

# Past provides the future key to major contemporary issues

By Dr GARRICK SMALL

## Abstract

The property industry is based on the current Western institution of private property. However, systematic investigation into the nature and problems of that institution is seldom a core topic in property education.

This paper reviews the history and theory of property to demonstrate their relevance to contemporary property issues and their place in property education. The paper concludes that property graduates can only respond rationally to issues challenging the current institution if they have a sound understanding of the history and theory of property.

Property education in common law countries, such as Australia, tends to assume the current Western system of commerce, with its characteristic property institution.

The contest between socialism and the free market that has raged over the past century has resulted in a popular belief that these represent the only two possibilities for property.

The demonstrable failure of socialism has given credence to the belief that the Western liberal institution of property is the only one that deserves serious attention. Bethell (1998) articulated the popular position which asserts that most remaining economic problems in the world will be resolved once property is further liberalised.

For these reasons, there appears to be no need to study property per se.

Several pressures challenge this complacency. There is evidence that the current institution has changed in the past few decades. There is also evidence of pressures for far greater changes.

To understand and respond to these changes, property professionals need to be aware of how the current institution of property came about and how it is supported. The literature on the institution of property is extensive and the debate on how property is theoretically grounded has a long and deep history.

This paper summarises the broad issues that inform the debate to demonstrate the importance of studying property theory as part of property education.

The paper is broken into four parts:

- Firstly, recent changes in the institution of property will be surveyed along with pressures for further change.
- Secondly, the current institution will be located historically.
- Thirdly, other cultural resolutions of property will be reviewed.
- Fourthly, major themes in the theory of property will be summarised following their historical development in the West. From these, recommendations for the property discipline will be drawn.

During the third quarter of the 20th century, Australian freehold property ownership changed significantly, when much of the owner's right to choose what use to make of land property was taken by the state.

This change was in the form of planning legislations that culminated in NSW with the 1979 Environmental Planning and Assessment (EPA) Act.

Many other countries were moving in the same direction at that time, although the USA stood as a notable exception, due largely to

its greater sensitivity to the erosion of private liberty by the state.

If property ownership means owning a bundle of rights, then the state's resumption of some of those rights constitutes a fundamental change to the nature of property. The arguments surrounding the justification of tighter planning controls are complex, and there is certainly a benefit to all from an ordered urban form, but this still leaves owners with a different type of property.

Closely following the acceptance of planning control was the environmental movement, appropriately described by Whelan (1989) as the greatest political movement since Marx challenged liberal capitalism.

In part, it asserts that the reckless exploitation of property is unjust, since it denies future persons their natural rights to the material resources of our world. This claim runs counter to the institution as it has existed in Western practice for centuries.

The environmental movement has achieved considerable success including a series of amendments to the EPA act, such as that regarding contaminated land (1996).

Under that amendment, property considered contaminated, on today's understanding of what contamination means, is often blighted well beyond the actual engineering or practical impacts.



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Limitations imposed due to the speculative concerns of environmental activists have had substantial effects on real property and development. They have been achieved by changing the institution of private property.

Environmental activists would appear to favour greater constraints on property in future. The environmental economist Buck (1998) argued for the recognition of global commons and the rejection of what she called the myths that ground the Western institution of property.

Her claim represents a recurrent theme through environmental economics and it was defended by a careful historical account of the origin of the Western institution of property.

Such changes would strip further rights from private ownership, supposedly to achieve some kind of inter-generational equity.

They are argued from justice and they imply that the current property institution is not just. They seek to force a sense of obligation towards future persons on present landowners.

As the spectrum of environmental concerns widens, it is likely that there will be more impact on property in the future, limiting it even further, perhaps in unexpected ways.

The institution of property is under a third current challenge, especially in Australia. At present in Australia, there are more than 500 applications for recognition of customary title.

These are in addition to the successfully processed claims and the great many other instances where Indigenous people believe that the laws of white Australia have stolen a major part of their cultural identity, in the form of their land property.

While many white Australians may not share their view, the fact that Indigenous people hold it, and that the 200-year-old legal principle, *terra nullius*, has been recently overthrown, suggest that the issue merits attention.

At present, the matter of customary title tends to be dealt with on a legal level, remaining within the current legal framework, even though the matter fundamentally exists outside that frame of reference.

Native title recognition forces a re-evaluation of the validity of white Australian law and this infers the recourse to a higher system of understanding, one that is capable of judging the applicability of a particular legal regime (Sheehan 2000).

The question of property originates from within this higher order, an order wherein justice, rights and obligations are fashioned and from which legal structures are designed.

Its treatment necessitates leaving one's cultural loyalties to consider the matter without provincialism.

In sum, these pressures to change the institution of property demonstrate that it is open to debate and manipulation. Future developments may have massive impacts on property as an investment.

These issues have no simple answer, and most people accept some aspects of the changes to property, but reject others.

To be able to meaningfully participate in discussion regarding these mutations in the institution of property, property professionals need to be more aware of the origin and rationale of property as an institution.

The current western institution of property is only about two centuries old.

It is the product of a gradual development that appears to have roots back about a millennium. An institution similar to it operated at the end of both the Greek and Roman empires, though each of these cultures came to greatness under very different property institutions.

The family or clan were accepted as the owners of real property in early Greece and early Rome. Benefits of ownership flowed to all clan members, not merely those actually working the land.

Romans in the early empire even saw it their duty to equip and supply themselves for military duty out of their property income. In this way, the land provided the material support for the Roman army without the need for recourse to taxation.

The ancient Egyptians owned land as families, but paid substantial land taxes. The ancient Germanic tribes possessed property on a tribal basis (Small 1997).

These ancient cultures displayed a range of cultural resolutions of the property problem that all had one common characteristic - they all recognised that property ownership was connected with obligations, either to the immediate family, to the tribal group, or to the state.

These cultures are significant in that they form the basis of what has developed into Western culture.

The late Roman period saw the development of large estates. Where these occurred in the remote parts of the empire, such as Britain, they resembled feudal manors, though the feudal hierarchies of the later periods were yet to come.

The decay of the empire disrupted law and order at all levels, though the owners of the estates tended to continue by family succession.

Medieval feudalism developed from local warrior chieftains offering military protection in return for formal title to the land. The feudal obligations were bi-directional, with an upward flow of rents in return for a downward flow of services, mainly military protection.

Feudalism resulted in the re-civilisation of Europe, which was symbolically completed with the crowning of Charlemagne in 800, ending the Dark Ages.

It is incorrect to conclude that feudalism was a creature of the European Dark Ages as this system of property has been employed almost all over the world at various times.

The Chinese, South American, Ottoman, many Pacific and Indian cultures also practised systems of land property that are quite evidently feudal (Mukherjee 1984).

The system is very sensitive to the integrity of its leaders. In Japan under just rulers for example, the system returned peace, prosperity and cultural development, but under greedy lords, the lower classes were exploited (Waswo 1977).

The occurrence of feudal property structures in diverse situations is a curious feature of the anthropology of property (Keyao 1990).

The feudal system was based on an institution of property that stressed obligations.

In Europe, those obligations worked in several ways. Land rights, or titles, were held on the understanding that they involved substantial obligations to the community.

Lords were understood to be responsible for protecting and ordering the communities within their control. This equates to the governmental functions of defence and law. They also were responsible for the provision of civil infrastructure, such as roads and bridges.

The Church became a landowner, with monasteries receiving substantial land rents. It was significant, not only because it formed a separate order, but also because the monasteries provided substantial services to the community.

Of these, education was the most important, though health care (as hospitals) and care of the poor were also critical in the lives of the ordinary people.

Between them, these two groups (Lords and Church) provided a spectrum of services similar to contemporary governments, all funded by land rents.



A second obligation pertained to the relationship of the ordinary people to the land. To the extent that the feudal estates had developed out of the Roman estates, ordinary working people had developed largely out of the Roman slaves.

The slaves had few rights, but the feudal serfs had one right that was especially significant among the many that they enjoyed above that of their forebears. They had a right of access to the land.

This was realised in the institution of the commons. The commons were available free to any one, which meant that anyone who did not have an alternative means of income could use them to obtain subsistence.

Implicitly, the commons prevented unemployment and provided a floor to wages.

The balance of rights and obligations comprising the feudal system was disturbed by the granting of land titles that did not carry feudal obligations, freehold tenures. Land without obligations meant that the entire rental income could be privately enjoyed.

William I granted a small amount of this type of title. Once alienated from the feudal system, their rents were permanently lost to the community.

Over time, more land was converted from feudal obligations to freehold. Eventually this necessitated the introduction of taxation to replace the land rental lost as public funding.

Part of the move towards freehold was the enclosure of the commons. The Enclosure movement is usually defended on the basis of agricultural efficiency but, for the ordinary person, it meant the denial of access to the commons.

The Enclosures proceeded irregularly over the centuries. They were only completed about a century and a half ago and, concurrent with the effective end of feudalism, marked the beginning of the current institution of property.

Three points are evident in the history of property:

- 1) The popular dichotomy of liberal capitalist versus socialist property systems is not found historically.
- 2) Property ownership is historically associated with obligation.
- 3) The current institution is historically recent and novel.

Many ancient cultures based their property system on some ethical or religious belief (Herhiy 1970). Islam provides a good example of this ancient tendency.

Moslems believe that God, as maker of creation, is its natural owner and accept land ownership as a gift that comes with certain obligations. Certain resources are to be kept as common property, such as mines and water.

Private property exists partly in recognition of that gift, and partly due to labour applied in utilising the land. The obligation that flows from the gift aspect of property requires that profits from property, in excess of a return for the labour expended, are to be used justly, such as for alms giving (Nomani and Rahnema 1994).

These directives can operate in a free market environment, though Moslem jurists have long debated the justice of rent-taking, even in land.

Contemporary indigenous peoples generally follow what are known as customary systems of property. Like the ancients, customary systems usually rest on beliefs regarding the origin of the world.

The study of the origin and nature of existence of things is metaphysics. If the metaphysical perspectives of indigenous peoples are accepted, then their systems of property logically follow.

Where their belief includes a benevolent deity (or deities) property will include considerations of justice and political necessity.

Simply put, God (or the gods) made the world and gave it to His people, usually on the expectation that they will use it to prosper and do His will. God's will includes the care of those who cannot care for themselves.

This simple formula is applied by many customary peoples, regardless of their specific conceptions of the nature of God, or the gods.

Many Australian Aboriginal peoples believe that they were formed from the earth and, as something like its children, are inexorably linked to it.

The outcome is the same: the genesis story provides the metaphysical foundation for property and a constellation of family obligations. These produce a social structure where the tribe's property is integral to its corporate survival.

The Australian customary situation is therefore slightly different to other customary peoples in that the link is familial, rather than merely gift.

Customary title systems may be grouped into three general types. The first is simple tribal land ownership, such as practised by most Australian Aboriginals. In this, the tribe owns the land communally with no private allocation.

The second consists of various systems of family allocation, such as was practiced in Tonga, or the Cook Islands before their most recent constitution. Typically, these have land allocated for personal, or family, use on a limited tenure from the tribe with tribal reversion with cultural sanctions against profiteering or holding more land than is personally useful.

The third is the most complex and usually resembles pre-modern feudalism such as Fiji or Hawaii.

The common feature of customary title systems is that there is minimal, if any, personal gain from property.

There is also no personal title of equivalence to Western freehold, despite some cultures allocating personal, though temporary, tenure. The absence of freehold property has proven to be a difficulty for modern financing and prohibits the formation of property markets (Ezigbalike 1994).

Several parallels exist between contemporary customary tenure systems and ancient approaches to property.

All tend to reject personal rental income from property, though none is socialist. All ultimately locate ownership with the collective and reject profit-taking from commerce in land.

Schlatter (1951) chronicled the history of the idea of property, showing the rich variety of theories that have enjoyed currency at various times. Within that array, there are certain recurrent themes, and the interpretation of these has proven to be an arena for considerable debate.

Some theories have been speculative (e.g. Aristotle); some have been developed as instruments for social change (e.g. Proudhon and the socialists); and some have attempted to justify existing systems (e.g. Locke).

Property theories are sometimes built on abstract reason, sometimes on facts, and sometimes in the face of the facts. Property means economic power to its owner, sometimes it is incentive for effort; sometimes it is the reward for exploitation or plunder.

Property in land, and hence in things that have a content based on raw materials, that is, all products, is a difficult thing to justify. Property in one's self, or even in the fruits of one's own labour, is obviously natural and seldom debated.

By contrast, people have no natural link to the land, especially to defined tracts of it.

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Property of that sort is always conventional, the product of social organisation.

Property in land is usually justified by its licit acquisition, through purchase, gift or inheritance, but that is contingent on the licit title of the previous owner. Regressing title will always end at some point where an individual or group has simply appropriated as private what was formerly common to all.

Aristotle (d.322BC) was the first to recognise that, ideally, property should be a balance of private ownership and common use. He discussed property and economics in two of his works, *The Nicomachean Ethics* and his *Politics*.

In these, he showed how property and trade could be understood within the question of justice and political effectiveness. His position was echoed later by St. Thomas Aquinas (d.1274) whose position reflected Europe at that time.

Small (2000) demonstrated that human nature inferred a fundamental universal common title over land to all humanity that did not preclude concurrent private ownership derived from licit title to improvements.

Customary title systems reflect this dual character of property, despite having no known contact with the European intellectual tradition.

Tonga, Murray Islands (off the north-eastern tip of Australia) and the traditional system of the Cook Islands are amongst the better examples of private ownership with common use. In these, there is private allocation, or ownership, on a life tenancy basis, with use always reverting to the community.

Feudalism also embodies Aristotle's dual concept of property, so long as those in power use their property income responsibly.

Modern property theory was a response to the need for a validation of the emerging legal reality of freehold that Lord Blackstone (d. 1780) described as "despotic ownership" in his description of property within English Enlightenment law.

The first attempt was by John Locke (d.1704) who attempted to show how this innovation in property was in fact natural. He suggested that when a person applied labour to natural resources, say land, the resultant product, or property, naturally belonged to that person.

This is very reasonable, as title to one's labour has never been in question. Locke argued that the labourer's natural title would be violated if freehold title was not granted.

Strictly speaking, Locke's approach justified partial title only (joint tenancy proportioned to the labour input), but it tended to entrain appropriation of the common aspect of property without justification.

The test of this was the actual amount of labour that was required to appropriate the whole. On Locke's criteria, it could be minimal and he even claimed that it could be the labour of one's servants or animals.

Adam Smith simplified the matter by employing David Hume's empiricism (knowledge only from observation).

Smith observed that private property without obligation was a fact of his culture. The fact that liberal property was accepted and defended by the society meant that it could not be improper.

Simply put, Smith's theory of property suggested that private property stood on two foundations, the fact of possession and the existence of a legal institution that supported it.

In addition, Smith's economics was based on the observation that the commercial practices found in England at the time were very successful. Therefore, they achieved the desired ends of society, making explicit active property obligations unnecessary and perhaps detrimental.

This simple theory was empirically satisfactory and it represents the basic arguments that have been used since. It suits a liberal democratic society by respecting the right of any society to create its own property institution.

Reeve (1986) concluded that Smith's position was merely the formalisation of a radical change in property that happened in the 18th century.

The criteria for property became its democratic acceptance and its apparent economic efficiency. Since then, few democratic states have adopted property institutions that differ from the basic modern system that Smith outlined.

Recent theorists such as Milton Friedman, Michael Novak and Bethell have added general empirical support to the modern (Western) theory of property by pointing to its achievements in terms of the high levels of economic development found in societies with the most liberal property institutions.

Jaffe (1996) investigated the economic efficiency of property rights in land and concluded that liberal freehold is the most economically efficient at a micro level.

These theorists and others form a body of thought that asserts that private property of the Smithian kind is one of the key planks that compose Fukuyama's culture at the end of history, radical democratic capitalism.

While the 18th century formalised liberal property, the following century saw the creation of an opposing theory of property, with its own economic and political structures.

Smith's observations regarding the economic effectiveness of the free market, and of property, were based on the fortunes of those who held property, and of the nation as a whole.

Freehold benefits the landowner, but not necessarily the tenant or employee. Likewise, free trade and industrialisation had both benefited England at that time. What was unclear was how these economic institutions affected the ordinary citizen and the nineteenth century became preoccupied with this aspect of property.

Charles Dickens (d. 1870) is known for his bleak depictions of life in England in the early 19th century. His purpose was political reform and the condition of his characters was historically valid.

The popular historian Cobbett (1824) was a patriot who described the demise of the ordinary person's lot since the sixteenth century. Rogers (1884), a systematic economic historian, demonstrated that effective wages in England had been falling continuously between 1500 and 1800 despite rising national economic strength.

The desperate condition of the working citizens of the economic giant of the times produced the political reaction of socialism.

Liberal modern property could be interpreted as one half of Aristotle's dual theory of property. It ignored the obligation inferred by common use.

Socialism rejected it and went to the opposing extreme by chanting with Proudhon (d.1865) that property is theft, thereby leaving only the common use dimension. The justifications and theory of socialism are complex, but it has proven popular for well over a century, despite proving flawed as an economic and political system.

Socialist property theory could be considered as being based on a political perspective and has always been used as an instrument for political revolution.

Despite its failures, its popularity should alert theorists to the fact that not all Western



people embrace liberal property thinking. The failure of socialism as an economic and political system may be sufficient to discredit its integrity as a theory of society, but is certainly not sufficient to disprove all critiques of liberal capitalism.

The 20th century was largely a contest between the two rival modern theories of property, and their respective economic and political systems.

In the USA, the virtues of modern property tend to be identified with the very fabric of the US culture, often referred to as Americanism.

Weaver's 1948 classic defence of conservatism, *Ideas Have Consequences*, claimed that the American institution of property represented the "last metaphysical right" and implied that it must be defended in order to avert further cultural decay.

The explicit enemy was communism, but hidden in the debate were complex issues regarding the efficacy of the so-called Enlightenment and its expression in the constitution of the USA.

History tends to be an impartial arbiter. Powelson and Stock (1987) analysed both capitalist and socialist regimes in the third world and concluded that neither delivered reasonable treatment to the majority of the populace.

The theory of property is intimately connected with this very lively debate. Absent from the debate has been any serious consideration of other resolutions of the property problem.

Somehow, both sides have succeeded in convincing the world that every property system is either liberal or statist (i.e. capitalist or socialist), contrary to the evidence.

Liberals look to the Romans, or conclude that family ownership meant private ownership to the other ancients, in order to assert that private property of the liberal capitalist sort has always existed. The issue of obligation tends to be ignored.

Socialists for their part have been creative in finding socialism in the writings of Aristotle, some Greek states and even the early Christian communities. Marx and Engels even created their own genesis story of original communism. Although Coulanges showed each of the socialist claims to be false, as early as 1890, their popularity continues.

On the other ideological extreme, late Rome and late Greece do come closest to the capitalist model, but that is no solace, since

those periods also marked the beginning of their respective cultural implosions.

Amongst this complex patchwork of theory and politics, Aristotle's dual theory of property stands out as a useful reference point.

Customary peoples and several ancient cultures can be seen to follow systems that embody it and it is an evident theme behind the current challenges to liberal freehold property.

Conversely, the dominant competing property theories in the current public debate represent opposing imbalances of it.

In this light, current changes to property can be seen more as a return to the centre position than the decay of Weaver's last metaphysical right.

The concept of property is most evident in land, but it also applies to other property. Capital is a form of property and the current interest in globalisation can be interpreted as dependent on the rights and obligations of international property in capital.

It is very possible that clarification of our understanding of property may have applications for the global ethics of international capital investment. The history and theory of commerce and property have much in common and it may provide an opportunity for the property discipline to contribute to a far wider debate.

Exploring the basis for the current Western institution of property is not necessary for day-to-day practice as a land economist, valuer or toiler in the property development and financing field.

For this reason, it has no place in the technical training of staff who will not be expected to participate in controversies over its future direction.

Also, if the modern, Western, institution of property represents the most evolved form of the institution, and the pinnacle of all possibilities for property, then merely understanding how to operate within it is sufficient.

On the other hand, if property is evolving, if it is coming more and more under challenge from both within and without Western culture, then property professionals should be the best equipped to enter the debate over its direction.

The API is currently a leader in its response to the current challenge of native title, and it would be hoped that all members would take an interest in this and other developments in what property means.

The provincialism evident in Smith's perspective must be avoided.

Property professionals should aim at informing themselves in the broader implications of their work, beyond the interests of property investors. In particular, it is necessary to move beyond the simple dichotomy of capitalism versus socialism that has dominated public debate for the past century.

New entrants into the profession have a special need to understand property in a way that was not necessary a generation ago. They will need to be able to respond not only to the customary title and environmental challenges, but perhaps to other pressures on the institution of property that have not yet erupted into political prominence.

For graduates to be prepared for the challenges of the future, a familiarity with the past will be essential, especially as the past is so rich in the debate over property.

The conclusion for property education is obvious. To be equipped for change, graduates will need to enter practice with a broad understanding of the history and theory of property, well beyond that currently found in most property courses.

This means that universities need to consider ways of including systematic study of property history and theory into their curriculum.

This does not mean the promotion of any particular institutional arrangement, but rather that students should have the opportunity to reflect on the issues that deserve attention in its resolution.

In this way, they may be expected to better understand the strengths of their preferred approach to property, while developing a greater respect for the diverse resolutions of other cultures.

Many of the names associated with property theory are also associated with ethics. Correctly understood, the study of the two is closely linked. Ethics has risen in prominence as a focus for professional education.

Graduates with the capacity to responsibly link the debate on property to well articulated ethical arguments will attract the popular respect that the profession is keen to cultivate. While the debate on property theory is far from over, the present opportunities for property education are quite clear.

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