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Edited by Hossein Esmaeili and Brendan Grigg  
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# THE BOUNDARIES OF AUSTRALIAN PROPERTY LAW

*The Boundaries of Australian Property Law* offers a unique perspective on real property law in Australia. As the overwhelming majority of land interests in Australia now fall under the Torrens title system, this book's particular focus on the development and operation of the Torrens system in Australia is both timely and welcome.

Written for students and scholars of property law in Australia, this informative and academically rigorous book includes carefully selected statutory material and case law from all Australian jurisdictions, as well as the United Kingdom. The general law system is also discussed and referred to where necessary, to give context and depth to the analysis of real property law.

This book addresses the prescribed Priestly 11 requirements for a subject in property law and it will also be a useful resource for practitioners, policy makers and judicial officers.

Written by prominent real property law academics from law schools around Australia, and edited by Hossein Esmaeili and Brendan Grigg, *The Boundaries of Australian Property Law* is a modern and much-needed addition to real property law literature.

**Hossein Esmaeili** is Associate Professor of Law and Associate Dean (International) of the Flinders Law School, Flinders University.

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# FOREWORD

I take great pleasure in introducing the reader to this important work. I commend the authors for taking an Australian and statute-based approach to their exposition of the law of real property. The contemporary focus of the book has allowed its contributors to succinctly explain property law concepts and rules in an easily accessible, functional style.

Sir Robert Torrens was convinced that the system of land registration which now bears his name would remedy the deficiencies of the common law method of tracing ownership back to the Crown's radical title, and those caused by property speculation in early colonial South Australia. However, even Sir Robert is unlikely to have foreseen its importance to the modern socioeconomic life of the State. Contemporary urban development and planning is much facilitated by statutory regimes creating and governing strata and community titles, easements and restrictive covenants. Torrens system mortgages provide a secure and equitable foundation for the relationship between landholder and financier which drives orderly property development. Residential tenancy law strikes a balance which provides accommodation for working people on reasonable terms. In Australia large tracts of land in regional and more remote areas are now subject to complex native title rights and interests. All of these topics are carefully examined in a most scholarly way and through a modern lens.

Importantly, the book provides insight into the jurisprudential context in which the particular incidents of real property rights, interests, privileges and obligations – examined and explained by the authors – must be understood.

I am confident that this scholarly book will serve as a solid foundation for the teaching of Australia's future lawyers. It will also repay the reading time of the many by whom it is sure to be consulted.

**The Honourable Chris Kourakis**  
**Chief Justice of the Supreme Court of South Australia**

*April 2016*

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# PREFACE

Kevin Gray has suggested that the teaching of property law has a ‘peculiarly important – perhaps even central – role’ in forming the mindset not just of the law student, but also of the lawyer, and in some degree, of the thoughtful and responsible citizen.<sup>1</sup> This is due to the ‘tremendously structural features’<sup>2</sup> that it implants in the mind of the student, including ‘rigour of thought and analysis, the capacity for abstract manipulation of complex ideas and some sense of the workability of entire bodies of statutory machinery’.<sup>3</sup> It is thus unsurprising that Gray asserts that ‘[i]t is in property law that consciously or unconsciously the student learns a basic competence in a number of skills which are of immense importance in later life’.<sup>4</sup>

A project to research and write a new book on property law that is relevant to students, scholars, legal practitioners and to Gray’s ‘thoughtful and responsible citizen’ is, therefore, a significant undertaking. This is even more so in light of the significant changes that property and real property have undergone in relatively recent times. In Australia, developments ranging from the common law recognition of native title to the digitisation of land title systems, from water resources law reform and the advent of carbon sequestration schemes, have all challenged traditional concepts of property.<sup>5</sup>

While mindful of the origins and history of real property law, this book approaches real property law by focusing on Australian aspects of real property first and drawing on old system principles where necessary. This approach necessarily places considerable emphasis on the Torrens title system. The book covers the concept, theory and practical aspects of property law in Australia in areas such as easements, restrictive covenants, leases, housing, native title and mortgages.

We are grateful for the assistance of our colleagues from the Law School at the University of Adelaide and at the University of South Australia for their assistance in developing the concepts that this book analyses. Although the genesis of this book is largely South Australian in origin, it covers the law of all Australian jurisdictions.

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- 1 Kevin Gray ‘The Teaching of Property Law’ in Peter Birks (ed) *Examining the Law Syllabus: The Core* (Oxford University Press 1992) 15.  
 2 Above n 1.  
 3 Above n 1.  
 4 Above n 1.  
 5 See, e.g., Penny Carruthers, Natalie Skead and Kate Galloway ‘Teaching property law in Australian in the Twenty-first Century: What we do now, what we should do in the future?’ (2012) 21 *Australian Property Law Journal* 57.

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Last and by no means least, we thank our families, without whose support this book would not have been possible.

**Hossein Esmacili and Brendan Grigg**  
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*March 2016*

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