Review Essay

What Indeed Has Rome To Do with Australia?

Roman Law Under the Southern Cross: Sidere Ius Civile Mutato by Arthur R Emmett AO KC (2025) Federation Press, 494 pp, ISBN 9781760025335

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Abstract

This review essay of Arthur Emmett's *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato* exhorts Australian lawyers to gain a better understanding of Roman law for one reason: a firm grasp of the classical world allows the ancient Romans to speak to us from the past, offering sage advice for dealing with modern problems to which law must respond. The historical Roman law shows us how we might think about our own law in light of the approaches that the ancient Romans took to problems which arose so long ago, but seem always to be present.

I Introduction

In his 1996 inaugural lecture as Regis Professor of Civil Law at the University of Cambridge, 'The Renewal of the Old',[1] David Johnston suggested that Roman law retains modern relevance, not only for those legal systems which trace their origins to the historical law found in Justinian's *Corpus Iuris Civilis*,[2] but also for the

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My title for this review essay is a very loose adaptation of Tertullian, *De Praescriptione Haereticorum* [On the Prescription of Heretics], ch 7: 'What indeed has Athens to do with Jerusalem?'.

1 For the revised lecture as published, see David Johnston, 'The Renewal of the Old' (1997) 56(1) *Cambridge Law Journal* 80.

2 [Body of Civil Law]. Comprised of the four major components of the law enacted by the Emperor Justinian between 529AD and 534AD: the *Codex Justinianus*, the *Digesta*, the *Institutiones*, and the *Novellae Constitutiones*. See further Wolfgang Kaiser, 'Justinian and the *Corpus Iuris Civilis*' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 119.

common law. The title of that lecture might lead one to think that Johnston meant that the contemporary relevance of Roman law comes through the adoption of Roman legal concepts to deal with modern problems; in fact, however, Johnston meant that its contemporary relevance lies

> not with the recovery of the old but with its renewal, not with an archaeological attempt to recover ancient remains but with the attempt to build on ancient foundations. [One seeks] the nourishment which we have derived, or can today derive, from the past.[3]

We can, Johnston argued, 'learn … much … from legal history and from the methods and approaches of our predecessors'.[4] Johnston summarised the three ways in which the Roman law continues to teach, even those of us who think the Roman law has nothing to do with the common law:

> First, the structure supplied by Roman law equips modern legal systems with the rigour necessary to allow them to develop coherently and consistently to face new challenges. That applies well beyond those countries which employ Civil Codes based on Roman law. … Second, to a remarkable extent legal history does repeat itself, in the sense that the same legal figures and forms appear, adapted for new and changed contexts. Legal history does therefore supply a fund of rules and principles ready for exploitation and not constrained simply because they were shaped and formulated in societies quite remote or contexts quite different. Third, in adapting those legal figures, rules and principles to new contexts, there is much to be learned from the adventurous and creative spirit in which our predecessors worked, reshaping legal rules, redeploying them, even misunderstanding them constructively, to meet new ends and new challenges.[5]

Roman law certainly provided the inspiration for innovation in the English law. In 1839, Charles Gale published a treatise on the English law of easements[6] that was heavily influenced by Roman and Continental law, both through borrowings from those systems in Bracton,[7] as well as the direct recourse[8] that Gale had to Justinian's *Digest*.[9] All of which prompted Barry Nicholas to write that 'English law here reveals an obvious debt, the law of easements being perhaps the most Roman part of English law'.[10] And it is possible that Roman law provided the inspiration for Australian legal innovation at some points in its past too — the perpetual Crown lease, for instance, seems very like the Roman concept of *emphyteusis*, which allowed for private use and occupation of state land for a perpetual rent. Whether *emphyteusis* goes beyond inspiration for the perpetual lease remains questionable, but there is no doubt that its origins in the Roman law were a response to the same considerations that faced Australia's late-Victorian legislators: the need to retain

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3 Johnston (n 1) 81.
4 Ibid.
5 Ibid 95 (citations omitted).
6 CJ Gale and TD Whatley, *A Treatise on the Law of Easements* (S Sweet and Hodges and Smith, 1st ed, 1839).
7 Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed GE Woodbine, trand revd SE Thorne (Harvard University Press, 1968–77 ed) [first published 1569]).
8 AWB Simpson, *A History of the Land Law* (Oxford University Press, 2nd ed, 1986) 261; Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 148.
9 Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press, 1998) vols 1–4.
10 Nicholas (n 8) 149.

state control of land while simultaneously allowing for its private use as part of a larger objective of economic development.[11]

But Gale's contributions to the English law of easements and the Australian perpetual Crown lease are almost two centuries old. If we are to follow Johnston's advice in Australia, and adopt his methodology for using the historical Roman law, where to start when Roman law has long since disappeared from the elective offerings let alone the core curriculum of our law schools?[12] Until now, the only place to turn has been WW Buckland's detailed and brilliant comparative analysis of the points of contact between Roman and English law;[13] but that work focused solely on the English law as representative of the common law tradition.

Now, though, the new book by Arthur Emmett AO KC, *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato*,[14] provides both the answer and the source for a uniquely Australian approach to the study of Roman law. As Emmett (Challis Lecturer in Roman Law at the University of Sydney) writes, the importance of the book's contribution lies in 'an understanding of the principles of law laid down by Justinian in the first half of the 6th century AD constitutes a solid foundation for the understanding of the legal complexities that are encountered today in the modern common law'.[15] And, as Johnston might add, that foundation allows us not only to understand those complexities, but also to answer the many new questions that emerge therefrom. The sub-title of the book means, literally, 'civil law under a changed star' (under the Southern Cross) and in this splendid book, Emmett shows how the ancient law speaks still to us today in Australia. This review essay provides a brief overview of Emmett's project, why it matters, and why Australian common lawyers should take note.

II Why Australian Lawyers Should Know Something about Roman Law

Before turning to the institutional scheme of the law and its substantive content,[16] Emmett begins with enjoyable chapters on the historical context and sources of the Roman law,[17] on its principle architect, the Emperor Justinian, and on the Roman law after Justinian (which reveals its spread, including to England).[18] The book is more than a mere compendium of the law found in Justinian's *Corpus Iuris Civilis*, it is also a deeply compelling *apologia* for the study of Roman Law. That begins in Emmett's Prologue, a marvellous statement of the value of a classical education.[19]

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11 PT Babie, 'Rome in the Antipodes: *Emphyteusis* and the Australian Perpetual Lease' in Joe Sampson and Stelios Tofaris (eds), *Essays in Law and History for David Ibbetson: Querella* (Hart Publishing, 2024) 205. Emmett also points to the connections between *emphyteusis* and the Australian perpetual lease: Arthur R Emmett, *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato* (Federation Press, 2025) 204 [726]–[727], 321 [1148].

12 On this, see Babie (n 11) 212–13.

13 WW Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline* (Cambridge University Press, 2nd ed (FH Lawson), 1952).

14 Emmett (n 11).

15 Ibid xxiv.

16 Ibid chs VI–XX.

17 Ibid chs II–III.

18 Ibid chs IV–V.

19 Ibid xxii–xxiv.

While suffering a somewhat tarnished image in our modern universities,[20] the classics, if seen as part of the wider humanities, retain value as a part of a liberal education.[21] Assuming we agree, what can the Roman law add to that value? Well, for a start, our study of Rome's place within the classical tradition may be confined to the Roman law as

> the only literature of the Romans that has any claim to originality and one that has most profoundly influenced modern thought. Roman law is pretty well the only original thing that the Romans produced. Their other literature is generally a copy of Greek literature, their architecture is, for the most part, copied from Greek architecture, some of their engineering was original and some of their military techniques were original but the great contribution that the Romans made to modern society is their law …[22]

But more substantively, Emmett writes,

> Roman law has considerable ethical value. It has been said that a lawyer had not really obtained the best professional training for practice unless that professional training has included a study of Roman law because Roman law can assist to develop a recognition of what is just and right.[23]

The Chief Justice of New South Wales, Andrew Bell, who writes an equally powerful vindication for the value of Roman law in the book's Foreword, adds, in words evoking Johnston

> In some instances, the common law's borrowing from Roman law's schema is clear; in others, the different means of addressing the same problem inevitably broadens the mind and gives important insight into the fact that equally legitimate legal solutions may be applied to solve universal problems.[24]

Time and again Emmett demonstrates throughout the book the ways in which the Roman law can be found in the Australian common law, and why that matters. Here I want to consider just one example of the use of Roman law as a means of better understanding our modern common law, and of how we may look at it through ethical lenses that seek to find what is just and right: the modern liberal conception of property adopted by the Anglo-Australian common law as its primary vehicle for allocating resources.

The liberal conception of property constitutes an abstraction that denies any importance to the thing to which property attaches, looking instead to a conceptual/theoretical bundle of rights that operate among legal persons in respect of things. This is understood as the 'sophisticated', rights-orientated conception of property, to be distinguished from the 'popular' view, which sees property primarily as things.[25] The Roman law, however, begins with things; indeed, its treatment of

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20 Consider the controversy over the Ramsay Centre for Western Civilisation: Andrew Glesson, 'What the Vulgar Feud around the Ramsay Centre Doesn't Grasp about "Western Civilisation"', *ABC Religion and Ethics* (9 July 2019) <https://www.abc.net.au/religion/ramsay-centre-western-civilisation-and-its-discontents/11293684>.

21 See Helen Small, *The Value of the Humanities* (Oxford University Press, 2013).

22 Emmett (n 11) 1–2 [3].

23 Ibid 4 [11].

24 Chief Justice Andrew S Bell, 'Foreword' in Arthur R Emmett, *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato* (Federation Press, 2025) v, v.

25 See Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990) 15–17.

property is known as the Law of Things, covered in Book 2 of Justinian's *Institutiones*.

The Romans made a number of distinctions concerning the classification of property and property rights,[26] which Emmett explains in prose[27] and diagrammatic form.[28] First, they distinguished between property that was not capable of being owned by private individuals, and that which was. Two categories fell within the former class: public property and *res nullius*. Public property was divided into three types:

1. air, flowing water, the sea and seashore, which belong to everyone;
2. rivers and harbours, which belonged to the state; and
3. places of public entertainment, such as theatres, *stadia*, and racecourses, belonged to the local citizen body or the city.

Res nullius was also divided into three classes:

1. *res sacrae*, things dedicated to the gods;
2. *res religiosa*, the place where a corpse was buried, and
3. *res sanctae*, things so important to the welfare of the community, such as defensive walls, that they could not belong to anyone.

Having sorted out whether something was capable of private ownership, one could determine whether a thing could be held under either a corporeal or an incorporeal form of property, as a moveable or an immoveable thing.[29]

As he does throughout the book, Emmett offers an example of the operation of these distinctions found in Australian law: 'the principle that there can be no private property in flowing water'.[30] In 2009, in *ICM Agriculture Pty Ltd v Commonwealth*,[31] the High Court of Australia 'confirmed that the common law position in relation to flowing water adapted Roman law doctrine that flowing water is *publici iuris* in the sense that no one has property in the water itself, but a simple usufruct while it passes along'.[32] Indeed, this principle enjoys a long lineage in the English law 'reflect[ing] Blackstone's classification of water as a "moveable, wandering thing" that was "common" property and, as a such, was beyond individual appropriation and alienation'.[33]

Why does the thing matter? Why should we care about the subject-matter of property rights? Because ignoring it can lead to iniquitous and abhorrent results:

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26 See also Paul J du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 154–6.
27 Emmett (n 11) 137–40 [487]–[499].
28 Ibid xviii (Figure 2).
29 Ibid 137–40 [487]–[499].
30 Ibid 138 [491].
31 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 ('*ICM*').
32 Emmett (n 11) 138 [491].
33 Ibid quoting *ICM* (n 31) 173 [55], citing William Blackstone, *Commentaries on the Laws of England* (1766) bk 2, ch 2, 18.

- human persons treated as property through slavery;[34]
- the environment treated as a common dumping ground for waste such as air and water pollutants and greenhouse gases;[35]
- land inhabited by Indigenous persons treated as not being inhabited or possessed by those persons or, indeed, being treated as no one at all inhabited it;[36]
- land the ownership of which is restricted through the use of racial restrictive covenants;[37]
- or land otherwise available for public accommodation restricted to members of defined racial groups through an owner's claims to be free to suit one's own preferences.[38]

Sometimes the subject-matter of personal and real property interact in surprising ways over the long-term. Early in 2023, activists in Georgia in the United States of America ('US') sought to prevent the development, for residential use, of a parcel of land that had been the location for The Weeping Time — the largest single auction of enslaved people in US history, which occurred in Savannah 150 years ago.[39] What began as the subject-matter of personal property (slaves), has become the subject-matter of real property (the place where the auction was held and its preservation as the location of The Weeping Time). In both of its manifestations, the subject-matter of property in The Weeping Time remains absolutely essential if we are not to lose sight of the ethical and moral implications of property.

The Romans' approach to the thing provides the moral and ethical dimension to the way we understand property — it is not mere abstraction, a bundle of rights alone. Rather, those rights attach to, control, and so have an effect on the thing to which they attach. And so the Romans, by showing us that there are simply some things in which property should not be possible, demonstrate how we can see what is just and right in the development of property as it responds and adapts to changing

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34 Bruce Ziff, *Principles of Property Law* (Thomson Reuters/Carswell, 7th ed, 2018) 15–16, 61.

35 Hidefumi Imura, *Environmental Systems Studies: A Macroscope for Understanding and Operating Spaceship Earth* (Springer, 2013) ch 7 ('The Environment as a Commons: How Should It Be Managed?').

36 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, which abolished the morally abhorrent doctrine of fictional *terra nullius*. In 2023, I visited the site of the Eumeralla Wars of 1830–60 in which British colonists massacred large numbers of the Gunditjmara Aboriginal people in what is now south-west Victoria, Australia. If there was no one on the land, of course, there would have been no need of a war with those non-existent people, which demonstrates the evils attendant upon ignoring the thing when using a functional approach.

37 Ziff (n 34) 450–3. See also Fred de Sam Lazaro, 'How the Twin Cities Is Trying to Close the Racial Gap in Home Ownership', *PBS NewsHour* (13 August 2021) <https://www.pbs.org/newshour/show/how-the-twin-cities-is-trying-to-close-the-racial-gap-in-home-ownership>.

38 Joseph William Singer, 'We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom' (2015) 95(3) *Boston University Law Review* 929.

39 Benedict Moran, 'Activists Fight to Memorialize Site of Largest Slave Auction in American History', *PBS NewsHour* (28 December 2022) <https://www.pbs.org/newshour/show/activists-fight-to-memorialize-site-of-largest-slave-auction-in-american-history>.

social, economic, and political circumstances.[40] And this, but one of the many ways that Emmett reveals in this remarkable book, is what Johnston referred to when he argued that we still have much to learn from the Romans and their law.

III Conclusion

For anyone with an interest in classical antiquity and its inheritance in our own world, Emmett's book is a joy to read. And if you have never before spent any time immersing yourself in the Roman law, this book is your opportunity to do so in a way that demonstrates the connections between the ancient civil law and our 21st century Australian common law. It allows us to take up the classical world with Johnston's suggestion that we allow the Romans to speak to us from the past, offering their sage advice as ways of dealing with our modern problems. But more than that, it can show us how we might think about our own law in light of the approaches that the ancient Romans took to problems which arose so long ago, but seem always to be present, as the example of property shows. It may seem a strange thing to say, but this book deserves a place on every Australian lawyer's intellectual bookshelf. It is, simply, a beautiful book. Johnston concluded his inaugural lecture by saying of Roman law what we might also say about Emmett's book: '[w]ith all this to offer, the past is assured of a bright future'.[41]

[40] See PT Babie, 'The Thing and Judicial Methodology in Resolving Novel Property Claims: It Matters When It Matters' (2023) 61(1) *Alberta Law Review* 69.

[41] Johnston (n 1) 95.