

Five Questions on the Republic

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This paper explores the meaning of a Republic from an Australian perspective. We look beyond populist discussions of the head of state, flag and anthem sparked by the recent visit of Prince William. Taking an allegorical approach, we interrogate questions about land, property, ownership, value, and property rights. We argue that the removal of the Crown both undermines the foundations of property rights and presents a unique opportunity to reflect on our land tenure institutions. To do this, we explore the relationship between Crown, country, and the role of Aboriginal interests with aim of providing a catalyst for a new discourse.

Keywords

Australia, republic, property rights, land, ownership, value, Indigenous rights

Introduction

[1] There are various moments in time when the connection between Australia and the Crown come to the attention of the populous, and such moments often give rise to discussion about the notion of Republic. In addition to celebrating the official birthday of our Monarch as a public holiday, issues like the Royal Wedding between Prince William and Kate Middleton gives pause for thought about the potential future King of England and the Commonwealth. Likewise, as we left behind the undefined decade of the '*noughties*' and entered the two thousand and teens, Australia welcomed Prince William on his first official visit representing his grandmother, Queen Elizabeth II, Australia's official head of state. It is difficult to imagine that more than 50 years after decolonisation movements led to the independence of dozens of nations throughout the world, Australia remains tied to a monarchy that colonised and wrestled this land from its original indigenous inhabitants. We should remember that, constitutionally, the Queen (or her appointed representative the governor general) has a number of important powers that usurp the elected government.

[2] In this paper we take a transdisciplinary approach (Max-Neef; Nicolescu) to engage sociolegal phenomena in the consideration of property rights within the contextualisation of a Republic scenario. We achieve this through creative non-fiction by using a dialectic approach in the tradition of an allegory. We draw on interactions with the future monarch that occur during a barbecue at the Governor Generals residence as the basis for our allegorical investigation of property rights under a Republic scenario. In particular, we explore how these property rights might be reframed in the absence of the Crown as the hold of the superior interest over land should Australia move towards becoming a Republic, and what the role of first Australians could be under such a scenario. We make the assumption that in moving from a Constitutional Monarchy to a Republic model, that new Constitution would have to be drafted to articulate the values of Australia under a Republic. Our hope is such a constitution, unlike the current one, would both fully acknowledge and reflect the authority of the first Australians. Our scenario takes the radical step of vesting the superior interest over land in Australia in the guardianship of the descendants of those first Australian, ensuring that they have a central role in the ongoing stewardship of the country. Such an approach, whilst radical, opens the door for broader discussion on contemporary property rights in Republican Australia. We are not going to discuss a new flag or anthem – which for some is a central issue in the Republic debate, but we see as a mere distraction. Rather, we propose to engage in the much thornier issue of Aboriginal and Torres Strait Islander recognition in a new Republic.

[3] In response to the thorny issues, we present this paper in the form of five questions on the Republic. After providing some historical context in this introductory section, we introduce our methodological stance early in the paper, as is appropriate for creative non-fiction. Taking Prince William as our protagonist, we then attempt to answer five challenging questions about land in the potential new Republic that must be considered beyond personality. For when we raise the issue of 'the Republic', it is important to note that we are discussing a separation from the superior interest of the Crown. This is a fundamental shift in our relationship to any number of aspects of life, but our focus here is dealing with land and property ownership. Consequently, the aim of this paper is to raise some of these broader issues by looking at the concept of the Republic and attempt to answer five core questions: What is Land? What is Property? What is Ownership? What is Value? What are Property Rights?

[4] In answering these questions, we reflect on the broader meaning of living in a community whose original foundations of *terra nullius* have been overturned and whose future must be reconsidered –otherwise we continue to live with unanswered questions. The second frame that we need to attach around these questions is the acknowledgement that Prince William has the right to rule when he becomes King William. While former Prime Minister John Howard noted that Australia would likely become a Republic only after Queen Elizabeth II passes on, the arrival of Prince William has highlighted the need for Australians to have a debate about the state of our nation. Although Ross Cameron (Cameron) used the arrival of the Prince as an excuse to promote the strengths of Australia's Constitution, we believe that a constitution that fails to realign its focus from a legal fiction is one structurally flawed.

[5] Australians restated their support for a constitutional monarchy in a referendum in 1999. The proposed alternative to the established constitutional monarchy that was rejected in the referendum consisted of a complex combination of electioneering and political appointment. The electorate had initially supported a Republic, but the combination of a complex model combined with a campaign by the supporters of the monarchy that was focussed on confusing voters rather than debating the broader issues, meant that the proposed constitutional reforms were soundly defeated. While some pro-monarchist commentators, such as former federal member of parliament, Ross Cameron (Cameron), have argued that this was popular confirmation by the public of a limited monarchy, it was clear in a great deal of pre-polling that a Republic was desired, but that the model offered was not the answer Australians were looking for. Cameron also claimed that the large crowds that greeted the Prince also confirm public

support for the monarchy.

[6] For many involved in the debates surrounding the Republic and the future direction of constitutional reform, it was not the wrong answer that is of primary concern, but the wrong question that is being asked. Rather than asking, 'who should be Australia's head of state?', or, 'how do we elect them?' the question should be 'what should an Australian Republic look like?' This question looks beyond the figurehead and seeks to inquire about the very foundations on which we have built this country. It asks questions such as 'Who are the custodians of the land? Who has superior ownership of the land? What does ownership mean anyway?'

[7] The former Chairperson of ATSIC, Gatjil Djerrkura, articulated such a perspective. He captured the sentiments of many Australians –both indigenous and non-indigenous –when he questioned the propriety of a minimalist Republican campaign that all but ignored indigenous claims:

A narrow debate over whether we should have an Australian or British head of state will not satisfy our expectations for change ... For my people there is a far more important question than asking: Do we want a Queen or a President as our head of state? Instead, we ask 'Are our rights as the continuing custodians of this land being recognized?' (McKenna 47)

Methodological Stance

[8] Before presenting the abovementioned sociolegal approach to property rights within the context of debates about the Australian Republic, it is important to contextualise our methodological approach of combining creative non-fiction with a dialectic approach in the tradition of an allegory. Importantly, an allegory is not opposed to truth but presents an alternative and creative way of facilitating an audience to make sense of the complex issues raised (Alvarez and Merchan) and allowing us to move beyond temporal constraints (Lämsä and Sintonen) and explore, in this case, the moral foundations of property rights in the Republic.

[9] Such an approach draws its methodological inspirations from the field of 'creative non-fiction'. This methodology involves the use of various techniques, including storytelling, allegory, vignettes and reflections (Vickers) to make far reaching and complex questions more accessible (Arvanitakis). Examples include Paul Dwyer's discussion of reconciliation in his

production of 'Bougainville: Photoplay Project'(Dwyer) and is an approach we have successfully employed to discuss the problematical nature of carbon taxes (Arvanitakis and Boydell).

[10] Obviously such topic areas are the focus of intense academic debate and research, but by using such a creative approach, it presents these issues in a way that is not only accessible but also grounded in lived experiences (Dillow) – something that is rarely achieved by standard approaches to academic writing and research. For example, we are interested in confronting the myth that people's 'backyards' are under threat when Aboriginal sovereign rights are recognized as occurred in debates about the High Court 'Mabo Decision' (*Eddie Mabo and Ors v The State of Queensland*) in 1990s (Warne-Smith). In debates as emotive as the Republic and the recognition of the peoples of First Nations, such methodological approaches also allow the researchers to engage directly with the issues, clearly outlining their own performative, pedagogical and political research practices (Denzin 423).

[11] This paper focuses on issues of justice and equity: specifically, how do we recognise Australia's Aboriginal population as custodians of this land beyond rhetoric. In this way, we attempt to ensure that our academic writing confronts rather than perpetuates a history of exclusion (Denzin 424).

[12] Echoing Vickers (Vickers), our approach challenges the concept that there is only one objective form of inquiry or knowledge (Stanfield II). Rather, we are attempting to promote a pluralist method of forming knowledge that mirrors the heterogeneous and complex world we are describing.

[13] As such our approach is not a legal exegesis; rather, we take a transdisciplinary perspective to embed complex legal questions involving property rights in a socio-cultural context. For example, when we critique Henry Maine's legal definition of a 'bundle of rights' associated with property, we are interested in this issue from a social and political dimension rather than through the lens of jurisprudence. It is with this in mind that we will turn to the first question, and ask 'what is land?'

Land and the Republic: what is land?

[14] The first place to start is with the question, 'what is land?' While this question seems quite simple, it raises a vast number of complex issues that provide insights into our cultural context

and priorities. Do we view land as the source of all economic wealth? Is it a commodity? Do we see land as our connection to spirit: either ancestors far gone or a parent recently passed in a house we grew up in? Do we see land as something to protect (and if so from whom or from what)? It is likely that most, if not all, of us would answer in (at least) partial affirmative to each of these questions.

[15] The next related question is whether our view of land would change if we became a Republic and, if so, why? The lens through which we interpret the world will in part, determine this and the answers to the other four questions. If we advocate the maximisation of individual liberty in thought and action (a libertarian perspective) for example, we will look at what we might gain individually and economically from a Republic. If our outlook would have some label us as neo-socialist, we may instead be more concerned with aspirations for equality and collective benefit. If we are of Aboriginal heritage, we may see this as an opportunity for our continuing custodianship of the land to be tangibly recognised.

[16] In contemporary Australia, is it possible to reconcile these three aspirations? On the other hand, would anything other than the libertarian approach so undermine the powerbase of any Government that it would be political suicide? If that is the case, the potential of using a Republic as a vehicle of change is lost before it is begun. How do we overcome the power and relationship challenges within a society to enable a Republic to be a vehicle for equity?

[17] If we were, by way of allegory, to have a conversation with Prince William at the barbeque organised in his honour at the Governor's House in Sydney, we could ask him if a monarchy could help us stand at the nexus of commercial gain, equity and indigenous heritage. Alternatively, is this the role of the new Republic, which should aim to achieve a complex balance rather than simply replace the head of state by name only?

Property and the Republic: what is property?

[18] The second question relates to the issue of property. To answer the question of what property (real property) is in the context of the Republic, we will first have to consider five sub-questions (which we adapt from Gray and Gray 100-101):

[19] The first is to consider if we believe our selves to be by nature, 'property absolutists' or 'property relativists'? That is, is ownership of land absolute in the sense that it is unqualified,

sacrosanct and inviolable? Alternatively, do we consider property rights in land to be constantly redefined by social context and community-oriented obligation?

[20] We again believe that there is no simple answer, as most of us would see this as a continuum. From a socio-political perspective, property absolutists fall into the category of libertarian, whilst property relativists run the risk of bearing a neo-socialist label. Consequently, answering this question forces us to understand where we are positioned in the land and the Republic debate.

[21] It is likely that Prince William would avoid a direct answer to this question during our barbeque conversation. While the monarchy has long held absolute control of its property, the changing social context of a modern United Kingdom means that expectations have changed, and so too has the position of the Royal Family. We must consider what this means in the contemporary Australian context.

[22] The second sub-question relates to the principle objective of land law: should it be about certainty of entitlement or fairness of outcome? This is a political question: is it more important that the applicable rule of law be settled than it be settled right? Again, how we respond the libertarian / neo-socialist question will influence our response.

[23] This may well be the fundamental question to be answered –are your motivations about you, as an individual, or about the greater good of the Republic as the collective? In contemporary discourse about multicultural Australia, such questions about Australian identity remain in a complex flux. Answering this question may help define the type of nation we want to become –with or without Prince William.

[24] The third sub-question asks whether property in land is based on socially constituted fact, or grounded in artificially defined jural entitlement. That is, does the organic reality of what actually happens on the ground eclipse the dusty record of ‘words upon parchment’ or even the digital record of an impersonal register of title?

[25] ‘King’ William will soon have the right to rule over Australia. Can we, in a moment of national identity, wipe away two hundred years of conception, or more likely perception, of what property is in Australia? That is, if we become a Republic, can we redefine our socially constructed facts in relation to property?

[26] We are not ready to discuss property rights yet, but at this point, it is important to note that there has been no real debate about how the Crown-Commonwealth-State continuum that protects and enforces our rights to property could change if we remove the Crown. If we can wipe away two hundred years of legal history by collectively deciding that we no longer need the Crown, are we brave enough to tackle what impact this could have on how we conceive of property? Our response, may once again be largely influenced by which of the two labels we adopt for ourselves – libertarian or neo-socialist. This seems to be a recurrent sticking point – self and other, or rather self over others (or vice-versa).

[27] Should land law reflect a culture of exclusion (driven by the motivations of fear and insecurity) or a culture of inclusion (driven by motivations of social justice and equal opportunity)? This reads like a very weighted question, and perhaps it should be. It implies that the libertarian label is driven by fear, insecurity and greed while the alternative perspective is inclusive. This is not necessarily the case, as even those who push for equitable solutions within their community may take a position that excludes ‘outsiders’. Yet again, we return to a spectrum of complex positions that should not be simplified.

[28] Despite this, we need to acknowledge that a position that prioritises self-interest at the expense of all other concerns takes us down the road that led to the global financial crisis. The ‘exclusion question’ mirrors – indeed epitomises – one of the more profound problems of social philosophy with which we have to engage if the Republic debate is really a ‘debate’. Are we ready as a society to take that long hard look at what our values are? If so, how can we use the transformation of our society into a Republic to raise these?

[29] Finally, we need to ask, what is property anyway? This final sub-question encapsulates all of the other questions posed for this, one of our oldest and most significant human institutions. Yet, if the holy grail of property were ever discovered, would it contain anything? Is property merely an illusion? Is property a mere register of the ‘day-to-day outcomes produced by the constant interplay of power relationships in society’? (Gray and Gray 101) This returns us to the unanswered power and relationship issue.

[30] What can we draw from these five sub-questions in returning an answer for ‘what is property in the Republic’? First, it depends on how we view the world (or the Republic of Australia) and our relationship with it. Second, it depends on whether we see land and property

law as cast in stone, or as something that can change and evolve with the needs of society at any given time – and how those needs are defined as a Republic?

[31] Thirdly, if we are going to understand the role of private property in a Republic, we have to take a long hard look at our values (which we will below, once we have considered ownership).

Ownership and the Republic: what is ownership?

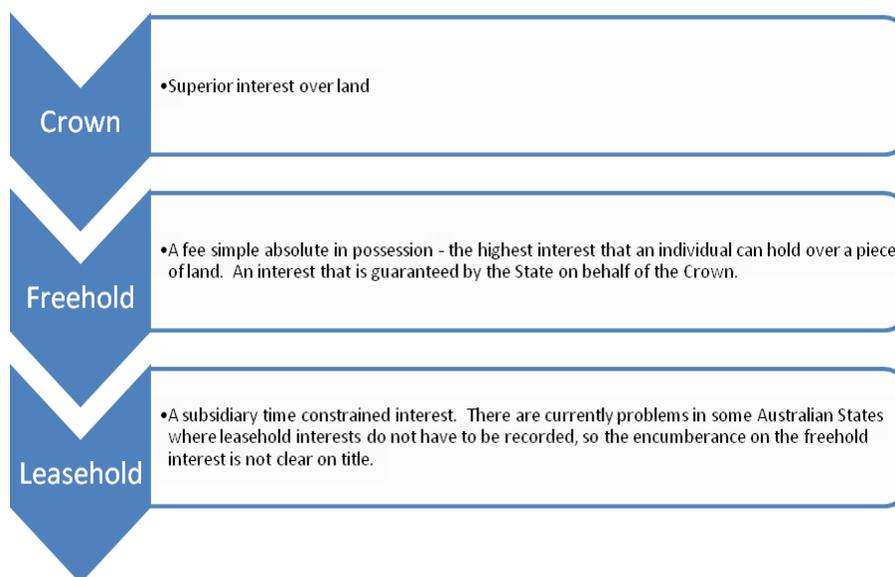
[32] What is ownership in the context of a Republic? What is ownership? In terms of land, and property, what is it that we own? We, individually or collectively, ‘own’ rights that are enforced by the Republic (remember, it used to be the Crown-Commonwealth-State continuum). We can call these ‘property rights’ and with the privilege of rights come a collection of obligations and restrictions. That is, just because you own a house does not leave you at liberty to change it, expand it or remove it without a string of state imposed obligations and restrictions. We also, as individuals, have obligations to our neighbours and fellow Republicans.

[33] Likewise, our assumed security of tenure that is supposedly assured by ‘owning’ a freehold interest in land (or is it in property, or both in land and in property?) until such time as the Crown, or now the Republic, need some or all of the land for the public interest. At that time, just as in the example of the 1997 Australian movie *The Castle*, we discover that our freehold tenure is shorthand for fee simple absolute possession at the grace of the Crown. If the Crown needs our land, state resumption or compulsory purchase legislation provides that we must relinquish it, willingly or otherwise, in return for ‘just terms’ compensation (which will notionally compensate us for our economic loss only). Are we to assume the same provisions will apply under a Republic model? We would suggest this assumption is reasonable.

[34] Before moving on, it is important to note that a freehold interest (which applies in all Australian States and the Northern Territory, but not in the Australian Capital Territory) is created by grace of the Crown, and guaranteed by the State or Territory on behalf of the Crown. It does not diminish the overarching and superior interest of the Crown. It merely enables individuals to use the land in a productive manner. In Australia, the notion of freehold is generally accepted to be a perpetual interest; unless the land is needed by the Crown (or the State), at which time the freeholder would be economically compensated for their loss at market value. The fact that a freehold interest is there by grace of the Crown (and guaranteed on behalf of the Crown by the State/Territory) is often overlooked. A freehold interest is also constrained

by the State through a number of obligations and restrictions – related to planning and building regulations and the need to pay land tax to reimburse the State for services. Despite the aspirations of libertarians, a person holding a freehold interest cannot do (or build) whatever they want on the land. A subsidiary leasehold interest creates another tier, a lesser time constrained interest (e.g. 3 years, 21 years or 99 years), with an intermediate interest retained by the freeholder (see fig. 1).

Figure 1 Hierarchy of interests



Source: Spike Boydell and James Arvanitakis.

[35] So now, we posit the question where does the land come from. This question goes beyond the libertarian / neo-socialist muse. It could challenge our scientific or spiritual (or perhaps religious) standpoint. Those who respond with a *Darwinesque* (or should that be Darwinian) and agnostic (or atheist) view will have a more comfortable outcome to this question. Those who subscribe to the Creation story will find it more confronting.

[36] Why, you may ask, is this relevant to a Republic? It all comes back to ownership. If the land was created by God or was indeed a gift from God, is it reasonable to assert that God is in the land or that the land is a representation of God on earth? If it is, who are we to assert that we 'own' land, for surely it would follow that we are presuming to own in some small way an aspect of God, which surely cannot be the case (for a broader discussion of this issue, see Boydell and

Shah).

[37] This perhaps leads us to understand the indigenous notion of stewardship or guardianship over land. Indigenous cultures do not ordinarily presume to own land, but rather they look to care for the land during their lifetime on behalf of (and as guardians or stewards in the earthly realm for) the spirits of their ancestors and for their descendants that will follow. Without romanticising indigenous cultures, we need to consider whether this perhaps explains their sustainable approach to land management for many millennia before the very recent dominance of land as a source of economic capital.

[38] Meanwhile back at the Governor's house, when we pass the ketchup (or HP sauce) to Prince William, he asks us how indigenous rights would be recognised in the new Republic. At this point, we would inform the Prince of the arguments developed in the context of leaseholds and ownership of the superior interest after the removal of the Crown (Boydell). This proposition reasons that under the new Republic, the guardianship of the land known as the Republic of Australia would be vested in the Aboriginal stewards to administer with superior title (replacing the former authority of the Crown). To make this work, a restoration tax and a leasehold resolution have been proposed (Boydell et al. "The Republic and Its Impact on Property Rights in Sydney"). The leasehold resolution proposes the abolition of an ownership structure based on a legal imperative that placed the Crown as the holder of the superior interest of all land in Australia (we are referring here to the fee simple absolute in possession, or more simply, freehold tenure). It follows that the Crown be replaced by the Aboriginal Guardianship of the new Republic of Australia. Beyond a restoration tax and leasehold resolution, some rich questions will require further discussion. These include what now happens to "State" land and what happens to "Crown" land? A return to the Aboriginal Guardianship would seem an equitable outcome –albeit that such a solution will not necessarily sit comfortably either with libertarians or the good Prince.

[39] This question takes on added meaning if we attempt to redress past injustices. Given that it took over two hundred years before the Mabo (in *Eddie Mabo and Ors v The State of Queensland* and *The Wik Peoples and Others v The State of Queensland and Others*) decisions formally discredited the *terra nullius* version of history, can we convince Prince William that the Republic is the appropriate vehicle to heal passed wounds?

[40] We could spend more time on this reality, but we still have two core questions begging our attention.

What Value a Republic? (Alternatively, what is value?)

[41] How can we rationalise value systems? At this point, we could draw on Plato's allegory of the cave in asking about our value systems (Plato). Is our impression of value real or a mere shadow of a reality that we cannot fully comprehend in its complexity? To this end, do an individual's values change in the absence of the Crown as Head of State? We think not. We do not anticipate that an individual's notion of self and other, or meaning, will be impacted by the move to a Republic model –so, likewise, it is unlikely to impact on our values.

[42] The Republic could act as a vehicle to reflect on these values –though such national reflection requires the kind of conversation that most political leaders do not want to engage. The discussion of values in the Australian political context has been marred by cheap nationalistic sentiment as well as claims that one or other perspective is 'un-Australian'.

[43] Rather than attempting such an awkward conversation with the Prince, we would direct him towards the very common Sydney dinner party conversation about the economic value of property. Specifically, we should consider the likely ramifications on economic value of changing the superior interest from the Crown to the Indigenous stewards.

[44] Whilst multiple meanings are attributed to (economic) 'value', in the context of our Sydney dinner party conversation, things only have the value that we ascribe to them. This provides a segue into a property economics definition along the lines of the measure of value (say in dollars) that a purchaser of particular property rights would probably pay for possession of those rights for a period of time. Crudely, this is the net present worth of the estimated future benefits arising out of 'ownership' of said property rights by typical users and investors.

[45] Staying with this real estate value terminology, is there any change in the assessed worth of something (property rights) that is owned (in an asset) under a Republic model? If we were, in one miraculous stroke, able to extinguish the notion of a freehold asset and replace it with a leasehold interest, would we see a 'real' change in worth? Whilst there is some anecdotal evidence from Singapore that indicates a 3-4% reduction in 'value' from freehold to leasehold interests, this is purely speculative and unrealistic. The valuation of real estate is largely

predicated on comparable evidence. In our Republic model, if all the evidence suddenly became leasehold (as it already is, for example, in the Australian Capital Territory) but with the superior interest held by the Indigenous Stewards, our evidence would be similarly impacted by the change. Therefore, in comparing like interest or like property rights, there would be no immediate impact on the economic worth of the asset as at now (today).

[46] Tomorrow, or rather in eighty years time, we would see a different economic calculation in terms of a leasehold being a wasting asset. In our prevailing model of 2011, no bank would want to use an individuals property rights as security beyond the term of their current lease. The rights, obligations and restrictions on that lease would also affect the level of security of the asset. This is particularly true for those relating to caveats (conditions) that may require the property to be returned to the superior interest holders at lease expiry in good and tenantable repair.

[47] In our conversation with Prince William, he could cite many such examples from Victorian building leases in the UK that started expiring in the 1970s and resulted in a deterioration of the inner city. In response to his concerns, we would inform him the the solution is to create an early trigger for surrendering and renewing leases with less than 30 years unexpired term, or creating an appropriate renewal / extension trigger to protect the interests of the tenants as well as equitably remunerating the holders of the superior interest.

[48] However, perhaps this is all too detailed. In summary, we do not see a shift in value systems of the individual in a Republic (as a moral citizen) and the economic worth of an asset under our proposed leasehold system would not be impacted today.

What are Property Rights?

[49] This brings us to our final question, what are Property Rights? By real property rights, we mean the formal and informal institutions and arrangements that govern access to land, buildings and other resources. These property rights arise from law, custom and the operation of the markets. They can be found in and change across the full range of human societies, both in time and space (Emigh; Hann; Herskovits; Hoebel; Horwitz).

[50] What evolved in Australia, under the spectre of *terra nullius*, was a situation where the superior interest in the land was been vested in the British Crown. We will not dwell on this

history or pursue the arguments that this radical title may have been adverse possession. From this Crown base, interests in land were made available to the new citizenry. Following the prevailing Westminster legal system, the highest grant of land that the Crown made available to an individual was a freehold interest (or fee simple absolute in possession) and below that, subsidiary leasehold interests (fixed term leases).

[51] These social constructions regulate the relations between humans over resources in western cultures. Henry Maine (Maine) described these property rights that are held as a 'bundle of sticks' and the metaphor of a bundle of rights has endured. These rights include use rights, access rights (to a resource), withdrawal rights, to exploit a resource for economic benefit, control or decision-making rights such as the right to manage, exclusion and alienation (such as freehold and leasehold, creating the right to rent out, sell or give away the rights that a particular party holds [by grace of the Crown]).

[52] We subscribe to the view that challenges the 'bundle of rights' as being conceptually limited (Giurco et al.; and see, for example, Arnold; Gluckman; von Benda-Beckmann et al.). These critiques of the bundle present new metaphors and models that establish alternate building blocks from which to visualise, imagine, understand, and problem-solve the complex relationships inherent in contemporary property. These critiques share the view that visualising property through the bundle of rights is too narrowly conceived, in that it brings up the image of exclusive, isolated, individualised and separate interests.

[53] The bundle metaphor it is argued does not adequately reflect the increasing legal, social, political and ecological interconnection and co-existence that marks contemporary property rights (such as those associated with for example, native title (Sheehan), water (Zellmer and Harder) and more recently, carbon (Boydell, Sheehan and Prior; Boydell et al. "Carbon Property Rights, Cities and Climate Change"). These new metaphors, which in some cases have been transformed into models, promote the use of such terms as 'interests' and 'relations' to promote a more fluid articulation and understanding of contemporary property rights as a constellation of relationships.

[54] So how does our constellation change in a Republic? What is the impact on property rights? How do we need to interpret the ideological, legal / economic and concrete / implementation issues if we change our Crown-Freehold-Leasehold hierarchy of interests?

[55] Our assumption is that in moving to a Republic we will no longer have the Crown as Head of State –which was the focus of the Republic debate of the 1990s. However, as far as we can tell, that debate completely overlooked the reality that the Republic has the potential to change those ‘man-made’ constructs of Crown-Freehold-Leasehold interest. Essentially, without the Crown holding a superior interest we no longer have the guarantee of a freehold estate in land – that is the fee simple absolute in possession by grace of the Crown. We contest therefore that the establishment of Australia as a Republic provides the catalyst to review our understanding and meaning of real property rights.

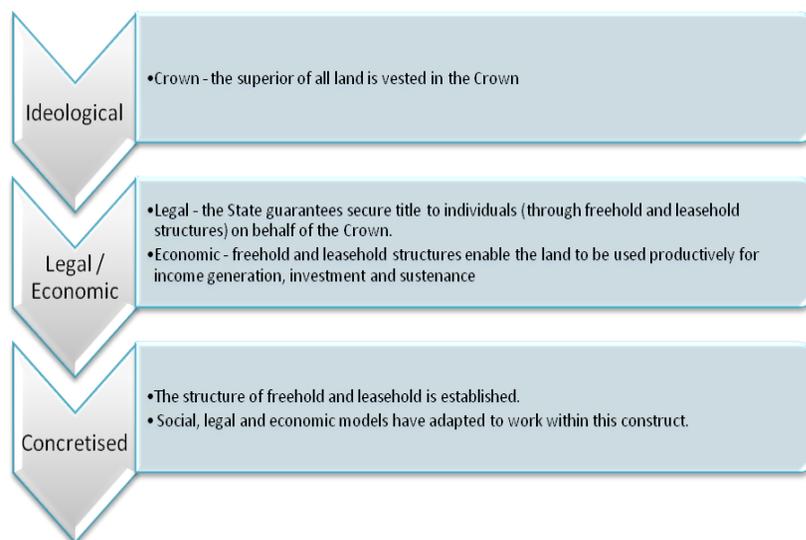
[56] We draw some guidance from the 1973 Federal Commission of Inquiry into Land Tenures that identified ‘in our modern complex society, an individualistic approach to property rights and land ownership is incompatible with public interest, unless individual rights are restricted to the use and enjoyment of the land’ (Else-Mitchell et al.). We have been exploring this opportunity concerning how Australia might re-conceive a property rights model under a Republic (Boydell; Boydell et al. “The Republic and Its Impact on Property Rights in Sydney”; Boydell et al. “Sydney Restored”). In this paper we take the analysis a stage further using the constellation approach that we (Boydell et al. “Carbon Property Rights, Cities and Climate Change”) and others (Arnold; von Benda-Beckmann et al.) have applied to the interpretation of emerging property rights (see fig. 2 and fig. 3).

[57] These figures review the current situation and the potential Republic scenario, and navigate between the ideological, legal/economic, and concretised realities. Many, especially the libertarians, may question why the move to a Republic would need to change the property rights that exist at present – and argue that the current freehold and leasehold system works, so why change it. Such detractors miss the underlying point – an issue that was made clear by Eddie ‘Koiki’ Mabo in explaining the importance of pursuing the landmark Murray Island case to his peers (Perkins) – the change is good for both Aboriginal Australians and the settler community. For Aboriginal Australians, the change is true recognition of their status as the ‘first’ Australians. For the settler community, it represents the final release from the two-hundred year old lie that was *terra nullius*.

[58] The need for a review of land tenure and property rights regimes was identified 38 years ago in the Commission of Inquiry into Land Tenures initiated by Sir Paul Hasluck, the Governor General and Commander in Chief of Australia (Else-Mitchell et al.). Importantly for the debate today, Hasluck appointed a Judge of the Supreme Court of New South Wales (Else-Mitchell), a

Professor of Accounting and Public Finance from the Australian National University (Mathews) and the Chairman of Directors of Lend Lease Corporation (Dusseldorp). Challenging the prevailing property rights is not a new concept, but society had difficulty with coming to terms with it in 1973. The subsequent landmark Mabo and Wik decisions have seen the judicial realisation of the limitations of prior regimes (*Eddie Mabo and Ors v The State of Queensland; The Wik Peoples and Others v The State of Queensland and Others*). Close to Australia, the notion of a Republic has seen formerly freehold regimes transformed into superior indigenous interests with leasehold models at the time of Independence in both Vanuatu and Niue. In 2011, we have the benefit of hindsight and understanding that was not available to our predecessors in the land tenure and property rights debate.

Figure 2 Australia under a Monarchy



Source: Spike Boydell and James Arvanitakis.

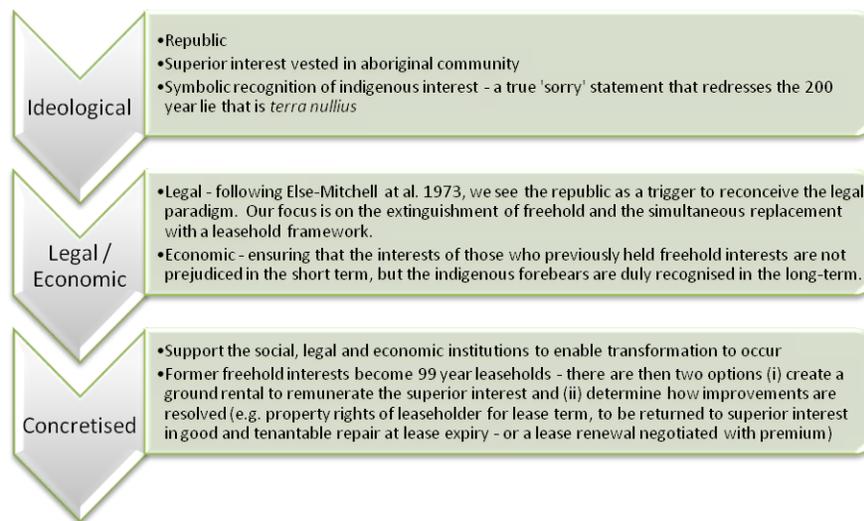
[59] So how are an individual's property rights affected under our Republic model (fig. 3)? For the current generation it is more symbolic than economic when all property rights move from freehold to 99-year leasehold simultaneously, as immediately the comparable interests are leasehold. Consequently, when like is compared with like there is no economic variance.

[60] Does a house-owner feel the difference? No, they would continue to reside and enjoy similar property rights to access, transfer, quiet enjoyment etc. under a long leasehold

arrangement as they did under the former freehold model. Likewise, there is no difference for lenders if the householder chooses to use their property rights as security for a mortgage (Boydell et al. "The Republic and Its Impact on Property Rights in Sydney").

[61] The real change is intergenerational and will come in the last 30 years of the lease, when a leasehold interest is more clearly identified with a wasting asset. Given that the average Australian only currently lives in a property for around seven years, this does not present a difficulty. In the last 30 years of the lease, a trigger will be enacted that facilitates the creation of a lease renewal subject to payment of a premium to the superior interest. Such models are not new, and as we stated above they have prevailed in the UK from the Victorian era. There can be an issue of understanding. That is, in understanding that the residual property rights in the land *and* buildings are vested in the Aboriginal community and as such the improvements (the building) are to be returned on lease expiration in good and tenable repair. This enables new leases to be created, assuming that the lease renewal trigger has not been enacted to allow continuance of occupation by the leaseholder.

Figure 3 Australia under a Republic



Source: Spike Boydell and James Arvanitakis.

Conclusion

[62] Prince William delicately dabs the crumbs from his hands and places the (paper) plate and napkin on the Governor's table. He shakes our hands and thanks us for the interesting conversation. We ask if we have offended him by raising the issue of the Republic. He turns and his answer is muffled as the Governor introduces him to other guests.

[63] It is a reasonable assumption that our discussion on five questions relating to the Republic will either have resonated with our reader or served to offend them. Our purpose was to offend neither the Prince nor the reader, but to encourage a reflection on the future constitutional structure of Australia, now that legal fictions have been extinguished.

[64] On the question of 'Land and the Republic' the answer is predicated by the stance of the reader, be it libertarian or neo-socialist, and the political ramifications that ensue. The notion of 'Property and the Republic' was answered by posing and responding to five more questions whose answers will be determined by (a) how we view the world (or in this instance, how we view the Republic of Australia), (b) if we see land and property law as cast in stone, and (c) what our respective values are.

[65] Our inquiry into 'Ownership and the Republic' led us to ponder on what it is that we actually own, which we determined to be certain property rights, obligations and restrictions. Discussion on the lie of *terra nullius* presented the opportunity for the Republic to be the trigger for replacing the feudal radical title of the Crown with Aboriginal guardianship (a theme that we explored in more detail under our explanation of property rights). In an exploration of Values and the Republic we deduced that individual value systems of moral citizens would not be prejudiced and the economic worth of a given asset (under our proposed leasehold system) would not be impacted.

[66] We provided more detail of what we see as the Property Rights in a Republic by drawing on the theoretical advancement of contemporary property rights and their representation as a constellation of interests within both a sociolegal and political frame. We contrasted the ideological, legal / economic and concretised interpretations of property rights under a Monarchy with those under a Republic, and provided elaboration on how this could be managed from a leasehold perspective.

[67] We hope that we have highlighted an important dimension to the Republic debate, and contest that it is a timely moment in Australia's history to discuss the options for land, property, ownership, value, and property rights. The move towards a Republic is indeed a unique moment in any nation's history and has the potential to achieve far more than a narrow debate over whether we should have a Queen or a President as a head of state. To move towards a Republic requires open and exhaustive discussion on the recognition of the rights of Aboriginal Australians as continuing custodians of the land. Our leasehold model may not be 'the' solution, but it can at least serve as a catalyst for subsequent discourse. It is worth discussing, even if it risks offending Prince William.

Works Cited

Alvarez, J., and C. Merchan. "The Role of Narrative Fiction in the Development of Imagination for Action." *International Studies of Management & Organization* 22.3 1992, 1992. 22(3): p. 27-45. Print.

Arnold, C. A. "The Reconstitution of Property: Property as a Web of Interests." *Harvard Environmental Law Review* 26.2 2002: 281-364. Print.

Arvanitakis, J. "Staging Maralinga and Looking for Community (or Why We Must Desire Community Before We Can Find It)." *Research in Drama Education: The Journal of Applied Theatre and Performance* 13.3 2008: 295-306. Print.

Arvanitakis, J., and S. Boydell. "The Miner and the Activist: A Parable for Our Carbon Constrained World." *Journal of Political Ecology: Case Studies in History and Society* 17 2010: 59-67. Print.

von Benda-Beckmann, F., K. von Benda-Beckmann, and M. G. Wiber. "The Properties of Property." *Changing Properties of Property*. Eds F. von Benda-Beckmann, K. von Benda-Beckmann, and M. G. Wiber. New York: Berghahn Books, 2006. 1-39. Print.

Boydell, S. Sydney Restored: A Collaborative Blog of the Sydney Restored Challenge Grant Research Project at the University of Technology, Sydney. 2009. Web. 4 March 2011.

Boydell, S., and K. Shah. "An Inquiry into the Nature of Land Ownership in Fiji." *International Association for the Study of Common Property (IASCP)* Ed. J. Sheehan. Brisbane: Digital Library

of the Commons, 2003. 1-9. Print.

Boydell, S., J. Sheehan, and J. Prior. "Carbon Property Rights in Context." *Cambridge Journal of Environmental Practice* 11.2 2009: 105-114. Print.

Boydell, S., et al. "Sydney Restored: Aboriginal Ownership of City Spaces." *Cities Nature Justice: Dialogues for Social Sustainability in Public Spaces*. Ed. H. Goodall. Sydney: University of Technology, Sydney, 2008. Print.

Boydell, S., et al. "Carbon Property Rights, Cities and Climate Change." *World Bank 5th Urban Research Symposium*. Marseilles: World Bank, 2009. Print.

Boydell, S., et al. "The Republic and Its Impact on Property Rights in Sydney." *State of Australian Cities Conference (SOAC) 2009*. Perth: Promaco, 2009. 25. Print.

Cameron, R. "Princely Magnetism Could Swing Views on Monarchy." *Sydney Morning Herald* 18 January 2010. Fairfax Digital, Sydney. Web.

Denzin, N. K. "Analytic Autoethnography, or Déjà Vu All Over Again." *Journal of Contemporary Ethnography* 35.4 2006: 419-428. Print.

Dillow, C. "Growing Up: A Journey Toward Theoretical Understanding." *Qualitative Inquiry* 15.8 2009: 1338-1351. Print.

Dwyer, P. *The Bougainville Photoplay Project*. Strawberry Hills: Currency Press, 2010. Print.

Eddie Mabo and Ors v The State of Queensland. High Court of Australia, Full Bench. 1992. Print.

Else-Mitchell, R., R. L. Mathews, and G. J. Dusseldorp. *Commission of Inquiry into Land Tenures*. Response to Request from Governor-General of Australia and Commander-in-Chief. Canberra: Government of Australia, 1973. 208. Print.

Emigh, R. J. "Means and Measures: Property Rights, Political Economy, and Productivity in Fifteenth-Century Tuscany." *Social Forces* 78 1999: 461-490.

Giurco, D., J. Prior, and S. Boydell. "Future Latrobe Valley Scenarios for a Carbon-Constrained World: Industrial Ecology, Environmental Impacts and Property Rights." *2009 SSEE International Conference -Solutions for a Sustainable Planet*. Melbourne: Society for Sustainability and Environmental Engineering, 2009. Print.

Gluckman, M. *Politics, Law and Ritual in Tribal Society*. 1965, Oxford: Blackwell, 1965. Print.

Gray, K. J., and S. F. Gray. *Elements of Land Law*. 4th ed. Oxford: Oxford University Press, 2005. Print.

Hann, C. M. "Introduction: The Embeddedness of Property." *Property Relations -Renewing the Anthropological Tradition*. Ed. C. M. Hann. Cambridge: Cambridge University Press, 1998. 1-47. Print.

Herskovits, M. H. *The Economic Life of Primitive Peoples*. New York: Knopf, 1940. Print.

Hoebel, E. A. *The Law of Primitive Man: A Study in Comparative Legal Dynamics*. Cambridge: Harvard University Press, 1954. Print.

Horwitz, M. J. *The Transformation of American Law, 1780-1860*. New York: Oxford University Press, 1992. Print.

Lämsä, A.-M., and T. Sintonen. "A Narrative Approach for Organizational Learning in a Diverse Organisation." *Journal of Workplace Learning* 18.2 2006: 106-120. Print.

McKenna, M. *This Country: A Reconciled Republic?* Sydney: University of New South Wales Press, 2004. Print.

Maine, H. S. *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*. New York: Charles Scribner, 1861. Print.

Max-Neef, M.A. "Foundations of Transdisciplinarity." *Ecological Economics* 53.1 2005: 5-16. Print.

Nicolescu, B. "Transdisciplinarity -Past, Present and Future." *Moving Worldviews: Reshaping*

Sciences, Policies and Practices for Endogenous Sustainable Development. Eds B. Haverkort and C. Reijntjes. Leusden: ETC/COMPAS, 2006. 142-166. Print.

Perkins, R. "Episode 7: We are No Longer Shadows." *SBS: First Australians*. Dir. R. Perkins. SBS, Sydney. 2008. Television.

Plato. *The Republic*. London: William Heinemann, 1937. Print.

Sheehan, J. "Ancient Property Rights: Dispossession and Compensation." *Second Conference of the International Academic Group on Planning, Law and Property Rights*. Warsaw, 2008. Print.

Stanfield II, J. H. "Ethnic Modelling in Qualitative Research (Racialized Ethnicity and Related Status Categories in Qualitative Research Methods)." *Handbook of Qualitative Research*. Eds N. K. Denzin and Y. S. Lincoln. Thousand Oaks: Sage Publications, Inc., 1994. 175-188. Print.

The Wik Peoples and Others v The State of Queensland and Others. [1997] AILR 5; (1997) 2 AILR 35. High Court of Australia (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), 1996. Print.

Vickers, M. "The Creation of Fiction to Share Other Truths and Different Viewpoints: A Creative Journey and an Interpretive Process." *Qualitative Inquiry* 16.7 2010: 556-565. Print.

--- "Taking a Compassionate Turn for Workers with Multiple Sclerosis (MS): Towards the Facilitation of Management Learning." *Management Learning* 42.1 2011: 49-65. Print.

Warne-Smith, D. "Time Capsule -June 3, 1992: High Court makes landmark ruling in Mabo case." *The Australian* 2008. Sydney: News Limited. Print.

Zellmer, S. B., and J. Harder. "Unbundling Property in Water." *Alabama Law Review* 2007. Web (PDF). 14 January 2008.