



# Teaching property law in Australia in the twenty-first century: What we do now, what should we do in the future?

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*'The teaching of property law has a particularly important — perhaps even central — role in forming the mind-set not just of the law student, but also of the lawyer, and, in some degree, of the thoughtful and responsible citizen. The teaching of property law implants tremendously structural features in the mind of the student, and here can be included rigour of thought and analysis, the capacity for abstract manipulation of complex ideas, and some sense of the workability of entire bodies of statutory machinery. . . . It is in property law that consciously or unconsciously the student learns a basic competence in a number of skills which are of immense importance in later life. Indeed, most of the classic dilemmas of private law are here — all human life is here, if we only choose to look.'*<sup>1</sup>

## Introduction

The contemporary law degree is changing. Globally, law schools have faced the twin challenges of: the introduction of standards-based quality assurance;<sup>2</sup> and the sustained critique of the content-heavy focus of the traditional law degree.<sup>3</sup> The profession, academia and the judiciary are calling for graduates who are proficient in a range of professional skills as well as being well versed in the law and its context.<sup>4</sup> In terms of property law, new frontiers for the property law teacher to grapple with include the relatively recent creation of new property rights involving land; more sophisticated forms of community title; the increasing importance of environmental considerations; the concept of sustainability in what has otherwise been a market-based field as well as recent significant developments in personal property law.

Given the central role ascribed to the teaching of property law, as highlighted in Gray's quote, it is entirely appropriate, and indeed timely, that property teachers take stock and reflect not only on the current and proposed future content of property law units but also on how this content is being taught and assessed. During 2011 the authors invited property law teachers from all Australian law schools to participate in a comprehensive survey

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1 K Gray, 'The Teaching of Property Law', in P Birks (Ed), *Examining the Law Syllabus: The Core*, Oxford University Press, 1992, p 15.

2 In Australia, for example, through the Tertiary Education Quality & Standards Agency which was established under the Tertiary Education Quality and Standards Agency Act 2011 (Cth).

3 See, eg, G Davis, *Report to Council of Australian Law Deans on the International Conference on the Future of Legal Education*, 2008.

4 Canvassed in S Kift, M Israel and R Field, *Bachelor of Laws Learning and Teaching Academic Standards Statement*, Australian Learning and Teaching Council, 2010.

regarding the teaching of the compulsory property law unit.<sup>5</sup> The survey covered various aspects of teaching property law including content; teaching format; the extent to which skills are taught in property law; learning outcomes; the methods of assessment; the developing areas of property law; and the challenges faced by property law teachers in the twenty-first century. The survey findings provide an in depth insight into the views of Australian property teachers on the current and future teaching of property law.

It is beyond the scope of this article to present all of the detailed and comprehensive findings from the survey. Rather, this article focuses on the survey results dealing with the content of our property law units: the content of what we teach now; and what we consider we should be teaching in the future. This discussion is undertaken within the context of the changing legal education environment of the twenty-first century and, more specifically, the developing areas of property law. In so doing the article aims to stimulate discussion and foster the further exploration of the challenges that confront property law teachers in teaching property law in the twenty-first century. The survey results dealing with assessment, teaching methods, skills and outcomes will be analysed elsewhere.<sup>6</sup>

### Legal education in the twenty-first century

For the past 25 years, the quality of legal education in Australia has been under close scrutiny. As early as 1987, a report by Pearce, Campbell and Harding (the Pearce Report) on an assessment of Australian law schools for the Commonwealth Tertiary Education Commission signalled a change in emphasis in law teaching from pure content and knowledge towards a more cognitive and contextual understanding of law. The Pearce Report suggested that 'all law schools should examine the adequacy of their attention to theoretical and critical perspectives, including the study of law in operation and the study of relations between law and other social forces'.<sup>7</sup>

Since then there have been further reviews and reports confirming this redirected emphasis in legal education on the acquisition of critical perspectives and legal skills.<sup>8</sup> Indeed, the 2010 Discipline Standards,

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5 The authors acknowledge the significant valuable contribution of Shane Rogers, Research Assistant from the Department of Psychology, University of Western Australia who conducted the statistical analysis for this project. In this article the 'compulsory property law unit' is used as a generic term covering all those aspects of property law that are prescribed by the 'Priestley 11' including property concepts, land law and personal property. The 'Priestley 11' is the list of prescribed areas of legal knowledge identified by the Law Council of Australia that a student must cover within his or her law degree in order to be admitted to legal practice. See <[http://www.lawcouncil.asn.au/shadomX/apps/fms/fmsdownload.cfm?file\\_uuid=3043E5A9-1C23-CACD-2244-630B0BFA046&siteName=lca](http://www.lawcouncil.asn.au/shadomX/apps/fms/fmsdownload.cfm?file_uuid=3043E5A9-1C23-CACD-2244-630B0BFA046&siteName=lca)> (accessed 11 December 2011).

6 P Carruthers, N Skead and K Galloway, 'Teaching, Skills and Outcomes in Australian Property Law Units: A Survey of Current Approaches'; and K Galloway, N Skead and P Carruthers, 'Assessment in the Law School: Contemporary Approaches of Australian Property Law Teachers', papers presented at the Australasian Law Teachers Association Conference, Sydney, 2012.

7 D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, AGPS, Canberra, 1987, p 149.

8 Australian Learning and Teaching Council and Council of Australian Law Deans, *Learning*

Threshold Learning Outcome 1 ('knowledge') includes 'international and comparative contexts . . . [and] the broader contexts within which legal issues arise'.<sup>9</sup> While skills are vital to a comprehensive legal education, discipline knowledge continues to be central to what it means to be a lawyer, and is naturally reflected in the expression of the Priestley 11,<sup>10</sup> the CALD Standards<sup>11</sup> and the Discipline Standards for Law.<sup>12</sup> Unsurprisingly then, as discussed below, the analysis of the project survey results demonstrates that most, if not all, the substantive topics relating to property law as prescribed by the 'Priestley 11' are adequately covered in the property law units of the respondent universities.

Interestingly, property law is widely seen to be 'the most difficult subject [lawyers and law students] studied in law school' perhaps because '[t]he language was arcane and each class introduced something which seemed wholly unrelated to everything else [they] had encountered previously in property law, other law subjects, and life in general'.<sup>13</sup> Mindful of this perception, it may be that property law teachers focus their efforts on ensuring students understand the substantive content covered in the unit. Yet if the substantive content is so difficult and, more importantly, if it is 'wholly unrelated to . . . life in general' then is it not high time that property law teachers in Australia re-assess what we teach? Once the 'what' is in place, the 'how' can be addressed and property law can begin to occupy its rightful territory on the skills development map of a law degree. The 'what' of property law teaching is the focus of this article. The 'how' is addressed elsewhere.<sup>14</sup>

### Property law in the twenty-first century

The teaching of property law has been driven first by the nature of property in the common law tradition, and second, by the traditional classification of property: primarily, into real and personal property. The approaches taken to the teaching of property law in Australian universities illustrate how the curriculum is constructed around this dichotomy. For the Australian lawyer, any discussion of property law in general will likewise follow this construction. Indeed the Australian lawyer is likely to recall their own learning in property law, though may speak differently about their contemporary

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*and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment*, Project Final Report 2009, ALTC/CALD Final Report, <[http://www.cald.asn.au/docs/altc\\_LawReport.pdf](http://www.cald.asn.au/docs/altc_LawReport.pdf)> (accessed 11 December 2011), pp 20 and 54–70; Council of Australian Law Deans, *The CALD Standards for Australian Law Schools*, CALD Standards, adopted on 17 November 2009 <<http://www.cald.asn.au/docs/CALD%20-%20standards%20project%20-%20final%20-%20adopted%2017%20November%202009.pdf>> (accessed 11 December 2011); Kift, Israel and Field, above n 4.

<sup>9</sup> Kift, Israel and Field, above n 4, p 10.

<sup>10</sup> Above n 5.

<sup>11</sup> CALD Standards, above n 8.

<sup>12</sup> Kift, Israel and Field, above n 4, TLO 1 'Knowledge'.

<sup>13</sup> R Chambers, *An Introduction to Property Law in Australia*, LBC Information Services, 2001, Preface, p v.

<sup>14</sup> See Carruthers, Skead and Galloway, above n 6.

experience in practice. However, our traditional understandings of both real and personal property law are undergoing significant, indeed radical, change in the twenty-first century.

The teaching of real property law has traditionally involved a central and conceptual focus on the doctrines of tenure and estates and their genesis, coupled with the framework of the Torrens system as developed in the nineteenth century, that is; as a paper-based system.<sup>15</sup> In Australia, the *Mabo*<sup>16</sup> decision suddenly brought life to the otherwise sterile and ostensibly historical doctrines of tenure and estates, and the advent of electronic titling and advanced survey technologies has resulted in fundamental changes to the Torrens system<sup>17</sup> and new forms of title.<sup>18</sup>

For the contemporary property practitioner, electronic titling and the risks associated with digital signatures and the online environment<sup>19</sup> have arguably superseded issues uppermost in the minds of the paper-based practitioner. While it appears as though fraud is in fact less prevalent under the digital, as compared to the paper-based, system,<sup>20</sup> the forthcoming move to a national e-conveyancing system still requires a focus on issues of digital security in terms of security of title.

Digitisation of title also represents a vastly expanded capacity for recognition of a wider variety of property interests than permitted at common law.<sup>21</sup> However, the property interests of private individuals that are capable of registration under the contemporary Torrens system remain relatively static. Interestingly however, the extent of those interests is arguably narrowed as a consequence of changes in the way in which Australian law understands 'land'. While the fee simple remains the largest estate known to the law, the land in respect of which it exists is not as extensive as it once was under the common law.<sup>22</sup> The fee simple estate no longer necessarily includes riparian

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15 This framework is reflected in property law texts, eg, P Butt, *Land Law*, 6th ed. Thomson Lawbook Co, 2010; B Edgeworth, C Rossiter, M Stone and P O'Connor, *Sackville and Neave: Australian Property Law*, 8th ed, LexisNexis Butterworths, Sydney, 2008; A Bradbook, S MacCallum, A Moore and S Grattan, *Australian Real Property Law*, 5th ed, Thomson Reuters Lawbook Co, 2011; S Hepburn, *Principles of Property Law*, 3rd ed, Routledge-Cavendish, 2006; J Tooher and B Dwyer, *Introduction to Property Law*, 5th ed, LexisNexis, 2008.

16 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1; 66 ALJR 408; BC9202681.

17 Such as the automated titling system pioneered in Queensland in the Land Title Act 1994 (Qld). E-conveyancing is presently being trialed, and has been supported by the Council of Australian Governments for some time: National Electronic Conveyancing System <<http://www.necs.gov.au/>> (accessed 30 August 2012).

18 For example, volumetric title, see Land Title Act 1994 (Qld) s 48D.

19 R Low, 'Opportunities for Fraud in the Proposed Australian National Electronic Conveyancing System: Fact or Fiction?' (2006) *Murdoch University Electronic Journal of Law* 225; S Christensen and A Stickley, 'Electronic Title in the New Millennium' (2000) 4(2) *The Flinders Journal of Law Reform* 209; L Griggs, 'Torrens Title in a Digital World' (2001) 8 (3) *Murdoch University Electronic Journal of Law*; R Low and E Foo, 'The susceptibility of digital signatures to fraud in the National Electronic Conveyancing System: An analysis' (2009) 17 *APLJ* 303.

20 Low, *ibid.*

21 B Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 (2) *MonLR* 388.

22 Increasingly the land owner's fee simple estate is subject to statutory rights, restrictions and responsibilities (statutory RRRs). For a discussion of the continued utility of the Torrens

rights,<sup>23</sup> minerals,<sup>24</sup> geothermal resources<sup>25</sup> or carbon sequestration.<sup>26</sup> While not all of these rights are new, some (eg, mining rights) have taken on new resonance in light of Australia's mining boom and the coal seam gas 'rush'.<sup>27</sup>

While removing 'ownership' of these formerly integral components of land, the state has created various rights in them: rights to water, minerals, geothermal resources and carbon sequestration. Such interests may now exist in the context of property law (or real property law) but also in terms of emerging fields of law such as water law, mining energy and resources law, climate change law, and the now somewhat 'old hat' environmental law. Interestingly, in each of these areas there is an overlap with other areas of law including international law, indigenous peoples and the law, cultural heritage law and native title. This overlap illustrates the increasingly complex and interconnected context of property law. Indeed there is debate over the extent to which some of these interests can be characterised as proprietary.<sup>28</sup> This in turn calls into question the contemporary utility of our common law understanding of property itself.

The urban context for real property has also changed markedly in recent years, resulting in increasingly complex legislation to deal with higher density housing<sup>29</sup> and more specific types of housing use (eg, retirement villages). As

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register in the light of these statutory RRRs see S Christensen and W D Duncan, 'Aligning sustainability and the Torrens register: Challenges and recommendations for reform' (2012) 20 *APLJ* 112.

- 23 J Gray, 'Legal approaches to the ownership, management and regulation of water from riparian rights to commodification' (2006) 1(2) *Transforming Cultures eJournal*; Water Act 2000 (Qld); Water Management Act 2000 (NSW); Water Act 1912 (NSW); Water Act 1989 (Vic); Natural Resources Management Act 2004 (SA); Rights in Water and Irrigation Act 1914 (WA); Water Management Act 1999 (Tas); Water Act 2009 (NT).
- 24 A J Bradbrook, 'The Relevance of the Cuius est Solum Doctrine to the Surface Owners' Claims to Natural Resources Located Above and Beneath the Land' (1988) 11 *Adel LR* 462; Minerals (Acquisition) Act (NT); Mining Act 1992 (NSW); Mineral Resources Act 1989 (Qld); Mining Act 1971 (SA); Mineral Resources Development Act 1995 (Tas); Mineral Resources (Sustainable Development) Act 1990 (Vic); Mining Act 1978 (WA).
- 25 Mining Act 1992 (NSW); Geothermal Energy Act 2009 (NT); Geothermal Exploration Act 2004 (Qld); Petroleum Act 2000 (SA), Petroleum and Geothermal Energy Act 2000 (SA); Mineral Resources Development Act 1995 (Tas); Geothermal Energy Resources Regulations 2005 (Vic); Petroleum and Geothermal Energy Resources Act 1967 (WA).
- 26 S Hepburn, 'Carbon Rights as New Property: The Benefits of Statutory Verification' (2009) 31 *SydLR* 239; N Durrant, 'Carbon Capture and Storage Laws in Australia: Project Facilitation or a Precautionary Approach?' (2010) 18 (4) *Environmental Liability Journal* 148; Greenhouse Geological Sequestration Act 2008 (Vic); Greenhouse Gas Storage Act 2009 (Qld).
- 27 K Galloway, 'Landowners' vs Miners' Property Interests: The Unsustainability of Property as Dominion' (2012) 37(2) *AltLJ* 1.
- 28 See, eg, the discussion in Hepburn, above n 26; M Crommelin, 'The Legal Character of Resource Titles' (1998) 17(1) *AMPLJ* 57; Gray, above n 23; M Crommelin, 'Mining and Petroleum Titles' (1988) 62 *ALJ* 863.
- 29 For example, in 2008–09, 29% of building approvals in Australia were for units or semi-detached dwellings: see National Housing Supply Council *State of Supply Report*, 2010, <[http://www.nhsc.org.au/state\\_of\\_supply/2009\\_ssr\\_rpt/sosr\\_ch6.html](http://www.nhsc.org.au/state_of_supply/2009_ssr_rpt/sosr_ch6.html)> (accessed 30 August 2012); R Kennedy and L Buys, 'Dimensions of Liveability: A Tool for Sustainable Cities', Paper delivered at *SB10mad Sustainable Building Conference*, Madrid, 28–30 April, 2010; G Bugden, 'Strata and Community Titles in Australia — Issues 1 Current Challenges', Paper delivered at *Strata and Community Title in Australia for the 21st Century Conference*, Griffith University, July 2005.

a consequence, community titles legislation has become more sophisticated in terms of the kinds of interests available.<sup>30</sup> For example, supported by highly specialised digital geospatial equipment, Queensland's volumetric plan<sup>31</sup> creates a lot 'in mid air'. The types of interest provided for in legislative schemes also extend beyond the fee simple: for example, management rights that are tied to a lot entitlement.<sup>32</sup>

Community titles cannot be considered in terms of proprietary interests alone, and all schemes include constraints on use expressed as by-laws and covenants, as well as dispute resolution mechanisms. The latter in particular recognise the social context of property.<sup>33</sup> This is reflected also in the regulatory framework surrounding special types of housing, such as retirement villages<sup>34</sup> and residential tenancies. In these cases, property law can be understood to intersect with consumer protection law and to incorporate forms of alternative dispute resolution.

In each of these domains of the law of real property, issues of sustainability also arise. Sustainability is, perhaps, the unifying theme throughout the sometimes radical changes in the law in recent years. Since the Brundtland Report there has been a focus on sustainable development internationally, and historically the law has absorbed this notion within the context of environmental law.<sup>35</sup> While sustainable development arguably takes on an economic flavour reflecting liberalism's roots,<sup>36</sup> there are also wider environmental sustainability issues at stake in the context of real property law.<sup>37</sup> The question is whether property law has the capacity, as presently conceptualised and taught, to deal with the challenges of land use including land degradation;<sup>38</sup> urban decay and social inclusion; biodiversity and efficient

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30 Strata Schemes (Freehold Development) Act 1973 (NSW); Strata Schemes Management Act 1966 (NSW); Body Corporate and Community Management Act 1997 (Qld); Strata Titles Act 1988 (SA); Strata Titles Act 1998 (Tas); Subdivision Act 1988 (Vic); Owners Corporations Act 2006 (Vic); Strata Titles Act 1995 (WA).

31 Land Title Act 1994 (Qld) s 48D.

32 See discussion in Bugden, above n 29.

33 G Bugden, 'Strata and Community Titles in Australia — Issues 2 Future Directions and Challenges', Paper delivered at Strata and Community Title in Australia for the 21st Century Conference, Griffith University, July 2005, p 8; C Sherry, 'A bigger strata footprint: are we aware of the implications?', Paper delivered at Strata and Community Title in Australia for the 21st Century Conference 2011, Gold Coast, 7–9 September 2011.

34 Retirement Villages Industry Code of Practice (ACT); Retirement Villages Act 1999 (NSW); Retirement Villages Act 1995 (NT); Retirement Villages Act 1999 (Qld); Retirement Villages Act 1987 (SA); Retirement Villages Act 2004 (Tas); Retirement Villages Act 1986 (Vic); Retirement Villages Act 1992 (WA).

35 P Carruthers, S Mascher and N Skead, 'Property and Sustainability in Context' in P Carruthers, S Mascher and N Skead (Eds), *Property and Sustainability: Selected Essays*, Thomson Reuters, 2011, p 1.

36 G Leane, 'Environmental Law's Liberal Roots: (Not) a Green Paradigm' in N Rogers (Ed), *Green Paradigms and the Law*, Southern Cross University Press, 1998, p 1.

37 L Godden and M Tehan, 'A Sustainable Future for Communal Lands, Resources and Communities' in L Godden and M Tehan (Eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures*, Routledge, 2010, pp 1, 3.

38 N Graham, 'Property and Adaptation: The Question of Coastal Erosion' in P Carruthers, S Mascher and N Skead (Eds), *Property and Sustainability: Selected Essays*, Thomson Reuters, 2011, p 39.

and just resource allocation<sup>39</sup> (to name a few).

In terms of personal property, the focus of teaching has traditionally rested upon the different categories of personal property and the variety of security interests that can be held. The nature and extent of these categories is presently under examination in Australia, for example, in relation to copyright in the digital context.<sup>40</sup> The recent *Optus* decision<sup>41</sup> highlights the difficulty of applying centuries-old concepts to the contemporary digital environment. Likewise, questions have been raised over ‘ownership’ of so-called ‘virtual property’<sup>42</sup> where there is a market in such ‘property’, yet a limited understanding of its categorisation within the traditional property law framework.<sup>43</sup>

Likewise, the essence of personal property security interests has altered fundamentally with the passage of the Personal Properties Security Act 2011 (Cth). The impact of this Act is not limited to an understanding of creation of property interests, but extends to fundamental aspects of company law, contract law and equity thus again illustrating the breadth of application of property law within the law as a whole.

Such radical changes to laws affecting real and personal property, in particular by the proliferation of legislation in recent years, would normally be expected to be a part of law’s evolution. Indeed in each case, it could perhaps be argued that a new or separate field of law has emerged. These changes however have wider implications for property law as a whole. They affect not just the rules about property interests and how they manifest; they challenge our understanding of the nature of property itself. The highly regulated nature of society in the twenty-first century means that increasingly there is no such thing as a ‘pure’ property right unfettered by rules and regulation. Such regulation has likewise had an effect on the practice of property law.

These examples illustrate the limitations of property law to sustain cultural, social and economic imperatives. Importantly, in terms of real property each of these domains is related also to the sustainability of the environment, widely recognised as a central concern for contemporary society and, of course, a concern central to the future.

In terms of what our graduates know and are able to do, whether they are equipped to practise in this complex regulatory environment and whether they have the capacity to generate creative solutions using property law, the question of what we teach and how becomes central to the capacity of our graduates to deal with the challenges of the twenty-first century.

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39 M Davies, *Property: Meanings, Histories, Theories*, Routledge, 2007, p 2.

40 Australian Law Reform Commission Copyright Inquiry <<http://www.alrc.gov.au/inquiries/copyright/terms-reference>> (accessed 30 August 2012).

41 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300; 285 ALR 157; [2012] FCA 34; BC201200207.

42 Online Game Theft Earns Real-world Conviction’ *The Telegraph* (online), 1 February 2012, <<http://www.telegraph.co.uk/technology/video-games/9053870/Online-game-theft-earns-real-world-conviction.html>> (accessed 30 August 2012).

43 L Bennet Moses, ‘The Applicability of Property Law in New Contexts: From Cells to Cyberspace’ (2008) 30 *SydLR* 639; J M Moringiello, ‘What Virtual Worlds Can Do for Property Law’ (2010) 62 *Florida Law Review* 159.

## **The project**

### **Methodology and response rate**

The survey of property law teachers undertaken in this study complies with the National Health and Research Council of Australia's National Statement on Ethical Conduct in Human Research. Institutional ethics approval for the survey was obtained from the Human Research Ethics Committees of both the University of Western Australia and James Cook University.

Information for the project was gathered by way of an anonymous online survey. Emails were sent to the property law teachers of all Australian law schools inviting them to participate in the survey. Apart from the first introductory section dealing with general information regarding the degree structure, the survey was divided into four sections dealing with: teaching methods; unit content; skills acquisition; and assessment and outcomes. The survey also included open ended questions inviting participants to comment further on: desirable changes in the teaching and assessing of property law and any barriers to implementing those changes; and, more generally, on the challenges of teaching property law in the twenty-first century. A total of 18 responses were received from 14 different universities.

### **Results — teaching property law: what we do now**

#### **General information: unit structure, teaching format and online delivery**

The structure for the teaching of the compulsory property law unit varies considerably across the different universities surveyed. For example, although in most universities the unit is taught over two semesters (67% of respondents), in a number of universities it is taught in one semester and in two of the respondent universities the unit is taught over three semesters. In some universities the content is delivered as part of a property and trusts or property and equity and trusts unit and in other universities the content is delivered over three semesters as Property Law, Land Law and Personal Property. Inevitably, these and other differences give rise to differences in the precise content of the compulsory property law unit/s across the universities. However, despite these differences, the survey revealed interesting and valuable information.

#### **Unit content**

The survey questionnaire asked respondents a number of very specific questions regarding the precise content of the compulsory property law unit. In particular, respondents were asked to indicate how long, in terms of hours of tuition, was spent on particular subject areas.

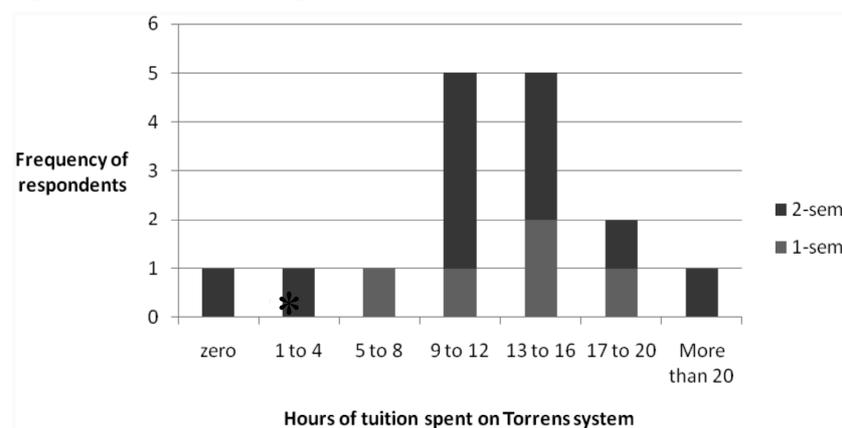
##### *Torrens system*

The authors contemplated that the hours of tuition spent on the Torrens system would be greater than the hours spent on other areas. Accordingly, the question regarding the Torrens system was asked separately from the other areas and provided for a wider range of tuition hours as alternative answers.

Figure 1 indicates the hours of tuition spent on the Torrens system. The two respondents who indicated zero hours or 1–4 hours respectively may be

discounted.<sup>44</sup> The majority of respondents indicate: 9–12 hours (36%) or 13–16 hours (36%) of tuition on the Torrens system with a further 21% of respondents indicating tuition of 17 or more hours. Given the fundamental importance of the Torrens system to land law in Australia, this emphasis on the teaching of the Torrens system is not surprising.

**Figure 1: The hours of tuition spent on the Torrens system**



#### *Property law topics other than Torrens*

Table 1 provides the details of the survey results for the hours of tuition on specified property law topics other than the Torrens system. The property law topics are arranged from the topic with the greatest mean hours of tuition to the topic with the least mean hours of tuition. The table also provides information on the general range in hours of tuition for each topic.<sup>45</sup>

The data reveals the clumping of results around particular hours of tuition for each topic. This suggests that property law teachers are in broad agreement as to how much time and focus should be spent on particular areas. However, despite this general agreement, there are some clear outliers in the results. The outliers tend to spend significantly longer on a particular area than the majority of respondents. The reasons for this may vary, though typically where this occurs it corresponds to those universities which teach property law over two or more semesters and accordingly have more time than others to devote to particular areas. Alternatively, it may be due to the composition of the compulsory property unit. As noted earlier, in some universities the unit is taught as part of a Property and Equity unit. It would be expected that a stronger focus on equity areas would be revealed in the responses from these universities.

<sup>44</sup> The respondent who indicated zero hours teaches at a university that offers property law over two semesters. This respondent is not involved in the teaching of the land law component of the unit. The respondent who indicated one to four hours of tuition was not, at the time of the survey, involved in teaching property law within a LLB or JD and is identified by \* on Figure 1.

<sup>45</sup> As noted above in 44, two of the respondents' data may skew the results regarding the hours of tuition spent on the particular topics covered in property law. Accordingly, these respondents' data has only been tabulated where appropriate in Table 1.

**Table 1: The mean hours of tuition for specified topics in property law, ranked from largest to smallest**

| Topic  | Range in hours of tuition   | Mean hours of tuition |
|--|---|-----------------------|
| Leases   | 57% spend 3-6 hours.<br>43% spend more than 7 hours.                    | 6.07                  |
| Mortgages  | 71% spend 2-5 hours,<br>29% spend 6 or more hours.                      | 4.64                  |
| Nature, concept and perspectives of property                   | 79% spend 2-4 hours<br>14% spend 6 hours<br>7% spend 10 or more hours.  | 3.92                  |
| Acquisition and transfer of real property                      | 71% spend 2-4 hours.<br>29% spend 5-7 hours                             | 3.71                  |
| Easements  | 50% spend 2-3 hours<br>50% spend 4-5 hours                              | 3.42                  |
| Co-ownership   | 86% spend 2-4 hours<br>14% spend 5-6 hours                              | 3.21                  |
| Native title   | 71% spend 2-4 hours<br>14% spend 6-7 hours<br>14% spend 1 or less hours | 2.93                  |
| General law priority rules including Deeds registration system | 71% spend 1-2 hours<br>21% spend 3-5 hours<br>7% spend 7 hours          | 2.57                  |
| Restrictive covenants  | 64% spend 2-4 hours<br>21% spend 1 or less hours<br>7% spend 5 hours    | 2.5                   |
| Physical dimensions of real property                           | 57% spend 2-4 hours<br>35% spend 1 or less hours<br>7% spend 9 hours    | 2.5                   |
| Doctrine of tenure and doctrine of estates                     | 77% spend 1-2 hours<br>15% spend 4 hours<br>7.5% spend 10 hours         | 2.38                  |
| Possession of real property including adverse possession       | 64% spend 1-2 hours<br>36% spend 4 hours                                | 2.36                  |
| Origins and nature of equitable interests                      | 71% spend 1-2 hours<br>21% spend 4-5 hours<br>7% spend 0 hours          | 2                     |
| Acquisition, transfer and priority of personal property        | 64% spend 1 hour or less<br>29% spend 2-3 hours<br>7% spend 10 hours    | 1.92                  |
| Possession of personal property including finders rights       | 64% spend 2-4 hours<br>36% spend 1 hour or less                         | 1.86                  |
| Conditional gifts and future interests                         | 71% spend 1 or less hours<br>21% spend 2 hours<br>7% spend 4 hours      | 1.21                  |
| Profits a pendre   | 93% spend 1 or less hours<br>7% spend 3 hours                           | 0.93                  |
| Strata title   | 71% spend 1 or less hours<br>29% spend 2-3 hours                        | 0.86                  |
| Rule against perpetuities                                      | 86% spend 1 or less hours<br>14% spend 2-3 hours                        | 0.57                  |

A few observations may be made regarding Table 1. First, and as may be expected, the areas with the highest number of hours of tuition are the land

transactions: leases and mortgages. Second, the explanation for results which are outside the norm may reflect differences in state's legislation. For example, in some jurisdictions the rights of an adverse possessor constitute an express exception to the registered proprietor's title.<sup>46</sup> In these jurisdictions it may be appropriate to devote more time to adverse possession than in those states where the adverse possession exception is more restricted.<sup>47</sup> Third, Table 1 indicates that the areas with the least hours of tuition are: conditional gifts and future interests; profits a prendre; strata title and the rule against perpetuities. These topics may be described as falling into one of two groups, either: the older areas of property law the current relevance of which is increasingly questioned; and new developing areas which have only recently entered the target scope of property law teachers and which may in the future enjoy a higher profile in property law units.

### *Personal property*

An aim of the survey was to ascertain the degree to which personal property law is taught in Australia. To some extent, this information is revealed in Table 1, particularly in the questions regarding the 'acquisition, transfer and priority of personal property' and 'possession of personal property including finder's rights', though personal property law may also be covered in the 'nature, concept and perspectives of property' and 'co-ownership'. However, in order to obtain more accurate information, two further specific questions were asked of respondents regarding the teaching of personal property law: 'Please indicate what aspects of personal property law are covered in this unit'; and 'Are aspects of personal property law covered in an alternative compulsory unit? If yes, please specify'.

The responses to the first of these questions were wide ranging. At one university there is extensive coverage of personal property as effectively a whole 13 week semester is devoted to property theory and personal property.<sup>48</sup> On the other hand, one respondent indicates that no aspects of personal property law are covered in the unit and a number of others indicate minimal coverage. For example, two respondents mention the property torts only and one respondent indicates that personal property is raised for comparative purposes in relation to real property. A number of respondents (36%)<sup>49</sup> indicate that the coverage of personal property law is limited to the notion of

46 The exception in favour of adverse possessors in Victoria and Western Australia is the most robust of all the jurisdictions. In these states the position of an adverse possessor of Torrens land equates to the position of an adverse possessor of general law land: Transfer of Land Act 1958 (Vic) s 42(2)(b) and Transfer of Land Act 1893 (WA) s 68(1). In Tasmania the principle of adverse possession also applies to Torrens land, though the position of the adverse possessor is not as secure as in Victoria and Western Australia: Land Titles Act 1980 (Tas) s 40(3)(h) and s 138W(1).

47 A more restricted exception in favour of adverse possessors applies in Queensland and South Australia: Land Title Act 1994 (Qld) s 185(1)(d) and Real Property Act 1886 (SA) ss 80A–80I. The New South Wales exception appears to be the most limited of all the jurisdictions: Real Property Act 1900 (NSW) Pt 6A ss 45B–45K.

48 At this university another semester is devoted to land law. Another respondent has indicated that 'all' aspects of personal property are covered in the unit. This would appear to indicate a comprehensive coverage of personal property law.

49 This figure excludes the two respondents who have extensive coverage of personal property law.

possession, finder's rights and bailment.

The authors appreciate that this data needs to be treated with some caution. As noted earlier, in some of the participant law schools, compulsory property law units are taught over two or three semesters in different units. It may be that personal property law is covered in an alternative unit and the respondent is not aware of the extent of coverage in that unit. The second question was included in the survey to address this possibility. Responses to the second question revealed a limited, and indeed entirely expected, level of coverage of personal property law in other compulsory units including tort, contract, trusts and corporations or commercial law. It may tentatively be concluded, therefore, that for most respondents there is only a limited coverage of personal property law in the compulsory property law unit/s or in other compulsory unit/s. Important aspects of personal property law including title to and transfer of personal property, and personal property securities legislation do not appear to be covered in detail in a compulsory property unit. This is not to say, however, that these important areas are not covered in an option unit, for example, commercial law, consumer law or personal property.<sup>50</sup>

#### *Other property law topics*

In an attempt to identify all areas of property law covered in compulsory property units that may not already have been revealed by the earlier questions, a final 'mopping up' question was asked of respondents: 'To what extent are other areas, not mentioned above, covered in the unit?'

The responses provided are enlightening and reveal the breadth and depth of topics that are being taught in compulsory property law units in Australia. For example:

Unjust enrichment, property torts & remedies, loss of personal property rights, security interests and the PPSA, bailment.

Constructive trusts in relationships get 4 hours. Although we don't teach it, we set an assignment on strata and community title which gave the students a pretty good understanding of the basics of that area. Estoppel is also taught.

We have a whole course dedicated to the critique of property in terms of its role in race class and gender. Examples used in this course include personal, property, native title, acquisition of sovereignty, debt etc, as well as land and intellectual property. This course critiques Locke and possessory individualism using Marx, Neo-Marx, Feminism and critical race theory, and Hegel.

Some aspects of planning and development law; heritage law; Crown law/state leasehold. Contractual licences — revocation and enforcement against 3Ps . . .

Of particular interest is the depth of theoretical material indicated by one respondent who offers a whole course on the critique of property by reference to the work of Locke, Marx, Neo-Marx, feminist theorists and Hegel; and the inclusion, by another respondent, of some aspects of planning and development law, heritage law, and Crown law/state leaseholds.

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<sup>50</sup> In some universities these subjects may, in fact, be compulsory units.

### The 10 most important property law cases

Reminiscent of Nick Hornby's top five favourite records of all time,<sup>51</sup> the survey sought to identify those cases that were considered by the respondents to be the most important property law cases. It was considered that such a question would provide further insight into what property law teachers are currently teaching and what areas of property law are considered most important. The list of cases appears at Table 2.

**Table 2: What do you consider to be the 10 most important cases that should be covered in the unit?**

| No of responses                         | Cited cases   |
|---|---|
| 12 responses                            | <i>Mabo v Queensland (No 2)</i> (1992) 175 CLR 1  |
| 7 responses                             | <i>Breskvar v Wall</i> (1971) 126 CLR 376; <i>Bahr v Nicolay (No 2)</i> (1988) 164 CLR 604; <i>Radaich v Smith</i> (1959) 101 CLR 209   |
| 6 responses                             | <i>Corin v Patton</i> (1990) 169 CLR 540; <i>Frazer v Walker</i> [1967] 1 AC 569  |
| 5 responses                             | <i>Re Ellenborough Park</i> [1956] 1 Ch 131   |
| 4 responses                             | <i>Tulk v Moxhay</i> (1848) 41 ER 1143; <i>Wik Peoples v Queensland</i> (1996) 187 CLR 1  |
| 3 responses                             | <i>Victoria Park Racing and Recreation Grounds Co Ltd v Taylor</i> (1937) 58 CLR 479; <i>Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)</i> (1965) 113 CLR 265   |
| 2 responses                             | <i>Cowell v Rosehill Racecourse Co Ltd</i> (1937) 56 CLR 605; <i>IAC (Finance) Pty Ltd v Courtenay</i> (1963) 110 CLR 550; <i>Walsh v Lonsdale</i> (1882) 21 Ch D 9; <i>Yanner v Eaton</i> (1999) 201 CLR 351; <i>Clos Farming Estates Pty Ltd v Easton</i> (2002) 11 BPR 20,605; <i>Milirrpum v Nabalco Pty Ltd</i> (1971) 17 FLR 141; <i>JA Pye (Oxford) Ltd v Graham</i> [2003] 1 AC 419   |
| 1 response                              | <i>Barry v Heider</i> (1914) 19 CLR 197; <i>Black v Garnock</i> (2007) 230 CLR 438; <i>Chan v Cresdon Pty Ltd</i> (1989) 168 CLR 242; <i>Farah Constructions Pty Ltd v Say-Dee Pty Ltd</i> (2007) 230 CLR 89; <i>Garcia v National Australia Bank Ltd</i> (1998) 194 CLR 395; <i>J and H Just (Holdings) Pty Ltd v Bank of NSW</i> (1971) 125 CLR 546; <i>Lysaght v Edwards</i> (1876) 2 Ch D 499; <i>Rice v Rice</i> (1853) 61 ER 646; <i>Trustees of the Property of Cummins v Cummins</i> (2006) 227 CLR 278; <i>Walton's Stores (Interstate) Ltd v Maher</i> (1988) 164 CLR 387 |
| Equitable interests in land /priorities |   |
| Mortgages                               | <i>ANZ Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd</i> (1978) 139 CLR 195; <i>Forsyth v Blundell</i> (1973) 129 CLR 477; <i>Kreglinger v New Patagonia Meat</i> [1914] AC 25; <i>Pendlebury v Colonial Mutual Life Assurance Society Ltd</i> (1912) 13 CLR 676; <i>Wily v Endeavour Health Care Services Pty Ltd</i> [2003] NSWCA312   |
| Torrens exceptions to indefeasibility   | <i>Bogdanovic v Koteff</i> (1988) 12 NSWLR 472; <i>Davis v Williams</i> (2003) 11 BPR 21,313; <i>Friedman v Barrett</i> [1962] Qd R 498; <i>Hillpalm Pty Ltd v Heaven's Door Pty Ltd</i> (2004) 220 CLR 472; <i>Loke Yew v Port Swettenham Rubber Co Ltd</i> [1913] AC 491; <i>Tessmann v Costello</i> [1987] 1 Qd R 283  |

51 N Hornby, *High Fidelity*, Victor Gollancz Ltd, Great Britain, 1995.

|                                     |  |
|-------------------------------------|--|
| Leases                              | <i>Gunland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd</i> (2008) 234 CLR 237; <i>Jones v Bartlett</i> (2000) 205 CLR 156; <i>KJRR Pty Ltd v Commissioner of State Revenue (Vic)</i> (1999) 99 ATC 4335; <i>Progressive Mailing House Pty Ltd v Tabali Pty Ltd</i> (1985) 157 CLR 17; <i>Spathis v Hanave Investment Co Pty Ltd</i> [2002] NSWSC 30 |
| Easements and restrictive covenants | <i>Elliston v Reacher</i> [1908] 2 Ch 374; <i>Gallagher v Rainbow</i> (1994) 179 CLR 624; <i>Moncrieff v Jamieson</i> [2007] 1 WLR 1620; <i>Rogers v Hosegood</i> [1900] 2 Ch 388; <i>Ward v Kirkland</i> [1967] Ch 194  |
| Tenure and possession of land       | <i>A-G (NSW) v Brown</i> (1847) 1 Legge 312; <i>Asher v Whitlock</i> (1865) LR 1 QB 1; <i>Mulcahy v Curramore Pty Ltd</i> [1974] 2 NSWLR 464   |
| Fixtures                            | <i>Belgrave Nominees Pty Ltd v Barlin Scott Air Conditioning (Aust) Pty Ltd</i> [1984] VR 947; <i>National Australia Bank Ltd v Blacker</i> [2000] FCA 1458; <i>Palumberi v Palumberi</i> (1986) 4 BPR 9106  |
| Co-ownership                        | <i>Forgeard v Shanahan</i> (1994) 35 NSWLR 206; <i>Ryan v Dries</i> (2002) 10 BPR 19,497; <i>Wright v Gibbons</i> (1994) 78 CLR 313  |
| Concept of property                 | <i>Moore v Regents of the University of California</i> (1990) 793 P 2d 479; <i>Millar v Taylor</i> (1769) 98 ER 201  |
| Possession of personal property     | <i>Parker v British Airways Board</i> [1982] 1 QB 1004; <i>Tottenham Investments Ltd v Carburettor Services Pty Ltd</i> (1994) Aust Torts Reports 81-292   |
| Other                               | <i>Lord Bernstein of Leigh v Skyviews &amp; General Ltd</i> [1978] QB 479; <i>Re Kemesys-Tynte</i> [1892] 2 Ch 211; <i>Re Robertson</i> (unknown)  |

Perhaps the most interesting, and on one view, the most comforting, aspect of the list is the fact that the cases mentioned are entirely to be expected with few, if any, surprises. Generally, the cases represent well recognised and often seminal authorities for particular propositions of property law. This is also illustrated by the average age of the cases: apparently property law as taught at the respondent universities is relatively old law. There are few cases that are less than 20 years old, and many cases are significantly older than 20 years. Given the comments noted elsewhere in this article regarding the dynamic nature of property law in the twenty-first century, this focus on the old familiar case law may require a radical rethink.<sup>52</sup> The case list is, however, to a large extent self-explanatory and it is not proposed to comment in detail on the list of cases.

The case most frequently cited as one of the most important property law cases is *Mabo v Queensland (No 2)*.<sup>53</sup> This reflects the fundamental importance of *Mabo*, not just for its groundbreaking recognition of the existence of native title at common law as a burden on the Crown's radical

<sup>52</sup> The authors note, however, that the wording of the question: 'What do you consider to be the 10 most important cases that should be covered in the unit?' could operate to channel the responses towards the older, well established and more authoritative case law.

<sup>53</sup> (1992) 175 CLR 1; 107 ALR 1; 66 ALJR 408; BC9202681 (*Mabo*).

title, but also for the High Court's comments on the nature of Crown ownership of land, the doctrine of tenure and the concept of possessory interests in land.

The next series of cases which have been named as most important by seven (*Breskvar v Wall*<sup>54</sup> and *Bahr v Nicolay*<sup>55</sup>) and six respondents (*Corin v Patton*<sup>56</sup> and *Frazer v Walker*)<sup>57</sup> respectively, demonstrate the perceived significance of the Torrens system to the study of property law in Australia and, in particular, the existence of equitable interests in the Torrens system and the exceptions to indefeasibility of title. Indeed, the identification of equitable interests in land and/or the determination of priority disputes between interests are a common feature of the cases cited as evidenced in the references to: *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)*<sup>58</sup> with three responses; *IAC (Finance) Pty Ltd v Courtenay*<sup>59</sup> and *Walsh v Lonsdale*<sup>60</sup> each with two responses; and the extensive number of cases which received one response and may be classified as equitable interest/priority cases or cases which discuss the exceptions to indefeasibility of Torrens title.

Another case warranting particular mention is *Radaich v Smith*,<sup>61</sup> which was noted by seven respondents as being a most important property law case. This case also deals with the more fundamental aspects of property law including: the distinguishing feature between a lease and a licence; and the nature and ramifications of the grant of a proprietary interest in land.

### Results — teaching property law: what should we do in the future?

The survey results as to the current content and doctrinal focus of property law units at the respondent universities provide an important and useful benchmark against which property law teachers may compare and assess their curricula. Arguably, however, it is the responses to those questions in the survey directed at what property law teachers consider should be (but is currently not) taught in property law units that are most instructive. It is these responses that may be of most assistance in the rethinking and redesigning of property law curricula so as to prepare property law graduates for the changing property law environment in the twenty-first century. In order to answer the question of what we should do in the future it is necessary to examine not only the desired future content of property units but also any impediments to the incorporation of that content.

#### What should we be teaching?

In this regard, respondents were asked to indicate, first, what they saw 'as the new developing areas in property law' and, second, what property law areas they would like to teach but do not. These were open-ended questions. All

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54 (1971) (1971) 126 CLR 376; [1972] ALR 205; (1971) 46 ALJR 68; BC7100630.

55 (1988) 164 CLR 604; 78 ALR 1; 62 ALJR 268; BC8802595.

56 (1990) 169 CLR 540; 92 ALR 1; 64 ALJR 256; BC9002936.

57 [1967] 1 AC 569; [1967] 1 All ER 649; [1967] NZLR 1069; [1967] 2 WLR 411.

58 (1965) 113 CLR 265; [1966] ALR 775; (1965) 39 ALJR 110; BC6500350.

59 (1963) 110 CLR 550; [1964] ALR 971; (1963) 37 ALJR 350; BC6300600.

60 (1882) 21 Ch D 9; (1882) 46 LT 858.

61 (1959) 101 CLR 209; [1959] ALR 1253; (1959) 33 ALJR 214; BC5900200.

respondents answered the first question and all but one answered the second. Several common themes emerged from the responses.

#### *Personal property securities*

Half of the respondents identified personal property law and, in particular, personal property securities law, as an important developing area in property law. As indicated above, all but one of the respondents teach aspects of personal property in their property law unit/s. In some units the coverage is extensive while in others it is minimal, typically being limited to possession, finder's rights, bailment and proprietary torts. However, a close analysis of the survey responses indicates that in 2011 only four respondents taught the new commonwealth personal property securities regime in their property law unit. In two of these four institutions this coverage was minimal: '*some* personal property securities'; and '*notification* to student of new personal properties security regime'. One respondent indicated that this area is covered in an alternative securities related compulsory unit. It is fair to assume that the coverage of the topic in this unit would be considerable.

While the survey responses reveal a recognition of the increasing importance of 'asset protection' through personal property securities law which forms 'the foundations [sic] of commercial legal practice', to a large extent this recognition has not yet translated into curriculum content.<sup>62</sup> Half the respondents who answered the question relating to what they would like to teach but do not, identified personal property security law as such an area. The absence of this area from property law units may be due to the fact that personal property securities law is a relatively new phenomenon in Australia: the Personal Property Securities Act (Cth) only having been introduced in 2009. As a result property law teachers in Australia are perhaps still grappling with where and how to integrate this new area of property law into the curriculum. Regardless of the reasons, however, what is clear from the survey responses is that this is no longer an area of law that can be omitted from a law school's core programme.

#### *Natural resources and sustainability*

Perhaps of greater concern than the absence of personal property securities law from the property law curricula is the absence of proprietary aspects of natural resources law and sustainability. Eleven of the 16 respondents indicated that the recognition of property rights in natural resources and/or the intersection between property rights and sustainability are new developing areas of property law that are largely ignored in current property law units. Despite this, none of the respondents indicated that these areas are covered in their unit/s, with three indicating that these are areas they would like to cover.

As noted above, over the past few decades Australian law has slowly been unbundling private real property rights: limiting 'ownership' of minerals, water and geothermal resources as well as protecting vegetation, animal life and certain buildings, on private land.<sup>63</sup> Such rights now either vest in the state or represent a significant limitation on one's enjoyment in full of what was formerly part of the individual's private property. While there are often

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<sup>62</sup> These phrases have been extracted from a number of survey responses.

<sup>63</sup> See the discussion in the text concerning footnotes 21–43 above.

elective units offered to law students dealing with the myriad of other legal issues arising in relation to natural resources, whether the proprietary implications of these emerging areas of resources law is analysed is not known. What is evident, however, is that these implications are generally not dealt with in compulsory property law units.

Further, there is an ever-increasing global focus on environmentally, economically and socially sustainable development. In Australian law courses this focus is typically embedded within an environmental law unit which is usually an elective unit.<sup>64</sup> Importantly, however, there are also wider environmental sustainability issues at stake in the context of property law.<sup>65</sup> Again, the survey responses suggest that these issues are not taught in compulsory property law units.

#### *Strata and community title*

The third property law area singled out by five survey respondents as both a new developing area and also an area that they would like to teach in their property law unit/s is strata (or community) title. Although not a new area, strata title is an area of continued development and increasing importance as the affordability, flexibility and security of alternative forms of communal housing increase in popularity. In relation to strata title regulation, it has been suggested that 'Australia has led the world in this field'.<sup>66</sup> It is therefore somewhat surprising that, despite Australia being touted as an international leader in this area, it seems Australian law schools do not place much emphasis on this important, pervasive and developing area of property law. Indeed, as noted in the discussion on 'what we do now' and Table 1 above, the mean hours spent teaching strata title in property law units in the participant institutions is 0.86 with 53% of respondents not teaching this topic at all, 35% spending 1–2 hours and 12% spending 3 hours.

#### **Why are we not teaching what we should be teaching?**

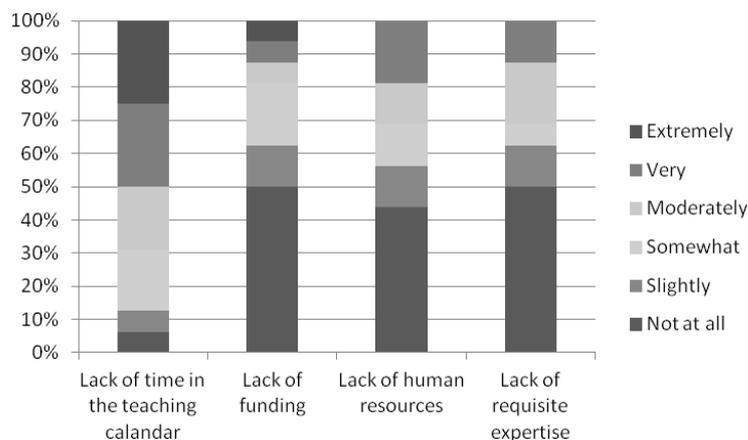
The common themes identified in the discussion regarding the important developing areas that property law teachers would like to introduce into their units indicate what we 'should' be teaching. The question that arises now is: what are the reasons for not teaching what we 'should' be teaching? Why have we not introduced those developing areas into the property law curricula? In order to provide answers to these questions respondents were asked, 'To what extent do the following factors act as a barrier to teaching new material in the unit?' Once again, as with other questions in the survey, the responses were fairly consistent. As reflected in Figure 2, while 'lack of funding'; 'lack of human resources' and 'lack of requisite expertise' were all cited by some respondents as barriers to introducing these topic areas into their unit/s, by far the most common reason given for not doing so was 'lack of time in the teaching calendar'. Twenty five percent of respondents stated lack of time as being an extreme barrier to teaching new material while 44% regarded it as influencing the introduction of new material very much (25%) or moderately (19%).

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64 Carruthers, Mascher and Skead, above n 35.

65 Godden and Tehan, above n 37, p 3.

66 P Butt, above n 15, at [2101].

**Figure 2: To what extent do the following factors act as a barrier to teaching new material in the unit.**

Interestingly, the 'lack of time in the teaching calendar' barrier was of relatively equal importance in universities that teach property law in just one semester or in those universities that teach the unit over two or more semesters. This would suggest that, despite the recognition of the new developing areas of property law and the desire to include them in the property law teaching programme, and regardless of whether property law is taught over one or two semesters, property law teachers are unable to shoehorn these topics into their curricula.

There are three possible explanations for this. The first explanation is that while property law teachers recognise the new developing areas of property law, these teachers are consciously prioritising other areas of property law as more important than these identified areas. This is unlikely to be the case. The survey question asked participants to identify new developing areas of property law. It is unlikely that a respondent would have identified an area that they considered relatively unimportant in response to this question. Further, the frequency with which the new developing areas were identified suggests that these areas are considered important by property law teachers generally.

The second explanation is historical practice and the reluctance by property law teachers to let go of existing content that has been taught for many, many years in order to make way for new developing topics. One can only surmise at the reasons for this reluctance. Perhaps like many university teachers, property law teachers do not relish the idea of discarding material traditionally considered highly relevant and that has taken many hours to develop and replacing it with new material that will also take many hours to develop.

The third explanation is the significant breadth of topics prescribed by the Priestley 11 requirements which leaves little room in a typical property law unit to introduce new material. Indeed, one of the respondents noted 'Can't

remove very much because of Priestley 11 requirements'.<sup>67</sup>

### **What should we exclude from our teaching?**

The authors anticipated that the respondents would identify the 'lack of time in the teaching calendar' barrier as a principal reason as to why new developing areas were not yet incorporated into the property law unit. The authors therefore sought to identify whether any property law topics currently being taught could be excluded. To this end, the authors included the following question in the survey: 'What areas do you think should/could be removed from the unit in order to accommodate the inclusion of developing areas?'

The responses to this question were wide-ranging and fall into one of three broad categories. First, a number of respondents consider their current unit/s to be entirely appropriate and indeed excellent: 'Happy with the course material' and 'None. Our three core property courses are excellent and cover more doctrine, theory, context, and critique than any other law school in Australia'.<sup>68</sup>

Second, some respondents indicate that only one or two specific topics could be removed from their unit/s. The topics identified in this second category of responses can be broken down into two groups: old property doctrines, for example, 'old system title', 'perpetuities' and 'conditional gifts & future interests'; and doctrines of diminishing relevance such as '[c]logging' and 'adverse possession'.<sup>69</sup> In relation to adverse possession, however, it is likely that in those jurisdictions in which adverse possession is expressly incorporated into the Torrens statutes as an unlimited exception to indefeasibility,<sup>70</sup> the doctrine continues to be regarded as a relevant and important area of law warranting inclusion in the property law curriculum.

The third broad category of responses recognises that significant changes could be made to the material covered in the property law units involved. For example, one respondent commented in response to this question:

Where do I start:-) We have gradually removed springing and shifting uses, legal contingent remainders, perpetuities, all of which do not help students understand land law. We could do less on leases as a lot of it is very easy and handle-turning. We don't need to do all the new 'indefeasibility for what-' cases because they are too complicated and will be a passing blip in history. We are moving to a one semester land law course which will remove a lot of material anyway. Ad poss, while interesting, is probably not necessary.<sup>71</sup>

Finally, it is worth pointing out that several respondents considered the continued inclusion of property law theory important. One respondent commented that 'without the conceptual understanding the developing areas are meaningless'.<sup>72</sup> While the authors unreservedly agree with this comment, as noted previously, it may be time for property law teachers to rethink precisely what the 'concept of property' entails.

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<sup>67</sup> Survey response.

<sup>68</sup> These quotes have been extracted a number of survey responses.

<sup>69</sup> These phrases have been extracted from a number of survey responses.

<sup>70</sup> These jurisdictions are Western Australia and Victoria and, to some extent, Tasmania.

<sup>71</sup> Survey response.

<sup>72</sup> Survey response.

## Conclusion

There is, it seems, a growing number of issues in property law that are increasingly important to the sustainability of our economy, society and environment. Responses of property law teachers to this survey indicate that they also see a growing importance of issues outside what seems to be a relatively standard curriculum; issues that they categorise as property law, but which do not seem 'important enough' to warrant replacing existing traditional content.

Why is this, and what sort of rationale might justify making the space in the property law curriculum?

It is possible that the contemporary issues in property law canvassed here might be seen as fragmenting the very 'content' of property law, into ever more specialised fields of law: mining and resources; water; community titles; housing; personal property securities; cyber law. If this were the case, then the argument for introducing these topics into the compulsory property law unit becomes somewhat weakened.

Alternatively, if we return to the very concept of property itself, it may be possible to reframe our understanding of what is property and how we understand it, utilising these contemporary issues as part of this conceptual fabric. In terms of the pressing needs of twenty-first century Australian society and environment, a redefined conceptual foundation may be required — a foundation that justifies reducing the focus on detailed content in property law units and develops a broader framework incorporating the cultural, social, environmental and economic triggers for our changing conceptions of property.