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# INTRO TO PROPERTY AND COMMERCIAL LAW NOTES

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## INTRODUCTION TO PROPERTY CONCEPTS

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- **A property right is a right to a thing, which corresponds to a general duty placed on other members of society not to interfere with that right**
  - It is a legal relationship with a thing, that refers to a degree of power recognised in law as power permissibly exercised over the thing
  - It can be applied to different kinds of relationships – it is not a ‘monolithic’ concept, but it usually involves a bundle of rights (*Yanner v Eaton*)
- Property rights have different forms that governs the exact rights that a person has over the physical subject matter: ownership, lease, mortgage
- Whenever a person has rights, they also have **obligations**
  - Rights exercisable against third parties with respect to a thing. For intangible property, there is no physical thing, but you have rights exercisable against third parties e.g. copyright
- Because it is a right, **property is a relationship between people**, and it involves a power relationship
- On one level property has a malleable meaning; but when we are talking about dealings between private individuals, property has a very fixed and definite form (*King v David Allen & Sons Billposting Ltd*)
  - If you have an agreement that creates contractual rights depending on whether the rights created fit into the categories, they can also be property rights
- Rights in law are divided into **personal and property rights** – and the division between the two can be messy. Is the right assignable? Is it enforceable?
- There are two key differences between contractual rights and proprietary rights
  - Sphere of enforceability – who can enforce the right against whom?
    - For contracts, the sphere of enforceability is a party to the contract (privity doctrine)
    - For property – the sphere of enforceability is against all the world but for the true owner (known as rights *in rem*)
  - Content of the rights – what can be put in the agreement?
    - Contracts – the parties can agree anything they like, for good consideration and as long as they aren’t illegal
    - Property – there are a limited set of certain rights and obligations that come with property. You can make agreements in relation to the property rights on other terms, but they only operate in contract. The content is given to it by the law of property
  - Equity bridges the divide between the two; it converts contractual rights into property rights
    - Equity treats the contract as having been performed, and the persons can have an equitable proprietary interest
- Most property rights share some key features, namely the right to:
  - Use and enjoy
  - Exclude
  - Alienate and transfer
  - However not all types of property need these rights (e.g. see compulsory acquisition s51(xxxi) in Constitution)
- But in most cases, **the definition of property rights is based on their enforceability**
  - Rights *in rem* are rights people have concerning particular things, without much regard to the people against whom those rights might be enforced. E.g. a book – you want your book back, no matter who it eventually sits with

- Rights *in personam* are enforced against particular persons, without much regard to the things they might have e.g. debt of a \$20 bill – you want the \$20 but not the exact note itself
- A right *in rem* depends upon the continued existence of the thing to which the right relates – destruction brings that right to an end (although it may create a right *in personam* against the person that destroyed it)
- All property rights share two characteristics that distinguish them from personal rights: they are **enforceable** and **the existence of some “thing”**
  - Enforceable
    - For property rights, there is no specific persons responsible for the fulfilment of an obligation created by property rights
    - The right can only be enforced against other persons – and the obligation that corresponds to your property right is owed by other members of society.
    - **All members of society have a duty not to interfere with your property rights**
  - Existence of some thing
    - Property rights must relate to things which are separate and apart from ourselves (i.e. not a body part)
    - “Thing” restricts the application of property to those items in the world which are contingently related to us, and this contingency will change given the surrounding circumstances (personal, cultural or technological) – things that are intrinsically connected to us, such as our bodies or reputations are not property rights
    - Intrinsic connection can be broken (e.g. lock of hair cut off and kept becomes property rights)
- This course will cover:
  - Land
    - Land forms the territory on which political and cultural activity occurs. This is reflected in the doctrine of tenure and native title
    - It is enduring – and ownership of land can be enjoyed in succession. If you own land you hold the “fee simple”, and it can be left to you for life, and designate who will get it when you die. This is the doctrine of estates
    - Land has historically been an important form of property right and therefore there are detailed rules regarding formalities for the creation and transfer of interests of land
    - Things can be attached to land (the law of fixtures), that can either form part of the land itself or do they attain their existence as goods/chattels
  - Choses in possession (goods)
    - The physical or lack of physical nature shapes the rules that apply to the property right
    - The concept of possession is central to these goods: they can be lost and found, and include
      - Delivery
      - Bailment
      - Security interests
  - Choses in action (intangible property)
    - The law crosses the line between personal/proprietary rights when it comes to choses in action

- Contract rights and debts are personal rights between parties – but in some ways they have property aspects
  - Assignment and disposition of interests
    - Differing formalities for creation and transfer of interests in land, choses in possession and choses in action
    - Effective assignment at law or rights assigned under equity? Is it bought or is it a gift?
  - Consequences of making a valid transfer
    - E.g. if there are two transfers of land, whose interest comes first?
    - Looks into personal property security interest (through legislation)
- There are certain characteristics that many property rights have (although not all), including
  - Alienability
  - Excludability
  - Value
- Alienability
  - Alienable means that the rights can be sold or given away to others
  - A few non-assignable rights exist *in rem* – e.g. a residential lease
  - If you think of alienable as disposable, rather than transferable, then all property rights fall into this category
- Excludability
  - Excludability means that the holder of a property right is able to exclude others from making use of the thing subject to that right
  - Most property rights have this trait – e.g. you have the right to exclude someone from entering your home
  - However, things like a right of way is a property right to cross another persons land, where a holder of this right is not permitted to exclude others from the land subject to it
- Value
  - Value is not a necessary characteristic of property, but many property rights share this trait
  - Some personal rights are often thought of as property rights because of their value e.g. money in bank accounts. Bank accounts are a desirable personal right (rather than property right) because they have a much lower risk of the things that come with a property right (e.g. lost, theft, destruction)

## ESSENTIAL AND SUBSTANTIVE REQUIREMENTS FOR PROPERTY RIGHTS

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- Whether a bundle of rights is proprietary or not, depends upon the intention of the parties and the nature of the rights and obligations that have been created
- Interests in land include:
  - **Fee simple** – exclusive possession of land ‘forever’
  - **Life estate** – exclusive possession of land for duration of life
  - **Lease** – exclusive possession of land for certain (fixed) term
  - **Easement** – right accommodating dominant land to use, or restrain use of, servient land in a manner not inconsistent with servient owner’s continuing ownership (right of way over land). Burden of one persons land and benefit to another’s

- **Profit a prendre** – right to enter servient land and remove the soil or its natural produce
- **Mortgage** – a special loan over land (mortgagor is the borrower, mortgagee is the lender), a way to lend money on a secure interest by giving the mortgagee an interest in the land. If the mortgagor defaults on a payment, mortgagee has a right of sale.
  - Mortgages operate quite differently under Old System and Torrens
- Under Torrens, all of the above interests must be registered in order to be recognised legal interests
- Examples of property in goods:
  - Chattel ownership – exclusive possession forever
  - Bailment of chattel – delivery of exclusive possession with an obligation to redeliver (lending a good to someone as bailee)
- Formal requirements also have to be met
  - Whether or not the intention to create the rights or obligations need to be manifested in a particular form
  - E.g. does it need to be a written document, signed, deed etc
- Land and goods
  - An important division of property law is between land and other things (usually referred to as goods or chattels)
  - Some things that are neither land nor goods are money, shares, copyright
  - Goods are those things other than land which are tangible
  - Land is both permanent and stationary – it remains constant while the people who use it come and go
  - Goods are transitory and moveable, meaning the laws of different areas can apply to it at different times
- An Australian distinction is between real and personal
  - Certain property rights in the 13<sup>th</sup> Century were classified as ‘real’ property rights because the holder of the right could bring a real action to recover the land from someone who was wrongly in possession of it
    - Under a real property action, you could have your land returned to you
    - Under a personal property action, you could only get a personal remedy (i.e. damages)
  - Personal rights had no real action available to recover the thing itself, but they had a personal action to be compensated for the loss created
  - Real property rights are any right to land other than a lease
- Legal and equitable
  - Most legal property rights have an equitable counterpart, but there are still important practicable differences between the two rights
    - The manner of their creation
    - Durability
  - Most equitable property rights can be created with less formality than the comparable legal property rights
  - Equitable rights tend to be less durable than legal property rights and are more easily extinguished by competing property rights to the same thing
- Tangible and Intangible
  - All property rights are intangible in the sense that they are rights enforceable against other persons, regardless of the nature of the thing to which those rights relate
  - This distinction depends on whether the property right entitles the holder to possession of the thing involved

- Some things cannot be possessed ie controlled physically (e.g. copyright to a song) and therefore are intangible
- But some things that can be possessed are also not necessarily tangible rights e.g. easement (about a tangible thing (land) but does not entitle right holder to possession)
- Right to possession of goods is a *chose in possession*
- Right to an intangible thing is a *chose in action* – also refers to purely personal rights
- Most property rights come from consent e.g. a sale of goods, bequest in a will

## OWNERSHIP

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- Ownership is not the same as property, nor is it the same as possession
- The law protects ownership and possession in the same way - they have the same remedies for wrongful interference
- Ownership usually includes the right to possess a thing indefinitely – although owners are always free to bring their ownership to an end
- Possession can end without ownership ending, where there is an owner with a greater right to possession
- There is a difference between a sale of gift (which transfers ownership) and a lease or bailment (which transfers possession but not ownership) – the latter leaves the owner with some residual rights
- Look at the rights a person has to use a thing in the future – this is referred to as incident of residuary
- Bundle of rights - There are nine rights, one duty and one liability which constitute ownership – six of those rights also belong to someone with possession
  - Possess the thing
  - To use it
  - To manage how it will be used
  - The income from it
  - Security from interference with the right to the thing
  - Transmit that right to successors of choice
  - Duty to prevent harm
  - Liability to execution
  - *\* Right to capital (to destroy or alienate the thing)*
  - *\*Absence of term*
  - *\*Incident of residuary*
  - The last three only apply to owners, not possessors
- One of the rights an owner has is a right to capital (to sell the thing) and to let it for income – but others have argued that while ownership includes the rights to give the thing away and share it, it doesn't necessarily include the right to do so for money/value
  - The exchange of property rights for value is part of our freedom of contract – not of property law
- **Property protects our interests in using things, while contract protects our interest in dealing co-operatively with others**
- Owners also have responsibilities, namely the duty to prevent harm and liability to execution
- Duty to prevent harm
  - There are two types: the duty not to harm others with the thing owned and the duty not to harm the thing itself



- It is unclear whether the duty attaches to ownership or the right of possession - the essence of the wrong is allowing the thing to be used in a way that causes harm to another
- There are situations where an owner is not free to harm the thing owned e.g. not entitled to dispose of animals cruelly; owners of particular lands may have a duty to preserve it e.g. heritage listings
- Liability to execution
  - The rights of the owner may be acquired by the government for the greater good and may be seized and sold to pay the owner's debts
  - When people are unable or unwilling to pay their debts, they can be forced to sell their property rights to raise money for those debts
  - Unclear whether this is an inherent limitation of ownership or part of every person's obligation to pay their debts

### King v David Allen & Sons Billposting Ltd [1916] 2 AC 54

#### **Facts:**

- Mr King gave the plaintiffs permission to put up posters on the walls of a cinema that was being built on his property for a period of 4 years for a fixed price. King agreed not to let anyone else put up advertising during that time.
- King then leased the cinema to a new company (of which he was a board member) that would build it for him on a 40 year lease
- There was no mention of the original agreement in the lease, or any assignment of the interests of King to the new company
- Once the cinema was built, the plaintiffs tried to put up posters, but were forcibly prevented from doing so by the new owners. King tried to have the agreement honoured, but was prevented from doing so by the board
- King was sued by the plaintiffs for breach of contract, but tried to argue that he had granted the plaintiffs property rights, that were therefore enforceable against the lessee.
- **Did King grant the billposters property or personal rights?**

#### **Held:**

- The Court held that the rights granted by King were purely under contract, and did not create an interest in the land. They merely created a personal obligation on the part of King to allow the plaintiff's use of the wall for advertisements
- Throughout the document, the agreement is referred to as a license – not a letting or tenancy
- It is irrelevant that the term was for a period of years, or that other people were prevented from having competing rights with the plaintiffs. No interest was created in the land itself
- There was never any assignment of the agreement to the company under the new lease; therefore the obligation remains with the licensor. The company's failure to honour the agreement means that the Licensor is liable in damages
- Private individuals cannot create new forms of property rights
  - Rights between private individuals will only constitute property rights if they fall into recognised categories
  - Posting bills on a building cannot be lease, as a lease needs the right to exclusive possession

- It could not be an easement – an easement is a right burdening one piece of land and benefiting another piece of land. It didn't benefit any land owned by the billposting company

### Yanner v Eaton (1999) 201 CLR 351

#### Facts:

- An Aboriginal man in QLD used traditional hunting methods to catch and eat two juvenile crocodiles.
- He did not have a license, permit, certificate or any form of authority as required under the *Fauna Conservation Act* and was charged with breaching the Act
- The magistrate in first instance found that the man's clan had a connection with the land long before the common law of QLD had come into existence, and that the *Native Title Act*, that said if he was exercising native title rights he could not be prosecuted, applied. He dismissed the charge
- On appeal, the prosecution argued that any native title right or interest to hunt crocodiles had been extinguished prior to the commencement of the *Native Title Act* by the enactment of the *Fauna Conservation Act* s7(1) that said all fauna is the property of the Crown.
- If the property was in the Crown, there could be no native title rights, as ownership would have extinguished native title
  - This was based on the assumption that property gave absolute ownership was vested in the Crown

#### Held (Gleeson CJ, Gaudron, Kirby and Hayne JJ):

- The court held that the property rights given to the Crown were not absolute and therefore did not extinguish native title
- The Act gave specific powers to the Crown in relation to fauna; **property was not absolute ownership**; it just meant the sum of the rights granted by the Act
- "Much of our false thinking about property stems from the residual perception that property is itself a thing or resource rather than a legally endorsed concentration of power over things and resources"
- Because property is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in B invites the question, what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? For present purposes, the important question is what interest in fauna was vested in the Crown when the *Fauna Act* provided that some fauna was the property of the Crown and under the control of the Fauna Authority?
  - The respondent and the Cth submitted that the Act gave *full beneficial, or absolute ownership of the fauna to the Crown* but the Court disagreed with this – the subject matter of the Act (Fauna) is intended to always remain outside the possession of humans
  - The Act does not identify what fauna is owned by the Crown, and at common law wild animals were the subject only of the most limited property rights, not the entirety of the powers of use and disposal allowed by law. These were limited to the right for a landowner to hunt wild animals on his own land, trespass against taming wild animals
- **"The statutory vesting of property in the Crown by the Fauna Acts can be seen to be nothing more than a fiction expressive in legal shorthand of the**