

THE MARGARET STONE LECTURE 2023

"MARGARET STONE: LEGAL SCHOLAR, JURIST AND PHILOSOPHER – WHY PROPERTY LAW IS 'BEAUTIFUL' AND ITS INFLUENCE ON LEGAL THINKING AND DEVELOPMENT"

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Introduction

1. In 2000, on her swearing in as a judge of the Federal Court of Australia, The Hon Justice Margaret Ackery Stone AO, wisely and prophetically said:¹

"... [T]he challenge for a judge is both to heed ... criticism, to profit from it and yet not be overwhelmed by it. To maintain one's integrity but to benefit from the criticism and the helpful comments of others. Probably even the unhelpful ones. That seems to me to be the essence of the task. I have

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1 Transcript of Proceedings, *Swearing in and welcome of the Hon Justice Stone* (Federal Court of Australia, 10 October 2000) 10.

some confidence that everything yields to hard work and I can undertake to put in that hard work. For the rest I rely on the guidance of the whole of the legal profession, coupled with my own natural inclination to ignore it at times."

2. My first interactions with The Hon Justice Margaret Stone were from the other side of the bar table, not long after her swearing in as a judge of the Federal Court. As Counsel, she sought my guidance, she interrogated that guidance and she ignored aspects of that guidance. And in doing so, Margaret immediately revealed her formidable intellect, her extraordinary capacity for hard work, and her interest in, and commitment to, identifying and interrogating the underlying principles at issue in any given dispute. Margaret's approach to the law was one of principle, not nomenclature. It was an approach informed and revealed by values and characterised by absolute intellectual rigour and wise judgment. In subsequent years I became the beneficiary of Margaret's guidance as a colleague, companion and confidant. Guidance, not advice, that you ignored at your peril. It is an absolute honour and privilege to be asked to deliver the inaugural Margaret Stone Lecture in the presence of her family, her friends and her colleagues.

3. Margaret's appointment to the Federal Court was the third chapter in a long and distinguished life. The reference to a "chapter" is in fact a misnomer, because many aspects of Margaret's extraordinary life were constant. What might be described as the first chapter – as an outstanding legal scholar and academic – informed her life. It physically overlapped with her time as a solicitor and then partner of Freehill, Hollingdale and Page; it was on public display as a judge of the Federal Court; and it was at the forefront of what Margaret did after retirement from the Court, again as an academic and in her role overseeing Australia's intelligence community.

4. On 16 March 2021, at her home in Sydney, Margaret gave an interview as part of the Inspector-General of Intelligence and Security Oral History Project.² It would be one of her last, as she passed away less than 6 months later. In that interview, Margaret reflected on her life in the law. She spoke of the events that saw her enter the lecture theatres at law school – with her daughters in hand – and of her first encounters with her courses. Margaret observed that "one of the subjects that fascinated [her] was property law", because of its history and development, and how it challenges how we think about law; how it, property law, challenges conceptions. She described it as "beautiful".³
5. That description caused me to smile. On the one hand, because it was such a Margaret response – intellectual and visceral. And, on the other hand, because I had just read another legal scholar observe that "in the life of the law there has never been a settled understanding of the nature of property law that has commanded widespread support over the long term. Perhaps there never will be."⁴ Was, is, property law beautiful? This lecture, in honouring Margaret Stone, seeks to identify and explain why Margaret *saw*, conceived of, property law as beautiful and how her conception of that beauty informed not only her legal thinking and judicial method, but so much more.

2 Interview with Margaret Stone (Daniel Connell, IGIS Oral History Project recording, 16-17 March 2021).

3 Interview with Margaret Stone (Daniel Connell, IGIS Oral History Project recording, 16-17 March 2021).

4 Edelman, "Foreword Conceptions of Ownership" (2019) 42(3) *University of New South Wales Law Journal* 785 at 789.

6. One need only glance at Margaret Stone's academic scholarship to appreciate that her fascination with property law, particularly real property law, continued well beyond law school. It is evidenced, in particular, by her part authorship of several editions of *Sackville & Neave: Australian Property Law*⁵ (which is the prescribed text for many property law courses) and joint authorship of *Torrens Title*.⁶ In her academic work, both teaching and writing, Margaret placed great importance on situating law in its historical context. Both her property law texts traverse the history of land law in great detail. But that bland description – "in great detail" – may hide, for all whose memory of their studies of land law has faded, the depth and breadth of Margaret's examination of history and will almost certainly hide the importance she attached to considering that history.

7. Equally importantly, saying that she treated history as very important does not tell you *why* she considered it so important or what she took from it. As I will later explain, Margaret's judicial work, like her academic work, showed that she saw the law as being founded in, formed by, and reflective of principles and values that can be identified and tested *only* by understanding what has gone before. The law for Margaret was not to be understood (and I would say *cannot* be understood) by reference only to labels or boxes. Labels or boxes may or may not be useful shorthand methods of describing particular forms of legal argument, but they provide no adequate basis for identifying – and, in turn, interrogating – the principles or values that underpin them. And it

5 Neave, Rossiter, Stone (eds), *Property Law: cases and materials*, 4th ed (1998).

6 Stein and Stone, *Torrens Title* (1991).

is these very principles and values that underpin the past development of the law, which will inform its future development and application.

8. Because history played the part it did in Margaret Stone's academic work and informed and explained so much of her later judicial method, let me try to offer a potted version of the history she treated as informing her work in property law. That history covers many centuries. But it is the breadth and depth of that history that both reveals and underpins what I later say about Margaret's overall understanding of, and approach to, the law as depending upon identifying the relevant underlying principles and values.

9. Archaeologists have identified that various property systems existed far beyond written history and that the suggestion that property rights emerged with agriculture is inaccurate.⁷ Throughout history, and across different societies, there have been all kinds of variations of property systems: the traditional relationships of indigenous peoples to land; the landed hierarchy of a feudal system; the command structure of a socialist State; private systems of ownership where much is left to the competence of individuals – to the market – to make decisions over the allocation of property resources. The choice of property system, and how it has been refined, warrants consideration, not only because the distribution of property rights has a profound impact on economic, cultural and social dynamics, but because the converse is equally true – the development of property law was driven by and reflects developments in society, its activities and its organisation. In this way,

⁷ Nordtveit, "The changing role of property rights: an introduction" in Nordtveit (ed), *The Changing Role of Property Law: Rights, Values and Concepts* (2023) 1 at 1.

the law of property can be seen as a tapestry that has been interwoven with, and which on closer inspection reveals, the threads of societal change. A tapestry which is forever being added to as the concept of property, and the rights to which it gives rise, evolve in response to new economic, social, legal and technological changes.

10. Throughout history, societies have had arrangements for sharing or allocating resources between persons, the State and other actors, and thus, have had arrangements for delineating legal rights in relation to those resources. As Sir William Blackstone noted in the opening pages of Book 2 of his *Commentaries* on "Of the Rights of Things":⁸

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original [sic] and foundation of this right."

11. Failure to "give themselves the trouble to consider the origin and foundation" of rights of property is a folly. To quote Margaret Stone: "It is only with a full knowledge of the historical facts and their consequences that the aims, hopes and possible principles underlying title ... may be appreciated."⁹ A consideration of history is where we should start. What follows are just some of the threads of the tapestry of that history to illustrate the beauty Margaret saw in property law. What might be described as the dynamism of property law and its inescapable

⁸ Sir William Blackstone, *Commentaries on the Laws of England*, 5th ed (1773), bk 2 at 2.

⁹ Stein and Stone, *Torrens Title* (1991) at 1.

development, which was not unbounded by the past, and not untethered from principles or values.

12. At the end of the 19th century it was said of English land law that it was of "mixed origin".¹⁰ That was an understatement. The elements in that mixture included:¹¹

"The customs of the early Teutonic invaders, the effect of conquest and settlement of the land on a large scale, the gradual and what may be called the natural growth of feudal ideas, the effect of the Norman Conquest in developing these ideas into a system of law and in importing doctrines unknown before, the subsequent influence of the Roman and Canon law ..."

13. These are all elements of which account must be taken in tracing the development of the law of property. And all of them are elements that not only historically informed an understanding of whether and how real property law could or should be applied in new and emerging areas of human endeavour, but that continue today to inform an understanding of developments in property law and the principles and values that the law codifies and protects more generally.

14. Four fundamental changes in the development of real property law in England – first, the feudal system of 1066; second, the *Statute of Quia Emptores* of 1290; third, the *Statute of Uses* of 1596; and fourth, the development of registration of title – will be considered. I will then briefly address two fundamental changes in Australia, before turning to

¹⁰ Digby, *An Introduction to the History of the Law of Real Property*, 5th ed (1897) at 1.

¹¹ Digby, *An Introduction to the History of the Law of Real Property*, 5th ed (1897) at 1.

consider how that history informed Margaret's conception of property law and her approach to legal analysis, and what we can all learn from this.

A potted history

The Feudal System

15. Turning first to the feudal system. For any common law jurisdiction where principles of property law have come from, or have been significantly influenced by, English common law, a tale of real property law cannot be told without an appreciation of the doctrine of tenure developed by the feudal system. As John Rood explained in 1910:¹²

"While unmistakable evidences of feudal tenures exist in the Saxon records, it remained for the military genius of the Norman conquerors under William and his successors to establish as the national policy of England that system of society and government invented by the northern Teutonic tribes, and used with such decisive effect by them in their invasion of the provinces of the disintegrating Roman empire, and in establishing themselves in their newly acquired territory."

16. Introduced in 1066 by William the Conqueror following the Norman Conquest, the feudal system rested upon the premise that all land was held "*mediately*", or immediately, from the king and that service was due directly to him. This system was implemented in two ways: *first*, by the confiscation of lands, and then the re-granting of them, by the Crown; and *second*, by the voluntary surrender of lands by owners, and the

¹² Rood, *History of Real Property Law* (1910) at 5.

receiving of them back from the Crown as feudal tenants, subject to the obligations which the feudal system imposed.¹³

17. In reward for loyalty, the king granted "feuds" (allotments of land) to his followers who, in turn, made grants to their tenants.¹⁴ The relationship of feudal lord and tenant thus entered into was one of mutual obligation. A measure of security of title was assured to the tenant by having his title warranted by the lord. The lord was bound to provide lands of equal value if the tenant was ejected by reason of another person or tenant showing superior title. Under this system, land was the subject of *tenure*, not ownership.¹⁵ Thus arose the maxim: *nulle terre sans seigneur*, or "no land without a lord".

18. As no land was "owned" by a subject under this system, it became more accurate to refer to a person holding an "estate" in land, or as being a tenant of land, rather than as being an owner of land.¹⁶ The estates were of various duration and divided into two classes: estates of freehold and estates not of freehold (generally "leasehold"). Freehold estates include(d) life estates, the fee tail and the fee simple. While the fee simple may have been close to absolute ownership, the king remained lord paramount of all land within the realm.

19. At that time, tenants could really only alienate estates in fee simple by obtaining the consent of the lord or by a process of substitution or

13 Kales, *Law of Real Property (Future Interests)* (1927) at 3.

14 Kales, *Law of Real Property (Future Interests)* (1927) at 3.

15 Kales, *Law of Real Property (Future Interests)* (1927) at 3.

16 DiCastri, *Thom's Canadian Torrens System* (1961) at 2.

subinfeudation. In the former, the tenant would alienate their land, and the attendant duties owed to the lord, with the lord's consent. In the latter, the tenant in effect sub-let part of the land to another tenant, thereby creating a new tenure, called subinfeudation. By this arrangement, the old tenant became the feudal lord or "mesne lord" of the sub-tenant and was owed feudal duties by them.¹⁷ But both systems presented difficulties for the superior lords in allocating resources. As Sir Frederick Pollock explained:¹⁸

"These under-tenures were constantly multiplying, and not only titles became complicated, but the interests of the superior lords were gravely affected.

The lord's right to the services of his tenant were in themselves unchanged by any subinfeudation; but his chance of getting them practically depended on the punctuality of the under-tenants, against whom he had no personal rights, in rendering their contributions to the immediate tenant.

The profits coming to him by escheat, marriage of wards, and wardship were also diminished.

Many years before the statute in question the great lords had thought themselves ill used in this matter. It was provided by Magna Charta that no free tenant should alienate more of his holding than would leave him enough to perform the services.

But this was found inadequate by the superior lords, and in 1290 the law was fundamentally changed."

20. The *Statute of Quia Emptores* of 1290 to which Pollock refers sought to remedy these issues.

¹⁷ Kales, *Law of Real Property (Future Interests)* (1927) at 3.

¹⁸ Pollock, *The Land Laws* (1887) at 67-69.

Statute of Quia Emptores (1290)

21. The *Statute of Quia Emptores* of 1290 – also called the Third Statute of Westminster – forbade subinfeudation. It prevented tenants from disposing of land to sub-tenants, who felt dependent on and accountable only to the mesne lord from whom they immediately held the land.

22. Pollock said the *Statute of Quia Emptores* was accepted with satisfaction by all.¹⁹ Why? He explained:²⁰

"It dealt a heavy blow to the consistency and elegance of the feudal theory, but made the conditions of land tenure far more simple.

It was the first approximation of feudal tenancy to the modern conception of full ownership.

...

It was enacted that every free man might thenceforth dispose at will of his tenement, or any part thereof, but so that the taker should hold it from the same chief lord, and by the same services ...

Since that day – the feast of St. Andrew in 1290 – it has been impossible to create a new feudal tenure of a fee simple estate; and any chief or quit rent now payable to a superior lord out of land held in fee simple must have been created before that time.

The statute enabled the fee simple tenant to deal with his land as property, without consulting his lord; and in this respect it was a great economical advance."

23. The advances were significant – legally, socially, economically. But there were long term consequences; the profits of feudalism increasingly

¹⁹ Pollock, *The Land Laws* (1887) at 67-69.

²⁰ Pollock, *The Land Laws* (1887) at 67-69.

became the profits of the Crown.²¹ By Tudor times, the incidence of mesne lords had declined, but the skills of avoiding feudal incidents – which included military service, homage, fealty and suit of court; wardship and marriage; relief and primer seisin; aids and escheat; and forfeiture²² – had increased. Thus, the need for the *Statute of Uses* of 1536.

Statute of Uses (1536)

24. The *Statute of Uses* (1536) was described by Sir William Holdsworth as "perhaps the most important addition that the legislature has ever made to our private law".²³ Others took a far less favourable view.²⁴ Sir Frederick Maitland said: "It is not a mere Statute of Uselessness but a Statute of Abuses." The import of this legislative reform, however, cannot be doubted.
25. Before the *Statute of Uses*, a landowner would convey land to a *feoffee to uses* (trustee) for the use of a *cestui que use* (beneficiary),

21 Simpson, *A History of the Land Law* 2nd ed (1986) at 22.

22 See Hepburn, "Feudal Tenure and Native Title: Revising an Enduring Fiction" (2005) 27(1) *Sydney Law Review* 49.

23 Holdsworth, *A History of English Law* (1924) vol 4 at 409.

24 For example, Maitland stated: "[T]he Statute of Uses, the statute through which not mere coaches and four, but whole judicial processions with javelin-men and trumpeters have passed and re-passed in triumph. It has been said of this ambitious statute that its sole effect has been to "add three words to a conveyance." This may pass as a contemptuous epigram, but it is far from the whole truth. It has caused innumerable unnecessary law-suits. This is not an epigram but a fact. It is not a mere Statute of Uselessness but a Statute of Abuses," quoted in Fisher (ed), *The Collected Papers of Frederic William Maitland* (1911) vol 1 at 191.

who might be the landowner himself or a third party. As one legal academic explained:²⁵

"The principal reason for the development of uses lay in the fact that feudal burdens and disabilities related only to the holders of legal title, while, conversely, the rights under a use could not be forfeited nor could uses be charged with other feudal incidents."

The *use* was enforced by the Chancellor in equity but not by the courts of common law. Thus, during the period when the feudal system was at its height, landlords could avoid many feudal incidents that were owed at common law by "enfeoffing" (or vesting) another with legal title, while reserving the use to themselves. In short, it became a measure of tax avoidance.²⁶

26. By the reign of King Henry VIII, the Crown was encountering financial difficulties. As Holdsworth wrote: "Some years before the passing of the Statute of Uses fiscal necessities had led Henry VIII to reflect upon the depletion of his feudal revenues."²⁷

27. What the *Statute of Uses*²⁸ of 1536 did was to vest the legal estate of the trust property in the beneficiary, thereby rendering the

25 Smith, "The Statute of Uses: A Look at Its Historical Evolution and Demise" (1966) 18 *Western Reserve Law Review* 40 at 44.

26 Smith, "The Statute of Uses: A Look at Its Historical Evolution and Demise" (1966) 18 *Western Reserve Law Review* 40 at 44-45.

27 Holdsworth, *A History of English Law* (1924) vol 4 at 450.

28 27 Hen 8, c 6 (1535).

beneficiary liable to the payment of feudal incidents.²⁹ The Statute saw the reimposition of feudal incidents, but it also became the means by which legal title could be transferred by document alone, thus providing for secrecy of title.³⁰

28. But that secrecy of title itself became a problem. And it was a problem that was sought to be avoided by the enactment of the *Statute of Enrolments* later that same year (1536).

29. As Sir Francis Bacon explained in his *Reading on the Statute of Uses*, the *Statute of Enrolments* was really a proviso to the *Statute of Uses*.³¹ The *Statute of Enrolments* was intended to alleviate the secrecy permitted by the *Statute of Uses*, by providing a register of conveyances. The *Statute of Enrolments* required bargains and sales to be by way of indenture, to be enrolled within six months either in the courts at Westminster or in the county in which the land was located.³²

30. That system relied upon property having been granted by the Crown and transferred by a particular document, referred to as a deed on conveyance, on each transfer of title. The documents, the "title deeds", together comprised the chain of title. Only where the transferor had the

29 Simpson, *A History of the Land Law* 2nd ed (1986) at 22; see also Smith, "The Statute of Uses: A Look at Its Historical Evolution and Demise" (1966) 18 *Western Reserve Law Review* 40 at 51-53, 59.

30 Stein and Stone, *Torrens Title* (1991) at 3.

31 Holdsworth, "Political Causes which Shaped the Statute of Uses" (1912-1913) 26(2) *Harvard Law Review* 108 at 115 fn 41, quoting Bacon, *Reading on the Statutes of Uses* (1859).

32 Holdsworth, *A History of English Law* (1924) vol 4 at 462.

right and capacity to transfer the relevant interest would the transferee acquire a legal interest.

31. The effectiveness of such a system was thus dependent upon the execution and preservation of original valid instruments and, consequently, the system inevitably had several defects:³³

- the difficulty in understanding the series of documents making up the chain of title;
- issues of insecurity of title as a consequence of potential fraud and forgery;
- the requirement for retrospective investigation to assure oneself of security of title;
- the increase in complexity as the chain of title expands;
- the need to manage the system;
- maintenance of the volume of records from a practicality perspective; and
- the possibility of error.

Expansion of system of registration of title

32. Following the *Statutes of Enrolments*, no further system of registration developed in Tudor England. It was not until two centuries later, in the 18th century, that the position changed, with the adoption of a new system of registration of deeds, first in Yorkshire in 1703,³⁴ and then in Middlesex in 1708.³⁵

33 These are examples of defects identified in Stein and Stone, *Torrens Title* (1991) at 6-7.

34 2 & 3 Anne, c 4.

35 7 Anne, c 20.

33. The expansion of a system of title by registration was the subject of parliamentary debate throughout the mid-to-late 1700s and the early 1800s,³⁶ but it was not until February 1828 when a Royal Commission was appointed to examine the law of real property of England and Wales that things began to move. Jeremy Bentham became one of the main champions of land law reform during the latter stages of his life, writing on the topic between 1826 to the time of his passing in 1832.³⁷

34. The Royal Commission into Real Property issued four reports. Of these, the second report dated 8 June 1830 concerned the subject of a general registry of deeds and instruments relating to land.³⁸

35. It has been observed:³⁹

"The genesis of land registration in England has been traced to the second report of the Real Property Commissioners issued at the end of the year 1830. ... The question of registration of title, as distinguished from registration of assurances, was not directly dealt with in the report. It was, however, suggested to the Commissioners that it would be both expedient and practicable to establish a registry on the same principle as registers of stocks, where title depends on entry in books, not on any instrument itself".

36 Stein and Stone, *Torrens Title* (1991) at 12.

37 See generally Sokol, "Jeremy Bentham and the Real Property Commission of 1828" (PhD Thesis, University College, University of London, 2016).

38 See, "List of commissions and officials: 1815-1829 (nos. 1-11)", *British History Online* <<https://www.british-history.ac.uk/office-holders/vol9/pp9-16#fnn53>>. The first report was received in Chancery on 11 May 1829, the second report on 8 June 1830, and the third report on 4 May 1832. Although the Commission officially closed on 10 March 1832, the fourth report was not received in Chancery until 18 April 1833.

39 Walker, "The Genesis of Land Registration in England" (1939) 55(4) *Law Quarterly Review* 547 at 547.

36. Though the Bill introduced consequent on the recommendations in the Report met opposition, the Report laid the foundation for a system of registration. And as the extract recorded, it took its structure – its foundations – from another area of property law: stocks and the registers of stocks.

Australia

37. The position here in Australia is distinct, but, as will be seen, shares the same reliance on history, principles and values. Two developments, in particular, shaped and reflected the evolving legal, social and cultural landscape.

38. First, the introduction of the system of Torrens Title in Australia in the 1850s. From the time of European settlement, with a dearth of lawyers, property law in the early days of the colony of South Australia was riddled with confusion. In 1857, a Bill was introduced into the South Australian Parliament. The bill became the *Real Property Act 1858* (SA).⁴⁰ The long title said it was "An Act to simplify the Laws relating to the transfer and encumbrance of freehold and other interests in Land" and the Preamble observed:

"WHEREAS the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants, it is therefore expedient to amend the said laws..."

40 21 Vict, c 15.

39. The Act introduced to South Australia the system of Torrens Title – the system of title by registration which now enables real property to be transferred by registration of a transfer of title. But, as James Hogg acknowledged in his 1905 work entitled "Australian Torrens System", "the germ of the Torrens System may be said to have been planted in English jurisprudence by the publication of the second report of the Real Property Commissioners in 1830 ...".⁴¹ As you all know, the Torrens System is now used in all States.

40. Any discussion of Australian property law would be incomplete, however, without reference to a second significant development 150 years later – the 1992 decision of the High Court in *Mabo v Queensland [No 2]*.⁴² As Brennan J said:⁴³

"The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous habitants of the Australian colonies as people too low in the social organization to be acknowledged as possessing interests and rights in land. Moreover, to reject the theory that the Crown acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history. The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power."

41 Walker, "The Genesis of Land Registration in England" (1939) 55(4) *Law Quarterly Review* 547 at 547.

42 (1992) 175 CLR 1.

43 *Mabo [No 2]* (1992) 175 CLR 1 at 58.

41. The Australian continent was "an inhabited territory which became ... settled colon[ies]"; it was not a legal desert.⁴⁴ Native title, though recognised by the common law, was not an institution of the common law and was not alienable by the common law.⁴⁵ But the common law could, by reference to the traditional laws and customs of an indigenous people, identify and protect their native rights and interests.⁴⁶ Whether or how common law property notions intersect with native title is now working its way through the Australian legal system. I say no more about it.

Conceptualising property

42. If one reflects on that potted history of some 900 years or so, what immediately becomes self-evident is not only the evolving nature of property law but how and why the law developed as it did. No development was untethered from the past. No development was shorn of a need to consider and address broader societal issues or values. Each development is both a history lesson, and a lesson in one or more of human endeavour, human advancement and thinking. Each of the developments that were effected were necessary to reflect changes in society, its activities and its organisation.

43. What then of the position now?

44 *Mabo [No 2]* (1992) 175 CLR 1 at 58.

45 *Mabo [No 2]* (1992) 175 CLR 1 at 59.

46 *Mabo [No 2]* (1992) 175 CLR 1 at 59, 70.

44. While often considered a stable body of law, with deep roots and developing slowly, as Professor Ernst Nordtveit has recently said:⁴⁷

"If this was ever true, it is not so any more. Basic tenets exist, of course, and the development of new forms of property rights is often based on older forms. However, contemporary property law is a dynamic system that changes alongside technological, economic, financial, social and ecological changes to meet new needs, achieve more effective use of resources and conform with the dominant values in society ... As with any other complex and dynamic system, ownership and property rights are more than the sum of the single functions they contain at any given time, due to the feedback effect from innovation. These attributes of property rights are the primary basis for economic growth and innovation in society."

45. Indeed, every development in property law has brought with it challenges to our thinking and conceptualisation of the area. Almost always, however, our identification of the challenges and our thinking about how the challenges are to be met depend upon us recognising what has gone before. Even then, while property, and property rights, can seem to be a nigh on universal phenomenon – deeply embedded in human history – ownership and property rights remain among the legal realities that are hardest to define. Few other legal concepts, if any, have caused such strong debate.

46. Today, the word itself – "property" – remains ambiguous. In ordinary parlance, the word is often used to refer to the item which is the subject of ownership. Thus, you frequently hear people speak of "a person's property" in the sense of the things that are owned by them or, alternatively expressed, that are the "objects of [their] right of

⁴⁷ Nordtveit, "The changing role of property rights: an introduction" in Nordtveit (ed), *The Changing Role of Property Law: Rights, Values and Concepts* (2023) 1 at 4.

ownership".⁴⁸ "Property" in this sense, therefore, refers to the object of legal rights.

47. However, in legal discourse, the term "property" is used more often than not to denote a specific type of legal right referred to as a property right. It is therefore important to differentiate between these two ways in which the word is used: (1) a legal *right* of a particular kind, and (2) the tangible or intangible *thing*, which is the object of that right.⁴⁹ It is with the former that we are presently concerned.

48. Put broadly, and loosely, a property right gives the holder power over or in respect of the subject matter of the right. Often that power will amount to rights of exclusion, possession or occupation. But this description is altogether too short and compressed and belies much of the complexity that attends property law. The subject of property rights can be tangible or intangible (corporeal or incorporeal). Ordinarily, the object of the rights will have a separate existence independent of any person, making it possible to transfer the right over the subject-matter from one person to another.

49. The developments in the feudal system experienced as the dealing with tenures grew in complexity provide early evidence of how new forms of economic "goods" (tangible and intangible) develop as a result

48 Nelson, *The Law of Property: Including Its Nature, Origin and History* (1895) at 1.

49 *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17].

of financial and legal, and more recently technological, developments.⁵⁰ Consequently, new objects of property rights emerge and, as new objects of property rights emerge, so too, new rights with respect to those objects emerge. Inevitably, our thinking about property law is challenged.

50. As the law with respect to property has altered, so too have attempts to conceptualise it. While relative consensus on a conception of property expressed in terms of rights has emerged, this has not quelled the questions. What rights are properly called property rights? What kinds of subject-matter can be the object of property rights? These questions have evoked many an answer.

51. Justice Edelman has recently said that:⁵¹

"One difficulty with the entire enterprise of defining 'property' may be the natural desire of the systemiser to unify different categories that have both similar and different characteristics. The more grand the theory, and the more it attempts to encompass, the more likely it may be that the theory will be expressed at such a level of abstraction that it is, at best, generally inutile and, at worst, productive of confusion and error."

52. This is a view with which Margaret would likely have agreed. It is a view which is wholly consistent with what she wrote (more than 10 years before her appointment to the Federal Court of Australia) about the

50 Nordtveit, "The changing role of property rights: an introduction" in Nordtveit (ed), *The Changing Role of Property Law: Rights, Values and Concepts* (2023) 1 at 5.

51 Edelman, "Foreword: Conceptions of Ownership" (2019) 42(3) *University of New South Wales Law Journal* 785 at 786.

High Court's decision in *Muschinski v Dodds*.⁵² In that case, de facto partners purchased a property as tenants in common in equal shares to renovate, with the purchase funded by the female partner. The majority of the Court found that the parties held their respective legal interests in the land on trust, after payment of joint debts incurred in improvement of the land, to repay to each the contribution she or he had made and as to the residue for them both in equal shares.⁵³ As Margaret explained, the reasons of the majority for the conclusion that the parties held their respective interests on trust were not uniform. Of particular significance for Margaret was what she described as Deane J's "instrumental approach" to constructive trusts.

53. In the article, Margaret wrote about the "reification" of legal concepts, which she explained as connoting "an essentialist mode of enquiry which assumes that judges must recognise interests in terms of their essential features".⁵⁴ To this, Margaret wrote that:⁵⁵

"Law is a metaphysical not a physical phenomenon and legal concepts are tools which ought to work for us rather than impose burdens. When courts reify these concepts they become enmeshed in nets of their own making and must perform Houdini-like feats to escape."

52 (1986) 160 CLR 583; Stone, "The Reification of Legal Concepts: *Muschinski v Dodds*" (1986) 9 *UNSW Law Journal* 63.

53 *Muschinski v Dodds* (1985) 160 CLR 583 at 598-599, 620-623.

54 Stone, "The Reification of Legal Concepts: *Muschinski v Dodds*" (1986) 9 *UNSW Law Journal* 63 at 66.

55 Stone, "The Reification of Legal Concepts: *Muschinski v Dodds*" (1986) 9 *UNSW Law Journal* 63 at 67.

54. The answer, Margaret urged, "will be found not in the nomenclature adopted but in an analysis of the respective merits of the parties to the litigation and any third parties ... in contemplation". She made a number of important and interconnected observations, posed essential questions and offered her view of judicial method.⁵⁶

Margaret observed that:

"The statement that judges are free from logical compulsion to apply particular rules in particular ways does not imply that they are free from all restraint."

She posed the question:

"The matter really comes down to the perennial problem of how, in the absence of a binding precedent, a judge arrives at and justifies [their] decision.

What role do the precedents play if they do not determine the decision in the instant case."

She pointed out:

"Julius Stone gave a convincing account of how and why precedents do not bind, do not logically compel a particular conclusion. He was neither so explicit nor so detailed however about the extent of their influence in the absence of this logical compulsion."

And then she gave her answer:

"It is clear however that though precedents may not compel, they still have a considerable role to play. A judge does not make [their] decision in a vacuum and previous approaches to similar problems will combine with other factors, too

⁵⁶ Stone, "The Reification of Legal Concepts: *Muschinski v Dodds*" (1986) 9 *UNSW Law Journal* 63 at 69.

numerous to mention here, to restrict the 'leeways of choice'."

Margaret then observed how:

"Commentators have emphasised different aspects of the restraint which they see affecting judges and have given varying weight to their influence on the development of the common law.

Stone and Llewellyn have referred to 'steadying factors', Dworkin to 'principles', MacCormick to 'coherence', Coper to 'fidelity' and Krygier to 'tradition'."

And she added that:

"Irrespective of emphasis, identification of these factors makes explicit a recognition that even judges consciously making law are not totally free from restraint.

The alternative to logical certainty is not necessarily total chaos."

And put forward her view of judicial method:

"An instrumentalist approach recognises that even where precedents do not bind they clearly influence and it allows a judge to take enlightened advantage of the wisdom of previous decisions."

55. Underpinning and informing what she said in rejecting reification and urging, instead, for an "instrumentalist approach", was Margaret's adherence to the need to root development of the law in principles and values discerned from what has gone before. As she pointed out, many scholars have grappled with how, absent binding precedent, a judge arrives at and justifies the decision reached in a novel case. All recognise that precedent has a role to play. All say that there are limits on the "leeways of choice", though they differ in how they think those limits are best described. Her rejection of reification (the search for "essential

features" as if describing a class of tangible objects), coupled with her references to an "instrumentalist approach" and law being a "metaphysical" not physical concept, point firmly towards her looking back at the relevant history to discern what principles have been applied earlier and what values were given effect to in what was done earlier. What then is to be done in the novel case is to be determined in light of those principles and values – either by demonstrating consistency with those principles and values or by explaining why departure from or modification of those principles is warranted.

56. None of that can be done without knowing how and why those principles and values developed and were applied in the past. That history sets the field of play. In the law of real property, it demands understanding what lies behind the law as it now stands – a history of intertwined threads spanning centuries. And in that field, as in all other fields of the law, identifying how and why particular principles and values have developed will, in turn, demand a broad and deep consideration of whether and how those particular principles and values which seem to emerge from previous cases in the particular area under consideration intersect with or are affected by the principles and values which inform other aspects of the law. The law strives for coherence.
57. It is the principles and values which underpin particular areas of the law, understood in light of other applicable principles and values, which are the steady factors confining the judge's response to the new case not governed by precedent.
58. For my own part I would add one additional, if obvious, point. The search for principle and for the values to which effect has been given

cannot stop at the point of observing only that what was said in one or more earlier cases could be applied to the case at hand without substantial verbal modification. To stop at that point is to reify the reasons for judgment in the earlier case. It is to treat what was said in a different kind of case as if it were a complete statement of the applicable principle in all kinds of cases, including the new and different case under consideration. It either assumes or asserts that the case at hand has the same "essential" characteristics as the case from which the quotation is taken.

59. These ideas inform so much of what Margaret Stone wrote. They lie at the heart of her writing about real property because she was at pains to point to the history which lies behind what we now understand to be the law of real property. These ideas lie at the heart of what she wrote about *Muschinski v Dodds*, then a novel case about property rights. It is why the CLR headnote writer records the decision as holding that "[t]here is no place in Australian law for the notion of a constructive trust which is imposed by law whenever justice and good conscience require it. Proprietary rights fall to be determined by principles of law and not by some mixture of judicial discretion, subjective views about which party ought to win or the formless void of individual moral opinion."⁵⁷ Margaret's rejection of reification was wholly consistent with this conclusion.

60. By rejecting the notion that a principle of law can be identified and described as if it were a tangible object, she pointed to the cardinal importance of recognising that "[l]aw is a metaphysical not a physical

⁵⁷ *Muschinski v Dodds* (1985) 160 CLR 583 at 584.

phenomenon and legal concepts are tools which ought to work for us rather than impose burdens."⁵⁸ Because law is a metaphysical phenomenon, what I earlier referred to as "labels and boxes" cannot be treated as the end of legal analysis or as the premise for arguing about further development of legal principle. Attaching a label or putting a group of results into a single box may or may not be a useful way of describing what has been done, but the description is truncated and cannot be treated as if it were exhaustive. And the description of what has gone before will not, without more, tell the inquirer whether new facts and circumstances should or should not yield a generally similar legal result.

61. Rather, as Margaret said, "legal concepts are tools". They ought to work for us rather than impose burdens; they are tools to be developed and applied in ways which accord with values. By values, I do not mean the idiosyncratic values of the judge or the "formless void of individual moral opinion," but the values that are identified as underpinning what has gone before. Legal concepts are tools to be applied and developed in ways that give effect to principle in the sense that they take proper account of established principles and yield results that can be seen to be based in principles that are wider and deeper than simply that A should win or B should lose. Legal concepts are not properly used as tools which work for us if the concept is treated as sufficiently described by a label. They are not properly used if the concept is treated as applying to novel facts and circumstances only because what was said in earlier

⁵⁸ Stone, "The Reification of Legal Concepts: *Muschinski v Dodds*" (1986) 9 *UNSW Law Journal* 63 at 67.

decisions dealing with other facts and circumstances is not inconsistent with the novel case at hand.

62. In a common law system, proper judicial method must reflect these considerations. Many cases in courts of first instance and intermediate courts of appeal are and must be decided by applying known and established rules to the particular facts of the case. But both at first instance and in intermediate courts, novel cases will arise. And in Courts of Final Appeal, many cases raise truly novel issues. Those novel issues cannot be resolved by reasoning only from a label or reasoning backwards from a desired result. The common law demands that they be resolved by identifying and justifying the principles that are applied.

63. These are anything but new ideas but they are of the greatest importance. They were captured by Sir Gerard Brennan in the speech he gave in 1998 on his retiring from the office of Chief Justice. He said that the High Court:⁵⁹

"cannot refrain from determining matters within its jurisdiction simply because a new rule must be devised for the purpose. To perform this function the Justices must master the existing authorities and from them elicit the underlying principle. In some cases it is necessary to perceive, if not to articulate, the community value which gives vitality to the law in question. Then, provided the value is consistent with enduring community values, the principle must be re-examined and, if need be, it must be restated in contemporary terms that can be integrated with other legal principles and a new rule, appropriate to the case in hand and expressed to apply to the instant and future similar cases, is formulated. This work, though conceptual in nature, requires more than intellectual rigour. It requires the wisdom which each Justice must bring to the task."

59 (1998) 193 CLR at ix.

64. Identifying principle and the relevant values, and adhering to intellectual rigour, coupled with wisdom (or I would say "judgment") – each has always been and remains critical to the judicial task.

Conclusion

65. When discussing her appointment to the Federal Court with the Hon Daryl Williams AM KC, then Attorney-General of the Commonwealth, Margaret Stone quipped "if something's new to me, I'll work it out".⁶⁰ And so she did. And she did so in a manner that I aspire to emulate.

66. Throughout her career, Margaret Stone championed a pragmatic and principled approach to the law and the process of judging. She was at once alive to the "leeways for choice"⁶¹ presented by virtue of the dynamism of the law and its inescapable development, but also strongly adhered to the view that there was little that did not yield to hard work, informed by principles, not nomenclature, and values, and subjected to absolute intellectual rigour and wise judgment. That was the beauty Margaret saw in property law and the law more generally.

67. I hope that this work – this lecture – has done justice to some aspects of the beauty and rich tapestry of the life of The Hon Margaret

60 Interview with Margaret Stone (Daniel Connell, IGIS Oral History Project recording, 16-17 March 2021).

61 To adopt the language of Julius Stone.

Therese Ackery Stone AO, a remarkable legal scholar, jurist, judicial philosopher and human.