

POSSESSION, INDEFEASIBILITY AND HUMAN RIGHTS

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The interaction of land based doctrines with human rights law has, to date, rarely attracted the interest of land lawyers. However, with the surge in human rights jurisprudence, and the European litigation of JA Pye (Oxford) Ltd & Ors v Graham and Ors, it is becoming apparent that human rights may have a significant future role to play in real property law. This paper examines the potential for that conflict in three areas. Two of these areas represent archetypal possession of land doctrines (adverse possession and prescriptive easements), with the third, the ideological foundation stone of registration land systems, indefeasibility. The suggestion is made that any resolution between these established real property doctrines and human rights lies not so much in logic, but in the value judgments that the courts will make in balancing the economic imperatives of the Torrens system with the historical and traditional importance of possession to land ownership. In other words, how we define, determine and allocate realty interests in contemporary Australia.

I INTRODUCTION

Australia has recently seen a surge in the evolution of human rights jurisprudence. With Australia as the only common law country without some kind of national charter of human rights,¹ individual States and Territories have assumed the leadership mantle of introducing this to our legal system. For example, Victoria has enacted the *Charter of Human Rights and Responsibilities Act 2006*, with the Australian Capital Territory passing the *Human Rights Act 2004*.² However, the Victorian legislation is the only Act which directly impacts on property; section 20 of this providing that ‘A person must not be deprived of his or her property other than in accordance with the law.’

Initially, lawyers may have thought that human rights jurisprudence would have no impact on established land doctrines.³ However, unquestioning faith in the non-

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¹ Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Issues Paper No 11 (2006) 4.1.1. The Federal Labor Government has also indicated that they place this matter under consideration.

² Tasmania has recommended the introduction of such a Charter, Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007) recommendation 16 was: ‘The right not to be deprived of property except on just terms.’

³ J Howell, ‘Land and Human Rights’ (1999) *Conveyancer and Property Lawyer* 287, 287 notes: ‘Historically, property lawyers would have tended to ignore any possible human rights aspects to their work. This is perhaps understandable, it seems axiomatic that anything as home grown as English land law could not be affected by foreign codes.’ See also: A Goymour, ‘Proprietary Claims

applicability of this jurisprudence may ultimately be misguided. For this reason land lawyers will need to, for the moment at least, take a watching brief. A failure to do this may quickly see established property doctrines evaporate in the arguably muddy, amorphous and presumably just waters of human rights. Accordingly, the purpose of this paper is to consider the extent to which a broadly based human rights charter with a stated applicability to ownership of land would impact upon recognised doctrines of real property. For the purposes of this analysis three are considered particularly germane, the first two based on the archetypal property law doctrine, possession (adverse possession and prescriptive easements), with the third the foundation stone of land systems built on registration, indefeasibility.

II ADVERSE POSSESSION

Based on land's historical recognition of possessory interests, and the idea that only one person can be seized (or possessed) of property at one time,⁴ adverse possession provides judicial recognition for the trespasser – that individual who for a requisite period of time⁵ utilises land for their own use and excludes others, (including the true owner) from occupation. On one view it turns what would otherwise be a moral wrong into a legal right.⁶ By virtue of government fiat, the trespasser is entitled to extinguish the registered, or in the eyes of the community, the true owner's interest in the land - the possessory right having met the judicially crafted criteria eliminating the interest of the registered owner.⁷ The rule operates to modify the sovereign principle that an individual can do what they like with their property. The operation and interaction of this land doctrine with human rights is highlighted by the recent European litigation of *JA Pye (Oxford) Ltd & Ors v Graham and Ors*,⁸ a decision that on a private law level ended its journey in the House of Lords, but which for Pye and the English Government continued to be litigated in Strasbourg and the European Court of Human Rights.

and Human Rights – A Reservoir of Entitlement' (2006) 65 *Cambridge Law Journal* 696, 696. As noted there (at 696) is in quoting from *R (on the application of Gangera) v Hounslow LBC* [2003] HLR 68, [49] 'the Convention might fundamentally transform our law as to the enforcement of property rights.'

⁴ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [70].

⁵ Generally either 12 years (*Limitations Act 1965* (NSW) s 27(2); *Limitations of Actions Act 1974* (Qld) ss 13, 24; *Limitation Act 1974* (Tas) ss 18, 21; and *Limitation Act 1935* (WA) ss 4, 30) or 15 years (*Limitations of Actions Act 1958* (Vic) s 8; and *Limitations of Actions Act 1936* (SA) s 4). In the Australian Capital Territory (*Land Titles Act 1925* (ACT) s 69) and the Northern Territory (*Land Title Act 2000* (NT) s 198) there is no limitation period for an action to recover land.

⁶ Note the comments of L Fennell, 'Efficient Trespass: The Case for Bad Faith Adverse Possession' (2006) 100 *Northwestern University Law Review* 1037, 1055 who suggests that no legal doctrine can turn a moral wrong into a right. A number of policies are routinely given to provide support for adverse possession. These include that some limitation period is needed to give effect to the status quo, that land owners should not rest on their ownership rights, to protect possessors from stale claims, and finally, in the context of unregistered (or non-Torrens) land, to allow more efficient conveyancing. The seminal statement for these reasons was made by Sir Thomas Plumer MR in *Marquis Cholmondeley v Lord Clinton* (1820) 37 ER 527, 577.

⁷ For a discussion of the literature and arguments for and against adverse possession, see Law Reform Commissioner of Tasmania, *Report on Adverse Possession and other Possessory Claims to Land*, Report No 73 (1995)

⁸ [2002] 3 WLR 221; [2002] UKHL 30 (House of Lords); [2005] EGLR 1 (15 November 2005; European Court of Human Rights, Chamber judgment 10 judges sitting); [2007] All ER (D) 177 (Grand Chamber Judgment, 17 judges sitting).

A *JA Pye (Oxford) Ltd & Ors v Graham and Ors*

The personal representatives of Graham claimed an entitlement to 25 hectares of registered land owned by the corporate plaintiff Pye. In 1983, a commercial agreement was reached between the parties entitling Graham to use the disputed area to graze livestock. The agreement was to last for 11 months. The only method of access to the land was through a gate, for which Graham had a key. The agreement expired at the end of the 11 months,⁹ but the parties were unable to renegotiate a new agreement. Despite the lack of agreement, Graham and his family continued to use the land and from September 1984 the land was used without permission. In 1985, Graham did seek to contact the plaintiffs about an agreement. Pye, professional real estate developers, failed to respond. In 1997, Graham lodged cautions with the Land Registry claiming to be entitled to the land based on adverse possession. Pye sought to challenge those cautions, and when Graham died, his wife and estate lodged further cautions against the land. In 1999, Pye began proceedings to seek possession of the disputed land. The facts indicated that from the period of 1984 to 1997, Graham had tilled the land, fertilised and limed it, and during that period had never vacated the land. The land was used primarily for grazing though in 1994 parts of the land became arable. In giving the leading judgment, Lord Browne-Wilkinson summarised the critical issue: ‘The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.’¹⁰ According to the House of Lords any suggestion that possession depended on the intention of the true owner was ‘heretical and wrong.’¹¹ Furthermore, it was not necessary to consider that there must be some form of ‘confrontational, knowing removal of the true owner from possession.’¹² With these principles in mind, there was no question that Graham had possessed the land for the requisite time. His title could trump that of the registered owner. Ownership to land worth £10 000 000 (on the registered owner’s view), or £380 725 - £1 150 500 (according to the view of the United Kingdom government)¹³ was to pass to the trespasser without compensation payable to the plaintiff.¹⁴

This conclusion was not to pass without critical comment by the House of Lords. It was arrived at ‘with no enthusiasm’,¹⁵ and was unfair, not ‘in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor’.¹⁶

⁹ The agreement was constructed to avoid the Grahams obtaining security of tenure under the *Agricultural Holdings Act 1948* (UK).

¹⁰ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [36] emphasis my own.

¹¹ *Ibid* [45]. Similar principles would seem to operate in Australia. See: *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215, [126] where the Court adopted the principles stated in *Powell v McFarlane* (1979) 38 P & CR 452. *Powell v McFarlane* was adopted by the *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [31].

¹² *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [38] (Lord Browne-Wilkinson).

¹³ These figures were quoted in the European Court of Human Rights decision *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] EGLR 1, [78]-[9].

¹⁴ The developed value of the land was near £21 000 000.

¹⁵ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [2] (Lord Bingham of Cornhill), quoting from the Trial Judge Neuberger J, *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2000] Ch 676, 709-10.

¹⁶ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [73] (Lord Hope of Craighead).

B *The European Court of Human Rights – Chamber Judgment*

In the House of Lords, an argument based on human rights was not pursued – it was accepted that the *Human Rights Act 1998* (UK) did not have retrospective effect to a matter that arose prior to its introduction.¹⁷ However two judges in the Court of Appeal¹⁸ did make passing reference. Mummery LJ framed the matter as involving the blocking, through limitation periods, of access to court, and not as a deprivation of property. Furthermore, the 12-year time limit was reasonable and did not impose an undue burden on any landowner.¹⁹ Therefore there was no breach of human rights. Similarly, Keene J characterised this as a question concerning limitation rights,²⁰ and as these were not incompatible with the Convention, no breach had occurred.

After the House of Lords decision, Pye took the matter to the European Court of Human Rights alleging that it had been deprived of its land in a way that was incompatible with Article 1 of Protocol No 1. This reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Four arguments were presented by the government as reasons why the legislation did not breach human rights.

First, adverse possession qualified or modified property rights at the time of acquisition. In other words, when Pye became the owner it was subject to the limitation periods and principles of adverse possession upon becoming registered. That is, every owner has the potential to lose land by way of adverse possession after they become the registered owner. Ownership is not subject to this condition as an added extra, the notion of land ownership includes this as an integral component. This was vehemently rejected by the majority of the Court (Pellonpää P, Bratza, Strážnická, and Pavlovschi JJ), who held the registered title was absolute and not subject to any limitation or restriction. ‘It was the operation of the [legislation] which brought to an end ... the applicant’s title and not any inherent defect or limitation in that title.’²¹ The adverse possession legislation only became operative at the time when 12 years had passed (the period of limitation), not at the time of acquisition.²²

¹⁷ Ibid [65]. The applicant was thus required to go to Strasbourg for a remedy.

¹⁸ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2001] Ch 804.

¹⁹ Ibid [43].

²⁰ Ibid [46]. Contrast the view of D Rook, *Property Law and Human Rights* (Blackstone Press, 2001) 207: ‘[I]s the ability to commence court proceedings to recover property from a trespasser a fundamental characteristic of property ownership? If it is, the loss of the right to commence court action impinges upon the very nature of property ownership and cannot be artificially dissected from it and treated as separate from it.’

²¹ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] ECLR 1, [50].

²² Ibid [52]: By contrast, the [English legislation] are in the view of the Court to be seen as ‘biting’ on the applicants’ property rights only at the point at which the Grahams had completed 12 years’ adverse possession of the applicants’ land and not as delimiting the right at the moment of its acquisition. As discussed by Goymour, above n 3, 712, the difficulty is in deciding whether the

Second, it was argued deprivation was not the result of government action; rather the loss was the consequence of Pye neglecting to monitor their land holdings. What was deprived was, (as the Court of Appeal in *Pye* had agreed), their right of access to court, not their property.²³ Again, this failed to sway the European Court. The legislation alone acted to remove the applicants of their title and see that transferred to the Grahams – legislation for which the State was responsible.²⁴

The third argument was that the State, through its limitation provisions was controlling use, rather than removing the proprietary or possessory rights of Pye. This submission similarly held no weight – the fact that the land was transferred between individuals, rather than to the State, led to the conclusion that this was a deprivation, rather than a control.²⁵

Finally, on the question of proportionality, the majority in the European Court saw the result as one of exceptional severity to the applicant. Acquisition of property without compensation could only be permitted in exceptional circumstances. Given that the government of the United Kingdom had recognised the inadequacies of the law (through amendments in the *Land Registration Act 2002*), the conclusion was established that this upset the fair balance between the public interest and the individual's enjoyment of their own possessions.²⁶

By contrast to the majority, the minority (Maruste, Garlicki, and Borrego JJ) saw the matter very differently. Disagreeing with the majority that ownership was absolute, and considering that the majority had been unreasonably swayed by the legislative changes and judicial statements that criticised the doctrine,²⁷ they concluded that Pye should have been aware that their property ownership was subject to 'restrictions, qualifications and limitations imposed by legal requirements.'²⁸

This view of the minority has seen academic support. For example, Jones considered that Article 1 of the First Protocol was not even engaged by the law of adverse possession. He suggests that a fundamental error was made by the Strasbourg Court on the basis that Article 1 protects what a person 'has or has been led to legitimately expect that they are to have.'²⁹ Ownership of land is always subject to adverse possession, yet the 'applicant was wrongly allowed to depart Strasbourg entitled to precisely that,

legislation operates to shift a proprietary entitlement, or whether the right is inherently limited from the start.

²³ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] EGLR 1, [53].

²⁴ *Ibid* [56].

²⁵ *Ibid*[58]-[62].

²⁶ *Ibid* [75]. However, as noted by RG Lee, 'Less than Nine Points: Adverse Possession and the Right to Peaceful Enjoyment of Property' [2006] *Journal of Business Law* 853, 858, the new English legislation still provides no right to compensation. As noted by the decision of the European Court of Human Rights, *In the Case of Hellborg v Sweden* (Application no 47473/99, [46]) (a decision which applied *Pye*), the Court examines whether the measure taken by the State was lawful, in the general interest and whether a 'fair balance' was struck between the demands of the public and the protection of the individual's fundamental rights.

²⁷ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] EGLR 1, [4] (Maruste, Garlicki and Borrego JJ). The matter should have been examined as if the legislative changes had not been made.

²⁸ *Ibid* [2] (Maruste, Garlicki and Borrego JJ).

²⁹ O Jones, 'Down with the Squatters! The European Court of Human Rights and *JA Pye (Oxford) Ltd v United Kingdom*' (2006) 25 *Civil Justice Quarterly* 404, 408.

ownership free from the risk of adverse possession.³⁰ It was the tenor of the minority judgments and the academic support for them that were adopted by the majority in the Grand Chamber Judgment.

C *The European Court of Human Rights - Grand Chamber Judgment*

The Court held, by a narrow majority of 10 votes to seven that there had been no violation of Article 1 of Protocol No 1. Significantly the majority³¹ held that the statutory provisions which had eliminated Pye's title were not intended to deprive paper owners of their title, but to regulate questions of title.³² Unlike the majority in the earlier chamber hearing, who had concluded that, as the property was taken by a private litigant, the dispute was about deprivation, this Court considered that the failure of the State to recover the property for themselves necessarily led it to be a control of use, rather than a deprivation. The second paragraph of Article 1 of Protocol No 1 was engaged, not the first.³³ With this as its starting point, and with consideration given to the comparative position,³⁴ the Grand Chamber considered that a fair balance had been struck within the legislation. Even in the case of registered land, it was open to the legislature to attach greater weight to the fact of possession rather than the act of registration.³⁵ Furthermore, and whilst accepting that there must be a reasonable relationship of proportionality³⁶ and that a fair balance must be struck, States are to enjoy a wide margin of appreciation, 'with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object in question.'³⁷ The applicant companies were also not denied procedural protection – the law on adverse possession should not have come as a surprise to them and, despite amendments tightening the operation of the principle, the facts of the case must be considered in light of the law as it stood at the time.³⁸ Limitation periods must also operate irrespective of the amount of the claim, the value of the land lost by Pye was of no consequence.³⁹

By contrast to the majority judgment, the minority dissenting opinion of Rozakis, Bratza, Tsatsa-Nikolovska, Gyulumyan and Šikuta JJ focussed far more on the operation of principles relevant to registered land than to the precepts of limitation. This, it is respectfully submitted, sits at the core of the differences between the majority and minority – to what extent should possessory based principles clothed within limitation be subsumed or superior to the tenets of land registration. In their Honour's view, limitation had to be subjugated. Whilst they agreed that the matter stood to be dealt with under 'control of use', rather than 'deprivation of possessions', any resolution had to

³⁰ Ibid 408.

³¹ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2007] All ER (D) 177, 1 (Costa, Zupančič, Lorenzen, Cabral Barreto, Butkevych, Baka, Zagrebelsky, Mularoni, Jaeger, Ziemele JJ).

³² Ibid [66].

³³ Ibid. For a case note on the Grand Chamber judgment, see: M Dixon, 'Adverse Possession, Human Rights and Land Registration: and They all Lived Happily Ever After?' (2007) 71 *Conveyancer* 552.

³⁴ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2007] All ER (D) 177, [72].

³⁵ Ibid [74].

³⁶ Ibid [75].

³⁷ Ibid.

³⁸ Ibid [81].

³⁹ Ibid [84]. For a cogent criticism of the application of Article 1 (first or second paragraph) to adverse possession claims, see: O Jones, 'Out with the Owners! The Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*' (2008) 27 *Civil Justice Quarterly* 260, 265-266.

recognise that the law of adverse possession could only be justified by factors over and above the law of limitation.⁴⁰ In this instance, the fair balance required had not been met. They considered the contrast between the gravity of the interference and the justification for that interference was so significant that substantial injustice would result from allowing the principle of adverse possession to override the registered owner's title. With registered land ownership depending on registration and not on possession, the traditional reasons to justify adverse possession lost much of their weight.⁴¹ Similarly, the lack of compensation, whilst not of itself making the loss of land disproportionate, '[makes] the loss of beneficial ownership the more serious and required, in our view, particularly strong measures of protection of the registered owner's property rights if a fair balance was to be preserved.'⁴² The legislative changes could also not be ignored – they were brought about, not as a natural evolution, but as a substantive legal change to what was seen as a principle variously described as leading to 'draconian, unjust, illogical and disproportionate'⁴³ results. The dissenting opinion of Loucaides and Kovler JJ was along similar lines, with their Honours considering that adverse possession shows disrespect for the rights and responsibilities of legitimate registered owners and can only serve to encourage the 'illegal possession of property and the growth of squatting.'⁴⁴

III PRESCRIPTIVE EASEMENTS

Prescriptive easements operate to provide legal effect to the de-facto state of affairs brought about by possession.⁴⁵ As with adverse possession, the doctrine has also been subject to significant criticism in three Australian States,⁴⁶ and a majority of an English Law Reform Committee recommended the total abolition of prescriptive easements.⁴⁷ Unlike adverse possession, however, there is no harmony between the Australian States as to their applicability in a system of title by registration. In New South Wales, prescriptive easements are presumably not available because of the decision of the Court of Appeal in *Williams v State Transit Authority*.⁴⁸ In Queensland, prescriptive easements are also not possible.⁴⁹ By contrast, in Victoria,⁵⁰ Tasmania,⁵¹ and Western

⁴⁰ *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2007] All ER (D) 177, [7] (of minority opinion).

⁴¹ *Ibid* [11] (of minority opinion).

⁴² *Ibid* [16] (of minority opinion).

⁴³ *Ibid* [21] (of minority opinion).

⁴⁴ *Ibid* [8] (of minority opinion of Loucaides and Kovler JJ).

⁴⁵ For a discussion of the differences between limitation and prescription, see: P Omar, 'Limitation and Prescription in English Law: Arguments and Pressures for Reform' (2006) *Australian Property Law Journal Lexis* 12, 18 -28 of online version.

⁴⁶ Law Reform Commission of Victoria, *Easements and Covenants*, Discussion Paper No 15 (1989); Law Reform Committee 1987); Law Reform Commission of Tasmania, *Report and Recommendations for Reform of Fifteen Conveyancing Matters*, Report No 36 (1984).

⁴⁷ Law Reform Committee, *Fourteenth Report (Acquisition of Easements and Profits by Prescription)* (Cmnd 3100) (1966) 11. Interestingly a recent review of the law of easements in the United Kingdom has not, as least as far as its consultation paper is concerned taken that view: see: The Law Commission, *Easements, Covenants and Profits à Prendre*, Consultation Paper No 186 (2008) <www.lawcom.gov.uk/easements.htm> at 10 April 2008.

⁴⁸ (2004) 60 NSWLR 286. Special leave to appeal to the High Court was refused [2005] HCA Trans 296. See the criticism of this conclusion by P Butt, *Land Law* (LawBook Co, 5th ed, 2006) 781.

⁴⁹ *Property Law Act 1974* (Qld) s 198A. See also: A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000) 249-50.

⁵⁰ *Transfer of Land Act 1958* (Vic) s 42(2)(d).

⁵¹ *Land Titles Act 1980* (Tas) pt IXB, div 2.

Australia,⁵² prescriptive easements can exist in respect of Torrens land. The matter is unresolved in the other jurisdictions.⁵³ This division within States as to the appropriateness of prescriptive easements not only reflects drafting differences between the States, but arguably the deeper issue of uncertainty as to the extent that possessory rights should influence Torrens title. If allowing title by adverse possession without compensation to the registered owner amounts to a breach of human rights, the same result could arguably apply to lesser proprietary rights. However, as was shown in *Oxfordshire CC v Oxford City Council*,⁵⁴ (in the context of the *Commons Registration Act 1965* and a claim for a village green) the owner of land still retains their title (unlike adverse possession) even though a possessory interest may be claimable against this title. Nevertheless, without any consistent basis for their inclusion,⁵⁵ and cross-jurisdictional support for their abolition, a person's title, which has been lessened by way of a prescriptive easement, would have a strong basis on which to allege a breach of human rights, (that is, that a deprivation of property has occurred). Support for this view can be found in the cases on abandonment of easements, with strong judicial authority that common law abandonment of an easement cannot occur until it has been removed from the title.⁵⁶ The only possible retort is that property, in its current context is not so much about exclusion, but about access, and that every individual is entitled to the right of movement, subject to the mutual obligation of respect inherent in living alongside and with others. As noted by Sara:⁵⁷

Instinctively we feel that land, certainly open land, should not be restricted to its owners. If there is a lane leading to my property, I should be allowed to use it. If my drain runs under the land of another, he should not be allowed to block it. If I want to walk up Snowden or walk in the woods I should be allowed to do so. This is all part of the unspoken idea, enshrined in the common law from the beginning, that ownership of land is far from absolute. It is qualified by right to freedom of movement, the right or liberty of every person to make use of land providing that he does not harm others and the duty of the owner of the land to assert his ownership.⁵⁸

This idea that the stability, rigidity and certainty of property ownership is now being inflicted by public law notions of legitimate expectation, fairness and conscience is also recognised by Gray.⁵⁹

The language of 'property' begins to disclose a deep subtext of social 'propriety' in opposition to its once more common connotation of appetitive economic power.... The claims of civic property endorsed by the new equity comprise merely the assertion of latent human entitlements which have long been submerged by superficial allocations of formal title.⁶⁰

⁵² *Di Masi v Piromalli* [1980] WAR 57.

⁵³ See generally: Bradbrook and Neave, above n 49, ch 11.

⁵⁴ [2006] 4 All ER 817.

⁵⁵ Various reasons have been suggested, including natural justice, acquiescence, the fiction of a lost grant, community convenience – see generally: C Sara, 'Prescription – What is it for' (2004) *Conveyancer and Property Lawyer* 13.

⁵⁶ *Wolfe v Freijahs Holdings Pty Ltd* [1988] VR 1017, applied in *Bookville Pty Ltd v O'Loghlen* [2007] V ConvR 54-734. The matter has also been raised but not answered in *Ashoil Holdings Pty Ltd v Fassoulas* [2005] NSWCA 80; *Walker v Bridgewood* [2006] NSWSC 149. Compare *Proprietors of Strata Plan No 9968 and Anor v Proprietors of Strata Plan No 11173 and Ors* [1979] 2 NSWLR 605.

⁵⁷ See Sara, above n 55.

⁵⁸ *Ibid* 17.

⁵⁹ K Gray, 'Equitable Property' (1994) 47 *Current Legal Problems* 157.

⁶⁰ *Ibid* 208.

It is this latter aspect that is critical to the topic under consideration. How in a system of title by registration, where not only is assertion of ownership established by registration, but the substantive requirements of ownership are met by registration, do we balance the competing possessory rights with the registered rights? Does the possessory right have to give way to the indefeasibility obtained by registration? There is a fundamental difference between registered and unregistered land. One depends for its formality on possession (unregistered land), with registration the sole criterion for title of registered, or Torrens land. On the other hand, should the inculcation of human rights on or over Torrens demand that indefeasibility ameliorate to broader community oriented notions – for example, the notion that property will cease to be solely concerned with enhancing individual welfare, but which implicitly contains a recognition that all ‘interests in land’ (with this meant in the wide sense of encompassing the concerns of stakeholders) lie interdependent upon each other? Will this recondite sense of property counter the view of Lord Wilberforce who argued that registered land systems, ‘intended as it was to provide a simple and understandable system for the protection of title to land should not be read down or glossed – to do so would destroy the usefulness of the Act ... the Act itself providing a simple and effective protection for persons in the [unregistered interest holder’s position] – viz by registration.’⁶¹

IV INDEFEASIBILITY

As readers would be aware, the Torrens process of land registration is a positive, bijural system.⁶² It does not merely recognise rights, it creates them. A failure to register can bluntly result in a loss of entitlement, or at least priority.⁶³ This conclusion is arguably compounded by the acceptance of immediate indefeasibility.⁶⁴ As Howell notes,⁶⁵ a right lost through failure to register may well be seen as an expropriation of a property interest without compensation, with this leading to a violation of the very Article discussed in *Pye*. With this comment made before *Pye*, the risk has, in no way been diminished by that decision. Whilst the response to this may be simple – the loss of the interest is as a consequence of what an individual failed to do, rather than any act of the State,⁶⁶ it masks the far deeper question of how this will mesh with human rights considerations. In responding to this conflict between Torrens and human rights, the Scottish Law Commission’s discussion paper on land registration⁶⁷ sought to balance any conflict by suggesting that any indemnity given to the purchaser of a void transaction should not be by way of indefeasible title (as presently occurs in Australia), but in monetary compensation. In doing so, they respond to the recognition that immediate indefeasibility can be an undeniably harsh and cruel doctrine,⁶⁸ and when

⁶¹ *Midland Trust v Green* [1981] AC 513, 528.

⁶² Positive in that it provides for the substantive right by the act of registration. Bijural in the way it imposes its own rules: See generally: E Cooke, ‘Land Registration: Void and Voidable Titles – A Discussion of the Scottish Law Commission’s Paper’ (2004) *Conveyancer and Property Lawyer* 482.

⁶³ See generally: A Bradbrook, A MacCallum and A Moore, *Australian Real Property Law* (Thomson LawBook Co, 4th ed, 2002) ch 4.

⁶⁴ *Breskvar v Wall* (1971) 126 CLR 376.

⁶⁵ Howell, above n 3, 303.

⁶⁶ A clear example of that is *Midland Bank Trust Co Ltd v Green* [1981] AC 513.

⁶⁷ Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (2004) <http://www.scotlawcom.gov.uk/downloads/dp125_land_reg.pdf> at 8 October 2008.

⁶⁸ *Breskvar v White* [1978] Qd R 187 illustrates how harsh it can be. In this case, the sequel to *Breskvar v Wall* (1971) 126 CLR 376, the claimants were statute barred from gaining compensation from the assurance fund, as they were outside the time limit. This conclusion was reached despite the claimants being unaware until the decision in *Breskvar v Wall* that their claims against the fraudulent

considered in isolation can be seen to bring about unacceptable results. The understanding of this highlights that the case for immediate indefeasibility depends largely on the value judgments associated with conflicting and competing policies.⁶⁹

In an attempt to ameliorate this harshness, the Scottish Law Reform Commission suggested an unusual solution in seeking to balance the extreme position offered by immediate indefeasibility. They recommended that the title of a good faith purchaser should be indefeasible, provided that the person from whom they have bought has been in possession for a prescribed period (possibly a year). As Cooke notes:⁷⁰

This is very strange and appears to run counter to the “mirror” principle of registration. However, the Commission points out, it avoids some human rights problems under the current law. It ensures that “A” [the original registered proprietor] cannot lose his land to D [D having purchased from C as a result of a void transaction, perhaps because of fraud attributed to B] without some equivalent of notification, because for the land to be out of his possession must put him on enquiry.

V AN ANALYSIS IN THE AUSTRALIAN CONTEXT

As noted by the High Court of Australia in *Mabo v State of Queensland (No 2)*,⁷¹ it is ‘far too late in the day to contemplate an allodial or other system of land ownership.’ Upon European settlement, the Crown acquired radical or ultimate title. The sovereign is the ‘universal occupant’.⁷² All land belongs to the Crown and every person⁷³ holds of, or from the Crown.⁷⁴

Furthermore Brennan J, in *Mabo v Queensland (No 2)*⁷⁵ commented that: ‘[the doctrine of tenure] cannot be overturned without fracturing the skeleton which gives our land law its shape and consistency.’⁷⁶ Critically, however, what this doctrine informs us is that ownership was not protected; rather it was seisin⁷⁷ or possession⁷⁸ which enjoyed

parties would be of no utility. Another example where the result is seen to be harsh is *Canadian Pacific Railway Co Ltd v Turta* [1954] 3 DLR 1 – the Canadian Pacific Railway, by reason of register error, were deprived of \$600 000 worth of petroleum rights. They too, were statute barred.

⁶⁹ See: W Taylor, ‘Scotching *Frazer v Walker*’ (1970) 44 *Australian Law Journal* 248, 251.

⁷⁰ E Cooke, ‘Land Registration: Void and Voidable Titles – A Discussion of the Scottish Law Commission’s Paper’ (2004) *Conveyancer and Property Lawyer* 482, 490-1.

⁷¹ (1992) 175 CLR 1, 47 (Brennan J).

⁷² *AG v Brown* (1847) 2 SCR (NSW) App 30, 35.

⁷³ Native title aside.

⁷⁴ Of course, this system devolved from the Norman conquest, where William the Conqueror passed the following law: ‘We decree also that every freeman shall affirm by oath and compact that he will be loyal to King William both within and without England, that he will preserve with him his lands and honor with all fidelity and defend him against his enemies’ – see: *Medieval Sourcebook - Laws of William of Conqueror*, Fordham University <<http://www.fordham.edu/halsall/source/will1-lawsb.html>> at 9 October 2008.

⁷⁵ (1992) 175 CLR 1, 45.

⁷⁶ The doctrine has received vehement academic criticism. See for example: J Devereux and S Dorsett, ‘Towards a Reconsideration of the Doctrines of Estates and Tenures’ (1996) 4 *Australian Property Law Journal Lexis* 6, 8-9, describing the doctrine as bizarre and inaccurate.

⁷⁷ For a discussion of what is meant by seisin see a series of articles by F W Maitland, ‘The Seisin of Chattels’ (1885) 1 *Law Quarterly Review* 324; ‘The Mystery of Seisin’ (1886) 2 *Law Quarterly Review* 481; ‘The Beatitude of Seisin’ (1888) 4 *Law Quarterly Review* 24.

⁷⁸ An example of which is: *Allen v Roughley* (1955) 94 CLR 98.

primacy. There was no law of ownership, merely a law of possession.⁷⁹ Legal effect was to be given to the de-facto state of affairs. To do otherwise would amount to an injustice.⁸⁰ However, this state of affairs was radically transformed in the 1850's and continues to this day. Title is now based on registration and not on possession. This conflict between registration and possession was the very essence of the dispute in *Pye*. On the one side stood an individual claiming that legal recognition should be given to the state of affairs which if a third party physically viewing the land may perceive to be the actuality. On the other side, stood the registered owner, the individual, who for whatever reason, has not seen fit to remove the trespasser from its land, to not exercise their legal rights, but who suggested that ownership of land is not reliant on a 'view from the street', but on the basis of a properly conducted search of the formal records. In *Pye v Graham*, the House of Lords found in favour of the possessor, the initial chamber of the European Court of Rights identifying this by a bare majority as a breach of human rights, with this overturned by a close split decision of the Grand Chamber. Given this divergence, where does that leave the role of possessory interests, such as adverse possession and prescriptive easements in a Torrens system where 'registration is not merely "a retrospective approbation of [title] as a derivative right"'.⁸¹ With Australia and New Zealand entrenching immediate indefeasibility,⁸² though this is far from uniform throughout Torrens jurisdictions⁸³ is there some logic that can be drawn from the aims of title registration which would answer this conundrum.

VI AIMS OF TITLE REGISTRATION

A number of reasons can be advanced as to what title registration systems are designed to achieve. First, and with this reason paramount due to the contemporary market driven economy that is embedded within Western society, title registration systems improve economic efficiency.⁸⁴ With transaction costs reduced⁸⁵ and heightened certainty and

⁷⁹ As stated by Cheshire and Burn: E H Burn, *Cheshire and Burn's Modern Law of Real Property* (Butterworths, 15th ed, 1994) 27: it may be said without undue exaggeration that so far as land is concerned, there is in England no law of ownership, but only a law of possession.

⁸⁰ As noted by the English Law Reform Committee in its report on prescriptive easements, Law Reform Committee, *Fourteenth Report*, above n 47, 5, 'the method by which English law gives legal recognition and effect to various kinds of de facto situations in which the relevant state of affairs has continued unchallenged for so long that to deny it legal recognition would, it is said, amount to injustice.'

⁸¹ WMC Gummow, 'Equity in the Torrens System' (Paper presented at the Taking Torrens into the 21st Century conference to mark the 50th Anniversary of the Land Transfer Act 1952, Faculty of Law, University of Auckland, 19-21 March 2003) 9, quoting from Windeyer J in *Breskvar v Wall* (1971) 126 CLR 376, 400.

⁸² *Breskvar v Wall* (1971) 126 CLR 376; *Vassos v State Bank of South Australia* (1993) 2 VR 316; *Frazer v Walker* [1967] NZLR 1069.

⁸³ Some argue for deferred or discretionary indefeasibility. See for example: J Mugambwa, 'Transportation of the Torrens System to Developing Countries: Uganda and Papua New Guinea' (Paper presented at the Taking Torrens into the 21st Century conference to mark the 50th Anniversary of the Land Transfer Act 1952, Faculty of Law, University of Auckland, 19-21 March 2003). See also a discussion of the Canadian position, and reform proposals in respect of this; Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990). Ziff notes that in Canada, immediate indefeasibility is the rule: B Ziff, *Principles of Property Law* (Carswell, 3rd ed, 2000) 426. In the New Zealand context, see: E Toomey, 'Fraud and Forgery in the 1990's Can our Adherence to *Frazer v Walker* survive the Strain?' (1994) 5 *Canterbury Law Review* 424.

⁸⁴ See: L Griggs, 'Torrens Title in a Digital World' (2001) 8(3) *Murdoch University Electronic Journal of Law*; L Griggs, 'The Assurance Fund – Government Funded or Private' (2002) 76 *Alternative Law Journal* 250.

stability in conveyancing, (at least in a transactional sense), land should move to the person who values it the most. By doing this, the welfare of society is enhanced.⁸⁶ However, this efficiency comes at a cost. 'Formal legal rights'⁸⁷ must be eliminated. In economic terms the transaction costs associated with alternatives (such as general law or old system title) are so high as to mandate the allocation of a liability based solution to ensure a more effective distribution of resources.⁸⁸ To achieve this result the 'legal status of ... property [must] be kept relatively simple and transparent in order to avoid confusion to ... multiple or successive interest holders.'⁸⁹

Second, and allied to the first, land ownership with attendant increased security of transaction leads to increased economic activity.⁹⁰ A normative expectation that investment in real estate will lead to a positive outcome generates not only labour and input into the land itself, but security allows for the elimination, or at the least the reduction of, 'moral hazards and adverse selection in the credit market.'⁹¹ A dynamic, active land market is enhanced, if not created. The crystalline rules provide for certainty, stability and ease of transfer.⁹²

Third, the Torrens system, by its focus on the dynamic security of the transaction mobilises the resources associated with what would otherwise be a static asset. Land becomes the equivalent of cash, enabling its use to dramatically alter as circumstances warrant.⁹³ The fundamental goal of efficiently transferring land is attained.⁹⁴ A liability, rather than property based model is to be preferred⁹⁵ - legislatures considering it cheaper to extinguish the formal legal title of the previously registered owner, in preference to compensating the new registered owner by way of money.

⁸⁵ JT Janczyk, 'An Economic Analysis of the Land Title Systems for Transferring Real Property' (1977) 6 *Journal of Legal Studies* 213.

⁸⁶ JT Janczyk, 'Land Title Systems, Scale of Operations, and Operating and Conversion Costs' (1979) *Journal of Legal Studies* 569. In particular see 258, the summary. See also: Ontario Law Reform Commission, *Report on Land Registration*, Department of Justice (1971) 135-51.

⁸⁷ As noted by: CM Rose, 'Property and Expropriation: Themes and Variations in American Law (2000) *Utah Law Review* 1, 7-8.

⁸⁸ The terms emanating from the work of G Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

⁸⁹ Rose, above n 87, 7-8.

⁹⁰ It is of course recognised that there is increased dynamic security in the Torrens system, but this does arise at the expense of static security. In other words, the title is subject to an option. See: C M Rose, 'The Shadow of the Cathedral' (1997) 106 *Yale Law Journal* 2175.

⁹¹ JM Ngugi, 'Re-examining the Role of Private Property in the Market Democracies: Problematic Ideological Issues Raised by Land Registration' (2004) 25 *Michigan Journal of International Law* 467, 498.

⁹² C Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford Law Review* 577, 577-8. 'Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it. We draw these ever-sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting into the confusions and disputes that would only escalate as the goods in question became scarcer and more highly valued.'

⁹³ See generally: Ngugi, above n 91, 498.

⁹⁴ Early attempts dating back to the 15th and 16th century and the time of Henry VIII and later, Queen Anne. HWB Mackay, 'Registration of Title to Real Estate' (1897) 11 *Harvard Law Review* 301.

⁹⁵ See: G Calabresi and A D Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089; L Kaplow and S Shavell, 'Property Rules Versus Liability Rules: An Economic Analysis (1996) 109 *Harvard Law Review* 713.

When combined with immediate indefeasibility, these predominantly economic aims provide a puzzle incapable of solution. With indefeasibility achieving either logical or perhaps legendary status within our Torrens register,⁹⁶ and its foundation directly oppositional to possessory interests, how does the jurisprudence find that elusive balance? Who is to be preferred, the majority or minority in the European Court in *Pye*? How are registration and possession to be weighted? The answer, it is submitted lies not so much in logic but in how we define what it means to have an interest in land. Is it simply about excluding others, or is there a wider sense, that proprietary interests include the right to exclude as well as the right *not* to be excluded from use or enjoyment.⁹⁷ As Macpherson comments in the context of human rights as property rights:

If we continue to take [property] in the modern narrow sense, the property right contradicts democratic human rights. If we take it in the broader sense, it does not contradict a democratic concept of human rights; indeed, it then may bring us back to something like the old concept of individual property in one's life, liberty, and capacities.⁹⁸

It is only the modern consumer society, and its focus on allocative efficiency,⁹⁹ that has seen the narrow construct of exclusionary property become paramount. Competition was to be the driving force, consumption measuring the wealth of the individual. The invisible hand of the market would lead to efficiency, and output within society maximised. The State as an institution existing only to provide the Rule of Law to settle disputes, and to assist in the process of voluntary cooperation. In the context of land registration systems, certainty, stability, speed and expense were the motivating agencies. The system designed to overcome the weaknesses articulated in the original preamble to the Torrens statute of South Australia (*Real Property Act 1858*) the:

inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants.

The blunt weapon of registration and indefeasibility married to bring out the marginalisation of possessory titles. In effect a narrow perception of what property or land is about. It was about exclusion with this defined by registration; the marketability of the land was not to be restricted by any sense of possession. By contrast a system which seeks to somehow balance registration and possession, endorses a notion of access in preference to exclusion.¹⁰⁰ '[This] language of "property" ... [it carries the] responsibility, of a trust to the larger community.'¹⁰¹ If looked at in this context, possessory interests by giving effect to the de-facto state and permitting access, arguably contribute to a notion of interdependence between the individual, the community, the society and the economic imperatives that may also underlie this.

⁹⁶ A Mason, 'Indefeasibility – Logic or Legend?' (Paper presented at the Taking Torrens into the 21st Century conference to mark the 50th Anniversary of the Land Transfer Act 1952, Faculty of Law, University of Auckland, 19-21 March 2003).

⁹⁷ See generally: CB Macpherson, 'Human Rights as Property Rights' (1977) 24 *Dissent* 72.

⁹⁸ *Ibid* 74.

⁹⁹ See generally: Independent Committee of Inquiry, Parliament of Australia, *Hilmer Report* (1993).

¹⁰⁰ See generally: Gray, above n 59.

¹⁰¹ *Ibid* 208.

Arguably, our notion of property ceases when fundamental human rights are infringed.¹⁰²

VII CONCLUSION

Pollock and Maitland comment that:

[I]n the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that the whole system of our land law was about seisin and its consequences.¹⁰³

Today, whilst ownership cannot properly be understood without reference to possession, the existence of the Torrens system, its central tenet of indefeasibility, and its effect on possessory interests, has arguably not truly been recognised. The continued acknowledgment of adverse possession and prescriptive easements illustrates the resonance of seisin, even though formal creation of legal rights is not made until registration. It is this very interaction that highlights the problems that real property lawyers may face if human rights jurisprudence becomes entrenched within our thinking. The importance of property, and in this specific context, land, cannot and should never be underestimated. It is the very core that establishes connection between species and the planet.¹⁰⁴

For this reason, the stability of land and land registration is critical. It is essential to our economic welfare, as a means of encouraging a productive workforce and, in the wider context of property, has been said to provide the foundation for democratic government.¹⁰⁵ ‘That is why ... Jeremy Bentham said, back around 1800, that in any conflict between equality and security of property, it is imperative that security prevail – even when the inequality is so striking as in the case of serfdom or slavery.’¹⁰⁶ To assist in this means governments have routinely provided a means by which ownership of land is to be recorded and made as transparent as possible. The fragmentation of property interests inherited from the feudal system dependant on there being a way in which a potential purchaser is able to identify an owner of an interest with ease. ‘[The] imperatives of transparency sometimes demand the sacrifice of perfectly good formal claims.’¹⁰⁷ Does this mean that possessory interests must yield, and that in this context, the utilitarian perspective insist that the registration system must impose itself on human rights by overriding possessory based interests?¹⁰⁸ The difficulty with accepting this at

¹⁰² An example of which is slavery: *ibid* 211.

¹⁰³ F Pollock and FW Maitland, *History of English Law before the Time of Edward I* (Cambridge University Press, 1968) 29.

¹⁰⁴ As eloquently expressed by K Gray and S Gray, *Elements of Land Law* (Oxford University Press, 2005) 1. ‘Land is elemental: it is where life begins and it is where life ends. Land provides the physical substratum for all human activity; it is the essential base of all social and commercial interaction. We spend scarcely a moment out of contact with terra firma and our very existence is constantly sustained and shaped by the natural and constructed world around us.’

¹⁰⁵ Rose, above n 87, 4.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* 8.

¹⁰⁸ The jurisprudence from Europe largely indicates that ‘human rights’ does concede its place to property law. See: D Hughes and M Davis, ‘Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law’ (2006) *Conveyancer and Property Lawyer*. 526.

any level is that possession is about what is in fact occurring. It speaks to third parties, the market, to the world, as to the state of affairs. It reverberates the idea that possession is nine tenths of the law. Its hold on the individual and collective psyche of Australian society is significant. Nevertheless, any undermining of the legal formalism of registration will reverberate on economic markets, and on the faith in title based systems. Without tolerance and respect for the ownership rights of others, with these identified by a public registration system, the regime for land ownership that presently operates in Australia will soon fail.¹⁰⁹ For this reason, it is suggested that as human rights jurisprudence continues to expand, Torrens legislation needs to resolve the inherent tension that may arise between it and human rights. As we move inexorably to a national conveyancing system in terms of process, any harmonisation of the substantive law should address the dilemma posed by the interaction of possessory based principles to a system of title by registration. The type of litigation encapsulated in *Pye* seems little to do with advancing human rights, yet it directly attacks a system of land registration which has successfully served Australia for 160 years. In summary, the questions raised here will not be answered by mechanical formula, the application of economic theory, or by resort to historical reference. It is not about 'protection or redistribution; it is the protection of whom, and the distribution of what.'¹¹⁰ It is this which must be answered, and with land being in 'defined and limited supply',¹¹¹ the answer that should be given, is a strong preference for the precepts, ideals and values provided within and by, the Torrens system of land registration.

¹⁰⁹ See generally: C Rose, 'Property as the Keystone Right' (1996) 71 *Notre Dame Law Review* 329.

¹¹⁰ LS Underkuffler-Freund, 'Takings and the Nature of Property' (1996) 9 *Canadian Journal of Law and Jurisprudence* 161, 205.

¹¹¹ *Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 107D (Lord Browne-Wilkinson).