory provisions are embedded in introductory explanations. All of the bolded text are hyperlinks.

What is the effect of registration?

The most important point to understand about the Torrens register is that it is recordation on the register that transfers or creates *legal* title to land. The Torrens system is not a system of derivative title; that is, purchasers do not derive their title from their vendor by the execution of deeds. A Torrens vendor (or donor) gives the purchaser (or donee) the appropriately executed forms/documents so that the purchaser (donee) can get on the register, and it is *the state act of registration* of those forms/documents that vests legal title in the new owner, not the signing and handing over of the forms/documents themselves.

This is what a typical **Torrens transfer form** looks like. Not quite as beautiful as a **parchment deed** with a red wax seal. 

A typical Torrens land sale will start with the signing and exchange of identical copies of a written (s54A Conveyancing Act 1919) **contract.** This is a promise by the vendor to transfer legal title and a promise by the purchaser to pay the full purchase price. At a later date, (typically around six weeks in a residential sale), the contract will be completed; ie the parties will carry out their promises. This is referred to as 'settlement' of the sale. The purchaser and vendor will meet (or more accurately, their solicitors will), and the purchaser will hand over the cheques and the vendor ('transferor') will hand over a signed **transfer form** and the **duplicate certificate of title**, (cf an Old System sale in which the vendor 'delivered' a signed and sealed deed, as well as the bundle of previous title deeds). The purchaser ('transferee') (or their mortgagee) will then take the signed transfer and certificate of title and 'lodge' them for registration at Land and Property Information (LPI). Usually within a few hours, the transfer will be registered. Again, it is the state registering the document that transfers legal title, not the signed transfer document itself.

All Torrens transfer forms look the same and must be used to create or transfer any interest in land *at law*. These are the Torrens forms to create a **legal mortgage,**

a legal easement, a legal lease and to legally transfer a **lease, mortgage or charge.** There are many other standard forms on the LPI website. Interests in land can still be created without registration but they will only be equitable (there are some minor exceptions to this rule). For example, a written (**s54A Conveyancing Act 1919**), specifically enforceable contract to sell someone land, or to grant them a lease, will still give that person an equitable fee simple (*Bunny Industries*) or equitable lease (*Walsh v Lonsdale*) in relation to Torrens land.

Registration creates or transfers legal title because **s42 *Real Property Act* 1900 (NSW)** replaced **s23B *Conveyancing Act* 1919 (NSW)**. (If you read s23B, you will see that s23B(3) says, "This section does not apply to land under the provisions of the Real Property Act 1900"; that is, Torrens land.) Please read the first paragraph of s42 carefully for yourselves. *Click on that hyperlink*: it is the single most important statutory provision in Land Law. It is not necessarily easy to read. Here's a hint for all statutory interpretation: read the section slowly aloud several times. Eventually it should start to make sense.

Now read: *Sackville and Neave*, para 5.25C-5.29.

The hyperlinked documents can then be used for formative class exercises. For decades I have struggled to get students to understand the distinction between a contract and a transfer. No matter how many times I explain that a contract is *a promise to do something at a point in the future*, (in the case of land, a vendor's promise to transfer legal title and a purchaser's promise to pay the full purchase price, typically 42 days after the making of the contract), and that registration of a transfer is *the actual transfer of legal title*, as opposed to *the promise* to transfer, a sizeable proportion of students, including very good students, cannot grasp this. This is possibly not surprising, given the age of our students; most undergraduates will never have signed a written contract, let alone bought a house. As Maranville argues, 'the rules concerning contract law, for instance, will make more sense (and be more interesting) if students are familiar with the circumstances in which the contract would be entered, have themselves engaged in the process of forming a contract or can see examples of written contracts.'[60]

Now, with the assistance Moodle, I can create an experiential learning exercise allowing my students to contract to buy or sell a house, and to carry that contract through to completion.[61] Moodle can create vendor and purchaser groups and students must sign up for one. Purchasers have to write a description, ('Renovator's Delight!'), and post a picture of a house they want to sell (sourced from anywhere the student can find a picture), and vendors must

[60] Deborah Maranville, 'Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning', (2001) 51 *Journal of Legal Education* 51, 57.

[61] No marks are allocated for this exercise, although I have sometimes had to remind undergraduate (although not JD) students that the exercise is part of overall class participation, for which they are allocated 20/100 marks. For a description of much more complex simulations for experiential learning see, J Finkelstein and K Okamoto, 'Simulations: Collaborative Experiential Learning' (2012-13) 14 *Transactions Tennessee Journal of Business Law* 419.

make private email offers. Although mock, students experience contractual negotiation, offer and acceptance. They must come to class, *all* having printed out a standard contract of sale from the hyperlink on Moodle, find their counterpart and fill in their contracts identically, and as best they can. Purchasers also hand over mock deposit 'cheques'; (the faker the better – land law is not a course in which we want to encourage forging skills!) By doing this exercise, I am not attempting to teach students conveyancing, just to understand that binding contracts in relation to land typically come into existence when parties sign and *exchange* identical, written copies of their agreement. I am convinced that we overestimate what our students understand, and that they have often missed the basics. For example, students can typically recount considerable detail about equitable estoppel and the minimum necessary to remedy the detriment, but few if any can explain that the root of the problem in *Waltons v Maher*[62] was that the Mahers had signed and sent their copy of the lease contract, while Waltons had not. The students have not grasped that the only reason that the High Court was grappling with complex equitable doctrine was because the parties had not completed *a physical process* which would have satisfied contractual doctrines and statute. This exercise requires students to go through that physical process, internalising their understand of contractual exchange.

We then wait a week or two, in which time I occasionally ask the purchasers if they are enjoying their equitable fees simple; the correct answer being that there is not much to enjoy, not being entitled to possession, rent or any other benefit from the property. We then complete the sales. The purchasers print out a Torrens transfer form from the hyperlink on Moodle and create mock cheques, while the vendors draw up a (very) mock certificates of title, based on a mock certificate of title from LPI, thereby grappling with existence of folio identifiers, and the content and function of first and second schedules.[63] The students fill in their transfer form as accurately as they can, have it *properly* witnessed, and then settle. The purchasers then 'register' their transfers with LPI (me). This allows me to iron out any confusion that students inevitably still have; eg when they attempt to give me their contracts, ('no, that is the private agreement between you and the vendor and it has now been completed; the contract does not transfer legal title'); attempt to give me their cheques, ('that is very generous to the state, but the vendor is entitled to keep the sale price'), or fail to hand over the certificate of title, ('the certificate of title is the security feature that prevents unauthorised people altering the register; anyone can print out a transfer form').[64]

While this kind of experiential exercise might be routine in some law schools, for many it is not. As Deborah Maranville has argued, in the traditional law school curriculum,

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[62] *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387

[63] Responsibility for printing or creating documents is not meant to mirror responsibility in practice, but rather to share printing costs and preparation time equitably between students.

[64] Logically, 'teachers need to provide opportunities that allow misconceptions to be made explicit, which are dealt with in terms that enter rather than ignore the students' existing frameworks, as for instance in interactive tutorials, in which the tutor can elicit and respond appropriately to students' conceptions of key course material': J B Biggs, "Approaches to the enhancement of tertiary teaching", (1989) 8(1) *Higher Education Research and Development* 7, 17.

> we fail to provide the context for doctrinal learning that will both engage students and help them learn more effectively. We focus on heavily edited appellate cases without linking those cases to the people, institutions, and lawyering tasks involved in the disputes. The result is that our students quickly forget much of what we teach them and often cannot apply in practice the information that they do retain.

I would go further and argue that as many property cases turn on concrete processes, unless students understand those processes, they will rarely understand the case or doctrine properly in the first place. Students might be able to parrot doctrinal phrases, but if they are pushed to explain a judgment in plain language, they flounder, because they do not have a secure understanding of the practical genesis of the case. Although doctrinal phrases, like 'minimal necessary to remedy the detriment', may sound impressive to students' ears, students are in fact engaging in classic 'surface' rather than 'deep' learning.[65] This phenomenon is common in law schools, and akin to the bright science students in a prestigious Australian university, observed by educational researchers, who could 'correctly describe, with detailed diagrams, what "photosynthesis" [was], but who [were] unable to see the difference between how plants and animals obtain food.'[66]

A basic experiential task 'buying and selling' houses sets students up to understand a whole raft of seminal cases in land law, including:

- *Breskvar v Wall*:[67] as described above, having seen a real transfer form, students are able to understand exactly what the Breskvars left blank;
- *Abigail v Lapin*:[68] like *Breskvar v Wall*, students can understand precisely what Lapin did to allow Mrs Heavener to represent herself to the world as the absolute owner of land, thus inducing Abigail to acquire a mortgage over the land;
- *J&H Just v Bank of NSW*:[69] having seen a mock certificate of title and 'experienced' its indispensability for registration, the students can better understand why holding a certificate of title is no minor matter, is most likely to be retained by a first mortgagee, and how this fact can effectively give third parties notice of the existence of a mortgage;
- *Waltons v Maher*,[70] *Giumelli v Giumelli*,[71] *Baumgartner v Baumgartner*,[72] or any other estoppel case or constructive trust case which arose as a result of the absence of an enforceable contractual agreement in relation to land;

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[65] It is generally agreed that 'deep' learning is more desirable than 'surface' learning: Biggs. However, the extent to which we can control student learning styles may be more limited than we would like to believe: P Baron, 'Deep and surface learning: Can teachers really control student approaches to learning in law?' (2002) 36(2) *The Law Teacher* 123.

[66] F Marton and P Ramsden, 'What does it take to improve learning?', in P Ramsden (Ed.), *Improving Learning: New Perspectives*, Kogan Page, London, 1988, cited in Biggs, 10.

[67] (1971) 126 CLR 376

[68] [1934] AC 491

[69] (1971) 125 CLR 546

[70] [1988] HCA 7; (1988) 164 CLR 387

[71] [1999] HCA 10; 196 CLR 101

[72] [1987] HCA 59; (1987) 164 CLR 137

- *Russo v Bendigo Bank Ltd & Reichman*,[73] having been told to have their transfers witnessed properly, students understand precisely what Miss Gerada did wrong in falsely attesting a signature on a Torrens mortgage form;[74]
- *Corin v Patton*,[75] having handed over or received a signed transfer and certificate of title as a precursor to registration, students have a concrete understanding of *what* is 'everything necessary to be done' by the donor to make a gift of Torrens land effective in equity.

Similar exercises could be devised for students to negotiate the creation of a lease or an easement, or a more complex four-party exercise could be devised with vendors and purchasers, and in-coming and out-going mortgagees. These exercises create a *motivational context*, in which students are 'actively involved in the planning and delivery of the task, and thus [have] some proprietorial interest or "ownership" in it';[76] they facilitate *learning activity* and *interaction with others*; and they provide *a knowledge base* on which more complex detail can be built throughout the semester. All four factors have been identified by research as encouraging deep learning.[77]

Assessment

Real documents are not only used for teaching purposes and formative exercises, they are used to create authentic summative assessment. Although, as noted above, we do not teach strata title in our land law course, we assess it.[78] This is not as radical as it seems, simply mimicking the work that lawyers do repeatedly in practice; that is, mastering a completely unfamiliar topic on their own. We set a mid-semester assignment which students are given six weeks to complete. It is a standard problem question, based on a real set of by-laws from a strata scheme or a management statement from a community scheme.[79] Students can only answer the question after teaching themselves the fundamentals of strata title and/or community title by reading the legislation, case law and any reliable government websites (e.g. Fair Trading or Land and Property Information). The use of real documents presents the added challenge of students confronting the inevitable mistakes and less than optimal drafting

[73] [1999] VSCA 108 (30 July 1999)
[74] Explaining the function of witnessing – that a person is simply attesting to the fact that they saw someone else sign a document - presents an opportunity for a fundamental lesson in professional ethics. Most land law teachers indicate that they place a medium to very high emphasis on professional ethics: Carruthers et al, 'Teaching skills and outcomes', 76.
[75] (1990) 64 ALJR 256
[76] Biggs, 18.
[77] Biggs, 17-20.
[78] Credit for this idea must go to Western Australian colleagues, Penny Carruthers and Natalie Skead who shared the idea with my colleague Lyria Bennett Moses and me. As this form of assessment was described by two respondents to Carruthers, Skead and Galloway's survey of property teachers, credit also goes to these anonymous academics: Carruthers et al 'Assessment in the Law School', 6.
[79] New South Wales, unlike most states, has separate legislation for apartment buildings (*Strata Schemes Development Act* 2015 and the *Strata Schemes Management Act* 2015), and for master planned sites, which may be low-rise or a combination of low and high-rise buildings, (*Community Land Development Act* 1989 and the *Community Land Management Act* 1989). The two sets of legislation perform the identical function of subdividing land and air into individually owned lots and collectively owned common property, governed by a set of by-laws (strata) or a management statement (community title), administered by an owners corporation (strata) or a community, neighbourhood or precinct association (community title).

that are found in real legal documents.[80] Response to the assignment has been very positive, with students repeatedly praising the practical nature of the work and its format.[81] As one student said to us, 'The assignment was great because partners don't ask you questions they already know the answers to'.

The assignment is also particularly useful in helping students to develop statutory interpretation and application skills, an area of persistent concern to the judiciary,[82] and the academy.[83] Justice Kirby noted in 2003 that the High Court was frustrated by the unwillingness of lawyers to grapple with statutory text, instead 'returning to the much loved words of judges, written long ago and far away' and that while 'this tribute to the judiciary is touching, it does not represent the law'.[84] Law Schools, particularly those in research-intensive universities, must take some responsibility for this case law bias. Firstly, teaching cases is simply more interesting than teaching statutes, based as they are on real people with real (and frequently bizarre) stories,[85] and it is tempting to avoid statutes as a result. Secondly, law schools in research-intensive universities have long had a cultural-bias against being characterised as 'trade schools', sometimes resisting the teaching and assessment of skills that are too narrowly aimed at legal practice, preferring to assess students through research essays and other tasks that develop 'critical thinking'. However, much as academics gain intellectual satisfaction from exploring the policy behind the law or 'grey' areas, that is a luxury not always afforded to the practising profession which our students will soon join. A fundamental purpose of statutes is to provide a clear statement of the law; provisions are frequently unambiguous and lawyers and judges have *no choice* but to apply them on their face. As Justice Leeming has argued, 'the sooner critical attention is paid to the statutory elephant in the room, the better.'[86] Assessment which requires students to actively engage with statutes in order to answer a practical problem is a much less painful method of teaching statutes than trawling through them section by section in class.

A variation on the mid-semester assignment I have used when I have manageable student numbers is to allow students to present their answer as a *viva voce*. Students do exactly the same strata problem as everyone else, but instead of submitting a 1500 word written answer, they can opt to present their answer orally in 15-20 minutes. They can hand in a single page of cases and statutory provisions, so I can see the authorities they have found, and they are asked to record our discussion on their iPhone. I ask gentle questions of students who may be struggling, but am able to ask more probing questions of stronger students, allowing them to

[80] For example, the easement in *Clos Farming Estates v Easton & Anor* [2002] NSWCA 389 (9 December 2002) was invalid irrespective of registration.
[81] Anonymous, university-administered, paper student surveys.
[82] Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room' (2013) 36(3) *UNSW Law Journal* 1002.
[83] Council of Australian Law Deans, 'Council of Australian Law Deans Good Practice Guide to Teaching Statutory Interpretation', June 2015.
[84] Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts (2003) 24(2) *Statute Law Review*, 95-96, cited by Carruthers et al, 'Teaching, skills and outcomes', 74.
[85] For example, there are two property books in which each chapter tells the fascinating story behind seminal property cases: G Korngold and A P Morriss, *Property Stories*, Foundation Press, New York, 2004 and N Gravells, *Landmark Cases in Land Law*, Hart Publishing, Oxford, 2013.
[86] Leeming, 1002.

demonstrate their expertise. The exercise replicates the oral explanations of law that students will be repeatedly required to do in practice; few law firm partners have time to read a 1500 word, footnoted explanation of an area of law. At least a third of the students opted to do the *viva voce*, including a number of quieter students who I would not have anticipated.

The *viva voce* format was partly motivated by concerns about plagiarism, collusion and academic dishonesty that have increasingly troubled the entire university sector.[87] Logic, and the Tertiary Education and Quality Standards Agency (TESQA) tell us that 'face-to-face (physical or virtual) assessment, including in-class essay writing' can minimise the potential for academic dishonesty.[88] As long as students are not allowed to recite memorised answers, academics can be confident that a *viva voce* is a student's own work.

While a *viva voce* takes no more time to mark than a written assignment, it cannot be done at random times that are convenient for a teacher, in the same way as marking written assessment. As a result, *viva voces* can be logistically difficult with large numbers of students and/or sessional staff. As an alternative plagiarism and collusion-proof assessment, I have used an in-class case note. Students are given an unseen case that they have to read and explain in their own words in an hour and a half of class time.[89] Fortunately, first instance property decisions are frequently between 10-12 pages, a manageable length, and it is not difficult to find different but similar length cases for multiple groups. The ability to read an unfamiliar case quickly, extract the major points and explain the case in their own words is an indispensable skill for all lawyers. Interestingly, rather than being relieved by the prospect of an assessment which required no preparation, sections of the student body were stressed and unnerved, possibly because many law students have an 'achievement approach' to learning which centres on well-honed methods of assessment preparation.[90] As legal practice frequently requires lawyers to do tasks for which they have not specifically prepared, (eg answer an unanticipated question from a judge or partner; complete an unfamiliar legal process), this suggests that 'unpreparable' assessment merits further exploration.

Like the vast majority of Australian property courses,[91] a significant component of our assessment is a final exam. We traditionally use an open-book, formal exam, but as a result of

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[87] The TESQA *Report on Student Academic Integrity and Allegations of Contract Cheating by University Students* stated that 'the ready availability of sophisticated communication technology and the rise of social media have increased the opportunity to access and/or repurpose another's work to present as your own. Availability of essay writing services is pervasive with both local and international websites advertising their services', http://www.teqsa.gov.au/sites/default/files/publication-documents/ReportOnAllegationsOfStudentMisconduct.pdf, 2.

[88] Ibid, 4.

[89] Students for whom English was not a first language were allowed dictionaries, but no other books or notes were permitted.

[90] In addition to deep and surface learning approaches, Briggs describes a third approach, the 'achievement approach', which is 'based on a particular form of extrinsic motive: the ego-enhancement that comes out of visibly achieving, in particular through high grades. The related strategies refer to organising time, working space, and syllabus coverage in the most cost-effective way (usually known as "study skills"). A student adopting an achieving approach is neat and systematic, and plans ahead, allocating time to tasks in proportion to their grade earning potential', Briggs, 13.

[91] All respondents to Carruthers, Skead and Galloway's survey reported using a final exam, on average worth 60% of the total assessment: Carruthers et al, 'Assessment in the Law School', 3. Our final exam is worth 50%, with the other 50% made up of a mid-semester assignment (30%) and a class participation mark (20%).

concerns about 'information dump' in open book exams,[92] I have experimented in recent years with a take-home exam, submitted via Turnitin, that students have a week to complete. The first question is an orthodox problem question, but more demanding than could be set for a formal exam. Students are assessed not only on the accuracy of their answer, but on their legal reasoning and the persuasiveness of their argument. 'Information dump' is more easily penalised as students have had time to consider their answer. The second question requires students to find a media article that involves a property doctrine that we have studied, and to discuss the social, political and/or economic implications of the doctrine in the context of the story. Students are given this question at the beginning of semester and so have 12 weeks to find a story. They are assessed on their ability to write sensibly, professionally, accurately and insightfully in their own words. Students are told that a law reform commission report would be a good guide for writing style. The assessment was designed to get students to think about the fact that property doctrines do not exist to provide content for exams, but to mediate real people's use of land. Students have found a range of fascinating and appropriate articles that raise questions about landlords' liability in torts,[93] the commercial benefits of subleasing,[94] and the limitations of traditional easement law to deal with a modern technology.[95] Some answers display a sophisticated ability to discuss law in context, while other students struggled in this regard.

While changes to assessment have been successful in many respects, from the perspective of staff and students,[96] I am mindful of the fact that assessment format alone cannot alter student approaches to learning. As Baron has argued,

> our students enter the classroom somewhere along a spectrum of learning approaches from deep to surface. Attempts to force these students to adopt a different learning approach are likely to meet resistance and may be largely unsuccessful.[97]

However, Baron helpfully suggests that we acknowledge our own biases and desires as teachers, and accept that 'we can only hope to assist our students through the labyrinth of learning. We cannot undertake the journey, nor determine its meaning for them.'[98]

Conclusion

[92] 'Information dump' is the practice of writing down every conceivable detail in an exam answer in the hope that any particular detail will be allocated a mark, rather than constructing well-reasoned responses that directly answer the question asked.
[93] Brooke Baskin, 'Landlord the focus as inquest starts into death of baby Isabella Diefenbach in deck accident', *The Courier Mail*, 18 October, 2011, http://www.couriermail.com.au/news/queensland/tenancy-act-under-spotlight-in-inquest/story-e6freoof-1226169133680.
[94] Carolyn Cummins, 'Small sublets fill tower gaps', *The Sydney Morning Herald*, 1 September, 2012.
[95] Vanda Carson, 'Bitter ups and downs in neighbourly dispute', *The Daily Telegraph*, 20 April 2013, http://www.theaustralian.com.au/news/bitter-ups-and-downs-in-neighbourly-dispute/story-e6frg6n6-1226624776474. Students were discouraged from choosing a dispute that was the subject of a reported case, as this dispute was, but so long as they did not rely heavily on the reported judgment, they were not penalised: *Richard Van Brugge & Anor v Meryl Lesley Hare & Anor* [2011] NSWSC 1364.
[96] Internal university-administered student assessments (CATEI) ask students to respond to the statement, 'The assessment methods and tasks in this course were appropriate given the course aims'. The most recent reports for our land law course had 98% of students agreeing with this statement.
[97] Baron, 139.
[98] Ibid.

Property law is not an easy subject to teach. Students are forced to take it, and they habitually dread its content. However, as we property teachers know, property is a fundamental and fascinating area. Property law, in particular land law, regulates our access to resources that are essentially not just for survival, but for a secure, dignified and decent life. By rationalising the curriculum, practising student-centred teaching, taking advantage of technology and using varied assessment, we can overcome the confusion that students often experience, allowing them to grasp the fundamental nature of property and engage with the subject with enthusiasm.