

Topic 1: (A) The Concept and Function of “Property” & (B) Real Property - Introduction to Real Property

This topic considers the meaning and role of the concept of “property” in our legal system and wider society. It then looks at the foundational elements of land ownership, including: the doctrine of tenure and estates; the institution of native title; the legal boundaries of land (focusing primarily on the doctrine of fixtures); the distinction between, and historical origin of, legal and equitable interests; and an overview of the variety of interests that can exist in land.

Corporeal Hereditaments - (physical) fee simple

Incorporeal Hereditaments - (permissive rights) easement/covenants

Summary

- Property is not a thing, it is a bundle of rights
 - There are legal interests and equitable interests (developed by the court of chancery - creating trust between those who deal with each other)
- Doctrine of tenure in all Commonwealth legal systems - the Crown has alienable title (land is held of the Crown) e.g all of the oil, minerals, gas beneath our soil belongs to the Crown for example and they will contract mining companies etc
- Doctrine of estates - the estate of the land as private land owners and dwellers
- The strongest form of ownership is fee simple/freehold
 - There are other types of property interests such as a lease etc
- Old system land is very rare (something like 4% of New South Wales) and deals with deeds (hallmark of old system land)
- Torrens title system (Sir Robert Torrens) a system of registration with a Certificate of Title (Real Property Act was deployed for the purpose of allowing for the Torrens title system)
- Indefeasibility - final/impeachable - can not be defeated
- An easement consists of two lots of land - advancement or next to each other and there is generally a right of access. The party gaining the benefit of the easement is the **dominant** estate (or **dominant tenement**), while the party granting the benefit or suffering the burden is the **servient** estate (or **servient tenement**).
- Profit à prendre allows you to make use of the minerals on the land (naturally occurring) - farming is not a profit

Required Reading (Text, Chapters 1 – 7)

Introduction to general property concepts:

- You can create an infinite number of interests in a piece of land/property etc. When it comes to goods, it generally comes to value.
- Interest means someone has a bundle property rights in your property (being an item, goods, land etc)
- Possession was initially used as a basis of a claim - ownership was hard to prove especially in the earlier centuries when a majority of people were illiterate
- Ownership is not properly defined and is only defined negatively in our system - ownership is the last bundle of rights that are left when all of the other subsidiary rights are taken away
- E.g a block of land - there is a mortgage over the property, an easement, a lease etc all of these are subsidiary rights - last person left is the 'freeholder' which is the closest thing we have in our system to an 'owner' (which is also a bit of a lie - it is more correct to say that the ultimate owner in our system is the Crown which means even a freeholder's right is derivative)
- Property is a relationship between people as property is a right, not a thing (human relationships mediated through a form of rights)

- Difference between property rights and contractual rights. E.g contractual rights are *in personam* (personal rights) which goes back to the concept of privity of contract - in an agreement, you can only make a claim if you are a party to that agreement. Property rights are *in rem* (against the world) which can be against anyone. This gives property rights a power that contractual rights do not have/are taken more seriously
- Rights *in personam* are enforced against particular persons without much regard to the things they might have. Rights *in rem* are rights people have concerning particular things, without much regard to the people against whom those rights might be enforced
- E.g compare a promise to repay someone \$20 they lent to you - it doesn't matter what comes of that \$20 note, it's just the fact that there is an obligation to repay that \$20 (*in personam*) compared to a right (*in rem*) whereby you have lent someone your book - the property rights rest in the book and follow the book
- Property law is primarily about rights *in rem* - a right *in rem* depends upon the continued existence of the thing to which the right relates - if your book is destroyed, the property right is gone. The destruction may give you a right *in personam* against the person who destroyed the book or against your insurance company but it brings to an end your right *in rem*
- A right *in personam* does not depend on the existence of any particular thing but it corresponds to the person's obligation to fulfil a right
- Contracts are often used to move property around which makes this complicated - simple distinction of *in personam* and *in rem* does not often work
- Equity's intervention is also important - it has a complex relationship between property and obligations (often in cases where common law will not recognise obligations or property)
- Property rights usually include rights to use and enjoy (but not everything you 'use and enjoy' is property), exclude (private property is a relatively new concept and property was commonly owned such as in local villages and communities etc), alienate and transfer (ability to move property from one person to another, alienating rights, sharing property)
- **Property rights always relate to, and depends upon the existence of, some particular thing. A property right can be enforced not just against specific persons, but against a wide range of persons**
- Text, Chapter 1. Especially note:
 - *King v David Allen & Sons Billposting Ltd* [1916] 2 AC 54
 - King owned land on which a theatre was to be erected by DA & Sons Billposting. It was agreed that the company would have sole rights to affix posters and advertising on the walls of the theatre for four years. King then leased the land to a third party. The lease did not refer to the agreement between DA and King
 - King unsuccessfully argued that the agreement with DA & Sons created an interest on the land that was enforceable against the lessee
 - The court turned to the contract between King and DA & Sons to refer to the intent of the parties. It did not create an interest, it created a licence. There was nothing in the contract that indicated DA & Sons had a right against the land
 - Who are the rights enforceable against? If it was a lease, the rights would be enforceable to the world at large
 - **Two elements that must be satisfied for there to be a lease**
 - Exclusive possession (See *WA v Brown*)
 - Certainty of Duration (commencement and term) easement
 - *Yanner v Eaton* (1999) 201 CLR 351
 - Gleeson CJ, Gaudron, Kirby, Hayne JJ 365 - 367 [19] - [20]
 - Yanner was well known to police who often visited his house. One time they visited his house, open his freezer and find dead crocodiles that he has caught and butchered them. He was planning on distributing them based on his customary law.