

## What is Property?

- Ordinary people think of property in terms of ‘things’ (e.g. houses and cars (tangible); credit balance, company shares, patent or copyright (intangibile))
- Lawyers refer to property as rights to things, or as a legal relationship between people with respect to things
  - As objects do not have rights themselves, nor can you have rights with an object, there must be other people involved
  - For there to be a right, there must be a correlative duty not to interfere with the interest

### Yanner v Eaton (1999) 201 CLR 351

#### Facts:

- The Fauna Act stated that you are not allowed to hunt animals on Crown Land
- Dispute arose when an Indigenous man from Queensland engaged in hunting on Crown Land

**Issue:** Did Indigenous people have native title rights in terms of hunting?

**Held:** Indigenous people had native title rights that overrode the provisions of the Fauna Act

#### **PROPERTY GIVES POWER OVER THE RESOURCE**

*‘The word “property” is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, “property” does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing.’ - par 17 (Gleeson CJ, Gaudron, Kirby and Hayne JJ)*

### Property as a Bundle of Rights

*Milirrpum v Nabalco (1971) 17 FLR 141 at 171:*

- the right to use and enjoy
- the right to exclude others from use and enjoyment
- the right to alienate – transferring property from one person to another ; sale, gift
- These basic three rights are taken as the hallmarks of property, though there are longer lists of rights e.g. right to income from property, though none are necessary aspects
- Milirrpum (overrode by Mabo) recognised that something might be property without all three rights, and something may be not be property with all three

### Property Rights can be Shared / Fragmented

- Since there are multiple types of property rights, multiple people can own different rights over the same thing.
  - EG. if I own real estate but lease it to tenants, I have given up my right to exclude, but kept my right to alienate
- Only the Crown has absolute ownership over property
  - Another reason why it is more accurate to talk about rights over property

### How are Property Rights different to Contractual/Personal Rights?

*King v David Allen & Sons [1916] 2 AC 54*

### **Facts:**

- King owned a block of land, and made a contract in 1913 with David Allen that allowed DA the right to put up posters on a wall for an annual charge
- The wall was part of a building that later became a picture theatre, which King gave a four-year lease to another company to run.
- DA wanted to place posters, but the picture theatre company refused.

**Issue:** Did the contract between K and DA create a proprietary right?

### **Held:**

#### **WHETHER SOMETHING IS A PERSONAL OR PROPRIETARY RIGHT DEPENDS ON THE CONSTRUCTION OF THE CONTRACT INVOLVED**

- It was held that the contract did not create a property right, as the reading of the term of the contract determined that it implied simply a **license** to place posters, a personal right
- The court recognised that if a **lease** on the wall was given, it may have been a proprietary right, but the terms didn't imply such.

#### **WHY DID IT MATTER THAT IT GAVE A PROPRIETARY RIGHT?**

- No doubt that K gave the picture theatre a proprietary right
- No doubt that DA could sue for compensation for damages based on their contractual rights against K that was breached
- However, DA did not have contractual rights against the picture theatre, as they were a third party

### **The Difference Between Personal and Proprietary Rights**

#### **Sphere of enforceability**

- Property rights are enforceable against more people than personal rights
- E.g. If you have contractual rights, they are only enforceable to the other parties under the contract; if you have a property right, they are enforceable against the entire world.

#### **Remedies**

- The remedy for property is the property itself (a court order to receive the property back, or prevent others from interfering with your right to the property)
- The remedy for contracts is a compensation for damages

### **Justifying Property Rights**

#### **NATURAL RIGHT THEORIES (LOCKE'S LABOUR THEORY)**

- If you create something, you have the right to own it, as you expended labour on it
- Context: in times where people made things more, rather than buying and selling
- Implicated why Australia is settled and not conquered

#### **CONSEQUENTIALIST THEORIES (BENTHAM'S UTILITARIANISM)**

- Utilitarian approach: Law should recognise property rights because they maximise the greatest number of good for greatest number of people

- Good: security, welfare of society, no disturbance of people's sense of private ownership over their portions of wealth
- Positivist aspect: Bentham denied Locke's theory because property rights do not exist due to an expenditure for labour, but because the law recognises it since it maximises good

### EVOLUTIONARY THEORIES (HUME)

- Over time, people started to respect other people's rights to their own property.
- It is a custom, not law, so we should recognise it

### The Objects of Property – What can be owned?

- Concept of property expanded over time, with more things becoming capable of being privately owned – from tangible things to more intangible things
- Things that have once been regarded as shared resources are now capable of private ownership – water, air
- Modern disputes- DNA, carbon sinks, mining fractions

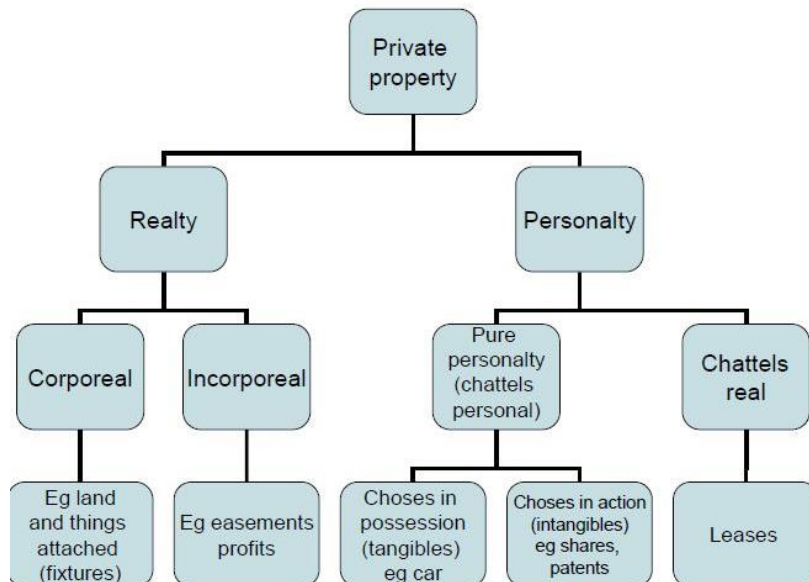
### Human body parts? – Is your body property?

The law says no, whilst you're still alive. However, body parts can be privately owned, especially when they have been subject to labour. Thus, drug companies can own rights over genes.

*Doodeward v Spence* (1908) 6 CLR 406

*Moore v Regents of the University of California* (1990) 793 P 2d 479

## Categories of Property



### Realty v Personality

- In the middle ages, the courts recognised different remedies for the two different kinds of property (realty and personality)
- Realty – The courts would restore as of right to an owner who has been disposed of it

