

ABORIGINAL AUSTRALIAN PERSPECTIVES ON SHARE OWNERSHIP

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ABSTRACT

The vast majority of studies on Indigenous Australian conceptions of property have focused on real property. As financial capitalism continues to grow, less wealth is being held in real property while a greater level of wealth is being held in abstract financial products. This paper attempts to bring Indigenous Australian concepts of property to bear on the new area of wealth accumulation, the company share and its subsidiary financial products.

The paper presents the results of interviews with a number of Indigenous Australians. Narrative research method and discourse analysis have produced unique insight into the ownership of company shares. The results do not present a cohesive narrative, but rather offer a familiar but often overlooked critique of the present Australian system of share ownership. Following these leads, this paper draws out the parallels between the interviewees' critiques and the earlier critiques of Proudhon, Schumpeter and Berle and Means. The result is a clear picture of the shortcomings in the existing theory and taxonomy of shares as a property right. These shortcomings are placed within their human-property relationship and are examined as potential liberators of Australian conceptions of property law.

I. THE CALLIPER AND THE HAMMER

Latour recounts the tale of the conquistadors who, with great religious fervour, denounce the local idols.¹ With iconoclasm and taxonomy, the conquistadors free the locals from their idolatry, simultaneously giving power to the once powerless idol.² This paper follows in the path of Latour's conquistadors. It uses the calliper of taxonomy to reinvigorate the lost categories of the *jus in re* and the *jus ad rem*. It uses the hammer of iconoclasm to break through the myth of intangible property and its associated legal rights. It is, however, an inversion of the tale of the iconoclastic conquistadors. While the colonisers so often brought enlightenment ideals which were intended to modernise indigenous populations, this paper uses

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1 Bruno Latour *On the Modern Cult of the Factish Gods* (Duke University Press, Durham (NC) 2010) at 3-5.

2 At 7.

the dissembled views of Aboriginal Australians to expose a distinct lack of reason and enlightenment in the post-colonial Australian legal framework. In doing so, this paper exposes the myth of reason at the heart of Australian personal property law. In turn, the calliper and the hammer provide freedom from false logic, finally providing the present property myth with the power which it claims: the power to civilise the uncivilised and to modernise the idolaters.

This paper does not, however, start with an attempt to give truth to the myth of modernity in property law. Rather, it starts with an earnest attempt to understand the wisdom of the Aboriginal Australian people. It is based on the premise that, if academia is to take seriously the wisdom of indigenous cultures, it must seek their input not only on matters which were historically relevant to those cultures, but to seek their input on matters which are presently relevant. The question was thus presented to numerous Aboriginal Australians: "Tell me about share ownership". Shares and their related financial market products now represent the great majority of world trade and accumulation of world wealth. The Aboriginal Australian perspective has not yet been provided. The qualitative research in this regard is, however, necessarily incomplete. This paper lacks the resources to provide a consistent narrative on Aboriginal Australian views of pure and documentary intangibles. If there was ever such a narrative, it is long since lost. Rather, this paper tries to obtain pieces of the narrative to provide fringe voices and perspectives to the current dominant understanding of property. The reflections on the narrative draw parallels to and reinvigorate a number of silenced dissenting voices which once challenged the dominant narrative. Echoes of Proudhon, Schumpeter and Berle and Means are drawn together. These critiques are not re-enlivened to revisit their exposing of myth, but rather to give power to the myth through its exposition.

This paper first presents a brief overview of the narrative research and discourse analysis which underpins this paper. It then draws on key themes identified in the knowledge shared by Aboriginal Australians to draw out existing critiques and find links between theory which can provide power to the present property narrative. It does so first by extrapolating current views on real property which have been revealed in existing literature. It then examines elements of Proudhon, before moving to a Schumpeterian critique and finally to a Berle and Means-based critique of share ownership. In the end, it is the Aboriginal Australian population pointing to colonial theory that transforms myth and superstition to reason and modernity.

II. SHARED KNOWLEDGE

This paper started with an attempt to assemble a new and consistent narrative on property rights and share ownership in Australia. An Aboriginal

Australian researcher visited individuals and communities throughout New South Wales to yarn about property rights and investigate Aboriginal Australian perspectives on share ownership. The individuals and groups who participated all identified as Aboriginal Australian and covered a wide socio-economic and demographic spectrum. Participants were both within and without the wage-capital system, old and young, male and female. In order to protect the confidentiality of the participants, all identifying details have been removed from this paper.

A narrative research method was employed by the researcher. She engaged with life stories and critical events of the participants.³ The narrative was guided,⁴ with focus directed to events around proprietary interests. The aim was to obtain a holistic understanding of the property narrative from the perspective of the participant. Where necessary, a single, open question was asked of the participants: "Tell me about share ownership". The response was encouraged and, where possible, related back to the narrative that had been formed in the earlier parts of the research.

Narrative research was utilised as it has been identified as a particularly effective means of engaging Aboriginal Australians in qualitative research.⁵ More importantly, it was a method that both the researcher and the participants felt comfortable engaging with. It strengthened social ties without creating a power imbalance or assigning the role of question asker to the researcher.⁶

The knowledge that was shared by the participants was recorded in writing, anonymised and then subjected to discourse analysis. Discourse analysis attempts to find common threads of discourse in qualitative data samples.⁷ Unlike thematic analysis, it does not require a belief in a tangible and discoverable objective truth.⁸ Rather, it looks for common threads while recognising the competing claims to truth that may exist both within and without the qualitative data.⁹ Discourse analysis was both desirable and necessary. It was desirable as it became evident early in the research process that, while commonalities existed in the data, there was a lack of consistency in the greater narratives being provided. It was necessary as this paper lacked

3 Torill Moen "Reflections on the Narrative Research Approach" (2006) 5 International Journal of Qualitative Methods 56.

4 Wendy Holloway and Tony Jefferson *Doing Qualitative Research Differently: Free Association, Narrative and the Interview Method* (SAGE Publications, London, 2000) at 2, 39.

5 See Leslie Allison Brown and Susan Strega (eds) *Research as Resistance: Critical, Indigenous and Anti-Oppressive Approaches* (Canadian Scholars Press, Toronto, 2005); Sylvia Barton "Narrative Inquiry: Locating Aboriginal Epistemology in a Relational Methodology" (2004) 45 Journal of Advanced Nursing 519.

6 Margaret Kovach "Emerging from the Margins: Indigenous Methodologies" in Leslie Allison Brown and Susan Strega, above n 5.

7 Julianne Cheek "At the Margins? Discourse Analysis and Qualitative Research" (2004) 14 Qualitative Health Research 1140.

8 Helene Starks and Susan Trinidad "Choose your Method: A Comparison of Phenomenology, Discourse Analysis and Grounded Theory" (2007) 17 Qualitative Health Research 1372.

9 Dawn Snape and Liz Spencer "The Foundations of Qualitative Research" in Jane Richie and Jane Lewis (eds), *Qualitative Research Practice: A guide for Social Science Students and Researchers* (SAGE Publications, London, 2003) 5.

the resources to expand research to include the multitude of Aboriginal Australian nations and voices that would be required to make a realistic attempt at reassembling any form of representative narrative.

From the discourse analysis, three key areas were identified. First, the overarching legitimacy of property law and particularly personal property law, was almost universally challenged. Second, shares as non-tangible property were challenged for their lack of “spirit”. Third, shares as property were challenged for being structured around ownership, rather than stewardship. Each of these key concepts contains elements of existing non-dominant narratives in Australian property law. This paper links the key areas of discourse in the narratives provided by the participants in this paper with the existing non-dominant property narratives. By examining the dominant property narrative through the lens of non-dominant discourse, the dominant property narrative is challenged, exposed, transformed and strengthened. Before doing so, it first examines existing views on real property so that parallels can be drawn between these views and views held in relation to share ownership.

III. AN OVERVIEW OF VIEWS ON REAL PROPERTY

The long struggle to overthrow the myth of *terra nullius* and establish land rights for Aboriginal Australians has left a wealth of judicial and academic commentary on Aboriginal Australian concepts of real property. Despite this wealth of knowledge, attempting to identify Aboriginal Australian concepts of real property is vexed by the ever-evolving nature of contemporary Australian property law. At present, a shift from the existing “bundle of sticks” approach to property law¹⁰ towards more nuanced concepts of property law¹¹ makes identification of the leading theory of contemporary Australian property law complex. This is even more so when considered in relation to Aboriginal Australian concepts of property law, which have undoubtedly had significant impact on the evolution of property law.¹²

For ease of current reference, this paper will consider Aboriginal Australian concepts of property law through the lens of the bundle of sticks theory. As such, it is able to draw clear links to the majority of recent case law and academic discussion. The bundle of sticks theory also provides a clear framework for examining individual elements of similarity and difference.

10 Kevin Gray “Property in Thin Air” (1991) 50 CLJ 252; Henry Smith “Property as the Law of Things” (2012) 125 Harv L Rev 1691.

11 Sean Brennan, Megan Davis, Brendon Edgeworth and Leon Terrill (eds) *From Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, Sydney, 2015).

12 As above; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267; and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

This discussion is relatively brief and generalised, with the aim of providing relevant background to the discussion of share ownership that follows.

The key difference between Aboriginal Australian and modern Australian legal conceptions of property law lies in alienability. One of the key sticks in the bundle of Australian property rights is the owner's ability to sell or otherwise dispossess themselves of the property.¹³ Without this right, the land becomes a burden and an obligation. Aboriginal Australian conceptions of property law do not contain notions of alienability.¹⁴ The concept of the owner owing some obligation to the land is an integral part of the relationship with the land.¹⁵ This sense of stewardship rather than ownership is a theme that carried strongly into the investigation of share ownership.

Another key difference lies in the owner's rights to exploit the land for profit. While Aboriginal Australian concepts of land allowed for the taking and consumption of resources,¹⁶ this cannot be equated with "profit". The renting or financial exploitation of land itself is only possible in a system of ownership which provides for the infrastructure for enforcement of a right to property, rather than only a right in property. This is something that is explored in detail in relation to share ownership. At this point, it is sufficient to note that a system of natural law is incapable of replicating the type of profit exploitation available in a positive law system.

The other sticks in the bundle may be roughly identified in Aboriginal Australian notions of land ownership. Under both systems, one is able to possess the land and exclude others from the land.¹⁷ While the communal rather than individual nature of ownership means that these concepts have different practical application, they are sufficiently linked as to be seen to fulfil this categorisation in Australian law.¹⁸

As such, some of the key issues arising under land ownership are amplified when considering share ownership. There are, however, also key differences that are unique to the ownership of shares. Both the differences in real property identified above and the issues unique to share ownership will be explored.

13 Gray, above n 10.

14 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267; and *Mabo v Queensland (No 2)*, above n 12; Brennan, Davis, Edgeworth and Terrill, above n 11.

15 Nancy Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition* (1986, Stamford University Press).

16 Williams, above n 15; *Milirrpum v Nabalco Pty Ltd*, above n 12, at 267; and *Mabo v Queensland (No 2)*, above n 12; Brennan, Davis, Edgeworth and Terrill, above n 11.

17 Williams, above n 15; *Milirrpum v Nabalco Pty Ltd*, above n 12 at 267.

18 *Mabo v Queensland (No 2)*, above n 12; *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.

IV. TAXONOMICAL ANTINOMY: THE MORAL JUSTIFICATION OF PROPERTY LACKS MORAL BASIS

Ownership of Property is not always as clear cut as people think.¹⁹

The strongest theme to emerge from the research was a lack of moral justification for the present system of property ownership. In particular, many of those who undertook to share their knowledge presented a clear critique of the validity of proprietary ownership. This presents clear parallels to non-dominant discourse which has been lost to the dominant narrative of Australian property law.

This critique was usually not premised on a distinction between real and personal property. Rather, the entirety of the system was brought into question. Representative of this line of thought, one participant stated, "It depends which system of property you're talking about: ours or theirs ... theirs isn't really a system, it's just stealing stuff."²⁰

Most participants were slightly less pointed in their responses, but there was a clear sense that the usurping and consequent dispossession of Aboriginal Australian property rights challenged the legitimacy of the current Australian property law narrative. There was, however, a deeper thread that appeared to run through the interviews. The current system of Australian property law was not to be dismissed as a whole. Areas of Australian property law appeared legitimate to many. Rent seeking behaviour was almost universally abhorred. One of the participants challenged the notion of rent seeking, from housing payments to car parks:²¹

Why should I have to pay to park my car on my land? \$25 a day. They haven't even done anything with the land ... I'm just being forced to pay to be where I belong.

This type of comment was common amongst the participants. Inherent within it is a sense that the owner of the carpark has an illegitimate claim to property, while there remains no issue with car ownership. Likewise, another participant complained about paying rent for housing, but saw no contradiction in claiming a right to non-violable ownership of the various objects she had accumulated within that house.²²

As a result, this critique cannot be taken to cast doubt on the legitimacy of the entire system of property. This is consistent with previous interactions of the dominant property narrative with Aboriginal Australia. Studies into native title and Aboriginal Australian conceptions of real property have repeatedly

19 Interview 2.

20 Interview 15.

21 Interview 18.

22 Interview 14.

identified a recognition of proprietary relationship with land.²³ While not an equivalent to the Australian property law proprietary relationship, there are sufficient characteristics to reject the concept that Aboriginal Australia, as a collective, had no concept of property.²⁴ So accepted is this thought that it has even been accepted in the highest courts of Australia, perhaps most famously in the *Mabo v Queensland (No 2)*²⁵ decision and, in the immortal words of Justice Blackburn, “If ever a system could be called ‘a government of laws, and not of men’ it is that shown in the evidence before me”.²⁶

The critique likewise cannot be considered to apply to personal property but not to real property. Numerous attempts have been made to extend native title to property outside of the real property taxonomy. *Yanner v Eaton*,²⁷ *Commonwealth v Yarmirr*²⁸ and *Akiba v Commonwealth*²⁹ are all premised on a claim to property in something other than real property. The difference therefore runs deeper than these classifications. In many ways, it should come as no surprise that the distinction between legitimate and illegitimate property should not line up with the current categorisations adopted by Australian property law.

Perhaps more surprising is the fact that the distinction may be reflected in the largely silenced counter-narrative of anarchic criticism of property. It contains within it a mechanism to distinguish between the car and the carpark and the house and the furniture. The knowledge shared by the participants

23 See James Cockayne “Indigenous and Colonial Traditions in Native Title: Members of the Yorta Yorta Aboriginal Community v Victoria” (2001) 25 MULR 786; Brennan, Davis, Edgeworth and Terrill, above n 11; and Sara Hudson “Enabling Indigenous Prosperity” (2012) 28 Journal of Public Policy and Ideas 9.

24 See David Ritter *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights* (Allen and Unwin, Sydney, 2009); Nick Duff “Reforming the Native Title Act: Baby Steps or Dancing the Running Man?” (2013) 17 AILR 56; and Stephen Gray “Peeking into Pandora’s Box: Common Law Recognition of Native Title to Aboriginal Art” (2000) 9 Griffith Law Review 227.

25 *Mabo v Queensland (No 2)*, above n 12.

26 *Milirrpum v Nabalco Pty Ltd*, above n 12, at 267.

27 *Yanner v Eaton* (1999) 201 CLR 351.

28 *Commonwealth v Yarmirr* (2001) 208 CLR 1.

29 *Akiba v Commonwealth* [2013] HCA 33.

contained echoes of the words and critique of Proudhon.³⁰ To discover what is property, it therefore becomes necessary to turn to *What is Property?*³¹

The key distinction appears to be along lines which have been conflated in Australian property law. The re-instatement of the distinction between *jus in re* and *jus ad rem* and the corresponding distinction between *petitoire* and *possessoire* gives clear logic to the shared knowledge which forms the basis of this paper. Put simply, the *jus in re* represents the entirety of the proprietary system, while the *jus ad rem* denotes only the right to come into possession of property.³² The *jus in re* allows the owner of property to make claim to it wherever they find it.³³ The *jus ad rem* only gives rise to the expectation of property.³⁴ These distinctions are matched by the corresponding classifications of *petitoire*, everything relating to property and *possessoire*, relating only to possession.³⁵

The proprietary claims of the participants may therefore be seen as a complex interplay of three separate but related distinctions: the possession-ownership distinction, the *jus in re* – *jus ad rem* distinction and the *petitoire-possessoire* distinction. Each of the participants has a *jus ad rem*, an expectation to come into property. The abolition of the myth of *terra nullius*³⁶ calls for a ground up reconsideration of historical proprietary justification. By all ethical justifications presented below, the *jus ad rem* of the participants is established, but remains denied by a pre-existing *jus in re* over the same property. The result is that the participants, through whatever dominant philosophical justification of property is examined (each of the dominant threads is examined below), must find themselves with a legitimate *action petitoire* against those who simultaneously possess a legitimate *action petitoire*.

30 Joseph Proudhon was a key thinker in the French revolution and widely considered to be the father of anarchist thought. This paper draws heavily on his most famous essay, “What is Property?”, which critically examined the moral justifications of property which were perpetuated by the French aristocratic classes. Importantly, these justifications relied on categorisations of property law which were common to French jurisprudence but have not been incorporated into the Australian legal system. These moral justifications are the same as those that underpin current Australian property law theory, namely: the “first in time” or “Cicero’s theatre” theory of property; John Locke’s labour theory of property; and Jeremy Bentham’s positivist notion of property. Proudhon considered that the revolution remained incomplete until notions of the right to property had been done away with, as ownership of property was theft, in the same way that slavery was murder. For similar reasons to those outlined below, Proudhon argued that each of the moral justifications for property were lacking if morally and critically examined. The key divergence between the investigation in this paper and Proudhon is that Proudhon dismissed Bentham on primarily moral grounds, rather than the inconsistency argument presented in this paper.

31 Joseph Proudhon “What is Property?” in Iain McKay (ed) *Property is Theft! A Joseph Proudhon Anthology* (AK Press, Chico (CA), 2011)

32 Proudhon, above n 31.

33 Wesley Hohfeld “Some Fundamental Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16, 21-22.

34 Hohfeld, above n 33; Charles Keigwin “The Action of Debt” (1923) 12 Geo LJ 28, 28-30.

35 Proudhon, above n 31.

36 *Mabo v Queensland (No 2)*, above n 18.

These claims are made clear in an examination of the dominant but inconsistent narrative of property rights. It can be seen through the examination of these three claims that what is objected to in property is the present state of *jus in re* and *petitoire*, while the claim to property remains legitimate in its historically accurate determination of *jus ad rem* and the necessity to bring an *action possessoire*.

A. Cicero's Theatre

Proudhon is incorrect in asserting that the ancient philosophy of the world rests entirely on Cicero. The property claims by Locke rest heavily on Judeo-Christian thought which thoroughly pre-dates Cicero's existence.³⁷ Nonetheless, it remains that Cicero's philosophical reflections on property are a dying but nonetheless recognised justification for property.

The idea is expressed "*Quemadmodum theatrum cum commune sit, recte tamen dici potest ejus esse eum locum quem quisque occupavit*"³⁸ or, as interpreted by Blackstone "the world [is] a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own".³⁹ As simply expressed by Blackstone:⁴⁰

... a tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast.

Much has been made in non-dominant discourse about the distinction between "taking" and "appropriating" a seat in Cicero's theatre.⁴¹ The purpose of this paper is not to attempt to put in place a non-dominant discourse, but rather to examine and strengthen the dominant discourse by applying the lens of forgotten taxonomy. For this reason, the dominant historical discourse on Australian property law can be accepted as truth, regardless of competing claims to truth. Using the dominant discourse as presented by the power structures of the ruling class, it is clear that Australia was not *terra nullius* prior to settlement.⁴² The Cicero's theatre argument is the reason that Blackstone's commentaries relied so heavily on the concept of *terra nullius* in

37 Luigi Salvatorelli "From Locke to Reitzenstein: the Historical Investigation of the Origins of Christianity" (1929) 22 Harvard Theological Review 263.

38 Marcus Tullius Cicero in Andrew Fitzmaurice *Sovereignty, Property and Empire 1500-2000* (Cambridge University Press, Cambridge, 2014).

39 William Blackstone, *Commentaries on the Laws of England* (e-books Adelaide, University of Adelaide, originally published 1765) book 2, chapter 1.

40 Blackstone, above n 39.

41 See Proudhon, above n 31; Michelle Garfinkle and Stergios Skaperdas (eds) *The Political Economy of Conflict and Appropriation* (Cambridge University Press, Cambridge, 2008); Shadia Drury "Locke and Nozick on Property" (1982) 30 Political Studies 28; and David Ellerman "Property Appropriation and Economic Theory" in Philip Mirowski (ed) *The Reconstruction of Economic Thought* (Springer, New York, 1986).

42 *Mabo v Queensland (No 2)*, above n 12.

relation to settlement. One could not possess a seat which already had a body in it. To claim otherwise would be to introduce brutality and absurdity into the supposed civilising laws of England.

Therefore, under the Cicero's theatre conception of property, Aboriginal Australians have their *jus ad rem*. That is, they were violently displaced from their seats and have right to expect the restoration of possession. If this conception is to hold, there is a clear *action petitoire* to be had over a great majority of the land mass. The proprietary system which lacks basis does not lack basis on the fact that property itself contains a fundamental error (though that may be so) but rather because of its support for the present *jus in re*. This claim logically extends not just to the shares that were at the centre of this paper, but to all forms of property which have been imposed on the basis of Cicero's theatre.

B. Labour Theory of Property

Of all of the dominant discourse on property, the Cicero's theatre conception is the least dominant. Its survival is perhaps more a product of the ongoing relevance of Blackstone's commentaries to the dominant historical narrative than to any philosophical strength. Indeed, very few of the seats in the world's theatre are presently occupied by those who sat down first.

Far more relevant to the dominant property narrative is the labour theory of property. Locke's concept that it was the adding of labour that justified the private appropriation of once public goods was a major force in justifying colonial property ownership.⁴³ It lacked the clear sense of first possession evident in the Cicero's theatre conception. The lack of cultivation activity provided philosophically consistent justification for English proprietary claims.⁴⁴

Reinstating the taxonomical boundaries of *jus in re* and *jus ad rem*, it can be seen that this justification is difficult to maintain with relation to a majority of personal property, but is entirely insufficient to explain proprietary interests in share ownership. Under this conception, those who shared their knowledge have a potential proprietary claim based on their *jus ad rem*. They have possession of their own labour, but are denied the product of that labour.⁴⁵ The modern economy is based on the presence of surplus labour value being appropriated by the owner of the means of production.⁴⁶

43 Neal Wood *John Locke and Agrarian Capitalism* (University of California Press, Oakland, 1984); and Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Clarendon Press, Oxford, 1996).

44 Barbara Arneil "Trade, Plantations and Prosperity: John Locke and the Economic Defence of Colonialism" (1994) 55 *Journal of the History of Ideas* 591.

45 Proudhon, above n 31.

46 Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University Press, Oxford, 1928 Edition) Volume 1, 75.

Again, much has been made of the injustice of this mechanism by non-dominant economic and property narratives.⁴⁷ The purpose of this paper is not to propose those narratives, but rather to examine the dominant narrative with the addition of taxonomical boundaries that were once part of the dominant narrative. As such, the claim is that the legitimacy of the personal property under the labour theory of property cannot be maintained when the difference between *jus in re* and *jus ad rem* is reinstated.

The labour theory of property would suggest that any labourer has a *jus ad rem* in the fruits of their labour. The application of their labour, over which they possess a *jus in re*, entitles them to claim for themselves their productive output. Yet, in modern capitalist society, the factory owner claims a *jus in re* over the entirety of the productive output of their factory.⁴⁸ In essence, the same problem exists as with Cicero's theatre. The worker's *jus ad rem* cannot be brought in *action petitoire* because a *jus in re* has already been placed over the same content. The system requires an acceptance that the worker's *jus in re* over their property be reduced to a *jus ad rem*. That is, that the worker may only have a potential claim to their own labour if conditions are met, but may not make a claim to the property of their labour as and where it is located. This system is only maintainable in a philosophically consistent manner when the two concepts are conflated. Where the right to property can be easily interchanged with the right in property, the dominant narrative may easily switch between the two without inconsistencies being identified. The reinstatement of categorisations exposes an error in the present application of property.

This is a problem which is significantly amplified when examining the company share specifically. As pointed out by Berle and Means,⁴⁹ the atom of ownership is split in the modern corporation. The owner has become a disembodied investor with no entrepreneurial input.⁵⁰ The factory owners of the modern corporation may maintain no *jus ad rem* to the productive output of their companies, as there is no intertwining of labour. Rather, they rest on a complex web of exchanges of original and historical labour value for the value of promises, reconverted to a sense of "ownership". At best, the claim ultimately falls back to the Homestead Principle,⁵¹ which relies on an original occupant theory falling subject to the same errors present in Cicero's theatre when considered in relation to Aboriginal Australia. At worst, it is

47 See Moishe Postone *Time, Labour and Social Domination: A Reinterpretation of Marx's Critical Theory* (Cambridge University Press, Cambridge, 1993); Elmar Wolfstetter "Surplus Labour, Synchronised Labour Costs and Marx's Labour Theory of Value" 83 *The Economic Journal* 787; and Paul Burkett *Marx and Nature: A Red and Green Perspective* (Haymarket Books, Chicago, 2014).

48 Adolf Berle and Gardiner Means *The Modern Corporation and Private Property* (Transaction Publishers, Piscataway, 1932).

49 Berle and Means, above n 48.

50 Robert Hessen "The Modern Corporation and Private Property: A Reappraisal" (1983) 26 *JLE* 273.

51 Karl Warneryd "Anarchy, Uncertainty and the Emergence of Property Rights" (1993) 5 *Economics and Politics* 1.

a boondoggle which serves only to obfuscate the triumph of unproductive investment over the fundamental rights of a human to their own labour value. Again, the problem may not rest in the concept of property itself, but rather the internal inconsistencies that arise in a system of property which lacks the separation of rights in and rights to property.

C. Legal Theory of Property

Perhaps the strongest of the theories presented within the dominant property narrative is the theory espoused by Bentham: “property and the law are born together and die together”.⁵² In its raw form, this may be sufficient reason alone to object to the validity of property. The idea that property is so because a mechanism of enforcement and violence support it is unlikely to appeal in any sense to the people dispossessed of property by virtue of that enforcement and violence. As has been stated, however, the purpose of this paper is not to challenge the dominant narrative by adopting a non-dominant perspective, but rather to consider the dominant narrative through the lens of forgotten taxonomy.

The Benthamite theory is utilitarian.⁵³ It is maintainable so long as it maximises pleasure and minimises pain.⁵⁴ This is maintainable insofar as the present conception of property provides more pleasure and less pain than workable alternatives. The present theory of property is theoretically maintainable for the inverse of the labour theory of property. Private property encourages investment and productive labour.⁵⁵ Without the assurance of the right to property, endeavours to produce, cultivate and develop could not be maintained.⁵⁶

Reinstating the *jus in re* and *jus ad rem* distinction, the concept of private property is maintainable on the basis that it ensures that the *jus ad rem* can be converted to a *jus in re*. That is, that a person who dedicates their labour to a task is not denied the productive output of that task through the appropriation of the productive output by someone not involved in the production process. The analysis of the labour theory of property has demonstrated the problems that arise with this sort of theorising in relation to private property and, in particular, shares.

The legal theory of property however, can be taken a step further. It is possible to maintain an inconsistent application of property provided that it provides the greatest pleasure and the least pain. That is, it is justifiable for

52 Jeremy Bentham, *Theory of Legislation* (Ogden, ed., Hildreth trans, Harcourt, Brace & Co 1931, 1802) 111.

53 Jacob Viner “Bentham and J S Mill: The Utilitaria Background” (1949) 39 *The American Economic Review* 360.

54 James Crimmins “Contending Interpretations of Bentham’s Utilitarianism” (1996) 29 *Canadian Journal of Political Science* 751.

55 Bentham, above n 52.

56 Carol Rose “Canons of Property Talk, or, Blackstone’s Anxiety” (1998) 108 *Yale LJ* 601.

the law to effectively colonise the *jus ad rem* that arises from labour value if it in turn produces pleasure which outweighs the pain of denying that *jus ad rem*. The resulting analysis leads to a conclusion that this is a tenuous case.

The argument may be mounted that the present system of production, complete with an inconsistent property right which conflates and switches between various forms of property, is justifiable in that it leads to human flourishing. This is an appealing argument, as it mirrors Bentham's original claim that property-led economic development was justifiable for its "civilising" effects.⁵⁷ The rejection of *terra nullius* nullifies the possibility of property for "civilising". The dominant historical narrative rejects the notion of an uncivilised pre-colonial Australia.⁵⁸ This, however, does not reject the possibility that capital leads to greater flourishing.

It is difficult to conceive of how the deprivation of the *jus ad rem* in labour could in any way lead to human flourishing. Rather, the capitalist means of production must provide that flourishing. Some may maintain this to be the case, through the advancement of freedom or the provision of opportunity.⁵⁹ The participants who shared their knowledge to help create this paper did not express either a sense of freedom or a sense of opportunity. Many were involved in the capital-labour relationship and none expressed a sense of liberation or fulfilment. It is likely that these views, having been provided by a non-dominant social class, are not reflective of the dominant social class. It is quite possible that the dominant social class supports the present system and feels a sense of freedom and flourishing from the system that deprives those same people the *jus ad rem* in their labour. To explore this further would be to enter the debate of the justifiability of utilitarianism: something far beyond the scope of this paper.

D. Taxonomy and Property as an Actor

When property is dissembled to its constituent parts, the present Australian system of property is, in one sense, substantially weakened. Just as Latour's locals were only able to maintain their idolatry when the distinction between natural and supernatural was removed,⁶⁰ Australian property law can only maintain its claim to legitimacy when the distinction between *jus in re* and *jus ad rem* is removed. Reinstating these categories leads to the conclusion that property is justifiable only on the basis that the lives of the dominant class are improved by the removal of the ability of a person to benefit from

57 Jennifer Pitts "Legislator of the World? A Rereading of Bentham on Colonies" (2003) 31 *Political Theory* 200; and Paul Moon "The Influence of 'Benthamite' Philosophies on British Colonial Policy on New Zealand in the era of the Treaty of Waitangi" (2015) *The Journal of Imperial and Commonwealth History* 367.

58 *Mabo v Queensland (No 2)*, above n 18.

59 Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, Chicago, 1982).

60 Latour, above n 1.

their own labour. It is open to Australian property law to maintain a claim to legitimacy on this basis. It is quite likely that it will.

In recognising this justification, Australian property law is transformed into something powerful. Before the introduction of the taxonomy, Australian property law thrives on a lack of internal consistency. It exists in a state where the user of property law is able to shift between *jus in re* and *jus ad rem*: between the natural and supernatural. The genuine nature and strength of property law is never revealed. The courts, books of law, gaols, fences, boom-gates, clubs and other apparatus of private property remain neutral and natural. These objects can be treated as a naturally occurring part of modern life, whose existence is simultaneously dictated by society and which in turn dictates society.

Reinstating the *jus in re* and *jus ad rem* forces a scientific evaluation of the property system. It changes the mediating function of the non-human actors. Courts, books of law, fences and the other aforementioned apparatus of private property transform from blinkers which hide power structures to a magnifying glass which lays bare those same power structures which were once hidden. In this, private property provides a reflective insight into human nature and the post-colonial world. It reveals truth and begins, for the first time, to be modern.

V. ICONOCLASTIC INCONGRUITY: THE PROPERTY WE CURRENTLY FAVOUR LACKS PROPERTY

While the first half of this paper relates to a wider conception of property, the second half of this paper applies specifically to company shares and other financial products. While traditional property taxonomy depicts these objects as belonging to a small categorisation toward the bottom of the property family tree, these choses in action presently comprise the majority of the world's wealth.⁶¹ These objects, and the property rights which attach to them, posed a unique problem for those who shared their knowledge to help create this paper. Even the basic premise of the company share fits awkwardly into many Aboriginal Australian conceptions of property.

Some participants rejected the notion that a share could be considered property, while others redefined the nature of the share. It was common to receive responses such as: "If you have a share of a company you own part of everything that company owns. You would own a certain percentage of its buildings, factories and products".⁶² It was common for shares to be altered from the ownership of a set of rights to the ownership of some share of physical product. Others sought to classify shares outside of a property system. This is

61 World Bank, *Stocks traded as a % of World GDP* <www.data.worldbank.org>.

62 Interview 5.

perhaps most succinctly summed up by the participant who stated: “Shares are just an investment.”⁶³

Overall, the concept of ownership of a share appeared to be at best an awkward fit within the participants’ narrative of property. Two dominant themes ran through the responses of the participants. First, the company share cannot enter the property relationship because it lacks spirit. This concept contains echoes of Schumpeter and requires a reconsideration of the dominant narrative through the lens of democratic socialist thought. Second, the company share cannot enter the property relationship because the owner lacks stewardship. This concept contains further echoes of Berle and Means and calls for a reconsideration of the dominant narrative through the lens of the equity-debt divide. In both these reconsiderations, the impetus provided by Aboriginal Australians shatter a myth and provide real power to objects which have traditionally only possessed the power to befog.

A. The Spirit of Shares

The Aboriginal Australian concept of property relies on an identification of all objects as possessing a spirit.⁶⁴ As one participant stated, “the idea of reciprocation to property comes from the idea that all property has a spirit”.⁶⁵ The land is possessed of spirit and all things which are sourced from that land remain possessed of that spirit.⁶⁶ The spirit makes possible a reciprocal relationship with the object.⁶⁷ The company share, having been invented by nothing more than the collective imagining of society, enforced by the property mechanism, is never vested with spirit. Within this property framework it should not, and does not, exist.

In many ways, this concept goes well beyond the division between tangible and intangible objects and is worthy of further investigation. For this paper, however, the goal is not to establish a new property narrative nor to suggest a replacement for the existing dominant property narrative. Rather, the purpose is to invigorate the current dominant narrative through a re-examination led by the thoughts of Aboriginal Australians. As with the first half of this paper, the second half does this by identifying obvious overlaps between the key themes that emerge from the knowledge provided to create this paper and existing non-dominant narratives that once challenged the dominant narrative before becoming obscure.

The parallels between spiritless property and the dangers of abstraction which were considered by Schumpeter are many. While a great proponent of

63 Interview 3.

64 Marcia Langton, Odette Mazel and Lisa Palmer “The ‘Spirit’ of the Thing: The Boundaries of Aboriginal Economic Relations at Australian Common Law” (2009) 17 *The Australian Journal of Anthropology* 307.

65 Interview 12.

66 Langton, Mazel and Plamer, above n 64.

67 Interview 12.

the dominant system of property, wealth generation and wealth distribution, Schumpeter saw within the capital system the seeds of its eventual destruction.⁶⁸ The quiet revolution would, in part, be fuelled by the rise in abstract goods and the loss of bricks and mortar industry.⁶⁹ That is, property which is not possessed of spirit will grow rapidly before breeding disenfranchisement, social and economic turmoil and leading people to socialist democratic rule.

The problem lies both in the nature of capitalism and in the nature of abstract property. The nature of capitalism is such that it is driven by constant innovation.⁷⁰ There is need for continual creation of new products and new markets, which in turn destroys the old.⁷¹ While introductory economic texts depict the economy as static, the market is in reality dialectic.⁷² Each second brings innovation which wipes out products and markets.⁷³

The most profitable product that can be conceived is one that requires no physical production. Technology allows for the creation of product in concept alone. The cost of producing a company share, option or derivative is considerably less than the cost of producing a car, table or house. An economy based on profit maximisation and innovation will inevitably find its way to increasing abstraction.⁷⁴ This has been seen in Australia, where manufacturing has given way to largely abstract products such as education and professional services.⁷⁵ Australia has entered the age of financial capitalism.

It is the consequences of this shift away from property with spirit to a spiritless, intangible economy which gives cause to reconsider the dominant narrative of private property. The tenuous thread of legitimate property that was left after the analysis in the first half of this paper was based on the concept that private property ultimately served the interests of the dominant class. This utilitarian analysis cannot be maintained if the very nature of property is planting the seeds of destruction of the system it is supposed to uphold.

The move toward non-tangible, spiritless property ultimately undermines capitalism. The elements which are needed to support genuine prosperity and growth are lost.⁷⁶ Factories and buildings are made of steel, iron, glass and bricks. The people who work in those buildings are raised in family units which exist largely in relation to a dwelling formed of physical material.

68 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Harper and Row, New York, 1942).

69 Herbert Giersch "The Age of Schumpeter" (1984) 74 *The American Economic Review* 103.

70 John Elliott "Marx and Schumpeter on Capitalism's Creative Destruction: A Comparative Restatement" (1980) 95 *The Quarterly Journal of Economics* 45.

71 Schumpeter, above n 68, at chapter 8.

72 At chapter 8.

73 Elliott, above n 70.

74 Schumpeter, above n 68, chapter 4.

75 Barry Dyster and David Meredith, *Australia in the Global Economy: Continuity and Change* (Cambridge University Press, Cambridge, 2012).

76 Schumpeter, above n 68; Matthew Tonts and Shane Greive "Commodification and Creative Destruction in the Australian Rural Landscape: The Case of Bridgetown, Western Australia" (2002) 40 *Australian Geographical Studies* 58.

The human is sustained by food grown in fields and by water transported through physical pipes. The loss of tangible production in favour of intangible production will result in an economy which is theoretically wealthy but without the means of satisfying human desire. It will, at its end, necessitate human intervention and direction of resources.⁷⁷

To the participants, the intangible has no spirit. To Schumpeter, the intangible has no inherent value.⁷⁸ The two concepts may be one and the same. Both expose a truth about non-tangible property: it is ultimately only worth what we conceive it to be worth. It is a myth of collective consciousness. While many claim that everything within a capitalist economy is only worth what we conceive it to be worth,⁷⁹ this claim overlooks the fact that an unsaleable hammer still has utility in driving nails and an unsaleable and valueless house still protects its occupants from the elements. All physical things ultimately can be used in some sense, even if it is only to be destroyed and fashioned into something else. In the words of one participant: “property is stuff you can touch”.⁸⁰ The non-tangible product only has the collective illusion of value. If we cease to value it, it ceases to exist.

It is no great revelation that choses in action exist only by collective will and the mechanisms of property. The revelation in a Schumpeterian analysis is that choses in action work against the utilitarian ideal of capitalist flourishing. It is one thing for non-tangible products to be of no value. It is another entirely for them to be destructive to the things we do value. The Schumpeterian perspective reveals the nature of non-tangible property for what it is: a collective self-delusion. It is a product made by humans and given the value that is ascribed by humans. In turn, the company share, a human-made, human-valued product, dictates the movements of productive forces and real resources within the Australian economy. Business decisions around the hiring and firing of staff, of resource allocation and of what to produce are dictated by the price movements of these non-existent objects. The company share is a mediator and not an intermediary.

At present, the company share mediates productive forces. It is Latour’s locals’ idol. By revealing the false process behind the creation and valuing of the company share, the idol is smashed. The concept of spirit acts as a gateway to iconoclasm. It reveals the Schumpeterian analysis and makes clear both the lack of real power in shares and the destructive influence that lies in ascribing a false power. It maintains the company share’s role as a mediator, but alters the effect of its mediation. The company share becomes the liberator of the human actor, economy and property. It exposes the share as a collective myth

77 Elliott, above n 70.

78 Schumpeter, above n 68.

79 See Emil Kauder *A History of Marginal Utility Theory* (Princeton University Press, Princeton, 1965); and John Hicks and Richard Allen “A Reconsideration of the Theory of Value: Part I” (1934) 1 *Economica* 52.

80 Interview 1.

and restores the power to the human actor. The human is not subject to the share; the share is subject to the human.

B. Stewardship of Property

The remaining theme to be explored is the fact that property contains an element of stewardship. This is necessarily tied to the concept of the spirit of property. This was a common theme, perhaps best summed up by the participant that stated: "Property is something that can be owned, well, not really owned, in the sense that everything is part of the same system that sustains us."⁸¹ Another stated that "The property goes two ways. You might be able to hold something, but it also holds you".⁸²

The concept of stewardship is not foreign to the dominant property narrative. While ownership remains the power structure of choice, the concept of stewardship remains a present challenger for the dominant theory of share ownership. The concept of stewardship finds its clearest parallel in Berle and Means' seminal study, *The Modern Corporation and Private Property*.⁸³ An empirical review of large corporations found that share ownership was becoming increasingly diverse, rather than concentrated.⁸⁴ Most large companies did not have identifiable human actors which could act as the directing mind and will of the company.⁸⁵ The owners of the company were thus not participants in the running of the company.⁸⁶

This essentially split the atom of ownership, with non-owners appointed to make decisions in relation to the company, while owners remained silent.⁸⁷ Owners did not attend or vote at annual general meetings and rarely read circulars and other information booklets provided by the company.⁸⁸ If owners were dissatisfied with their investment in the company, they were more likely to sell their shares and invest elsewhere.⁸⁹

A reconsideration of the concept of share ownership from the Berle and Means perspective shines a light on the distinction between debt and equity. A person who wishes to obtain a rate of return from a company but not involve themselves in ownership is able to provide a loan to that company and seek a return in the form of interest.⁹⁰ The thing that distinguishes an equity investor is that they share in the risk of the company and are responsible for the direction of the company. That is, the difference between the ownership

81 Interview 2.

82 Interview 11.

83 Berle and Means, above n 48.

84 Hessen, above n 49.

85 Lynne Dallas "Two Models of Corporate Governance: Beyond Berle and Means" (1988) 22 JLR 19.

86 Dallas, above n 85.

87 Henry Butler 'The Contractual Theory of the Corporation' (1989) 11 Geo Mason L Rev 99.

88 Dallas, above n 85.

89 Hessen, above n 49.

90 Berle and Means, above n 48.

of a debt and the ownership of a share is stewardship. The share owner has responsibilities as well as rights.

It is not necessary to re-evaluate the ownership of shares from the perspective of Berle and Means in order to challenge the dominant narrative of share ownership. The perspective of Berle and Means remains a strong part of the dominant narrative of capitalism. Corporate social responsibility scholars, those advocating stakeholder management, those advocating the direct alternative (shareholder primacy), those supporting government intervention and those arguing for anarcho-capitalism all regularly draw on Berle and Means' study. It is only necessary to move the present consideration of Berle and Means from the field of corporate governance to the field of property law.

When Berle and Means' study is brought into the conceptions of private property, two results are clear. First, there is an inherent problem with the labour theory of ownership. This has been addressed in the first half of the essay. Second, there is a problem with stewardship. Historically, the limited liability and immortal presence of the corporation were justified on the basis that they provided a socially valued good.⁹¹ That is, the corporation was a gift of the state. This gift was given on the basis that its owners, the shareholders, would in return owe duties toward the company and in turn the state.⁹² The shareholder was given great privilege in return for great responsibility.

The separation of the privilege and responsibility of share ownership divorces the concept of a company share from its own historical purpose. It is left only with its utility. The utility of a share would be fairly easy to establish, were it not the case that the debt mechanism exists to serve the function of seeking returns in a company without participating in its ownership. If the share has any purpose beyond debt, it appears to be either couched in avarice and entitlement or else in the socialising effects of the joint-stock company described by Marx.⁹³ Put simply, the ownership of shares is at best a pointless and duplicated property right and at worst a mechanism for undermining the system which it appeals to in order to justify its existence.

Once again, the Aboriginal Australian views on share ownership have acted as the catalyst for great iconoclasm. The company share is revealed not just as a myth, but a myth which serves no productive process. The only possible means of justifying the present state of share ownership is conservatism. While a conservative viewpoint may win the day, it must be open to challenge and reconsideration, particularly from those who do not wish to dispose of the present structures, but rather to create legitimacy where none presently exists. The iconoclastic process does exactly that. By laying bare the lack of stewardship in share ownership, the nature of shareholding as an alternate

91 Ralph Winter "State Law, Shareholder Protection and the Theory of the Corporation" (1977) 6 JLS 252; and Henry Manne "The 'Higher Criticism' of the Modern Corporation" (1962) 62 Colum L Rev 399.

92 Winter, above n 91.

93 Karl Marx *Capital: Volume Three* (Lawrence and Wishart, London, 1974 edition, 1894) Part 3.

debt instrument is exposed. The owner of the means of production is revealed to be a disembodied shadow. The capitalist which the system supposedly serves is a spectre, floating in and out of ownership offering little to no disruption or guidance to the system. The proprietary system which exists to protect these rights of owners who are subject to the risk of moral hazard serves no unique end. The corporate governance literature may reflect on the fact that exposing the hollow core of the company share frees the corporate manager from the constraints of the owner-overseer myth. Brought within the context of property law, the exposing of the hollow core of the company share frees the subject of property from its illusory nature. In doing so, the myth gains the power to set its former captives free. The company share becomes the symbol of freedom from illusion and superstition.

C. Property was Always an Illusion

The question remains as to whether the exposing of company shares as an illegitimate, non-existent and ultimately unnecessary myth actually presents anything that has not already been well accepted by the dominant narrative of property law. Gray has been well accepted in High Court judgements.⁹⁴ Property is known to be an illusion: a bundle of sticks which governs relations between people, devoid of physical objects.⁹⁵

This paper supports the conclusion that property in shares is an illusion, but for an entirely different set of reasons. The standard conception of property as a relationship between people treats the mediator as an intermediary. It treats the object of property as meaningless. If anything, it empowers the mythical elements of property. This analysis brings the object of property back within the network of property. It suggests that the object of property has power. For intangible property, it is the physical mechanisms of property law which contain that power. The books, courts, fences, guns and gaols all interact with the human actors to determine what property is and what power it possesses.

So long as the concept of property is conceived as nothing more than an expression of human relations, property itself gains an illegitimate power. Unobserved and unchallenged, historical once-truths, now present lies, continue to flourish. Myths created to legitimise social circumstances which no longer exist are strengthened and reinforced. Myths are created by reference to myth. By ignoring the centrality of property in the property relationship, the human actors become servants of their own creation. Property ceases to be an informed, useful, rational, civilising force. It becomes a mechanism for defending itself.

By borrowing elements from the non-dominant class and by borrowing theoretical frameworks from non-dominant narratives, elements of the true nature of the power of property can be revealed. In revealing that power,

⁹⁴ Gray, above n 10; *Yanner v Eaton*, above n 27.

⁹⁵ Gray, above n 10.

the illegitimate elements are brought to light and transformed. What once perpetuated convenient ignorance becomes the mechanism by which the human actor is freed from ignorance.

VI. A NECKER CUBE OF FREEDOM

It would be possible to declare at this point that the dominant property narrative had been examined, exposed, reinvented and strengthened. It would be possible to finish without further thought as to the ultimate futility of the process. To do so, however, would be to accept the form of purposeful ignorance which led to creation of non-dominance in Aboriginal Australia in the first place. The power of the objects of property to free the human actor from the myth of its own creation is only the first step in a recurring cycle.

As Latour's conquistadors point out,⁹⁶ the native is now free of their creation, but they are not now free to create. Science, sociology and psychology all dictate that humanity is not the sole creation of their psyche, but rather a product of their environment.⁹⁷ Having transformed the mediator into a mechanism for freedom, the human uses freedom to reach the realisation that they are not free from the power of objects. It is not the intention of this paper to try to break the cycle of circularity that may never be broken. Humanity and property law will continue to feedback and inform one another, possibly in perpetuity. This paper rather started with a misguided aim to assemble a new narrative on property law and ended up seeing the opportunity to instead try to spark the next wave of human-property law relations. It is sincerely hoped that the process of exposing myth will provide Australian property law with the logical, reasoned and civilising effects that it has claimed and maintained through myth since the enlightenment. In doing so, it is hoped that those who so graciously gave their time and knowledge to prompt this discussion may find that property law begins to understand them and exposes injustice where it occurs.

96 Latour, above n 1.

97 Latour, above n 1.