

Topic One: Introduction

(A) The Concept and Function of “Property”

Introduction to general property concepts

What is property?

Property is a relationship between the holder of the property and other non-holders, rights exercisable against the whole world a right *in rem* (rem is latin for ‘the thing’).

Contractual Rights <i>In personam</i> : between the parties Tend to be weaker than property rights	Property Rights <i>In rem</i> : against the world Tend to be stronger than personal rights
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Overlap of contract and property rights

- Contracts are often used to move property around: *in personam* mechanism to pass an *in rem* right
- Therefore the simple distinction is not always clear
- Equity also comes into play: recognises property rights where common law doesn’t

Some indicators of property rights (*these are more consequences of property rights, than the right itself*):

- Use and enjoyment (right to use a car, land, etc)
- Exclusion (right to stop other people using the property)
- Alienate/transfer (right to move property rights through leases, easements, etc)

Variable meaning of “property”

Yanner v Eaton (1999) HCA Majority defined property as:

- The concept of "property" may be elusive. Usually it is treated as a "bundle of rights."
- "Property" is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not "a monolithic notion of standard content and invariable intensity".
- Consider: Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? These will not always add up to full beneficial, or absolute, ownership ...

WHAT DEGREE OF PROPERTY RIGHTS EXIST?

STATUTE EXTINGUISHING RIGHTS

Consider the statutory elements against the common law background of the types of rights being claimed (**Yanner**)

CONFLICTING CONTRACTS

When there are competing rights from the same source, look to the wording of the contract and the intention of the parties (**King v David Allen**)

Yanner v Eaton (1999) HCA: s 7(1) of the Qld Fauna Act stated: “all fauna... is property of the Crown.” Indigenous man was charged with taking a crocodile without a licence.

If ‘property of the Crown’ meant absolute ownership, all native title rights would have been extinguished. Court held this was not the effect of s 7(1), but rather the statute created an aggregate of legal relations less than absolute ownership.

Court read the Fauna Act as a whole.

- Other parts of the Act indicated people could be given hunting rights, which implies the Crown did not own the animals: there was not a complete taking of the ownership, so native title could coexist with this statute.

So far as now relevant those were rights to limit what fauna might be taken and how it might be taken, rights to possession of fauna that had been reduced to possession, and rights to receive royalty in respect of fauna that was taken (all coupled with, or supported by, a prohibition against taking or keeping fauna except in accordance with the Act 1975). Those rights are less than the rights of full beneficial, or absolute, ownership.

King v David Allen and Sons, Billposting (1916):

Cinema owner had an agreement with a billposting company to put posters on the wall for four years. Owner then leased building to a new tenant, who refused to let them put posters up.

Did the contract create a licence (personal right) or an interest in the land (property right)?

Court held there was no intention to create a property right. Billposting company could only sue for breach of contract, not enforce property rights.

- **There was nothing in the contract** to indicate the billposting company had a right against future parties that were given property rights.

“...creates nothing but a personal obligation. It is a licence given for good and valuable consideration and to endure for a certain time.”

“The agreement contained an implied term that King would not disable himself from carrying out his contractual obligation. King breached that condition and was liable in damages...”

7. FIXTURES: INTERESTS IN CHOSE IN POSSESSION

Has a chose in possession (chattel) become a fixture (part of the real property)?

A **fixture** is a chose in possession (chattel) that has been attached or is resting on land in such a way that it has lost its legal identity as a separate object, and has become a part of the land (real property)

Fixtures become important:

- When land has been leased and the lease is about to conclude
- When land is sold

LOOK AT THE CONTRACT

A. Refer to the terms of the agreement

☑ If the sale or lease agreement **specifies** the entitlement to the specific item, this is determinative.



☒ If the agreement is **silent**, the law of fixtures will determine whether the item is:

A **chattel**, which remains a piece of personal property, and the vendor (seller of property) or tenant (lessee of property) is entitled to retain ownership;

OR

A piece of **real property** (i.e. fixture), in which case it passes to the purchaser upon sale, or passes to the landlord upon the conclusion of the lease.

B. Initial presumption

The initial presumption determines the applicable burden of proof (OBP to refute presumption).

Initial presumption: How is the object supported?

1. If the object is resting by its own weight only (i.e. it doesn't need the support of the real property), it is presumed to be a **chattel**
2. If the object is attached to the land in some way (needs the support of the real property to function of exist), it is presumed to be a **fixture**.

Belgrave Nominees affirms that this presumption is **a low threshold** - “... even slight fixing to the land is sufficient to raise the presumption that a chattel is a fixture.”

➔ Consider the freestanding linen cabinet in **Palumberi v Palumberi**: arguably resting against the real property (floor/wall) because it isn't easy to move. Sufficient to raise presumption.

C. Substantive tests

BALANCING TEST: The court in **Belgrave Nominees** held that “whether the intention of the party fixing the chattel was to make it a permanent accession to the freehold is to be inferred from matters and circumstances including the following”:

- The **mode and degree** of annexation
- The **purpose** for which the item was to be fixed: Considerations of the purpose/object/intention of annexation have been given **greatest emphasis** (**Palumberi v Palumberi**). The court in Belgrave also considered relevant to the purpose:
 - The **nature** of the chattel (in that case an airconditioning unit)
 - The **relationship** and situation of the party making the annexation

i) Degree/mode of annexation: *How has the object been attached to the land? Bolts, screws, cemented, carved? Consider the degree of permanence.*

Held to be a fixture

- **Belgrave Nominees:** **Airconditioning unit** connected by pipes to the building's water reticulation system. Very attached to the building. Removing the unit at that point would involve ripping out the pipes and would cause substantial damage.
- **Palumberi v Palumberi:** Brother made a number of improvements to a property in anticipation of receiving the property as a gift. **Stove and carpet** The mode and degree of annexation here was not compelling, but greater emphasis was given to purpose, i.e. that they were attached for the enjoyment of the premises and were fixtures.
- **Re Cancer Care:** **Steel frame to support radiotherapy equipment** was cemented or grouted into a recessed pit in the slab floor of the suite. Strong mode of annexation. The Equipment and frame are **not a single item**. They were installed and could be used separately: particular frames and linear accelerators are interchangeable.
 - Alternatively even if the Equipment and frame were a single item, the equipment has **a "separate and independent viability"** which means that even if it were part of a single composite machine the equipment need not become a fixture even though other parts of the machine did: the two items could easily still be detached and turned into two separate items because the accelerators have a different function and purpose to the frame.

Held to be a chattel

- **NH Dunn:** **Electronics unit** attached to the wall and floor with **nails, screws and plugs**: could be removed with little difficulty and expense and would not be overly detrimental or damaging to remove
- **Palumberi v Palumberi:** Brother made a number of improvements to a property in anticipation of receiving the property as a gift. **Linen cabinet** linen cabinet was freestanding and readily removable. Nothing attaching it to the real property. Very superficial, but enough to raise the first presumption (low threshold) **Television antenna** installed with some degree of permanence, but purpose outweighed this (for the enjoyment of the TV set). **Venetian blinds** screwed into the wall, not overly attached.
- **Re Cancer Care:** **\$9 million radiotherapy equipment** could be easily detached from the frame and moved elsewhere. Not a strong mode of annexation.

Why has it been brought onto the land?

Was it joined to the land for its better use as a chattel/better enjoyment of the item itself (as in Dunn v Ericsson), or for the improvement of the land?)

ii) Object/purpose of annexation [greatest emphasis]: *What was the intention behind the annexation? Is the annexation for the greater enjoyment of the object or is it intended to be a permanent improvement to the property?*

This is **primarily an objective test**: would a reasonable observer think this was supposed to be a fixture, but **regard can be had to subjective intention** (parties can explain why it was attached).

Held to be a fixture

- **Belgrave Nominees:** **Airconditioning unit** connected by pipes to the building's water reticulation system. Court said this was an essential part of the building, necessary for its use and occupancy as modern office premises. They weren't attaching the air conditioner to the pipes so it wouldn't fall off the wall, they were making a permanent improvement to the space. Air-conditioners aren't usually attached to property with the assumption you would rip them out of the wall when you leave – they are a permanent improvement to the property. Within this, the court considered:
 - **Nature of property:** *What is the item? Is it inherently a fixture?*
 - Air-conditioners by nature are something that implies a degree of permanence.
 - **Relationship between the parties:** *was the annexation made by the owner of the freehold (permanent interest) or the person in possession (limited interest)?*
 - Subcontractors vs owner of freehold. If a modification is made by someone who has freehold, there might be a stronger argument that it was intended to be fixture. Also - tenant/subcontractors have possession for a specific duration and it is therefore less compelling that they intended the property to form a permanent part of the real property. Shorter duration would probably be even less compelling.

Topic Two: Personal Property – Introduction to Choses in Possession

C. Transfer of Ownership (engaging in dealings in choses in possession)

8. TRANSFER OF OWNERSHIP: HAS THE ITEM BEEN TRANSFERRED BY SALE?

a. PARTIES: Who are the parties?

- Is there a buyer (person who buys or agrees to buy goods) and a seller (sells or agrees to sell)?

b. CONTRACT: Does a contract exist?

- Are there goods?

- SOGA s 5** Definition of **goods**: *include all chattels personal other than things in action and money.*

– Is it personal property? Or a chose in action (e.g. currency, shares, etc)

– **Ask: is it a contract for the sale of goods, or a contract for labour and materials?**

- **Robinson v Graves**: Contract commissioning an artist to create a painting which was held to be a contract for labour and materials.

Greer LJ: *Is the substance of the contract (1) the production of something or (2) that skill and labour and experience have to be used for the production of the article and it is only ancillary to that there will some materials?*

- **Lee v Griffin**: Dentures were held to be contract for sale of goods, not skill and labour, because the contract resulted in production of a finished product.

- **Clay v Yates**: Printing press. Contract for production of books was held to be contract for sale of goods.

- **Criticism of Robinson v Graves in Deta Nominees v Viscount Plastic Products**: **Victorian Supreme Court has criticised the superficial distinction between contract for labour/materials and goods: 'illogical and unsatisfactory', 'wrong in principle' and 'too erratic' to be useful.**

- If a contract exists, has there been a sale?

- SOGA s 8**: Contract does not have to be in writing (i.e. can be oral agreement)

- SOGA s 5** Definition of a **contract**: *includes an agreement to sell (in the future) as well as a sale (immediate).*

- SOGA s 6(1)**: A **contract of sale of goods**: *contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.*

– **Ask: Is it definitely a sale or agreement to sell? Or a retention of title agreement?**

- **Helby v Matthews**: **Does the contract impose an obligation to buy? Look at the substance of the agreement.**

- **Facts**: Contract to use a piano. Would become the owner if he continued to make monthly repayments. Could be returned at any time. Person used the piano as security for a loan at pawnbrokers, owner tried to retrieve it.

- Court held property had not passed: terms of the contract did not upon its execution bind the person to buy – nothing in the contract imposed an obligation to buy the piano.

- **NOTE**: *this can provide the basis of a security interest under the PPSA s 12 – see Topic 5B.*

- **McEntire v Crossley Brothers**: **Court will look beyond the terminology of the agreement and consider its actual legal effect.**

- **Facts**: Agreement between 'owners' and 'lessors' of a gas engine. Agreement to hire at particular rent and instalments, becomes owner upon complete payment. Default, can sue for the amount or recover possession. Lessee pays first instalment then bankrupt.

- Court held while this used the language of leasing, it was a hire/purchase and retention of title agreement. Look at the agreement as a whole and see what its substantial effect is.

c. INTENTION: When did the parties intend the title in the property to pass?

- Are the goods ascertained?

- SOGA s 21**: **Property in goods can't pass until the goods are ascertained**

- Status of goods:

- **Specific goods**: **SOGA s 5** definition: *goods identified and agreed upon at the time a contract of sale is made*

- **Future goods by description**: **SOGA s 5** definition: *goods to be manufactured or acquired by the seller after the making of the contract of sale.*

- **Ascertained goods**: Not defined in act, refers to: *goods unidentified at time contract was made, which become identified subsequently as the goods to satisfy that contract.*

- **Unascertained goods**: Not defined.

GAMMASONICS - software package delivered by remote download with no physical medium (like a USB or otherwise) was not a good.
Could only become a good where it is transformed into a medium which gives it the qualities required to bring it into the jurisdiction of SOGA (s 5) - needs tangibility and moveability

SCAFFOLDS

LAWS5008: Introduction to Property and Commercial Law

Topic One: (A) The Concept/Function of “Property” and (B) Intro to Real Property

1. NATURE OF THE PROPERTY RIGHTS

- a. **Statutory**: consider statute as a whole, and against common law background (**Yanner v Eaton**)
- b. **Conflicting contracts**: look to the wording of the contract and the intention of the parties: do the intend to confer a property or personal right? (**King v David Allen and Sons**)
- c. **Native title**:
 - i. Existence requires possession and maintenance of customary laws (**Mabo No 2**)
 - ii. Extinguished to the extent of inconsistency with Crown grants of interest (**WA v Brown**)

2. LEGAL INTERESTS IN LAND

- a. **What is the interest and who are the parties**: Freehold (title/mortgage) or non-freehold (lease/easement/profit a prendre)
- b. **Freehold**: (title, mortgages)
 - i. Has a legal interest been created?
 - 1. Old system: **23B(1)** requires a deed to pass a legal interest (deed: **s 38(1)**)
 - a. Term ‘deed’ not used: most solemn act of party (**Manton**)
 - b. **s 38(1)** deed does not need to be delivered, as at common law.
 - 2. Torrens: registration **RPA s 41** takes effect as a deed (**RPA s 36(11)**)
 - ii. Is there any fraud?
 - 1. Old System: forgery = instrument is void and passes no rights in law or equity; fraud will pass a legal interest but equity will allow the instrument to be set aside and there will be priority issues. Registration under s 184G does not cure any defects and fraud is an exception to s 184G so will also lose any priority advantages.
 - 2. Torrens: Actual fraud **RPA s 42(1)**; notice not sufficient **RPA s 43(1)**
 - iii. If a legal interest has been created and there is no fraud:
 - 1. Old System: Legal interest is created. Mortgagee has a power of sale (implied by **s 109** if made by deed, but not expressly stated in agreement)
 - 2. Torrens: Registered proprietor obtains indefeasible title **RPA s 42**
 - iv. If no legal interest has been created (and also no fraud,):
 - 1. Consider whether an equitable interest has been created (below): writing as per **s 23C(1)(a)**; part performance exception under **s 23E** or deposit of title documents with intention to provide
- c. **Non-freehold**: (leases)
 - i. Is the agreement a lease or a licence?
 - 1. Exclusive possession and certainty of duration (**King v David Allen**)
 - ii. Has a legal interest been created?
 - 1. Formal statutory compliance:
 - a. Old System: Lease in the form of a deed as per **s 23B(1)**
 - b. Torrens: Registered lease under **RPA s 41**
 - 2. Exception under **s 23D(2)(d)**: best rent (market); not exceeding three years (including extension options); right to immediate possession (not future). Query whether consideration required.
 - iii. Is there any fraud?
 - 1. Old System: forgery = instrument is void and passes no rights in law or equity; fraud will pass a legal interest but equity will allow the instrument to be set aside and there will be priority issues. Registration under s 184G does not cure any defects and fraud is an exception to s 184G so will also lose any priority advantages.
 - 2. Torrens: Actual fraud **RPA s 42(1)**; notice not sufficient **RPA s 43(1)**
 - iv. If a legal lease has been created and there is no fraud:
 - 1. The agreement will confer a proprietary right to exclusive possession along with other rights and obligations in the agreement. Equitable remedies are available for breach, including specific performance (land is unique); injunction, equitable damages, etc.
 - v. If no legal lease has been created (and also no fraud,):
 - 1. Consider whether an equitable lease has been created (below): writing as per **s 23C(1)(a)**; part performance exception under **s 23E**.

CONVEYANCING ACT 1919 (NSW) [LAND]

<p>23B ASSURANCES OF LAND TO BE BY DEED [LEGAL INTERESTS]</p> <p>(1) No assurance of land shall be valid to pass an interest at law unless made by deed.</p> <p>(2) This section does not apply to:</p> <ul style="list-style-type: none"> (a) an acknowledgment under section 83 of the Probate and Administration Act 1898 , (b) a disclaimer made in accordance with any law relating to bankruptcy in force before or after the commencement of the Conveyancing (Amendment) Act 1972 , or not required to be evidenced in writing, (c) a surrender by operation of law, and a surrender which may, by law, be effected without writing, <u>(d) a lease or tenancy or other assurance not required by law to be made in writing,</u> (e) a vesting order, (f) any other assurance taking effect under any Act or Commonwealth Act. <p>(3) This section does not apply to land under the provisions of the Real Property Act 1900.</p>	<p>23D CREATION OF INTERESTS IN LAND BY PAROL [ORAL AND INFORMAL LEASES]</p> <p>(1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by the person's agent thereunto lawfully authorised in writing, shall have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.</p> <p>(2) Nothing in this section or in sections 23B or 23C shall affect the creation by parol of a lease at the best rent which can reasonably be obtained without taking a fine taking effect in possession for a term not exceeding three years, with or without a right for the lessee to extend the term at the best rent which can reasonably be obtained without taking a fine for any period which with the term would not exceed three years.</p>
<p>23C INSTRUMENTS REQUIRED TO BE IN WRITING [EQUITABLE INTERESTS]</p> <p>(1) Subject to the provisions of this Act with respect to the creation of interests in land by parol:</p> <ul style="list-style-type: none"> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the <u>person's agent thereunto lawfully authorised in writing</u>, or by will, or by operation of law, (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will, (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing. <p>(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.</p>	<p>23E SAVINGS IN REGARD TO SECS 23B, 23C, 23D [PART PERFORMANCE EXCEPTION]</p> <p>Nothing in section 23B, 23C, or 23D shall:</p> <ul style="list-style-type: none"> (a) invalidate any disposition by will, or (b) affect any interest validly created before the commencement of the Conveyancing (Amendment) Act 1930, or (c) affect the right to acquire an interest in land by virtue of taking possession, or (d) affect the operation of the law relating to part performance.
<p>38 SIGNATURE AND ATTESTATION [DEEDS]</p> <p>Deed must be: 38(1): Signed, sealed, attested by witness (not party to agreement). No particular words required.</p> <p>38(3): Instrument signed and attested in accordance with the section shall be deemed to be sealed.</p> <p>38(2): Indenting no longer necessary</p> <p>184G: Old System title registration of a valid instrument under Deeds Registration System gives priority advantages (fraud is one of many exceptions to 184G).</p>	<p>54A CONTRACTS FOR SALE ETC OF LAND TO BE IN WRITING [FUTURE AGREEMENTS]</p> <p>(1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.</p> <p>(2) This section applies to contracts whether made before or after the commencement of the Conveyancing (Amendment) Act 1930 and does not affect the law relating to part performance, or sales by the court.</p> <p>(3) This section applies and shall be deemed to have applied from the commencement of the Conveyancing (Amendment) Act 1930 to land under the provisions of the Real Property Act 1900 .</p> <p>REAL PROPERTY ACT 1900 (NSW)</p> <p>41: Torrens registration confers interest in the land</p> <p>42: Indefeasibility - once registered, the registered proprietor's title can only be set aside in narrow circumstances, including actual fraud</p> <p>43: For the purposes of fraud, mere notice of an adverse claim is not sufficient.</p> <p>56: Details of Torrens Title mortgages</p> <p>57(1): Torrens mortgages operate as charges</p>