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## Indigenous Property Matters: Embedding Indigenous Content and Perspectives in Real Property

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# INDIGENOUS PROPERTY MATTERS IN REAL PROPERTY COURSES AT AUSTRALIAN UNIVERSITIES

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NICOLE GRAHAM\*

## I INTRODUCTION

The approach to the teaching of property law varies significantly across and within Australian universities.<sup>1</sup> This may be attributed to the ‘challenging’, ‘problematic’ and ‘difficult’ nature of legal education in general, which attempts to ‘satisfy simultaneously the immediate demands of legal practice and the traditional values associated with the university’.<sup>2</sup> The disparity of purpose apparent in this dual commitment accounts for a degree of contrast between approaches to teaching Indigenous-Australian land laws; Indigenous perspectives on Anglo-Australian property laws; and the law of native title. A minority of real property courses include any or all of these topics to a significant degree in their content, materials and assessment. However, many real property courses adopt a conventional model of legal education that emphasises the immediate practical function of doctrinal knowledge to, and for, a predominantly non-Indigenous property market.<sup>3</sup> This paper contends that the use of the conventional model of legal education in teaching real property often coincides with an exclusion of Indigenous-Australian land laws and perspectives on Anglo-Australian property law and sometimes even an exclusion of the Anglo-Australian law of native title. Where Indigenous laws and perspectives are presented in real property courses, they are often referred to via abstract technical or ‘substantive’ aspects of native

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<sup>1</sup> Lynden Griggs and Rick Snell, ‘The Curriculum and Teaching of Property Law in Australian Law Schools’ (1997) 5 *Australian Property Law Journal* 213.

<sup>2</sup> Margaret Thornton, ‘Portia Lost in the Groves of Academe Wondering What to do about Legal Education’ (Inaugural Lecture, Department of Legal Studies, La Trobe University, 1991) 1.

<sup>3</sup> The information on real property course curricula is based on research that appears in ch 5, pt 4 ‘Dephysicalised Property in Pedagogic Practice’ in Nicole Graham, *Landscape: Paradigm and Place in Australian Property Law* (PhD Thesis, University of Sydney, 2003); on the content and structure of several current leading texts on real property law in Australia and NSW, around which many courses in NSW law schools are structured; and on informal discussions with property teachers.

title legislation and case law. Teaching law students that Indigenous land laws and perspectives are simply another part of, or even a ‘new form’<sup>4</sup> of traditional property law categories — rather than different and challenging to those categories — inhibits the development of Australian law and lawyers. Why? Because Indigenous-Australian land laws and perspectives on Anglo-Australian property law are not the same thing as native title. To conflate these topics (or to exclude them completely) fails to recognise their intellectual and practical difference. Further, it misses the opportunity that Indigenous-Australian land laws offer to the development of a distinctively Australian property law — one that has confidently departed from its colonial origins and is well-adapted and responsive to the real of real property, the country itself.

This article explores the patterns and possibilities of presenting Indigenous property matters in real property courses in Australia through three key teaching strategies: curriculum; information; and language. Part II, on curriculum, considers the selection and sequence of topics in the structure of the course. It suggests methods of integrating Indigenous content into topics conventionally considered separate from Indigenous matters. Part III, on information, briefly addresses the significance of the choice of materials in the real property course. Part IV, on language, considers the significance of both translation and terminology in teaching Indigenous-Australian property law and the law of native title. It asks whether, as inheritors of a colonial lexicon, we can, first, develop an awareness of the cultural specificity of language; and second, move beyond the use of the word ‘custom’ when referring to Indigenous-Australian land laws.

The article acknowledges the importance of providing property courses that satisfy the Uniform Admission requirements and offers the following observations and suggestions mindful of the timing constraints of property courses that are often offered in a single university semester. Each part of the article suggests alternatives to conventional teaching practice that do not necessarily demand additional time or content. Rather, they offer alternative emphases, alternative disclosures, alternative use of language and alternative perspectives that may be offered in written material, as part of required or assignment-based reading, or in the oral content delivered in lectures and tutorials by teachers in the same way that case law is quoted and analysed. It is important that Indigenous-Australian land laws and Indigenous perspectives on Anglo-Australian property law are not structured as separate, stand alone and add-on parts of a property course. Rather, these laws and perspectives can be embedded throughout the already-established topics of the course to achieve both intellectual integrity and avoid the need to substantially extend

<sup>4</sup> Griggs and Snell, above n 1, 213.

already tightly-designed course content. Arguably there are tensions between the comparative approach suggested and conventional approaches to legal education; however, it is possible to overstate these and, as a result, simply exclude consideration of innovative and alternative approaches. This is regrettable, given the intellectual and professional advantages to students of property if Indigenous laws and perspectives were included in property courses, and the relative ease with which this could be achieved given the wealth of legal scholarship available on these matters. Indigenous property matters — and students of Australian law will learn this only through the pedagogical choices of their property teachers.

## II CURRICULUM

Convenors of real property courses design their course structure in a variety of ways to suit the particular learning needs of students and the particular learning objectives they have set for the course. In courses which set an understanding of ‘law in context’ as a learning objective, the dispossession of Indigenous Australians and the introduction of native title as a category of Anglo-Australian property law are often taught together. The links between Indigenous matters and theories of property are clearly easier to teach (and learn) once these topics are completed. Some of these courses, particularly those with a ‘critical legal education’ approach, teach these two topics together as part of an historical introduction to Anglo-Australian property law and/or as part of an economic analysis of property law in Australia.

Of course a property course is about economics and wealth ... the fact that Indigenous people in Australia are the poorest, sickest, and most subjected to violence on and within their communities, has everything to do with the fact that their law and their property rights were not recognised for two centuries.<sup>5</sup>

Where real property courses include economic analyses of property, students will often also develop an awareness of the significance of political science to the study of law. Indeed, real property law is an inherently suitable subject for lending substance to claims of innovative and interdisciplinary legal education. Other approaches to real property courses, particularly more conventional courses with an emphasis on doctrinal knowledge, can often exclude Indigenous land laws and perspectives on Anglo-Australian property law completely and some also continue to exclude the law of native title. The norm, however, is increasingly to include rather than exclude native title and to position the topic either at the beginning

<sup>5</sup> Valerie Kerruish, *Property and Equity* (Unpublished lectures, School of Law, Macquarie University, 1999).

or the end of the course structure.<sup>6</sup> This is perhaps a convenient approach to course structure. Nevertheless, this ‘bookending’ approach establishes an unnecessary and arguably disingenuous classificatory segregation and reductionism that obscures the complexity of competing proprietary interests. For example, how does native title relate to leasehold and freehold titles and to the definition of property itself? Separating Indigenous property matters from the rest of the course’s content is not the only way to teach these matters. It is possible to weave Indigenous property matters throughout the course structure.

A comparative law approach can assist students’ ability to identify and distinguish between the particular features of multiple systems. Comparing and contrasting Indigenous-Australian land laws with Anglo-Australian property law can be done independently of the topic of native title. For example, if the course begins with an introduction to the concept of property then it will perhaps refer to Kenneth Vandavelde’s theory of ‘dephysicalised property’<sup>7</sup> or to Kevin Gray’s theory of ‘property as fraud’ and ‘illusion’.<sup>8</sup> Clearly, these theories are helpful in articulating and analysing the notion of property as a ‘bundle of rights’. Australian courts employ this notion when they define property because it reflects accurately the function of property within the Anglo-Australian economy. Facilitating the fluidity of capital requires the twin rights to exclude and to alienate. The discourse of rights can well be taught in its own terms but it can also be taught by contrast to the discourse of responsibilities and obligations that characterise Indigenous-Australian land laws.

Our affinity with the land is like the bonding between a parent and a child. You have responsibilities and obligations to look after and care for a child. You can speak for a child. But you don’t own a child.<sup>9</sup>

Contrasting the concept of property at the foundation of the Indigenous and Anglo-Australian legal systems and economies is important because it helps make sense of and develop literacy in both. Further, the discourse of rights is employed by Australian courts not only to describe Anglo-Australian property interests but also to describe native title interests. This creates the problem of attempting but failing to ‘translate Indigenous peoples’ spiritual and economic relations to the land into a form of property right recognisable by

<sup>6</sup> See especially Melissa Castan and Jenny Schultz, ‘Teaching Native Title’ (1997) 8(1) *Legal Education Review* 75, 78.

<sup>7</sup> Kenneth Vandavelde, ‘The New Property of the Nineteenth Century: The Development of the Modern Concept of Property’ (1980) 29 *Buffalo Law Review* 325.

<sup>8</sup> Kevin Gray, ‘Property in Thin Air’ (1991) 50 *Cambridge Law Journal* 252.

<sup>9</sup> Paul Behrendt, cited in Larissa Behrendt, *Aboriginal Dispute Resolution* (1995) 12.

the common law'.<sup>10</sup> It is a problem recognised by the High Court in native title proceedings:

[T]he difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal.<sup>11</sup>

It can be confusing for students to grasp the discursive and conceptual underpinnings of both Anglo-Australian and Indigenous-Australian property laws in the evidence of native title cases where the contrast between them is not drawn because the language of rights remains the same.

Apart from teaching Indigenous property matters via the law of native title and/or property theory, there are several ways a convenor might integrate Indigenous-Australian and Anglo-Australian property laws into the doctrinal topics. Most real property courses deal with topics and concepts whose rationale pre-dates the current economy. For example, trespass and profit-a-prendre are steeped in the history of major events in the formation of modern English land law. Even a brief and passing reference to the enclosure of the commons in England, Wales and Scotland affords ample opportunity for students to become acquainted with the logic of private property. Comparing and contrasting the rights and responsibilities of pre-enclosure common property interest holders in Britain with Indigenous property interests in Australia enables students to understand that property laws are not simply indicators of cultural difference but also of economic and environmental differences. Understanding, for example, that common property regimes in both pre-enclosure Britain and Indigenous Australia marry the laws of ownership and resource management, highlights the fact that modern private property regimes belong to a legal system that divorces the two laws. This allows students to understand the need for a separate body of law in the Anglo-Australian legal system: environmental law. The overarching logic of the structure of Anglo-Australian law becomes accessible to students as they begin to be able to relate the various components or subjects of their law degree.

The law of native title is an excellent way of introducing the topics of the doctrines of tenures and estates and of leases. The *Wik* case<sup>12</sup> provides a seminal critical view on the doctrines of tenures and estates and their relevance to contemporary Australian property law. Gummow J's judgment in particular contrasts clearly to that

<sup>10</sup> Paul Patton, 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence' (2000) 6 *Parallax* 25, 28.

<sup>11</sup> *Western Australia v Ward* (2002) 191 ALR 1, 15 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>12</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*').

of Brennan J in *Mabo*<sup>13</sup> (with which law students are often well-acquainted). Not only does this contrast in views allow students to appreciate the divergence of judicial opinion, opening up a space for them to develop their own position, the contrast also highlights the relationship between property law and colonisation. Specifically, it indicates the centrality of the role of the Crown in creating interests in land both in feudal England and modern Australia. The use of the *Wik* case in teaching lease law not only allows students to develop insight into the political as well as legal significance of this topic but, given the substantial interest in the case of the most powerful lobby groups in Australian politics,<sup>14</sup> it allows them to question the place of property within the seemingly neat and mutually exclusive categories of private law and public law. Students' notions of property as a private law concept are challenged by the case in several respects: tenures and estates; leases; and the regulation of relationships between entire communities and particular places. The case points to the specificity of leases in Australian law, particularly the continuing role of the Crown in the direct creation and management of Australian land use and ownership. By considering carefully the fundamental nature of and difference between common law and statutory leases, the case provides students with an analysis not only of the definitions and objectives of these interests but also their relationship with other interests. Developing students' capacity to relate a leasehold interest to other interests is helpful in a nation where half the landmass is held as leasehold.

Almost all real property courses include old system title and the rules of priorities, and it is here that Indigenous perspectives on Anglo-Australian law<sup>15</sup> can offer students insight into the centrality of private law to the fundamental logic of the Anglo-Australian legal system. Indigenous land laws are as much about community as they are about land. The principle of inclusion is paramount to the experience of community and to the practice of Indigenous land laws.<sup>16</sup> Indigenous-Australian property is not owned by individuals but by communities. The notion of inalienability of property is similarly central to Indigenous land laws.<sup>17</sup> Indigenous-Australian property is owned not as a saleable commodity but as part of an aboriginal economy and culture. Together these twin principles of inclusion and inalienability contrast starkly with the competition and adversarial character which necessitate the rules of priorities in Anglo-Australian law. Priorities between interests are needed only where property is excludable and alienable. Teaching students the

<sup>13</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 45 (Brennan J).

<sup>14</sup> Minerals Council of Australia and the National Farmers' Federation.

<sup>15</sup> Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181, 186.

<sup>16</sup> Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (2003) 22.

<sup>17</sup> *Ibid* 21.

process of solving priorities between competing interests enables them to grasp the inherently individualistic structure of private property interests in Anglo-Australian law and, further, allows them to contrast these interests with the communal structure of property interests in Indigenous-Australian laws.

The failure to teach these perspectives and relationships by including the law of native title as an ‘add-on’ rather than as a significant topic in Australian property law implies or permits a perception by students that these topics will not (and arguably should not) matter to their legal professional practice. This outcome coincides with a pedagogical choice to emphasise the commercial practicability of doctrinal knowledge in learning objectives. The choice is curious in the context of significant commercial interests involved in almost all native title claims and proceedings.

A further consequence of a conventional approach to the real property curriculum is that (without explicit indication otherwise) students may form the impression that Indigenous property matters begin and end with the law of native title. This may be a reasonable mistake to make if the only reference to Indigenous land laws is made through native title case law and legislation. The conflation of Indigenous land laws and Indigenous perspectives on Anglo-Australian property law with the law of native title, however, obscures the fact that native title is a category of Anglo-Australian property law. The law of native title in Australia does not operate independently of, or even in parallel with, Anglo-Australian law. Australia is not a legally pluralistic nation.<sup>18</sup> Indeed, Indigenous and non-Indigenous legal scholars and Indigenous communities alike have argued that, since its institution in Australian law, the law of native title is increasingly inconsistent with the distinctive and core features of Indigenous-Australian land laws because it replaces the integrity of those laws with a fragmentation or ‘particularisation’ of them.<sup>19</sup>

We bond with the universe and the land and everything that exists on the land. Everyone is bonded to everything ... Ownership for the white people is something on a piece of paper. We have a different system. You can no more sell our land than sell the sky.<sup>20</sup>

It has been argued that the law of native title has become less about a belated recognition of Indigenous-Australian land laws than it is about their restriction — in favour of providing the certainty of non-Indigenous property interests.<sup>21</sup>

<sup>18</sup> See Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008) 209.

<sup>19</sup> Richard H Bartlett, *Native Title in Australia* (2<sup>nd</sup> ed, 2004) 123.

<sup>20</sup> P Behrendt, above n 9.

<sup>21</sup> Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009) 185.



The power of the state to steal and remove us from ruwi continues today as trans-national corporations in their merging to become an even bigger greedier frog, are empowered to steal and plunder the remaining internal organs of our ruwi-ancestors.<sup>22</sup>

If real property course convenors do, for various reasons, exclude Indigenous land laws and Indigenous perspectives on Anglo-Australian property law and teach only the law of native title, students should be, at the very least, alerted to the distinction between them.

### III INFORMATION

The choice of materials in teaching any subject goes beyond the provision of information. The choice of materials reflects and indicates what information has been regarded as relevant and by implication, therefore, what has been regarded as less relevant or as irrelevant. Whether one selects a single or series of textbooks or alternatively prepares one's own course materials the outcome is the same from the perspective of the student: an indication of information that they are expected to engage with and understand.

There are numerous textbooks on property law in Australia. From comprehensive provision of substantial and detailed commentary and excerpts of case law and legislation to concise outline of key doctrines, convenors can draw from a variety of possible sources of information. Most, but not all texts on property law in Australia address the law of native title. Few, however, deal with Indigenous land laws and perspectives on Anglo-Australian laws. It is a noticeable gap in Australian legal education literature. The consequence for students is that where they do learn the law of native title, they learn it often without an awareness of its difference to Indigenous land laws.

An important aspect of information on the law of native title in property texts is the approach taken by authors to the topic. Some texts focus on the substantive rules or 'machinery' of native title legislation.<sup>23</sup> Such inclusion of native title in property law textbooks is desirable and important. However, without information also on the relevant contexts which gave rise to that 'machinery' and without information on relevant Indigenous laws, there is a risk that students will be limited in their capacity to practise in the area. The historical and political contexts of the legislation (and of the case law) would allow students to develop proficiency not only in the doctrinal aspects of the law but also with the evaluative skills necessary to elaborate independent legal reasoning regarding the viability and logic of the law itself. This is necessary to respond intelligently to questions raised by scholars, practitioners and entire communities

<sup>22</sup> Irene Watson, 'Buried Alive' (2002) 13 *Law and Critique* 253, 260.

<sup>23</sup> Peter Butt, *Land Law* (4<sup>th</sup> ed, 2001) 795.

on the most contested topic in Australian property law. A contrary approach risks producing law graduates who would understandably but incorrectly imagine that Indigenous land laws and native title are of minor significance in Australian property law.

Students reasonably assume that the information on property law in their texts is either universally relevant or else that their teacher's choice of materials is pedagogically sound. For this reason, any implicit or explicit indication that Indigenous land laws and native title are of minor significance or outright irrelevance to Australian property law may be learned, erroneously, as fact rather than opinion. 'The challenge for teachers is to present these issues in such a way as to avoid accusations of bias, or to perhaps make biases explicit.'<sup>24</sup> Where convenors draw attention to the fact of, or rationale for, their choice of materials students will learn that their information (or exclusion of information) on the law of native title and Indigenous land laws are neither universal nor inevitable but are the subject of ongoing consideration and debate. This will prohibit assumptions about the relevance of the law of native title and Indigenous land laws and render students responsible for their own positions on this question.

Indigenous perspectives on Anglo-Australian law are abundant — the law of real property and the law of native title are no exceptions. In addition to information about Indigenous land laws of, and from, Indigenous people in native title case law, information on Indigenous perspectives on native title law is also important for students to access. From activist interviews to scholarly literature, diverse Indigenous voices from across the country over a long period of time have contributed important information about and perspectives on the law of native title. Yet, although perspectives of both advocacy and critique are available, they are often absent from real property course materials. The work of Indigenous-Australian lawyers Watson<sup>25</sup> and Behrendt,<sup>26</sup> for example, provides important counter-readings of native title in legal, intellectual, economic and political terms that would enable students to develop their own jurisprudential perspectives on matters that are often presented to them in exclusively technical terms.

Indigenous-Australian land laws and Indigenous perspectives on Anglo-Australian property law also provide important information and reflections on questions of land use and sustainable people–place relationships. Anglo-Australian property law is about land ownership but most questions pertaining to land use are segregated from it and addressed in another sub-discipline, environmental law. Indigenous-Australian land laws provide an excellent basis to begin to understand

<sup>24</sup> Castan and Schultz, above n 6, 78.

<sup>25</sup> See, eg, Watson, above n 22.

<sup>26</sup> See, eg, Larissa Behrendt, 'Home: The Importance of Place to the Dispossessed' (2009) 108(1) *The South Atlantic Quarterly* 71.

the importance of an integrated approach to land use and ownership. The integrity of people and place is evident in numerous statements by Indigenous people about their laws. Watson writes:

Nunga relationships to ruwi are more complex than owning and controlling a piece of property ... we are the natural world; it is a mirror of our self, our Nunganness, so how can we sell our self? We nurture ruwi as we do our self, for we are one.<sup>27</sup>

Further, Watson points out that this people–place relationship is responsive to the limits and capacities of the non-human world and as such is environmentally sustainable. ‘Our ways guarantee a sustainable model not only for Nungas but for all.’<sup>28</sup> The different epistemic and ontological framework of Indigenous land laws allow Indigenous-Australians to perceive the limitations of Anglo-Australian property law with regards to viable people–place relationships over the long term and, specifically, the ways in which it does not support sustainable land use.

The non-indigenous relationship to land is to take more than is needed, depleting ruwi and depleting self. Their way with the land is separate and alien, unable to understand how it is we communicate with the natural world. We are talking to relations and our family, for we are one.<sup>29</sup>

Without essentialising and homogenising diverse Indigenous land laws and their contribution to examining people–place relationships in Anglo-Australian property law, it is possible for students to receive the intellectual and strategic insights available even through a cursory exposure to Indigenous land laws and perspectives. From stand alone journal articles such as Watson’s to lengthy scholarly monographs,<sup>30</sup> material exists that is both important for Australian law graduates and lawyers to access and engage with.

#### IV LANGUAGE

Language is an important issue in the logic and process of native title. First, there is the fact that Indigenous-Australians can require interpreters for their testimony to be translated into the language of the Anglo-Australian court. Such translation, as with all linguistic translation, is never complete as there are always critical ellipses where no equivalent concepts or elements exist in the receptor language. This relates to the second issue, that what is being translated in native title cases is not simply the claimants’ language but the claimants’ knowledge and experience of law and culture that

<sup>27</sup> Watson, above n 22, 256.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> See, eg, Karl-Erik Sveiby and Tex Skuthorpe, *Treading Lightly: The Hidden Wisdom of the World’s Oldest People* (2006).

finds no legal and cultural equivalency. For this reason, the work of anthropologists is almost unexceptionally required as evidence in native title claims and proceedings. ‘While the court has declared that the testimony of the claimants is primary, the preparation of the claim and the hearing itself rely heavily on anthropologists.’<sup>31</sup> It is therefore helpful to students studying real property law to appreciate that the law of native title requires comprehension of these two issues. Students who speak more than one language will readily grasp the first issue and may perhaps more easily then also grasp the second. Inviting students to compare their insights, as bilingual or trilingual speakers, into language and translation with their developing understanding of the process of native title works extremely well for all students in a classroom context. Indeed, a good place to begin to teach Indigenous-Australian property law is to ask students to read aloud in class the text of the Yirrkala Bark Petition from the Yolngu people to the Parliament of Australia.<sup>32</sup> Although it is written in both English and Gumatj languages, it is worthwhile inviting any students who speak and read Gumatj to read the text aloud and in the absence of such students, critically reflect on the significance of language to the petition itself and more broadly to property law.

The difference between Indigenous-Australian property and Anglo-Australian property is well marked in the use of the Aboriginal-English expression ‘caring for country’. Indigenous-Australian property law articulates a relation to land not as ownership of a commodity, as something separate to the people living on it, but as being owned by the land with attendant obligations and responsibilities for its management. The verb ‘to care’ used to connect people and land here partially conveys the sentiment of the property relation ‘as if it were a proper noun — uncomfortable to the English ear’.<sup>33</sup> Teaching law students that their ability to understand Indigenous-Australian property law and native title evidence depends in part on their ability to grasp the cultural specificity of law and language is essential to prevent students hearing inaccuracy where in fact they are encountering their own difference to another law and language.

The fact that native title is conceived as a project of translation indicates that there is a proper, familiar terrain of property for instance, and a foreign, the *sui generis* of Indigenous place relations. It marks the matter as one of difference, and Indigenous peoples as the ones who are different.<sup>34</sup>

<sup>31</sup> Kirsten Anker, *The Unofficial Law of Native Title: Indigenous Rights, State Recognition and Legal Pluralism in Australia* (PhD Thesis, University of Sydney, 2007) 198.

<sup>32</sup> Petitions of the Aboriginal people of Yirrkala, 14 and 28 August 1963.

<sup>33</sup> Anker, above n 31, 219.

<sup>34</sup> *Ibid* 227.

Teaching Indigenous-Australian property law as different from rather than subordinate to Anglo-Australian property law enables students to understand that the language of rights that describes the logic of the latter legal system is particular to it, rather than assuming this language is universal and therefore descriptive also of the former legal system. The High Court in *Ward* remarked that translating Indigenous-Australian property law into the Anglo-Australian law of native title ‘requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.’<sup>35</sup> This indicates the Court’s sophisticated understanding of the issues of language, culture and translation in the law of native title. But, as Anker points out, this remark ‘assumes ... that rights and interests are actually there in the first place and able to be separated from their context.’<sup>36</sup> How can we teach real property in a way that those assumptions are not made? Closer attention to the logic of the Anglo-Australian language of property is helpful here.

An obvious and curious inheritance of many Australian law courses that refer to Indigenous-Australian laws is the use of the expression ‘customary law’. The expression is often used in Anglo-Australian law to refer to non-Anglo legal systems but was also used by common law courts in England with the centralisation and systematisation of English law in the 16th century.<sup>37</sup> The expression arises from a distinction drawn between two supposedly separate and different normative systems: law and custom. However, as Australian legal scholars and courts have found, ‘(t)he distinction between law and custom from a post-sovereignty perspective is not significant nor “readily discernible”’.<sup>38</sup> The meaning of the concept of ‘custom’ has varied over time, but gained currency as a term contrasted to the concept of statute in 533 in the Institutes of Eastern Roman Emperor Justinian I.<sup>39</sup> The contrast, which actually began as a comparison, hinged not on the authority or legitimacy of either law or custom but on the ways through which both were conveyed and observed.

From unwritten law comes that which has been approved by use. For a long-standing custom endorsed by the agreement of those who observe it is just like statute.<sup>40</sup>

<sup>35</sup> *Western Australia v Ward* (2002) 191 ALR 1, 15 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>36</sup> Anker, above n 31, 204.

<sup>37</sup> For an excellent discussion of customary law, see Shaunnagh Dorsett, ‘“Since Time Immemorial”: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry’ (2002) 26 *Melbourne University Law Review* 32.

<sup>38</sup> *Yarmirr v Northern Territory* (1998) 156 ALR 370 [90] (‘*Croker Island*’) cited in Bartlett, above n 19, 126.

<sup>39</sup> Iain Stewart, ‘“Customs in Common”: The Emperor’s Old Clothes’ (2006) 6 *Macquarie Law Journal* 139, 147.

<sup>40</sup> Justinian, *Institutes*, 1.2.9 cited in Stewart, above n 39, 148.

In Britain, the Roman terminology of law and custom ‘came over with the Conqueror’ but was not imported with the Roman definition which distinguished between systems on the basis of whether they were written. For William, the significance of writing to the distinction between law and custom was irrelevant. What mattered to the Norman king and subsequent royal rulers was establishing a recognisable hierarchy or kingdom of his own laws over the existing regionally specific Anglo-Saxon laws. Calling the latter ‘customs’ enabled William to replace the ‘institutions of the colonised’ with ‘royal, Norman colonial power’.<sup>41</sup> Thus, generations of common law makers and scholars inherited a Roman terminology but created their own meanings.<sup>42</sup> Treatise writers maintained William’s position that the distinction between law and custom was a question of the geographical scale of authority.<sup>43</sup> Hale wrote that the common law had ‘a Superintendency over those particular Laws that are admitted in Relation to particular Places or Matters’.<sup>44</sup> General customs with broad application across England became known as the common law whereas the particular customs of particular communities, that were location specific, were excluded from but subject to the common law. ‘The common law became the ‘law of the land’, while custom remained localised, rooted in everyday practices.’<sup>45</sup>

Yet, despite the elevation of general customs to common law, particular customs were still recognised by common law courts in England well into the 20th century because ‘local custom is understood as part of the common law, as both derive their validity from the same source: practice since time immemorial.’<sup>46</sup> But, as Dorsett points out, since its elevation from custom to law, general custom or common law has been selective of which particular customs it will recognise and accommodate. The basis of these choices often coincided with the politics and economics of colonisation.<sup>47</sup> The common law treatment of customs differed between those laws of local communities rebadged as customs and subordinated to the laws asserted as universal throughout a kingdom, and those subordinated to the laws asserted as universal throughout an empire.<sup>48</sup>

What remains of an ancient Roman distinction between law and custom, its 11th century Norman variation, and its application in

<sup>41</sup> Stewart, above n 39, 149.

<sup>42</sup> See David J Seipp, ‘Bracton, the Year Books and the “Transformation of Elementary Legal Ideas” in the Early Common Law’ (1989) 7 *Law and History Review* 175.

<sup>43</sup> Stewart, above n 39, 152.

<sup>44</sup> Sir Matthew Hale, *The History of the Common Law of England* (1713) cited in Dorsett above n 37, 40.

<sup>45</sup> Dorsett, above n 37, 40.

<sup>46</sup> *Ibid* 43.

<sup>47</sup> *Ibid* 58.

<sup>48</sup> See Peter Karsten, *Between Law and Custom: ‘High’ and ‘Low’ Legal Cultures in the Lands of the British Diaspora — The United States, Canada, Australia, and New Zealand, 1600-1900* (2002).

colonial Australian legal discourse is not a meaningful intellectual and legal signification. Law students today are not taught the meaning of the history and language of the term ‘custom’ because it is simply inherited as an intellectually vague but nonetheless applicable category. What remains of the distinction between law and custom is a blunt and unsophisticated hierarchical structure that was used by British and later Anglo-Australian lawmakers to not recognise Indigenous-Australian laws as laws.<sup>49</sup> The use of the word custom is, in other words, not simply a legacy but repetition of a colonial project and the assertion of the authority of the colonial legal system.

Aboriginal law is not recognised as ‘law’ by the Australian legal system but as custom. Any understandings of custom and tradition must, for the majority [of the High Court in *Yorta Yorta*] be formulated in the shadow of its own sovereignty.<sup>50</sup>

The distinction between law and custom offers contemporary Australian property law little but costs it much. Faith in the logic and utility of an ancient and hijacked distinction between law and custom replaces an intelligent and modern relationship between two different Australian laws.

In teaching Indigenous-Australian property matters, it is important to note that the ongoing and uncritical use of the distinction between law and custom, and/or the use of the phrase ‘customary law’, ‘place(s) the primary focus on observable behaviour rather than culture’.<sup>51</sup> Indigenous-Australian land laws were and are regarded by Indigenous-Australian communities as laws. The difference between Indigenous laws and non-Indigenous laws in Australia is inaccurately described by the language of hierarchy, to which law and custom belong. Indigenous-Australian laws are not inherently inferior or less authoritative than Anglo-Australian laws either in intellectual or moral terms. Indigenous-Australian land laws have been no less rigid, binding and coherent than Anglo-Australian property laws. It is not because British colonial and later Anglo-Australian legal systems repeatedly failed to recognise Indigenous-Australian laws as laws that the error should remain uncorrected. Without informing students of the origins and function of the law/custom dualism in the cultural narratives and political expediencies of colonialism; students could reasonably, but nonetheless mistakenly, believe that Indigenous-Australian laws are not law or are inherently inferior to law. This matters because legal education is the genesis of the legal thinking and practice that informs Indigenous-Australian

<sup>49</sup> Ibid 61–8.

<sup>50</sup> Shaunnagh Dorsett and Shaun McVeigh, ‘An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia on *Yorta Yorta* (2001)’ (2005) 56(1) *Northern Ireland Legal Quarterly* 1, 13.

<sup>51</sup> Stewart, above n 39, 160.

policy, legislation and case law — it is the how and why of the use of the law—custom terminology in the *Native Title Act 1993* (Cth). The link between legal education and legal practice is circular. Students are taught what the law is — and the law is what lawyers (former students) say it is.

[S]tudents accept theories on the authority of teacher and text, not because of evidence. What alternatives have they, or what competence? The applications given in texts are not there as evidence but because learning them is part of learning the paradigm at the base of current practice.<sup>52</sup>

To refer to Indigenous land laws as customs fails to distinguish between Indigenous and non-Indigenous laws in terms of their difference. Further, it fails to acknowledge that Indigenous-Australian land laws continue to be known, understood and practised as laws, regardless of whether they are recognised as laws by Anglo-Australian property law.<sup>53</sup> To teach students of Australian property law that Indigenous law is anything other than law prevents an accurate understanding of Indigenous-Australian land laws and their potential use as a basis for a critique of the Anglo-Australian system of property law. To teach Indigenous-Australian land laws as anything other than law forgets the words of Justice Blackburn in *Milirrpum v Nabalco*:<sup>54</sup>

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 and influence. If ever a system could be called ‘a government of laws, and not of men’, it is that shown in evidence before me.

Indigenous-Australian land laws should be correctly understood as different to the Anglo-Australian law of native title. The law of native title should be correctly taught as both ‘a recognition and disavowal of Australian indigenous jurisdictions’.<sup>55</sup> Importantly, it must be remembered that the law of native title is the creation of the Anglo-Australian legal system, as stated by Justice Kirby in *Wik*:

The theory accepted by this Court in *Mabo (No 2)* was not that the native title of indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such title was enforceable in Australian courts because the common law of Australia said so.<sup>56</sup>

This point allows students to use the law of native title as the basis of critiques of the operation of Anglo-Australian property law and the role of narrative and power in the distribution and protection

<sup>52</sup> Thomas Kuhn, *The Structure of the Scientific Revolutions* (3<sup>rd</sup> ed, 1996) 80.

<sup>53</sup> See Dorsett, above n 37, 54–6.

<sup>54</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.

<sup>55</sup> Dorsett, above n 37, 58.

<sup>56</sup> *Wik* (1996) 187 CLR 1, 238 (emphasis added) cited in Dorsett, above n 37, 57.



of land in this country. Just as terra nullius came to be known as a fiction, so too must students of law understand that native title has a function that is more than administrative and far from reconciliatory. As Kerruish said of terra nullius, the law of native title in Australia is ‘instrumental and justificatory in its function’.<sup>57</sup>

## V CONCLUSION

Indigenous land laws, Indigenous perspectives on Anglo-Australian property law, and native title are often taught as optional or even irrelevant to real property in Australian law schools. Conventional pedagogical choices in many property law courses maintain this perspective through a restrictive curriculum schedule; through the limited provision of information about these matters in course readings; by neglecting the significance of language to property law generally and specifically to the historical development of property in Australia within the context of colonisation. In so doing, many property law courses diminish the radicalism and opportunity that Indigenous land laws offer the Anglo-Australian system of rights-based property which abstracts ownership from responsibility to land and water resources. Indigenous property matters to Australian property law, and Australian legal education can and should provide students of Australian property law with an understanding of the ways in which it has, does and will continue to do so. “It is through the possibility of Aboriginalising our legal education that we could bring another way of knowing the world and its legal systems, and thereby introduce students to other ways of coming to know the law.”<sup>58</sup>

<sup>57</sup> Valerie Kerruish, ‘At the Court of the Strange God’ (2002) 13 *Law and Critique* 271, 281.

<sup>58</sup> Irene Watson, ‘Some Reflections on Teaching Law: Whose Law, Yours or Mine?’ (2005) 6 (8) *Indigenous Law Bulletin* 23.