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A.R.Buck, The Making of Australian Property Law

Margaret McCallum
University of New Brunswick

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A. R. Buck, *The Making of Australian Property Law*. Sydney, N.S.W.: Federation Press, 2006. 176 pp.

Students in first year law in English-speaking common law schools in Canada follow a fairly standard curriculum, heavily weighted in favour of private law subjects such as torts, contracts and property, with criminal law, constitutional law, and perhaps a methods, theories or skills course rounding out their required courses. Most students find the content to be as they expected in courses in torts, contracts, criminal and constitutional law. These areas of law, after all, provide the law-related stories that are an increasing part of national and even international news. But many students find first year property a puzzle. They expect the course to deal with protecting one's property from others; buying and selling land; creating and marketing residential, commercial and recreational developments; or raising money on the security of land. Instead, students are presented with ideas of property rights and obligations that developed in England in the five hundred years following the Norman Conquest. Grappling with such abstractions as freehold and leasehold estates, reversions and remainders, or determinable and defeasible interests, students have little time to ponder why rules that developed in a very different time and place continue to shape the possibilities for structuring their client's business and family opportunities in the twenty-first century.

In Australia, it seems, based on my quick survey of law programmes online, most students beginning a university law programme will study torts and contracts but not property law. In upper years, they will take courses that treat land law separately from other aspects of property law, using texts that assume that land law in Australia is "peculiarly Australian." Andrew Buck includes this quotation, taken from the first page of A. Bradbrook, S. MacCallum, and A. Moore, *Australian Real Property Law*, in the preface to his monograph, *The Making of Australian Property Law*. (p. vii) He refers to other authors as well who have paid careful attention to "distinctively Australian adaptations of the inherited English law of real property." (p. viii) The emphasis on change rather than continuity may stimulate student questions about how the law they study came to be. Buck's book provides some answers. By placing legal developments in their social and economic context, Buck shows that law develops not according to its own internal logic, but is the product of human choices, often made to further a particular vision of how best to structure social and economic relations.

Buck has no quarrel with the description of Australian property law as distinctive. He opens his book with the assertion that “the feudal imprint on property in Australia had been ‘washed away’ by the early 1860s and that the decades of the early 19th century witnessed the making of a distinct Australian property law.” (p. viii, quotation marks in the original, no reference given) Buck’s concern is not the details of the distinctiveness, but the characterization of the relationship between property and law which emerged in early Australia. Reacting against the sometimes unstated assumption that changes in land law were a necessary shedding of feudal vestiges in an emerging capitalist economy, Buck argues that one can best understand property law in Australia “by reference, not to the dominant mode of production, but to the relationship between property law and society.” (p. 139) Based on the debates in the legislature and the popular press concerning various proposals for reform of the law governing property rights in New South Wales, Buck’s account of the making of Australian property law diverges from earlier accounts in two main ways. First, Buck argues that property law in Australia developed its distinctive character earlier than generally believed, and second, that this development was the product of a distinctive logic of property that Buck calls possessive egalitarianism. Thus, Buck asserts, “in mid-19th century New South Wales the ‘ghost’ of feudalism was giving way to the ‘spectre’ of egalitarianism.” (p. 139)

Buck’s reference to the ‘spectre’ of egalitarianism is, I assume, an oblique reference to the first sentence of the *Communist Manifesto*, written by Karl Marx and Friedrich Engels, and first published in 1848. It begins: “A spectre is haunting Europe—the spectre of communism.” The ‘ghost’ of feudalism invokes the language used by A. D. Hargreaves and B. A. Helmore, in *An Introduction to the Principles of Land Law (New South Wales)* (Sydney, NSW, 1963) in discussing *Attorney-General v. Brown* (1847), a case which Buck says had “profound implications for the development of Australian property law.” (p. vii) Chief Justice Brennan cited *AG v. Brown* in the High Court decision in *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1, as authority for the proposition that the English doctrine of feudal tenures was the foundation of real property law in Australia. In *Mabo*, the High Court departed from two hundred years of precedent and policy in declaring that native title could, and in some cases, did, survive the British assertion of sovereignty over the Australian continent. Although the Crown acquired radical title to the Australian continent by its assertion of sovereignty at international law, it acquired

that title subject to the pre-existing rights of the Aborigines and Torres Strait Islanders.

The aftermath of *Mabo* included the *Native Title Act*, which attempted to fit property rights derived from pre-colonial occupation of land into the property law regime of modern Australia. This legislation was significantly amended after the decision in *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1, suggested that native title was not necessarily extinguished by the grant of pastoral leases. Buck quotes Justice Gummow's observation in the *Wik* decision that "lawyers have been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding." Nonetheless, in *Mabo*, the High Court corrected an error of history while maintaining what Chief Justice Brennan referred to as "the skeleton of principle which gives the body of our law its shape and internal consistency." Buck quotes Chief Justice Brennan's statement in *Mabo* that it was "far too late in the day" to destroy that skeleton. Yet Chief Justice Brennan managed to make the skeleton support native title by drawing on doctrines developed in the English Court of Chancery—just as legal title could be burdened with rights recognized in the Court of Chancery, so the Crown's radical title could be burdened with native title. Law is the product, but not the prisoner of history.

The *Mabo* decision, while it could not undo the injustice of the many acts of colonial dispossession of Aborigines and Torres Strait Islanders, at least exposed the human agency behind the dispossession. It was not the feudal property law that the colonists brought with them that dispossessed the original Australians of their land, but the colonists' inability to perceive these inhabitants as rights holders, with claims more valid than their own. Buck's second chapter, called "The Empire of Property," deals directly with the dispossession of Australia's original inhabitants. In it, Buck "examines the process by which market-oriented notions of property as a tradeable commodity were displacing alternative notions that supported customary and communal property rights." (p. 14) This process was underway in England, with enclosures of the commons and denial of customary rights such as the right to glean in another's field after harvest, at the same time as English law was introduced into the colonies. Why then, Buck asks, did settlers with experience of customary property rights in England reject the communal property claims of indigenous peoples?

To answer this question, Buck draws on the work of M. J. Radin, who distinguished between constitutive property that has value to the individual because it expresses that individual's personhood, and fungible property that has value as a commodity. In this chapter and others, Buck argues that Australia's white settlers overwhelmingly thought of

property as a means to acquire wealth, perhaps as a means to return again to England, or perhaps as a means to acquire power in Australia. In any case, Australia's settlers had little sympathy for aboriginal ideas of land and identity as inseparable. Buck quotes E. P. Thompson's description of the enclosure movement in England as making the poor "strangers in their own land" and suggests the denial of aboriginal peoples' relationship with the land had the same consequence. Buck does not develop this idea, but the white settlers, too, were strangers where they immigrated and strangers again if they tried to return to England. In English, after all, the word "title" is both recognition of one's position, as in, for example, the title of Earl, and evidence of one's right to the family's landed property. It is not surprising that settlers who left England to escape that linking of property and personhood were not eager to see it re-established in the colony, or to accord any validity to pre-existing notions of property relations that rendered property inalienable and inaccessible to the newcomers.

As Buck argues, in a society in which the majority view property as a means to gain wealth, land ownership is likely to be regarded differently than in a society in which one's landholding is the basis and buttress of one's social position. Leasehold tenures in England were expected to support a landed élite. Attempts to recreate a leasehold system in the North American colony of Prince Edward Island faced sustained, sometimes violent, and ultimately successful resistance. In New South Wales, in contrast, those who hoped to make a fortune raising cattle or sheep supported Crown leaseholds that provided relatively cheap access to grazing land. The prevalence of leasehold tenure in New South Wales contributed to blurring the distinction between real and personal property, as Buck demonstrates in his description of the colonial debate on such questions as abolition of primogeniture in cases of intestacy, administration of intestates' estates, recognition of new security interests such as liens on wool, appropriate limitation periods for bringing actions to recover possession of land, and introduction of the Torrens system of public registration of titles to land.

The introduction of the Torrens system was intended "to make land as easily transferable as stock"—a quotation from English political economist John Stuart Mill that was often invoked by Robert Richard Torrens, promoter of the Torrens system. (p. 125) Buck argues that reforms to limit the widow's right to her dower—a life interest in her deceased husband's real property—had the same purpose. The defenders of dower characterized it as an ancient right that provided some compensation for the legal incapacity a woman suffered on marriage. The reformers saw it as "a burdensome interference on the profitable exploitation of land as a commodity on the market." (p. 100) And the reformers prevailed. Dower

ensured that heirs used the family land to fulfil their family obligations, but it was inconsistent with the fluidity of family and market relationships in New South Wales. Registration and the concomitant state guarantee of title were possible only if land were freed of non-commercial burdens, and treated as a commodity. As Buck shows, proponents of something as seemingly arcane as conveyancing reform characterized their cause as “a people’s question” because everyone in Australia expected to become a proprietor. (p. 104) Making land ownership available to even those of modest means would “turn the ‘poor man’ into a propertied man,” (p. 109) and ensure that democracy in Australia would be a bulwark against socialism.

Possessive egalitarianism is the name Buck that gives to the particular property system, or the particular relationship between property, law and society, that emerged from and provided support for Australia’s adaptations and innovations with respect to real property law. The adjective distinguishes Buck’s use of the term egalitarianism from other scholars’ use of the same term in explicating Australian history and popular culture. As used by scholars such as Elaine Thompson, John Hirst, and Stuart Macintyre, the term encompasses Australians’ widespread belief in equality in social relations and social standing, despite real inequalities. Buck quotes Thompson’s encapsulation of the concept in the expression that “Jack is as good as his master.” (p. 137) Buck uses the term to describe not ideas about equality but ideas about access to land: land should be available cheaply and easily, through a universal market system, free of the legal complications necessary to permit the landed élite to perpetuate their power and status through land ownership, and free as well of any claims based on the spiritual and cultural relationship between indigenous peoples and the land they occupied.

In his title and in summarizing his conclusions, Buck speaks of Australian law, but his examples are drawn from a single colony, New South Wales. I live in Atlantic Canada, and so am perhaps unduly sensitive to claims that the part stands for the whole, having tired of frequent reminders that power brokers elsewhere regard Canada east of Quebec as peripheral. Perhaps the regional dynamic is different in Australia. I expect, though, that if I lived in Queensland or South Australia, I would grumble that a more accurate, though perhaps less compelling, title for Buck’s book would be *The Making of Land Law in New South Wales*. And I would wonder whether *Attorney-General v. Brown* was all that important. Australians, colonists elsewhere, and even in 1925 the English themselves, re-made the law in accordance with the wishes of those who were able to convince legislators and judges of the congruence between what suited

them, what society needed, and what the law required--in short, those who achieved hegemony in public and legal discourse. In Australia, that was neither aristocrats nor aboriginal peoples.

Dr. Margaret McCallum
Professor, Faculty of Law, University of New Brunswick