

THE EVOLUTION OF THE PROFIT À PRENDRE AND ITS IMPORTANCE IN AUSTRALIA

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I INTRODUCTION

Traditionally, a profit à prendre (hereinafter referred to as a ‘profit’) is the ‘right to take something off the land of another person’¹ and ‘to take some profit of the soil, or a portion of the soil itself ... for the use of the owner of the right’.² The kind of commodities which were conventionally the subject matter of a profit included wild animals, vegetation and any part of the soil such as stone, sand and minerals.³ Like an easement, a profit was and remains a proprietary interest in land which can be assigned, but generally unlike an easement it can exist ‘in gross’, that is unconnected to a specified dominant tenement.⁴ A profit was and remains exercisable in common with one or more persons or it may be exclusive or a right in severalty.⁵

Profits have had an important and continuous role in the history of land law, initially in the form of rights of common. They were an example of an intangible thing or incorporeal hereditament which, as ‘real’ property, passed to the owner’s heir rather than the next of kin.⁶ The concept of seisin was applied to them so that they were protected by medieval writs and real actions.⁷

Gray and Gray have pointed out that: ‘What actually happens on the ground — whether rightly or wrongly — has always constituted a powerful determinant of entitlement in English land law. The normative tug of sheer physical fact should never be underestimated’.⁸ This statement particularly applies to profits. Profits have performed the fundamental function of giving legal legitimacy to the taking of commodities from the land of another, thereby supporting both subsistence agricultural practices and then later, the capitalist exploitation of land resources.

In earlier times, profits in the form of rights of common were all pervasive legally and practically. However, over the centuries there have been changes in attitude both towards the management of land and how the produce from the

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1 RG Nicholson Combe, ‘Easements and Profits à Prendre’ in Viscount Halsham (ed), *Halsbury’s Laws of England* (Butterworth, 2nd ed, 1933) vol 11, [669].

2 Ibid 382 [669].

3 Ibid 382 [670].

4 Ibid 384 [673], 385 [676].

5 Ibid 383–4 [672].

6 A W B Simpson, *A History of the Land Law* (Oxford University Press, 2nd ed, 1986) 105.

7 G D G Hall (ed), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Thomas Nelson & Sons, 1965) 142 [12], 169 [37].

8 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) [1.1.11].

land ought to be legally characterised. The result has been that while profits have not disappeared from the English or Australian legal systems, their complex role in modern land law has been less readily apparent and accordingly they have been either neglected or cursorily treated in legal literature. This can be seen in several ways in the Australian context. First, although the basic notion of a profit is understood, its development and incorporation into statute has been delayed, haphazard and inconsistent. Second, there appears to have been no major article or monograph written about the existence and operation of profits as modern proprietary interests. Indeed, the last major and extensive treatises on profits, predominantly in the form of rights of common, were written in England in the 19th century, when legal authors took the opportunity to consider their medieval origins and strictly outline the legal conditions under which they arose.⁹ Later authors have observed the decline of Australia's biophysical environment and have considered the concept of 'commons' as a logical starting point for an ecologically sustainable common property resource system,¹⁰ a matter beyond the scope of this paper. Third, profits are discussed in major English and Australian textbooks which generally discuss their nature, creation, extinguishment and interface with title-by-registration systems.¹¹ These are important issues. However, in the Australian context, there has been a tendency to: (a) ignore how the English law of profits developed and how it was received into and evolved in Australian law; (b) underestimate the importance of the profit and how it can form the basis for land-based activities such as agriculture, forestry and quarrying; and (c) pay little attention to ongoing and unresolved tensions evident in the modern case law, such as the definitional interface of profits with sale of goods legislation. Fourth, easements have unquestionably become the predominant incorporeal hereditament in Australia and England. However, profits are often treated as peculiar 'add-ons' to a more elaborate discussion of easements which may have had the unwitting effect of diminishing profits' earlier and innovative contribution to land law.

The function of this article is not to outline in detail the traditional methods for the creation, management or extinguishment of profits. This has already been undertaken comprehensively.¹² Rather, its function is to review and re-evaluate the

9 See, eg, George Wingrove Cooke, *The Acts for Facilitating the Inclosure of Commons in England and Wales with a Treatise on the Law of Rights of Commons, in Reference to these Acts; and on the Jurisdiction of the Inclosure Commissioners in Exchanges and Partition; under the Public and Private Moneys Drainage Acts; and under the Companies' Acts Relating thereto: With Forms as Settled by the Commissioners* (Stevens, Sons and Haynes, 4th ed, 1864); John Edward Hall, *A Treatise on the Law Relating to Profits à Prendre and Rights of Common* (Hodges, Foster, 1871); Thomas Edward Scrutton, *Commons and Common Fields* (Cambridge University Press, 1887).

10 Sima Williamson, David Brunckhorst and Gerard Kelly, *Reinventing the Common: Cross-Boundary Farming for a Sustainable Future* (Federation Press, 2003) 16, ch 3.

11 See Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 8th ed, 2012) chs 27–30; Gray and Gray, above n 8, pt 5; Anthony P Moore, Scott Grattan and Lynden Griggs, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thomson Reuters, 6th ed, 2016) 883–6 [17.450]–[17.475]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 590–6 [9.860]–[9.950].

12 *Halsbury's Laws of England*, above n 1, 381–94 [669]–[698]. For a later discussion, see *Bettison v Langton* [2000] Ch 54.

evolution and role of profits in Australia. This article will be divided into four parts. First, the article will discuss briefly the historical origins of the profit because as Milson pointed out ‘our modern rules about profits à prendre have very ancient roots’.¹³ Moreover, some significant issues in relation to modern profits have historical antecedents. Second, the article will consider briefly the reception of English law into Australian law in the 18th and 19th centuries, outlining the predominance of colonial rights of common over the modern profit. Third, the article will outline the evolution of the modern profit in the 20th century and consider several contentious and ongoing legal issues. Finally, the article briefly reflects upon what future directions may need to be taken in the profit’s further development.

II THE RISE OF THE PROFIT À PRENDRE IN ENGLAND

A Rights in Common

As far as it can be determined, the profit appears to be essentially English in origin. In Roman law there existed certain rural and personal servitudes which mediated the needs of rural life and may have had some similarity to profits, but they were ultimately structured and governed by precepts dissimilar to rights of common or the modern profit.¹⁴

The likely origins of the profit existed in England prior to the Norman Conquest where there were customary land practices¹⁵ rather than hard-edged ‘rights’ in land.¹⁶ For the purpose of this article, the Norman Conquest initiated four developments which were entrenched by the end of the 13th century. First, the feudal system under which land was a source of power¹⁷ and obligation had been implemented. Second, the manorial system secured the local lord as the ruler in the district and the village as the centre of agricultural production.¹⁸ Third, there was also an appropriation of the common land, customary land and wastes to the lord of the manor¹⁹ but villagers and villeins were given access to such land for their needs.²⁰ These rights became known as ‘commons’ or ‘rights of common’ which became symbolic of medieval Christian communalism²¹ and the practical

13 S F C Milson, *Historical Foundations of the Common Law* (Butterworths, 2nd ed, 1981) 101.

14 Rudolph Sohm, *The Institutes: A Text-Book of the History and System of Roman Private Law* (Clarendon Press, 2nd ed, 1901) 358–66. However, R W Lee notes there may be some similarities with profits in terms of subject matter such as rights of pasture and the digging of sand: R W Lee, *The Elements of Roman Law* (Sweet & Maxwell, 4th ed, 1956) 161.

15 W G Hoskins and L Dudley Stamp, *The Common Lands of England & Wales* (Collins, 1963) 27–8.

16 Hoskins and Stamp, above n 15, 27–8; Scrutton, above n 9, 38.

17 G R Rubin and David Sugarman (eds), *Law, Economy and Society, 1750–1914: Essays in the History of English Law* (Professional Books, 1984) 23–4.

18 Scrutton, above n 9, 1–2; Mark Overton, *Agricultural Revolution in England: The Transformation of the Agrarian Economy, 1500–1850* (Cambridge University Press, 1996) 22–30.

19 Hoskins and Stamp, above n 15, 35; Scrutton, above n 9, 39.

20 Scrutton, above n 9, 2–6.

21 George Yerby, *The English Revolution and the Roots of Environmental Change: The Changing Concept of the Land in Early Modern England* (Routledge, 2016) ch 1.

foundation of feudalism.²² Fourth, rights of common began to be recognised and settled in law. It is neither possible nor necessary to outline the law of commons in detail,²³ suffice to say that there were a number of forms including rights of pasture (grazing of beasts),²⁴ rights of turbury (digging peat and turf),²⁵ rights of piscary (taking of fish from non-tidal waters)²⁶ and estovers (taking wood for fuel and repairs).²⁷ It is likely that the law of commons would have idiosyncratically differed throughout England, depending on the land's terrain and how disputes were dealt with by the relevant manorial court.²⁸ However, as the royal court began to hear disputes about rights of common because litigants were dissatisfied with their treatment in the manorial courts,²⁹ what had been a mere customary practice entered into the lexicon of the common law³⁰ and was governed by external rules.³¹ Medieval authors such as Britton,³² Glanvill³³ and Bracton³⁴ discussed the law of commons. Bracton, in particular, extensively explored it, highlighting that the various forms of rights of common 'had evolved'³⁵ in number and that those entitled to them were allowed 'free access and departure' to the land.³⁶ Significantly, Bracton did not suggest constraints which have become important in the modern era, most notably the limitation of profits to *fructus naturales*.³⁷ Nevertheless, it cannot be known with any certainty to what extent the literary version of rights of common matched the reality because of different customary practices and manorial traditions and the likely fact that poorer members of society would not have had recourse to the royal courts.³⁸

Whatever their nature, commons were granted³⁹ rather than contracted for (although in a general sense, there must have been consensus between the parties or at least an acceptance of the 'tug of sheer physical fact').⁴⁰ As Pollock and Maitland commented:

22 Simpson, above n 6, 4.

23 See, eg, Sir William Blackstone, *Commentaries on the Laws of England* (J B Lippincott, 1891) vol 1, book II, ch 3, 31–5; John Edward Hall, above n 9, 1–2.

24 John Edward Hall, above n 9, ch 13.

25 Ibid ch 19.

26 Ibid ch 18.

27 Ibid ch 20.

28 Scrutton, above n 9, 22.

29 Alan Harding, *A Social History of English Law* (Peter Smith, 1973) 36–7.

30 G D G Hall (ed), above n 7, 136–48.

31 Milsom, above n 13, 103, 122.

32 Francis Morgan Nichols, *Britton: An English Translation and Notes* (John Byrne, 1901) 287–314.

33 G D G Hall (ed), above n 7, 169.

34 Samuel E Thorne, *Bracton on the Laws and Customs of England* (Harvard University Press, 1977) vol 3, 185–9.

35 Ibid 167. See also Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 2, 145.

36 Ibid 189.

37 See below Part II(C)(2).

38 John Hudson, *The Oxford History of the Laws of England* (Oxford University Press, 2012) vol 2, 663–6.

39 See, eg, Thorne, above n 34, vol 3, 164.

40 Gray and Gray, above n 8, [1.1.11].

The yet feeble law of contract is supplemented by a generous liberality in the creation of incorporeal things. The man of the thirteenth century does not say, 'I agree that you may have so many trees out of my copse in every year,' he says, 'I give and grant you so much wood.' The main needs of the agricultural economy of the age can be met in this manner without the creation of any personal obligations.⁴¹

B The Breakdown of Feudalism, the Decline of Rights of Common and the Rise of Capitalism

However, the feudal social structure which rights of common supported broke down.⁴² Feudalism was replaced by an emerging economic liberalism in which individuals were able to act freely to exploit the opportunities afforded by their talents and the market. Central to such a society was the protection and enforcement of property rights and the establishment of private rules of market engagement. It could be thought that such a society would endorse rights of common, but as Macpherson pointed out, in capitalist societies 'the idea of common property drops virtually out of sight and property is equated with private property'.⁴³ Communal or 'conditional' notions of property were replaced by 'absolute' ownership.⁴⁴ There was also 'a change in the ethics of how land and property should be used'.⁴⁵ Land was no longer a resource charged with Christian communalism. Rather it was a commodity from which economic profits ought to be maximised.

This major intellectual transformation led to what were arguably the most dramatic and traumatic processes in the history of English land law, namely the judicial rejection of local custom as a method for creating rights of common, the consolidation of landholdings into large parcels and the enclosure of the common land. The removal of the informality of local custom as a legitimate legal reason for the exercise of rights of common (other than in copyhold)⁴⁶ was later justified on the basis that such a custom 'might lead to the destruction of the subject matter to which the alleged custom applied'.⁴⁷ Therefore, commoners were faced with

41 Pollock and Maitland, above n 35, 146. See also the comment in Sir William Holdsworth, *A History of English Law* (Methuen, 4th ed, 1936) vol 2, 355.

42 The *Tenures Abolition Act 1660*, 12 Car 2, c 24 formally brought the feudal system to an end.

43 C B Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka and R S Neale (eds), *Feudalism, Capitalism and Beyond* (Australian National University Press, 1975) 105, 105.

44 Yerby, above n 21, 63. See also Rubin and Sugarman (eds), above n 17, 24–8.

45 Yerby, above n 21, 66.

46 *Gateward's Case* (1606) 6 Co Rep 59b; 77 ER 344. See EP Thompson, *Customs in Common* (Merlin Press, 1991) 130–1. Later cases following this approach include: *Inhabitants de Haley* (1675) W Jones 297; 82 ER 157; *Welby v Harbert* (1674) 3 Keble 609; 84 ER 907; *Inhabitants d' Egham* (1632) W Jones 275, 276; 82 ER 144, 145; *Sir Francis Barrington's Case* (1610) 8 Co Rep 136b, 137a; 77 ER 681, 682–3; *Bound v Brooking* (1680) T Jones 148; 84 ER 1190; *Suckerman and Coates v Warner* (1613) 2 Bulstrode 248, 249; 81 ER 1097, 1098; *Burwell v Harwell* (1642) March NC 207, 210; 82 ER 477, 479.

47 *Race v Ward* (1855) 4 Ellis and Blackburn 702, 713; 119 ER 259, 263. See also *In the Matter of the Hainault Forest Act 1858* (1861) 9 CB NS 648, 673; 142 ER 254, 265; *A-G v Mathias* (1858) 4 Kay & J 579; 70 ER 241.

the difficulty of proving entitlement based on express grant or prescription.⁴⁸ The prospect of consolidation and enclosure had existed in the medieval period.⁴⁹ However by the 17th century, the reforms gathered apace and there were a number of legal methods including private enclosure acts⁵⁰ for removing common rights.⁵¹ Consolidation and enclosure were instrumental in creating vast increases in agricultural production,⁵² but there was significant social dislocation and rural unrest because they meant exclusion from the land.⁵³ The aristocracy and gentry increased their landholdings and absorbed copyhold interests⁵⁴ while a large landless agricultural labouring class was deprived of social mobility or additional means of sustenance (like maintaining a few animals or fishing).⁵⁵

The demise of feudalism and the implementation of enclosure destroyed the *raison d'être* for rights of common⁵⁶ and the social cohesion it promoted.⁵⁷ Historians have considered the decline of rights of common at length, but this was only part of the story. The idea of entering another person's property and taking some product from that land for payment was not contrary to the emerging capitalism or the rise of contract as the principal conductor of human economic activity in the 18th and 19th centuries.⁵⁸ Instead, carving out interests in land had the potential to expand economic activity.

C The Modern Profit

1 Beginning of the Modern Profit

While it can be contended broadly that rights of common were various kinds of profits, profits of the modern capitalist era are not rights of common. It is true that profits grew out of the broad notions of rights of common and that some

48 C Wood-Hill and JB Stonebridge, 'Common and Rights of Common' in Viscount Halsham (ed), *Halsbury's Laws of England* (Butterworth, 2nd ed, 1933) vol 4, [980].

49 Thorne, above n 34, vol 3, 180.

50 Cooke, above n 9, ch 7; E C K Gonner, *Common Land and Inclosure* (Frank Cass, 2nd ed, 1966) 43; J L Hammond and Barbara Hammond, *The Village Labourer* (Longman, 1978) 15–57.

51 Private enclosure acts: Cooke, above n 9, 83–4; Overton, above n 18, 158–9; *Inclosure Act 1845*, 8 & 9 Vict, c 118; *Halsbury's Laws of England*, above n 1, vol 4, 630–99 [1180]–[1309]; Scrutton, above n 9, 157–60.

52 Overton, above n 18, 164–8; Michael Andrew Žmolek, *Rethinking the Industrial Revolution* (Brill, 2013) 270–80.

53 Overton, above n 18, 188–91; Roger B Manning, *Village Revolts: Social Protest and Popular Disturbances in England, 1509–1640* (Oxford University Press, 1988) 31–131.

54 Tom Williamson, *The Transformation of Rural England: Farming and the Landscape 1700–1870* (University of Exeter Press, 2002) 15.

55 Hammond and Hammond, above n 50, 66–79; E P Thompson, *The Making of the English Working Class* (Penguin Books, 1968) 233–58; J M Neeson, 'Parliamentary Enclosure and the Disappearance of the English Peasantry, Revisited' in George Grantham and Carol S Leonard (eds), *Agrarian Organization in the Century of Industrialization: Europe, Russia and North America* (JAI Press, 1989) 89, 113; Overton, above n 18, 176–8.

56 This was arguably reflected in Blackstone's concise treatment of rights of common in the mid-18th century: Blackstone, above n 23, vol 1, book II, ch 3, 31–5.

57 See Thompson, *Customs in Common*, above n 46, ch 3.

58 P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) 388.

legal principles and practices were and remain in both. However, these legal relationships became fundamentally different. The agricultural and communal interdependence of the giver and taker of rights of common largely disappeared from the modern profit which could be exercised to the exclusion of all others or ‘severally’. Profits facilitated the capitalist exploitation of resources by formalising the acquisition of a proprietary right and enabling the holder to enter land and acquire commodities for uses sometimes commercially unconnected to the land. Atiyah has contended that in the 18th century ‘the significance of property rights changed from their use-value to their exchange-value’ and that this was connected to the development of the 19th century capitalist economy.⁵⁹ The rise of the modern profit and its detachment from rights of common was an example of this process as the use of land-based commodities gave way to the recognition of their market value. Indeed, Sir Edward Coke, writing in the 17th century, suggested both the disconnection of land from the manorial system and commodities from the land when he opined ‘what is the land but the profits thereof, for thereby vesture, herbage, trees, mines, and all whatsoever is parcel of the land’.⁶⁰

While there is considerable material about rights of common and enclosure, there is a dearth of discussion about the rise of the modern profit and its detachment from rights in common. For example, Holdsworth treated profits as simply rights of common and did not consider how they reflected and adapted to new capitalist conditions.⁶¹ Simpson also initially discussed rights of common and then later identified the profit in the 19th century, assuming that they were one and the same thing⁶² without considering the change in language and the temporal hiatus between the two legal relationships.⁶³ Moreover, he assumed that profits declined in the 19th century, whereas what probably happened was that in view of the agricultural revolution and enclosure there was a decline in rights in common, while the modern capitalist notion of profits slowly grew in popularity.⁶⁴

Distinct reference to profits began to appear in the law reports both in language and content in the 16th century. According to the *Oxford English Dictionary*, a version of the phrase, ‘profit appender’, first appeared in 1648 before the Court of King’s Bench, followed by a reference in 1658.⁶⁵ However, the case law indicates that the phrase was used even earlier. A statement emerges in 1578 in *All Souls’ Colledge v Everal*⁶⁶ in which rights of common were identified as ‘profit appender’⁶⁷ and in *Paramour v Yardley*⁶⁸ which concerned whether one of the

59 Ibid 103.

60 Thomas Coventry, *A Readable Edition of Coke Upon Littleton* (Saunders and Benning, 1830) Litt s1 Co Litt 4b.

61 Holdsworth, above n 41, vol 2, 355; vol 3, 143.

62 John Edward Hall, above n 9, 1.

63 Simpson, above n 6, 104–15, 261–2.

64 Ibid 261–2.

65 *Profit à Prendre* (June 2007) *Oxford English Dictionary* <<http://www.oed.com>>.

66 (1606) Ch Cas in Ch 126; 21 ER 76.

67 See also *All Souls’ Colledge v Leighton* (1606) Ch Cas in Ch 148; 21 ER 85.

68 (1578) 2 Plow 539; 75 ER 794.

gifts in a will was a profit.⁶⁹ Later, in 1597 a lease of land included ‘commons, profits, and commodities’,⁷⁰ in 1598 a coal mine was described as a profit⁷¹ and in 1607 custom as the basis for rights in land in the form of a profit were seriously circumscribed.⁷²

The phrase ‘profit apprender’ was probably a transitional phrase indicating an intermediary phase in property law.⁷³ It comprised the word ‘profit’ which has etymological roots dating back to the 12th century, but which was used in relation to the land as a commodity or putting land to a profitable use in the 15th century.⁷⁴ The word ‘apprender’ has links to the noun ‘prender’ which means ‘[t]he power or right of taking a thing without its[sic] being offered’⁷⁵ and the verb ‘prend’ meaning ‘[t]o take.’⁷⁶

The emergence of the phrases ‘profit apprender’,⁷⁷ ‘profit apprender *in alieno solo*’,⁷⁸ profit apprende⁷⁹ and later ‘profit à prendre’⁸⁰ and ‘profit à prendre *in alieno solo*’⁸¹ appeared to be slow. The terms ‘commons’ and ‘rights of common’ continued to be used for taking of commodities from the land, while the terms ‘profits apprender’,⁸² ‘profit apprende’⁸³ and later ‘profits à prendre’⁸⁴ appeared

69 Ibid 542; 799.

70 *Bradshaw v Eyre* (1597) Cro Eliz 570, 570; 78 ER 814, 814.

71 *Sanders v Norwood* (1598) Cro Eliz 683; 78 ER 919.

72 *Gateward’s Case* (1607) 6 Co Rep 59b; 77 ER 344. See E P Thompson, *Customs in Common*, above n 46, 130–1.

73 *Gateward’s Case* (1607) 6 Co Rep 59b; 77 ER 344; *Inhabitants de Haley* (1633) W Jones 297; 82 ER 157; *Welby v Harbert* (1674) 3 Keb 609; 84 ER 907; *Inhabitants d’Egham* (1632) W Jones 275, 276; 82 ER 144, 145; *Sir Francis Barrington’s Case* (1610) 8 Co Rep 136b, 137a; 77 ER 681, 682–3; *Bound v Brooking* (1680) T Jones 148, 148; 84 ER 1190, 1190; *Suckerman and Coates v Warner* (1613) 2 Bulstrode 248, 249; 80 ER 1097, 1098; *Burwell v Harwell* (1642) March NC 207, 210; 82 ER 477, 479.

74 *Profit* (June 2007) Oxford English Dictionary <<http://www.oed.com>>.

75 *Prender* (June 2007) Oxford English Dictionary <<http://www.oed.com>>.

76 *Prend* (June 2007) Oxford English Dictionary <<http://www.oed.com>>.

77 *Welby v Harbert* (1674) 3 Keb 609; 84 ER 907; *Sir Thomas Stanley, Bart v White* (1811) 14 East 332; 104 ER 630.

78 *Dowglas v Kendall* (1609) 1 Bulstrode 93; 80 ER 792; *Fisher v Wren* (1688) 3 Mod 250; 87 ER 165; *Sir Francis Barrington’s Case* (1610) 8 Co Rep 136b; 77 ER 681.

79 *Lambert v Cummin* (1723) 2 Bunb 138 in Henry Gwillim and Charles Ellis, *A Collection of Acts and Records of Parliament: With Reports of Cases, Argued and Determined in the Courts of Law and Equity Respecting Tithes* (A Strahan, 1801) vol 2, 647.

80 See, eg, *James v Johnson* (1676) 1 Mod 231; 86 ER 849; *James v Johnson* (1676) 2 Mod 143; 86 ER 989; *Potter v North* (1668) 2 Keb 517; 84 ER 324; *Rex v The Inhabitants of Lockerly* (1752) in James Burrow, *Series of the Decisions of the Court of King’s Bench upon Settlement-Cases; From the Death of Lord Raymond in March 1732* (J Worrall & B Tovey, 1768) 315, 317; *Tyler v Bennett* (1836) 5 Ad & El 377; 111 ER 1208; *Micklethwait v Winter* (1851) 6 Ex 644; 155 ER 701 where what was probably created was a profit although it was not labelled as such.

81 *In the Matter of the Hainault Forest Act 1858* (1861) 9 CB NS 648, 680; 142 ER 254, 268; *Fisher v Wren* (1688) 3 Mod 250, 251; 87 ER 165, 166; *Grimstead v Marlowe* (1792) 4 Term Rep 717, 717; 100 ER 1263, 1263; *Blewett v Treginning* (1835) 3 Ad & El 554; 111 ER 524; *Sir Thomas Aston Clifford Constable, Bart v Nicholson* (1863) 14 CB NS 230; 143 ER 434; *Race v Ward* (1855) 4 El & Bl 702; 119 ER 259; *Manning v Wasdale* (1836) 5 Ad & El 758; 111 ER 1353; *Tyler v Bennett* (1836) 5 Ad & El 377; 111 ER 1208.

82 *Swayne’s Case* (1608) 8 Co Rep 63; 77 ER 568; *Gipps v Woollicot* (1702) Skin 677; 90 ER 302.

83 *Lambert v Cumming* (1723) Bunb 138; 145 ER 624.

84 *Fawlkner v Fawlkner* (1681) 1 Vern 21; 23 ER 276; *R v The Inhabitants of Piddletrenthide* (1790) 3 Term Rep 772, 774; 100 ER 851, 852.

to be one and the same thing⁸⁵ and could be intertwined with the language of ‘commons’. ‘Profit appender’ and ‘profit à prendre’ were not incorporated immediately in dictionaries and textbooks⁸⁶ and this is additionally indicative of its very gradual emergence as a separate entity from rights in common.

However, by the end of the 19th century, the profit had emerged as a legal entity separate from (although recognised as allied to) rights of common. For example, profits could be created prescriptively under statute,⁸⁷ profits were expressly identified as irrevocable licenses coupled with a proprietary grant⁸⁸ and the potential subject matter of easements and profits was distinguished.⁸⁹ Where a profit was not created formally by deed, it was recognised in equity if there was writing or evidence of part performance.⁹⁰

In terms of broad academic treatment, there were three trends which were not necessarily inconsistent. First, in several major works, rights of common were treated separately from profits, probably due to enclosure.⁹¹ Second, sometimes rights of common were subsumed under the notion of profits which became the flagship standard. Characteristics which were shared by profits and rights of common were normative.⁹² Third, the fact that rights of common were subsumed under the notion of profits did not mean that profits were substantively discussed with rights of common. For example, in *Halsbury’s Laws of England* rights of common were considered to be profits, but the substantive treatment of profits was coupled with easements.⁹³ This approach is still evident in modern English textbooks.⁹⁴

85 *Fisher v Wren* (1688) 3 Mod 250, 251; 87 ER 165, 166. For example, a *profit à prendre appendant* was essentially considered ‘of common right’: *Tyrringham’s Case* (1584) 4 Co Rep 36a, 36b; 76 ER 973, 974; *Musgrave v Inclosure Commissioners* (1874) LR 9 QB 162, 174.

86 See, eg, Thomas Wood, *An Institute of the Laws of England* (H Woodfall and W Strahan, 8th ed, 1763) 199–204 where there is discussion of rights of common but no discussion of profits. In Giles Jacob, Owen Ruffhead and John Morgan, *A New Law Dictionary* (W Strahan and M Woodfall, 1773) rights of common are discussed and the concept of prender as taking is noted, but there is no listing of profits. Blackstone briefly discussed rights in common, but did not refer to profits: Blackstone, above n 23, vol 1, book II, 31–5.

87 *Prescription Act 1832*, 2 & 3 Will 4, c 71, s 1.

88 *Ewart v Graham* (1859) 7 HL Cas 331, 344–5; 11 ER 132, 138; *Wood v Leadbitter* (1845) 13 M & W 838, 843–6; 153 ER 351, 354–5. See also the discussion in *Frank Warr & Co Ltd v London County Council* [1904] 1 KB 713, 721–3.

89 The right to take water could not be the subject matter of a profit because water could not be owned and could only be subject to an easement: *Race v Ward* (1855) 4 El & Bl 702; 119 ER 259; *Chasemore v Richards* (1859) 7 HL Cas 349; 11 ER 140; *Manning v Wasdale* (1836) 5 Ad & El 758; 111 ER 1353.

90 *Goodman v Mayor of Saltash* (1882) 7 App Cas 633; *Lowe v Adams* [1901] 2 Ch 598; *Halsbury’s Laws of England*, above n 1, 387–8 [682].

91 See, eg, the separate treatment of rights of common without a discussion of profits in Scrutton, above n 9; Cooke, above n 9.

92 *Halsbury’s Laws of England*, above n 48, vol 4, 529 [978].

93 *Ibid* 381–94 [669]–[698].

94 Gray and Gray, above n 8, pt 5. In Harpum, Bridge and Dixon, above n 11, [27-058]–[27-067] easements and profits are co-joined, but the discussion of rights of common falls for consideration within the section on profits in ch 27.

2 Profits, Contracts for the Sale of Goods and the Statute of Frauds

Despite the profit's evident advantages, it was not the only legally sanctioned method for entering land and taking commodities. Such commodities could be severed, taken from the land and sold as 'goods' in arms-length contractual transactions in which there were no reciprocal obligations between the parties other than the fulfilment of the commercial transaction. The land was considered 'a mere warehouse of the thing sold'⁹⁵ and the only concern was ensuring that the buyer had a right to enter the land to sever or take the 'goods'.⁹⁶ The advantage for the seller was that the produce could be sold for its exchange value without granting the buyer any proprietary interest in the land.

It is unclear to what extent the number of such agricultural sale contracts outstripped the grant of profits. What can be said is that such contracts had two effects. One was that were viable alternatives to profits which probably had the effect of constraining their commercial application (because an outright severance and sale may have been all that was transactionally required).

The other was that upon the passing of the *Statute of Frauds* ('Statute')⁹⁷ in 1677, there were two important writing requirements. Section 4 of the *Statute* required a memorandum in writing signed by the party acquiring the '[l]ands, [t]enements or [h]ereditaments, or any interest in or concerning them'. Section 17 of the *Statute* required that the sale of '[g]oods, [w]ares and [m]erchandizes' over a certain value had to be in a memorandum in writing and signed by the party acquiring them. Unfortunately, the *Statute* did not provide a definition of what constituted 'goods' and the cases did not give consistent answers⁹⁸ because agricultural produce could be either severed or severable 'goods' or a profit. The courts adopted several tests.

First, where a commodity was attached to land and was to be severed and sold by the seller,⁹⁹ then the commodity was 'goods' for the purpose of s 17 of the *Statute*.¹⁰⁰ On the other hand, if the buyer was granted a licence to enter the land to sever and/or take the commodity,¹⁰¹ it was likely that the contract created a profit.¹⁰² Second, courts relied on the difference between *fructus industriales* and *fructus*

95 *Marshall v Green* (1875) 1 CPD 35, 39 (Lord Coleridge).

96 *Evans v Roberts* (1826) 5 B & C 829; 108 ER 309.

97 *Statute of Frauds 1677*, 29 Car 2, c 3, as enacted.

98 See James A Bailey, *A Treatise on the Construction of the Statute of Frauds* (Little, Brown, 1895) 310; M G Bridge, *The Sale of Goods* (Oxford University Press, 3rd ed, 2014) 35 [2.05]. Consider *Saunders (Inspector of Taxes) v Pilcher* [1949] 2 All ER 1097.

99 See, eg, *Smith v Surman* (1829) 9 B & C 561, 574; 109 ER 209, 214; *Sainsbury v Matthews* (1838) 4 M & W 343; 150 ER 1460.

100 Bailey, above n 98, 312–3. See also *Washbourn v Burrows* (1847) 1 Ex 107, 115; 154 ER 45, 49 where there was a reference to the land being a 'warehouse' for the commodity.

101 *Crosby v Wadsworth* (1805) 6 East 602; 102 ER 1419.

102 See generally, M G Bridge (ed), *Benjamin's Sale of Goods* (Sweet & Maxwell, 9th ed, 2014) 80–1 [1-091]; *Webber v Lee* (1882) 9 QBD 315. Cf *Parker v Staniland* (1809) 11 East 362; 103 ER 1043; *Evans v Roberts* (1826) 5 B & C 829; 108 ER 309.

naturales derived from medieval law.¹⁰³ Where a medieval tenant-farmer had a leasehold interest of an uncertain duration, he was entitled to take the last mature crop which was evidently the result of his efforts, although the crop matured at a time when he no longer possessed the land.¹⁰⁴ The right was a personal interest, an ‘emblem’ or *fructus industriales*, the work of human labour.¹⁰⁵ In contrast, the tenant could not remove the *fructus naturales* or uncultivated fruits of nature such as grass, native trees, and the fruits and nuts from trees which formed part of the land.¹⁰⁶ In later centuries, courts transferred and applied this principle to the sale of goods. A contract for an interest identified as *fructus naturales* was a contract for an interest in land and was subject to s 4 of the *Statute*, while a contract for the sale of *fructus industriales* whether they were attached to the land or were ready for harvesting, was a contract for the sale of goods under s 17 of the *Statute*.¹⁰⁷ Perhaps the transfer of this agricultural distinction was artificial. The contexts of tenancy and sale are dissimilar, and it has been suggested that the influence and usefulness of the principle ought not to have been overstated.¹⁰⁸ Nevertheless, several commentaries have confirmed the special distinction made for vegetation, timber and crops.¹⁰⁹ Third, initially a contract for the sale of unsevered *fructus naturales* created a profit. However, in *Marshall v Green*¹¹⁰ the Court held that where the parties intended that *fructus naturales* (in this case timber) was to be severed immediately by the buyer, the land was a mere ‘warehouse’ and the buyer did not acquire any interest in the land.¹¹¹ For some writers this decision suggested that the distinction between *fructus naturales* and *fructus industrials* had no relevance.¹¹²

The *Statute* was revoked and replaced by, inter alia, the *Sales of Goods Act 1893*¹¹³ (which was repealed and replaced by the *Sale of Goods Act 1979* (UK)).¹¹⁴ As will be discussed below, a broad definition of ‘goods’ in the contemporary statute

103 See *Scorell v Boxall* (1827) 1 Y & J 396, 398; 148 ER 724, 725; *Rodwell v Phillips* (1842) 9 M & W 501, 505; 152 ER 212, 213–14; *Jones v Flint* (1839) 10 Ad & El 753, 758; 113 ER 285, 287.

104 Sir John Baker, ‘Property in Chattels’ in Sir John Baker (ed), *The Oxford History of the Laws of England: 1483–1558* (Oxford University Press, 2003) vol 6, 733–4; *Kingsbury v Collins* (1827) 4 Bing 202; 130 ER 746; *Graves v Weld* (1833) 5 B & Ad 105; 110 ER 731.

105 See, eg, hops: *Latham v Atwood* (1635) Cro Car 515; 79 ER 1045.

106 Baker, above n 104, 734; *ibid*. However, note that growing fruit has been considered to be an interest in land, rather than a personal right: *Rodwell v Phillips* (1842) 9 M & W 501; 152 ER 212.

107 *Parker v Staniland* (1809) 11 East 362; 103 ER 1043; *Evans v Roberts* (1826) 5 B & C 829; 108 ER 309. See generally, Bridge (ed), *Benjamin’s Sale of Goods*, above n 102, 82–3 [1–093].

108 Bailey, above n 98, 332.

109 Henry Reed, *A Treatise on the Law of the Statute of Frauds and Other Like Enactments in Force in the United States of America and the British Empire* (Kay & Bro, 1884) vol 2, 421–7; Sir William Regnell Anson, *Principles of the Law of Contract with a Chapter on the Law of Agency* (Oxford University Press, 16th ed, 1924) 101–2; Bridge (ed), *Benjamin’s Sale of Goods*, above n 102, 82 [1–093]; Bridge, *The Sale of Goods*, above n 98, 36 [2.07]–[2.08].

110 (1875) 1 CPD 35; *Washbourn v Burrows* (1847) 1 Ex 107; 154 ER 45.

111 *Parker v Staniland* (1809) 11 East 362; 103 ER 1043; *Marshall v Green* (1875) 1 CPD 35; Bailey, above n 98, 332.

112 Bailey, above n 98, 331.

113 *Sales of Goods Act 1893*, 56 & 57 Vict, c 71.

114 *Sale of Goods Act 1979* (UK) c 54.

has arguably rendered the earlier cases otiose in relation to sales contracts.¹¹⁵ Nevertheless, the decisions under the *Statute* had a significant influence on the development of profits in England and Australia. Cases¹¹⁶ and eminent legal compendia¹¹⁷ indicated that profits were strictly limited to naturally occurring commodities ‘deposited upon the land by some agency other than that of man’¹¹⁸ (despite the fact that this limitation did not affect the medieval rights of common from which the modern profit stemmed).

III THE RECEPTION OF ENGLISH LAW INTO AUSTRALIAN LAW IN THE 18TH AND 19TH CENTURIES

When the British ‘settled’ Australia in 1788,¹¹⁹ it was assumed that those laws in force in England that were necessary to the colony applied to it.¹²⁰ Subsequently, under the *Australian Courts Act 1828*, the laws and statutes of England in force on 25 July 1828 formally became the law of the Australian colonies ‘so far as the same can be applied within’ them.¹²¹ While settlers brought with them English rules for the governance of land, it was not necessarily possible to apply them precisely to colonial conditions.¹²²

Nevertheless, English rights of common and the *Statute* fell relatively easily into transportable and adaptable legal cargo sanctioned by the legislation. Rights of common (particularly rights of common pasturage) were utilised in the early days of the Australian colonies. This may appear strange in view of the breakdown of such rights in England. However, Governors allotted grazing commons to support agriculture and increase stock when it was not practicable to issue further land grants.¹²³ While the Crown was considered to be ‘in the same position as the lord of the manor is in England’¹²⁴ the local system of commons was a variation under which trustees managed the interests of the settlers and the Crown.¹²⁵ Settlers were protected because the Crown could not revoke dedications of commons or resume

115 See generally, Bridge (ed), *Benjamin’s Sale of Goods*, above n 102, 83 [1-093].

116 *Smart v Jones* (1864) 15 CB NS 717; 143 ER 966.

117 *Halsbury’s Laws of England*, above n 1, 382–3 [670].

118 *Ibid.*

119 This is the legal view of what happened in 1788, according to the decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 26.

120 *Ibid.* Note Alex C Castles, *An Australian Legal History* (Law Book, 1992) 394–6.

121 *Australian Courts Act 1828*, 9 Geo 4, c 83, s 24. See also *Cooper v Stuart* (1889) 14 App Cas 286; J Stoljar, ‘Invisible Cargo: The Introduction of English Law into Australia’ in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 1, 194, 197–203, 206–7; PM Lane, ‘Australian Land Law’ in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 1, 212, 217–8.

122 Edgeworth, *Butt’s Land Law*, above n 11, 11–15 [1.80]–[1.100].

123 Enid Campbell, ‘Rights of Common in New South Wales: A History’ (2007) 11 *Legal History* 243, 246.

124 *A-G v Municipal Council of Sydney* (1892) 13 NSWLR (Eq) 139, 148.

125 Trustees were appointed by the Crown or local councils: Campbell, above n 123, 254–8; *Fordyce v Wormall* (1884) 5 NSW 461.

land without statutory authority.¹²⁶ However, settlers never acquired proprietary interests or traditional rights of common,¹²⁷ having a ‘mere permission, revocable at any time ... in common with others’.¹²⁸

During the colonial period, judges and litigants were aware of matters associated with various provisions of the *Statute*.¹²⁹ However, there were few cases where the sale of agricultural produce arose and even then, whether what was sold was an interest in land was not discussed in any depth.¹³⁰

The initial reception of the modern profit into Australian law is problematical. The profit received little attention in Australian law during the 18th and 19th centuries. There appears to have been only one brief reference in 1899 when the Supreme Court of Western Australia suggested, obiter dicta, that a profit could arise between two parties, but not between the Crown and its subjects.¹³¹ Moreover, the modern profit (distinct from statutory rights of common) was not embedded in legislation.¹³²

There were also several factors which could have suggested that it was not part of colonial law or that even if it were, the colonists had little use for it. First, the modern profit was arguably still in development at the time of the passing of the *Australian Courts Act 1828*,¹³³ so that its parameters may have been difficult to gauge. Second, a question was whether, as ‘unenacted’ or judge made law, it could be applied in the Australian context because the application of other principles of ‘unenacted’ law had caused concern.¹³⁴ However, this ought not to be overstated. The colonial courts took a flexible approach to ‘unenacted’ law, which could be ‘received’ after ‘settlement’, provided that the unenacted law was capable of earlier legal reception.¹³⁵ Third, colonists were preoccupied with the

126 See, eg, *Crown Lands Act 1884* (NSW) s 104; *Fordyce v Wormall* (1884) 5 NSW 461. For a discussion of the issue, see *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54, 77 (Windeyer J); *R v Dallimore* (1864) 1 WW & A'B 153.

127 Campbell, above n 123, 249–52, 258–9.

128 *Hall v Gibson [No 2]* (1858) 2 Legge 1125, 1127. Sometimes land was not a common, notwithstanding its apparent designation as one: *Municipal Council of Sydney v A-G (NSW)* [1894] AC 444, 453.

129 *Lockhart v Dymock* [1877] Knox (NSW) 181; *South Australian Banking Co v Ayers* (1869) 3 SALR 24, 39, 45; *Byrnes v Williams* (1863) 2 Legge 1479; *Sutton v Linton* (1859) 2 Legge 1229; *Caffrey v Taylor* (1854) 2 Legge 842; *Miller v Gulliver* (1880) 1 NSW 176; *Chun Goon v The Reform Gold Mining Co* (1882) 8 VLR (Eq) 128, 152; *Williams v Robinson* (1891) 12 NSWLR (Eq) 35, 38–9, 40–1; *Kennedy v Currie* [1896] NSWLawRp 15; (1896) 17 NSWLR (Eq) 28, 31.

130 *Lorenz v Heffernan* (1877) 3 VLR 129, 134.

131 *The Monte Christo G M Co Ltd v The Commissioner of Railways* (1899) 1 WALR 161, 163.

132 For example, it appears that profits are not considered at all in any Torrens title legislation in NSW in the 19th century. See *Real Property Act 1862* (NSW); *Real Property Amendment Act 1873* (NSW); *Real Property Act Further Amendment Act 1877* (NSW); *Real Property Act Further Amendment Act 1893* (NSW).

133 *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83.

134 See, eg, reservations made in Crown grants: *Cooper v Stuart* (1889) 14 App Cas 286; and easements for light: *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283.

135 Castles, above n 120, 505.

aggressive acquisition of a secure tenure in land,¹³⁶ so that it is unlikely that they would have settled for a mere profit.

It was left to the courts and legislatures in the 20th and 21st centuries to recognise and construct the modern Australian profit.

IV THE MODERN PROFIT À PRENDRE IN AUSTRALIA

The profit featured more predominantly in the 20th century than in the 19th century, although the easement has always eclipsed it. Nevertheless, the profit enabled a party to access and take land-based resources in a growing capitalist economy without challenging an owner's rights to title and possession of the land.

In order to understand the modern profit, it is helpful to consider it from two viewpoints: its broad lineal evolution during the 20th and 21st centuries; and the three major contexts and perspectives from which profits have been contemporaneously framed and adapted.

A The Lineal Evolution: An Overview

In the 20th century, the concept of government endorsed agricultural commons diminished markedly, although in New South Wales ('NSW') there remains some statutory commons.¹³⁷ In contrast, the recognition and utilisation of profits in legislation, case law and commentary grew steadily, although there were a number of early cases in which the contested right was not labelled a profit, although it probably was one.¹³⁸ While it may appear artificial, it is helpful to divide the period after 1900 into two segments: the first period from 1900 to around 1975–1979; and the second period from and after 1980.

1 1900–circa 1979

The first period was characterised by four features. First, modern profits were part of the 'unenacted' law of England and there were a series of decisions, (initially at the High Court level)¹³⁹ in which Australian courts accepted the modern profit,¹⁴⁰ and the substantive principles governing them.¹⁴¹

136 Ibid 175–6, 288–9, 461–5; A R Buck, *The Making of Australian Property Law* (Federation Press, 2006) 71–85, 104, 122.

137 *Commons Management Act 1989* (NSW); Campbell, above n 123, 260–3; Jacob Saulwick, 'No Common Fight as St Albans Village Battles to Save Historic Acreage', *The Sydney Morning Herald* (online), 25 March 2017 <<https://www.smh.com.au/national/nsw/no-common-fight-as-st-albans-village-battles-to-save-historic-acreage-20170324-gv5id4.html>>.

138 *Chapman v Strawbridge* [1910] SALR 118, 123 (Way CJ); *Millars' Karri and Jarrah Co (1902) Ltd v Harvey District Road Board* (1912) 15 CLR 490.

139 *Hindmarsh v Quinn* (1914) 17 CLR 622.

140 Ibid 635 (Isaacs J); *Newland v Cooper* [1940] SASR 40, 44 (Richards J).

141 *Cowell v Rosehill Racecourse* (1937) 56 CLR 605; *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1; *Mills v Stokman* (1967) 116 CLR 61; *Reid v Zoanetti* [1943] SASR 92, 102 (Mayo J).

Second, whether a profit existed was considered in ‘traditional’ contexts such as timber cutting,¹⁴² mining and quarrying,¹⁴³ taking fruits¹⁴⁴ and salt,¹⁴⁵ agistment¹⁴⁶ and other agricultural practices.¹⁴⁷ However, the cases did not cover all forms of English profits. Noticeably absent were disputes concerning native species and the cutting of turf.¹⁴⁸

Third, the cases flagged contexts and issues which would emerge later in the 20th century such as share-farming,¹⁴⁹ the imposition of taxation,¹⁵⁰ the interpretation of Australian enactments of the *Statute*¹⁵¹ and sale of goods legislation¹⁵² and the impact of the Torrens system.¹⁵³ In contrast to the second period, there appeared to be a degree of doctrinal flexibility. For example, in several share-farming cases, the courts did not discuss the English law which had confined profits to *fructus naturales*.¹⁵⁴

Fourth, notwithstanding the judicial recognition of profits at High Court and Supreme Court level, it appears that most academic commentators did not seriously consider them. Some textbooks described the traditional rights of common but ignored the modern profit¹⁵⁵ while others gave them minimal treatment.¹⁵⁶ In Butt’s *Introduction to Land Law* just at the end of the first period, profits were noted but there was no discussion of Australian cases or their actual or potential operation within the Torrens system.¹⁵⁷

An important academic exception was John Baalman who commented in 1951 that:

142 *Worsley Timber Co Ltd v Minister for Works* (1933) 36 WALR 52; *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1; *Smith v McCabe* [1957] VR 518 (5 September 1956); *O’Keefe v Ellis* [1961] Tas SR 169.

143 *Turner v Bladin* (1951) 82 CLR 463; *Commissioner of Stamp Duties (NSW) v Henry* (1964) 114 CLR 322; *Stow v Mineral Holdings (Australia) Pty Ltd* [1975] Tas SR 25.

144 *Kouveras v Angas* [1919] SALR 98.

145 *Nicholls v Lovell* [1923] SASR 542.

146 *Beach v Trims Investments Ltd* [1960] SASR 5.

147 *Lamond v Calcraft* (1945) 53 SR (NSW) 103.

148 Some native wood was not considered to be timber for the purpose of a licence to remove timber: *Chapman v Strawbridge* [1910] SALR 118. Today, the relevant protective legislation includes the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

149 *Hindmarsh v Quinn* (1914) 17 CLR 622; *Moore v Collins* [1937] SASR 195; *Newland v Cooper* [1940] SASR 40.

150 *McCaughey v Commissioner of Taxation* (1944) 69 CLR 235; *Herring (Receiver) v Commissioner of Taxation* (1946) 52 ArgLR 296.

151 *Turner v Bladin* (1951) 82 CLR 463.

152 *Mills v Stokman* (1967) 116 CLR 61.

153 *Re Caveat of Gamboola Cabonne Phosphates Ltd* (1919) 19 SR (NSW) 227.

154 *Bellinger v Hughes* (1911) 11 SR (NSW) 419; *Hindmarsh v Quinn* (1914) 17 CLR 622; *Moore v Collins* [1937] SASR 195, 208, 211 (Cleland J); *Newland v Cooper* [1940] SASR 40, 44 (Richards J).

155 Richard E Kemp, *Principles of the Law of Real Property in New South Wales* (Law Book, 1903) 382–5; B A Helmore, A C Millard and G W Millard, *The Law of Real Property in New South Wales* (Law Book, 4th ed, 1930) 412–13, 424–5.

156 B A Helmore, *The Law of Real Property in New South Wales* (Law Book, 1961) 196–8.

157 Peter Butt, *Introduction to Land Law* (Law Book, 1980) 194–5. Similarly, profits are treated cursorily in R A Woodman, *The Law of Real Property in New South Wales* (Law Book, 1980) vol 1, 292–3. Although published in 1980, the textbooks represent the approach in the first period.

The subject of profits-à-prendre has received scant attention in New South Wales. Most legal writers and educators appear to have been satisfied to dismiss it as being associated only with manorial rights of common ...¹⁵⁸

In an earlier article,¹⁵⁹ Baalman protested against the neglect of profits in academic commentary and ably refuted one author's attempt¹⁶⁰ to argue that easements were viable alternatives to profits, thereby rendering profits redundant.¹⁶¹ Baalman pointed out the unique characteristics of profits¹⁶² and presaged that their interface with the Torrens system¹⁶³ and the sale of goods legislation¹⁶⁴ would require future consideration. Moreover, Baalman observed that there were no major restrictions on a profit's potential subject matter.¹⁶⁵

2 Circa 1980 – The Present

From around the 1980s onwards, the profit featured more predominantly in Australian law and became a fully-fledged part of the real property lexicon. Profits have been subject to legislative day-to-day regulation of land law matters, no doubt because they have become more widely used. For example, in 1987 legislative amendments in NSW included profits in provisions which had hitherto only concerned easements,¹⁶⁶ mortgagee powers and the powers incidental to a power of sale.¹⁶⁷ The amendments also provided that forestry rights would 'for all purposes, be deemed to be a profit à prendre'.¹⁶⁸ In 1995 there were further legislative amendments to deal with the creation of profits and the treatment of omitted profits as exceptions to indefeasibility in the Torrens system¹⁶⁹ and in 1996 the extinguishment of profits generally.¹⁷⁰ Profits have been also legislatively deployed in various states to enable the exploitation and use of timber resources as statutory forestry rights¹⁷¹ (which can include carbon sequestration rights,¹⁷² timber share-farming agreements,¹⁷³ or plantation licences).¹⁷⁴ However, the potential value and utility of profits does not appear to have been always

158 John Baalman, *The Torrens System in New South Wales* (Law Book, 1951) 213.

159 John Baalman, 'The Neglected Profit à Prendre' (1948) 22 *Australian Law Journal* 302.

160 P R Watts, 'The Conveyancer' (1945) 19 *Australian Law Journal* 183.

161 Baalman, 'The Neglected Profit à Prendre', above n 159, 302–3.

162 *Ibid* 303.

163 *Ibid* 304.

164 *Ibid* 305.

165 *Ibid* 304.

166 *Conveyancing (Forestry Rights) Amendment Act 1987* (NSW) sch 1 cls (1)–(3), (6).

167 *Ibid* sch 1 cls (14)–(15).

168 *Ibid* sch 1 cl (5), inserting s 88AB into the *Conveyancing Act 1919* (NSW).

169 See *Property Legislation Amendment (Easements) Act 1995* (NSW) s 4, sch 2, amending *Real Property Act 1900* (NSW) ss 42, 47.

170 See *Statute Law (Miscellaneous Provisions) Act 1996* (NSW) s 3, sch 1, amending *Conveyancing Act 1919* (NSW) s 89.

171 *Conveyancing Act 1919* (NSW) s 88AB(1); *Forest Products Act 2000* (WA) s 54; *Forestry Rights Registration Act 1990* (Tas) s 5.

172 *Conveyancing Act 1919* (NSW) s 87A(b) (definition of 'forestry right').

173 *Conservation and Land Management Act 1984* (WA) s 34B.

174 *Forestry Act 1959* (Qld) s 61QC.

appreciated as they are not included in the definition of an interest in Australian land for the purpose of foreign acquisitions.¹⁷⁵

Courts have been called upon to settle the relationship of profits to legislative schemes such as modern versions of the *Statute*,¹⁷⁶ sale of goods legislation and title by registration.¹⁷⁷ While some cases considered the profit in agricultural contexts,¹⁷⁸ there were cases involving other issues such as the compulsory acquisition of land,¹⁷⁹ licence schemes¹⁸⁰ and plantation schemes, requiring an evaluation of the fundamental nature of profits.¹⁸¹ In *Vanstone v Malura Pty Ltd*¹⁸² it was held that native vegetation could be the subject of a profit,¹⁸³ although it is questionable whether native flora and fauna would be the subject of a profit in view of legislative protection of native species.¹⁸⁴ However, in *Georgeski v Owners Corporation SP49833*¹⁸⁵ Barrett J was unwilling to determine finally that the right to remove a jetty from land constituted a profit.¹⁸⁶

Finally, profits received far more attention in textbooks than previously. For example, the second edition of Butt's textbook, published in 1988,¹⁸⁷ dealt with profits at greater length than the earlier work. This edition considered not only

175 *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 12, amended by *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) sch 1.

176 *Duff v Blinco* [2007] 1 Qd R 407 ('Duff').

177 See, eg, *Corporate Affairs Commission v ASC Timber Pty Ltd* (1989) 18 NSWLR 577; *Ellison v Vukicevic* (1986) 7 NSWLR 104; *Dean v Dean* [1999] TASSC 15 (19 February 1999); *Giacci Bros Pty Ltd v Tyrrell* [1998] WASC 46 (18 February 1998); *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426; *Four Oaks Enterprises Pty Ltd v Clark* [2002] TASSC 39 (26 June 2002).

178 *Dean v Dean* [1999] TASSC 15 (19 February 1999); *Ashgrove Pty Ltd v Commissioner of Taxation* (1994) 53 FCR 452; *Four Oaks Enterprises Pty Ltd v Clark* [2002] TASSC 39 (26 June 2002); *Public Trustee v Donoghue* [1999] TASSC 147 (20 December 1999); *Duff* [2007] 1 Qd R 407; *Collins v Northern Territory* (2007) 161 FCR 549; *Antonio Giorgio Pty Ltd v Commonwealth of Australia* [1986] ACTSC 17 (11 March 1986); *Ellison v Vukicevic* (1986) 7 NSWLR 104; *Williams v De Biasi* [1992] FCA 393 (18 August 1992); *Giacci Bros Pty Ltd v Tyrrell* [1998] WASC 46 (18 February 1998); *Finesky Holdings Ltd v Minister for Transport (WA)* (2002) 26 WAR 368; *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 19 NTLR 153.

179 *Citizens Airport Environment Association Inc v Maritime Services Board* (1993) 30 NSWLR 207; *Altamura v Director of Fisheries Policy (SA)* (2003) 229 LSJS 208; *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* [2007] 2 Qd R 373.

180 See, eg, *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314; *Bienke v Minister of Primary Industries and Energy* [1996] FCA 1220 (8 February 1996); *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (1999) 170 ALR 1; *Tasmania v Mayes* [2004] TASSC 52 (4 June 2004); *Alcoota Aboriginal Corporation v Gray J* (2003) 13 NTLR 170.

181 See, eg, *Warren v Nut Farms of Australia Pty Ltd* [1981] WAR 134; *Corporate Affairs Commission v ASC Timber Pty Ltd* (1989) 18 NSWLR 577; *Australian Softwood Forests Pty Ltd v A-G (NSW) ex rel Corporate Affairs Commission* (1981) 148 CLR 121; *Australian Securities Commission v United Tree Farmers Pty Ltd* (1997) 24 ACSR 94; *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426; *Equuscorp Pty Ltd v Acehand Pty Ltd* [2010] VSC 89 (30 March 2010); *Primary RE Ltd v Great Southern Property Holdings Ltd* [2011] VSC 242 (8 June 2011).

182 (1988) 50 SASR 110.

183 *Ibid* 128 (Legoe J).

184 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

185 (2004) 62 NSWLR 534.

186 *Ibid* 554. In *AAT Case 6225* (1990) 21 ATR 3691, O'Connor J held that a right to take rents and profits was not akin to taking something out of land.

187 Peter Butt, *Land Law* (Law Book, 2nd ed, 1988).

their nature and creation,¹⁸⁸ but also cited important Australian cases.¹⁸⁹ It appears that legislative amendments in NSW which created ‘forestry rights’¹⁹⁰ may have influenced the expanded treatment.¹⁹¹

During the 20th century, three broad issues attracted legislative and judicial attention, namely: the creation and interpretation of profits as the subject of contract; the recognition and creation of rights in the nature of profits; and the formal introduction of profits into the Torrens System.

B Profits as the Subject of Contract

As in preceding centuries, the commercial and contractual creation of profits has prefigured in the modern era. Australian commentators have recognised that profits may be the subject of contractual dealings where a central issue is whether the parties have created a proprietary interest in the form of a profit or a lesser personal interest which permits the taking of some commodity from the land.¹⁹² However, commentators have not recognised or discussed this issue’s complexity,¹⁹³ and the case law has not resolved how important statutory provisions ought to be applied.

For the sake of completeness, it must be observed that while most contractual disputes involving profits have concerned the dichotomy between proprietary and personal interests, occasionally the contractual litigation has not involved this question. For example, in *Duff v Blinco* (*‘Duff’*),¹⁹⁴ the question whether a profit had been created appears to have been hardly disputed and the Court was easily satisfied that the written agreement had created it.¹⁹⁵ Rather, the Court considered whether a failure to comply with s 59 of the *Property Law Act 1974* (Qld) (which required that the written agreement contain details of the consideration payable) meant that the obligation to pay royalties was unenforceable.¹⁹⁶ The trial judge and the Queensland Court of Appeal held that compliance with s 59 (which applied to executory contracts) was unnecessary because an immediate and valid written interest had been created.¹⁹⁷

Leaving aside such cases as *Duff*, there are two broad groups of cases. One group centres on the parties’ general contractual intention as interpreted in the

188 Ibid 326–30 [1646]–[1647].

189 See, eg, *Australian Softwood Forests Pty Ltd v A-G (NSW) ex rel Corporate Affairs Commission* (1981) 148 CLR 121, cited in ibid 326; *Ellison v Vukicevic* (1987) 9 NSWLR 13, cited in ibid 328.

190 *Conveyancing Act 1919* (NSW) s 88AB.

191 Butt, *Land Law*, above n 187, 328–30 [1647]. A similar treatment of profits can be found in Peter Butt, *Land Law* (3rd ed, 1996) 461–2 [1694].

192 Edgeworth, *Butt’s Land Law*, above n 11, 590–1 [9.860]; Moore, Grattan and Griggs, above n 11, 884–5 [17.40].

193 See, eg, Edgeworth, *Butt’s Land Law*, above n 11, 590–1 [9.860].

194 [2007] 1 Qd R 407.

195 Ibid 415–16 [38]–[39].

196 Ibid 414–15 [30]–[37].

197 Ibid 412 [18], 415–16 [37]–[39].

circumstances of the case. The other group measures the parties' intention against earlier determinations under the *Statute* and/or the definition of 'goods' under the relevant sale of goods legislation.

1 *Interpreting the Intention of the Parties*

In the first group, mostly appearing in the first half of the 20th century, the courts interpreted the intention of the parties and the nature of the interest granted where it was unclear whether a profit had been created.¹⁹⁸ The courts provided guidance as to the kind of terms or characteristics which may indicate a profit, subject to the distinctive details of the case. For example, the intention to create an interest, such as a tenancy,¹⁹⁹ will be strong evidence that a profit was not intended. However, the intention to create an interest which was not a tenancy but which gave a party the right to enter the land, manage a dairy farm and split the profits with the owner of the land may constitute a profit because it permitted the taking of a commodity from the land but did not give the party exclusive possession.²⁰⁰

2 *The Definition of 'Goods' in the Statute of Frauds and the Sale of Goods Legislation*

In the second group, the courts have considered contracts in the light of earlier determinations under the *Statute* and the current definition of 'goods' in the sale of goods legislation in each state. It is necessary to discuss such decisions under the separate legislative enactments.

(a) *The Definition of 'Goods' in the Statute of Frauds*

Although profits have been distinguished from contractual rights to enter land to take chattels under a sale of goods contract,²⁰¹ the impact of the *Statute* on the evolution of the profit in Australia has not been fully considered.

In the 19th century and early 20th century Australian cases, the English cases defining 'goods' under the *Statute* apparently had little or no impact upon judicial decisions. There were a series of cases concerning share-farming and the planting

198 *Hindmarsh v Quinn* (1914) 17 CLR 622; *Kouveras v Angas* [1919] SALR 98; *Nicholls v Lovell* [1923] SASR 542; *Ferres v Cope* [1928] SASR 415; *Worsley Timber Co Ltd v Minister for Works* (1933) 36 WALR 52; *Moore v Collins* [1937] SASR 195; *Newland v Cooper* [1940] SASR 40; *Reid v Zoanetti* [1943] SASR 92; *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1. See also *National Executors and Trustees Co of Tasmania Ltd v Edwards* [1957] Tas SR 182; *Smith v McCabe* [1957] VR 518; *Bayview Properties Pty Ltd v A-G (Vic)* [1960] VR 214; *Commissioner of Stamp Duties (NSW) v Henry* (1964) 114 CLR 322; *Antonio Giorgio Pty Ltd v Commonwealth* [1986] ACTSC 17 (11 March 1986); *Pikes Wines Pty Ltd v Kelly* (2000) 211 LSJS 159; *Roads and Traffic Authority (NSW) v Collex Pty Ltd* [2009] NSWCA 101 (7 May 2009); *Primary RE Ltd v Great Southern Property Holdings Ltd (rec & mgr apptd) (in liq)* [2011] VSC 242 (8 June 2011) [93] (Judd J).

199 *Commissioner of Stamp Duties (NSW) v Henry* (1964) 114 CLR 322, 327 (Dixon J), 329, 331 (Kitto J).

200 *Hindmarsh v Quinn* (1914) 17 CLR 622, 630–2. See also *Bellinger v Hughes* [1911] 11 SR (NSW) 419, 425 (Pring J).

201 Edgeworth, *Butt's Land Law*, above n 11, 590–1 [9.860].

and growing of crops (including the High Court decision in *Hindmarsh v Quinn*)²⁰² which did not refer to the legislation or rules,²⁰³ even when the commodity was deemed to resemble an annual crop.²⁰⁴ In one case, the Court held that there was both a licence to collect and purchase a crop, but there was negligible discussion of the earlier cases.²⁰⁵ However subsequently, the *Statute* and decisions under it have been influential.

(i) *The ‘Warehouse’ Principle*

Some judges have considered the *Marshall v Green*²⁰⁶ principle that where the timber is to be cut and removed immediately or after a short period of time, then the transaction is the sale of chattels.²⁰⁷ For example, in *McCauley v Federal Commissioner of Taxation*,²⁰⁸ a landowner agreed that a purchaser could cut and remove standing timber during a 12-month period. The consideration was the ‘price or royalty of three shillings ... for each and every one hundred (100) superficial feet of such milling timber so cut’.²⁰⁹ A majority of the High Court held that the payments constituted a royalty and were assessable as income.²¹⁰ However Rich J, in dissent, drew a sharp distinction between the sale of timber as chattels and the creation of profit.²¹¹ Referring to *Marshall v Green*, he held that as the timber had to be removed within a relatively short period, the payments were for a capital asset (notwithstanding the contractual description) and the instalments were not income.²¹²

(ii) *‘Fructus Naturales’ and ‘Fructus Industriales’*

Early cases overlooked the significant distinction between *fructus naturales* and *fructus industriales*.²¹³ Indeed, it was only in and after 1981 that courts directly confronted the application of the distinction in agricultural production.²¹⁴ Thereafter, Australian commentators have generally accepted the distinction

202 (1914) 17 CLR 622.

203 *Ferres v Cope* [1928] SASR 415; *Newland v Cooper* [1940] SASR 40; *Moore v Collins* [1937] SASR 195; *Bellinger v Hughes* [1911] 11 SR (NSW) 419; *Lamond v Calcraft* (1945) 53 SR (NSW) 103; *O’Keefe v Ellis* [1961] Tas SR 169.

204 *Nicholls v Lovell* [1923] SASR 542, 546 (Poole J).

205 *Kouveras v Angas* [1919] SALR 98.

206 (1875) 1 CPD 35.

207 Other cases include consideration of whether investors in a pine plantation scheme had acquired a profit: *Australian Softwood Forests Pty Ltd v A-G (NSW) ex rel Corporate Affairs Commission* (1981) 148 CLR 121; and whether growing palms are chattels for the purpose of applying the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW): *Richardson v Roads and Traffic Authority (NSW)* (1996) 90 LGERA 294.

208 (1944) 69 CLR 235.

209 *Ibid* 238 (Latham CJ).

210 *Ibid* 240–2 (Latham CJ), 248 (McTiernan J).

211 *Ibid* 244 (Rich J).

212 *Ibid* 244–5 (Rich J).

213 See, eg, *Hindmarsh v Quinn* (1914) 17 CLR 622; *Kouveras v Angas* [1919] SALR 98; *McCauley v Federal Commissioner of Taxation* (1944) 69 CLR 235; *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1.

214 *Warren v Nut Farms of Australia Pty Ltd* [1981] WAR 134.

between *fructus naturales* and *fructus industriales* and that profits apply only to the former, even in situations where there is no sale involved.²¹⁵ However, the modern judicial approach to *fructus naturales* and *fructus industrials* has not been as straightforward and although this has been noted, it has not been fully explored.²¹⁶ Instead, modern courts have displayed three different approaches to this issue.

Ignoring the Distinction

Consistent with approaches in the early 20th century, some courts have ignored the distinction between *fructus naturales* and *fructus industriales* even where the case has concerned crops or timber such as when a party has planted valuable palm trees,²¹⁷ participated in forestry schemes²¹⁸ or retrieved timber, including dead trees.²¹⁹

A Strict Distinction

The application of a strict distinction between *fructus naturales* and *fructus industrials* appears to have occurred principally in NSW. In *Ellison v Vukicevic*,²²⁰ Young J endorsed the difference between a profit and a sale of goods based on the distinction between *fructus naturales* and *fructus industriales*.²²¹ In *Permanent Trustee Australia Ltd v Shand*,²²² Young J reiterated the distinction and added that ‘it is only the right to remove a crop which does not require attention after initial planting that qualifies as a profit’.²²³ In *Clos Farming Estates Pty Ltd (recs and mgrs apptd) v Easton* (‘*Clos*’),²²⁴ the NSW Court of Appeal confirmed this approach although there was no sale of goods involved. The plaintiff registered a plan creating an estate comprising 80 lots. The lots were sold to purchasers and the plaintiff retained a lot to which it purportedly annexed an express easement for the farming of crops and viticulture on part of each of the other lots.²²⁵ Bryson J held that neither an easement nor a profit had been created. Although the precise meaning of the words *fructus naturales* and *fructus industriales* was difficult to understand and apply, ‘[a]ny system of characterisation which regarded cultivation of vines and the production of grapes as a natural process as distinct from a process of industry would be unrealistic and incomprehensible’.²²⁶

215 See Edgeworth, *Butt’s Land Law*, above n 11, 590–1 [9.860]; Brendan Edgeworth, ‘The *Numerus Clausus* Principle in Contemporary Australian Property Law’ (2006) 32 *Monash University Law Review* 387, 415–17.

216 See *Australian Securities Commission v United Tree Farmers Pty Ltd* (1997) 24 ACSR 94, 102.

217 *Silovi v Barbaro* (1988) 13 NSWLR 466.

218 *Equuscorp Pty Ltd v Acehand Pty Ltd* [2010] VSC 89 (30 March 2010).

219 *Four Oaks Enterprises Pty Ltd v Clark [No 2]* (2003) 12 Tas R 125.

220 (1986) 7 NSWLR 104.

221 *Ibid* 116–18.

222 (1992) 27 NSWLR 426.

223 *Ibid* 432.

224 (2002) 11 BPR 20 605.

225 *Ibid* 20 606–8.

226 *Clos Farming Estates Pty Ltd (recs & mgrs appt) v Easton* (2001) 10 BPR 18 845, 18 865 [67].

He also held that a profit was ‘a right to take part of the land or the creatures on it’²²⁷ and ‘[t]his is not a description which could possibly be applied to a right to carry out vineyard establishment works, plant and replant grapevines and crops, plant and harvest crops, including grapes and other crops’.²²⁸

The Court of Appeal agreed with Bryson J, adding that the express rights were more intrusive than a profit because they included ‘rights to enter and plant and tend the vines and the right to recover payment for the costs associated with such works and the sale of any produce’.²²⁹

Therefore, throughout these cases, the profit’s common characteristic is that it is a right to take produce which is ‘growing ... or deposited upon the land by some agency other than that of man’.²³⁰ The merit of the distinction, particularly if the concept of *fructus naturales* is strictly interpreted, is that it provides a clear indication of whether a profit has been created. However, the distinction may have little modern utility. First, a strict application of the distinction fails to recognise its early medieval origins in tenancy law. Second, the distinction may not always be easy to apply to the facts because it may not explain when vegetation occurs naturally. For example, would non-native plants and trees ever fall within the concept of *fructus naturales* because they would not have existed in Australia ‘without the agency of man’ or is it sufficient that since their introduction they have grown with minimal human assistance? Third, the application of the distinction may be contrary to the express intention of the parties or a significant indication that a grower or investor was to have an interest in the land. For example, in *Clos*,²³¹ the characterisation of the viticulture scheme as being neither an easement nor a profit meant that the express intention of the parties to create some form of proprietary interest in favour of the plaintiff was ultimately ignored in favour of the *numerus clausus* principle.²³²

Evaluation of the Distinction

However, there are Australian authorities which have taken a less restrictive approach.²³³ Indeed, in *Corporate Affairs Commission v ASC Timber Pty Ltd*,²³⁴ Powell J pointed out that a strict distinction ‘does contain an element of over-simplification’.²³⁵

227 Ibid 18 864 [63], quoting *Lowe (Inspector of Taxes) v JW Ashmore Ltd* [1971] 1 Ch 545, 557 (Megarry J).

228 *Clos Farming Estates Pty Ltd (recs and mgrs apptd) v Easton* (2001) 10 BPR 18 845, 18 865 [67].

229 *Clos* (2002) 11 BPR 20 605, 20 617 [58].

230 *Halsbury’s Laws of England*, above n 1, 382 [670].

231 (2002) 11 BPR 20 605.

232 Ibid 20 609–18 [25]–[62].

233 See *Pikes Wines Pty Ltd v Kelly* [2000] SASC 380 (9 November 2000).

234 (1989) 18 NSWLR 577.

235 Ibid 587. See also *Myola Enterprises Pty Ltd v Pearlman* (1993) 17 BPR 34 031.

An important authority is *Warren v Nut Farms of Australia Pty Ltd* ('Warren'),²³⁶ the reasoning in relation to which has largely been unnoticed.²³⁷ A company under an investment scheme arranged for the supply, planting and care of trees until they were ready to bear fruit. The pecan and chestnut trees were grown for their fruit, while the black walnut trees were grown for their wood and fruit. Therefore, the pecan and chestnut trees were of no value in a severed state.²³⁸ The investor was entitled to harvest the crop or to authorise the company to do so.²³⁹ As the trees were not only planted, but subject to ongoing maintenance, it may have been thought that the trees and their fruit were *fructus industriales*. However, Brinsden J held that profits were created in favour of investors because the subject of the agreement was fruit from the land (even though it was subject to cultivation).²⁴⁰ He also questioned the distinction between *fructus industriales* and *fructus naturales*. First, he referred to English commentary which emphasised that a profit was limited to the natural produce of soil or that which required no further attention after planting.²⁴¹ He observed that this view was not appropriate to Western Australian climatic conditions and 'that not much of a crop of fruit would be obtained in this State from a fruit tree without requiring attention through each and every bearing year'.²⁴² Second, he pointed out that there were English authorities which held that fruits and nuts were not considered to be *fructus industriales*,²⁴³ notwithstanding the ongoing maintenance of the fruit trees.²⁴⁴ Third, he effectively applied the converse of the 'warehouse' principle. He held that there was no intention that the trees be immediately severed, but rather 'intended by the agreement that they should remain upon the land and yield benefit from doing so until severance'.²⁴⁵ The pecan and chestnut trees were of no value if they were severed from it and the investors had no general obligation to sever the trees from the land.²⁴⁶

(b) The Meaning of 'Goods' under State Sale of Goods Legislation

Another level of complexity has been added by the meaning of 'goods' under the sale of goods legislation. During the last decade of the 19th century, colonial legislatures replaced the *Statute* and passed their own sale of goods legislation

236 [1981] WAR 134 ('Warren').

237 Cf *Clos Farming Estates Pty Ltd (recs and mgrs apptd) v Easton* (2001) 10 BPR 18 845.

238 *Warren* [1981] WAR 134, 143.

239 *Ibid* 137–8, 140.

240 *Ibid* 142.

241 *Ibid*.

242 *Ibid*.

243 *Saunders (Inspector of Taxes) v Pilcher* [1949] 2 All ER 1097; *Latham v Atwood* (1638) CroCar 515; 79 ER 1045.

244 Baker, above n 104, 734.

245 *Warren* [1981] WAR 134, 143.

246 *Ibid*.

which, inter alia, copied the definition of ‘goods’ in the United Kingdom statute.²⁴⁷ ‘Goods’ include ‘emblems, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale’.²⁴⁸

An issue is whether the definition of ‘goods’ merely replicates the principles established under the *Statute* or whether the definition provides a different measure of coverage. The definition appears consistent with early cases as *fructus industriales* and crops severed from the land before sale were considered to be ‘goods’ under s 17 of the *Statute*.

It is also arguable that a literal reading of the modern definition leaves little room for the creation of a profit because it broadly covers an agreement for an unsevered commodity which is attached to or forms part of the land and is agreed to be severed before sale or under the contract. It is an inclusive definition and ‘things attached to or forming part of the land’²⁴⁹ not only covers crops and timber, but probably also soil and minerals.²⁵⁰

According to the authors of the latest edition of *Benjamin’s Sale of Goods*, the definition has the potential to eliminate any difference between *fructus naturales* and *fructus industriales* and makes the earlier decisions under the *Statute* irrelevant.²⁵¹ Bridge points out that the definition is consistent with the ‘warehouse’ principle and that the practical extension ‘of the definition would lie in the area of *fructus naturales* where the buyer severs’.²⁵² While endorsing a literal and broad interpretation, Bridge has suggested that a ‘possible exception’ may be ‘where the buyer is given an interest in land pending a lengthy maturing of the produce’.²⁵³

Accordingly, an important issue has been whether the (arguably) extended definition changes the general law, because it eliminates the need to refer to the decisions under the *Statute* so that once an agreement falls within the definition, the interest created could never constitute a profit. As Hudson pointed out, there have been mixed academic reactions.²⁵⁴ Some writers have taken the view that previous case law can be still relevant, particularly as the broad definition is prefaced by the words ‘[i]n this Act’.²⁵⁵ Others have stated that the provision ought to be literally applied and no contract to sell and to sever a commodity from land

247 *Sale of Goods Act 1895* (SA) s A2(1) (definition of ‘goods’); *Sale of Goods Act 1895* (WA) s 60(1) (definition of ‘goods’); *Sale of Goods Act 1896* (Tas) s 3(1) (definition of ‘goods’); *Sale of Goods Act 1896* (Qld) s 3(1) (definition of ‘goods’); *Sale of Goods Act 1896* (Vic) which was repealed and now there is the *Goods Act 1958* (Vic) s 3(1) (definition of ‘goods’) which substantially replicated the United Kingdom legislation.

248 *Sale of Goods Act 1893*, 56 & 57 Vict, c 71, s 62(1) (definition of ‘goods’); *Sale of Goods Act 1979* (UK) c 54, s 61(1).

249 *Sale of Goods Act 1893* (UK) 56 & 57 Vict, c 71, s 62(1) (definition of ‘goods’).

250 Bridge (ed), *Benjamin’s Sale of Goods*, above n 102, 86–7 [1-097].

251 *Ibid* 82–3 [1-093].

252 Bridge, *The Sale of Goods*, above n 98, 37 [2.09].

253 *Ibid* 37 [2.11].

254 A H Hudson, ‘Goods or Land?’ (1958) 22 *The Conveyancer* (NS) 137–9.

255 *Ibid* 137–8.

can create an equitable interest in the land, notwithstanding the length of time it takes for the commodity to be severed after the contract has been made.²⁵⁶

In England, the situation remains unsettled in relation to crops and timber, particularly in regard to the application of the ‘warehouse’ principle. Some cases establish that a right to take timber from a forest over many years is a sale of goods,²⁵⁷ while other cases have held that the ‘warehouse’ principle would not apply when there would be a long period before the trees matured and the timber was removed.²⁵⁸

Academic interpretations have differed²⁵⁹ as to how to apply the broad definition to soil and mineral products. Some authors consider that the sale of sand from a quarry is inevitably a sale of an interest in land,²⁶⁰ while others have considered that it could be the sale of goods.²⁶¹ There are two problems. One is that the concept of *fructus naturales* may not extend to soil and mineral products.²⁶² The other is that the extraction of soil or minerals can take a long time, so some courts have considered that such commodities could not be subject to a contract for the sale of goods.²⁶³

In Australia, it appears that the earlier decisions under the *Statute* are at least persuasive (if not authoritative), but there are few decisions on this point. In *Australian Softwood Forests Pty Ltd v A-G (NSW) ex rel Corporate Affairs Commission*,²⁶⁴ Mason J observed in relation to the definition of ‘goods’:

It may be the presence of this definition that has induced courts in later cases to hold that a contract for the sale of growing timber under which the purchaser has the right to enter the land, cut and remove the timber immediately is a contract for the sale of goods. This is presumably on the footing that the property in the timber passes when it is severed from the land under the contract for sale ... In most of the cases the right to cut and remove timber was not created by a deed or formal instrument appropriate to the creation of a profit à prendre. Consequently, the right of the purchaser to enter upon the land to cut and remove timber has been classified as an equitable profit à prendre, something of the nature of a profit à prendre or as an irrevocable licence coupled with an interest.²⁶⁵

256 See generally *ibid.* In relation to modern textbooks, see Harpum, Bridge and Dixon, above n 11, 634–5 [15-026]; N C Seddon, R A Bigwood and M P Ellinghaus, *Cheshire and Fifoot: Law of Contract* (LexisNexis Butterworths, 10th ed, 2012) 853–4 [16.26]–[16.29]; Christian Twigg-Flesner, Rick Canavan and Hector MacQueen, *Atiyah and Adams’ Sale of Goods* (Pearson, 13th ed, 2016) 52.

257 *Kursell v Timber Operators and Contractors Ltd* [1927] 1 KB 298; *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440.

258 *Kauri Timber Co Ltd v Commissioner of Taxes* [1913] AC 771; *Stephenson v Thompson* [1924] 2 KB 240.

259 Bridge (ed), *Benjamin’s Sale of Goods*, above n 102, 87–8 [1-098].

260 Twigg-Flesner, Canavan and MacQueen, above n 256, 58.

261 See also Harpum, Bridge and Dixon, above n 11, 634–5 [15-026], who consider that building materials would be covered by the extended definition.

262 Bridge (ed), *Benjamin’s Sale of Goods*, above n 102, 87–8 [1-098].

263 *Morgan v Russell and Sons* [1909] 1 KB 357.

264 (1981) 148 CLR 121.

265 *Ibid* 131.

While his Honour acknowledged the influence of the sale of goods definition, he accepted that a right to cut timber could create an interest in land.

In *Ashgrove Pty Ltd v Deputy Commissioner of Taxation*,²⁶⁶ Hill J had to determine, inter alia, whether contracts for the sale of standing timber created an interest in land or were sales of goods. The purchaser commenced removing the timber immediately, although there was no obligation to do so.²⁶⁷ Hill J rejected the view that the definition in the sale of goods legislation changed the general law.²⁶⁸ His Honour held that a contract could be both a contract for the sale of goods and create an interest in land under property law,²⁶⁹ although he did not explain how this could work in practice. His Honour applied the decision in *Marshall v Green*,²⁷⁰ observing that the contract would neither be a contract for the creation of an interest in land for the purpose of the general law nor the sale of goods legislation.²⁷¹ The timber was ‘warehoused’ on the land and the agreements were contracts for the sale of goods.²⁷² Although the decision confirmed the ongoing efficacy of the warehouse principle, the result also conformed to the broad definition.

However, other decisions have questioned the all-inclusiveness of the sale of goods definition. In *Mills v Stokman*,²⁷³ a quarry had operated on the land and had dumped waste which included slabs of slate on it.²⁷⁴ In 1955 after the quarry had closed the then-owner of land contracted to sell the slate to Warren, allowing him and his agents, including Stokman, to enter the land to take it.²⁷⁵ Later the land was sold to Mills who refused initially to allow Stokman to do so. Another contract was created in 1961 under which Stokman was acknowledged as the owner of the slate and was entitled to remove it. Mills later prevented the removal of the slate.²⁷⁶ The NSW Court of Appeal²⁷⁷ held that the slate was either a severed chattel from the land due to the process of quarrying or the slate formed part of the land and it had been agreed that the slate would be severed from the land. In either case, the slate fell within the definition of goods²⁷⁸ and Mills acquired the land without the slate.²⁷⁹ The High Court disagreed. During the quarrying process the owners of the land had intended that the slate remain part of the land and it had ‘become integrated at its base with the subjacent soil’.²⁸⁰ The contract to

266 (1994) 53 FCR 452.

267 Ibid 468.

268 Ibid 466–8.

269 Ibid 467.

270 *Marshall v Green* (1875) 1 CPD 35.

271 *Ashgrove Pty Ltd v Deputy Commissioner of Taxation* (1994) 53 FCR 452, 467–8.

272 Ibid 469.

273 (1967) 116 CLR 61.

274 Ibid 65 (Barwick CJ).

275 Ibid 66 (Barwick CJ).

276 Ibid 69 (Barwick CJ).

277 *Stokman v Mills* [1966] 1 NSW 612.

278 *Sale of Goods Act 1923* (NSW) s 5 (definition of ‘goods’).

279 *Stokman v Mills* [1966] 1 NSW 612, 619.

280 *Mills v Stokman* (1967) 116 CLR 61, 71 (Barwick CJ).

sell the slate constituted an equitable profit, granting a right to enter the land and remove it. Mills was bound by his notice of the first contract.²⁸¹

The case has two noteworthy features. One is that the slate was not an ‘emblem’ and so the question was whether the parties had agreed to Warren severing the slate before sale or under the contract. The High Court held that there was no express agreement to sever and an implicit agreement to sever could not be constructed.²⁸² Yet it is difficult to understand how an implicit agreement to sever could not arise because a realisation of rights under the contract arguably depended on it.²⁸³ The other was that the High Court did not discuss earlier analogous cases in which man-made commodities, such as cinders dumped on land, were not subject to a profit.²⁸⁴

In *Warren*,²⁸⁵ Brinsden J also considered whether the trees were covered by the general definition of ‘goods’. He held that the legislation had no application because there no agreement that an investor would sever the trees and ‘there would be no conceivable reason why he should do so in relation to the pecan and chestnut trees as they would be of no use whatsoever in a severed state’.²⁸⁶ The trees were *fructus naturales*.²⁸⁷

C Rights in the Nature of a Profit or Deemed to Be a Profit

It will be recalled that Baalman pointed out (well before such decisions as *Clos*²⁸⁸) that there were no major restrictions on the subject matter of a profit.²⁸⁹ Leaving aside the distinction between *fructus naturales* and *fructus industrials* and the sale of goods legislation, there have been two modern innovative trends extending profits beyond their traditional base. First, there has been judicial recognition of interests which are rights in the nature of a traditional legal profit, which may not create a legal proprietary interest in land, but nevertheless meet some of the characteristics of a profit in a penumbral sense. Second, legislatures have statutorily deemed some interests as profits, although they would not otherwise be considered so.

281 Ibid 72 (Barwick CJ), 75 (McTiernan J), 76 (Kitto J), 79 (Menzies J).

282 Ibid 71 (Barwick CJ), 76 (Kitto J), 79 (Menzies J).

283 See the comments in relation to severance of building materials in Harpum, Bridge and Dixon, above n 11, 634–5 [15-026].

284 *Smart v Jones* (1864) 15 CB NS 717, 724; 143 ER 966, 969.

285 [1981] WAR 134.

286 Ibid 143.

287 Ibid.

288 (2002) 11 BPR 20 605.

289 Baalman, ‘The Neglected Profit à Prendre’, above n 159, 304.

1 *Rights in the Nature of a Profit*

There has been little reference in Australian textbooks to rights in the nature of a profit,²⁹⁰ although there are ample cases where courts have referred to a right ‘in the nature of a profit à prendre’²⁹¹ or ‘an interest in the nature of a profit à prendre’²⁹² or a right ‘analogous to a profit à prendre’.²⁹³ Notwithstanding such descriptions, courts have ultimately determined whether or not a profit has been created. Such decisions have not directly challenged the *numerus clausus* principle in property law (which prescriptively limits proprietary rights to a ‘tight regulatory regime’ of corporeal and incorporeal hereditaments,²⁹⁴ including profits²⁹⁵ and licences).²⁹⁶

The earliest right in the nature of a profit was the equitable profit. The failure to comply with the strict method of creating a profit by deed became less critical as courts held that other forms of writing accompanied with valuable consideration could create ‘something in the nature of a profit’²⁹⁷ which would be protected by equitable relief.²⁹⁸

However, the modern cases disclose three other bases upon which rights in the nature of a profit may arise.

First, it may be uncertain whether the claimed right is capable of forming the subject matter of a grant. In *Vanstone v Malura Pty Ltd*²⁹⁹ the plaintiff was entitled to enter land to gather and burn mallee roots for making charcoal. Although the initial subject matter was *fructus naturales*, the agreement envisaged industrial processes on the land prior to the charcoal’s removal. Legoe J held that the agreement:

290 At best it has been merely noted: Edgeworth, *Butt’s Land Law*, above n 11, 594 [9.930]. See also Brendan Edgeworth et al, *Sackville and Neave: Australian Property Law* (LexisNexis Butterworths, 10th ed, 2016); Moore, Grattan and Griggs, above n 11, 883–5 [17.450]–[17.465] where there appears to be no reference at all to this concept.

291 *Mills v Stokman* (1967) 116 CLR 61, 77 (Kitto J); *Bayview Properties Pty Ltd v A-G (Vic)* [1960] VR 214, 215; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 350 (Wilson J); *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd (admin apptd)* [1998] NTSC 97 (27 November 1998) [14]; *Clos* (2002) 11 BPR 20 605, 20 615 [51]; *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656, 664 [22].

292 *Moreland Timber Co Pty Ltd v Reid* [1946] VLR 237, 243 (Macfarlan J); *Clos Farming Estates Pty Ltd v Easton* (2001) 10 BPR 18 845, 18 862 [54].

293 *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567, 580, 584–5; *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1, 15 [56]; *Collins v Northern Territory* (2007) 161 FCR 549, 577 [81] (French J). See also *Lime Nominees Pty Ltd v Adelaide Brighton Cement Ltd* [2014] WASC 503 (23 September 2014) [21].

294 Edgeworth, ‘The *Numerus Clausus* Principle in Contemporary Australian Property Law’, above n 215, 388.

295 *Ibid* 415.

296 *Ibid* 388, 408.

297 *Australian Softwood Forests Pty Ltd v A-G (NSW) ex rel Corporate Affairs Commission* (1981) 148 CLR 121,131 (Mason J).

298 *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 632 (Dixon J). See also *Williams v De Biasi* [1992] FCA 393 (18 August 1992) [62]; *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534, 554 [72] (Barrett J).

299 (1988) 50 SASR 110.

created a contractual interest in the land coupled with a licence to enter the land in order to produce a product from the mallee roots on the land. It was at least in the nature of a profit à prendre if not a profit à prendre in the strict sense. It was not a mere licence to collect and take away the mallee roots, but was in addition a right for the grantee to bring on to the land equipment and assistants to produce charcoal by process of burning the mallee roots and working the burnt wood by sieving, blowing and finally transporting off the property ...³⁰⁰

Although the concept of a contractual interest in the land may seem contradictory because contracts create personal rather than proprietary interests, Legoe J decided that the agreement was for valuable consideration and created an equitable profit.³⁰¹ However, other attempts to stretch the notion of a profit beyond its origins have been rejected, such as the argument that rights in a management agreement granting a share in the rents and profits of a building was the same thing as taking something out of the soil.³⁰²

Second, courts have considered that the concept of a licence coupled with a grant of a proprietary interest or a licence coupled with an interest in land is a profit³⁰³ so that if a person is granted a profit, she has an irrevocable licence to enter the land.³⁰⁴ However, this may not always be the case because courts have recognised licences to enter the property for the purpose of taking a chattel interest or an interest which in some way falls short of a profit.³⁰⁵ Therefore, if there was a concern that the interest did not fully constitute a profit, a flexible fallback position was that it comprised an irrevocable licence coupled with a lesser interest. For example in *Australian Softwood Forests Pty Ltd v A-G (NSW) ex rel Corporate Affairs Commission*,³⁰⁶ Mason J held in relation to a plantation agreement that even if the investors' interest was not a profit 'in the strict sense',³⁰⁷ the contract indicated that 'the evident intention of the parties was that the grower was to have a continuing interest in the land which would culminate in his severance and removal of the trees'.³⁰⁸

Third, courts have considered whether the creation of statutory licences (which are not expressly deemed to be profits), constitute profits, particularly where the subject matter of the licence conforms to the subject matter of a traditional right

300 Ibid 128.

301 Ibid.

302 *AAT Case 6225* (1990) 21 ATR 3691, 3699–700 [38].

303 *Wood v Leadbitter* (1845) 13 M & W 838; 153 ER 351; *Bellinger v Hughes* (1911) 11 SR (NSW) 419, 422; *Lamond v Calcraft* (1945) 53 SR (NSW) 103, 106 (Roper J); *Stow v Mineral Holdings (Australia) Pty Ltd* [1975] Tas SR 25, 49–50 (Neasey J); *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd* [1998] NTSC 97 (27 November 1998) [20]; Edgeworth et al, above n 290, 10 [1.16].

304 *Naylor v The Canterbury Park Racecourse Co Ltd* (1935) 35 SR (NSW) 281, 284 (Jordan CJ).

305 *Moore v Collins* [1937] SASR 195, 212 (Cleland J). See also *Chapman v Strawbridge* [1910] SALR 118; *Bellinger v Hughes* (1911) 11 SR (NSW) 419; *Kouveras v Angus* [1919] SALR 98; *Mills v Stokman* (1967) 116 CLR 61, 71 (Barwick CJ); *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* [2007] 2 Qd R 373, 382 [24]–[25] (Holmes JA).

306 (1981) 148 CLR 121.

307 Ibid 132.

308 Ibid.

of common. For example, in *Harper v Minister for Sea Fisheries*³⁰⁹ the High Court considered a licensing system for the commercial exploitation of abalone. The Court held that the licence was a personal interest which was ‘an entitlement of a new kind created as part of a system for preserving a limited public natural resource’.³¹⁰ Nevertheless, the Court recognised that the privilege under the licence could be compared to a profit and was similar to the common of piscary.³¹¹ The payment of the licence fee was ‘a charge for the acquisition of a right akin to property’.³¹² The Court stopped short of creating a new proprietary interest which may have challenged the *numerus clausus* principle and left uncertain what were the concrete characteristics of ‘a right akin to property’.

In *R v Toohey; Ex parte Meneling Station Pty Ltd*³¹³ the High Court considered, inter alia, whether land subject to a grazing licence (under the *Crown Lands Act 1931* (NT)) was ‘unalienated Crown land’ which could be subject to an aboriginal land claim under Commonwealth legislation.³¹⁴ It was contended that the licence created a proprietary interest in the nature of profit so that the land was not unalienated Crown land amenable to an aboriginal land rights claim. The Court held that grazing and pasturage fell within the classical concept of a profit. However, the licence did not create an interest in the land because it did not display proprietary features. The licence was neither irrevocable nor capable of assignment.³¹⁵

At this point, it is appropriate to consider briefly whether profits have a role in modern native title claims, particularly as a basis for a claim in view of the strong spiritual and existential connection of indigenous Australians to the land. It is not the purpose of this article to discuss native title in depth, but there are several core characteristics to keep in mind. Native title ‘reflects the entitlement that Indigenous inhabitants have to their traditional lands in accordance with their own laws and customs’.³¹⁶ It is recognised by the common law although it lies outside the common law.³¹⁷ Native title has been recognised as a bundle of rights³¹⁸ which are broadly proprietary.³¹⁹ However, native title is weak because it

309 (1989) 168 CLR 314.

310 Ibid 325 (Mason CJ, Deane and Gaudron JJ). See also *Bienke v Minister of Primary Industries and Energy* (1996) 63 FCR 567, 584–5.

311 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314, 325 (Mason CJ, Deane and Gaudron JJ), 333–5 (Brennan J).

312 Ibid 335 (Brennan J).

313 (1982) 158 CLR 327.

314 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

315 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 342–3 (Mason J), 353–4 (Wilson J).

316 Edgeworth, *Butt’s Land Law*, above n 11, 1014 [14.260].

317 *Fejo v Northern Territory* (1998) 195 CLR 96, 128; *Yanner v Eaton* (1999) 201 CLR 351, 383–4 [73]–[76] (Gummow J); Edgeworth, *Butt’s Land Law*, above n 11, 1016 [14.280].

318 *Ward v Western Australia* (1998) 159 ALR 483, 508; *Akiba v Commonwealth* (2013) 250 CLR 209, 229 [29], 232–3 [39] (French CJ and Crennan J); Edgeworth, *Butt’s Land Law*, above n 11, 1020 [14.330].

319 Edgeworth, *Butt’s Land Law*, above n 11, 1015–16 [14.280].

may be extinguished expressly or indirectly by the creation of inconsistent rights such as grants in fee simple or some kinds of leases.³²⁰

It is arguable that the traditional subject matter of profits and native title claims can overlap because both concern interests connected to land, although native title interests may cover ceremonial and religious rights.³²¹ Nevertheless, an interesting dichotomy exists in the legal treatment of native title claims and profits. Native title claims are not accorded the proprietary status and protection of a profit (pending the determination of their validity) with the result that they cannot be alienated outside the indigenous group³²² and are potentially vulnerable to inconsistent rights. However, profits may be registered and survive the ‘re-grant’ of the fee simple in the Torrens system³²³ or the grant of a lease. In particular, profits by prescription³²⁴ which lack the formal process of writing, but arise by virtue of a long connection and use of the land, may survive the creation of other interests such as leases. Moreover, the decision in *R v Toohey; Ex parte Meneling Station Pty Ltd*³²⁵ does not exclude the possibility that a legislative grant of a profit or a right in the nature of a profit could extinguish one or more of the rights constituting a native title claim.³²⁶

2 Interests Deemed to Be Profits

While native title claims are not deemed to be profits, some legislatures have had no hesitation deeming some commercial interests associated with land (which would otherwise not constitute profits at general law) as profits. For example, NSW has passed legislation which deals with the planting and harvesting of crops (which would otherwise be precluded by the distinction between *fructus naturales* and *fructus industriales*) and carbon sequestration (which was not the subject matter of rights of common or modern profits).³²⁷ The legislation recognises ‘forestry rights’³²⁸ and permits the imposition of ‘forestry covenants’³²⁹ over land subject to forestry rights. A ‘forestry right’ is deemed to be a profit³³⁰ and is an interest entitling a person to enter land and establish, maintain and harvest a crop of trees and/or the fruit of the trees³³¹ with or without a right to construct and use such buildings, works and facilities as are necessary or convenient for that purpose. However, the legislation is not all-inclusive. While the ‘forestry right’

320 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 68–70 (Brennan J), 110 (Deane and Gaudron JJ); Edgeworth, *Butt’s Land Law*, above n 11, 1011–26 [14.210]–[14.400].

321 Edgeworth, *Butt’s Land Law*, above n 11, 1015 [14.270].

322 *Ibid* 1016 [14.290].

323 *Ibid* 1021–3 [14.360].

324 *Ibid* 593 [9.900].

325 (1982) 158 CLR 327.

326 See also *Alcoota Aboriginal Corporation v Gray* (2003) 13 NTLR 170.

327 A similar approach has been taken in Tasmania: *Forestry Rights Registration Act 1990* (Tas) s 5. See also *Primary RE Ltd v Great Southern Property Holdings Ltd* [2011] VSC 242 (8 June 2011).

328 *Conveyancing Act 1919* (NSW) s 87A.

329 *Ibid* s 88EA.

330 *Ibid* s 88AB(1). See *Equuscop Pty Ltd v Acehand Pty Ltd* [2010] VSC 89 (30 March 2010) [46].

331 *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426, 433.

concept probably covers the situation in *Warren*³³² or *Australian Softwood*,³³³ it would not cover the viticulture in *Clos*.³³⁴ Indeed, the decision in *Clos* postdated the legislation creating statutory forestry rights in NSW.³³⁵

Forestry rights can also include carbon sequestration which is a right to the legal, commercial or other benefit of carbon sequestration by an existing or future tree or forest on the land.³³⁶ The inclusion of carbon sequestration is unusual because it appears to reverse the traditional profit, while not challenging the *numerus clausus* principle. The aim is to store carbon as a commodity on the land for commercial gain (rather than taking it from the land) and create a proprietary interest in favour of the holder of that right.

Some other states have also elevated forestry rights to the status of profits, although the language employed is different. In Queensland, a forest agreement must be registered as a profit³³⁷ and a plantation licence is ‘in the nature of’ a profit and confers an interest in land.³³⁸ In Western Australia, a timber share-farming agreement³³⁹ is a profit and has all its attributes including, but not limited to, assignability.³⁴⁰

The statutory provisions in NSW, Tasmania and Queensland raise a hitherto unexplored issue: what is the nature and extent of an interest ‘deemed’ or ‘in the nature of’ a profit?³⁴¹ It has been determined in cases unconnected to profits that ‘deemed’ and similar expressions are devices ‘for extending the meaning of a term to a subject matter which it properly does not designate’.³⁴² Accordingly, the legislative responses are fictions where interests which may not constitute profits in the general law are elevated to that status for the purpose of the statutory provisions. However, such provisions are strictly construed and limited to the purposes of the legislation, so that theoretically at least the interest would not constitute a profit for other purposes.³⁴³

D Profits and the Torrens System

Considering that the Torrens system has operated in Australia for nearly 160 years, the specific regulation of profits has been a relatively late occurrence. In the

332 [1981] WAR 134.

333 (1981) 148 CLR 121.

334 (2002) 11 BPR 20 605.

335 *Carbon Rights Legislation Amendment Act 1998* (NSW) sch 1.

336 *Conveyancing Act 1919* (NSW) s 87A.

337 *Forestry Act 1959* (Qld) ss 61JA–61JB.

338 *Ibid* s 61QC.

339 *Forest Products Act 2000* (WA) s 52(2)(a).

340 *Ibid* ss 54(1), (4).

341 In other states, such forestry and sequestration rights are not deemed to be profits, but the owner of the land can grant rights which can be registered on the title of the land: see, eg, *Climate Change Act 2017* (Vic) ss 3, 63.

342 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 151 [4.43]: other expressions include ‘as if’ and ‘shall be taken to be’.

343 *Ibid*.

19th century, Robert Torrens proselytised his system of title-by-registration, but the status of profits was never considered to be important for the implementation of this system.³⁴⁴ Baalman commented that the creators of the Torrens system ‘made a poor job of incorporeal hereditaments generally’³⁴⁵ and profits ‘were not mentioned at all’.³⁴⁶ For example, in South Australia, the first state to introduce the Torrens system, the legislative scheme did not expressly mention profits.³⁴⁷ In NSW, the statutes which created and developed the Torrens system did not expressly incorporate profits.³⁴⁸ While profits were incorporated into the system of forest preservation and management in NSW in 1972,³⁴⁹ it was only in 1987 that the statute governing the Torrens system was amended to apply, inter alia, the requirements for the grant of a possessory application or the creation of easements to profits.³⁵⁰ Prior to major legislative amendments, there were only a few academic sources which attempted to evaluate in a prefatory fashion the operation of profits within the system.³⁵¹

How and to what extent profits interfaced with and ought to be incorporated into the Torrens system was essentially addressed in the 20th century and the approach has not necessarily been uniform across the states. There have been three main issues.

First, in all states an unregistered proprietary interest may be protected by a caveat.³⁵² Early cases confirmed that legal and equitable profits are proprietary interests in land which are caveatable interests. For example, courts held that an exclusive right to mine phosphates, copper and other minerals³⁵³ and a right to remove timber over a five year period³⁵⁴ were caveatable and that a failure to caveat could constitute postponing conduct.³⁵⁵

344 See, eg, Sir Robert Torrens, *Transfer of Land by Registration of Title* (1872).

345 Baalman, ‘The Neglected Profit à Prendre’, above n 159, 302.

346 Ibid 303.

347 *Real Property Act 1858* (SA).

348 See, eg, *Real Property Act 1862* (NSW); *Real Property Act Amendment Act 1873* (NSW); *Real Property Further Amendment Act 1877* (NSW); *Real Property Act 1900* (NSW); *Real Property (Amendment) Act 1921* (NSW); *Real Property (Amendment) Act 1928* (NSW); *Real Property (Amendment) Act 1955* (NSW); *Real Property (Amendment) Act 1956* (NSW); *Real Property (Amendment) Act 1970* (NSW); *Real Property (Amendment) Act 1976* (NSW).

349 *Forestry, Soil Conservation and Other Acts (Amendment) Act 1972* (NSW); *Forestry, Conservation Authority of New South Wales and Other Acts (Amendment) Act 1972* (NSW).

350 *Real Property (Forestry Rights) Amendment Act 1987* (NSW) sch 1. See also *Property Legislation Amendment (Easements) Act 1995* (NSW) sch 2; *Statute Law (Miscellaneous Provisions) Act 1997* (NSW) sch 1.

351 See Baalman, ‘The Neglected Profit à Prendre’, above n 159; Robert Stein, ‘Profits à Prendre and Torrens Title in New South Wales’ (1982) 56 *Australian Law Journal* 426; E A Francis, *The Law and Practice Relating to Torrens Title in Australasia* (Butterworth, 1972) vol 1, 544–5.

352 *Land Titles Act 1925* (ACT) ss 104–8; *Real Property Act 1900* (NSW) ss 74F–74R; *Land Title Act 2000* (NT) ss 137–47; *Land Act 1994* (Qld) ss 389C–389L; *Real Property Act 1886* (SA) s 191; *Land Titles Act 1980* (Tas) ss 133–8; *Transfer of Land Act 1958* (Vic) ss 89–91; *Transfer of Land Act 1893* (WA) ss 136K–142.

353 *Re Caveat of Gamboola Cabonne Phosphates Ltd* (1919) 19 SR (NSW) 227.

354 *Connolly v Noone* [1912] St R Qd 70.

355 Ibid 79–80.

Second, the process for the creation and registration of profits as on-the-register interests has been complex. Early statutes did not specifically provide for their creation and registration. Instead, it was arguable (although not conclusive) that profits could be registered under broad umbrella provisions allowing for registrations³⁵⁶ or dealings³⁵⁷ in regard to an ‘incorporeal right’,³⁵⁸ ‘incorporeal hereditaments’³⁵⁹ or where the definition of land included reference to ‘hereditaments corporeal and incorporeal’³⁶⁰ or ‘hereditaments, corporeal or incorporeal’.³⁶¹ It was also suggested that where the legislation allowed for the creation and registration of easements that profits may be included. However, this remained uncertain.³⁶²

New South Wales,³⁶³ Queensland,³⁶⁴ Tasmania³⁶⁵ and the Northern Territory³⁶⁶ have implemented provisions allowing for the creation and registration of profits, generally in the same fashion as easements. In South Australia, the definition of ‘easements’ includes profits³⁶⁷ so that provisions for the creation of easements apply to profits.³⁶⁸ The ACT allows for the registration of incorporeal rights other than an annuity or a rent charge, so that profits may be registered.³⁶⁹ Western Australian and Victorian legislation have general provisions which could apply to profits. Under the Western Australian legislation, an ‘instrument’ can include ‘a document creating [a] ... profit à prendre’³⁷⁰ and instruments may be registered.³⁷¹ In Victoria, the legislation does not mention profits. It has been suggested that, where there is no such reference, it is unlikely that they can be registered.³⁷² Conversely, it has been contended that the creation of profits may be covered by a broad definition of land and the ability to transfer it.³⁷³ In Victoria, it would be necessary to rely on the definition of land which includes ‘any estate or

356 *Real Property Act 1862* (Tas) s 43.

357 *Real Property Act 1862* (NSW) s 42; *Real Property Act 1862* (Vic) s 41; *Real Property Act 1862* (Tas) s 42; *Transfer of Land Act 1874* (WA) s 57; *Real Property Act 1886* (SA) s 96.

358 *Real Property Act 1900* (NSW) s 47; *Real Property Act 1862* (Vic) s 42.

359 *Law of Property Act 1936* (SA) s 7 (definition of ‘land’); *An Act to Make Provision for the Better Administration of Justice in County Courts in the Colony of Victoria 1852* (Vic) s 15.

360 *Real Property Act 1862* (NSW) s 3 (definition of ‘land’); *Real Property Act 1861* (SA) s 3 (definition of ‘land’); *Real Property Act 1886* (SA) s 3 (definition of ‘land’); *Real Property Act 1862* (Tas) s 3 (definition of ‘land’); *Real Property Act 1862* (Vic) s 3 (definition of ‘land’).

361 *Transfer of Land Act 1874* (WA) s 3.

362 Stein, above n 351, 426–7.

363 *Real Property Act 1900* (NSW) s 47. Note also that other legislation also affects the registration of profits in plans of subdivision: *Conveyancing Act 1919* (NSW) s 88B.

364 *Land Title Act 1994* (Qld) ss 97E–97H.

365 *Land Titles Act 1980* (Tas) s 107.

366 *Land Title Act 2000* (NT) ss 118–20.

367 *Real Property Act 1886* (SA) s 3.

368 *Ibid* pt 8.

369 *Land Titles Act 1925* (ACT) s 103G.

370 *Transfer of Land Act 1893* (WA) s 4.

371 *Ibid* s 52(2).

372 Stein, above n 351, 426–7.

373 Douglas J Whalan, *The Torrens System in Australia* (Law Book, 1982) 107; *Ellison v Vukicevic* (1986) 7 NSWLR 104, 119.

interest³⁷⁴ and the Registrar's power to register instruments³⁷⁵ for land transfer.³⁷⁶ Throughout the states, there may also be other statutes which allow for the creation and registration of profits in the Torrens system.³⁷⁷

Third, there is the problem of profits as 'off-the-register' interests. A distinction has to be made between express and non-express exceptions to indefeasibility. Only NSW provides for an express exception to indefeasibility where there is an 'omission or misdescription of any profit ... created in or existing upon any land'.³⁷⁸ This provision protects profits in two situations: when the profit was created when the land was governed by old system title but was omitted when the land was converted to Torrens title; and when the land was under Torrens title and the parties have done all they could do create the profit, but it was not registered.³⁷⁹

In old system title, profits could be created by implied grant, reservation or prescription in the same way as easements. The extent to which non-express profits can be created 'off-the-register' by relying on such principles remains uncertain.³⁸⁰ In addition, prescriptive profits are treated differently in the states. In Western Australia and South Australia, profits may be created by prescription respectively on the reception of the English *Prescription Act 1832*,³⁸¹ or case law.³⁸² In NSW there is authority which does not recognise prescriptive easements in the Torrens system³⁸³ and analogously would not recognise profits.³⁸⁴ The position in the other states remains unclear.

V CONCLUSION

In England, the modern profit emerged from the demise of feudalism and the rise of capitalism. The profit was still in development in England when Australia was 'settled' in 1788. Initially, the profit was not judicially considered and Australian academic lawyers limited its relevance to the bygone manorial system. However, the profit eventually emerged from the shadows and became a critical component of legal land management. As in England, the profit arose in response to economic conditions. Australian economic prosperity fundamentally depended

374 *Transfer of Land Act 1958* (Vic) s 4.

375 *Ibid* s 27A.

376 *Ibid* s 45.

377 See, eg, *Conveyancing Act 1919* (NSW) s 88AA.

378 *Real Property Act 1900* (NSW) s 42(1)(b).

379 Edgeworth, *Butt's Land Law*, above n 11, 869 [12.800].

380 Butt does not envisage creation by implied grant or reservation: *ibid* 592 [9.890]. However, other commentators insist on a registered court order or declaration before such rights can have effect: Moore, Grattan and Griggs, above n 11, 886 [17.475].

381 *Prescription Act 1832*, 2 & 3 Will 4, c 71.

382 *Golding v Tanner* (1991) 56 SASR 482.

383 *Williams v State Transit Authority (NSW)* (2004) 60 NSWLR 286.

384 *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618. An additional limitation is that assuming that profits can be created impliedly or by prescription, they cease to have effect when the land burdened by the profit is transferred to a third party without fraud: at 623–4.

upon the capitalist exploitation and development of land, including agriculture and the extraction of land-based assets. The profit was a fluid concept, supporting economic development, providing a legal basis for taking assets from land and bestowing upon the holder the protection of a proprietary interest. Therefore, for example, commercial parties entered into contracts expressly creating profits and judges evaluated whether a profit best approximated bilateral intention or the circumstances of the case. Later, after commercial use and judicial consideration, legislatures incorporated profits in title-by-registration systems.

The problem has been that the recognition, creation, incorporation and adaptation of profits have been rather haphazard and inconsistent throughout Australia. It is strongly arguable that Baalman was right — profits have and will continue to perform a valuable and innovative function in Australian law, despite earlier naysayers. However, it is submitted that the future of profits will need to be considered in three main ways. First, one major issue will be whether the content of the profit can and ought to be standardised. Subsumed under this consideration will be such matters as the impact of the definition of goods in the sale of goods legislation. Already the subject matter of profits has changed to cover commercial plantations and carbon sequestration while it is unlikely that profits will include protected native fauna and flora. Second, the uniform treatment of the profit (both generally and in the Torrens system) is likely to assume some importance as part of any attempt to arrive at an integrated Australia-wide land law system. Finally, a potential issue is the extent to which profits could be used to assist modern native title claims.