The Making of Australian Property Law

(by **A R Buck**, Federation Press, Sydney, 2006; 166 pp)

In this short and rather compressed account of legal change in early- and mid-nineteenth century New South Wales 'property' generally means land, 'law' generally means legislation, and Australianness is measured by the extent of departure from the English stock. Dr Buck concludes that the departure came earlier and was more significant than previous writers have conceded. He attributes this in part to a different conception of landed property than in England – more commercial, less aristocratic, more akin to personal property – and in part to the political structure that allowed realization of that vision: an independent legislature followed quickly by manhood suffrage. In the 1860s that brought New South Wales a Torrens system (Dr Buck is reticent about its origin in South Australia) and abolition of intestate primogeniture. Earlier there were inventions of crown pastoral leases and liens on wool, plus significant changes to more mundane areas of land law such as dower, forms of conveyancing, and the effect of crown debts. There were also some failures, or, at best, very limited successes. Proposals in the late 1840s to create a state administrator for landed intestate estates stalled. So did an attempt to reduce limitation periods that unduly favoured mortgagors, another to curtail the lien that judgment debts created over land (I think – Dr Buck is a bit inconclusive here), and another to prevent abuse of the power of sale that the new (English-imported) form of mortgage gave mortgagees.[1] Undaunted, however, Dr Buck twice urges that such failed proposals demonstrate a 'perceived inapplicability' of English law. Since, however, the reasons for their failure seem to have been entirely local it is unclear why they do not instead show the opposite.

This points to a difficulty. In Dr Buck's account it was commonplace for advocates of change to contrast reform they were proposing with the equivalent (and backward) English law, and for them to explain the differences by contrasting England's feudal past and aristocratic present with Australia's commercial and egalitarian future. That can very properly be taken as evidence of their values and opinions, and from those one may properly conclude that an imagined England was an important element in constructing Australianness, including an Australian law. But Dr Buck goes further, using their opinions as evidence of how English law really stood, very largely as the only such evidence, and hence as a true benchmark for measuring the difference between the two jurisdictions. Granted, the best measure of how English law was adapted to local circumstance may not exist. Property law is largely, though never entirely, a template for drafters to use in constructing dispositions for their clients, so the best evidence of the state of the law will come from study of those dispositions, from the leases,

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[1] Dr Buck's account of the superseded form of mortgage as involving an outright conveyance and a separate deed called a 'defiance' looks suspect. There was an English form involving a 'defeasance', which is perhaps what he means. By the mid century it had been replaced by the single deed containing a power of sale (via intermediate forms using a trust for sale), which is the form that caused the concern.

mortgages, family trusts and settlements that the relatively wealthy used to provide for their widows and children. For Otago and Canterbury, albeit mainly for one generation later than Dr Buck's period, there is Jim McAloon's *No Idle Rich*, which gives indispensable information about the state of the living law. Dr Buck cites nothing equivalent to that, so the actual operation of English law in the colony nas to be seen at one remove, through the opinions of would-be legislators. For the English side of the equation, however, there are the vast and forbidding tomes of English practice books, precedents and commentaries, the latter often reprinted verbatim in American editions. Together these books paint rather a different picture of English property law from Dr Buck's, altogether more varied and dynamic, a much more difficult, moving target against which to measure Australia's changes.

This is most obviously true of what I called the mundane changes. At least, in England the Real Property Commissioners thought dismantling dower was mundane, because men with property habitually took great pains to draft their dispositions so as to exclude widows' common law rights. If that was what they wanted the law should be modernized to get rid of the right entirely. New South Wales simply followed suit (as Dr Buck says), and what happened next was just a cleaning up of the details. Likewise the simplifying of conveyancing documents comes straight from the agenda proposed by the (English) Real Property Commissioners, who also began the chipping away at limitation periods. All of that made its way into English legislation much as it did into Australian. Here and there a detail or the timing differed; but that was the way of legislation, English legislation certainly – after the demise of the Real Property Commission the details and the timing were often happenstance. In England too there was tension between streamlining land sales on the one hand and, on the other, providing judgment creditors with a secure remedy against their debtor's land. The (English) Judgments Act 1838 shifted the balance heavily towards creditors, so much so that corrective acts were passed in 1839 and 1840 to protect land purchasers through a mixture of improved registration systems and statutory incorporation of the rules of notice. Dr Buck passes this by, citing instead Australian lawyers complaining to Australian committees in 1841 that the ancient English law was unsuitable to Australia. No doubt it was; it was unsuitable to England too, and had been heavily amended – but not in exactly the same direction these Australian lawyers wanted. Dr Buck does not pursue what happened next; perhaps nothing did. In England the balance was shifted against creditors in 1860, if only gently, and then dramatically in 1864. But even that was not the end of it, a stable solution being reached only in 1888 and completed in 1900. At any time from 1838 English law and Australian would have differed, though quite possibly not always in the same way; but neither was the same as the old law that Dr Buck suggests as his benchmark. On the other hand, the Australian legislation from 1858 he describes as easing the procedures by which the crown's lien for debts could be removed from land copies changes made in England in 1853, a loosening of the crown's grip there that was continued with further legislation through into the 1860s. The Real Property Commissioners had had that on their list in the early 1830s too.

It is the big changes that catch the eye: Torrens, wool liens, pastoral leases, abolition of intestate primogeniture. Surely here are differences that are both

indigenous and significant? Well, perhaps. In England intestate primogeniture was generally seen as functionally unimportant; very few significant property owners left neither a will nor an inter vivos settlement. It may perhaps have been different in the New South Wales of the early 1860s; Dr Buck does not say. In both places it was a symbol of something that people argued about, being associated with the maintenance of an aristocracy (quite wrongly, from a functional point of view), which is why the one got rid of it early and the other only sixty years later. As for pastoral leases, though, Dr Buck has gone awry. It is true that England had no squatters; the word and the phenomenon of occupying unallocated land ahead of government control are American, replicated in Australia. So the situation was new for English law. Dr Buck claims that the solution was new too, that in England since 1660 only one tenure from the crown was allowed, being free and common socage, whereas in Australia from 1847 there were two: socage and crown leaseholds. This is important to his argument, for he sees the change as enormous and as reflecting a different conception of property. But he is wrong about England. Since 1701 crown leaseholds had been regulated by statute (such-and-such a duration, such-and-such terms ...), not because they were then being introduced for the first time but because William III had so much squandered his patrimony on foreign wars that little remained to cushion the taxpayer.[2] It was important that the new queen should conserve what was left. Subsequent statutes altered the durations, terms, purposes and processes as need arose and, importantly, added that these restrictions applied only to lands forming part of the royal ancestral estate. Lands the king acquired by other means he could deal with as though he were a private person. Pastoral leases were no doubt an important political solution to a difficult question, but an innovatory concept they were not.

Wool liens certainly were both innovatory and indigenous, and Dr Buck nicely captures Lord Stanley's incredulity on signalling his disallowance when they were first proposed. They are interesting for straddling the boundary between real and personal property, again as Dr Buck says: functionally they were mortgage loans to landowners, legally they were securities over future personalty, moveables in a very literal sense. There is a convergence with the situation the West Indies plantation owners faced forty years or more earlier, for they too owned land that was worthless save for its annual produce, in their case sugar. They borrowed their working capital from the London merchants, who took mortgages, of course, but whose interest lay in procuring the sugar. So the mortgage deeds contained elaborate 'consignments' of future sugar, and in due course the courts decided the various points of law that arose in a way that validated the arrangement.[3] The difference may only be that sugar consignments arose at a time when innovation came through private ordering, subsequently tested in courts, whereas by the 1840s legislation was the primary vehicle. As Dr Buck says, the 'substance' of English law lay particularly in the freedom it conferred on property owners. Its capacious toolkit could tackle

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2 1 Ann st. 1 c. 7 s. 5; J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820) 203–205.

3 Bythewood and Jarman, *Precedents in Conveyancing* (1829) vol 5 533–43; R W Beachey, *The British West Indies Sugar Industry in the Late 19th Century* (1957).

most new problems. One of the precedent books includes a sample mortgage of whaling boats, their insurance policies, and their future whale-produce, for example, though I do not know whether anyone actually used it.[4] None of this should detract from the originality of wool liens, but it does offer a context in which they are rather less mould-breaking than Dr Buck makes out.

Torrens was innovatory too, though in 1862, when Dr Buck draws his account to a close, the difference from England would have seemed less than it does now. The New South Wales legislature chose his scheme in competition with Lord Westbury's English version of title registration, just as Victoria did. In 1860 New Zealand had jumped the other way, preferring a thin adaptation of the scheme recommended by an English royal commission in 1857, until switching to Torrens in 1870. The basic idea of them all was the same. Torrens drew his inspiration from ship registration; the English reformers took theirs from the register of government stock kept by the Bank of England, and they developed the analogies between land and the funds that Dr Buck says were attractive in the debates in New South Wales. The objectives overlapped too. Dr Buck says that wider distribution of land was the aim in New South Wales; in England it was that too (in the different rhetoric of making land a more attractive investment) plus reducing transaction costs for its own sake. As we now know, these Torrens acts flourished, while Westbury's ailed and the second English attempt, in 1875, was sicklier still. So the jurisdictions grew further apart and faster than might have been anticipated when all was newly minted.

In conclusion, then, Dr Buck's book works well as a study of a reforming mentality that drew strength from a contrast with the mother country that was as much imagined as it was real. The reformers' objectives, their rhetoric, and their achievements are analysed well, and the total of it no doubt did change the law substantially. But readers should be careful in accepting their English law through these eyes. A doubt about mortgages has already been mentioned, and Dr Buck's description of a strict settlement is unlike anything that would have been recognised by that name at the time.[5] They should be aware too that often there were similar changes happening in England. Reformers there would not have accepted the label of 'possessive egalitarianism' that Dr Buck finds apt for their Australian equivalents, but they might, I think, have worn 'liberal individualism', which is not so very different. They would also have agreed with Dr Buck's Australian reformers that the law of real property should be made more like that of personal property. But, then, as Maitland pointed out, that had been 'the one steady tendency' of our law for centuries past.[6]

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4 J Montefiore, *Commercial and Notarial Precedents* (2nd ed, 1813) 106–7.

5 The best starting place is B English and J Saville, *Strict Settlement: a guide for historians* (1983). There are examples in the precedent books, at great length.

6 'The law of real property', Westminster Review 1879, reprinted in Collected Papers, (ed H A L Fisher, 1911) vol 1 162, 195.