

# Australian Property Law Journal (APLJ)

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(articles and book review included in this part are linked to the LexisNexis platform)

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#### Articles

##### [Rescission for defects in title and the law of requisitions:](#)

##### [Carter v Mehmet](#)

— Rhys Carvosso

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This article examines two of the doctrinal implications for conveyancing transactions in New South Wales which arise from the Court of Appeal's decision in *Carter v Mehmet* [2021] NSWCA 286 ('*Carter*'). First, it explores the uncertain interaction between two rules presumptively available to a purchaser seeking to rescind for a defect in title to subject land: the common law right to rescind for any defect however trivial, as expressed in *Dainford v Lam*; and the rule in *Flight v Booth* which permits rescission for 'material and substantial' defects. It contends that, despite an inconsistent body of judicial authority, there is strong reason to consider that these rules no longer retain any concurrent operation. The latter has usurped the former as the sole criterion controlling a purchaser's right to rescind in the circumstances which arose in *Carter*. Secondly, it considers how the law governing the making and answering of requisitions on title applies in circumstances where an object said to constitute a defect in title is reputed but not proven to exist on subject land. It argues that contrary to the Court's approach in *Carter*, the law of requisitions should account for the uncertain factual basis of such a requisition only by attenuating the requirements for a valid response, rather than by treating the requisition as improperly made.

##### [A right to roam: How an ancient norm can help guide the legislative future of public recreational access to Australia's countryside](#)

— Rebecca Elizabeth Hartshorne

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As William Blackstone's axiom observes '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'. Indeed, one of the oldest known written words in the English language is 'acre', signifying the importance of land to the early English. The contemporary momentum of land access discourse shows no evidence of waning, as the world's population grows, and rapid urbanisation and property privatisation dominate the trajectory, the question of land access sits central to the scholarly discussion. The following pages trace the origin of land access in the form of the ancient norm of *jus spaciandi*; a right to roam, and the convergent legislative history of countries that have been influenced by this, particularly England. Relating this to the fragility of Australia's access to public Crown land, this article asks, 'how can Australia both increase recreational access to public land and protect it for future use?' This article addresses the untapped resources of Crown road reserves and travelling stock reserves as a means for increasing recreational access in the Australian countryside. This article draws upon progressive property theories in order to imagine an Australia where the population embraces the paradoxical

understanding that access to land is an inherent birthright, and that the landholder's endoxical bundle of sticks should not absolutely and unconditionally encompass the right to exclude; that a fence should perform the job of keeping livestock in, rather than keeping people out. The article concludes by proposing that the enactment of specific access legislation can address the needs of the public recreator by preserving Crown land for future generations, whilst simultaneously addressing the concerns of the private land holder.

### Possessory title: Its salience to the Torrens systems of Australian states

— *Anthony Gray and Julie Copley*

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The ancient doctrines of possessory title — protecting possessory interests in land, independent of legal title — continue within the Torrens land title registration systems of Australian states, despite evidence in the case law of legal confusions between possessory title and registered title. To analyse possessory title and its confusions, this article applies law and economics theory of possession to possessory title. According to that theory, possession operates to turn ordinary, social expectations into legal reality, and fundamental to the analysis will be Frederick Pollock's argument that possession is law's way of mediating scrambled property interests. The analysis is of the social and legal norms of possessory title (also termed 'adverse possession') in Australia: the twin legal doctrines; the consistency of the doctrines with the law and economics of possession and modern property theory; and case law evidence of scrambled real property interests when possessory title operates within a formal, legislative Torrens system. From Pollock's argument, as applied to contemporary real property interests, an ongoing salience of possessory title will emerge. The salience relates to possession's contingencies. Where Torrens law is unclear and unsettled, social norms formed from community expectations can convert into legal norms. Where Torrens law is clear and settled, social norms can promote shared understandings of the acts of possession a community associates with legal title.

### Book Review

*Compensation for Native Title*, Dr William Isdale

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— *Clyde Croft AM*