

Property Law Week 1 Lecture

The Concept of Property

- Means different things to different people within different contexts
- Three basic meanings:
 1. Things people own
 2. Things themselves:
 - a) Land (real property)
 - b) Chattels (goods) (personal property)
 - c) Chattels real (leases)
 3. Rights which people have to things (property rights)
- Property right: right to land or goods (to be distinguished from:)
- Personal right: right to another person in terms of a contract
- Property is a platform for the rest of private law (Smith)
- Property can be defined:
 - a) **with reference to its features**
 - b) **with reference to its content**
 - c) **more broadly as a relationship**
 - d) **as a right**
 - e) **as a public law/human right**
 - f) **by distinguishing it from a personal right**
- Property is seen as a bundle of rights or relationship, but really involves a bundle of relationships
- A 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

Defining Property by Features

- Blackstone's Common law 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 exercises 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)
- The following features can be deduced from Blackstone's definition:
 1. Dominion
 2. Things of the world
 3. Externalised
 4. Exclusion
 5. Enforceability
 6. Transferability
 7. Value
 8. Legally recognised

- Criticism is that one must not overstate essential characteristics of property to identify property
- Difficult to identify a set of core characteristics – Emphasis seems to be placed upon the characteristic of excludability

Dominion (sovereignty of control)

- Control exercised by a person over an object (control over disposal)
- Dominion denotes some legally authorised power
- “Despotic” means an absolute power
- Power is concentrated in a specific person(s) (“a sole right”)
- For example: distinguish right to bicycle (property right) from right of access to library (personal right)
- Indigenous rights are concentrated in group

Things of the world

- Outside of a person – bodies, right to good name or reputation are not things
- Things must be separate and apart from ourselves
- Physical things (land and chattels)
- Importance of object in property relationship (Lametti)

Externalised

- Demarcation of property/boundaries
- Must be identifiable
- Jean-Jacques Rousseau (*Discourse on the Origin and Basis of Inequality Among Men*):
 - “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.
 - From how many crimes, wars, and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows:
 - ‘Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody’.

Exclusion

- To exclude others from enjoying same rights or interfering with the exercise of rights
- Exclusion serves the use interests of property (Smith)
- Power of exclusion is said to be total/absolute
- State can enforce exclusion (matter of law not power)
- Excludable: property consists primarily in control over access (Gray)
- 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”) – (i) one may not interfere with rights of others; or (ii) property is subject to health and safety regulation
- Holder of, for instance, an **easement** cannot exclude owner from using land
- **Not** the **only** right inherent in property (there are other associated rights)
- Exclusion is not a characteristic of an **indigenous relationship**: connection with land rather than exclusion

Enforceability

- Must be enforceable against other persons
- **Right in rem** (operates against the whole world) - property right
 - 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
 - Conceded, there is universal acceptance of *in rem* operation of a property right:
 - “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 against another person) – personal right
 - Enforceable against a **specific person** (parties privy to relationship)
 - Not depended on existence of a thing
 - Basis for division between personal rights and property rights (great divide)

Transferability of right

- Property rights are said to be transferable/assignable
- Criticisms:
 - Too wide: most rights are transferable (including personal rights)
 - Some property rights are not assignable (non-assignable residential lease)
 - Native title rights are not transferable – *Millirrpum v Nabalco* (1971)

Millirrpum v Nabalco (1971)

- Involved a claim that a mining company was interfering with right to perform ritual ceremonies
- Issue was 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. 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 property

- 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

Value

- Is dictated by the market value
- May have sentimental value
- Some things are valueless
- May have a negative value resulting in a liability (such as toxic chemicals)
- Personal rights (or intellectual property rights) also have market value
- Value is not necessary a characteristic of property

Legal recognition

- Property rights must be recognised and be 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 the absence of a legal system
- Criticism: Other rights (such as contractual rights) are also recognised by law
- 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 are 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

Mabo v Queensland (No 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
- Native title (special form of property) has its own special features:
 - Inalienable
 - Not transferable to third parties (transferred from generation to generation or to Crown to its pre-emptive right)
 - Vulnerable, as it can be extinguished by the Crown's exercise of radical title
 - Based upon the traditional belief of belonging to land
- Native title is proprietary:
 - Claim for compensation (s51(xxxi) CA 1901(Cth))
 - Exclusionary because of availability of equitable and common law remedies
 - Burden upon Crown title