

Topic 1 The Concept and Function of Property AND Introduction to Real Property

(1) INTRODUCTION TO GENERAL PROPERTY CONCEPTS

Concepts of 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: in personam between the parties tend to be weaker than property rights
- Property rights: in rem against the world tend to be stronger than personal rights
 - Native title is a personal right, as it is not transferrable, but better view was to consider it as sui generis (i.e., generated by itself unique and alien to property laws from England).

Whenever lawyers use the term property, they refer to rights to things, and not the thing (i.e., object) itself.

- In more precise thought, it has been long recognised that when the concept of property is used in law in the context of a tangible thing it describes the legal relationship between a person and a thing rather than the things itself. The focus is therefore upon the nature of the legal relationship between a person and a thing. [Hocking v Director-General of the National Archives of Australia \(2020\) 271 CLR 1, 82 \(Edelman J\).](#)
- In fact, this is not correct either. One cannot have a legal relationship with a thing (because things cannot bear rights and owe duties). A property right is more properly a legal relationship with other legal persons with respect to things.

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)

[Yanner v Eaton \(1999\) 201 CLR 351](#)

Facts:

- Mr Yanner charged with killing a juvenile crocodile for traditional purposes contrary to [s 54\(1\)\(a\) Fauna Conservation Act 1974 \(Qld\)](#). Yanner 1974 54(1)(a) .
- Mr Yanner claimed he was exercising his [native title rights](#) as he killed the crocodile for cultural purposes and so did not commit any offence, as [s 211 Native Title Act 1993 \(Cth\)](#) provided explicit permission for traditional hunting. Yanner 1993 211 .
- The prosecutor argued that native title rights to take the crocodile had been extinguished by the [Fauna Act](#) which [vested property in all wild fauna in the Queensland government by s7](#) 7

Issue: What did the word property in the Fauna Act mean?

Majority:

On the meaning of property

- Concept of property is elusive
- Quoting Gray¹: 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](#)

¹ K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 15-51.

- Property might in some senses mean the absolute control over a thing, but it is not a monolithic notion of standard content and invariable intensity and can mean different things

On the Fauna Act

- Court read the Fauna Act as a whole.
- In the context, the word property in the Fauna Act was not full beneficial or absolute ownership Those rights are less than the rights of full beneficial, or absolute, ownership.
- Not possible to have true ownership over wild animals: unlike domestic animals, which are chattels, at common law wild animals are not owned by anyone (publicly owned) until the animal is captured or killed and a person takes possession of it
- The vesting of property in the Crown was no more than a fiction expressing the importance to its people that a state has power to reserve and regulate the exploitation of an important resource
- Property used to support the system of regulation and provide foundation for Crown to assert rights to unlawfully taken fauna or to impose a royalty
- Introduced concept of government ownership as a means of control rather than the normal use and enjoyment conferred by private ownership

Conclusion

- The Crown's proprietary right to fauna was not inconsistent with Mr Yanner's native title rights, which prevailed because they were protected by the Native Title Act s 211 which preserves certain native title rights and interests on lands occupied by Indigenous peoples. In turn, the Racial Discrimination Act and section 109 of the Australian Constitution further protect those rights against extinguishment by state legislation. Yanner 211, 109

Gummow J

- Property is used in the law in various senses to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Distinct corporeal and incorporeal property rights in relation to the one object may exist concurrently and be held by different parties
- Property need not necessarily be susceptible of transfer.

The Numerus Clausus Principle and Legal Limits of Property

Numerus Clausus:

Definition: the law recognizes a limited class of rights as **proprietary rights**, which is a closed class and will not allow the creation of new property rights (sometimes called fancies) by agreement.

- Personal property:
 - Ownership (including co-ownership);
 - Mortgages and other security rights;
 - Bailments (perhaps);
- Real property:
 - Fee simple (in possession, reversion, conditional and determinable); leasehold and life estate (although not in England);
 - Mortgages and other security interests;
 - Servitudes (easements, profits à prendre etc.)
 - Restrictive covenants.

Hocking v D-G of the National Archives of Australia [2020] HCA 19

Facts:

- Documents about the 1975 dismissal of the Whitlam government 1975
- They were in the possession of the official secretary of the D-G who had consigned this correspondence to the National Archives

- Section 3(1) of the Archives Act defines a Commonwealth record as a record that is the property of the Commonwealth or of a Commonwealth institution.

Issue: Were they property of the Cth or a Cth institution for the purposes of the statute? Cth Cth

Judgment Edelman J:

- It would be very surprising if Parliament had intended to use the concept of property in the Archives Act to describe a legal relationship with a chattel according to some unique, undefined meaning, unknowable until it is revealed by creative judicial exegesis. If Parliament had created such a unique meaning it would potentially compete with the common law conception of property rights, violating a numerus clausus principle of a closed number of property rights and creating a potential clash between the statutory regime and co-existing remedies for common law actions for detinue and replevin and equitable remedies for delivery up of chattels. Unsurprisingly, it did not do so.

Possession and Title

Ownership: the ability to exercise control over or dispose of property recognised by law.

- Subject to whatever qualifications may be imposed by statute or the common law, or by reservation or grant, the holder of an estate in fee simple may use the land as he or she sees fit and may exclude any and everyone from access to the land. *Fejo v NT (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)*.
- At common law, ownership is thus sometimes described as, a right to exclude any and everyone from access to the land for any reason or no reason. *WA v Brown (2014) 253 CLR 507, 522 (the Court)*.

Title: the legal status of ownership

Possession: the state of fact in which a person has intention to exercise control (animus possedendi) and actual physical control, over land or goods animus possedendi

Relationship between possession and ownership

Possession is an incident/right of ownership, but ownership is not an incident of possession, i.e., you can possess something without owning it, e.g.,

- 1. Lease
- 2. Bailment
- 3. Adverse possession of land: If a squatter does such acts as the owner would do, after 12 years subject to other conditions, that person can actually make an application for title

Incident of residuosity is a necessary element of ownership: need to look at the rights a person has to use a thing in the future to distinguish between ownership and possession.

(2) CLASSIFICATION OF PROPERTY RIGHTS

Rights in rem vs rights in personam

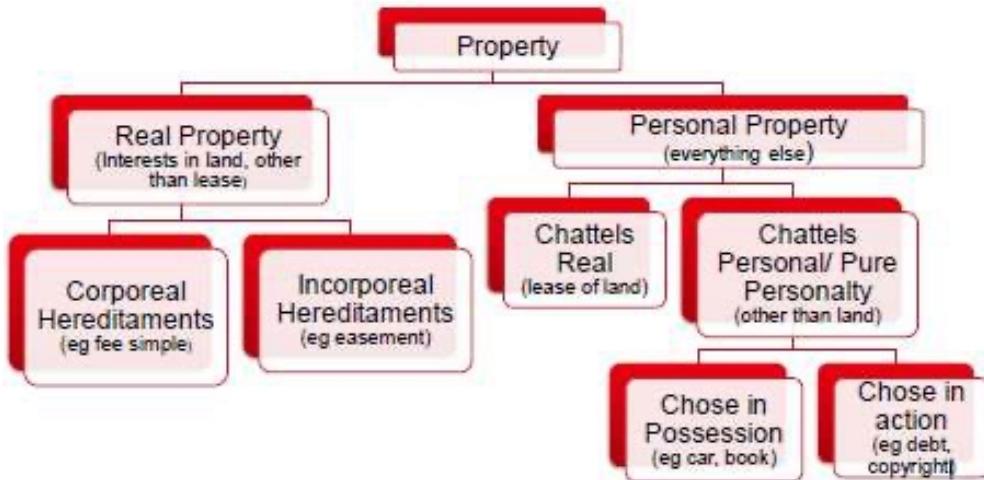
- 1. Rights in rem (remedies for land rights): operate against the whole world
- 2. Rights in personam: rights which are enforceable against an identifiable person

Rights in rem depend on the continued existence of the thing to which the rights relates, while rights in personam does not depend on the existence of a thing, but corresponds to the persons obligation to fulfil that right.

- E.g., if the book a friend borrows is destroyed, might have a right in personam against the other person, but right in rem no longer exists.

Real vs personal property, legal and equitable interests

Taxonomy of Property Interests



Real property

- Real property refers to land and anything permanently attached to it, such as buildings or trees. It involves legal interests in the land itself and is governed by real estate law.
- Legal interests **protected by actions in rem** to establish or vindicate the title to land recognised by the common law.
- Equitable interests were **protected by remedies issued by the Chancellor (injunctions, specific performance and declarations)** which were rights enforced **in personam** because against the owner at common law.

Personal Property

- Personal property, on the other hand, includes movable items or possessions not fixed to land, such as vehicles, furniture, and electronics. It can be either tangible (physical objects) or intangible (rights, patents).
- **Choses in possession (chattels/goods):** are **tangible items or goods** that a person has physical control over or possession of. They are physical objects that can be moved and owned.
 - a. Legal interests (ownership or possession) in chattels are protected by remedies in tort (trespass, conversion) and the specific relief of detinue
 - b. Equitable interests are protected by equitable remedies, generally to enforce trusts or recognise the effect of assignments in equity
- **Choses in actions:** refer to **intangible rights** that can be legally claimed or enforced through action, not physical possession. They are rights to recover debts or damages, including bank accounts, stocks, intellectual property rights, and contractual rights.
 - They are enforced by taking action, whether at law or in equity

(3) TENURES AND ESTATES AND THE RECOGNITION OF NATIVE TITLE - TWO SYSTEMS

Tenure and Estates

Definition of tenure: the tenant holds land from another subject to the performance of certain obligations.

- The Crown in Australia has absolute beneficial title. Owners of land are tenants in chief of the Crown.
- However, **Court in Mabo (No 2)** denied existence of absolute beneficial title, instead endorsing concept of radical title to acknowledge native title. Crown has the power to take that's the radical nature.

Doctrine of estates: The fullest set of rights of enjoyment of land i.e., possession

Recognition and non-recognition of Native Title Mabo No 2

Mabo v Queensland (No 2) (1992) 175 CLR 1

- Native title is made up of the rights as dictated by customary law of those people, so it is formed and shaped by that customary law.
- It is wider than common law proprietary interests, but it is a **very weak and fragile right**. It is a burden on the radical title of the Crown; the Crown has a duty to respect native title, but it is subject to **being extinguished by an inconsistent interest granted by the Crown**.
- **Native title does not attract compensation if extinguished.** The courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power to extinguish native title.

Brennan J:

- **Native title may be proprietary** and that where this is so it nevertheless can accommodate personal usufructuary rights (right to use the property and enjoy its fruits) that are enjoyed under that proprietary title.
- At 58: Native title has its origin and is given its content by the traditional laws acknowledged by and the customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained by reference to those law and customs. 58

Deane and Gaudron JJ:

- **Native title is a personal right, as it was not transferable**, but better view was to consider it as *sui generis* (i.e., generated by itself unique and alien to property laws from England).

1. Does native title exist?

Existence of native title needs possession and maintenance of customary laws.

Brennan J: Native title survives when:

- ... a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.

Native title has not survived when:

- ...the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition

Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.

2. Has native title been extinguished?

Native title is extinguished to the extent of any inconsistency with grants of interest by the Crown.

Test for extinguishment:

- To answer question of extinguishment must ask **whether the rights [granted] are inconsistent with the alleged native title rights and interests**, which is an objective inquiry which requires identification and comparison between the two sets of rights[]

WA v Brown: Process for determining native title inconsistency:

- Identify the nature of both sets of rights (**WA v Brown**)
 - Toohey J in Wik said identification of the native title rights must focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right.
- Objective comparison of the two sets of rights (**WA v Brown**)

- Consider legal nature and content of the rights at the time of creation: the manner in which rights are subsequently exercised does not change the original content of the right.
- The sets of rights are either inconsistent or there are no degrees of inconsistency.
- If rights are inconsistent native title is extinguished to the extent of the inconsistency, **and cannot be revived**.

A Does the Crown grant of interests confer exclusive possession?

WA v Brown: A grant by the Crown of a right to exclusive possession is inconsistent with, and therefore extinguishes, native title.

Exclusive possession: Extinguished	Not exclusive possession: not extinguished
Fee simple: even if it is granted subject to native title rights. The fee simple grant by the Crown confers exclusive possession and automatically extinguishes native title (Fee simple v NT)	A grant of rights to use land for a particular purpose (pastoral, mining, etc) is not necessarily inconsistent with native title rights (such as right to camp, hunt, gather, conduct ceremonies on land and care for land) if it is not accompanied by <i>the grant of a right to exclude any or everyone from the land for any reason or no reason</i> (i.e., it doesn't confer exclusive possession).

B What does a grant of interests less than exclusive possession look like?

- **WA v Brown:** Rights are inconsistent where the existence of one necessarily implies the non- existence of the other.
- **Brennan J in Mabo (No 2)** said there will be no inconsistency where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land.

Examples of inconsistency (native title extinguished):

- **Brennan J in Mabo (No 2):** where land is appropriated and used for roads, railways, post offices and other permanent public works.

Examples of no inconsistency (native title is preserved):

- Examples in **Mabo (No 2):** land set aside as a national park, authorities to prospect for minerals.

Wik Peoples v Queensland (1996) 187 CLR 1: The leases were creatures of statute, rather than the common law, and thus did not necessarily grant exclusive possession

Issue: Did pastoral leases granted under Land Act 1962 (Qld) confer exclusive possession on grantees so as to completely extinguish the native titles of the Wik? 1962 Wik

Held: NO

- Leases were granted for grazing purposes only, not absolute property rights.
- Nothing in the statute expressly extinguished native title interests. Kirby J thought **very clear language of extinguishment would have been required, by conventional theory.** J (Kirby J)
- Gummow J said **there was nothing that said the statutory interests could only be enjoyed with the full abrogation of any such native title.**

Western Australia v Brown (2014) 253 CLR 507

- Competing rights:
 - Native title rights included non-exclusive rights to access and camp on land; to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land; to engage in ritual and ceremony on the land; and to care for, maintain and protect sites of particular significance.
 - Mineral lease authorised the joint venturers to extract iron ore and to build a town, roads and railway. Town of over 200 houses was constructed, together with roads, shopping centre, school, clubs, sporting facilities, medical centre, police station etc. Covered about one-third of area subject to one of the leases. After cessation of mining, the town was closed and removed. 200
- Rejected arguments for inconsistency:

- 1. Mineral lease did not confer exclusive possession
 - The mineral lease only conferred a right to go onto the land and retrieve iron ore. Not exclusive possession right to exclude anyone and everyone from the land for any or no reason.
- 2. The grant of right to mine and construct infrastructure anywhere on the land was inconsistent with continuation of native title
 - The width of the activity allowed was irrelevant. It was still not inconsistent with native title rights, absent the grant of a right to exclude any or everyone from the land for any reason or no reason.
- 3. The actual exercise of the right to mine and construct infrastructure anywhere on the land was inconsistent with continuation of native title
 - Inconsistent with principle that the nature and content of the rights is relevant, not the manner of exercise.
 - On the day following the grant of the mineral leases the native title holders could have exercised all their rights anywhere on the land without breach of any of the lessees rights.
 - When the joint venturers built a house in the town, native title holders could not (for example) hunt and gather on the land which the house occupied. **And the rights which the joint venturers had, and exercised, took and continue to take priority over the rights and interests of the native title holders for so long as the joint venturers enjoy and exercise those rights.** Any competition between the exercise of the two rights must be resolved in favour of the rights granted by statute. **But when the joint venturers cease to exercise their rights (or their rights come to an end) the native title rights and interests remain, unaffected.**

[Yorta Yorta v Victoria \(2002\) 214 CLR 422](#)

Violently disowned from the land unable to maintain the land this is an example of a tide of history washing away traditional connection to the land but argument that the spiritual connection to the land has been maintained as they continued to practice their traditional laws and customs this meant that NT expired, and the Crown's radical title expands to a full beneficial title - NT

[Fejo v Northern Territory \(1998\) 196 CLR 96](#)

On appeal, the High Court considered whether native title could still exist over land which was once granted in fee simple but later reverted to vacant Crown land. The High Court held that native title was extinguished by freehold grants and that the extinguishment was permanent.

[Western Australia v Ward \(2000\) 170 ALR 159](#)

Issue:

- 1. Should native title be recognised as a wholistic title to land (as in Canada) or as a bundle of rights?
- 2. What is the test for extinguishment?

Held:

- 1. **Native title is recognised as a bundle of rights**, e.g., access for obtaining recourses, ceremony, etc.
- 2. **Partial extinguishment** where only some of the rights are extinguished by the creation of inconsistent rights by laws or executive acts:
 - a. Crown grant of fee simple: always inconsistent with the full bundle of native title rights
 - b. Grant of leasehold: depends on the nature of the rights granted, e.g., whether occupation to the exclusion of others, or merely permission to use land in a certain way
- 3. Native title & the various Crown grants at issue in [WA v Ward](#)
 - a. Pastoral leases: extinguished the exclusivity of the native title right to possess, occupy, use and enjoy the land, however retained full right to enter upon the land for the purpose of seeking their sustenance

- b. WA ownership of minerals: any native title rights to the minerals extinguished and Crown acquired full beneficial ownership of all the minerals specified
- c. Mining tenements : statutory character of mining leases inconsistent with any native title rights because established a scheme which is inconsistent with the use or occupation of the lands by native title holders

Native Title Act 1993

Definition of native title s 223

- 1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - c) the rights and interests are recognised by the common law of Australia.
- 2) Without limiting subsection (1), rights and interests in that subsection includes **hunting, gathering, or fishing, rights and interests.** (1)

S 15 effect of Cth laws on native title

- (b) If it is in respect to a public works: **the act extinguishes the native title in relation to the land or waters on which the public work concerned is situated**
- (c) If it is a past act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights: **the act extinguishes the native title to the extent of the inconsistency**

S 10 Recognition and protection of native title

- Native title is recognised, and protected, in accordance with this Act.

S 11 Native title not to be extinguished except in accordance with Act

- An act that consists of the making, amendment or repeal of legislation on or after 1 July 1993 by the Commonwealth, a State or a Territory is only able to extinguish native title.

f(4) INTRODUCTION TO REAL PROPERTY

	Old System Title	Torrens System Title
Title transfer	Purchaser and Vendor (then work out who is the titleholder/freeholder/has the fee simple)	Purchaser and Vendor (party who holds the registered title is referred to as the registered proprietor)
Mortgage	Mortgagor (lender and titleholder) and Mortgagee (original owner, has money and equity of redemption)	Mortgagor (has a security interest - charge) and Mortgagee (registered proprietor and titleholder)
Life estate	Feofor (original owner) and life tenant and possible remainderman/woman	
Lease		Leaseholder/tenant and landlord
License		Licensee (holder of the licence) and licensor (grantee of the interest)
Easement		Servient owner and the dominant owner
Others		Third party or contracting party

1. WHAT IS THE POSSIBLE INTEREST?

There are different requirements depending on the interest you're trying to establish:

Freehold interests: Freehold title transfers/disputes and mortgage problem questions: