

PROPERTY

LAW

LAW 1511

Semester Two 2018

- 1) **Common Law**
- 2) **Statute**
- 3) **Process Notes**

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PROPERTY LAW.

Two Concepts of Property

There is no universal or agreed upon definition of property.

Property is about the distribution, allocation and control of scarce resources.

The concept of property includes three critical aspects:

1. Things

1. David Lametti, 'The Concept of Property: Relations Through Objects of Social Wealth' (2003) 53 *University of Toronto Law Journal* 325: 354

'The intuitive appeal of making things the mediator of the relationship is evidenced by the pervasiveness of 'thingness' in the layperson's understanding of property.'

This encompasses both tangible and intangible property

2. Rights

Property rights are created, conferred and protected by law i.e. if you have a property right, you have it because of the law and, if someone was to interfere with it, the law protects it.

Property rights are legal rights (not natural)

There are three dominant property rights (*liberal triad*):

1. Use

2. Exclusivity

3. Abandonment

These rights give the owners choice. There are at least 11 kinds of rights but the law agrees on these three bare minimum ones.

There are no duties or responsibilities.

4. Social relationships

Property is about relations between people in respect control over goods and resources i.e. things.

The source and internal constitution of private property arises from social relationships.

5. Joseph William Singer, *Entitlement: The Paradoxes of Property* (2000) 13.

'Property is something we must collectively define and construct. It is not given to us whole; it does not emerge fully formed like Athena from Zeus's head. It is closer to a piece of music that unfolds over time. Like music, property gets its sense of stability from the ongoing creation and resolution of various forms of tension.'

There are multiple ways property can be conceived and structured:

1. Private property

2. State/public property

3. Common property

INTRODUCTION TO PROPERTY RIGHTS

Introductory Concepts

1. Distinction between real and personal property

Personal: An interest in anything other than land e.g. chattels, moveable, tangible (pen, shares, copyright.)

Real: An interest or estate in land: Immovable – includes land and anything attached to it i.e., fixtures

2. Property vs. Contract

Property rights are enforceable against the whole world; contract is only enforceable against those parties to the contract. Property interests are superior.

3. Possession vs. Ownership:

Possession: Whoever has control over an item has possession = cornerstone of property system

Ownership: Whoever has hold over the legal triad has ownership.

Distinction Between Property And Non-Property Rights

4. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479

Distinction between property and non-property rights. This case established that despite the neighbour building a viewing platform and broadcasting race results, there was no nuisance, no property in spectacle, no unnatural construction and the function of racing was not hindered, therefore Victoria Park lost.

Main Differences:

Access: If have property right have clear right to access and law will support that

- If don't have property right (i.e. just contract) then if you are interfered in your use you cannot sue to re-enter i.e. Property right gets specific performance to be placed back on land, if not, only damages

Value: a lot more value is granted to something with property right

- In Australian Constitution, Crown must, in just terms and value, compensate if takes away property right
 - o *Davis v Commonwealth* (1988) 166 CLR 79
Cannot ban the use of words
Held: Government could not have prevented the plaintiff from using certain words as this was not the intention of the act and his use of the words had no effect on the legislations use. But could prevent him from using symbols. Said there was 'gross disproportionality' between what the legislation was trying to do and the ends that were sought to be achieved by the Cth.
 - o *Kent v Johnson* (1973) 21 FLR 177
Obstructing View
The plaintiff (Kent) sought an injunction against the defendant (Johnson) for building a tower on the top of Black Mountain in Canberra. He argued that the tower would impact his natural view. Held: Found not sufficient, must balance interests; need to allow construction and development. Is *prima facie* lawful to erect what one wishes on one's land. Inference with a view is not sufficient for an injunction.
 - o *Stow v Mineral Holdings Pty Ltd* (1977) 51 ALJR 672
No protection if not a proprietary right defined by law
NGO's sought an injunction against mining in Tasmania. Their only interest was walking/hiking. Decision: court held that a person seeking an injunction would need to have an 'estate or interest' in land sufficient to allow them to object to the mining activity. Recreational interests were considered insufficient. An 'estate or interest' was qualified to mean a defined type of proprietary interest in land which is recognised by law i.e. fee simple, lease, easement etc.

Distinction Between Property Rights at Law and Equity

Two ways to hold a property right

General/Torrens	Law	Equity
General law land (old system)	Deed, valid chain of title, for a right recognised at law	Principles of contract, trust and fraud
Torrens System Land	Registration	Equity is not abolished

(equity steps in where justice demands that it should e.g. property right in equity when you've paid for a house or signed a contract but have not registered yet.)

5. *Judicature Acts* of 1873 and 1875
Law and equity are fused in practice
6. Property Rights at Law

Common Law (Old) System

At General Law = Right *in rem* is good against all the world.

- A relationship between the right holder and the recognised property
- A gives legal right to B – A later gives the right to C. Can B (with pre-existing right) have a binding legal right against C? YES – C will be bound. It is enough that it is legal.

Three requirements to prove at law

1. Recognised at law (Estates and Interests: fee simple, lease, estates, easements, profits, mortgages, rentcharges etc.)
2. Valid chain of title – The person prior must have a real title to pass on to you (no fraudulent dealings any point prior)
3. Conveyed/granted by deed

- *Law of Property Act 1936 (SA)*
(formality requirement – s28(1)
s30(2): Exception for short leases – 3 years or less may create legal right by parole evidence rule (not in writing)
NOT a contract

If cannot prove on of the above, instead look to equity

The Torrens System (Introduction)

Basic Principles

Mirror principle: what you see on the title is what exists (there are no hidden factors)

Curtain principle: once registered, all previous transactions are irrelevant

Indefeasibility principle: once registered, you have the strongest possible right

- *Real Property Act 1886 (SA)*
Sections 57(3) and 69 concern registering and recording and are used to make the argument that once someone has registered their property, they have interest.

Property Rights at Equity

In personam – good against all those whose conscience is bound

A relationship between the landowner and the right holder who has a proprietary effect

When formality has not been adhered to, still get protection through equity (e.g. selling a house without a formal contract).

Equity is flexible. Is conscience bound? (depends on whether they have notice, if they do then they are bound)

Binds those who take subsequent interests in the land

Bona fide purchaser: Does not know about prior purchase, have no notice their conscience is not bound and therefore they cannot be bound.

- *Law of Property Act 1936 (SA)*
s29(1)(c) – equitable rights are assignable in writing (must be in writing)

Occurs in three situations:

1. Express Trusts of land – relationship between trustee and beneficiary – conscience of trustee bound
2. Valid contracts in writing concerning land may constitute equitable property rights
3. Occurrence of fraud/unconscionable conduct – i.e. the victim has equitable right

Torrens System and Equity

- *Real Property Act 1886 (SA)*
Section 249 concerns equitable interest and states that equities continue to exist under the torrens system

Types of Interests in Land:

Fee Simple Estate: Free hold estate – Highest right – no qualifications on a person's right to occupy land and the right can be passed on to their heirs – essentially perpetual (i.e. infinite)

Life Estate: Grant of a right/interest in land for duration of a person's life. When they die land reverts to person holding fee simple estate in that land.

Leasehold estate: Non freehold estate conferring a right of exclusive possession to a tenant for a set period of time

Trusts: Arrangement where one person (the Trustee) holds land for the benefit of another person(s) (beneficiary) = equitable interest.

Mortgages: Is a security under contract over property (either real or personal) for money lent or owing. Money can be used for any purpose although generally lent to aid the debtor to purchase land.

Easements: A right annexed to land enabling the owner of the land to use other land in different ownership in a particular way to prevent the owner of the other land using his/her land in a particular manner. Are positive and negative forms i.e. some allow the right to act (i.e. right of way) others enable one landowner to prevent another engaging in certain activity on that other owner's land (i.e. right to light prevents another house owner building constructions that will prevent light reaching your property). Such interest requires a dominant and servient tenement.

Restrictive Covenants: Similar to negative easements. Equitable right. Can be used to prevent certain forms of development on land, particular activities taking place on land, and to protect certain existing

amenities on land. In many cases, land used planning laws and zoning controls achieve the same purpose. Also some statutory mechanisms with similarities e.g. Land Management Agreements under s 57 Development Act (1993)(SA)

Rentcharge: Rare in Australia. Is a security interest for the purposes of securing on land, or an interest in land, a periodical payment. Normally paid on an annual basis. Generally arise out of a sale of land when the vendor reserves to themselves the annual payment of a sum of money normally in perpetuity.

Profit a Prendre: Is a right to take from servient land, soil or minerals (e.g. sand, salt, quarry rubble), natural produce (e.g. fruit, mallee roots, nuts, olives etc.) or wild animals existing on it. Certain similarities to easements. Can (in rare cases) be obtained by prescription after certain period of time. Various statutory provisions make the need for profits redundant in some cases e.g. Local Government right to take road making material, forest property agreements re carbon bio sequestration.

INDEFEASIBILITY.

In 1858 Sir Robert Richard Torrens introduced the system of title to land known as the Torrens System. Deeds and private conveyancing system – complicated and did not provide a simple, speedy and inexpensive method for conveyancing and dealing with interests in land. How does a purchaser satisfy themselves that the vendor had in fact the title proposed to be sold?

- *Real Property Act* 1886 (SA) s69

Once registered under the Torrens System you are said to have indefeasible title

69—Title of registered proprietor indefeasible

The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible, subject only to the following qualifications: (listed in act)

Definition: A characteristic of Torrens title, which treats the registered proprietor's interest as paramount, except in the case of fraud or statutory qualification. Indefeasibility of title does not apply to land under old system title.

The Torrens System is a system of title by registration. The title to land under the Torrens System is displayed on the Certificate of Title which discloses ownership and all other encumbrances to which that land is subject.

- *Frazer v Walker* [1967] 1 AC 569

The holder of a registered title acquires an immunity from adverse attack – a secure and conclusive title that is subject only to the interests registered on that title, to statutory exceptions, including fraud, and to other non-statutory exceptions.

Note: Privy Council decision and therefore not binding authority in Australian courts.

Mrs Frazer forged her husband's signature to get the mortgage approved (fraud) and although Frazer had prior equitable interest, Walker had current legal interest through the paramount title by registration and Walker won.

General (old) law would have favoured Frazer as, by the *nemo dat* principle, 'if you do not have good title you cannot give good title.'

- *Real Property Act* 1886 (SA)

Key section 69 (as above)

Note s69(i)

notes that a mortgagee does not have an indefeasible title if they fail to comply with verification requirements.

- *Breskvar v Wall* (1971) 126 CLR 376

High Court unanimously adopted the Privy Council's decision in *Frazer v Walker* and applied the principle of immediate indefeasibility.

Breskvaes were recognised proprietors of land but left the transfer (mortgage) certificate blank (no name for who the land was being transferred to). Petrie gets the memorandum and puts his grandson (Wall) on it and registers it on his grandsons behalf, selling the land to Alban. However, before Alban registers title, the Breskuaes ban him from getting title. Even though Petrie has used forgery, so long as they have registered their interest in accordance with the act, they have title.

THE TORRENS SYSTEM

Process of Registration – What does registration involve?

Past: Two stage process – memorandum of transfer is lodged with a duplicate certificate of title at the Lands Titles Office.

Today: National electronic conveyancing (NEC)

Note that this system is so new that it will not be referenced in the cases we are reading!

1. Verification of Identity and Authority

The Verification of Identity Requirements require legal practitioners, conveyancers and mortgagees to take 'reasonable steps' to verify the identity of their client.

The Verification of Authority requirements require legal practitioners, conveyancers and mortgagees to take 'reasonable steps' to verify their client has the authority (or right to deal) with the land they are transacting. These requirements are usually undertaken at a face-to-face meeting with the client where they sign the Client Authorisation

2. Client Authorisation

Transacting parties will sign a Client Authorisation Form authorising their legal practitioner or conveyancer to sign and certify real property documents on their behalf.

The introduction of the Client Authorisation removes parties signatures (and witnessing requirements) from real property documents

Instead, the legal practitioner or conveyancer certifies real property documents

Codified in s273 where (a)-(d) must be met

Priority Notice

A Priority Notice is a notification of intended dealings lodged with the Registrar- General and noted on the Register i.e. to say 'I was here first.'

Reserves priority for the dealings listed in the Priority Notice

Prevents registration of inconsistent dealings with the subject land (with some exceptions)

Gives notification to anyone searching the Title of forthcoming dealing(s)

Gives confidence and transparency for transactions with the removal of Duplicate Certificates of Title

Abolition of the Duplicate Certificate of Title

As of 4 July 2016, duplicate Certificate of Titles (CT) are void and of no legal effect. The Registrar-General also no longer issues or requires production of Duplicate CT's into the Lands Titles Office i.e. two owners.

A number considerations factored into the removal of the Duplicate CT:

1. the production of a paper duplicate CT was incompatible with the new electronic form of conveyancing
2. Potential of fraudulent reproduction of duplicate CT
3. Potential of fraudulently obtaining the duplicate CT and transacting over the land.

The original Certificate of Title is held electronically on the Register Book and is the source of ownership.

This Register Book is a publically searchable Register and can be accessed through www.sailis.sa.gov.au

Electronic Conveyancing

Electronic conveyancing is a national initiative and therefore the legal framework, instruments and procedures have been designed to be nationally consistent.

The ECNL allows the Registrar-General to register instruments that will transfer/create legal interests in land, when those instruments are in electronic form.

It is therefore now possible to sign and lodge instruments electronically under the *Electronic Conveyancing National Law (South Australia) Act 2013* or in paper under the *Real Property Act 1886*.

Note: it is still possible to deal in paper and *only* need to comply with the RPA if dealing in only paper but need to comply with both pieces of legislation if dealing online.

Property Exchange Australia (PEXA) is the national provider for Electronic Conveyancing.

At this stage, the following documents can be lodged electronically through PEXA:

4. Transfer
5. Caveat
6. Mortgage
7. Withdrawal of Caveat
8. Discharge of Mortgage

These 5 documents account for 85% of land transactions

The alignment of conveyancing requirements in South Australia has removed any impediment to the uptake of Electronic Conveyancing.