

Week 1: What is Property?

NB: Property law is not logical, it is historical

- A lot of the concepts derive from medieval England and France
- It has also been strongly influenced by political forces those with property have a greater voice in determining what the law would be than those who do not

In property, technically no one owns anything, the only entity that can own land is the Crown. Instead you have RIGHTS over things

- So what does ownership mean then?
- When you own a home, you ACTUALLY own a right to that property
- What you own is a state or interest, a 'fee simple' - Closest you can come to full ownership

EXAMPLE: In most common cases, when someone buys a house, they take money from the bank so they don't own the house, the bank also has rights coming from the loan. If you were then to lease out the property, then the tenants would also have the right to use and enjoy the house for the period of the lease. As can be seen, property can quickly become a complicated issue of multiple ownerships.

THE RIGHTS OF PROPERTY

Property = rights to things, legal relationships between people with respect to things

Hallmarks of property:

- A bundle of rights
- To have a right you will therefore inevitably have a relationship with people with respect to things
- The right to use and enjoy
- The right to exclude others from use and enjoyment
- The right to alienate
 - Legal jargon 'alienate': Transferring property from one person to another
 - Sales, gift is a form of alienation)
- Rights can be shared/fragmented
 - Multiple people can own different rights over the same thing
- *Yanner v Eaton*
 - *Facts: hunting on crown land*
 - *Issue: whether indigenous people had native title rights in terms of hunting*
 - *Held: yes native title rights exists*
 - *Dealt with the core definition of property*
 - *'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' - (Gleeson CJ, Gaudron, Kirby and Hayne JJ para 17)*
 - Property is a legal relationship with a thing, refers to a degree of power that is recognised in law as permissible exercised over that thing
 - A legally endorsed concentration of power
- *Millurpum* (early land rights case; pre *Mabo*) (1971)
 - Land rights regarding indigenous relationship with land—does that make it property?
 - Problems with indigenous understanding of land
 - Right to communal land
 - Do not have the right to exclude others from use and enjoyment

- More like the land owns the Aboriginal people they have obligations and spiritual connections to it
- Judge here stated that even though you satisfy all three definitions of property, it may still not be property and also vice versa
 - None of those are necessary aspects
 - Rights to exclude is hallmark
- Judges concluded that whatever the indigenous system was, it was not property and therefore the indigenous rights to land were not recognized until the Mabo decision

How is Property Different?

King v David Allen & Sons, Billposting Ltd (1916) 2 AC 54

Facts:

- King owned a block of land (had the fee simple)
- In 1913 made a contract with the company David Allen which gave that company a right ('an exclusive license for a period of four years') to put up posters and ads on the wall of a picture theatre that was to be built on King's land
- In return for this right an annual rental was specified
- So did David Allen have a property right?
 - King undoubtedly have a property with the second company
- King entered into another deal with a company that was going to build and fund the picture theatre - King essentially leased the land
- This company was going to lease the land and run the theatre on behalf of King
- NB: companies have a separate legal personality and are not the same as their owners and/or shareholders)
- After the theatre was built, the company that built the theatre, once it was built, said that David Allen could not put up the adverts

Held:

- Was there a contract?
 - Yes, and there had been a breach of that contract as David Allen was not permitted to put the posters up on the wall
- The court decides at the very least David Allen has contractual rights against King
 - REMEDY: Normally in a contract breach remedy is damages (different between personal and proprietary rights)
 - Personal rights are normally money
 - But a proprietary right then you can demand that the contract is specifically enforced
 - (SPECIFIC PERFORMANCE IS AN IMPORTANT REMEDY IN PROPERTY)
- As David Allen wanted to put the photos up on the wall he would want to find a proprietary right
- HELD that it was just personal, not proprietary
 - If lease/easement words were used, David Allen could have enforced proprietary rights however the words of the contract showed only intention in creating a personal right
 - It was simply permission to put poster up for a fee
 - Instead the contract used the language of licence and therefore the sphere of enforceability was not that of a proprietary right
 - Proprietary rights can be enforced against third parties



There are big differences between property rights and personal rights (ie contracts)

- There is a different sphere of enforceability
 - Property rights are enforceable against more people than personal rights
 - Contract only two parties
 - Property - you can enforce against entire world
- Remedies: damages/ compensation vs the property itself

Difference between licence and lease/agreement

LICENCE	LEASE/AGREEMENT
= personal rights	= proprietary rights
(<i>in personam</i>) <ul style="list-style-type: none"> Against particular people 	(<i>in rem</i>) <ul style="list-style-type: none"> Enforceable against whole world
PERSONAL	REAL

- 2 understandings of 'personal'
 - No property at all
 - Within concept of property, there is distinction between personal property and real estate.

Justifying Property Rights

- We cannot justify our legal rules by just referring to our legal system. We have to look for justification on why property rights exist and why the law should recognize private property
- Natural right theories (*Locke's Labour Theory*)
 - If you create something, you have the right to own it. If you expend labour - the law should recognise your right to it
 - This theory implicates why later decisions ruled Australia as settled rather than conquered
- Consequentialist theories (utilitarianism - Bentham)
 - Should recognise property rights because maximise greater number of good to greatest number of people
 - Best for society if we do not disturb people's private sense of ownership
 - Property rights because law recognises it and law recognises it because it maximises good
- Evolutionary theories (Hume) / Customary Law
 - Hume took position that it did not come from nature right or a system of right
 - According to Hume, property rights exist in convention
 - Overtime, people started respected other people's rights to property
 - Pre-dates law but does not predate society
 - It is custom, not law

OBJECT OF PROPERTY - what can be owned and what can't be owned?

- Generally speaking, the objects of property (things that are capable of being subjected to private ownership) continuously expand over time
 - We continue to privatise and subject to private ownership more and more of the world's resources
 - Originally property was just about the ownership of physical and tangible things but over time, we have gotten things like printing press which lead to copyright and the recognition of law regarding that, company shares, water

Do you own your own body?

- Body parts and things extracted from the body can fall within private ownership although the physical body is not property
- Doodeward v Spence* (1908) 6 CLR 406: concluded no ownership over human body but body parts, particularly when it has been subjected to labour creates ownership
 - le drug companies ownership over genes

- If you do something with body part it becomes subject to ownership
- *Moore v Regent of the University of California*
 - Moore needed to be treated for serious disease, but found out later that in the course of diagnosing and treating the illness, samples of his blood, bone marrow, skin, semen and other body substances were taken and his spleen was removed
 - Moore signed a consent form to the removal of his spleen but did not consent to its use for scientific purposes and was unaware of the potential commercial value of his cells
 - Golde (the doctor) later established a cell line from Moore's cells that he then patented and went on to receive payments amounting to at least \$450 000
 - Moore argued that he should have been given the money because the research was made from his cells, his property. He argued that he continued to own his cells following their removal from his body, at least for the purpose of directing their use and he never consented to this line of use
- Held:
 - Court held body is not property
 - Mosk J 'the term property is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.'

SUMMARY

Hallmarks of property rights:

The right to enjoy

The right to exclude

The right to alienate (transfer)

Rights can be fragmented and shared

Personal rights are much more restricted than property rights (*King v David Allen*) because:

Sphere of enforceability is wider (not just parties in contractual relationship)

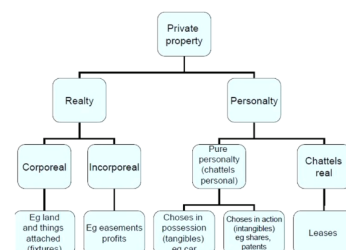
Broader range of remedies (not just compensation)

REAL PROPERTY V PERSONAL PROPERTY

Real property = land

Personal property = everything else

Categories of property



Historical Background:

- The remedies that were involved in real property were different from personal property
 - Dates back to Medieval England
 - In early English law, a thing was deemed 'real' if the courts would restore that thing as of right, to an owner that had been dispossessed of it, as opposed to merely awarding damages for the loss of the thing involved
 - The Medieval court would restore land as of right but if you'd been dispossessed of a personal property (chattel) then it was within the courts discretion whether to return the thing to you or grant compensation instead



REALTY—a right to repossession of the res



- PERSONAL**—a personal right to compensation (i.e. the value of the thing taken)
- These were enforced indirectly
 - The owner who was deprived of possession of a chattel did not have a right to a court order repossession but compensation of the value of the thing that was taken
 - So at COMMON LAW property rights in personality were protected by way of the law of torts
 - This historical distinction is the basic distinction between real and personal property
 - But there are further sub-categories

Corporeal Realty vs Incorporeal Realty

Corporeal Realty: physical existence

- Eg land --> the right to possess that piece of land and things that are attached to the land.
 - Things that are attached to the land ceases to become a chattel, but becomes part of the land
 - Land and things attached to the land are corporeal realty

Incorporeal Hereditaments don't have a physical form

- E.g. easements = right to use someone's land in a way.
 - Easement: e right of way, your neighbour may have easement to cross your land for some reason but not a permanent right to possess the land (ie driving through your property to get to their property)
 - A 'profit' a 'prendre' - the right to take something off someone's land (eg crops - the farmer gives you right to take orchard off trees - it is an incorporeal interest in the neighbours land)

Pure Personality vs. Chattels Real

Chattels Real ☐ leases

- Dealt with later in the course
- In Australia, leases are still considered personal property
- ★ Tenants can get order for repossession if they are illegally dispossessed of their tenancy so although we categorise it as a 'personal property' you can still get a real remedy

Pure Personality: goods/ personal property

- Is separated into Choses in Possession (CiP) (tangible) and Choses in Action (CiA) (intangible)
 - In French 'Choses' means 'things'
 - CiP are thing that can be touched and moved
 - CiA are things that are intangible
 - They are items of personal property but they cannot be touched
 - E.g. intellectual property rights, debts, Frequent Flyer Points
 - They are enforced by suing

WHAT IS MY LAND?

If someone is the owner of land (real property right) what is 'owned'?

Cuius est solum eius est usque ad coelom et usque ad inferos= the person who owns the land at ground level owns it from the heavens to the depths

- If you own this piece of land then you own the block of airspace which goes to the heavens and the soil/rock beneath the land until hell (Medieval English interpretation of the world)

If we took that literally what that would mean is that when an airplane flies over the land at 10000 meters, the air company would be committing trespass