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## TORRENS, HÜBBE, STEWARDSHIP AND THE GLOBALISATION OF PROPERTY LAW SYSTEMS

The development and introduction of the Torrens land title registration system was a momentous law reform project. The work of the Torrens reform group was multi-disciplinary and multi-lingual, drawing on international comparative legal analysis beyond common law systems, foreshadowing by at least 120 years the methodology of great modern law reform projects. This is the most impressive and most advanced aspect of the historical adventure of developing the Torrens system. South Australia deserves to take great pride in the intellectual calibre of that project. The South Australian politician, Robert Richard Torrens, is deservedly admired for his enthusiastic work within the Torrens reform group and for championing the reform in the public politics of South Australia's first popular parliamentary chamber.

My own comparative work on the Torrens and German land title registration systems<sup>1</sup> also commenced with a law reform project. In 1986 I was engaged by

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I am very grateful for the invitation to present this paper at the 150<sup>th</sup> Anniversary of Torrens Title Symposium, Law School, University of Adelaide, 20<sup>th</sup> June 2008. I wish to express my warmest congratulations to the Adelaide Law School on the 125<sup>th</sup> Anniversary of its foundation and to those who conceived and implemented the wonderful plan to hold this Symposium to commemorate the 150<sup>th</sup> Anniversary of the *Real Property Act 1858* (SA).

<sup>1</sup> Murray Raff, *German Real Property Law and the Conclusive Land Title Register* (PhD thesis, University of Melbourne, 1999) and *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law* (2003). Research has been greatly assisted by the hospitality of the *Max-Planck-Institut für ausländisches und internationales Privatrecht* (Max Planck Institute for Comparative and Private International Law) in Hamburg. Gratitude to many for advice and assistance in these projects is expressed in my book.

the Law Reform Commission of Victoria to assist on its land law reference.<sup>2</sup> In that project we analysed the Torrens system at a profound depth with the objective of preparing Victoria's Torrens system to take maximum advantage of the powerful technologies that were emerging in the form of computerised land title registration processes and Digital Cadastral Databases ('DCDs'), now advanced to Geographic Information Systems ('GIS'). The advantages of attaining a comparative understanding of the legal frameworks of land title registration systems employed outside the common law world were clear at many points. When policies were developed to accelerate the conversion of land titles remaining under the English deeds conveyancing system ('the general law system') the way to great simplification of Australian real property law was opened. Analysis of other models illuminates the development of a better structure of general principle to support the land title registration system.

When one recognises the influence that German jurisprudence has historically had on development of the Torrens system and on land title registration systems internationally, one must acknowledge that study of German real property law is the logical starting point of comparative study. A broader international understanding reveals the Torrens system as a special example of the emergent international model of land title registration which appears originally to have emanated from German models. Indeed, the similarities of the Torrens and German systems are so great that comparative study could suggest better interpretations of the existing text of legislation underpinning the Torrens system and further steps in the evolution of principles of equity, as well as contributing to research of viable options within law reform methodologies. A clear example of this, which coincides with the most urgent current practical need in Australian land law, is the need for deeper understanding of responsibilities that are implicit in holding proprietary interests in land, especially with respect to environmental responsibilities.

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<sup>2</sup> I am very grateful to the former Commissioner in Charge of the Land Law Reference, Ms Jude Wallace, and to the former Chair of the VLRC, Professor David Kelly, an Adelaidean, for the education and insights that the reference afforded me. I also note my gratitude to (then) Law Reform Commissioner Professor Marcia Neave, to Professor Ian Williamson, School of Geomatics, University of Melbourne, and to the heads and directors of the government agencies involved, as well as the generous and insightful contributions to the project made by its reference group. Publications of greatest relevance to this paper were *The Torrens Register Book*, Discussion Paper No 3 (October 1986), *Mortgagee Sales and Judgment Debts*, Discussion Paper No 4 (October 1986), *Priorities*, Discussion Paper No 6 (May 1988), *Sale of Land*, Discussion Paper No 8 (May 1988), *Torrens Title: Compensation for Loss*, Discussion Paper with NSWLRC (June 1989), *Easements & Covenants*, Discussion Paper No 15 (1989). I note at this point that Professor Kelly undertook some of the first research that revealed the contribution of Dr juris Ulrich Hübbe to development of the Torrens system: D StL Kelly, 'Hübbe, Ulrich (1805–1892)' in D Pike et al (eds), *Australian Dictionary of Biography* (1972), explored in text below, following n 59.

## I DEVELOPMENT OF AN INTERNATIONAL MODEL OF LAND TITLE REGISTRATION

Over the 150 years since enactment of the first Torrens legislation there has been on-going international convergence of systems of private land title. Two very significant catalysing factors have stemmed from international developments since the 1980s: the transition of the socialist property systems and the ongoing innovation and rapid dissemination of information and communication technologies.<sup>3</sup> One result of this long term international convergence is that land title registration is a pre-eminent example in comparative law of Sacco's 'circulating model',<sup>4</sup> a legal model that has become so general it defies efforts to trace receptions or transplantations. The globalisation of what must be termed the international model of land title registration appears set to continue in light of support for it from international capacity building institutions. United Nations Capacity Building Guidelines simply assume that land title registration systems will be adopted.<sup>5</sup> The World Bank also prefers land title registration.<sup>6</sup> International Monetary Fund requirements that land law reforms be introduced as a facet of structural adjustment can lead to the adoption of land title registration systems even where this might lead to social tensions.<sup>7</sup> The latest international example of the adoption of a new land title registration system of which I am aware is the *Property Rights Law* of the People's Republic of China.<sup>8</sup> It is a good example of the international land title registration model. Yet, in defiance of Sacco's 'circulating model', internet browsing reveals German juristic influence in the development of

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<sup>3</sup> See generally, Ian Williamson and Jude Wallace (eds), *Sustainability and Land Administration Systems – Proceedings of the Expert Group Meeting, Melbourne, 9–11 November 2005* (2006).

<sup>4</sup> R Sacco, 'Droit Commun de l'Europe, et Composantes du Droit' in M. Cappelletti (ed), *New Perspectives for a Common Law of Europe* (1978). I sketched the spread and similarities of many land title registration systems in Raff, *Private Property and Environmental Responsibility*, above n 1, 8–12.

<sup>5</sup> United Nations – Economic Commission for Europe, *Land Administration Guidelines – With Special Reference to Countries in Transition* ECE/HBP/96 (1996) 15–18.

<sup>6</sup> See J Slater, 'Thailand Sets an Example – Land-Titling Initiatives Lead to Cheaper and Longer-Term Loans' in *Far Eastern Economic Review*, 9 May 2002, 40; F.F.K. Byamugisha, 'The Effects of Land Registration on Financial Development and Economic Growth: A Theoretical and Conceptual Framework' World Bank Policy Research Working Paper No. 2240 (November 1999). See also H de Soto, *The Mystery of Capital – Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

<sup>7</sup> D Lea, *Melanesian Land Tenure in a Contemporary and Philosophical Context* (1997) 75.

<sup>8</sup> Adopted at the 5<sup>th</sup> Session of the 10<sup>th</sup> National People's Congress of the People's Republic of China on the 16<sup>th</sup> March 2007, taking effect on the 1<sup>st</sup> October 2007. Promulgated by Order of the President of the People's Republic of China No 62. Accessible in English at: <<http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html>> at 2 October 2009.

the legislation. As we will see, this is an influence found in the development of many other land title registration systems.<sup>9</sup>

There is more to this example of globalisation than rapid extension across national and cultural boundaries. It also extends across disciplines and applications; for example, application of the model to seabed resources. With satellite technologies and global positioning systems ('GPS'), title referencing systems could move from volume and folio number to unique parcel identifier and on to geo-positioning. However, the fundamental principle of organising information around the identity of the land itself remains in contrast to organising the information around the identity of the titleholder or an aristocratic title. The international popularity of land title registration is connected to the rationality, within western technocratic understanding, of amassing and organising data about land, including proprietary titles, around the identity of the fixed and publicly discernable land parcel itself, known internationally as the 'real folio system'.<sup>10</sup> The objective of this article is neither to criticise nor to applaud these developments but rather, through comparative analysis, to discern deeper meaning in the international model of land title registration itself.

Land title registration systems that follow the international model generally exhibit the following characteristics:

1. A public register of rights over land that may be asserted against third parties. The land parcels themselves are identifiable in a cadastre, map or other description.
2. Registration of an interest in the land is best evidence that the registered party is legally entitled to it (property vests when the right is registered) but those who do not register their interests risk loss of priority to one who has registered in good faith.
3. Parties relying on the register are protected against challenges to the accuracy of the register.
4. A remedy is provided to honest parties who lose their interests in land parcels through operation of the register.

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<sup>9</sup> Deutsche Gesellschaft für Technische Zusammenarbeit ('GTZ'), *Sachenrechtsgesetz der Volksrepublik China — Dritter Diskussionsentwurf* (2005) <<http://www.gtz-law.org/en/project.php?cid=39>> at 13 January 2009. Professor Wang Liming, Dean of the Faculty of Law at Renmin University of China, is closely associated with this work.

<sup>10</sup> See Williamson and Wallace, above n 3. The contrasting approach, in which the identity of the person holding the relevant interest is the central organizational characteristic, may be found in the historical French personal folio title system. The French registration system was reformed in 1955 in order to re-orientate it to a real folio system, placing it in a similar position to the German system: see Edzard Blanke, *Die Reform des Französischen Liegenschaftsrechts im Jahre 1955 und das Deutsche Liegenschaftsrecht* (Doctoral Dissertation, Faculty of Law, University of München, 1963).

In terms of historical development it might be observed that this concept of land title registration is a simple but powerful idea. Most simple but powerful ideas emerge from a critical mass of earlier developments inching forward in the same field. With the enormous benefit of hindsight, the successful idea strikes us as the plainly obvious next step, while, in contrast, the floundering of historical contemporaries around less successful ideas often strikes us as amusing or quaint.<sup>11</sup>

The earliest European examples of land title registration, prototypical of the model described above, operated in the mercantile cities of the Hanseatic League of Northern Europe. In this area, and in the Anglo-Saxon communities in Britain, a simple ceremony had been performed before the people of the village assembled on the land to commemorate the passage of land tenure from one to another, similar to the later Norman ceremony of feoffment with 'livery of seisin'. It was important for the community to know who held tenure of land because tenure of land brought responsibilities and not just to assist in the settlement of disputes about rights and entitlements. In North Germany the maintenance of dykes to prevent flooding of the community was one example of an important responsibility of the individual recorded titleholder.<sup>12</sup> The ceremony of symbolic transfer moved indoors at some point. Later it was performed before the City Council instead of the entire village, and then before a committee of the Council. When writing became more widespread, the ceremony was recorded and the records were collected and bound together in annual volumes. Such records of title were referred to in the City Code of 1270 of the Free and Hanseatic City of Hamburg. It is known that there was a City Code before 1270 but it is long lost.<sup>13</sup> The written record of the ceremony made in the City Books by the official who presided gained stronger legal status than the oral accounts advanced by those who attended, and grounded a virtually conclusive presumption in favour of the accuracy of the register which gained a legislative basis. These legislative provisions were replicated in almost identical language in

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<sup>11</sup> See generally, John Gribbin, *Science – A History 1543–2001* (2003).

<sup>12</sup> See generally, Euchar Schalk, *Einführung in die Geschichte des Liegenschaftsrechtes der Freien und Hansestadt Hamburg — Eine Darstellung des hamburgischen Grundstücksrechtes bis zur reichsrechtlichen Vereinheitlichung* (Leipzig, A Deichert'sche Verlagsbuchhandlung Dr Werner Scholl, 1931). An unpublished part of this work is held in the Staats- und Universitätsbibliothek of the City of Hamburg: *Manuscript B-12832*. See also the 1968 German Constitutional Court case *Hamburg Dyke Case* BVerfGE 24, 367; NJW, 1969, 309 and Rudolf Huebner, *A History of Germanic Private Law* (F S Philbrick trans, 1918) 288–289.

<sup>13</sup> The laws of Hamburg provide a very relevant example of the developmental process because, as we shall see in the text below that follows n 59, they influenced the emergence of the Torrens system through contributions made to the Torrens reform group by a German migrant to South Australia, Dr juris Ulrich Hübbe, who had been a property lawyer in Hamburg.

each new version of the Hamburg City Codes until the 19<sup>th</sup> century,<sup>14</sup> when German national provisions were promulgated in the German Civil Code.<sup>15</sup>

The next step in the system's evolution was reorganisation of the bound annual volumes of transactions onto a 'real estate balance sheet' prepared for each land parcel, stating proprietary rights (assets) beside encumbrances (liabilities) in the order of registration — a certificate of title or folio of the register (*das Grundbuchblatt*). This innovation was probably first made in Hanseatic Danzig (Gdansk). It appears to have been inspired by double entry accounting, an idea apparently gained by Europe from Arabic merchants.<sup>16</sup> The Hanseatic cities experimented with new methods of public administration and discussed advances in their methods at annual conferences of the Hanseatic League.<sup>17</sup> Presumably the Danzig innovation spread in this way. Reorganisation of records in this manner, around a certificate of title, was achieved in Hamburg by Gerhard Kelpke, who worked in the office responsible for the City Books between 1657 and 1693. The certificate of title was originally intended to be in the nature of an index, referring the title searcher to the record of the relevant transaction in the annual volumes, 'the journals', but it proved so reliable that the certificate of title itself emerged as the record to be consulted.<sup>18</sup>

It is interesting to ask why the Hanseatic cities gained pre-eminence in the development and implementation of the land title registration model. The origin

<sup>14</sup> City Code of 1270, I.6; City Code of 1292, C.2; City Code of 1497, G. II; City Code of 1603 I.30.3. The provisions are set out in their contemporary languages in Raff, *Private Property and Environmental Responsibility*, above n 1, Appendix. See also the corresponding provisions of the German Civil Code (*Das bürgerliche Gesetzbuch* or *BGB*) §§891–893. On historical development of the property provisions in the BGB see Raff, *Private Property and Environmental Responsibility*, above n 1, Chapter 3. This approach to establishing the paramountcy of the land title register, by requiring courts to accept its contents as conclusive evidence of the state of land title and removing the availability of relevant court remedies (which one might call the 'evidentiary status approach') is also found in the present Torrens legislation of all Australian states and territories: *Real Property Act 1886* (SA) ss 80, 207; *Land Titles Act 1925* (ACT) ss 52, 152, 159; *Real Property Act 1900* (NSW) ss 40, 44, 45; *Land Title Act 2000* (NT) ss 47, 190, 191; *Land Title Act 1994* (Qld) ss 46, 186, 187; *Land Titles Act 1980* (Tas) ss 39, 42; *Transfer of Land Act 1958* (Vic) ss 41, 44; *Transfer of Land Act 1893* (WA) ss 63, 199, 202. B Edgeworth, et al *Sackville & Neave on Australian Property Law* (8<sup>th</sup> ed, 2008), 462–9.

<sup>15</sup> *Ibid*, *BGB*.

<sup>16</sup> Michael E Tigar and Madeleine R Levy, *Law and the Rise of Capitalism* (1977) 72–3. See also Subhi Y Labib, 'Capitalism in Medieval Islam' (1969) 29 *Journal of Economic History* 79, 92–3.

<sup>17</sup> Raff, *Private Property and Environmental Responsibility*, above n 1, 68–73. Vast materials on the societies, culture and administration of Hanseatic cities are collected in Jürgen Bracker (ed), *Die Hanse — Lebenswirklichkeit und Mythos* (1989).

<sup>18</sup> Schalk, above n 12. Baumeister, *Das Privatrecht der freien und Hansestadt Hamburg* (1856) Vol 1, 201, n 11. See also Stephan Buchholz, *Abstraktionsprinzip und Immobilienrecht — Zur Geschichte der Auflassung und der Grundschuld* (1978) also published as a special edition of *Ius Commune*: (1978) 8 *Ius Commune*.

of the Hanseatic League of trading cities is generally dated to the founding of the city of Lübeck in 1159. The League dominated trade in Northern Europe until the 17<sup>th</sup> century. It pre-dated both the modern system of sovereign states, the origin of which is generally linked to the Peace of Westphalia of 1648, and the emergence of Germany as a modern unified state in 1871. At the height of its influence there were almost 100 Hanseatic cities, 18 recognised trading centres, and many other cities in which Hanseatic traders had a significant presence. They spread from England in the west to Novgorod in the east, and from as far north as Bergen and Reval and as far south as Krakau. In my assessment, the key factors behind the historical success of land title registration in this area were, first, the excision of the Hanseatic cities from their feudal hinterlands, and secondly, their administration by a city council within a framework of rapidly progressing European law, rather than a feudal overlord operating within feudal customary law.<sup>19</sup> Studies have shown that Free and Hanseatic Hamburg had a larger middle class than the feudal medieval cities of Europe. In the mercantile Hanseatic cities, ships competed with land as assets of economic importance. Title to ships was recorded in similar registers to those in which title to land was recorded. It has been suggested that in some cities the same register was used for both purposes for some of the time.<sup>20</sup> Maritime laws developed by the Hanseatic League, such as the Hamburg-Visby rules, played a very significant role in the development of the shipping laws of the modern world, including the British Imperial *Merchant Shipping Act 1854*.<sup>21</sup>

Many Hanseatic cities lay in areas which by the 18<sup>th</sup> and 19<sup>th</sup> centuries were part of Prussia, were in significant communication with Prussia or later engaged with Prussia through the North German Federation, which preceded the unification of Germany. When Prussia developed a Mortgage Book (*das Hypothekenbuch*) system<sup>22</sup> the Hanseatic land title registration system provided a ready model.<sup>23</sup> Reform of feudal land tenures and the oppressive living conditions of the peasants were widely debated topics in Central and Eastern Europe in the late 18<sup>th</sup> and early

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<sup>19</sup> The *Mirror of the Saxons (der Sachsenspiegel)* reflected the feudal law of most German areas and in Prussia at least until the General Prussian Code of 1794 (*Allgemeines Landrecht* or ALR). On the *Sachsenspiegel* see E Koolman, E Gäbler and F Scheele, *Der Sassen Speyghel – Sachsenspiegel – Recht – Alltag* (2<sup>nd</sup> ed, 1995) and M Dobozy, *The Saxon Mirror – A Sachsenspiegel of the Fourteenth Century* (1999). On the ALR see Hans Hattenhauer and Gunther Bernert (eds) *Allgemeines Landrecht für die Preußischen Staaten von 1794* (2<sup>nd</sup> ed, 1994).

<sup>20</sup> Schalk, above n 12, 88 n. 3.

<sup>21</sup> 1854 (17 and 18 Vict. c. 104) (Imperial). On the influence of Hanseatic maritime law see Frederic Rockwell Sanborn, *Origins of the Early Maritime and Commercial Law* (2002) 76–77 and J F Donaldson and C T Ellis, *Lowndes & Rudolf's Law of General Average and the York-Antwerp Rules* (8<sup>th</sup> ed, 1955) 7–8. It is noteworthy that Ulrich Hübbe's father was notary and registrar of the Hamburg Admiralty. See text below at n 62.

<sup>22</sup> Introduced by the *Allgemeinen Hypotheken-Ordnung für die gesammten königlichen Staaten* of 20 December 1783.

<sup>23</sup> Buchholz, *Abstraktionsprinzip*, above n 18, 14–16. Stephan Buchholz, 'Die Quellen des deutschen Immobilienrechts im 19. Jahrhundert' (1978) 7 *Ius Commune* 250, 262–5.

19<sup>th</sup> centuries. This was especially so in the wake of the French Revolution,<sup>24</sup> and later under the pressure of the Napoleonic wars and the reforms they precipitated in subjugated Prussia, as well as the liberal revolutionary movement of 1848. The struggle to liberate Prussia's peasants stretched from 1797, when Friedrich Wilhelm III freed the peasants of his own feudal domain and some other aristocrats followed his example, to 1850 when a new Prussian *Constitution* was promulgated under Friedrich Wilhelm IV.<sup>25</sup> The Mortgage Book system extended basic and indeed systematised title registration methods to areas not already administrated under a land title registration system, generally rural hinterland, without great need for spatial accuracy or the re-definition of tenures and estates in feudal areas in a period of rapid change. Prussia moved to a system of full land title registration in 1872.<sup>26</sup> The question of whether a system of land title registration would be adopted for the property law provisions of the German Civil Code<sup>27</sup> was disposed of quickly by the first drafting committee in 1875 and the issue was never again questioned by a committee or by critics. In this process Mortgage Book systems were seen as a middle step in evolution toward the optimum system: a land title register maintained in conjunction with a cadastre.<sup>28</sup>

The Prussian and Austrian Mortgage Book systems influenced the British Parliamentary inquiries held across the 19<sup>th</sup> century to inquire into a range of property law issues. These ultimately led to great reforms such as settled land legislation, the *Law of Property Act 1925* (UK) and the *Land Registration Act 1925* (UK).<sup>29</sup> The Report of 1830 recommended the establishment of a General Registry of Deeds.<sup>30</sup> In arriving at this recommendation, the Commissioners considered registers operating successfully in other countries, including Germany.<sup>31</sup> Indeed, one Mr Cooper took a progressive international approach when he extensively

<sup>24</sup> See for example E F Klein, *Freyheit und Eigenthum*, (facsimile edition, 1977).

<sup>25</sup> See generally, Horst Welkoborsky, 'Die Herausbildung des Bürgerlichen Eigentumsbegriffs' in Däubler and Sieling-Wendeling, *Eigentum und Recht* (1976).

<sup>26</sup> *Gesetz über den Eigenthumserwerb und die dingliche Belastung der Grundstücke, Bergwerke und selbständigen Gerechtigkeiten*, 5 May 1872, in *Gesetz-Sammlung für die Königlich Preußischen Staaten*, 433–45, and *Grundbuch-Ordnung*, 5 May 1872, *ibid*, 446–72.

<sup>27</sup> *BGB*. See above n 14.

<sup>28</sup> Raff, *Private Property and Environmental Responsibility*, above n 1, 143–4. Werner Schubert, *Die Entstehung der Vorschriften des BGBs über Besitz und Eigentumsübertragung* (1966) 99 and 118.

<sup>29</sup> The British inquiries are examined in greater detail in Raff *German Real Property Law and the Conclusive Land Title Register* and *Private Property and Environmental Responsibility*, above n 1, A K Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrens-system) – eine Rezeption Hamburger Partikularrechts?!* (2005), and A K Esposito, 'A New Look at Anthony Forster's Contribution to Development of the Torrens System' (2007) 33 *University of Western Australia Law Review* 251.

<sup>30</sup> Great Britain, *Second Report to His Majesty by the Commissioners appointed to Inquire into the Law of England respecting Real Property*, House of Commons, British Sessional Papers Vol XI (1830) 18.

<sup>31</sup> *Ibid* 19 and 33.



examined systems in Bavaria, Prussia, Norway, Italy and Sweden, with translations of Bavarian provisions. This was welcomed and its accuracy confirmed in a contemporary article published in the German journal *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*.<sup>32</sup>

The *First Report of the Registration and Conveyancing Commission* of 1850<sup>33</sup> again recommended establishment of a General Register of Deeds,<sup>34</sup> setting out detailed recommendations for its structure.<sup>35</sup> An extensive analysis was made by one Mr Ludlow of registration systems in other countries.<sup>36</sup> Although the Commission ultimately concluded that foreign systems should not be imitated,<sup>37</sup> clear recognition was finally reached of the existence of a system of land title registration beyond mere registration of deeds and this was achieved through contemplation of German systems. Mr Ludlow analysed in great detail the register established under the Prussian system, founded by the *Hypothekenordnung* of 1783.<sup>38</sup> Ludlow's endeavours to come to grips theoretically with the idea of title by registration, through reflection on the German system, were the first recognition in the English inquiries of the new or different paradigm.

In light of the debate that emerged around this report, and a Bill for an Act of Parliament introduced to give effect to it, a new inquiry was commissioned to investigate in greater depth the idea of registration of title. The new report, received on 15 May 1857,<sup>39</sup> identified in the English history of real property law a latent principle of *publicity*, which could be restored by the Commission's simple proposal for a system of registered title:

<sup>32</sup> Report of 1830, above n 30, Appendix V, 440–75. The German article was Mittermaier, 'Englische Verhandlungen über Einführung von Grund- und Hypothekenbüchern' (1832) 4 *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* 235 <<http://www.dlib-zs.mpiet.mpg.de/mj/kleioc/0010/exec/series/%222084752-x%22>> at 10 March 2009. Professor Mittermaier admired Cooper as a distinguished advocate and author of works about the Court of Chancery and the author of a true and comprehensive account of German and French real securities: Mittermaier, *ibid.*, 237, 258–9. I am indebted to Professor Horst Lücke for reference to this article. Professor Lücke suggests that an early South Australian proposal for a deed registry in Adelaide could have been inspired by the 1830 Report: see J H Fisher, *Sketch of Three Colonial Acts Suggested for Adoption in the New Province of South Australia* (1836).

<sup>33</sup> Great Britain, *First Report of the Registration and Conveyancing Commission*, British Sessional Papers, Vol XXXII (1850) [hereafter the '1850 Report'], 1.

<sup>34</sup> *Ibid.* 5.

<sup>35</sup> *Ibid.* 32.

<sup>36</sup> *Ibid.*, Appendix V, pp 206–31, 'Registration of Deeds in Foreign Countries'.

<sup>37</sup> *Ibid.* 4.

<sup>38</sup> See above n 22.

<sup>39</sup> Great Britain, *Report of the Commissioners appointed to consider the subject of the Registration of Title with reference to the Sale and Transfer of Land*, British Sessional Papers, Vol XXI (1857) (hereafter the '1857 Report'), 245.

In the earlier period of our history publicity was considered essential in almost all dealings with landed property. The transfer of the immediate freehold in possession was made notorious by livery of seisin<sup>40</sup>

The Commission saw no dilemma between ensuring the existing security of landed settlements and protecting the new interests of purchasers, and thus conceded no antithesis of the interests of family and the benefits of marketable title:

Were we to allow, however, that such a difficulty does in fact present itself, we should be able to rely... on our ancient law as affording for the present purpose a wise and useful precedent; for just as the feudal law required that the freehold should always be filled by one capable of contributing to the national defence, and performing the duties of a feudal follower, so the spirit of commerce now demands that for its purposes also the fee simple in land shall always be represented and be in the possession of persons capable of fulfilling those *new duties and offices which the ownership of land in the present state of society entails or involves*.<sup>41</sup>

This statement implicitly acknowledges that registered freehold title would continue to be subject to responsibilities that match the evolving needs of society.

The thrust of the Commission's recommendations was not successfully implemented in Britain for almost 70 years<sup>42</sup> and further inquiry followed, in which international comparative analysis was resumed, even if with some disdain of the Torrens system by Brickdale.<sup>43</sup> According to Ruoff, Brickdale was 'the pioneer of effectual registration of title in [England]'.<sup>44</sup> Brickdale preferred the German system over the Torrens system as a source of inspiration:

The population affected by the system [in Germany and Austria-Hungary] amounts to 95 millions, whereas the population of Australasia ... is only 5½

<sup>40</sup> Ibid 2. The modern German *principle of publicity* comprises (i) the *formal publicity principle* (*das formelle Publizitätsprinzip*), according to which the land title register may be inspected by anyone with a legitimate motivation, and (ii) the *substantive publicity principle* (*das materielle Publizitätsprinzip*), which provides that an honest party is entitled to rely on the state of the register, which in the absence of actual knowledge to the contrary is presumed correct in a positive sense, that a registered right exists, and in a negative sense, that a clear register means there are no other proprietary interests in the land.

<sup>41</sup> *1857 Report*, above n 39, 29 [L] – (my emphasis).

<sup>42</sup> A W B Simpson, *A History of the Land Law* (2<sup>nd</sup> ed, 1986) 280–3. The underlying policy position in the recommendations was implemented ultimately in the *Registration of Land Act 1925* (UK).

<sup>43</sup> C Fortescue-Brickdale, 'Registration of Title in Prussia' (1888) 4 *Law Quarterly Review* 63.

<sup>44</sup> Theodore Ruoff, *An Englishman Looks at the Torrens System* (1957) 6. L Charlebois, 'Creating Land Registration Systems for Developing Countries' (1999) *Amicus Curiae* 8.

millions. The general conditions also combine in many ways to render this Central European system the most useful and general model for study and imitation.<sup>45</sup>

In conclusion on this point, the 19<sup>th</sup> century British inquiries into land title administration also referred to German systems of land title registration at pivotal points. Indeed, progression from the perception that all registration systems were deed registration systems to a deeper understanding of land title registration systems appears to have been achieved through reflection on the Prussian system. Express reference to the continental systems declined following rejection of the idea of imitating foreign systems and the commensurate increase in appeals to British history and spirit.

The 1857 Report was published in Britain on 15 May 1857. It is widely reported that Torrens received it in Adelaide on the eve of his second reading speech in support of his Substitute Bill in the South Australian Legislative Assembly on 11 November 1857.<sup>46</sup> In view of the rapidity with which he received it, given the speed of shipping at the time, the report must have been sent to him unsolicited or by prior arrangement. Torrens would already have seen the reports of the 1850 and 1853 inquiries. Torrens probably enjoyed privileged access to the reports through his father, Colonel R Torrens, who, as chairman of the Colonisation Commission for South Australia was an eminent man in London.<sup>47</sup>

The 1857 Report was not tabled in the South Australian Parliament until January 1858. After the Legislative Council received it, Mr Baker stated that he had read it and, contrary to what had been said, the Torrens proposal was not identical. He considered some of the clauses and stated they were ‘a convincing proof that the measure had not been, as was said, framed after its model.’<sup>48</sup> A proposed reform Bill was appended to the 1857 Report. All commentators agree that the final version of Torrens’ Substitute Bill, the text of which he introduced on 18 November 1857, and in the development of which a German immigrant to South Australia, Dr juris Ulrich Hübbe, played a very significant role, was not modelled on it. Nevertheless, Torrens would have been very pleased with his proposal after reading the 1857 Report and its suggested Bill on the eve of his second reading speech.

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<sup>45</sup> C Fortescue-Brickdale, *Methods of Land Transfer – Eight Lectures* (1914) 129–30. See also C Fortescue-Brickdale, ‘Registration of Title in Prussia’, above n 43.

<sup>46</sup> Robert Richard Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) Preface, vii.

<sup>47</sup> Esposito contends that Mr Anthony Forster MLC (see text below around n 51) had already consulted the earlier British reports and points to Forster’s article in *The South Australian Register* of 5 July 1856 at 3, in which Forster extracted passages from the 1830 Report (see text above following n 30): Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrenssystem)*, above n 29, 55–6. See generally, Esposito, ‘A New Look at Anthony Forster’s Contribution to Development of the Torrens System’, above n 29.

<sup>48</sup> South Australia, *Parliamentary Debates*, Legislative Council, 19 January 1858, 763 (Mr John Baker).

The use Torrens made of the 1857 Report was far more political than textual. He would have found reassurance in it. His political constituency of British descent would have acknowledged the support of a report of the British Parliament for the same main principles that lay behind Torrens' proposal in preference to references to the Hanseatic system, which was foreign to them and outside the common law world of the British Empire. Rather than the 1857 Report being a source of grand ideas on the eve of Torrens' second reading speech, in later debates Torrens drew upon it in addition to, or in place of references to the Hanseatic system in order to bolster the reasonableness and, ironically,<sup>49</sup> the feasibility of the Torrens measure. In the probable scenario that Torrens and Forster were aware of the 'Teutonic influence' on the earlier British reports they would have recognised the importance of gaining the assistance of Dr juris Ulrich Hübbe for the Torrens reform group.

## II DEVELOPMENT OF THE TORRENS SYSTEM

The Torrens land title registration system was developed in Adelaide in the late 1850s by an expert multi-disciplinary and multi-lingual law reform group. The system that emerged and that was effectively replicated around Australia, most of the former British Empire, and parts of the United States, adopted many German juristic ideas through the influence of Dr Hübbe.

In support of this contention, I will set out evidence that:

1. Robert Torrens was a member of a reform group and not acting alone;
2. Dr juris Ulrich Hübbe, an immigrant to South Australia from Hamburg, was also part of that reform group; and
3. Hübbe made significant contributions to the group and broader law reform activity in South Australia.

### A *The Torrens Reform Group*

Torrens himself referred to gaining help from others in developing the land title registration reform:

I therefore submitted my scheme in the form of a draft Bill to ... (Mr Forster) ... and to several other gentlemen on whose judgment I placed reliance. From these gentlemen I received some valuable suggestions, which are embodied in the measure as it now stands. To them I am further indebted for powerful and unwavering support throughout the struggle now so successfully terminated.<sup>50</sup>

<sup>49</sup> Implementation of the *1857 Report* in Britain was ultimately unsuccessful: S R Simpson, *Land Law and Registration* (1976) 76. As Torrens had pointed out on earlier occasions, the Hanseatic system had been successful in practice for hundreds of years: see text below at n 76.

<sup>50</sup> Torrens, *The South Australian System of Conveyancing by Registration of Title*, above n 46, vi.

A persistent opponent of the reform, Mr Baker, remarked in the closing stages of the debate that '[t]he Bill was the production of a clique, who sought to pass this measure for popularity's sake.'<sup>51</sup>

It is difficult to assess the contributions of the respective members of the Torrens clique, or even confidently to identify them. It certainly included Mr Anthony Forster MLC, who was editor of the Adelaide newspaper *The South Australian Register*. It is clear from records of the debates that Mr Forster had a far more protracted struggle in carrying the Bill through the Upper House than Torrens did in the Lower House. Esposito identifies Forster as the real champion of the Torrens reform measure.<sup>52</sup> Although the reform was brought to fruition by a group, the name of Torrens attached to 'the Torrens measure' at an early point and stuck even when the substance of the reform changed. Professor Lücke outlines many reasons for this.<sup>53</sup> One important reason must have been the need to differentiate Torrens' Bill(s) to enact the system (ultimately successful) from the Bill to enact a more conservative system advocated at the same time by the Attorney-General of South Australia, Richard Hanson (ultimately unsuccessful). Torrens is in any case deservedly admired for his work within the Torrens reform group and for championing the reform in the public politics of South Australia's first popular parliamentary chamber.

### B *Hübbe as Member of the Reform Group*

One extraordinarily talented and loyal member of the Torrens clique was Dr juris Ulrich Hübbe who had immigrated to South Australia from Hamburg. Torrens championed politically, inside the first South Australian Parliament and in wider society, the need for a new conveyancing system to replace the existing system of English general law deeds conveyancing, the transaction costs of which were sometimes more than the value of the land concerned<sup>54</sup> and which was plagued by fraud. Torrens' ideas for a system of registered land title were nevertheless relatively amorphous, and as Robinson has shown,<sup>55</sup> these ideas changed in the course of the campaign for its adoption, largely through Hübbe's influence.

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<sup>51</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 January 1858, 779 (Mr John Baker).

<sup>52</sup> Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrens-system)*, and 'A New Look at Anthony Forster's Contribution to Development of the Torrens System', above n 29.

<sup>53</sup> Horst K Lücke, 'Ulrich Hübbe or Robert R Torrens? The Germans in Early South Australia' (2005) 26 *Adelaide Law Review* 211, 212–7.

<sup>54</sup> South Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 1857 (First Reading Debate), 206–7 (Captain Hart) and Judith Brown and Barbara Mullins, *Town Life in Pioneer South Australia* (1980) 177.

<sup>55</sup> Stanley Robinson, *Equity And Systems of Title to Land By Registration* (Ph D Thesis, Monash University, 1973). See also Stanley Robinson, *Transfer of Land in Victoria* (1978) Chapter 1.

Robert Richard Torrens was born in Cork, Ireland, in 1814. He arrived in South Australia on the *Brightman* in 1840. He was the son of Colonel Robert Torrens and graduated with a Bachelor of Arts from Trinity College, Dublin, in 1835.<sup>56</sup> Two aspects of Torrens' past recurred in his speeches and writings as socio-legal assumptions about his world or his motivations for reform. The first was the ruin of a close relative in the Court of Chancery.<sup>57</sup> The second concerned the ideals of his father, Colonel Robert Torrens, who was instrumental in the founding of the colony as chairman of the Colonisation Commission for South Australia.<sup>58</sup> A key strategy in the colonisation project was the immigration Land Fund. The Crown would gain funds from sale of land to free settlers and use them to finance the immigration of yet more settlers. It was argued that the risk of land title fraud and exorbitant costs of deeds conveyancing thus placed the colonisation project itself at risk. Torrens left South Australia for England in 1862. His efforts in English public politics, to have the South Australian system adopted there, were unsuccessful. R R Torrens died at Falmouth in 1884.

Dr Hübbe was born in Hamburg on 1 June 1805. He arrived in South Australia on the *Taglione* in 1842. Hübbe read Law at Kiel, Jena and Berlin<sup>59</sup> before being appointed to a junior position in the Prussian Civil Service. He obtained his Doctorate in Law from the University of Kiel on 10 March 1837<sup>60</sup> and later practised law in Hamburg.<sup>61</sup> Hübbe was reputedly fluent in eleven languages. He was the third son of Heinrich Hübbe who was a notary and registrar of the Hamburg Admiralty.<sup>62</sup> Dr Hübbe had assisted Prussian Lutherans, who wished to escape religious repression under King Friedrich Wilhelm III, to find vessels sailing from Hamburg.<sup>63</sup> Following the Great Fire of Hamburg in 1842,<sup>64</sup> Hübbe decided to follow the immigrants he had assisted.

<sup>56</sup> See generally Douglas J Whalan, 'Torrens, Sir Robert Richard (1814–1884)' *Australian Dictionary of Biography* (1976) Vol 6, 292–3; also at <<http://www.adb.online.anu.edu.au/biogs/A060313b.htm>> at 14 December 2008; Brown and Mullins, *Town Life in Pioneer South Australia*, above n 54, 174.

<sup>57</sup> Torrens, *The South Australian System of Conveyancing by Registration of Title*, above n 46, v-vi. The details remain a mystery.

<sup>58</sup> See Torrens, *Colonization of South Australia* (1835).

<sup>59</sup> 1826–1837. See generally D St L Kelly, 'Hübbe, Ulrich (1805–1892)', *Australian Dictionary of Biography* (1972) Vol 4, 436–7; also at <[www.adb.online.anu.edu.au/biogs/A040491b.htm](http://www.adb.online.anu.edu.au/biogs/A040491b.htm)> at 14 December 2008.

<sup>60</sup> E H Tilbrook, 'The Hübbe Memorial At Clare' Royal Geographical Society of Australasia, South Australian Branch, Proceedings for the Session 1939–40, Vol XLI, November 1940, 39.

<sup>61</sup> Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 52.

<sup>62</sup> On the Hübbe family in Hamburg: see Martur, 'A Worthy Colonist' *The Adelaide Observer* (Adelaide), 11 October 1884, 42–3.

<sup>63</sup> A Brauer, 'Another Page from the Life of the Fathers' *The Australian Lutheran Almanac*, 1929, 40 et seq. See generally, Raff, *Private Property and Environmental Responsibility*, above n 1, 32–3, and C Clark, *Iron Kingdom – The Rise and Downfall of Prussia 1600–1947* (2007) 412–9.

<sup>64</sup> Martur, above n 62.

In South Australia, in addition to his efforts for reform of real property law, Dr Hübbe was also a teacher, a land agent, interpreter and translator, editor of the *Neue Deutsche Zeitung*, poet and Lector of the Lutheran Church. Dr Hübbe also contributed to formulation of the Public Trustee Bill.<sup>65</sup> His agitation for reform of the law of succession probably contributed to the abolition of primogeniture in South Australia in 1867.<sup>66</sup> Hübbe's wife, Martha, was an active campaigner for public education and with their daughter, Isabel Hübbe, opened the first South Australian Education Department School at White Hut (Clare) on 1 September 1880, not far from the ruins of the first White Hut School at which Dr Ulrich and Mrs Martha Hübbe had lived and taught. Martha died and was buried at White Hut in 1885, aged 79 years. Dr Ulrich Hübbe died in 1892 and lies in the Hahndorf Cemetery.<sup>67</sup> On his grave there are memorials to his son Samuel, who was killed in action while commanding the Third South Australian Bushmen's Contingent to the Boer War in 1899, and to a grandson who died while serving with the Australian Imperial Forces in the First World War.

Hübbe's work with the Torrens reform group followed the appearance in 1856 and early 1857 of a series of letters in *The South Australian Register* under the *noms de plume* Vitis and Sincerus. Vitis wrote that reforms to the land title system which had been suggested along the lines of the new *Shipping Act* were already in practice in the system in Prussia, which he described in some detail.<sup>68</sup> Hübbe later recounted that Torrens drove in his horse and trap to the Hübbe family home and inquired after the author of letters in the newspaper. Hübbe acknowledged their authorship and Torrens took him immediately to his home at Torrens Park, Mitcham, in Adelaide. This was probably early in 1857.

A number of points reported about Hübbe's work with Torrens suggest the importance of Hübbe's role. Hübbe sat outside the Chamber of the Legislative Assembly awaiting consultation while Torrens debated the Bill inside.<sup>69</sup> Four texts were obtained from Hamburg and Hübbe translated and commented upon them. Hübbe's consequent paper *Title by Registration in the Hanse Towns* was ordered to be printed by the Legislative Council on 27 November 1861.<sup>70</sup> Hübbe's monograph, *The Voice of History and Reason brought to bear against the present Absurd and*

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<sup>65</sup> Ibid 41, 42.

<sup>66</sup> South Australia, Act no. 29 of 1867. See Ulrich Hübbe, *The Voice of History and Reason brought to bear against the present Absurd and Expensive Method of Transferring and Encumbering Immoveable Property* (1857) 76–7, and U Hübbe, *Letters to a Countryman on Intestate Estates, Acts, Judges, and Things in General* (1872).

<sup>67</sup> Tilbrook, above n 60, 39–42.

<sup>68</sup> *South Australian Register* (Adelaide), 16 August 1856. See also letters of Reformer, *South Australian Register* (Adelaide), 11 February 1857, who referred to the Hanseatic and Prussian systems in addition to other foreign systems, and Sincerus, *South Australian Register* (Adelaide), 18 and 26 February 1857.

<sup>69</sup> Royal Geographical Society Proceedings (South Australia) Vol XXXII, 110.

<sup>70</sup> South Australia, *Title by Registration in the Hanse Towns*, Parliamentary Paper No 212 (1861).

*Expensive Method of Transferring and Encumbering Immoveable Property*,<sup>71</sup> was distributed to members of Parliament during the debate.<sup>72</sup> There are two handwritten notes on the front piece of the copy of this work held by the National Library of Australia in Canberra stating that Torrens himself presented it to the Committee of the Legislative Assembly on Registration of Real Property Titles and on 10 June 1858 handed it to the Committee on Registration and Preservation of Records. This is an indication of the esteem in which Torrens held Hübbe. Clearly Torrens regarded Hübbe's monograph as an essential part of the heritage of the development of the title registration system.

There are various reports that, through Torrens, Hübbe was given a desk in the Registry Office following enactment of the reform. This might have been to assist Torrens and Hübbe to formulate rules for implementation of the system in practice.<sup>73</sup> An article in the German language *Süd-Australische Zeitung* suggested that Hübbe was an adviser to Torrens who, as noted above, did not have legal education.<sup>74</sup>

The importance of Hübbe's participation is also evidenced by the level of the contributions that he made.

### C *Hübbe's Contributions*

The reform was pressed through the Legislative Council by Mr Anthony Forster MLC, as noted above. On 15 May 1892 he wrote to his niece Miss Ridley stating that:

it never could have been brought to a final consummation but for the efficient help of a German Lawyer, Dr Hübbe, who has unfortunately had too little recognition in connection with it.

The provisions of the Bill were settled by Mr Torrens and a few friends and put into proper form by Dr Hübbe and passed triumphantly through the local legislature notwithstanding the fierce and uncompromising opposition of the lawyers. Mr Torrens took charge of it in the House of Assembly and I in the Legislative Council. We had the whole Colony at our back.<sup>75</sup>

<sup>71</sup> Above n 66.

<sup>72</sup> See Tilbrook, above n 60, 41, and Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 59 n 1.

<sup>73</sup> South Australia, Parliamentary Paper, No 192 of 1861, questions 789–2. Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 81–2. In this connection it cannot be mere coincidence that conveyancing transactions were concluded by land brokers in Hamburg and provision for a similar profession was made in South Australia.

<sup>74</sup> Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrens-system)*, above n 29, 179–81, citing *Süd-Australische Zeitung*, 12 January 1861, 1.

<sup>75</sup> South Australian Archives No. A-792, quoted from Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 44–5.



Torrens himself stated what he wished to accomplish in his first reading speech in support of the reform initiative:

In the Hanse Towns a system of transfer by registration has been in force for over 600 years. I have had communications from legal practitioners there, and I hold in my hand a letter from a gentleman who for many years conducted an extensive agency business in Hamburg; and from these communications I am assured that the cost of a transfer or mortgage in that city seldom exceeds 7s6d, and that suits about titles to land are almost unknown. No one in this House will assert that this which is accomplished by Germans in Hamburg cannot be accomplished by German and English colonists in South Australia.<sup>76</sup>

Speaking in reply at conclusion of the first reading debate, Torrens reaffirmed:

It was not an untried measure, for although he was not at first aware of it, it had been in operation for 600 years in the Hanse Towns.<sup>77</sup>

Torrens also referred in his book to the Hanseatic cities of Northern Europe, when addressing implementation of the system:

our titles would have been preserved clear and susceptible of being transferred with certainty, facility, and economy, as those of the Hanse Towns have, under a similar institution, been preserved for centuries<sup>78</sup>

Torrens rarely addressed the legal details of the reform initiative. However, over 1857 such explanations that he attempted grew to reflect his new knowledge of the system that operated in the Hanseatic cities of Germany, and specifically Hamburg. Torrens obtained this knowledge from Hübbe, or from German sources which Hübbe translated. In his first reading speech Torrens drew attention to systems of registration for shares and ships. Robinson considered that Torrens' use of the concept of 'immovable property', while arguing that there are no relevant differences between the registration of land and that of shares and ships, suggested influence of the civil law system transmitted through Hübbe.<sup>79</sup>

On 11 November 1857 the Bill finally entered its second reading, six months after its first reading on 15 May 1857. The principles were reorganised and articulated with more sophistication. The vital elements were: first, estates and interests in

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<sup>76</sup> South Australia, *Parliamentary Debates*, Legislative Assembly 4 June 1857, 205 (Mr Robert Richard Torrens).

<sup>77</sup> Ibid 210.

<sup>78</sup> Torrens, *The South Australian System of Conveyancing by Registration of Title*, above n 46, 22.

<sup>79</sup> South Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 1857, 205 (Mr Robert Richard Torrens). See Hübbe *The Voice of History and Reason* above n 66, 6. Robinson, above n 55, 23.

land should pass by registration of the transaction; secondly, registered titles should be absolutely indefeasible, unless procured by fraud; and thirdly, lesser interests granted by the registered proprietor should derive from the indefeasible title and simply burden it as encumbrances or limitations.

Torrens went on to state that, unless registered, leases and mortgages would not be binding, 'except as personal contracts between the individuals.' In conclusion he stated that:

It would be necessary for the opponents of the Bill to show that the inhabitants of South Australia could not do that which was done by the inhabitants of the Hanse Towns, the Prussians, and the Americans. They would have to show that there was something in the nature of land which prevented the application to it of all the law that applied to shipping.

On 18 November 1857 Torrens introduced his Substitute Bill for the reform measure. At the beginning of his second reading speech Torrens acknowledged that he had collected materials which induced him to make many alterations to his original Bill to make it more complete, but in his view the essence remained the same. One significant clarification was the way that the principle of registration was to be expressed. At the outset, Torrens had stated simply that each change of title would be as a new grant from the Crown. However, the principle that emerged adopted a particular approach, the evidentiary status approach:

The two great principles of the measure were that not merely the instrument, but the entry in the book shall form the title; and that the certificate, for the future, shall always be deemed evidence of title in a court of law.<sup>80</sup>

This approach was not by any means the only way that the register could have been established, or incentives to register one's interests constructed or the superiority of the register maintained. It is an approach that comprises four interrelated points:

1. the title passes or the proprietary interest is created when registered;
2. the content of the register is deemed to be a superior form of evidence;
3. the registered proprietor is protected from court action; and
4. some defined interests are paramount above registered interests.

It cannot be mere coincidence that Torrens advocated this structure of the principle of indefeasibility of title that had been employed in Hamburg to maintain the conclusive register since 1270 and which surrounded him on three points with juristic influences of German and primarily Hanseatic origin. In sum, these three points were:

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<sup>80</sup> South Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 1857, 647 (Mr Robert Richard Torrens). See discussion of the *evidentiary status approach*, above n 14.

1. Hübbe and the materials imported from Hamburg that he translated and explained, as well as the encouragement of other German settlers in South Australia;
2. inspiring accounts of German land title systems in the English Parliamentary Reports from 1830 to 1857; and
3. methods of international shipping registration that derived from Hanseatic maritime law.

Torrens showed little capacity for independent juristic thought at this level in any other pursuit. The evidentiary status approach remains at the heart of most Torrens legislation in Australia and also modern German law.<sup>81</sup> The Substitute Bill thus displays solidly the influence of Hübbe, especially in the rewriting of the provisions which originally had been derived from the *Merchant Shipping Act*. Robinson analysed very closely the transition of the provisions in the two Bills and identified eight changes which he attributed to the influence of Hübbe.<sup>82</sup> Two significant variations in Torrens' proposals have drawn particular attention.

First, one authentic original Torrens idea was that each transfer of land would be like a fresh Crown grant of the land to the transferee. However, it is difficult to see where this feature survived in the system that emerged; the term 'land grant' is used for the initial Crown grant of the land and the 'certificate of title' evidences subsequent transactions with it. Taylor suggests that Hübbe was actually critical of Torrens' original idea being altered in the new proposal,<sup>83</sup> and thus is unlikely to have had influence in relation to it. The relevant part of Hübbe's text simply points out Torrens' original idea and queries the advisability of changing it at such a late stage, in view of public acceptance of Torrens' original approach. This query could hardly be read as advocacy for the original idea.<sup>84</sup> In any case, the format of the Torrens certificate of title that emerged strongly resembled the Hamburg format and it is unlikely that Hübbe was uncomfortable with it.<sup>85</sup> Indeed, in the same text Hübbe supported and praised the Torrens measure precisely for that reason.<sup>86</sup>

Secondly, although Torrens had earlier made some reference to a registered mortgage taking effect as a charge, until April 1857 the proposed reform measure featured a registered form of English mortgage. The legal title was to be transferred to the mortgagee by way of mortgage and then retransferred when the secured obligation was repaid. Each step in these transactions was to be registered. The

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<sup>81</sup> See above, n 14.

<sup>82</sup> See Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 54–81; Robinson, *Transfer of Land in Victoria*, above n 55, 14–19; Raff, *German Real Property Law and the Conclusive Land Title Register*, above n 1, 37–8; Raff, *Private Property and Environmental Responsibility*, above n 1, 39–46.

<sup>83</sup> Greg Taylor, 'Is the Torrens System German?' (2008) 29 *Journal of Legal History* 253, 262–3.

<sup>84</sup> Hübbe, above n 66, 80.

<sup>85</sup> For the Hamburg format, see Schalk, above n 12.

<sup>86</sup> Hübbe, above n 66, 64–70.

‘Torrens mortgage’, adopted in the revised proposals of November 1857, is in the style of a German mortgage or *Hypothek*.<sup>87</sup> Commenting on Torrens’ adoption of the English style, Hübbe stated that Torrens had yielded for a time to the influence of others.<sup>88</sup> This happens frequently to even the closest technical advisors of politicians. Hübbe suggested that he, as someone who had ‘lived under a better system’, was influential in the reversal. Taylor rightly concedes that this was feasible while seeking to play down its importance.<sup>89</sup> Torrens himself acknowledged the analogy of the ‘Torrens mortgage’ to Hanseatic real securities:<sup>90</sup>

The South Australian system analogous to that adopted in the Hanseatic States

The South Australian method of mortgaging resembles that of the Hanse Towns referred to. The cost of mortgage is 10s<sup>91</sup>

Evidence given to the Real Property Law Commission of 1861 also corroborates Hübbe’s role. In particular, Torrens questioned one Mr Schumacher in an effort to extract a favourable comparison between the South Australian and the Hanseatic systems. Mr Schumacher was a land broker and most of the questions were directed to showing that the expense of transactions through land brokers in Hamburg was comparable with expenses under the Torrens system.<sup>92</sup> Robinson concluded<sup>93</sup> that Torrens was at pains to show that:

1. the Hamburg system and the new South Australian system were similar;
2. the Hamburg system worked well;
3. while the general law system produced litigation constantly, the registered system produced none, and therefore;
4. Torrens’ system would work well and produce minimal litigation.

This line of questioning was a clear acknowledgment by Torrens of his efforts to emulate the achievements of the Hanseatic system.

Four texts were obtained from Hamburg and Hübbe translated them and circulated his comments. Hübbe’s consequent paper *Title by Registration in the Hanse Towns* was ordered to be printed by the Legislative Council on 27 November 1861,

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<sup>87</sup> See Hübbe, above n 66, 88–91.

<sup>88</sup> *Ibid*, 89.

<sup>89</sup> Taylor, above n 83, 262.

<sup>90</sup> Torrens, *The South Australian System of Conveyancing by Registration of Title*, above n 46, 37.

<sup>91</sup> *Ibid* 38.

<sup>92</sup> South Australia, *Report of the Real Property Law Commission*, Parliamentary Paper No. 192 of 1861, questions 1105–1126.

<sup>93</sup> Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 81–84.

as noted above.<sup>94</sup> Another text, a translation of rules compiled by Dr Luhrsen of Hamburg entitled *The Book of the City of Hamburg, of Hereditaments and Rents; or, the order of transcribing land and Hypotheks* is reproduced by Robinson.<sup>95</sup> It was first published in 1860 when the original *Real Property Act* was two years old. Robinson saw publication of the papers after enactment of the reform as an effort by Torrens to justify the basic principles of the Act in the face of persistent opposition.<sup>96</sup> It might also have been published in the course of Torrens' and Hübbe's collaboration in formulating more detailed rules for implementation of the system in practice. In 1880 a Bill was introduced into the South Australian Parliament to award Torrens an additional pension of £500 per annum. Brown and Mullins report that chaos broke out in the House when the pension for Torrens was proposed.<sup>97</sup> Of the 14 members who spoke on the issue of the pension, three expressly referred to the significant contributions of Dr Hübbe and no other speaker expressed the slightest doubt about their views.<sup>98</sup> According to Henning:

... it was perfectly well known at the time that Sir R R Torrens brought in the Real Property Act that Dr Hubbe provided the ideas, the brains, and the work of the measure, and that Sir R R Torrens merely fought the battle of the Bill ...<sup>99</sup>

Four years later Hübbe also petitioned for a pension<sup>100</sup> and obtained £250. Hansard records:

Mr. HENNING felt disappointed at the sum named, and he hoped the Government would reconsider the question with the view of putting not less than £500 on the Estimates. Dr Hubbe had materially assisted in the passing of the Real Property Act, and some years ago he introduced to the House the advisability of voting a sum of money to that gentleman. Unfortunately he was unsuccessful in his object, and therefore he hoped that a reasonable sum would now be voted to Dr Hubbe.<sup>101</sup>

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<sup>94</sup> Above n 70.

<sup>95</sup> Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 135–47.

<sup>96</sup> *Ibid* 84–5.

<sup>97</sup> Brown and Mullins, above n 54, 178. Their account in this text of Torrens' participation in Adelaide society is probably the most damning in print: see generally, Brown and Mullins, above n 54, 174–8.

<sup>98</sup> See Mr Ross in South Australia, *Parliamentary Debates*, Legislative Assembly, 20 July 1880, 424; Mr Freidrich Krichauff, 425; Mr Henning, 427. See also Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 50 n 2. Cf Taylor, above n 83, 267–268.

<sup>99</sup> *Ibid* 427; Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 50.

<sup>100</sup> South Australia, *Parliamentary Debates*, Legislative Assembly, 28 August 1884, 797, and 17 September 1884, 1024–7. See also Anon. 'An Unacknowledged Public Benefactor' *The Adelaide Observer*, 21 June 1884, 30, col 3.

<sup>101</sup> *Ibid*, 17 September 1884, 1025.

This cannot credibly be described as Henning ‘correcting himself’.<sup>102</sup> Henning was pressing to double the sum proposed to be granted and reaffirmed his earlier opinion. Of the 16 members who on the 17<sup>th</sup> September 1884 spoke on the issue of a pension for Hübbe, all but one, Furner, supported the measure. Many, like Henning, supported it strongly and advocated a higher sum. Furner conceded that he had no knowledge of the issue but expressed doubt because Hübbe as ‘a professional man’ must have been remunerated in some way.<sup>103</sup> Hardy, a lawyer, stated:

The late Sir R R Torrens was staying with him at the time he started the idea of the Real Property Act and he knew that the information which Dr Hübbe had obtained from the continent was of great service. Dr Hübbe was always a strong supporter of the measure, and the country was almost as much indebted to him in the matter as it was to Sir R R Torrens.<sup>104</sup>

The Honourable Mr Johnson, the son of a lawyer who was a contemporary of Hübbe, stated:

[Hübbe] did not receive anything for his endeavours to work out the Real Property Act. The late Sir R R Torrens had received all the honor and glory in connection with the Act, but Dr Hübbe, by bringing his experience of a similar law in the Hanseatic towns of Germany, had been of great assistance, and was entitled to some part of the glory...<sup>105</sup>

While Torrens had been rewarded with the position of Commissioner for land titles, a pension, and later a grant, Hübbe received nothing but odd work as a court interpreter.<sup>106</sup> Hübbe stated that appointment to a position in the public administration of land titles under the new system had been suggested to him as a reward for assisting Torrens. However, it did not eventuate and this was the reason for Hübbe’s application for financial assistance.<sup>107</sup>

<sup>102</sup> Taylor, above n 83, 268.

<sup>103</sup> *Parliamentary Debates*, above n 100, 17 September 1884, 1025.

<sup>104</sup> *Parliamentary Debates*, above n 100, 17 September 1884, 1024. Also in Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 51.

<sup>105</sup> *Ibid*, 1026. Robinson, *Equity and Systems of Title to Land by Registration*, paraphrased the views of many others in support of the view that Hübbe was a considerable influence: see above n 55, 52 n 1. Among them was Hague, *History of South Australia*, stating that ‘[Torrens] had assistance all the way through – he could not have succeeded without it, nor did he ever attempt to conceal it. Dr Huebbe sat just outside the bar of the House during the consideration of the Bill and was frequently consulted by Torrens.’

<sup>106</sup> Hübbe’s position as Supreme Court interpreter was apparently abolished in 1867 in the legal profession backlash against the system he had helped to develop: Martur, above n 62, 43.

<sup>107</sup> South Australian Archives, from Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 80. Further evidence of Hübbe’s contribution may be found in Robinson, *Transfer of Land in Victoria*, above n 55, and Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrens-system)*, above n 29; Esposito, *The History of the Torrens System of Land Registration with Special Reference to its*

I have surveyed above strong evidence that Torrens had access to information about German systems of land title registration. In the development of the Substitute Bill introduced to the Parliament by Torrens in November 1857, he gained far more attentive assistance from Dr Hübbe. At the very least there was a sharing of juristic material between Germany and South Australia in the enactment of the measure. There were, nevertheless, innovative aspects of the system that emerged in South Australia. The Torrens caveat system, for example, could not be a transplantation because Hamburg law did not have one. It had been abolished in 1802. The view of progressive Hamburg jurists was that it should be re-introduced. Hübbe was in touch with these progressive views through the material he obtained from Hamburg.<sup>108</sup> However, the caveat system that emerged in the Torrens system was a simpler, more effective and efficient approach. This does not prevent the conclusion that other aspects of the Torrens system represent a transplantation or a reception of German concepts and principles.

#### D *Understating Hübbe's Role*

When drawing attention to the ample positive evidence of Hübbe's role in the development of the Torrens system it is nevertheless a matter of curiosity why recognition of his contribution was neglected for so long.

Robinson concluded that the answer lay in Torrens' character. I have drawn attention above to the position of Torrens' father as chairman of the Colonisation Commission for South Australia. Whalan suggested that young Torrens' position in the colony was advanced through this family connection on at least one occasion.<sup>109</sup> He was famous for arrogance.<sup>110</sup> With allegations of false imprisonment and assault against him, in consequence of which he resigned as a Justice of the Peace,<sup>111</sup> Torrens' character must have a question mark beside it.

Only two days after the third reading of the Real Property Bill in the Legislative Assembly, Torrens wrote to the Governor requesting that a copy of his speeches be forwarded in support of his application for promotion. Governor MacDonnell appears to have supported Torrens, but his successor Governor Daly later wrote,

speak of him more as an unscrupulous Charlatan than as the real author of a beneficial measure of Law reform to the orientation of which he is well known to have no pretension whatever. His absence is so beneficially felt in

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*German Origins* (LLM Thesis, University of Adelaide, 2000); and 'A Comparison of the Australian ("Torrens") System of Land Registration of 1858 and the Law of Hamburg in the 1850s' (2003) 7 *Australian Journal of Legal History* 193.

<sup>108</sup> G Luhrsen, *The Book of the City of Hamburg, of Hereditaments and Rents; or, the order of transcribing land and Hypotheke* (trans U Hübbe) reproduced in Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 135–7.

<sup>109</sup> Whalan, above n 56.

<sup>110</sup> Brown and Mullins, *Town Life in Pioneer South Australia*, above n 54, 174–8.

<sup>111</sup> *Ibid.*, 175. See also Whalan, above n 56.

this community that even those most friendly to him consider that such a pension as would prevent his return to this colony would be well bestowed.<sup>112</sup>

That Governor Daly might not have been in the colony at relevant points in Torrens' career and thus learned about these questionable aspects from others simply points to the long standing notoriety of Torrens' reputation on these points in the colony. It is important to note that it was being said and believed by the Adelaideans who had such influence on the Governor.

Without doubt, Torrens worked tirelessly against great odds in the political realm.<sup>113</sup> His virtual silence concerning Hübbe's contribution could also be accounted for by the political disadvantage which the reform could have suffered if it had been linked too directly with the German immigrants, against whom there was apathy in some quarters. In this respect we are thinking about perceptions held by the Torrens reform group of potential political risks in their advocacy of the reform initiative. They already suffered strong opposition from the legal profession. Could we criticise them if they calculated that they did not need to aggravate latent anti-German sentiment in the British-descended population of the colony, even if they miscalculated that risk?

Fischer's research suggests that in 1861 German immigrants comprised 4.32% of the total Australian population and that proportion would have been much higher in South Australia, making them the largest non-British immigrant ethnic group and as large as all other non-British immigrant groups combined.<sup>114</sup> In the same session of the Legislative Assembly in which Torrens advocated a system of land title registration, on 5 June 1857, the Assembly also considered the question of German immigration, and particularly whether German migrants could take advantage of the immigration Land Fund.<sup>115</sup> The South Australian German community wanted this access to help them bring to South Australia relatives and other members of their former communities in Germany. One opinion was that the colony should be completely closed to German migration — it was a British colony.<sup>116</sup> Concern was also expressed about the 'introduction of discontented politicians from the continent of Europe'<sup>117</sup> perhaps referring to liberal revolutionaries of the 1848 rebellions. One proposal was a 1:10 quota for Germans in proportion to the British immigrants. From the tone of discussion one might have imagined that Mr Krichauff, the elected representative of Mount Barker, was not in the chamber, but he added that there were advantages for everyone in taking hard-working Germans, and naïvely that '[w]

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<sup>112</sup> South Australian Archives, Confidential Dispatch to the Duke of Newcastle, 24 November 1863, in Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, 47–8.

<sup>113</sup> Brown and Mullins, *Town Life in Pioneer South Australia*, above n 54, 177–8.

<sup>114</sup> Gerhard Fischer, *Enemy Aliens — Internment and the Homefront Experience in Australia* (1989).

<sup>115</sup> See text above, following n 58.

<sup>116</sup> South Australia, *Parliamentary Debates*, House of Assembly, 5 June 1857, 214 (Mr John Hallett).

<sup>117</sup> *Ibid* (Mr William Henville Burford).



hen a man became naturalized he ceased to be a foreigner, for he became a South Australian.<sup>118</sup>

It is not necessary to point to ethnic riots in the streets of Adelaide to support this point. The relevant level of discrimination is indeed precisely illustrated by the incident described by Professor Lücke, in which the Attorney-General, Richard Hanson, opposed use of the Land Fund for German migration with the cynical argument that this did not involve inequality — Germans who could not bring their relatives to South Australia were in the same position as British colonists who had no relatives to bring over.<sup>119</sup> That this incident might appear discriminatory only retrospectively, through the lens of 21<sup>st</sup> century multi-cultural society, and was actually the order of the day in those times, would simply prove the point. However, as Hübbe's letter attests, it occasioned great pain at the time. It might also be observed that the liberal and tolerant views reviewed by Professor Lücke were generally held by influential, educated and travelled members of South Australian, English and Hamburg society. With a liberal electoral property franchise, the views and votes of less cosmopolitan members of South Australian society might have been a concern.

To his great credit, Torrens supported immigration by the Germans and their access to the immigration Land Fund, even at risk to the precarious government of the day.<sup>120</sup> Torrens might nevertheless have assessed the balance of political opinion as too risky to do more than point out that the Germans already had successful experience of land title registration, without proclaiming the Hanseatic origins of key features of the measure. With hindsight we might consider that attitude overly cautious, however, in terms of political risk management, in Torrens' mind at least, there would have been a lot at stake in adoption of the measure and publicity about the German connection was a dispensable risk. It could also be that Torrens and Hübbe found it a mutually satisfactory collaboration to achieve in Torrens' name the Torrens reform measure, on the one hand, and to support continued German immigration on the other.

A third tenable explanation could lie in Torrens' limited juristic abilities. After all, Torrens was not a lawyer, he was a politician. He had plainly devoted great effort to gaining familiarity with many legal concepts. His speeches nevertheless convey

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<sup>118</sup> South Australia, *Parliamentary Debates*, above n 116, 214 (Mr Friedrich Krichauff). At that time the British-descended colonists continued to think of themselves as British and were British subjects. Only the naturalised German immigrants held a limited South Australian status.

<sup>119</sup> Lücke, above n 53, 239. See also Hübbe's letter to the *South Australian Register*, 6<sup>th</sup> June 1857. The Attorney-General's comment is at *Parliamentary Debates*, above n 118, 218. In his letter to the *South Australian Register* of 16<sup>th</sup> April 1857 Rudolf Reimer related a similarly acerbic proposal that Silesians should travel to London to lodge applications for assistance to immigrate to South Australia — quite a different journey in the 1850s and with no assured outcome.

<sup>120</sup> *Parliamentary Debates*, above n 118, 219 (Mr Robert Richard Torrens, Treasurer). See also Torrens' election speech reported in *South Australian Register*, 2<sup>nd</sup> February 1856, for which reference I am indebted to Dr Greg Taylor.

the distinct impression that he was never more articulate and confident than when rousing his fellow parliamentarians to confront the expense of deeds conveyancing, the monopoly of the legal profession and the uncertainty of general law title, and pointing out that these posed a great obstacle to the prosperity of the South Australian colony. Torrens did that very well. However, Torrens' apparent failure to appreciate the significance of the changes made to his proposal through Hübbe's influence between June and November 1857 mirrors an aspect of his leadership of the reform group which is also reflected by his claim to have devised 'his scheme' through the innovative application to land of the provisions for ship registration in the British *Merchant Shipping Act*,<sup>121</sup> and his claim that the system proposed in the report of the English Commissioners<sup>122</sup> was virtually identical.<sup>123</sup> These aspects of his rhetoric demonstrate that Torrens painted with a very broad brush — he discussed land title registration in such broad terms that in his mind all of the new registration schemes imagined in this period in the English speaking world were more or less one and the same, whether inspired by the method of issuing railway stock employed by the Bank of England,<sup>124</sup> systems used on the continent,<sup>125</sup> or the registration of ships,<sup>126</sup> and they were all 'his scheme'.

That Torrens was a consummate politician was a crucial contribution, for which he should never be forgotten. However, his role in bringing together the legal elements of the reform has long been exaggerated. If Torrens was the consummate politician, then Dr Hübbe was the consummate jurist in the Torrens clique. One need only compare the book that Torrens prepared to publicise his triumph around the Empire<sup>127</sup> with Hübbe's remarkable legal publication<sup>128</sup> to conclude that Hübbe had the stronger abilities to provide the juristic framework and many of the detailed provisions for the system adopted in Adelaide. While Torrens was concerned with such pragmatic matters as the cost of a transfer, Hübbe equated escape from English real property law with escape from the legacies of feudalism and the complicated devices developed to evade it. Hübbe penned a very competent analysis of the legal foundations of deed conveyancing before the United Kingdom reforms of 1925, a description of the French post-revolutionary system, an analysis of the Hanseatic system and a stirring argument for achievement of social and democratic liberalism among the Saxon descendant peoples of Britain and Germany in South Australia through the Torrens reforms. It might be that Torrens' failure to appreciate his dependence on the other participants in the group, and

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<sup>121</sup> *Merchant Shipping Act 1854* (17 and 18 Vict. c. 104) (Imp).

<sup>122</sup> Great Britain, *1857 Report*, above n 39, Vol XXI, 245.

<sup>123</sup> Torrens, *The South Australian System of Conveyancing by Registration of Title*, above n 46, iii.

<sup>124</sup> Great Britain, *Report of the Select Committee on the Registration of Assurances Bill*, 5 August 1853, British Sessional Papers, 1852–53 (hereafter 'the 1853 Report'), Vol XXXVI, 397, Minutes of Evidence, 3, Question 16 (Mr W S Cookson).

<sup>125</sup> Great Britain, *1850 Report*, above n 33, 206ff (Mr J M Ludlow).

<sup>126</sup> *Ibid* 207.

<sup>127</sup> Torrens, *The South Australian System of Conveyancing by Registration of Title*, above n 46.

<sup>128</sup> Hübbe, above n 66.

especially Dr Hübbe, is the reason for the relative failure of later projects which he undertook alone: drafting the *Record of Title (Ireland) Act 1865*<sup>129</sup> and promotion of registered title in England.

These points are very relevant when we consider the recent ‘spirited critique’<sup>130</sup> advanced by Dr Greg Taylor of research to date into the role of Dr Hübbe and its implications.<sup>131</sup> Dr Taylor’s spirited critique does not, at least in papers published to date, test the comparative law concepts of ‘transplantation’ or ‘reception’ beside the evidence. The extensive literature on those points is not discussed.<sup>132</sup> Dr Taylor appears to concede that Torrens’ approach had matured by November 1857, when he finally made his second reading speech and introduced his Substitute Bill, and that this was due significantly to the influence of Hübbe, drawing on significant points from the Hamburg-Hanseatic title system. Thus, the model that was enacted in the *Real Property Act 1858* (SA) was a transplantation of Hamburg legal principle, if not a reception to a greater or a lesser extent. This much appears to be agreed.

The point of disagreement appears to be about who thought of the idea of land title registration first. Dr Taylor’s effort, if I understand it correctly, is to preserve that ‘brainwave’ as South Australian and thus also to maintain that South Australia was a place of legal enlightenment in Australia in the 19<sup>th</sup> century. As related above, many relevant features of land title registration had already been explored in the British Reports of 1850 and 1853, so those features could not be South Australian regardless of whether one recognises the influence of German systems in those reports or not. If Torrens gained the essential inspiration from the registration of ships under the British *Merchant Shipping Act*, regardless of whether one feels the spirit of the Hanseatic League at sail in those waters, those features could not be South Australian either. Remaining ideas that could be attributed to Torrens alone, those he thought of before collecting Hübbe in his horse and trap, were largely abandoned. To justify the line of argument that Torrens’ contributions were South Australian but Hübbe’s brain waves were not, one must also explain why Torrens, who in 1857 had been in the colony for 17 years and later returned to England after only 22 years, was more ‘South Australian’ than Hübbe, who had been in the colony for 15 years and died there after 50 years service to South Australia.

In any case, by the 17<sup>th</sup> October 1856 when *The South Australian Register* announced that Torrens had commenced the ‘great and glorious reformation’ by developing a draft Bill, Forster had already published in the newspaper at least six editorial pieces and a letter to the editor referring to the English real property inquiries, the continental laws and the *Merchant Shipping Act*, embracing the

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<sup>129</sup> 28 and 29 Vict c 88.

<sup>130</sup> So described in Timothy Stutt, ‘Transitions to Torrens: The six-fold path to the ideal land administration system?’ (2008) 15 *Australian Property Law Journal* 1, 14, n 36.

<sup>131</sup> Greg Taylor, ‘A Great and Glorious Reformation’ – *Early South Australian Legal Innovations* (2005), Chap 2.

<sup>132</sup> See also Raff, *Private Property and Environmental Responsibility*, above n 1, Introduction.

principle of registration and the mortgage in the style of a *Hypothek*.<sup>133</sup> The letter by Vitis overviewed Prussian Real Property Law as it stood at 1833.<sup>134</sup> The vision for a land title register that Torrens presented in his last election speech strongly reflects the description in Vitis' letter.<sup>135</sup> There is other evidence in that speech in three important respects that Torrens was acquainted with the situation in Prussia. When articulating his views on the place of religion in a state education system Torrens is reported to have said, '[t]he State in despotic countries, insists upon one peculiar doctrine — that which is adopted by the State — to be inculcated in schools', which reflected the very situation in Prussia that had been the crucial factor in the emigration of the Lutherans from Prussia.<sup>136</sup> Torrens also expressed willingness to assist the immigration of Germans on the same terms as English immigrants.<sup>137</sup> On land title registration he is reported to have said, '[i]n looking into the laws of other countries with respect to the transfer, mortgage, or incumbrance of real property I have come to the conclusion that the law of England is inferior to most of them ...' suggesting that he gained inspiration from comparative sources and we have seen that he had ample access to accounts of German sources.<sup>138</sup>

The point about the development of the Torrens system in South Australia that places that legal system at the forefront internationally at that time, and for many years to follow, is the *calibre* of the broader land title registration reform initiative. The project of the Torrens reform group was brilliant precisely because it was a multi-disciplinary multi-lingual law reform project drawing on international comparative analysis that transcended international legal families. This foreshadowed the methodology of great modern law reform projects by at least 120 years.

### III INTERNATIONAL SHARING OF JURISTIC MATERIAL

The Hanseatic-Hamburg land title system became the foundation of the modern German system,<sup>139</sup> after influencing the Torrens reform in South Australia. The fact that the Hamburg-Hanseatic land title registration system, the modern German system and the Torrens system share juristic material is the starting point for comparison of solutions to difficulties experienced in administration of the continuing systems. Through reflection on solutions developed by the different systems, we gain deeper understanding of other approaches that might be taken to comparable problematical issues. The German system of civil law has been most influential internationally through voluntary processes of reception

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<sup>133</sup> *South Australian Register*, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 17<sup>th</sup> July 1856.

<sup>134</sup> *South Australian Register*, 16<sup>th</sup> August 1856. See also the letter of Reformer, above n 68.

<sup>135</sup> Above n 68.

<sup>136</sup> *Ibid.* See also text above following n 62.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> Buchholz, 'Die Quellen des deutschen Immobilienrechts im 19. Jahrhundert', above n 23, 265.

and transplantation, rather than colonisation.<sup>140</sup> With respect to real property law, the German system is the product of centuries of development and that experience could be very valuable in the interpretation, administration and further development of the Torrens system.

Comparative legal methodology with respect to the transfer or sharing of juristic materials between different lands has recently become the subject of debate from many viewpoints,<sup>141</sup> including the view that it simply cannot happen at all.<sup>142</sup> Academic interest in reception or transplantation issues has four dimensions.

First, many scholars are interested in the historical circumstances of a particular transfer of juristic material from one land to another. At this level each transfer or sharing of juristic material can be ‘treated on its own facts’. Scholars theorise about the history they describe and its implications, however, for the first group this is not the vital issue beside what happened ‘on the ground’ and its consequences. The intention might well be to shed light on current problems by gaining deeper insight into legal material that was created in donor or recipient jurisdictions.

The second group is an extension of the first and seeks to ground analogical reasoning in implications arising from the historical sharing of juristic material. Later interpretation of the shared material and the unfolding of the shared laws over time in either jurisdiction might well reveal a potential in the text for similar interpretation in the other jurisdiction. In some legal systems, if the nature of the exchange of legal-cultural material amounts to a ‘reception’ then the legal material of the two systems becomes connected to the point that legal reasoning processes may also cross international boundaries on an on-going basis. New developments in one country become strongly persuasive when interpreting the shared legal material in the other country.<sup>143</sup> The common law world is not so inhibited in this respect. Common law courts habitually refer to a vast range of material, including literature and sacred texts, similar statutes and court decisions about them in other common law countries, in search of legal material in the light of which legal principle might further be developed. In any case, it is clear that the occurrence of a reception is regarded in international private law as justification for treating connected legal material in both jurisdictions as legitimate legal resources in conventional legal reasoning. For example, English cases interpreting the *Law of Property Act 1925* (UK) are routinely drawn upon without asking ‘the reception question’ when

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<sup>140</sup> I outlined many of these receptions in the introduction to my book; Raff, *Private Property and Environmental Responsibility*, above n 1, 16–17.

<sup>141</sup> For a recent and very interesting overview of the issues and contribution to their advancement see John Gillespie, ‘Towards a Discursive Analysis of Legal Transfers into Developing East Asia’ (2008) *New York University Journal of International Law & Politics* 657.

<sup>142</sup> Pierre Legrand, ‘The Impossibility of “Legal Transplants”’ (1997) 4 MJ 111.

<sup>143</sup> See Peter Häberle, ‘Theorieelemente eines allgemeinen juristischen Rezeptionsmodells’ (1992) JZ 1033, 1038.

construing one current Australian adaptation of that legislation: the *Property Law Act 1958* (Vic).<sup>144</sup>

The third group appears most concerned with the international prestige of having been a donor of laws — law-givers in the Justinian tradition. For this group, criteria and categorisations are important in order to establish that the transfer of laws amounted to a full reception, changing the way that law is done in the recipient culture to the way it is done in the donor culture, and not just adoption of some legal text that has, in any case, been read quite differently in the recipient land. One must acknowledge, nevertheless, that it is a ground for great pride when another country has seen such merit in one's justice system that it will adopt or find inspiration in some aspect of it in the development of its own legal system.

The fourth group is concerned with evaluating *prospectively* whether future international contributions to legal development in another country are likely to succeed. Would it, for example, be a successful initiative to register as full individual ownership (whatever that means) collective land use-rights enjoyed by peasant farmers in a socialist country in the Asian region under a scheme that was in any case never fully implemented according to the socialist program? In this context 'success' will probably be judged by an international aid organisation. These questions raise a myriad of complex cultural, social and political issues.

Each of these four groups brings different considerations to the question of transplanting legal principles from one legal system to another and imposes different priorities on their findings. The issues raised in this paper range across the first and second groups. Thus it is not necessary for Australian scholars to prove a 'true reception', with all of its social and cultural implications, before drawing on the unfolding of the Hanseatic-Hamburg system and its modern German successor to demonstrate new potential in the texts constituting the Torrens system. It might, however, be necessary for German scholars to prove a 'true reception' in order authoritatively to cite handy points about the Torrens system when seeking new potentials in the texts of the modern German land title system. The evidence reviewed above in any case demonstrates, in my assessment, that the Torrens system was inspired by German jurisprudence directly or indirectly through one or more of three sources, including Dr Hübbe.

The Australian system of land title registration could benefit enormously from international communication with its juristic cousins. The engagement of land

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<sup>144</sup> *Property Law Act 1958* (Vic). See generally Stanley Robinson, *The Property Law Act – Victoria* (1992). See also Jude Wallace, *Review of the Victorian Property Law Act 1958* (Briefing Paper for the Attorney-General of Victoria, 1 May 1984). Transfer of juristic material in the *Law of Property Act 1925* (UK) was undertaken with free will on the part of relevant Australian jurisdictions and not through superior imperial legislative power. This is an important point because Erich Pritsch asserted that the adoption of law in a colonial relationship cannot be treated as a true reception: 'Das Schweizerische Zivilgesetzbuch in der Türkei – Seine Rezeption und die Frage seiner Bewahrung' (1957) 59 ZVglRWiss 123, 127–8.

title systems with a range of powerful technologies is just one valuable point of comparison. Connecting the status of land title and related interests in land to cadastral information through GIS is already an important field of Australian-European cooperation.<sup>145</sup> We might gain understanding of other ways to approach a range of Torrens system issues, such as the ‘tremors’ at the point where it meets the great tectonic plate of equity,<sup>146</sup> theories of indefeasibility of registered title and its relationship to unregistered interests, especially with respect to trusts and the *in personam* and volunteer exceptions to indefeasibility.<sup>147</sup> Deeper insight and simpler solutions could be gained with respect to the dilemmas of the caveat system,<sup>148</sup> especially when compounded by issues of insolvency.<sup>149</sup> The day must be close when Australian ‘old system legislation’, such as the *Property Law Act 1958* (Vic) and the *Conveyancing Act 1919* (NSW) will be reconciled with the fact that there is no more ‘old system’ land left. Ultimately, a deeper understanding of the German land title system could inform the development of a national system of comprehensive Torrens-orientated real property legislation that would be brief and comprehensible. However, in the absence of any political priority for national land law reform at any level, exploration and reform of these issues would consume more than one lifetime, and it is therefore necessary to prioritise them.

The most important land law issue confronting Australia is the urgent need to develop a framework of juristic principle at the deepest level that is compatible with the strictures of ecologically sustainable development. It is not enough for common law systems to pass this task on to the legislature<sup>150</sup> and then to test the consequential legislative reforms against the very common law principles that stand in the way of ecological considerations being given due priority in land use regulation;<sup>151</sup> that is, to test the legislative reforms with the starting presumption

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<sup>145</sup> In text above at n 3.

<sup>146</sup> ‘The interplay between equitable causes of action and the Torrens system of indefeasibility was the principal subject of argument in this case. This case brings into sharp relief the great tectonic plates of law and equity as they grind against each other and struggle to settle into a stable position in the substratum of Australia’s legal landscape’: *Tara Shire Council v Garner* [2003] 1 Qd R 556 582 (Atkinson J). See also Lynden Griggs, ‘The Tectonic Plate of Equity — Establishing a Fault Line in Our Torrens Landscape’ (2003) 10 *Australian Property Law Journal* 78; Matthew Harding, ‘*Barnes v Addy* Claims and the Indefeasibility of Torrens Title’ (2007) 31 *Melbourne University Law Review* 15; Tang Hang Wu, ‘Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility’ (2008) 32 *Melbourne University Law Review* 20.

<sup>147</sup> *Bogdanovic v Koteff* (1988) 12 NSWLR 472; *Bahr v Nicolay (No. 2)* (1988) 164 CLR 604.

<sup>148</sup> For example, Robinson’s problematical theory of classes of caveatable interests: see *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd* [1994] V ConvR 54–106, 65–791 (Batt J).

<sup>149</sup> For example, *Latec Investments Ltd v Hotel Terrigal* (1965) 113 CLR 265; *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672.

<sup>150</sup> *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264, 292 (Lord Goff)

<sup>151</sup> *Protean (Holdings) Ltd v Environment Protection Authority* [1977] VR 51, 55–6.

that the reforms will fail. I am referring of course to the question of what freedoms with respect to the use or abuse of land should be presumed as a matter of basic principle to be due to the proprietor of an estate or interest in that land. The approach attributed to the common law, largely on the basis of an ambiguous and perhaps even flippant passage penned by Blackstone,<sup>152</sup> presumes for the landowner a ‘sole and despotic dominion’ over the object. One of many disadvantages of this approach is that it drives environmental law reformers with legitimate policy objectives to legislate in voluminous detail in statutory micro-management of land use and inspires demands by landowners for compensation, beyond the resources of the community to pay, simply to observe the ecological constraints of the land they have acquired, presumably following due investigation.

Australian land law need not remain locked in to this approach. The development of the Australian Torrens system of land title registration was a comprehensive legislative reform of real property law which far exceeded in scope and impact the introduction of deeds registration, replacing the inconsistent common law of real property with a new juristic structure.<sup>153</sup> We have seen that the juristic shape and detail of this development was influenced, if not inspired in a very large measure, by the contemporary system operating in Hamburg. This occurred through the work of Dr juris Ulrich Hübbe and the Torrens reform group.<sup>154</sup> It is to the great credit of the Torrens reform group in South Australia that it could undertake a multi-disciplinary law reform project, and, in doing so, engage in international comparative legal analysis beyond the common law legal circle, at a level of sophistication not seen again for at least another century.<sup>155</sup>

I have set out above the historical context of information about registration systems received by Robert Torrens and the broader land title reform group. The roots of this informational context can ultimately be traced back to a conception of ship or land title registration that appears first to have emerged in the Hanseatic cities

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<sup>152</sup> William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809), Book II, Chapter 1, 2. Discussed extensively in Raff, ‘Toward an Ecologically Sustainable Property Concept’ in E Cooke (ed), *Modern Studies in Property Law – Volume III* (2005) 65.

<sup>153</sup> *Frazer v Walker* [1967] 1 AC 569. This is certainly the view of the case found in Warrington Taylor, ‘Scotching *Frazer v Walker*’ (1970) 44 *Australian Law Journal* 248.

<sup>154</sup> Robinson, *Equity and Systems of Title to Land by Registration*, above n 55, Robinson, *Transfer of Land in Victoria*, above n 55, Chp 1; Raff, *Private Property and Environmental Responsibility*, above n 1, Chp 1; Esposito, ‘A Comparison of the Australian (“Torrens”) System of Land Registration of 1858 and the Law of Hamburg in the 1850s’, above n 107.

<sup>155</sup> The contemporary Swiss federal constitutional model was referred to in debates surrounding the drafting of the Australian *Constitution*, but was not accorded sufficient importance to justify notation in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (1986). In any case, Swiss approaches might not have been influential: see Michael Crommelin, ‘The Federal Model’ in Gregory Craven (ed), *Australian Federation Towards the Second Century* (1992) 33, 41.



of northern Europe, as Torrens himself effectively explained to the first South Australian Parliament when introducing his Bill.<sup>156</sup> The study, translation, re-conceptualisation, amalgamation and incorporation of all this juristic material into the Torrens system of land title registration was a sophisticated and highly influential South Australian contribution to the construction of the international circulating model<sup>157</sup> of land title registration that we see being digitised and globalised today. As a matter of comparative law, this international sharing of juristic materials justifies an examination of basic property concepts in the modern German property law system in connection with issues implicit in ecological sustainability.

#### IV PROPERTY AND ECOLOGY IN GERMAN LAW

Many German legal concepts are described as a synthesis of positive and negative elements. The modern German concept of property is a synthesis of entitlement and responsibility.<sup>158</sup> This understanding of property is obscured to some extent by the greater emphasis placed on the distinction between public and private law in the modern German legal system.

The most obvious example of responsibility in the public law concept of property is found in Article 14 of the German *Constitution*,<sup>159</sup> which contains both a civil rights guarantee of property and a statement that property carries with it responsibilities:

##### **Article 14 [Property, Inheritance and Expropriation]**

- (1) Property and inheritance are guaranteed. Their meaning and limitations are defined in legislation.
- (2) Property carries responsibilities. Its use shall at the same time serve the common good.

Article 14(3) goes on to require compensation for the expropriation of private property. Article 14 is not regarded as the source of the element of responsibility in the property concept, but rather as one more manifestation of a much deeper juristic principle of responsibility that reaches back before the Enlightenment<sup>160</sup> and even to the work of the Glossators.<sup>161</sup> The modern natural law works of Grotius, Pufendorf

<sup>156</sup> In text above n 76 and n 77.

<sup>157</sup> Sacco, above n 4.

<sup>158</sup> I have noted above, in text at n 12 and below following n 178, the connection of responsibility to registered title in the Hamburg-Hanseatic and German systems.

<sup>159</sup> *Grundgesetz für die Bundesrepublik Deutschland*, 23.5.1949 (BGBl. S. 1) ('GG'), the title of which has often been translated as the *Basic Law*. *German Constitution* is equally appropriate, certainly following unification of the former German Democratic Republic with the Federal Republic of Germany.

<sup>160</sup> *Maßnahmen des Wohnungsamts* BGHZ,6, 270, 278. This case is explored in Raff, *Private Property and Environmental Responsibility*, above n 1, 169.

<sup>161</sup> See Raff, *Private Property and Environmental Responsibility*, above n 1, 123–6. See also Raff 'Natural Law, Private Property and the Environment – Universal Human

and Wolff confirmed and secularised responsibility as an element of property.<sup>162</sup> Thus it is only a small surprise that even the Romanist Savigny and his protégé Windscheid repeated it,<sup>163</sup> and almost no surprise at all that the eminent Germanist commentator Gierke<sup>164</sup> embraced it:

When the concept of ownership is considered in isolation it cannot be viewed as an unlimited right of dominion. Only in comparison with the other rights of property<sup>165</sup> can it be described as unlimited. [B]eside the illusion of absolute power, it carries limitations within its very concept ... It confers not arbitrary power but power bound by right. ... Here [is] the ... German legal idea ... – ownership is pervaded by responsibilities.<sup>166</sup>

Application of the principle of responsible proprietorship found in Article 14(2) to an environmental issue is well illustrated by the first significant decision of the Bundesgerichtshof ('BGH') on the question in the *Cathedral of Beech Trees Case*.<sup>167</sup> The plaintiff owned a farm where a centuries-old grove of beech and oak trees stood, popularly known as the Cathedral of Beeches. The trees were first designated for protection in 1925 and thus the land owner was prohibited by legislation from felling them. After 1945 the owner sought removal of the trees from the protected list without success. He then sought compensation, arguing that the preservation order amounted to an expropriation of property for which compensation had to be paid. The Court found that the natural features and landscape of the land imposed a responsibility on the owner to preserve the trees, even in the absence of legal regulation; a responsibility which would be recognised by a reasonable and economically oriented owner of that land with the common good in mind. The content of the environmental responsibility to be expected of the proprietor depends in turn upon the environmental context of the relevant property: the nature of the property, the nature of the thing.<sup>168</sup> Therefore, the tree preservation order in question was not an expropriation of property — it merely formalised an existing responsibility of the landowner. Similar approaches have been taken in many cases in

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Values and the Universal Laws of Nature' at *Law and Universal Values*, the 18<sup>th</sup> Conference of the Mt Kopaonik School of Natural Law, Serbia, 14 December 2005.

<sup>162</sup> Ibid, 126–38.

<sup>163</sup> Ibid, 134–8.

<sup>164</sup> See Otto von Gierke 'Das Eigentum' in Gierke (ed), *Deutsches Privatrecht* Vol II (1905) 347.

<sup>165</sup> Such as leases and easements.

<sup>166</sup> Gierke, above n 164. This view is also reflected in the work of Rudolf von Ihering, *Der Zweck im Recht* (3<sup>rd</sup> ed, 1893) 519.

<sup>167</sup> *Buchendomurteil* DVBl, 1957, 861; DÖV, 1957, 669. See also Raff, *Private Property and Environmental Responsibility*, above n 1, 173–5; Rudolf Dolzer, *Property and Environment: The Social Obligation Inherent in Ownership – A Study of the German Constitutional Setting* (1976) 50–1; Michael Kloepfer, *Umweltrecht* (2<sup>nd</sup> ed, 1998) 729–30.

<sup>168</sup> See Gustav Radbruch, *Die Natur der Sache als juristische Denkform*, (1960), 25–6 on the conventional ambit of 'nature of the thing'

the intervening 50 years, dealing with issues ranging from protection of groundwater to the de-contamination of industrial land.

The principle of responsibility also applies in German private law. Its influence is clear in development of the doctrine of good faith in environmental nuisance cases between neighbours, leading to judicial conception of a duty of neighbourly consideration, often through analogical consideration of Article 14(2) GG.<sup>169</sup> The German Civil Code does not attempt a definition of property; however, reference to the attributes of property is found in § 903 which sets out the *Powers of the Owner*:

The owner of a thing can, so far as not contrary to law or the rights of third parties, deal with the thing at discretion and exclude others from every use or misuse of it. The owner of an animal has to observe the particular provisions for the protection of animals in the exercise of his powers.<sup>170</sup>

I have translated the expression *nach Belieben* as ‘at discretion’. It might be thought that ‘at pleasure’ would be a better translation and thus this conception might be closer to Blackstone’s conception of ‘sole and despotic dominion’. However, § 903 is followed by further paragraphs which make it clear that in exercise of the powers described a wide range of factors must be taken into account, including environmental factors in § 906. The powers of the owner would be unique in German Law if they could be exercised with caprice (*die Kaprice*) or arbitrariness (*die Willkür*). Also, the text of § 903 echoes strongly Pufendorf’s discussion of the conception of private property in his work on the citizen’s responsibilities under natural law:

Ownership is the right by virtue of which someone is entitled to a thing in its totality in such a manner that it cannot simultaneously belong to another. It follows that we may deal with our property at our discretion and exclude all from every use or misuse of it, unless someone has acquired a particular right from us by agreement. Nevertheless, in a governed community it is generally the case that property is not always unlimited. More often it is, either through governmental authority or through particular arrangements, provided to humans with particular limitations.<sup>171</sup>

The solution is that the powers of the owner are to be determined by rational consideration of the ‘nature of the thing’, and with respect to property this includes the nature of the object of property. This is a recurrent idea in natural law, from the Glossators to even Savigny and Windscheid. According to Pufendorf, natural

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<sup>169</sup> Raff, *Private Property and Environmental Responsibility*, above n 1, 193–209.

<sup>170</sup> *Befugnisse des Eigentümers* § 903

Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen. Der Eigentümer eines Tieres hat bei der Ausübung seiner Befugnisse die besonderen Vorschriften zum Schutz der Tiere zu beachten.

<sup>171</sup> Samuel von Pufendorf, *Über die Pflicht des Menschen und des Bürgers nach dem Gesetz der Natur* (1994) 106.

law is to be recognised by all in nature and thus the ‘individual duties that natural law imposes on humans are best distinguished through consideration of the type of object to which they refer’.<sup>172</sup>

In his report on the work of the First Committee appointed to draft the German Civil Code, Johow’s opening sentence on property law was, ‘One speaks of property in relation to various objects and the property concept has differing content according to the difference of the object.’<sup>173</sup> Another basic idea of natural law, as described by theorists from Montesquieu to Radbruch, is that human laws should not contradict natural laws.<sup>174</sup> A theory of natural law resting upon ‘immanent and teleological qualities’<sup>175</sup> could hardly ignore the constraints set by nature herself, just as law cannot require what is physically impossible. Matthew Hale pointed out that a law cannot require one physically to be in two places at the same time.<sup>176</sup> It follows that within this framework one could not juristically presume a power for a landowner that exceeds the ecological constraints of the land.

The resonance of natural law influences in the text of the German Civil Code is well illustrated by the provisions concerning ownership of bees. The paradigmatic natural law codification, the General Prussian Code of 1794,<sup>177</sup> had provisions with respect to property in bees, the import of which turned on the insects’ natural characteristics — the nature of the thing. A submission to the First Committee appointed to draft the German Civil Code proposed an additional provision to deal with property in a swarm of bees that, driven by hunger or other need, domiciles itself in the hive of another swarm that is owned by another bee-keeper. In this case, it was submitted, property in the distressed swarm should merge with that of the resident swarm and there should not even be a claim in unjustified enrichment for the former owner of the distressed swarm. The committee approved this position because, as a matter of experience, neglect by the owner of the first swarm would have compelled it to escape.<sup>178</sup> BGB § 964 now captures the essence of this submission, omitting the precondition of the bees’ motives, which would be extraordinarily difficult to prove! The natural law responsibility to deal

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<sup>172</sup> Ibid, 49–50.

<sup>173</sup> R Johow, *Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich – Sachenrecht* (1880), 490. Johow (1823–1904) was entrusted with developing the first draft of the *Property Law Book* of the BGB. See further Raff, *Private Property and Environmental Responsibility*, above n 1, 139–158; and W Schubert, *Die Entstehung der Vorschriften des BGBs über Besitz und Eigentumsübertragung* (1966) 25.

<sup>174</sup> See also Gustav Radbruch, above n 168.

<sup>175</sup> Max Weber, *Max Weber on Law and Economy in Society* (1954), 288.

<sup>176</sup> Matthew Hale, ‘Some Chapters Touching The Law of Nature’ MS British Museum Additional 18235, 41. Discussed in Raff, ‘Matthew Hale’s Other Contribution – Science as a Metaphor in the Development of Common Law Method’ (1997) 13 *Australian Journal of Law and Society* 73, 110.

<sup>177</sup> ALR, above n 19, Title 9, §§ 118–126. § 124 provides for change of rights over escaped swarms.

<sup>178</sup> Sitting of 6 June 1884: H H Jakobs and W Schubert, *Die Beratung des Bürgerlichen Gesetzbuchs – Sachenrecht I – BGB §§ 854–1017* (1985) 696.

appropriately with what one owns, according to its nature, was thus to be *passively* enforced — you neglect your responsibility, you risk loss of your property.

German law has similarly dealt with land as an asset with unique characteristics. The responsibility to register one's interests in land on the land title register is another manifestation of the deeper principle of responsible proprietorship. We have seen above<sup>179</sup> that clear property records were needed in Hamburg in view of responsibilities implicit in holding it. The Second Committee appointed to complete drafting of the German Civil Code also recognised broader social objectives of the 'duty of registration'.<sup>180</sup> They included:

1. prevention of doubts and disputes;
2. protection of the interests of third persons;
3. making the proprietary legal relationships of a land parcel transparent;
4. legal certainty;
5. promoting national welfare;
6. the approval of most governments in Germany and the representatives of agricultural interests;
7. enhancement of secured credit; and
8. consistency with the ideals of the people.<sup>181</sup>

More closely related to the post-19<sup>th</sup> century role of the civil law, the land title register is maintained in order to provide transparency with respect to the position of rights concerning land. This is crucial for the security of all transactions concerning land. That this is a social objective cannot be doubted. This is expressed in the very term employed in the German system for 'indefeasibility of registered title', namely the principle of *public faith* (*der öffentliche Glaube*). The public orientation of the responsibility to register one's interest in land, to ensure that the register is in fact correct and complete, is also evident in the related *publicity* principle.

The necessity of registering a proprietary interest is thus a social responsibility to which the concept of property in a land title registration system is implicitly subject.<sup>182</sup> This responsibility is also passively enforced through risk of the loss of one's interests in land that would be occasioned by prior registration of conflicting interests by someone else — you neglect your responsibility, you lose your property.

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<sup>179</sup> In text above, surrounding n 12.

<sup>180</sup> *Die Eintragungspflicht*.

<sup>181</sup> Deutschland, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* (ed B Mugdan, Berlin, R von Decker, 1899) vol III [Sachenrecht] 3868–82 (1979 re-edition, Aalen, Scientia) vol 3, 723–8. Discussed in Raff, *Private Property and Environmental Responsibility*, above n 1, 139–158.

<sup>182</sup> Raff, *Private Property and Environmental Responsibility*, above n 1, 209–268.

## V RESPONSIBILITY AND TORRENS REGISTERED TITLE

I contend that legislative adoption of the German ideas of registered title in the Torrens system inevitably brought with them a particular concept of property through the comprehensive statutory reform of common law approaches to real property that the Torrens reforms entailed. We can determine the characteristics of this concept of property through two channels.

The first channel is concerned with new characteristics specified for registered title by the Torrens legislation itself, distinct from the English deeds system. The following points may be made about the concept of property conceived by the Torrens legislation in Australia:

1. the introduction of a conclusive land title register finally abolished the feudal concept of *seisin*, under which the *owner* was the person with the best right to possession,<sup>183</sup> and substituted for it the modern liberal ‘bundle of rights’ approach under which one of the rights of the registered owner is possession;<sup>184</sup>
2. in the Torrens system, absent fraud, the registered legal proprietor holds free of all prior unregistered interests, whether aware of them or not,<sup>185</sup> apart from paramount (overriding) interests such as leases and rights of way;<sup>186</sup> and
3. the Torrens legislation directly concerns the registration of ‘land’, which is generally defined to encompass estates and interests indirectly.

In its totality, this concept of the nature and priority of legal ownership of land differs greatly from that conceived by the English general law.

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<sup>183</sup> See *Allen v Roughly* (1955) 94 CLR 98.

<sup>184</sup> To this end, the general model of Australian Torrens land title registration legislation deems registered title to be equivalent to *seisin*: *Real Property Act 1886* (SA) ss 51A, 52, 68, 87; *Land Titles Act 1925* (ACT) ss 47, 53; *Transfer of Land Act 1958* (Vic) s 41; *Transfer of Land Act 1893* (WA) s 63. More recent drafting of the evidence provision attempts alternative formulae: *Real Property Act 1900* (NSW) s 40 (but see the definition of ‘proprietor’ in ss 3(1)(a), 3(1)(b), 40(3)); *Land Title Act 2000* (NT) s 47; *Land Titles Act 1994* (Qld) s 46; *Land Titles Act 1980* (Tas) s 39.

<sup>185</sup> *Real Property Act 1886* (SA) ss 72, 186, 187; *Land Titles Act 1925* (ACT) ss 59, 60; *Real Property Act 1900* (NSW) ss 43, 43A; *Land Title Act 2000* (NT) s 188; *Land Titles Act 1994* (Qld) s 184; *Land Titles Act 1980* (Tas) s 41; *Transfer of Land Act 1958* (Vic) s 43; *Transfer of Land Act 1893* (WA) s 134.

<sup>186</sup> *Real Property Act 1886* (SA) s 69; *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42; *Land Title Act 2000* (NT) s 188; *Land Titles Act 1994* (Qld) s 184; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42; *Transfer of Land Act 1893* (WA) s 68.

Most importantly, under the Torrens model no estate or interest in land is to be created or to pass until registered in the land title register.<sup>187</sup> The land title register is maintained for the wider social good. It allows certainty in transactions concerning real estate, and especially securities in it. It also facilitates information symmetry about quality of title in real estate markets. Implicit in these clear and comprehensive reforms is a legal concept of property subject to at least one wider responsibility, to register estates and interests in land at the risk of losing them completely. One can imagine no greater disincentive to breach a civil law responsibility.

The second channel through which we can determine characteristics of the concept of registered title follows legitimate processes of comparative legal analysis, first with the Hamburg-Hanseatic system that was so influential in the formation of the Torrens model, and, secondly, through the potential of the Torrens text revealed by the unfolding of the analogous Hamburg-Hanseatic system in the modern German real property system. German ideas of property have reflected a principle of *responsible proprietorship* for many centuries and this has been embedded in Germany's private and public law jurisprudence through the European Natural Law tradition.<sup>188</sup> The points are inseparable in logic: a land title register is maintained to achieve valuable social benefits and it operates on the basis of a responsibility to register one's property in land, so this responsibility must be regarded as a social responsibility with respect to one's property. The legal machinery of the conclusive land title register sets up incentives and disincentives that stimulate the self-interest of a citizen who acquires an estate or interest in land to register it for the achievement of greater social good.

In addition to these two channels within the internal logic of the juristic paradigm that structures the Torrens system, we may also review the evidence that, as a matter of history, the reformers who developed the Torrens system in Adelaide in the 1850s advocated a basic principle of responsibility and the common good when advancing registered title. Responsible proprietorship was intended by the framers of the legislation as one aspect of a comprehensive reform that would displace the common law. Much contemporary writing in support of the reform measure demonstrates that a socially embedded concept of property was in the reforming mind. In his pamphlet, *The Voice of Reason and the History brought to bear against the Absurd and Expensive Method of Encumbering Immoveable Property*,<sup>189</sup> Hübbe made an extensive comparative analysis of the principle of *publicity* in many real property systems around the world. He also sought to build on the shared historical traditions of the British and German communities of South Australia by drawing on shared Saxon heritage. He reminded readers that both English and German Saxon

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<sup>187</sup> *Real Property Act 1886* (SA) ss 57, 67; *Land Titles Act 1925* (ACT) ss 48, 57; *Real Property Act 1900* (NSW) ss 36(11), 41; *Land Title Act 2000* (NT) ss 39, 179, 184, 185; *Land Titles Act 1994* (Qld) ss 37, 176, 181, 182; *Land Titles Act 1980* (Tas) ss 48(7), 49; *Transfer of Land Act 1958* (Vic) s 40; *Transfer of Land Act 1893* (WA) ss 58, 85.

<sup>188</sup> See Raff, *Private Property and Environmental Responsibility*, above n 1, Ch 3.

<sup>189</sup> Hübbe, *The Voice of History and Reason*, above n 66.

real property law required publicity of transactions with land through symbolic ceremonies with a turf or a twig from the land before the local community.<sup>190</sup> This connection was broken, he reminded eminent readers, by the English experience of Norman feudalism that commenced in 1066, and the English development of the ‘use’ (trust)<sup>191</sup> and deeds conveyancing to avoid its most repressive aspects.

Hübbe’s book also demonstrates that the legal-cultural values he brought to the analysis of land title registration were far from mechanistic and asocial. Throughout the work he referred to feudalism as an oppressive social system. He drew attention to the ability of pre-feudal Saxon women to own and transact with land, and to the absence of primogeniture.<sup>192</sup> At many points Hübbe was concerned with the situations of those who were at disadvantage in a transaction in any of the studied systems; for example, when he described French marital real securities.<sup>193</sup> To illustrate the advantages and savings in interest and legal costs that would flow from land title registration, he drew on the example of a transaction involving a young couple of limited means.<sup>194</sup> Ultimately, he considered that the ‘less propertied’ gained greater protection through the principle of publicity which, in contrast to deeds conveyancing, requires transparent transactions recorded in public.<sup>195</sup>

Hübbe also approved the relevance of *public interest* that he found in Saxon property law:

In such ... [national council meetings] ... the Saxons had their first shares in their commonwealth adjusted, in point of property as well as of possession, of dignity, and of burden. The sturdy Saxons, though very far from holding communistic views were a people eminently given to meet together and devise anything and everything, under some point of view or other, as a matter of public interest.<sup>196</sup>

This democratic participation and social responsibility were for Hübbe the overarching custom. Within it the distinguishing principle was,

and always has been, wherever Saxons had it their own way, that transactions affecting lands must be public and notorious, and attested to at the people’s ordinary meeting, in order to be valid.<sup>197</sup>

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<sup>190</sup> Ibid, 10–12 and 26–7.

<sup>191</sup> The English concept of the trust involves division of title to property. Legal title is held by a trustee on trust for the benefit of one or more beneficiaries, who hold equitable proprietary interests in the property (the beneficial title): see generally Robert Chambers, *Trusts: A Modern Analysis* (2006).

<sup>192</sup> Hübbe, *The Voice of History and Reason*, above n 66, 13 and 20–1.

<sup>193</sup> Ibid, 39 and 42.

<sup>194</sup> Ibid, 68–9.

<sup>195</sup> Ibid, 59–60 and 94.

<sup>196</sup> Ibid, 10.

<sup>197</sup> Ibid, 11.



This direct connection between the more general ideal of a concept of property imbued with responsibility and the more technical operations of land title registration is repeated in other jurisdictions. Movement to land title registration coincided with rapid urbanisation and the growth of middle-class land ownership on one hand, and bureaucratisation on the other. This is illustrated by the 19<sup>th</sup> century British parliamentary inquiries into land title. In the first report to recommend land title registration,<sup>198</sup> the Commission also pressed the social responsibility implicit in land ownership as an argument for the adoption of land title registration:

... the fee simple in land shall always be represented and be in the possession of persons capable of fulfilling those new *duties and offices which the ownership of land in the present state of society entails or involves*.<sup>199</sup>

We might connect this to Torrens' frequent references to a policy of encouraging yeoman farm proprietors,<sup>200</sup> which also suggests a conception of freehold land title subject to social responsibilities, just as it was interpreted in this passage of the English Report of 1857.<sup>201</sup> Torrens could, alternatively, have simply referred to them as 'freeholders'. We may conclude that in Adelaide, London and Berlin<sup>202</sup> it was considered that introduction of land title registration at the pivotal juncture in rapidly changing settlement patterns in all three jurisdictions would secure social benefits at a number of different levels. The responsibility to register one's property in land has thus been regarded as a social responsibility in history as well.

Are there grounds for saying that the principle of responsible proprietorship received into the Torrens system extended to *environmentally responsible proprietorship*? In the Hamburg model, estates in land (*Erbe*) were classified according to land use in a fascinating application of civil law property concepts to the urban problem of placing inconsistent land uses in tolerable spatial relationship to each other. Examples included *Brauerbe* [brewery estates], *Backerbe* [bakery estates] and *Wohnerbe* [residential estates]. While at first sight this might appear as a divergence between the systems, a similar capacity was actually retained for the Torrens system by instituting an exception to the security of registered title: a paramount (overriding) interest in favour of conditions and reservations in the original Crown grant of freehold tenure.<sup>203</sup> This capacity was actually utilised in

<sup>198</sup> *1857 Report*, above n 39, Vol XXI, 245. Discussed in Raff, *Private Property and Environmental Responsibility*, above n 1, 47–54.

<sup>199</sup> *Ibid*, 29 [L] (my emphasis).

<sup>200</sup> See for example his election speech reported in *The South Australian Register*, (Adelaide), 2 February 1857.

<sup>201</sup> See text above at n 41.

<sup>202</sup> See the conclusions of the Second Committee on this subject. The Committee was appointed to complete drafting of the BGB: discussed in text above at n 181.

<sup>203</sup> *Real Property Act 1858* (SA) ss 37, 38 *Real Property Act 1858* (SA), now *Real Property Act 1886* (SA) ss 69, 161; *Transfer of Land Act 1958* (Vic) s 42; *Real Property Act 1900* (NSW) s 42; *Transfer of Land Act 1893* (WA) s 68(1); *Land Titles Act 1980* (Tas) s 40(3)(c).

the early years of the implementation of the Torrens system in Australia in order to restrict the uses to which land might be put when laying out the development of some early country towns. This was certainly done in South Australia in later periods with respect to land not under the planning authority of a local council.<sup>204</sup> Reservations and conditions of the Crown grant for the benefit of mining and grazing purposes have been more common but these purposes also implement the same concept, in non-urban landscapes. In these ways, broader social intentions could be integrated in the Crown Grant with the description of the tenure. Such ‘pre-planning’ efforts in Hamburg and Australia to integrate the civil law object of ownership with its social and environmental context contrast strongly with their equivalents at the time under the English general law system.<sup>205</sup>

Further, concern was expressed in South Australia about the polluted environments of major English cities, and the need to plan Adelaide in advance to avoid such problems, at the time when land title registration was being debated:

From the immense difficulty experienced by sanitary reformers in England in purifying their great towns and cities, the inhabitants of all rising towns and cities should learn never to allow theirs to become impure. We ought not, in South Australia, to neglect the painful experiences of the mother-country. Under careful sanitary and medical supervision Adelaide never need become unhealthy; without such attention it will gradually develop the same physical horrors observable in London and elsewhere ... To prevent this melancholy pressure every means should be devised by the authorities. No person should be allowed to build hovels in populous cities. *The limitation of liberty implied in proper regulations is no greater infringement upon personal rights than is demanded by the public welfare.* The law allows the pulling down of hovels, and it should equally prohibit their erection.<sup>206</sup>

The editors of the Adelaide newspapers, such as Mr Anthony Forster MLC,<sup>207</sup> were part of the inner sanctum of the Torrens reform group, as was Dr Hübbe. We

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<sup>204</sup> Some examples are Crown Grant Vol 1746 Folio 20, which restricts the use of the land to business purposes, Crown Grant Vol 1750 Folio 153, which restricts use of the land to residential purposes, in addition to those granting land to public authorities for general and specified public purposes. I am indebted to Mr D Mackintosh, Deputy Registrar-General of South Australia, for correspondence on this point (letter of 29 January 1999 on file with author).

<sup>205</sup> See descriptions of Manchester in Friedrich Engels, *The Conditions of the Working Class in England* (2<sup>nd</sup> ed, 1971). See also Raff, ‘A History of Land Use Planning Legislation in Victoria’ (1996) 22 *Monash University Law Review* 90.

<sup>206</sup> ‘The Contaminations of Great Cities’ *The South Australian Register* (Adelaide) 3 July 1857 (my emphasis). According to Ian Harmstorf, the German community maintained a traditional perspective of environmental stewardship, which manifested itself among many things in agricultural and forestry educational programs and art and craft: see Ian Marmstorf, ‘Insight: Folklore of the German People in South Australia’ (2001) South Australian German Association <<http://www.saadv.com.au/sa-germanhistory02e.html#Folklore>> at 22 March 2009).

<sup>207</sup> See text above, following n 51.

may conclude that in 1857 Adelaide was ready for a concept of property implicitly subject to responsibility, social and environmental, and the Torrens system was appropriate to deliver it.

## VI CONCLUSION

The juristic roots of the international model of land title registration lead historically back to the German prototypal system that developed in the Hanseatic cities of northern Europe. At the most significant points of its adoption into the common law world, international comparison and the influence of German models has been evident, whether we consider the British parliamentary inquiries of the 19<sup>th</sup> century, the work of Brickdale, or Hübbe's contributions to the Torrens system. Even the registration of ships brings Hanseatic maritime law and the conception of the first registers into consideration. The most basic principle of the Hanseatic real property system, the potential of which is demonstrated in the unfolding of modern German land law, is the juristic idea of *responsible proprietorship*, a principle also found in the natural law tradition of the European legal systems. The principle of *responsible proprietorship* is clearly reflected in the responsibility to register one's interests in land for the benefit of fellow citizens in broader society who might transact with it.

That the underlying principle of responsibility embraces an *environmental responsibility* is demonstrated historically by the use of land title processes as the basis of environmental planning in Hanseatic Hamburg. It is demonstrated in the public law and private law of modern Germany and their interface with environmental and planning law today. The desirability of the principle of *responsible proprietorship* as an element of the international model of land title registration is demonstrated by the work of the United Nations — FIG *Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development*:<sup>208</sup>

property rights in land do not in principle carry with them a right to neglect or destroy the land. The concept of property (including ownership and other proprietary interests) embraces social and environmental responsibility as well as relevant rights to benefit from the property. The registration of property in land is thus simultaneously a record of who is presumed to bear this responsibility and who is presumed to enjoy the benefit of relevant rights. The extent of responsibility is to be assessed by understanding the social and environmental location of the land in the light of available information and is subject to express laws and practices of the appropriate jurisdiction.<sup>209</sup>

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<sup>208</sup> 'International Conference on Land Tenure and Cadastral Infrastructure for Sustainable Development' (1999) University of Melbourne, available at <<http://www.sli.unimelb.edu.au/UNConf99/index.html>> at 3 October 2009.

<sup>209</sup> *The Bathurst Declaration on Land Administration for Sustainable Development*, 6 (in 3. Workshop Findings, para 3), available at <<http://www.fig.net/pub/figpub/pub21/figpub21.htm>> at 23 September 2009.

In other work I have argued that the idea of property behind the common law presumption of a ‘sole and despotic dominion’ for the benefit of landowners, in the style of Blackstone,<sup>210</sup> which we know to be ecologically unsustainable, was based on a flippant passage behind which lies mistaken theology.<sup>211</sup> In common law systems one is the proprietor of the relevant abstract estate or interest in a tenure of the land, such as a fee simple estate in freehold, and not in the land itself. It would have been, and still should be possible to confine the common law presumption of ‘sole and despotic dominion’ to dealings with the abstract estate. With respect to use of the land itself we should presume a *responsible proprietorship*.

Today, in any case, the common law idea of real property exists nowhere in pure form. In Australia, the outdated common law system of real property was overturned by the comprehensive reform of real property law made by the introduction of the Torrens system,<sup>212</sup> the main policy of which is the responsibility to register, for the benefit of those in wider society who might transact with the land. In this respect at the very least, the proprietorship of estates and interests in land under the Torrens system is subject to a principle of *responsible proprietorship*. We have seen that all valuable sources of information about contemporary land title registration systems available to Torrens derived ultimately from northern European Hanseatic sources at formative points. In this respect the Hanseatic system may be identified as the prototypal European land title registration system. Through the influence of Dr juris Ulrich Hübbe the Torrens system was developed, at the very least, in reflection on the Hamburg-Hanseatic system. There is historical evidence that in South Australia there was desire in influential circles for an idea of *responsible proprietorship* in broader dimensions than simply the responsibility to register. It reached into a broader social responsibility of proprietorship, and actually into the regulation of environmental issues.

The international sharing of juristic materials that took place at that time allows us to contemplate the unfolding of the prototypal Hamburg-Hanseatic system over the time that has passed since the juristic exchange took place. In this way, potential interpretations that are as yet undetected in our own system can be given due regard. This is a recognised approach in international comparative law. The adjudication of environmental issues within the modern German paradigm of *environmentally responsible proprietorship* is a fertile area of jurisprudence which could thus be treated as a body of persuasive juristic material by courts and tribunals in Australia and other jurisdictions that have adopted the international model of land title registration.

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<sup>210</sup> Blackstone, *Commentaries on the Laws of England* (15<sup>th</sup> ed, 1809) Book II, Chapter 1, 2.

<sup>211</sup> Raff, ‘Toward an Ecologically Sustainable Property Concept’, above n 152. That a common law presumption of complete freedom of use was paralleled by virtual absence of legal responsibility with respect to land title documents in common law conveyancing is illustrated by *Northern Counties of England Fire Insurance Company v Whipp* (1884) 26 Ch D 482.

<sup>212</sup> See above n 153.

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Rather than presuming that the 21<sup>st</sup>-century private registered proprietor has in basic principle a freedom to do whatever he or she might arbitrarily wish with the eco-systems found on his or her registered land, legal systems should presume that the 21<sup>st</sup>-century private registered proprietor will act with responsibility regarding the ecological constraints of the land parcel in question, allowing environmental and planning laws their full voice. With recognition on a wider plane of the juristic concept of *responsible proprietorship* that is implicit in all examples of the international model of land title registration, historically, jurisprudentially and logically, the integration of the international concept of sustainable development into the many domestic legal systems where analogous systems have been adopted will be more achievable.