

# LPAB Real Property Lecture Notes

## LECTURE 1: Introduction to Property; Definitions and Concepts

### Course Information:

- Assignment → 20% weighting, due 30th June.
  - Problem question based around priorities (i.e. conflicting claims over a property).
- Final exam → 80% weighting, held 8th September 1:45pm-5pm.
  - Part 1: Question 1, 40 marks → priorities (i.e. Torrens priorities).
  - Part 2: Choose 2 of 3 questions, 40 marks total → related to other topics covered in second half of course.

### What is Property?

- Blackstone was the first English professor of common law, his academic publications have been vital in classifying the common law.
- Blackstone divided property into categories that are still adopted today:
  1. Real property → realty, interests in land, *seisin* (i.e. possession of land by freehold), a right of possession of land, recoverable property (meaning tied to 13th century conceptions of land).
    - (a) Corporeal hereditament → interests existing through the physical manifestation of control (i.e. possession) of property.
    - (b) Incorporeal hereditament → interests not existing through possession but through action (e.g. through easement, restrictive covenant, profits en prendre, etc.) of property.
      - NB: 'Hereditament' refers to rights that are passed through succession.
  2. Personal property:
    - (a) Chattels real → leaseholds and other interests in land that are less than freehold (i.e. interests of land that aren't protected by real property, such as leases).

- Developed as historically, writs did not cover this type of interest and therefore Blackstone's classifications of real property couldn't protect these interests.

(b) Choses in possession → a moveable corporeal thing (e.g. goods), i.e. if not land and something that is in existence, this is sufficient.

3. Chose in action → incorporeal things and rights which are enforceable by action (e.g. shares, patents, copyrights, equitable securities, contractual rights, promissory notes, cheques, mere equities, etc.).

### Further Definitions of Property:

- *Sale of Goods Act 1923 s3(1)*: "chattels personal other than money and things in action and also includes emblements and things attached to and forming part of the land which are agreed to be severed before sale or under the contract for sale".
- *Bankruptcy Act 1966 s5(1)*: ships, aircraft and other vehicles; animals including fish, minerals, trees and crops, whether on or attached to the land or not and gas and electricity.

### Test for Property Classifications:

- These factors distinguish one classification from another and their respective legal tests to be applied.
  1. Enforceability.
  2. Incorporeal and intangible.
  3. Bare right → not occupation and enjoyment.

### Defining Interests:

- Conventional term for the bundle of rights which a person has in an object.
- E.g. interest in land (e.g. covenants, easements, etc.) vs ownership of land.
- Common law allows for the recognition of many (often competing) interests in property.

### Historical Significance of Ownership:

- *Knapp v Knapp (1944)* per Majo J: "The general right of ownership embraces subsidiary rights such as exclusive enjoyment to destroy, to alienate or to

alter, and, of course, the right to maintain, and to resume and recover possession from other persons”.

- Ownership historically not an essential element/consideration, as it was previously physically impossible to provide proof of this (i.e. nobody could read/write, nor did they have access to paper).
  - By 17th century the introduction of the deeds system allowed for closer tracking of ownership.
- Whilst ownership can be easily proved today, it is not an essential requirement for a claim, as there is a greater focus on possession.
- Modern Torrens system and technology allows ownership to be tracked nowadays, which has made it an increasingly important consideration compared to the past.

### **Defining Ownership:**

- Indicates the relationship between a person and a corporeal or incorporeal legal object. Confers a bundle of rights to enjoy, use, possess, dispose of and alienate a ‘thing’ as well as the capacity to ward off any encroachment on the thing.
- Ownership can be limited by other rights, but it is not dependent on other rights.
- *Campbells Hardware & Timber Pty Ltd v CSD (QLD) (1996)* → a subsidiary right is left when all other interests in property have been taken away.

### **Defining Title:**

- The measure of the strength of an interest.
  - Provides a yardstick to measure the strength of competitors claims of interest in a property.
- Old System Title → basis of all property law and common law, basically defunct in the modern day.
- Torrens Title → main system used in Australia for title.

### **Defining Possession:**

- *United States of America and Republic of France v Dollfus Mieg et Cie SA & Bank of England (1952)* → there is no complete, logical or exhaustive definition of ‘possession’ ever given at common law.

- *Button v Cooper (1947)* → “Possession connotes a relationship between a person and some material object. It is a relation subsisting in fact. The ‘right’ of the possession to the chattel arises out of the factual situation”.
- Therefore possession is a factual question, which is inevitably socially constructed - it reflects the understanding of the material relationship.
- 2 elements of possession:
  1. Physical control (*corpus possessionis*) → some exercise of power over the goods or land. Almost always determined on social constructs as to what is acceptable.
  2. Intention to control (*animus possidendi*) → attitude in the mind of the actor denying the rights of others to have access to the land or goods.

### **Possessory Title:**

- Possession confers possessory title, it is the root of title → therefore not only an evidence of title, but a form of title itself.
  - Therefore you have a claim against the whole world being the true owner, title is relative.

### **Characteristics of Property and its Issues:**

1. Possession.
  - Physical control → corporeality.
  - What about incorporeal forms of rights which are also property but cannot be physically controlled?
2. Exclusion.
  - The right to stop others from enjoyment of the thing.
  - *Milirrpum v Nabalco Pty Ltd (1971)*.