BAILMENT ........ 35

JUS TERTII DEFENCE [RIGHT OF THIRD PERSON] ........ 35

THE DOCTRINE OF FIXTURES .......... 37

TEST A: DEGREE OF ANNEXATION ........ 38

TEST B: OBJECT OF ANNEXATION [INTENTION] ........ 39

BUNGALOWS: ARE THEY APART OF THE LAND OR INDEPENDENT? ........ 41

TENANTS RIGHT TO REMOVE FIXTURES .......... 43

THIRD PARTIES RIGHT TO REMOVE FIXTURES [CONTRACTUAL/EQUITABLE] ........ 44

FACTORS TO LOOK AT WHEN DETERMINING IF OBJECT IS A FIXTURE OR NOT ........ 44

STATUTORY PROTECTION OF FIXTURES .......... 45

TEST TO DETERMINE ADVERSE POSSESSION .......... 46

TEST A: LIMITATION PERIOD FOR ADVERSE POSSESSION .......... 46 / 53

TEST B: FACTUAL CONTROL .......... 49

TEST C: INTENTION .......... 50

WHAT TO DO IF INTENTION IS NOT CLEAR .......... 51

ACTS OF ADVERSE POSSESSION: CASE EXAMPLE .......... 52

ERRONEOUS BELIEF IS NOT REQUIRED .......... 52

DIFFERENT PERIODS OF ADVERSE POSSESSION MAY BE ADDED TOGETHER TO ESABLISH ADVERSE POSSESSION

 .......... 65
POSSESSION MUST BE CONTINUOUS/EFFECT OF ACCIDENTAL POSSESSION ........ 54

WHICH OWNER IS ADVERSE POSSESSION AVAILABLE AGAINST? .......... 55

WHAT INTERRUPTS CONTINUOUS POSSESSION? ........... 56

WHO CAN’T YOU CLAIM ADVERSE POSSESSION AGAINST? ........... 57

CONSEQUENCES OF ADVERSE POSSESSION ........... 58

FEUDAL ORIGINS OF THE DOCTRINE OF TENURE ........... 62

APPLICATION OF THE STATUTE OF QUIA EMPTORES 1290 ........... 63

THE SETTLEMENT PRINCIPLE: ISSUE WITH INDIGENOUS AUSTRALIANS ........... 64

AUSTRALIAN LAND TENURE: OUR ADOPTION OF THE DOCTRINE OF FEDUAL TENURE ........... 66

OPERATION OF NATURE TITLE IN FEDUAL TENURE: THE DIFFICULTIES ........... 67

THE MABO (1) & (2) DECISIONS ........... 67

RADICIAL TITLE ........... 69

DOCTRINE OF ESTATES: TYPES OF ESTATES ........... 72

CREATION/TRANSFER OF A FEE SIMPLE ESTATE ........... 73

CREATION OF A LIFE ESTATE ........... 73/74

FUTURE INTERESTS ........... 74

TYPES OF REMAINDER INTERESTS: VESTED & CONTINGENT FUTURE INTERESTS ........... 75

TYPES OF CONTINGENT REMAINDER INTERESTS: CONDITION PRECEDENT, CONDITION SUBSEQUENT & DETERMINABLE LIMITATION ........... 76
REQUIREMENTS FOR A VALID EASEMENT .......... 125

METHODS OF CREATING EASEMENTS [EXPRESSLY, IMPLIEDLY, PRESCRIPTION, STATUTE] .......... 127

CONSTRUCTION OF EASEMENTS & REMEDIES FOR INTEREFEERENCE WITH EASEMENT .......... 136

MODIFICATION OR EXTINGUISHMENT OF EASEMENTS ....... 137

NATURE OF COVENANTS: RESTRICTIVE COVENANT VS POSITIVE COVENANT .......... 142

RULE AGAINST PASSING THE BURDEN OF A RESTRICTIVE COVENANT UNDER COMMON LAW .......... 144

PASSING THE BURDEN OF A RESTRICTIVE COVENANT IN EQUITY .......... 145

PASSING THE BENEFIT OF A RESTRICTIVE COVENANT IN EQUITY .......... 150

ASSINGMENT OF BENEFIT OF COVENANT IN STATUTE & IN EQUITY ...... 152

BUILDING SCHEMES ........... 153

EXTINGUISHMENT & MODIFICATION OF COVENANTS ........ 155

REMEDIES FOR INFRINGEMENT OF COVENANTS: CONTRACT & EQUITY ........... 156

TYPES OF MORTGAGES [OLD TITLE, LIEN, TORRENS, EQUITABLE] ........... 157

RIGHTS OF MORTGAGOR [EQUITY OF REDEMPTION, RIGHT TO POSSESSION, LEASES] ....... 163

RIGHTS OF MORTGAGEE [RIGHT TO SUE FOR LOAN MONEY, RIGHT TO ALIENATE, RIGHT TO POSSESSION, FORECLOSURE, POWER OF SALE] ........... 165

DISCHARGE OF MORTGAGE ........... 170

ANSWER GUIDES TO TOPIC 3, 6, 8, 9 & 10 ........... 171 - 183
TOPIC 1: THE CONCEPT AND FORMS OF PROPERTY

MEANING OF THE CONCEPT OF PROPERTY

Property means different things to different people, different times and contexts

Modern Context …Three basic meanings:

1. Things people own
2. Things/Objects themselves:
   - Land (real property)
   - Chattels (goods) (personal property which can be moved)
   - Chattels real – Lease
3. Rights which people have to things (property rights) – ownership/right to property
   - Property right: right to land or goods
     (to be distinguished from:)
   - Personal right: right to another person in terms of a contract (enter into agreement with someone else)

Property is a platform for the rest of private law (Smith)

Property can be defined:

(a) with reference to its features (identity features with reference to its characteristics) – what is the most important feature of property? – ‘it is property because that element is there?’
(b) with reference to its content – focus on content of the right
(c) more broadly as a relationship – relationship between someone and the object of your right – what does a relationship contain?
(d) as an object of public law/human right
(e) by distinguishing it from a personal right – personal right has particular features vs property (distinguish property from other things)

(A) DEFINITION OF PROPERTY ACCORDING TO ITS FEATURES

FEATURES OF PROPERTY (BLACKSTONE)

The following features can be deduced from Blackstone’s definition:

- (a) **Dominion (right to use)**
  - Property is something you own – **you have the right to use** this specific property
  - **Control** exercised by a person over an object/property – **recognised by the legal system**
  - Dominion denotes some legally authorised **power** – power person can exercise over property that is recognised by the law
“Despotic” denotes an absolute power over the object/property

- Power concentrated in a specific **person(s)** (“sole”):
  - Distinguish: right to a bicycle (**property right**) [vested in you, you control it, etc] vs right of access to library (**personal right**) [entitled to the right because of a contract – eg, university has control, not you]
  - Indigenous rights are concentrated in clan/group

**• (b) Things of the world**
  - Outside of a person
  - Things must be **separate** and **apart** from ourselves – distinguish between psychical things and intangible things
  - Physical things (land and chattels) and intangible things (shares, and trademarks)
  - Importance of **object** in property relationship (**Lametti**)

**• (c) Externalised – outside of a person**
  - Demarcation of **property/boundaries** – identify boundaries
  - Must be **identifiable**

**• (d) Exclusion**
  - To **exclude** others from:
    - (a) enjoying same rights; OR
    - (b) interfering with the exercise of rights – private law recognises your property so you can exclude others from using it
    - Exclusion **serves** the **use** interests of property (**Smith**)
    - Power of exclusion is said to be **total**
  - State can **enforce** exclusion (matter of law not power) – ownership protected
  - Excludable: property consists primarily in **control over access** (**Gray**) [eg, having the keys to a car means you can control the car, therefore, you have property]
  - Excludable if it is feasible for a person to exercise regulatory control over access of strangers to benefits of resource (**Gray**)

**Criticism:**
  - Property is **not** an **absolute** concept (“total”) – one may not interfere with rights of others or public property, health and safety – always subject to limitations of law/rights of other people
  - **Not** the **only** right inherent in property (there are other associated rights)
  - Exclusion is not a characteristic of **indigenous relationship**: connection with land rather than exclusion
OTHER FEATURES OF PROPERTY

• (e) Enforceability of right against other persons:

  Right in rem (property rights enforceable against the entire world, not one specific person)
  
  – Enforceable against a large and indefinite class of people
  
  – Continued existence of a thing is required
  
  – Criticism: rather a consequence or feature of a property right than an identification tool
  
  – Universal acceptance of in rem operation of a property right:
  
    – “A real right, such as ownership, is enforceable against the whole world.” (XZS Industries v AF Dreyer (Pty) Ltd (2004 (4) SA 186 (W) 196F/G)

DISTINGUISH FROM:

Right in personam (enforceable against a person) – personal right/contractual right (enforce against the other person in the contract)

  – Enforceable against specific person (parties privy to relationship) – No legal object or thing involved
  
  – Not depended on existence of a thing
  
  – Basis for division between personal rights and property rights (great divide)

• (f) Transferability of right – can you the transfer the right you have to somebody else?

  • Property rights are said to be transferable/assignable

  • Criticism:
    
      – Too wide: most rights are transferable (including personal rights) – not a unique feature of property
    
      – Some property rights are not assignable (non-assignable residential lease)
    
      – Native title rights are not transferable (Millirrump)

• (g) Value – if it has some value, it must be property?

  • Market value

  • Sentimental value (photographs, etc) – is that still property? yes

  • Negative value? (toxic chemicals) (eg, old tv’s, etc) – you have to pay to get rid of it

  • Personal rights also have market value

  • Value not necessary a characteristic of property – not very helpful
• (h) Legal recognition
  • 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
  • Criticism: Other rights are also recognised by law (eg, contracts)
  • 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 (Yorta Yorta)
  • Pre-sovereignty rights may encumber title of Crown upon colonisation
  • Post-colonisation aboriginal rights are destroyed

FEATURES OF PROPERTY

In terms of the features approach the following features of property can be distinguished: (EXAM: use all these features to identify if something is property/not property)

1. Sole dominium
2. External to humans
3. Identifiable (boundaries)
4. Excludability: control over access
5. Enforceability
6. Alienability
7. Value (economic, sentimental or negative?)
8. Legal construct

Criticism of features approach: One must not overstate essential characteristics of property to identify property – focus too narrow (see for example Millirpum decision):

MILLIRPUM V NABALCO (1971)

• Claim that a mining company was interfering with right to perform ritual ceremonies
• Issue: whether Aboriginal customary rights over land qualified as ‘property’
• ‘I think that property in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate [referring to previous features discussed]. I do not say that all these rights must co-exist before there can be proprietary interests, or deny that each of them may be subject to qualifications.’ (Blackburn J)
• According to the court the following incidents of property were absent:
  – No use and enjoyment - right of clan extended to performance of rituals only
– Not exclusionary - no right to exclude other members or other clans;
– Inalienable - no right to alienate the land - Aboriginal custom prohibited transfer of rights

- Held that due to absence of the above features: absence of property rights to land in Anglo-Australian meaning of the term

- Criticism:
  – Rights related to land to which they were connected
  – Right to perform ceremonies can be a property right (compare to easement)
  – Had power to sever connection with land by moving away

**Case overruled in Mabo**

**MABO V STATE OF QLD (2)**

- Native title recognised by the common law despite the fact that it did not fit the Western definition of property
- Native title rights recognised as a new form of property
- **Native title meaning:** 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 16-7))
- Native title (special form of property) has its own special features:
  1. Native title is *inalienable*;
  2. Not *transferable* to third parties (transferred from generation to generation or to Crown into its pre-emptive right);
  3. Native title is *vulnerable*, as it can be extinguished by the Crown’s exercise of radical title
  4. Based upon the 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

**(B) PROPERTY DEFINED WITH REFERENCE TO ITS CONTEXT (HONORE)**

- In Roman law a real right entailed the so-called: *ius utendi, ius fruendi et abutendi* - ‘the right to use, enjoy and abuse a thing’ (within limits of law)
- **Millirrpum v Nabalco:** right to use, exclude and alienate
- In common law property is seen as a *bundle of rights* (metaphor)
• Property includes following elements (forming basis of) property according to Honore:
  1. Right to possess (exclusive physical control)
  2. Right to use (use and enjoyment)
  3. Right to manage (determine who may use and how)
  4. Right to income (right to value generated by thing)
  5. Right to capital (right to consume, waste and destroy)
  6. Right to security (right to exclude others)
  7. Power of transmissibility (right to transfer)
  8. Absence of a term (of termination): indefinite right to enjoy
  9. Prohibition of harmful use (refrain from interfering)
  10. Liability to execution (liability for satisfaction of debt)
  11. Residuary rights (rights which governs entitlements of others)

BUNDLE OF STICK METAPHOR
• Not one right, a bundle of rights
• It confers upon the holder a ‘bundle of rights’ which refers to the aggregate of rights associated with property enforcement
• Bundle can be split up between legal and equitable interests and freehold and leasehold interests – split up bundle between different people
• Provides an accurate description of whom can do what to whom in a relationship and who is entitled to do what
• Problems with “bundle of sticks” metaphor:
  – Abstract treatment of property
  – Defines according to constituent parts and treat each parcel of land similar
  – Problematic with propertisation of natural resources
  – Attempt to analyse legal relationship to smallest atoms (Smith)
  – More of a description than a theory (Smith)
• “Bundle of sticks” metaphor focuses on the collection of interrelated rights rather than a single defined notion
• “Bundle of relationships” – can change, more than one relationship existing

(C) PROPERTY DEFINED AS A RELATIONSHIP – what does the relationship involve?
• Lay language: specific tangible object
• Hohfeld rejected Blackstone’s characterisation of property as a physical thing and the idea of property as an absolute right
• All rights are concerned with relationships and not things (Hohfeld) – relationship between person and thing/object rather than the object itself

• Relational focus rather than an object focus

• Property relationships, however, differs from relationship in case of contract or tort

• Things form the backdrop of relationships (Smith)

• A relationship entails:
  - (a) relationship between property holder and thing (use and enjoyment);
  - and
  - (b) relationship between property holder and third parties (exclusion/enforceability)

• Relationship can be broken down into powers, rights, duties and immunities

• Property is an “exclusive and private relationship (focus on private nature of it) which an individual has with an object or resources which is enforceable against the rest of the world (idea of Blackstone – enforceable against anyone else).”

YANNER V EATON – Acknowledges that ‘property is a description of a legal relationship with a thing’

• Argued: hunting of crocodiles amounted to an exercise of native title rights protected by Native Title Act and the Constitution

• Counter argument: Hunting rights were extinguished by the Fauna Conservation Act
  - S 7(1) of the Fauna Conservation Act 1974 (Qld): - Requires permit, which they didn’t have
    “All fauna is the property of the Crown and under the control of the Fauna Authority”

• Issues:
  - meaning of s 7(1) FCA and its provision that fauna is the property of Crown
    - Fauna: bird/mammal indigenous to Australia
    - Property?
  - Did vesting of “property” create rights inconsistent with rights of hunters (and extinguished rights)?
  - Is property a wide concept (which would extinguish rights) or is it something else (which would not extinguish right)?

PROPERTY AS DEFINED IN YANNER – ‘LEGAL RELATIONSHIP’

- “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. The concept of ‘property’ may be illusive [difficult to define].
- Usually it is treated as a ‘bundle of rights’. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that the
'ultimate fact about property is that it does not really exist: it is a mere illusion.’” per Gleeson CJ (CB 14).

FEATURES OF PROPERTY (YANNER)

- False thinking that property is a thing --- Property is a relationship
- Rather a legally endorsed concentration of power over things and resources
- Property consists in control over access (Gray)
- Property relationship is not a ‘monolithic notion of standard content and invariable intensity’ – not a general concept
- Comprehensive term describing all or any of different kinds of relationships between person and subject matter
- The fact that the term is so comprehensive presents the problem, not the answer to it

LEGAL QUESTION AND SUBMISSION IN YANNER

- What interest in fauna was vested in the Crown when the Fauna Conservation Act provided that some fauna was “the property of the Crown under the control of the Fauna authority”?
- It was submitted that the Fauna Act gave full beneficial or absolute ownership of the fauna to the Crown
- Submission was founded on notion that property is the widest of all terms
- What does the word property mean in terms of a statute? – not a philosophical meaning

DECISION OF THE COURT IN YANNER

- Several reasons why Crown ‘property’ is not accurately described as full beneficial or absolute ownership:
  1. Difficulty to identify what fauna is owned by Crown – mammals in qld? Birds that leave qld?
  2. Meaning of full and beneficial ownership of wild animals?
     - Wild animals at common law: limited property rights
     - Property in Act cannot be equated to property of domesticated animals
     - Ownership connotes right to have and dispose of possession (fauna outside possession and disposition) – Crown does not have the right to dispose of the animals
  3. Fauna Act suggests that property in fauna cannot be equated with property of a domesticated animal
  4. Reasons for vesting fauna in Crown: desirability to provide for some vesting to create royalty system
- Vesting of some form of property was desired
- Term ‘property’ does not necessarily mean full, exclusive or beneficial ownership
• Statutory vesting = fiction expressive in legal short hand of the importance that a State has power to regulate and exploit certain resources (not to have full ownership, but to exercise some control and regulation)

• Property vested in FCA: aggregate of various rights of control by Executive that the legislation created:
  1. rights to limit what fauna might be taken and how it might be taken;
  2. rights to possession of fauna; and
  3. rights to receive royalty in respect of fauna that was taken – demand payment

• The above rights are less than full beneficial ownership

• Comment: State holds fauna in sense of imperium (and not in sense of dominium [full ownership]): guardianship of resources (Pound)

• Native title interest (ito s 223 Native Title Act):
  1. Hunting in terms of the traditional customs and laws of the clan
  2. By those laws and customs the clan had a link to land
  3. Until passing of FCA rights/interests were recognised by common law

• Principle: NT is extinguished by creation of inconsistent rights

• Regulating the way in which interest may be exercised is not inconsistent with continued existence of NT

• Effect of FCA: establish a regime forbidding the taking or keeping of fauna except pursuant to a licence granted by Act

• Regulating aspects of the relationship with land but:
  1. does not sever connection of Aboriginal people with land; and
  2. is not inconsistent with continued existence of NT interests

• The FCA, with reference to NTA and Constitution, did not prohibit or restrict native title holder from hunting crocodiles for personal or non-commercial/communal needs.

• Thus, the FCA did not extinguish NT interests

• How wide is the concept of property? What does it mean in a statue?

(D) PROPERTY AS OBJECT OF PUBLIC LAW/HUMAN RIGHT

• “Property is the institution by means of which all societies regulates access to material resources or things”

• USA Bill of rights example:
  – “No person shall be …. deprived of … property, without due process of law … nor shall private property be taken for public use, without just compensation…” (5th Amendment of the Constitution of the USA) - what is property and what is deprivation?
• S 51 Cth of Australian Constitution Act 1901:

“The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to... (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws; (my underlining)

• 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’

(e) Property in contrast with a personal right

PRELIMINARY FINDINGS

• Difficult to identify a set of core characteristics

• Emphasis seems to be placed upon the characteristic of excludability (making it private)

• Property rights are limited (numerus clausus):
  • Freehold estates, leasehold estates, easements, profits and mortgages [common law]
  • Equitable interests: beneficial ownership (trust), equitable lease, restrictive covenants, liens and equitable mortgages

• Public interest in property: modified by rights of other – restricted by public law interests

• Property has become fragmented in modern world (Vide example, CB p 20-1):
  • Jurisdiction, subject matter, duration of time, culture, statutory.

• Property is seen as a bundle of rights or relationship

• Property rather involves a complex bundle of relationships

• Range of property interests can arise over single piece of land because each is distinctive

• Different forms of property relationships co-exist without conflicting with others

• If interests are in conflict, property law provides rules to resolve conflict: accord priority to a right

JUSTIFICATION OF PROPERTY – why do we have property?

• Rewards labour

• Protects privacy

• Promotes security

• Personal and economic incentives

• Promotes personal liberty (CB 35-36)

• It should be noted that:
– Property remains a social **creation**: not absolute, sacrosanct and government may interfere with it
– Property has led to **monopolisation** of scarce resources
– Property rights are **subjugated** by public interests concerns (environmental law and resource management)

**SOURCES OF PROPERTY LAW**

- Property law doctrine introduced when British Crown claimed sovereignty over Australia a little more than 200 years ago

- **Sources**:
  - Imported English common law (judge-made law and statutes)
  - Equity
  - Enactments of local legislature and court decisions
  - Native title (ongoing indigenous connection to land) was recognised in the *Mabo* decision as a right recognised by the common law but not ‘of’ the common law (new form of property right – *sui generis* form of interest in relation to land - and a new source of Property law)
  - International human rights law having a bearing on property
    - Ex, Article 1 of the First Protocol of European Convention on Human Rights impacts on English law:
      - Provides a **guarantee** of property rights
      - State conditions for **deprivation** – public interest + compensation
      - Allows **control** of the use of property in the general interest by the States

**NEW FORMS OF PROPERTY: ARE THERE NEW FORMS OF PROPERTY WE SHOULD RECOGNISE?**

- Property is a **dynamic** concept – New forms of property can develop/can be recognised especially in reference to goods and chattels, not so much to land as land rights are limited
- Social needs may change, thus, why new forms of property may need to be recognised
- Notion of property may **change** to meet social demands
- New sources are being ‘privatised’ / ‘propertised’ to make it property
- New forms of property can be created by the legislature, by the court (is something personal property? Up to the court to make the decision)
  - In creation of new property by a **court**, the court must be prepared to identify the **object** of property and **entitlements** that attach to the property – Look at the content, ect.
- If new forms of property are created: [Certain criteria should be kept in mind]
1. It must be **definable** *(what is it)*

2. its scope and form must be **ascertainable** *(identifiable)* *(can you identify it in a way)*

3. It must be **transferable** *(not a unique feature, but eventually you may want to transfer it to someone else)*

*(National Provincial Bank Ltd v Ainsworth [1965] AC 1175)*

4. it must not impinge upon accepted **moral** boundaries/principles, whatever they may be in a given society

5. There has to be a socially and economically **imperative** for the creation of new property – Is there a reason why something like this must be recognised? Will people benefit? Economic reason?

- **Parliament** can recognise and create new forms of property: intellectual property: patents, copyright, trademarks and virtual property etc

- **Distinguish between private property and intellectual property** *(specific areas of law dealing with intellectual property, not a tangible thing but a product of the human mind)*

**VIRTUAL PROPERTY**

- In **cyber space** individuals can obtain various kinds of vested interests:
  - domain names,
  - web pages,
  - web sites,
  - online databases, and
  - treasures and credits internet games

- **Valuable**

- **Intangible**, though virtual property is a reality

- Law challenged to bring new kind of resources into theoretical range of property law *(“propertised”)*

- Task of property law to recognise these new forms of property

- **First step**: How do you define these new forms of property? [re: Yanner]

**SOURCES OUTSIDE OF PRIVATE OWNERSHIP**

- Romans distinguished between things capable of private ownership and things not capable of private ownership *(res intra commercium and res extra commercium)*:

- Things outside of commerce:
  - **Common things** *(res communes)* things that were common to all but not capable of appropriation by any:
    - Air, running water and sea [can’t exclude others, not controllable]
– Public things (res publicae): property belonging to the state but intended for public use:
  • Roads, rivers and harbours
– Unowned things: Things not belonging to an owner at a given moment in time but capable of appropriation (res nullius)
  • Wild animals, if you haven’t captured it yet, it belongs to no one, but once caught, you own it
– Religious things (res divini iuris)

NATURAL RESOURCES

• Bracton influenced by Roman law: not all resources amendable to private ownership: [some resources should not be privatised]
  – Public possess rights to natural resources (sea, beaches, parks, air and running water (res communes) (uncontrollable)
  – Public trust over natural resources
  – Immune from ‘privatisation’

• Public possess inviolable rights to natural resources
• Absence of excludability – Nobody has the right to exclude others in relation to common property – Issue: This property may deteriorate
• Statutory control over natural resources – Need for State to control it (EG, Water and minerals are vested in the State to control)
• Natural resources (water/minerals) are vested in the State in Aus
• Basis for environmental law
• Some resources, are, thus outside the boundaries of private ownership pursuant to moral and social principles

RESOURCES INCAPABLE OF OWNERSHIP

(a) RIGHT TO A SPECTACLE (Victoria Park Racing v Taylor 1937) – Whether the right to a spectacle can form the object of a property right?

HELD: Spectacle/View is not property – Not exclusive, too difficult to define boundaries

Reasoning:

Latham CJ

• Owner entitled to look over fence of neighbour
• Neighbour can prevent this by erecting fence
• Race track an put up fences and structures to prevent people from attending without payment
• Can place **notice boards** where not visible to people on outside
• Does not **harm** the owner by describing what takes place on another owner’s land
• Law cannot by **injunction** erect a fence which owner is not prepared to erect

**VICTORIA PARK**

• Expenditure of **money** in creating spectacle does not create **quasi-property** [not almost property]
• No precise **meaning** in phrase ‘property in a spectacle’
• Spectacle **cannot be owned** in the ordinary sense of the word – only property in **metaphorical sense** in absence of legal principle (not definable) – Boundaries of a spectacle not definable

**Dixon J**

• Unlike in the USA, there is no **quasi**-property (broadcasting rights) if an individual has expended effort and incurred expenses in creating something of value
• Does not assume the **exclusiveness** of property because of efforts of someone to obtain value
• The **right to exclude** defendants from broadcasting a description of the occurrence they can see on the plaintiff’s land is not given by law
• Not an interest protected by law or equity

**Evatt J (dissenting)**

• No general right of privacy and no unrestricted right to spy upon neighbour
• A person who uses devices for the purposes of enabling the general public to overlook/spy can be liable in nuisance if appreciable damage, discomfort or annoyance is caused to neighbour
• Surrounding circumstances need to be examined
• Answer lies in private nuisance
• Thus, **spectacle/view** not capable of being owned / ‘propertised’
• **Ratio:** Not **definable**, no tangible **presence**, parameters/boundaries of a spectacle are unclear and exclusiveness of property is absent
• To allow right to exclude the whole world from spectacle or view may impede rights of neighbouring owners
• **Other rights** are used to control access to a spectacle

**(B) MORAL BOUNDARIES:**

• General Principle: **Human life cannot be owned** (slavery abolished)
• Ownership of **human life is** impossible
• Ownership of corpse sometimes acceptable (*Doodeward v Spence*): application of work or skills but subject to right of executor
  o Can acquire rights to human body where forms of skills and labour are applied (e.g., Doctor, Museum)
• **Human corpse** intended for burial/cremation not treated as property; executor has **custody** to deal with body according to law – Corpse not owned by someone [immoral]
• Individual “owner” of own **body parts**
• **Regenerative parts** (blood, urine, sperms etc) **may be transferred in ownership to third party who can claim ownership**
  o Cryogenically stored semen acquired at request during life constitute private property and part of intestate estate (*Roblin v Public Trustee ACT*)
  o Personal asset in his estate – Property should not be denied because it had been given to a third party
• **Non-regenerative** parts (vital organ) not transferable **unless donated** during life/after death
  – Person can donate their organs, dealt with via legislation and regulations
• **Regulations** regarding donor donations are to prevent unlawful trade
• Human **parts** or **tissue** may be needed for medical research (CB 61-2) – If certain cells have been removed from your body and is used for medical research and something is discovered, do you still have property rights over it?

**OWNERSHIP OF CELLS NOT ESTABLISHED …**

**MOORE V REGENTS OF UNI CALIFORNIA**

• Issue: can human tissues that were removed from patient and used for medical research be reclaimed in ownership by patient (from owner of patented cell-line)?
• Moore claimed he **owned** cells and unauthorised use thereof gave him right to sue for conversion
• Held that **ownership** of cells was not established:
  – Did not retain a **sufficient interest/control** in excised cells;
  – California legislation limits control over excised cells;
  – Cell line and products derived from it cannot be Moore’s property because it is **factually and legally distinct** from original cells
  – Held that excised cells are not like **chattels/goods** to support action for conversion:
    – Policy consideration not to extend tort of conversion;
    – Tort of conversion is not necessary to protect patient’s interest;
    – Problems in this area should be resolved by legislation.
  – Uni C had **property rights** over cell-line (patents)
  – Patient cannot claim tissues back because societal policy arguments favouring **medical treatment** outweigh the importance of individual proprietary considerations
  – (Efficiency argument prevailed)
– Extension of personal property rights to interfere with medical research would be socially unacceptable and unjustified

– Individual rights are protected by doctrine of fiduciary duty and informed consent

– Broussard J (dissenting): difficulty with majority’s reasoning on conversion – if cell is stolen by thief in laboratory, Uni C would be able to maintain an action in conversion (Dual issue of ownership of property in body and its products and unethical nature of practice of non-disclosure)

– Note: cause of action was recognised for breach of fiduciary duty or failure to obtain consent

HUMAN TISSUES ACT 1982 VIC

• Ownership over human tissue is dealt with by Aus statutes
• Ss 38-39 Human Tissues Act 1982 (Vic) prohibits buying and selling of human tissue:
  • “...a person shall not sell, or agree to sell, tissue (including his own tissue) or the right to take tissue from his body” (s 38(1)).
  • “.. a person shall not buy, agree to buy, offer to buy, hold himself out as being willing to buy, or inquire whether a person is willing to sell to the person or another person - (a) tissue; or (b) the right to take tissue from the body of another person” (s 39(1)).
• Unlikely that claim for conversion (as attempted in Moore) would succeed.

(C) COMMON HERITAGE OF MANKIND

• Natural resources of the high sea may not be owned/appropriated

Notion of common heritage of mankind (International law applies)

Endorsing private ownership will lead to conflict

• UN Outer space treaty

Space is province of all mankind

No sovereignty claims by states

Property rights contrary to common heritage

Property rights have been asserted

• Moon Treaty
  • Regulating control and ownership of moon
  • Division of lunar resources
  • Res communes concept
  • Private ownership not expressly prohibited
  • Extra-terrestrial real estate
DISTINCTION BETWEEN PROPERTY AND CONTRACTUAL RIGHTS

CONTRACTUAL RIGHT

• A contractual right entails the right to have the contract performed

• Not a right to a thing

• A contractual right is only enforceable against another party to a contract

• In general, not enforceable against third parties

• Enforceable contract entitles party to sue in the event of breach of contract by the other party

• Range of personal remedies

• Personal right against other party to claim damages for breach of obligation

• Remedy: to make good damage

• Contractual right may be interpreted to become property interest (loan contract – mortgage; purchase contract - trust)

PROPERTY RIGHT

• Confers a right over a thing

• Must fall under the recognised categories of property rights (numerous clausus)

• Enforceable against third parties/rest of the world

• Supported by property remedies to preclude anybody (apart from person with better title) from interfering with property rights

• Remedies are different from the law of contract

• Property rights may arise from contract causing an overlap between two systems of rights

• Contract which purports to give rights over things, not necessarily property right: Cinema ticket: right of entry/access; property rights are not conferred [remains contractual right, not property]

• Note: a right to enforce a contract is resource capable of forming subject of property relationship:
  – Ownership of contractual right
  – Shares, insurance policies and bank accounts

DISTINCTION BETWEEN LEASE AND LICENCE

• The distinction between a lease and licence highlights the distinction between property and non-property and a property right and contractual right

  • Issue: (a) is right revocable?

  • (b) is it enforceable against third parties?
Possibilities:

1) **CREATES PROPERTY ... Lease**:
   
   conferral of exclusive possession of that apartment on specific terms, upon terms, for a limited period of time. Not revocable [consequences if revoke] and is enforceable against third parties. – Property right

2) **ONLY CONFIERS A PERSONAL RIGHT ... Licence**:
   
   permission to perform an act on licensor’s land which would otherwise constitute trespass:

   I. **Mere licence**: gratuitous permission to enter land, revocable at will, because the law does not enforce promises without consideration [no payment]. Not supported by a contract. Not enforceable against third parties

   II. **Licence coupled with a contract**: permission to enter supported by contractual arrangement. Revocable even if it amounts to breach of contract. Not enforceable against third parties

   III. **Licence coupled with the grant of a property interest**: permission to enter land in support of a recognisable property interest in land – for instance a right to remove gravel from another’s land (profit à prendre). Not revocable and enforceable against third parties if the land is sold to your successor

**LEASE VS LICENCE: CONCEPT OF ‘EXCLUSIVE POSSESSION’**

- **Lease**: A property interest is created by conferring possession/enjoyment of land - leasehold interest (proprietary)
  
  – Exclusive possession = property interest/right [can exclude everyone including landlord depending on your contract]
  
  – Right *in rem*

  – Classified historically as personal property (don’t confuse personal property with a personal right!)

- **Licence**: permission to do something which without permission would be unlawful (access lawful) – *No exclusive possession*

  – Creation of personal right to *use* land under conditions with owner retaining possession

  – No property interest passes to licensee

  – Property not altered

  – No “despotic dominium” over land

  – Contractual licence (even if irrevocable) not property interest

- **Right to exclusive possession** is used to **distinguish** a lease from a licence:

  – exclusive possession (lease);

  – absence thereof (licence)

- **Opportunity to witness a performance** is not an interest in property/equitable title
Issue: Upon purchase of a ticket, does one acquire an irrevocable licence to remain because he paid for the ticket? … COWELL V ROSEHILL RACECOURSE CO LTD (HC)

• Possibilities:
  o If contractual licence damage limited to admittance fee, could not have been able to claim much
  o If proprietary right the damage recoverable in tort would be greater, more compensation

• **Wood v Leadbitter:**
  o mere licence is revocable at anytime;
  o licence coupled with a property interest (example, easements and profit à prendre, remove gravel from a farm) is irrevocable

• **Doctrine of Wood v Leadbitter:** if a property right is created and a licence is given to enjoy the property right, the grantor cannot divest grantee of property right or terminate property right by breaking agreement. A grantee holds a property right to which licence is an irrevocable incident

• Wrongly decided: Hurst v Picture Theatres: right to see a spectacle = (proprietary) interest. Interest coupled with licence is irrevocable.
  o Hurst was wrongly decided because it ignores the distinction between contractual and property right (therefore, not followed)

**HELD:** No property right in buying a ticket to watch an event

• Buying a ticket for entertainment creates a personal right in the buyer against the seller to have the contract performed. – Have access to the event

• Contractual rights and obligations are created which are enforceable in personam – only a right between yourself and the organisers of the event

• **Breach** of such contract, remedy in damages and not proprietary remedies because you don’t have a property right

• **Distinguish** between a contract conferring possession and enjoyment (lease) and contract conferring right to use land under conditions with owner retaining possession (licence)

• Right to see a spectacle not property interest:
  o Not a tangible thing to be taken from land
  o Personal advantage arising from plaintiff’s presence

• Even if agreed for consideration not to revoke licence, such licence can be revoked where no property interest has been granted

• Such revocation constitutes a breach of contract: damage limited to admission fee.

• Unable to recover damage in tort for exclusion
Upon revocation (even wrongfully) plaintiff becomes a trespasser and removal without use of undue force did not constitute assault

Contract to provide entertainment is not a contract which equity would decree specific performance or restrain by injunction

**SUMMARY**

- **BARE LICENCE** – can be revoked at will of licensor, and for any reason whatsoever (no contractual relationship [no consideration= no contract] and no grant of a property interest)

- **LICENCE CREATED BY MEANS OF A CONTRACT** – revocable at will of licensor, by such revocation the licensor may at common law become liable for breach of contract (contractual relationship but no grant of a property interest)
  - If equity is prepared to enforce a licence, the licence is irrevocable

- **LICENCE COUPLED WITH GRANT OF PROPERTY INTEREST** (*profit à prendre* – right to remove natural product from land).
  - License cannot be revoked [two farms, owner of one farm grants the owner of the other farm to remove wood from the farm, it is a property right and is enforceable against the owner of the farm] – cannot stop the property right by refusing to allow it to be exercised, the permission to be there cannot be revoked

**AIR RIGHTS/TRANSFER DEVELOPMENT RIGHTS: CARBON SEQUESTRATION RIGHTS**

“TDR”: USA

- **Development rights** generally refer to the maximum amount of floor area permissible on a zoning lot

- The difference between the maximum permitted floor area and actual floor area is referred to as “unused development rights.” Unused development rights are often described as air rights.

- A transfer of development rights (TDR) allows for the transfer of unused development rights from one zoning lot to another in special circumstances, usually to promote the preservation of historic buildings, open space or unique cultural resources

- In November 2005, Christ Church in New York sold their air rights for a record $430 per square foot. They made more than $30 million on the sale

- TDR Credit Banks can be used to store development rights that have been purchased if there is not yet a receiving area development identified

**EXAMPLE:**

**PROPERTY RIGHT?**

- Floating floor space right

- Right can be transferred to another landowner to utilise the increase built-up area of another piece of land
• Development rights “are transferable, and I assume transmissible; they are of large commercial value; and I see no reason why they are not ‘proprietary rights’ in the same way as goodwill, patents or shares in the capital of a company are ‘proprietary rights”’ - *Uniting Church in Australia Property Trust (NSW) v Immer (No 145) Pty Ltd 1991 NSW 510 511*

**CARBON SEQUESTRATION RIGHT**

• **Carbon sequestration** is the process of capture/storage of atmospheric carbon dioxide

• A carbon right is a new and unique form of land interest that confers upon the holder a right to the incorporeal benefit of carbon sequestration on a piece of forested land (Hepburn 2009 (31) SLR 239)

• **Climate Change Act, 2010 – Vic**

26. Creation and transfer of forest carbon rights

   (1) A forest carbon right may be created by the execution of an instrument of transfer of the right by a person who is the registered proprietor of a freehold or leasehold estate in land to which the right applies.

   (8) A registered forest carbon right- (a)... may be dealt with under the *Transfer of Land Act 1958*; and (b) may be transferred under that Act for a term of not less than 3 years
# ANSWER PLAN TO TOPIC 8: EQUITABLE PROPRIETARY INTERESTS

The following is an overview, summarising the different forms of equitable interests that may arise, whether expressly, presumptively or as a consequence of judicial imposition. There are **FIVE** primary questions to examine

| **STEP 1:** WAS THE INTEREST INTENDED TO BE CREATED & WHAT LEVEL OF FORMALITY COMPLIANCE HAS BEEN SATISFIED? | **Requirements:** Page 117 of exam notes  
**EXPRESS TRUST:** Has the settlor transferred legal title to the trust property over to the trustee & provided a clear & manifest written intention that the trust property is to be held for identifiable beneficiaries?  
**OR**, has the settlor declared himself or herself trustee and, where the trust property is land or equitable title, evidenced that intention in writing? |
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STEP 2:</strong> IF THERE IS AN EXPRESS INTENTION TO CREATE A TITLE, BUT THE FORMALITIES HAVE NOT BEEN COMPLIED WITH, IS THERE AN AGREEMENT TO CREATE AN INTEREST THAT MAY BE SUPPORTED BY UNEQUIVOCAL ACTS OF PART PERFORMANCE?</td>
<td><strong>Part Performance:</strong> Page 120 of exam notes</td>
</tr>
</tbody>
</table>
| **STEP 3:** IN THE ABSENCE OF AN EXPRESS INTENTION TO CREATE A TITLE OR ANY ACTS OF PART PERFORMANCE, ARE THERE CIRCUMSTANCES SUCH THAT AN INTENTION TO CREATE A TRUST CAN BE INFERRED? | **RESULTING TRUSTS**  
**Was there an attempt to create an express trust that failed?** – page 109 of exam notes  
**Should the presumption of equitable title be raised in the circumstances to give effect to the natural consequences of contribution to a purchase price?** – page 110 of exam notes  
**Is it possible to infer an equitable interest to give effect to an enduring intention to protect the property interest in issue?** – page 110 of exam notes |
| **STEP 4:** ALTERNATIVELY, DO THE CIRCUMSTANCES MAKE IT CLEAR THAT IT WOULD BE UNCONSCIONABLE FOR A COURT TO DENY AN EQUITABLE TITLE? | **CONSTRUCTIVE TRUSTS**  
**In this context, should an equitable title be imposed as a protect device, irrespective of the intention of the parties, to protect the pre-existing equitable relationship or contractual responsibility?** – page 115 of exam notes  
**OR, should an equitable interest be imposed as a remedial response to particular circumstances where the conferral of beneficial title is the most appropriate remedy** in the circumstances? - page 112 of exam notes  
  o **EG**, Is it unfair to allow a legal titleholder to assert full ownership over a domestic residence when |

---

28


<table>
<thead>
<tr>
<th>'pooled' resources have been utilised to pay for it?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Further, is it unfair to allow a person to deny a proprietary representation that another has relied upon to their detriment?</td>
</tr>
<tr>
<td>• Finally, in creating such interests, should it be held to arise from the date of the court order or would circumstances, such as the need to protect against a third party intervention, make it equitable to backdate the interest? – page 114 of exam notes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>STEP 5: IS THE INTEREST A FULL EQUITABLE INTEREST OR IS IT MORE IN THE NATURE OF A PERSONAL RIGHT TO SEEK EQUITABLE RELIEF?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• MERE EQUITIES</td>
</tr>
<tr>
<td>• If the interest is antecedent [existed BEFORE] to a remedial order that would result in full equitable title, does the scope of enforceability of this antecedent right give a quasi-proprietary status? – page 121 of exam notes</td>
</tr>
<tr>
<td>• Has a bona fide third party purchaser acquired title prior to the enforcement of the antecedent right resulting in postponement?</td>
</tr>
</tbody>
</table>