

# Topic 1: Concepts of Property

## Defining Property and its Characteristics

### **Definition**

- Property law defines the relationship between legal persons with respect to things
- The term 'property' tends to be used in three different senses:
  - It is employed to indicate the physical object to which various legal rights, privileges, etc. relate
  - It is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object
  - It is used in such a blended sense as to convey no definite meaning whatsoever

### **Characteristics**

- As per Blackburn J in *Milirrpum v Nabalco (1971)*
  - The right to use and enjoy
  - The right to exclude others
  - The right to alienate
- Property rights are *in rem* (enforceable in respect of a thing)
- Property rights are enforceable against the world

## Justifying Property and New Forms of Proprietary Interests

### **Justification of private property**

Ziff's Hierarchy offers 3 questions for the justification of private property:

1. Should there be private property?
  - a. Communal property (owned by everyone) is only beneficial if it is unlimited (eg. air)
  - b. Reluctance to find new property rights as it confers more power to the right holder, and such rights can be enforced against the world
2. What should be the object of private property?
  - a. First occupation theory: whoever found it first

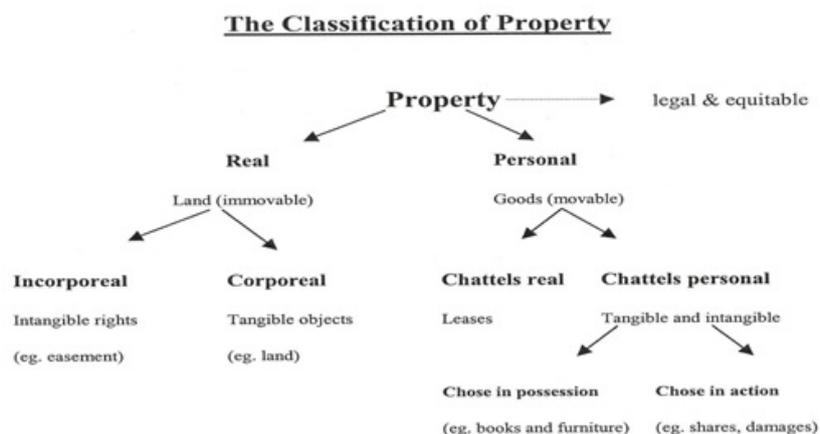
- b. Labour/Locke's theory: if you put effort/work into something, communal property "naturally" becomes your private property as you are entitled to your fruits
  - c. Utilitarianism (Bentham): the state should allocate resources in a way that would be the most useful and beneficial for the greatest amount of people
  - d. Personhood (Hegel): we require property to express ourselves, which is necessary to distinguish ourselves from others
  - e. Economic efficiency (Posner): private property creates incentives to use resources efficiently and prevent waste
3. To whom should the property be allocated?

### **Recognition of new proprietary rights**

- Restrictive covenant
  - *Tulk v Moxhay (1832)*
    - Since a covenant is a contract between the vendor and the vendee, it may be enforced against a subsequent purchaser who has notice of the contractual obligation of his vendor, even though it does not run with the land
- Property in the human body (or body parts)
  - *Bazley v Wesley Monash IVF (2011)*
    - There can be property in sperm, and where that property was vested in the man while alive, it is vested in his executor after his death
- Native title
  - *Milirrpum v Nobalco (1971)*
    - The aboriginals have a connection to the land, but not a proprietary one  
→ only had a religious relationship with the land
  - *Mabo v Queensland (1992)*
    - Radical title  
→ upon arrival in Australia, the Crown acquired radical title  
→ since Australia was inhabited (and not *terra nullius*), radical title did not mean full beneficial ownership, and did not extinguish native title

- Native title
  - common law of Australia recognises a form of native title
  - only the indigenous can have native title, and once it is lost (eg. by purchase, voluntarily, losing connection with land, etc.) it is lost forever
  
- Property in a ‘spectacle’
  - *Victoria Park Racing & Recreation Grounds v Taylor (1937)*
    - There was no property in a spectacle
      - a spectacle cannot be ‘owned’ in any ordinary sense of the word
    - No proof that nuisance had been brought upon the track
      - defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff’s land or by describing it to other persons
    - No existence of a legal right to privacy
    - Building the platform was not an unnatural use of property, as it did not breach any bylaws

## Classification of Property



- Basic distinction in property law is between real property (land) and personal property (chattels)
  - Real property means that which can be recovered in kind – only things recoverable in kind were the freehold estates in land

- Personal property encompasses everything else, mainly leasehold interests, interests in goods and intangible rights

### **Real property**

- Real property is sub-classified into two areas:
  1. Corporeal hereditaments
    - describes rights of possession, or tangible real property (eg. land)
  2. Incorporeal hereditaments
    - describes lesser rights over land, or intangible real property (eg. easement)

\*\*\* Note: hereditament denotes an interest that passes to the heirs

### **Personal property**

- Personal property is sub-classified into two areas:
  - Chattels real
    - covers leasehold interests
    - designed to indicate both the ‘personal’ nature of leasehold interests and the fact they create proprietary interests in land
  - Chattels personal
    - refers to other forms of personalty (personal property)
    - sub-divided into two areas:
      - Chose in possession
        - covers moveable, physical objects (eg. books, furniture)
      - Chose in action
        - covers intangibles (eg. patents, copyrights, shares)

## Doctrine of Fixtures

### **When is the doctrine of fixtures relevant**

1. Land is sold
  - Fixtures are passed to the buyer under the contract of sale
  - Chattels will only pass if specifically identified
2. Land is mortgaged (or charged)
  - A mortgagee’s security interest will generally include fixtures, but not chattels
3. Land is leased to a tenant

- Special rules apply to fixtures installed by a tenant
- 4. A land owner dies
  - Fixtures automatically pass to those entitled to the real estate, not to those entitled to personal property
- 5. Land is given by gift
  - Only fixtures will be passed to the new owner, not chattels

## Test

1. Presumption
  - *Quicquid plantatur solo, solo cedit* (whatever is attached to the land forms part of the land)
  - A chattel, once attached to the land, becomes a fixture and is classed as real property
  - If the fixture is later detached from the land, it reverts to its status as a chattel
2. Degree of annexation
  - If a chattel is attached to the land other than by its own weight (eg. by screws or bolts), prima facie it is a fixture
  - If a chattel is only attached by its own weight, prima facie the chattel is not a fixture even if it has become embedded in the soil
3. Mode of annexation
  - How strong is the annexation/attachment?
  - Is it easy to remove?
  - Whether removal would cause damage to the land or building to which the item is attached, or the item itself?
  - Whether it would cost more to remove it than the item is worth
4. Object of annexation
  - For what purpose was it attached?
    - Better use of the land → fixture
    - Better use of the object itself → chattel
  - Was it intended to be there permanently or temporarily?