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## Week 1: Concept of Property

### Introduction

- Property law is more statute heavy compared to contracts- Conveyancing Act 1919 (NSW) and the Real Property Act 1900 (NSW).
- Property is concerned with 'rights' as opposed to 'things'.
- Property law is a part of private law – governs the relationship between private individuals and is to be contrasted with public law, which governs the relationships between individuals and States, and between States.

### What is property

- **Property**; relations between human beings, or more accurately about relations between persons *in relation to things*- *Milirrpum v Nabalco (1971) 17 FLR 141*- Property generally implies:
  - **1. The right to use or enjoy**- property does not refer to a thing; it is a description of a legal relationship with a thing. Treated as a bundle of rights. Refers to the degree of power that is recognised in law as power permissibly exercised over the thing.
  - **2. The right to exclude others**= It is a private right exercisable against the general public including the state
    - **Example of public right**: fish and navigate in an open sea
  - **3. The right to alienate**
- Elements of property can be seen by examining the boundaries that property rights share with other classes of rights within the scheme of private law. Private law subdivided into two distinct categories:
  - **1) Property Rights**
    - Property rights: are *in rem* (enforceable in respect of a thing)
    - Personal rights: are *in personam* (enforceable against a person)
  - **2) Obligations** = Refers to the rights of persons against other persons that arise from certain events.
- Property Rights and contractual rights
  - Property rights: are rights **over things** enforceable against other persons
  - Contractual rights: rights enforceable against **particular persons**

### Categories of Property

- **Real property**: ownership of an immovable piece of land, typically a house, unit, apartment, farm or an empty plot. Assumed recognition that the owner has a real action in the restoration of the *res* (the thing) is an unlawful eviction
  - **Land focused in this subject**
- **Personal property**: a chattel that is typically movable and not involving land
  - **Not involving land**
- **Intellectual property**: intangible property, usually creative work
  - **Not covering this (elective)**
- **Family or relationship property**: all property in the context of a family relationship
  - **Property in the family context**
  - **Some family property law matters**

### History of Property

- Blackstone was a leading jurist in his time and provided a definition to property:
  - “[Property is] 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**.”
    - **Property requires dominion**
    - **Held against something**
    - **Individual exercises control**
- **Margaret Davies 2007**: disagrees with Blackstone, at least in regards to contemporary property law. Specifically, rejecting the individualism of the Blackstonian conception of property. She argues for a communitarian view of property which ‘concerns individuals and communities: how they are formed, how they live together and how they use their resources’.

**Three dimensions to the concept of property**

- **1. Analytical-** What is property
- **2. Philosophical-** What is the jurisdiction for a particular regime of property rights
- **3. Doctrinal-** What are the legal rules of property? (such as classification, definition, delimitation nation that makes property rights distinct)

**1. Analytical Dimension**

<ul style="list-style-type: none"> <li>• The analytical dimension is concerned with the question “What is property”</li> <li>• concerns the role of the government, the autonomy of the individual and the distribution of wealth. Human rights issues arise in property law.</li> </ul>	
<p><b>Davis v Commonwealth (1988) 166 CLR 79</b></p>	
<p><b>Facts</b></p> <ul style="list-style-type: none"> <li>• Indigenous civil rights activists produced shirts bearing similarities to the official Commonwealth symbols of the Australian Bicentennial Authority with the words “200 years of suppression and depression”. The Authority refused consent for Lou Davis to use the symbols.</li> </ul>	
<p><b>Decision</b></p> <ul style="list-style-type: none"> <li>• The High Court of Australia recognised the civil rights of Davis (namely freedom of expression in the Australian Constitution) over the property rights of the Authority under the Australian Bicentennial Act 1980 (Cth).</li> </ul>	
<p><b>Comment:</b> Commonwealth power over property can be subject to freedom of expression as civil rights according to the Australian Constitution.</p> <ul style="list-style-type: none"> <li>• <b>Implied right to the freedom of speech/expression.</b></li> <li>• <b>Property rights exist within the context of human rights</b></li> <li>• <b>Making a political comment is completely fine</b></li> </ul>	
<p>Australian Constitution, s 51(xxxi) states:</p>	<ul style="list-style-type: none"> <li>• “The Parliament shall...make laws...with respect to: the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”</li> <li>• The Government can compulsorily acquire property but owners must be paid on just terms. <b>(adequate compensation of the land)</b></li> </ul>

**Blackstonian Elements**

<p><b>Three Blackstonian elements- Blackstonian Definition</b></p>		
<ul style="list-style-type: none"> <li>• <b>1. Dominion:</b> a legally authorised power, such as personal possession of chattels (e.g. book, phone, etc). This confers a right to use or enjoy. → Sole and despotic dominion: rights exclusive to the property owner and has to be alienable</li> <li>• <b>2. Exclusion:</b> The <i>right to exclude</i> others from enjoying the same rights or interfering with property holders rights → <b>only you can own the property</b></li> <li>• <b>3. External things:</b> This may be tangible (e.g. car) or intangible (e.g. copyright) with a <i>right to transfer or alienate</i> the thing → <b>based on the power of possession</b></li> </ul>		
<p><b>Application of the Blackstonian Principle</b></p>		
<p><b>Application of the Blackstonian Principle</b></p>	<p><b>Milirrpum v Nabalco (1971) 17 FLR 141 (Gove Island Land Rights case)</b></p>	<p><b>Facts:</b> The Yolngu people from Yirrkala (Arnhem Land, Northern Territory) on the Gove peninsula attempted to claim native title.</p> <p><b>Decision:</b> Blackburn J of the Supreme Court of the Northern Territory rejected the Applicant’s claim. Although there was a recognisable system of law, Blackburn J found that the Yolngu did not have a proprietary interest in the land, because the Blackstonian indicia was not present (spiritual connection did not fit into the traditional definition)</p> <ul style="list-style-type: none"> <li>• <b>Older people did not have a proprietary interest in the land</b></li> <li>• <b>Anglo view of property to deny native title</b></li> <li>• <b>This was overruled after the Mabo decision</b></li> </ul> <p>Per Blackburn J: “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.”</p> <p><b>Comment:</b> This was an early case on native title and the case was ultimately overturned in the 1992 Mabo decision.</p>
<p>Definition of right to use or enjoy.</p>	<p><b>Yanner v Eaton</b></p>	<ul style="list-style-type: none"> <li>• The appellant was an Indigenous man who killed two crocodiles in a creek for his own consumption, contrary to the statute law.</li> <li>• The term property does not necessarily mean, full, exclusive or beneficial ownership. It is a degree of power that is recognised in law as power permissibly exercised over a thing.</li> <li>• High Court of Australia found in favour of the appellant, as the statute did not cover absolute ownership of native animals but merely regulated hunting. They were influenced by Kevin Gray’s illusion theory.</li> <li>• Gummow J states, “property comprised legal relations not things, and those sets of legal relations need not be absolute or fixed.” • <b>Endorsement of the bundle of rights theory.</b></li> </ul>