The Concept and Form of property

1. What do we mean by property?

a. Characteristics of Private Property

**Definition**

**NOTE:** It is important to note that ‘property’ describes the relationship between an individual and an object or resource; it does not refer to the object itself.

- The property relationship confers a legally enforceable right or, more accurately, a bundle of rights entitling the holder to control an object or resource.
- Relates primarily to a legal relationship with the object or source being able to tangible or intangible.

The primary defining feature of a property relationship in Western society is the existence of a right to exclude. In Western society, all property relationships will confer upon the holder of rights to exclude the rest of the world, making the property relationship private in nature.

In Western society property is defined as the relationship that an individual has with an object, rather than that object itself. A propriety relationship confers the right to exclusive use, that is, it has a private status. You will own something if that ownership confers upon you the right to exclude the rest of the world.

**General Rights Generally associated with Property Interest**

**Ratio:** The first task of property is not to resolve disputes between people over resources, but to establish a relation between a person and an identifiable thing, which predates disputes between that person and others through his rights over that object.

Ownership rights focus upon rights of use, control and possession over an object and include:

i. The right to exclusive physical control of the property;
ii. The right to possess the property;
iii. The right to use and enjoy the property; and
iv. The right to alienate the property (i.e. transmit, devise or bequeath the property).

There are many different types of objects and resources, which may be amenable to property relationship, and these include:

- Land – As signified by the bundle, ownership of land does not indicate title to a physical portion of the earth so much as a power to enforce certain rights over the land.
- Goods
- Shares
- The benefit of a contract
- The lyrics to a song
- Computer software
- Ideas
- Airspace
- Encumbrances
- Rights attached to land
- Indigenous cultural relationships over land
i) Property as an object – ‘a legal relationship’

**Legal meaning:** right to against the rest of the world

From a legal perspective, property refers to the relationship that an individual has with an object rather than the object itself.

The property relationship confers upon the holder rights to use and enjoy the object exclusively and this exclusivity is enforceable against the rest of the world. The holder therefore acquires a legally enforced concentration of power and control.

**Rule:** High Court in *Yanner v Eaton (CB 10 13)* ‘property is a description of a legal relationship with a thing’.

ii. Property as a right – ‘a legal right to a thing’

**Legal meaning:** right to a thing (right to land and goods)

**Distinguish between two kinds of rights:**
- Property right: right to a particular thing
- Personal right: right against another person in terms of a contract

**Following elements can be deduced from Blackstone’s definition:**

“There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercise over the external things of the world, in total exclusion of the right of any other individual in the universe.” (Blackstone Commentaries on the Law of England) (CB 3)

**a. Dominion (right to use)**

- Control exercised by a person over an object
- Dominion denotes some legally authorised power
- Power concentrated in a specific person(s):
- Right to a bicycle vs right of access to library (x)

**b. Exclusion (right to exclude)**

To exclude others from:

- (a) Enjoying same rights; or (b) interfering with the exercise of rights
- State can enforce exclusion (matter of law not power)

The right to exclude the rest of the world is the primary defining feature of a property right in Western Society.

- This defines the right as an *in rem* right, meaning that the right is *enforceable against the rest of the world* (as opposed to an *in personam* right, which can only be enforced against the other party to the transaction).
- Accordingly, the holder of a property right can enforce that right against the rest of the world.
- The right to exclude others from the property
However, this is not the defining feature of property for indigenous Australians for **native title** over land is defined by proof of a continuing relationship with the land: that is, a connection rather than an exclusion with land.

c. **(External) Things**

- Things must be separate and apart from ourselves
- Physical things (land and chattels)
- Intangible things (shares, patents and trademarks)

d. **External: demarcation of property/boundaries**

- “The first man who, having fenced in a piece of land, said ‘This is mine,’ and found people naïve enough to believe him, that man was the true founder of civil society - Jean-Jacques Rousseau (*Discourse on the Origin and Basis of Inequality Among Men*)

b. **Characteristics of the Property Relationship**

i. **Property in reference to its features**

Property can be defined with reference to its features, such as:

**Transferability of right (too wide)**
- Most rights are transferable (includes personal rights)

**Enforceability of right against other persons (narrower)**

*Rule:* “A real right, such as ownership, is as every first year law student knows, enforceable against the whole world.” [*XZS Industries v AF Dreyer (Pty) Ltd* (2004 (4) SA 186 (W) 196F/G]

- **Right in personam** (enforceable @ person)
  - Enforceable against specific person (parties privy to relationship)
    » Personal right
    » Not depended on existence of thing

- **Right in rem** (operates @ world)
  - Enforceable against a large and indefinite class of people
    » Property right
    » Continued existence of thing

**Basis for division between personal rights and property rights**

**Right to alienate a thing**

- Non-assignable property rights (non-assignable lease)
- Native title rights are not transferable (Millirrump)

**Value**

- Market value (air rights) is an indicator of property ie. market demand and monetary value on an item may point to it being property
- Sentimental value is an indicator or property ie. Handed down family object
- Negative value? (toxic chemicals)
Legal recognition and Native Title

- Property rights must be **recognised** and **legally enforceable**.
- Property and law are born together and die together. Before laws were made there was no property. Take away the laws and property ceases’ (Bentham)
- It is a legal construct; there is no property in absence of a legal system
- Legal identity of property depends on legal system in which it is enforced: Common law, Equity or statute
- Aboriginal rights recognised as proprietary because the common law and statutory framework recognise them
- Aboriginal rights only recognised if rights have their origin in pre-sovereignty law and custom

**Mabo v State of QLD (2)(1992) 175 CLR**

- **Mabo (2):** native title recognised by the common law despite the fact that it did not fit the Western definition of property

**Native title:** interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by indigenous inhabitants (Brennan J) (Vide s 223 NTA (CB 16))

**Native title (special form of property) has special features:**

- Native title is inalienable;
- **Not transferable** to others (transferred from generation to generation or to Crown into its pre-emptive right);
- **Native title is vulnerable**, as it can be extinguished by the Crown’s exercise of radical title
  - Traditional belief of belonging to land
- **Native title is proprietary** (Bartlett):
  - Claim for compensation (**s51(xxxi) CA 1901(Cth)**)
  - Exclusionary because of availability of equitable and common law remedies
  - Burden upon Crown title

**ii. Property according to its context and property as a relationship**
Property as an object of public law/human right

“Property is the institution by means of which all societies regulates access to material resources or things”
(Sackville & Neave Australian Property law 1)
Emphasis seems to be placed upon the characteristic of excludability (making it private).

### c. Classification of Property

- **REAL PROPERTY**
  - (Land and things annexed to it)
    - CORPOREAL HEREDITAMENTS
      - Visible and tangible objects.
        - Eg. Lands, buildings, windmills and fixtures
    - INCORPOREAL HEREDITAMENTS
      - Intangible interests
        - Eg. Easements, profits a prendre, rights of pasture, carbon sequestration
    - CHATTELS REAL
      - Or leaseholders
    - PURE PERSONALITY
      - Or chattels personal

- **PERSONAL PROPERTY**
  - (No land, except for a lease)

- Property rights are limited (*numerus clausus*):
  - Freehold estates; leasehold estates; easements; profits and mortgages
  - Equitable interests: beneficial ownership (trust), equitable lease; restrictive covenants and liens
  - Public interest in property: modified by rights of other

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**S 51 Cth of Australian Constitution Act 1901:**

“...the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power...”

**Victoria:** “Property” is protected by s 20 of Charter of Human Rights and Responsibilities Act, 2006 (Vic): ‘A person must not be deprived of his or her property other than in accordance with law’
General Summary of Rules:

1. Property refers to the relationship between an individual and an object/right rather than the object/right itself. As outlined by the High Court in *Yanner v Eaton (CB 9)* ‘property is a description of a legal relationship with a thing’.
2. Property is enforceable in rem (against all the world).
3. Property confers upon the holder a *bundle of rights*, which refers to the aggregate of rights associated with property enforcement (this metaphor was originally outlined by Wesley Hohfeld and AM Honore (CB 4)).
4. Property only exists where a legal framework exists to support it. In this respect it is, as Jeremy Bentham has stated, a legal construct.
5. One of the primary utilities of property is that it governs the use of things and the allocation of social wealth.
6. Property is a dynamic concept. It can change to meet new social needs and shifting moral perspectives.

Private Property and its advantages:

- Private property protects privacy;
- Private property rewards labour: it is a fair exchange for money/labour;
- Private property promotes security: society grants ‘exclusive possession’ in return compliance with social conditions; it is a social construct;
- Private property has personal and economic incentives: it promotes economic and individual happiness.
i. **Real Property**

The common law distinguishes between real property (real) and personal property (personally).

**Real property** consists of land and interests in land, including fixtures and incorporeal hereditaments, but does not include leaseholds.

- **INCORPOREAL HEREDITAMENTS**
- Intangible Interests
- Eg. Easements (right to use another one's land), profits a prendre, rights of pasture, carbon sequestration rights

ii. **Personal Property**

**Personal property** consists of all forms of property other than real property and is described traditionally by the term 'goods and chattels'. It is the latter, personal property, that we are primarily concerned with.

- Personal property is generally only enforceable by way of a personal action for damages. Under common law, there are three main torts which may be used to protect or receiver chattels; trespass to goods, conversion and detinue.

Traditionally, personal property is divided into chattels real and chattels personal.
**Chattels real — Real Property**

Include interests in land for a fixed term of years, such as leaseholds, and annuities arising out of such interests.

**Leasehold interests**

- Also known as **chattels real**, leasehold interests have been categorized into a specific group because of their ambiguous nature.

**Rule:** A leasehold interest is primarily a personal contract between an owner of land and a tenant, conferring upon the tenant the right to exclusive occupation for a specified period of time in return for the tenant paying an agreed rental to the owner.

- Being personal and contractual in nature, the leasehold interest has not traditionally come within the ambit of ‘real property’ interests, and is thus referred to as belonging to the chattels real class of property.

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**Chattels personal — Personal Property**

Also known as pure personality, includes all other forms of personal property, both corporeal and incorporeal.

**Chattels personal are further divided into**

- *chooses in possession*
- *chooses in action.*

**Choses in possession** are items capable of being the subject of actual possession.

**Choses in action**, also known as things in action, are incapable of physical possession and can only be claimed or enforced by legal or equitable action.

- All personal things are either in possession or in action. Incorporeal personal property is property incapable of being the subject of actual possession and can only be protected by legal action. In this sense, the expression ‘incorporeal personal property’ equates to the term ‘chose in action’.

- Legal choses in action include:
  1. Debts;
  2. Bills of exchange;
  3. Shares in a limited company;
  4. The benefit of a contract;
  5. Shares or stocks in any kind of company;
  6. Copyright;

- Choses in action may be ‘pure’ or ‘documentary’. Pure choses are those rights which are enforceable but are not identifiable by way of any documentary evidence. Documentary choses are enforceable rights expressly set out in specific documents.

**ii. Distinction between Personal Property and Real property: Proprietary vs Contractual Rights**
In examining the distinction between proprietary and contractual interests the following points are relevant:

I. Property is *in rem* whereas contract is *in personam*
   - In order to establish a proprietary interest it must be proven that the holder has an enforceable, *in rem* right to exclude the rest of the world.
   - This contrasts to contractual rights, which are not enforceable against the rest of the world; they are only enforceable against the parties to the contract and are therefore *in personam* in nature.

II. Property confers different rights to contract. These rights may overlap but the foundation of all *in rem* proprietary interests is the right to exclude.
   - It is often difficult to distinguish between *in rem* and contractual rights.
   - A contract which is expressed to exist for the benefit of a third party may be subsequently interpreted by a court as creating a trust for the benefit of the third party and thereby confer an equitable proprietary interest upon the third party; *Trident General Insurance v McNeice*.
   - The factors borne in minds by courts when elevating a contractual right into a trust relationship and conferring an *in rem* right upon a third party to the contract include:
     - a) The nature of the contract and the intention of the parties;
     - b) The impact that the proprietary interest will have upon the third parties;
     - c) The hardship (if any) caused to the contracting parties; and
     - d) The suitability of other, available remedies.

III. Some contracts may commence as *in personam* rights;
   - However, because of their character, come to be treated as proprietary interests: For instance, a lease contract, where a lessor confers exclusive possession upon a lessee, will create a lease estate.

IV. A lease should be distinguished from a license.
   - A license is merely a permission to enter and cannot constitute a property interest although it may be coupled with a contract.
   - In *Cowell* because the majority held that because the contractual license conferred nothing more than contractual rights the only remedy was that of damages.

V. Property can describe many different relationships between a person and an object or a resource and the existence of a contract does not mean that the relationship can never be regarded as proprietary.
As society has developed, new forms of proprietary interest have developed. It is important to recognize that new property must be:

i. Identifiable  
ii. Scope and form must be ascertainable  
iii. Must not impinge on accepted moral boundaries  
iv. Rational that it is beneficial socially, economically, and environmentally.

**Boundaries of ownership: Resources Incapable of Ownership**

**Rights to a spectacle**

- A resource may not be propertised because it has *no tangible presence* and is *not clearly identifiable*. This is the case with a view or a spectacle.
  - Australian courts have regularly held that a view/spectacle is not a resource that is capable of ownership.
    - Primary rationale – this is that the parameters of a spectacle are unclear and to allow an owner the right to exclude the rest of the world from a spectacle or a view interferes with the scope of the property rights held by neighbouring landowners.
      - *A resource is excludable only if it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource.*
      - *A Spectacle is not property and therefore not an in rem right operating against the rest of the world*
Moral Matters – human life

It is accepted that some resources can’t be propertised because it would be contrary to fundamental moral assumptions. Property interests may be ‘overridden’ by the greater social good.

- This is then associated with decent moral living
- Determining the nature and scope however is deceptive as they are in a constant state of change, which highlights the core ambiguity of the CL framework.

Rule: For instance, ownership in human life is generally regarded as impossible because of the unacceptable moral and ethical implications such rights may generate.

Moore v Regents of the University of California: The court dismissed a claim by a patient that he owned his cells and that the defendant’s acts of taking his body cells constituted an interference with his actual ownership. The court held that there already existed sufficient avenues of legal redress without needing to artificially extend the proprietary analysis.

The court concluded that ‘the extension of personal property rights to interfere with proper and effective development of medical research would be socially unacceptable and unjustified.

Topic 2: Personal Property, Possession and Fixtures

1. Introduction

In this topic we introduce personal property and examine the principles associated with the regulation of personal property. Personal property refers to the category of movable objects which do not constitute land.
Historically speaking, there are three major differences between real (land) and personal property (chattels).

1. **The first relates to feudal tenure.** Land is subject to ultimate ownership by the Crown whereas personal property is not.

2. **The second relates to the available remedies for real and personal property.** Real property could be recovered if the owner was wrongfully dispossessed. This did not apply to personal property until the middle of the nineteenth century. Before this time, the owner’s claim was restricted to a personal monetary claim. Hence, possessory title is an important attribute for personal property as an owner of personal property who is dispossessed does not have the real actions available and must rely upon the character of the title that possession confers.

3. **The third difference concerns the fact that the rules relating to descent upon the death of an owner differed depending upon whether the property was real or personal.** Land went to the heir at law (usually the eldest son) whereas personal property went to the next of kin. Primogeniture survived in New South Wales until 1863 when it was abolished by the *Real Estate of Intestates Distribution Act 1862* which came into force on 1 July 1863. Section 1 provided that land of a person who died intestate henceforth would not pass to the heir at law but would vest in the deceased’s legal personal representatives in the same way as chattels real.

This topic is intended to overview personal property, as an independent category of property interests, and to consider fundamental issues relating to possession, title and enforceability pertaining to personal property.

### 2. The Nature of Personal Property

**Define:** Personal property refers to all property interests that do not constitute land or come within the definition of land. (Land, or *real property*, includes not only tangible, identifiable land interests, but also intangible rights associated with the land such as easements.)

**Statutory Law:** Leasehold interests are included w/in the definition of land under the *Property Law Act 1958 (Vic)*

**Common Law:** Leasehold interests remain separately categorised (as part of personal property) under the special heading ‘chattels real’. (In early times leasehold interests were considered to be personal property because the remedy for a person dispossessed was damages (not the recovery of the land itself).

- **Chattels** that have become permanently attached to the land so that they constitute fixtures are also considered to constitute land. (They are treated as part of ‘real property’)

#### a. Distinction between Real and Personal

- The true origins of the dichotomy b/w real and personal property stem from the differing remedies available to each type of property interest:
  - **Real property** - able to be recovered in a real action
  - **Personal property** - personal action