

Policy

Two general types of policy questions:

1. Proposition based (quote based);

- State your understanding of the statement/proposition and your opinion.
- Identify and explain the key concepts – what is the law; what is the policy rationale behind the law?
- Restate your opinion.
- Justify your opinion – reference to cases (and commentaries); show independent thought.
- Conclude by restating your understanding of the statement/proposition and your opinion.

2. Case-analysis:

- State the central issue in the case and your opinion.
- Give a brief summary of the case – facts; outcome; when/what court?
- Identify and explain the key concepts – what is the law; what is the policy rationale behind the law?
- Restate and justify your opinion – refer to the judgments and reasoning of the case; reference to other cases (and commentaries); show independent thought.
- Conclude by restating your understanding of the statement/proposition and your opinion.

TOPIC 1

NEW PROPERTY RIGHTS

New property interests:

- Talk generally about the very slow movement of law in this area- courts rarely recognise new rights.
 - What's the problem with this right?
 - Human body – moral issues/autonomy;
 - Native title – how do we balance two 'systems' of law
 - Spectacle – how far do we want property rights to extend? Are there better laws to deal with this?
 - Restrictive covenants – the ability to do what you want on your property:
 - Look at the characteristics of property:
 - Use, exclude, alienate;
 - Are all made out for this property right?
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- **Can it be property?**
 - What are the elements of property?
 - Use, exclude alienate from Nabalco
 - Does this item satisfy them?
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- **Should it be property?**
 - Are there theories to support your position (refer above)
 - How do these theories apply to the item?
 - Are there policy implications – flow on, morality, social expectations, practicality?
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- **How will it be property?**
 - Parameters
 - Are there any alternatives to property rights?
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- **Are there cases that considered these issues?**
 - How and what did they decide?
 - Analogue and distinguish

GENERAL PROPERTY RIGHTS

- labour theories (utilitarian, natural law tradition, hegel & kant – free will, hume – spontaneous order)
 - **utilitarian:**
 - tragedy of the commons – property rights help to not overexploit resources
 - freeriding – there will be no incentive to free ride if there's no copyright on property
- **natural law tradition (Locke)**
- we own ourselves & our labour
- justified morally, extension of property we have in ourselves
- Locke justifies Doodeward v Spence
- **free will:**
- taking possession = manifesting your own free will and choices
- private property is a good thing
- **spontaneous order:**
- condition of scarcity, property rights create order in possession

- these rights emerge spontaneously
- note that a property right is not a 'thing' it is a right against other legal persons conditioned by the existence of a thing (these rights are abstract)
- rights correlate to duties – obliges the world to refrain from doing something
- 3 cardinal rights – Blackwood J
 - Right to use
 - Right to exclude
 - Right to alienate

NUMEROUS CLAUSUS

- Parties cannot create novel forms of property rights – numerus clausus (closed list) principle
- Parties by mutual agreement cannot create rights over things which bind strangers to the creation of those rights, because:
 - Informational burdens and transaction costs – could discourage the transfer of assets
 - The restrictions could 'sterilise' the use of land
 - Moral objection to imposing duties on those who have not consented
 - Very hard for a stranger to discover these rights if they weren't party to their creation
 - New property rights would need to be created by statute
- Tulk v Moxhay – exception to NC – you can enforce a RC on a 3rd party

TOPIC 5

- Relative title – the party with an older right has the better right

JUS TERTII

- Cannot plead this defence. This is an essential part of relative title
- In UK torts – you can sue both for interference of goods,

Interference With Goods Act UK S 8(1): The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law (sometimes called jus tertii) to the contrary is abolished.

- but in Australia jus tertii prevents this
- Case of Jeffries v Great Western Railways – shows that C cannot deny B's claim by showing A's right

ADVERSE POSSESSION

Adverse possession:

- General issues:
 - Sleeping on rights:
 - ❖ Should owners be compelled to actively exercise their rights and use and maintain property?
 - ❖ In line with economic efficiency theory.
 - ❖ Can holding land be an effective use of it?
 - Timing issues:
 - ❖ Proof becomes more difficult with time.
 - ❖ Risk of indeterminable litigation.
 - At odds with Torrens system:
 - ❖ Indefeasibility may be diminished – is this fair?