



HD APPROVED

PROPERTY

MLP327

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

CONTENTS

1 CONCEPT & CATEGORIES OF PROPERTY	14
LEGAL MEANING OF “PROPERTY”	14
Key concepts	14
Rights in Rem vs Rights in Personam	15
Other essential features of property	15
PROPERTY RIGHT	16
Property rights	16
Thing/s the subject of property rights	16
WHAT IS PROPERTY — AUSTRALIAN CASE LAW	17
Sources of property law	17
Native title	17
<i>Yanner v Eaton (1999) 166 ALR 258</i>	17
CLASSIFICATION OF PROPERTY	18
‘Real’ property vs ‘personal’ property	18
In rem vs in personam; real vs personal	18
LEGAL AND EQUITABLE RIGHTS	19
How property rights are enforced	19
PROPERTY RIGHTS DISTINGUISHED FROM CONTRACTUAL RIGHTS	19
When contracts become proprietary	19
Lease vs license	20
Types of licenses	20
<i>Cowell v Rosehill Racecourse (1937) 56 CLR 605 CB 1.12</i>	20
SUMMARY: Equity	21
TOPIC 1.2: THE CONCEPT OF PROPERTY	22
Justification of (private) property	22
BOUNDARIES OF OWNERSHIP: What can and cannot be private property?	23
Property in a spectacle	23
<i>Vic Park Racing and Recreation Ground v Taylor (1937) 58 CLR 479 CB 1.27</i>	23
BOUNDARIES OF OWNERSHIP: Moral boundaries	24
Property in body parts	24
<i>Moore v Regents of the University of California (51 Cal. 3d 120, (1990)</i>	24
BOUNDARIES OF OWNERSHIP: Common heritage of mankind	24
SUMMARY TOPIC 1.1	24
2 PERSONAL PROPERTY, POSSESSION & FIXTURES	26
SUMMARY OF POSSESSIVE TITLE	26
Importance of possession	26
Enforceability of possessory title	26
Competition between possessory title holders	26
THE DIFFERENCE BETWEEN REAL AND PERSONAL PROPERTY	27

Terminology: Seisin and Land	27
Classification	27
Remedies (CB 2.21)	27
Personal property actions	28
POSSESSION	28
Ownership, Title, Possession	28
Obtaining possession	28
Acquiring possession	28
Key concept: Rule — Possessory title (even as a wrongdoer) is enforceable against all the world except for the true owner.	28
POSSESSORY TITLE FOR PERSONAL PROPERTY	29
1) Physical control	29
2) Intention	29
<i>The Tubantia</i> [1924]	29
PRIOR POSSESSORY TITLE	30
<i>Doodeward v Spence</i> (1908) 6 CLR 406 — re: objects CB 2.3	30
<i>Asher v Whitlock</i> (1865) LR 1 QB 1	31
<i>Perry v Clissold</i> [1907] AC 73 CB 2.7	31
<i>Toohey J in Mabo v Queensland (No 2)</i>	31
THE “FINDERS” PRINCIPLE	32
<i>Waverley Borough Council v Fletcher</i> CB 2.12	32
1) Finding goods “on land”	32
<i>Armory v Delamirie</i> (1722) 1 Strange 506; 96 ER 664	32
2) Finding goods in or attached to land	32
<i>Elwes v Brigg Gas Co.</i> (1886) 33 Ch.D. 562, per Chitty J	32
<i>Parker v. British Airways Board</i> [1982] Q.B. 1004 per Donaldson LJ	32
3) Finding unattached things on land in a public space	32
<i>Bridges v. Hawkesworth</i> (1851) 21 L.J QB 75	33
<i>Parker v. British Airways Board</i> [1982] QB 1004	33
<i>Waverley Borough Council v Fletcher</i> CB 2.12	33
JUS TERTII DEFENCE	33
<i>Costello v Chief Constable of Derbyshire Constabulary</i> [2001] 1 WLR 1437 CB 2.15	33
FIXTURES	34
Chattels vs Fixtures	34
Fixtures: Tests	34
Limb 1: Degree of Annexation	34
Limb 2: Purpose of Annexation	35
Decline of importance of degree of annexation	35
Nature of the chattel	35
<i>Leigh v Taylor</i> [1902] AC 157 vs <i>Re Whaley</i> 1908 1 Ch 615	35
<i>Re Whaley</i> [1908] 1 Ch 615	35
Intention of the affixer	35
<i>Pegasus Gold Australia Ltd v Mesto Minerals Australia Ltd</i> [2002] NTCA 203	36

<i>Elitestone v Morris</i> [1997] 1 WLR 687 per Lord Lloyd of Berwick CB 3.2	36
Fixtures and third parties	36
<i>Metal Manufacturers Limited v Federal Commissioner of Taxation</i> [1999] FCA 1712 CB 3.10	37
SUMMARY TOPIC 2	38
FINDERS PRINCIPLE: TABLE	39
3 ADVERSE POSSESSION	40
Limitation of Actions Act 1958	40
Title Hierarchy	40
TYPICAL CASES	41
Policy rationales underlying adverse possession	41
ESTABLISHING ADVERSE POSSESSION	41
a) Factual possession	41
<i>JA Pye (Oxford) Ltd v Graham</i> [2003] 1 AC 419	42
b) Intention to Possess	42
<i>Pye v Graham per Lord Browne-Wilkinson</i>	42
<i>JA Pye (Oxford) v Graham</i> CB 12.16	42
c) Without permission	42
Stopping time	42
ADVERSE POSSESSION AGAINST CROWN LAND	43
Crown land	43
ADVERSE POSSESSION AGAINST COUNCIL LAND	43
CASES	43
<i>Whittlesea City Council v Abbatangelo</i> [2009] VSCA 188 CB 4.16	43
AGAINST WHICH OWNER?	44
Special cases of lesser interests and future interests	44
Expediting adverse possession period against future title holders	45
LESSER INTEREST	45
Adverse possession against lesser interest	45
MULTIPLE POSSESSION	46
1) Transmission 46	
2) Abandonment 46	
3) Ouster 46	
SUMMARY OF CONCEPT	47
GAPS IN POSSESSION AND ACCIDENTAL POSSESSION	47
What is a "Gap" that constitutes abandonment?	47
<i>Kierford Ridge Pty Ltd v Ward</i> [2005] VSC 215 CB 4.20	47
DISABILITY AND FRAUD: Limitations of Actions Act 1958	48
Disability and the LAA	48
SUMMARY: Disability	49
Fraud	49
CONSEQUENCES OF ADVERSE POSSESSION	49
AP and the Torrens System	49

Procedural aspects	49
SUMMARY: TOPIC 3	50
4 DOCTRINE OF TENURE	51
What is the Doctrine of Tenure?	51
English Feudal History	51
Effect	52
The introduction of the English feudal system to colonial Australia	52
Principles of settlement	52
Colonial statutory grants	52
NATURE OF CROWN OWNERSHIP IN AUSTRALIA	53
Pre-Mabo	53
Case law describing settlement	53
<i>Mabo v Queensland (No. 2) in the context of Crown title and settlement</i>	53
5 NATIVE TITLE	54
What is native title?	54
Pre-Mabo — Common law native title case law	54
<i>Milirrpum v Nabalco Pty Ltd [1972-3] ALR 65 (the Gove Land Rights case) CB 5.6, 8.1</i>	54
Mabo in context of common law native title	54
<i>Mabo v Queensland (No. 1) (1998) 166 CLR 186</i>	54
<i>Mabo v Queensland (No. 2)</i>	54
Reasoning of Mabo judgement	55
Radical title and land grants	55
Native title and radical title	55
Common law native title	55
STATUTORY RECOGNITION OF NATIVE TITLE	56
Procedure	56
Scope of native title rights	56
Meaning of traditional	56
ELEMENTS: Native title	57
Has there been continuity of use?	57
<i>Members of the Yorta and Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, CB 8.14</i>	57
Critical Facts: Yorta Yorta	57
<i>Bodney v Bennell (2007) 167 FCR 84 CB 8.15, 8.16</i>	57
EXTINGUISHMENT	58
What is extinguishment	58
Acts which extinguish native title	58
Examples of extinguishment	58
<i>Fejo v Northern Territory of Australia [1998] HCA 58 CB 8.28</i>	58
STATUTORY PASTORAL LEASES	59
<i>Wik Peoples v Queensland (1996) 187 CLR 1 CB 8.23</i>	59
PARTIAL EXTINGUISHMENT	59
<i>Western Australia v Ward [2002] HCA 28 CB 8.26</i>	59

INTERSECTION OF NATIVE TITLE AND REGULATORY ACTS	60
<i>Yanner v Eaton (1999) 166 ALR 258 CB 8.19</i>	60
AN OVERVIEW OF THE RELEVANT NTA PROVISIONS AND THEIR EFFECT	60
Native Title Act 1993 (Cth)	60
“Past Acts” that extinguish NT	61
“Intermediate Acts”	61
“Future Acts”	61
SUMMARY	61
6 FREEHOLD ESTATES	62
OVERVIEW	62
FREEHOLD VS NON-FREEHOLD	62
FREEHOLD	62
1) Fee simple	62
Creating a fee simple	62
2) Fee tail estate	63
3) Life estate	63
LIMITING A FREEHOLD ESTATE	63
1) Determinable limitation	63
Fee simple ad determinable limitation	63
Life estate and determinable limitation	64
Leasehold and determinable limitation	64
Void determinable limitations	64
2) Conditions subsequent	64
Fee simple subject to conditions subsequent	64
Void condition subsequent	64
Determinable limitations vs conditions subsequent	65
Void conditions / (and DLs)	65
<i>Zapletal v Wright [1957] Tas SR 211 CB 5.17</i>	65
FUTURE INTERESTS	66
1) Remainder	66
2) Reversion	66
Doctrine of waste	66
VESTED & CONTINGENT INTERESTS	67
When vested: Test	67
Contingent legal remainder rules	68
Property Law Act 1958: s 191	69
Statute of uses and the trust	69
Vested and contingent interests	69
Restrictions upon the right to alienation	69
Land must be alienable	70
CREATION OF ESTATES UNDER STATUTE	70
Torrens land: History	70

Non-Torrens land (General law land)	70
How to create a legal interest in land	70
Torrens land	71
Exception: Oral leases 3 years	71
In writing	71
Electronic conveyancing	71
Nemo dat quod non habet rule	72
CONTRACTUAL RESTRAINTS ON ALIENATION	72
Restraints on alienation	72
<i>Hall v Busst (1960) 104 CLR 206 CB 7.33</i>	72
Collateral purpose	72
<i>Nullagine Investments Pty Ltd v Western Australia Club Inc (1993) 116 ALR 26</i>	73
<i>Elton and Another v Cavill and Another [No 2] 34 NSWLR 289 CB 6.6</i>	73
Collateral purpose	73
Conclusion	73
RULE AGAINST PERPETUITIES (not examinable)	74
Rule against perpetuities (RAP)	74
Date the interest was created	74
Vest	74
“Life in being”	75
“Life in being”: Test	75
Fertile Octogenarian and Precocious Toddler Rules	76
Statutory wait and see period	76
Statute	77
Class gifts	77
Class closing rules	77
7 LEASES	78
Cross-referencing / Connection with other topics	78
LEASE: INTRODUCTION	78
History	78
Sources of law	78
Terminology	78
The lease contract	78
TYPES OF LEASES	79
1) Fixed Term lease	79
2) Periodic Tenancy	79
3) Tenancy at Will	79
Tenancy at will and Adverse Possession	80
4) Tenancy at Sufferance	80
FORMALITIES FOR CREATING A LEASE	80
1) Statutory formalities	80
2) Exclusive possession	81

<i>Radaich v Smith (1959) 101 CLR 209 CB 7.6</i>	81
Australian position summary	81
<i>Street v Mountford [1985] AC 809, CB 7.6</i>	81
<i>Bruton v London Quadrant Housing Ltd [2000] 1 AC 406</i>	82
3) Certainty of duration	82
ROADMAP: Creation of a lease	82
EQUITABLE LEASES	83
1) Legal vs Equitable lease: <i>Walsh v Lonsdale</i>	83
<i>Walsh v Lonsdale (1882) LR 21 Ch D 9 (CA) CB 7.11</i>	83
2) Tenancy by estoppel	83
3) Part performance	83
ASSIGNMENTS AND SUBLEASING	84
Statement of law	84
<i>Debonair Nominees Pty Ltd v J & K Berry Nominees Pty Ltd [2000] SASC 244</i>	84
Concepts	84
Typical lease	84
Sublease	84
Assignment	84
RECAP: So far...	85
CONSENT OF THE LANDLORD	85
COVENANTS THAT TOUCH AND CONCERN THE LAND	85
The enforceability of lease covenants	85
'Touch and Concern' land	86
<i>P & A Swift Investments v Combined English Stores Group (CESG) [1989] CB 7.30</i>	86
RIGHTS AND DUTIES OF LANDLORDS AND TENANTS	87
A) COVENANTS IMPLIED BY COMMON LAW 87	
1) To provide tenant with quiet enjoyment	87
2) Non-derogation fro Grant by landlord	87
<i>Aussie Traveller Pty Ltd v Marklea Pty Ltd [1998]</i>	87
3) Duty of reasonable repair by landlord	87
4) Duty to exercise reasonable care by landlord	87
Landlord has duty to take reasonable care to avoid foreseeable risk or injury to tenant and occupants.	87
<i>Jones v Bartlett (2000) CB 7.18</i>	87
Summary: Landlord duty of care	88
5) Tenant to use premises in a tenant-like manner	88
6) Implied covenant at common law: Other examples of tenants duties	88
B) COVENANTS IMPLIED BY STATUTE	88
1) Transfer of Land Act 1958 (Vic): s 67	88
2) Residential Tenancies Act 1997	88
REMEDIES FOR BREACH	89
REMEDIES: Terminating a lease for breach	89
1) Forfeiture 89	

2) Repudiation of contract	89
<i>Progressive Mailing House v Tabali (1985)</i>	90
<i>Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd (2008) CB 352 CB 7.33</i>	90
ROADMAP: Breach of lease	90
8 EQUITABLE PROPERTY	91
EQUITY	91
History of equity	91
What is equity	91
Equity vs common law interests	91
History of the USE 15th/16th century	91
(MODERN) TRUSTS	92
Modern use of the trust	92
1) THE EXPRESS TRUST	92
Formalities	93
2) THE RESULTING TRUST	93
Type 1: Failed express trusts	93
Type 2: Voluntary transfer trusts	93
Type 3: Purchase money resulting trusts	94
Presumption of advancement/gift	94
Rebuttable: Purchase money resulting trusts	94
<i>Calverley v Green (1984) 155 CLR 242</i>	94
<i>Trustees of the Property of Cummins (a bankrupt) v Cummins (2006) 80 ALJR 589</i>	95
ROADMAP: Purchase money resulting trusts	95
3) CONSTRUCTIVE TRUSTS	95
<i>Muschinski v Dodds (1985) 160 CLR 583 CB 9.24</i>	95
<i>Baumgartner v Baumgartner (1987) 164 CLR 137 CB 9.26</i>	96
Compare cases: Constructive trusts	96
ROADMAP: Remedial unconscionability constructive trusts	96
Note on statutory reform	96
4) CONSTRUCTIVE TRUST AND ESTOPPEL	97
<i>Giumelli v Giumelli (1999) 161 ALR 473 CB 9.28</i>	97
ROADMAP: Constructive trust and estoppel	97
5) INSTITUTIONAL CONSTRUCTIVE TRUST	98
Sale of land contract	98
Doctrine of conversion: Equity does what ought to be done	98
Instructional constructive trusts and purchasing a home	98
<i>Tanwar Enterprises Pty Ltd v Cauchi (2004) 217 CLR 315 CB 9.34</i>	99
Sale of land post Tanwar	99
FORMALITIES: Checklist	100
Enforcement of equitable interests	100
DOCTRINE OF PART PERFORMANCE	101
ROADMAP: Part performance	101

MERE EQUITIES	102
Difference between a mere equity and an equitable interest	102
<i>Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965) 113 CLR 265 CB 11.27</i>	102
ROADMAP: Mere equities	102
9 EASEMENTS	103
What is an easement?	103
Easement compared	103
Requirements for a valid easement: ELEMENTS	104
<i>Re Ellenborough Park [1956] Ch 131 CB 13.10</i>	104
Element 4: Subject matter of a grant	105
<i>Copeland v Greenhalf (1952 Chancery)</i>	105
<i>Riley v Penttila [1974] VR 547</i>	106
<i>Clos Farming Estates v Graham Rush Eaton (2002) NSWCA</i>	106
SUMMARY: Ellenborough Factors	107
GRANT v RESERVATION	107
(1) EXPRESS EASEMENT — by grant or reservation in law or equity	108
(2) IMPLIED EASEMENT	108
(a) Implied by construction	108
<i>Dabbs v Seaman (1925) 36 CLR 538 CB 13.26</i>	108
(b) Implied by common intention	109
(c) Implied by necessity: North Sydney, Adealon	109
<i>North Sydney Printing v Sabemo Investment Corporation Pty Ltd [1971] 2NSWLR 150, CB p13.21</i>	109
<i>Adealon International Pty Ltd v London Borough Council of Merton [2007] All ER 225</i>	109
(d) Implied: Continuous and apparent	110
General principle of non-derogation from grant	110
Non-derogation from grant	110
Implied grant of easement due to continuous and apparent use	111
Implied grant of easement under Wheeldon v Burrows doctrine	111
Implied easements by reservation?	111
<i>Wheeldon v Burrows (1879) 12 Ch D 31</i>	111
<i>McGrath v Campbell (2006) 68 NSWLR 229</i>	112
(4) EASEMENT BY PRESCRIPTION	112
Comparison with Adverse Possession	112
The lost modern grant	112
The underlying principle: Dalton v Angus (1881)	113
Prescriptive easements and Torrens Land	113
(3) EASEMENTS BY STATUTE	113
Interference by ST	113
Scope of easements: Westfield v Perpetual (2007) 233 CLR 528	114
<i>Westfield v Perpetual (2007) 233 CLR 528</i>	114
(5) EXTINGUISHMENT	115
1. Express release	115
2. Unity of title	115

3. Change of circumstances	115
4. Abandonment: Treweke, Brookeville	115
<i>Treweeke v 36 Wolseley Road Pty Ltd (1973) CLR 274</i>	115
<i>Bookville Pty Ltd v O'Loughlen [2007] V ConvR 54-734</i>	116
Impact of abandonment on registration	116
PROFITS À PRENDRE	117
Profit v Lease v License	117
EASEMENTS ROADMAP	118
10 RESTRICTIVE COVENANTS OVER LAND	119
COVENANTS ROADMAP	119
Positive Covenant v Restrictive Covenant	119
COMPARISON: Negative Easement v Covenants	120
Restrictive covenant	120
SUCCESSOR IN TITLE	121
Privity of contract — benefit of the covenant	121
Privity of contract — burden of a covenant	121
(1) PASSING THE BURDEN OF A POSITIVE COVENANT	121
Privity of contract — burden of a positive covenant	121
<i>Austerberry v Corporation of Oldham (1885) 29 Ch D 750</i>	121
Avoiding Austerberry?	122
Exception to Austerberry: Thamesmead	122
<i>Thamesmead Town Ltd v Allotey [1998] 30 HLR105</i>	122
(2) PASSING BENEFIT OF A POSITIVE COVENANT AT COMMON LAW	123
Successor in title: Privity of contract — benefit of a positive covenant	123
The touch and concern test	123
<i>Smith and Snipes Hall Farm v River Douglas Catchment Board 1949 2 KB 500</i>	123
<i>Town of Congleton v Pattison (1808)</i>	123
Effect of s 78	124
(3A) PASSING THE BURDEN OF A RESTRICTIVE COVENANT IN EQUITY	124
<i>Talk v Moxhay</i>	125
<i>Forestview & Silkchime v Perpetual</i>	126
ROADMAP: Passing the burden of a restrictive covenant in equity	127
(3B) PASSING BURDEN OF RESTRICTIVE COVENANT AT COMMON LAW	128
<i>Clem Smith Nominees v Farrelly (1978) 20 SASR 227</i>	128
(4A) PASSING THE BENEFIT OF A RESTRICTIVE COVENANT AT COMMON LAW	128
Effect of ss 78 and 79	128
<i>Federated Homes v Mill Lodge Properties [1980] 1 WLR 594</i>	128
Successors in title: Passing the benefit to a successor covenantee	129
<i>Midland Brick Company v Welsh (2006) 32 WAR 287</i>	129
SUMMARY re effect of ss 78 and 79	129
ROADMAP: Passing the benefit of a positive or restrictive covenant at common law	129
(4B) PASSING THE BENEFIT OF A RESTRICTIVE COVENANT IN EQUITY	130
ROADMAP: Passing the benefit of a restrictive covenant in equity	130

ASSIGNMENT	131
Assignment of the benefit not annexed to land	131
Elements	131
<i>Re Union of London and Smith's Bank Ltd's Conveyance [1933] Ch 611</i>	131
ROADMAP: Assignment of benefit in equity enforcing against a Sit of the burden	132
<i>Established in Re Union of London and Smith's Bank Ltd's Conveyance [1933]:</i>	132
BUILDING SCHEMES	132
Non simultaneous sales	132
Problem with development schemes	133
Doctrine of building schemes: <i>Eliston v Reacher [1908]</i>	133
<i>Eliston v Reacher [1908] 2 Ch 374</i>	133
Mutuality / reciprocity	134
<i>Small v Oliver & Saunders [2006] EWHC 1293 (Ch)</i>	134
Test: <i>Small v Oliver & Saunders [2006]</i>	134
<i>Small v Oliver & Saunders [2006] EWHC 1293 (Ch)</i>	134
Building scheme rules: <i>Re Dennerstein</i>	134
EXTINGUISHMENT	135
Modification and Extinguishment of Covenants	135
Release: Express, Implied and by Statute	135
<i>Stanhill Pty Ltd v Jackson and Others (2005) 12 VR 224</i>	135
REMEDIES	136
Remedies for infringement	136
SUMMARY	136
11 MORTGAGES	137
SECURITY INTEREST	137
Why want a security interest	137
Why mortgage?	137
Terminology	138
FORMALITY REQUIREMENTS	138
Legal mortgage (Torrens)	138
GENERAL LAW LAND VS TORRENS	138
Main forms of security interests	138
1) Old title mortgage	138
Lifecycle of an old title mortgage	139
2) Torrens land mortgage	139
Old title mortgage vs Torrens mortgage: Comparison	139
EQUITABLE MORTGAGES	140
<i>Re Wallis and Simmonds [1974] 1 WLR 391</i>	140
<i>Theodore v Mistford [2005] HCA 45</i>	140
<i>CNG Co (Aust) Pty Ltd v ANZ Banking Group (1992) 6 BPR 13,101, — limits on 3rd party logic</i>	141
CASES: Contrast	141
EQUITY OF REDEMPTION	142
<i>Campbell v Holyland (1878) 7 Ch D 166</i>	142

Equity of redemption applies to Torrens land	142
Clogging equity of redemption	143
Modern law	143
<i>Lift Capital Partners Pty Ltd v Merrill Lynch International (2009) 253 ALR 482,</i>	143
RIGHTS OF THE MORTGAGEE	144
1) Right to sue for loaned monies	144
2) Right to possession	144
3) Right to assign a mortgage debt	144
4) Right to appoint receivers	144
5) Right of foreclosure	145
<i>Ryan v O'Sullivan</i>	146
6) Right to exercise a power of sale	146
<i>Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd [1976] VR 309</i>	149
<i>Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) (High Court)</i>	149
The Australian position lower courts	149
<i>Upton Tasmanian Perpetual Trustees Ltd (2007) 242 ALR 422</i>	149
Improper sale and the impact on third party purchaser	150
<i>Forsyth v Blundell (1973) HCA</i>	151
SETTLEMENT DISCHARGING A MORTGAGE	152
Discharge of a mortgage	152
DICTIONARY: PROPERTY LAW	153
NATIVE TITLE: Varieties of title	157

1 CONCEPT & CATEGORIES OF PROPERTY

LEGAL MEANING OF “PROPERTY”

- Property means different things to different people and the concept is used in different contexts
- “Property is thus ubiquitous and complex, socially important and controversial ... Any general notion of property is notoriously elusive”: JW Harris, *Private and Non-private Property: What is the Difference?*
- Property ownership = social, economic power, power to dictate the rules

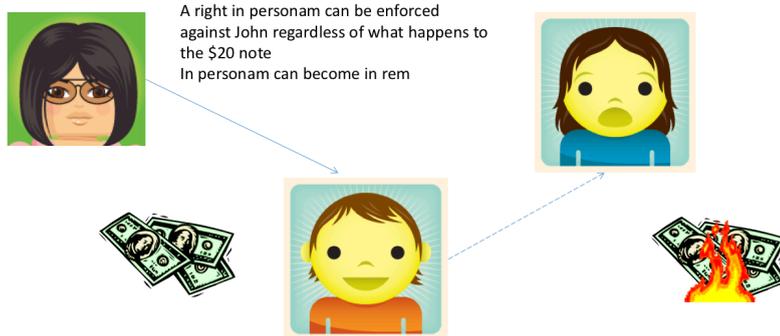
What is property?

- property is about a **relationship between people and objects**
- property law helps to order these relationships
- objects are **usually tangible**, expanded to meet new social needs and moral perspectives
- property rights are **in rem cf in personam** (see below)
- bundle of rights include **right to use, exclude, transfer, alienate**
- strict definition of property illusory: *Yanner v Eaton*
- property rights can only exist if there is a legal and social framework to support and enforce (Bentham — property and law live and die together)

Key concepts

- **Layperson concept:** “property” is an object or thing
- **Legal concept:** The term “property” refers to the many different kinds of **relationship between a person and an object**, rather than the object itself: *Yanner v Eaton*
- Property is a composite of legal relations that holds between persons that incidentally involves a “thing”: <http://www.yalelawjournal.org/the-yale-law-journal/essay/what-happened-to-property-in-law-and-economics?/>
- Concept: **Fragmentation** — different property rights can attach to the same object
- Concept: Property law as an organising principle for allocating rights to land and resources in a society
- Key concept: **A property right is a right in rem** (latin: against the thing):
 - the holder can enforce their property right in rem **against the world**
 - your right is in the thing without much regard to the people against whom that right might be enforced
 - Contrast: **rights in personam** (latin: right directed to a person); e.g. contract law:
 - enforceable against the person who is privy to the relationship only
 - your right is against the person without much regard to what they might have
 - e.g. contractual right or in a debt

Rights in Rem v Rights in Personam



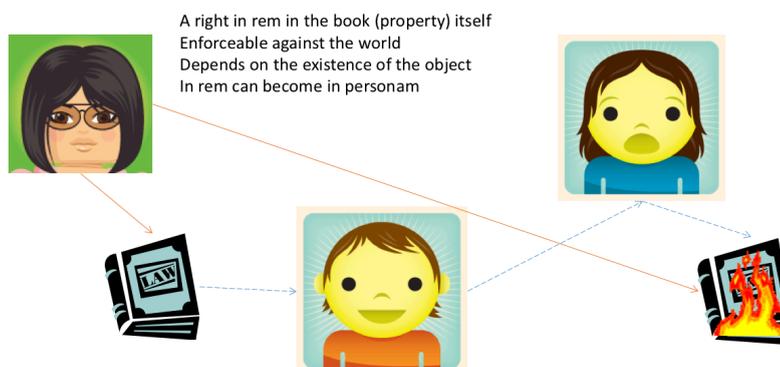
Rights in Rem vs Rights in Personam

In personam:

- agreement in personam between you and John (an “I owe you” agreement)
- Even though Mary destroys money, you will still have agreement with John to pay back money — therefore **in personam**

Contrast:

Rights in Rem v Rights in Personam



In rem:

- Property right follows the book
- Girl has right against John for losing book + Mary for destroying it — as interest in **in rem** — in the thing itself

Other essential features of property

- property confers upon the holder a ‘bundle of rights’ which refers to the aggregate of rights associated with property enforcement (this metaphor was originally outlined by Wesley Hohfield and AM Honore)
- features are contentious and not definitive or exclusive to property rights
- Legal recognition —
 - property rights **must be recognised and legally enforceable**
 - “property and law are born together and die together. Before laws were made there was no property. Take away the laws and property ceases’: Bentham
 - “Property is an artificial legal construct - it can only exist where it is supported by a legal system that recognises it. There can be no [property] in the absence of legal enforcement”: Finkelstein J in *Wily v St George*

PROPERTY RIGHT

What is a property right?

Common law definition — “There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or 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.”: Blackstone Commentaries on the Law of England, Circa 1765

- 1) A physical thing
- 2) Exclusive (despotic ownership)
 - by 19th century acceptance of **property in intangibles** e.g. trade marks and trade secrets
 - exclusive possession of public land
 - 20th century; Wesley Hohfeld conceptualised property as a **set of legal relations** (thus no need for a tangible object) — rights privileges and powers
 - dominion need not be fixed or absolute
 - “rights of exclusion and immunities against divesting”: (1960) 34 Tulane Law Review 453, AM Honore

Property rights

1) Dominion (right to use)

- control exercised by a person over an object
- dominion denotes some legally authorised power

2) Exclusion

- to exclude others from: (a) enjoying the same rights; or (b) interfering with the exercise of rights
- state can enforce exclusion
- no longer ‘total exclusion’

3) (External) things

- things must be separate and apart from ourselves
- physical things (land and chattels)
- intangible things (shares, patents and trademarks)

4) External: demarcation of property/boundaries

Property can be defined with reference to its features, such as:

- a) **transferability of right** — most rights are transferable (including personal rights)
- b) **enforceability of right against other persons** — right in rem; almost universal acceptance
 - “A real right, such as ownership, is as every first year law student knows, enforceable against the whole world”: *XZS Industries v AF Dreyer (Pty) Ltd* (2004) (4) SA 186 (W) 196 F/G
- c) **right to alienate a thing** — cf non-assignable property rights (non-assignable lease) + note native rights not transferable: *Millirpum*
- d) **value** — market value; sentimental value; negative value? (e.g. toxic chemicals)

Thing/s the subject of property rights

Once an entity is designated as property, it becomes possible to exert a legal regime of control over that entity: *Yanner v Eaton* (1999) 166 ALR 258, per majority at 264

- Land, goods; shares, the benefit of a contract; the lyrics to a song, computer software, ideas, airspace, encumbrances, rights attached to land, indigenous cultural relationships over land
- Body parts? Genes? Information? Air? Water?

WHAT IS PROPERTY – AUSTRALIAN CASE LAW

Sources of property law

- property law doctrine introduced when British Crown claimed sovereignty over Australia a > 200 years ago
- **Sources include:** imported English common law (judge-made law and statutes); equity; enactments of local legislature and court decisions; native title; international human rights law having a bearing on property

Examples

- Article 1 of the First Protocol of European Convention on Human Rights impacts on English law:
 - provides a **guarantee** of property rights
 - state conditions for **deprivation** — public interest + compensation
 - allows **control** of the use of property in the general interest by the States
- Kyoto Protocol on global warming — carbon request ration interests

Native title

Native Title = Rights to land held by Aboriginal Australians and Torres Strait Islanders, rights include hunting, gathering, or fishing — in *Mabo* the HCA declared that native title has been a part of the common law since it was first introduced to Australia in 1788, but the declaration was not made until 1992.

Extinguishing Native Title

- NT is extinguished or reduced if the Crown lawfully exercises its sovereignty to do so or grants inconsistent rights to itself or others
- any new rights lawfully granted will take priority over native title

Yanner v Eaton (1999) 166 ALR 258

- in 1994 Yanner (famed Aboriginal activist) used traditional harpoon to catch 2 juvenile crocodiles for food under NT rights. Charged with one count of taking fauna without a permit contrary to the *Fauna Conservation Act 1974* (Qld) ('FCA')
- defence claimed NT rights extinguished by FCA. Magistrate held Y not guilty. The informant (police officer) appealed. COA set aside Magistrates' decision. By special leave, Y appealed to HCA

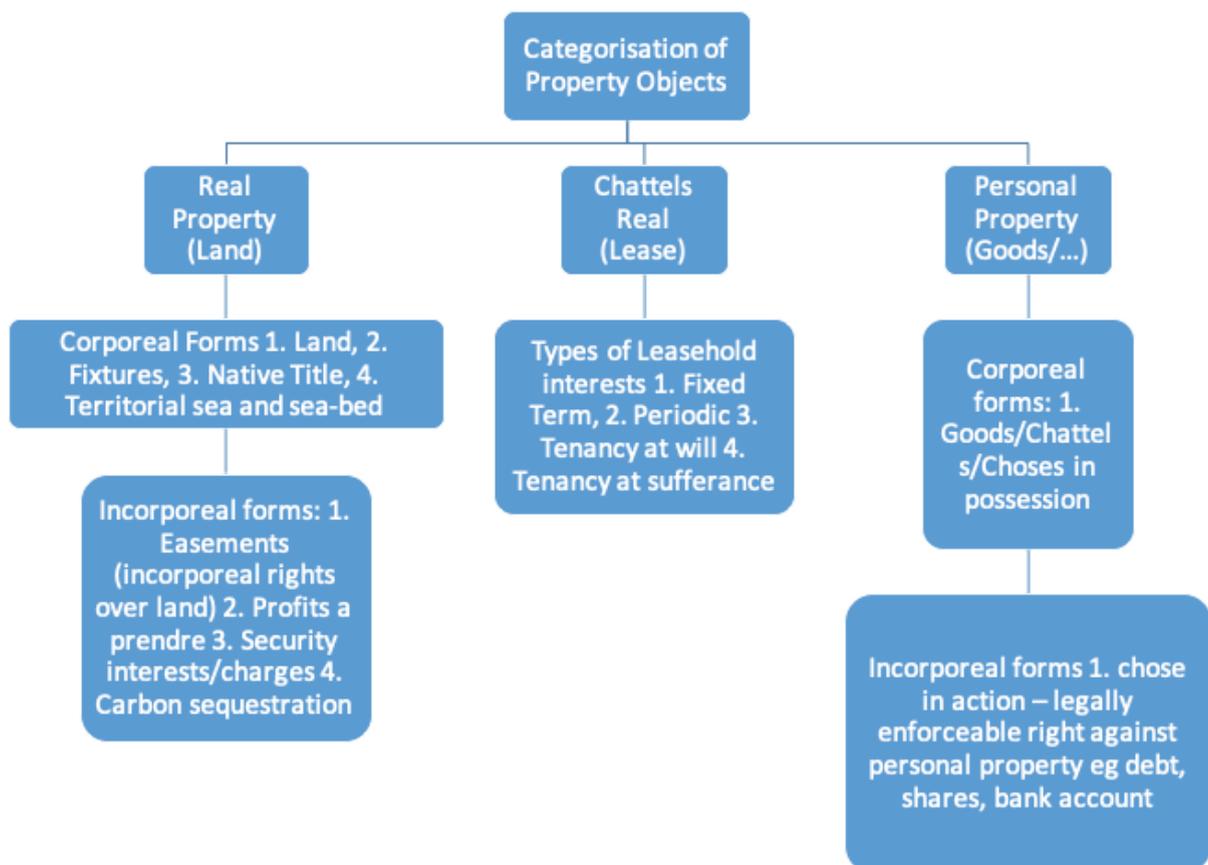
Held (HCA):

- **s 7(1)** of FCA: "All fauna, save fauna taken or kept otherwise than in contravention of this Act, during an open season with respect to that fauna, **is the property of the Crown and under the Control of the Fauna Authority**"
- absolute beneficial ownership must extinguish (all) inconsistent rights
- Issue: **all fauna** is "property" of the Crown —
 - Held property is not an object, but a reference to a degree of power that the property relationship covers
 - **s 7(1)** is **not intending to vest ownership** in objects, rather intends to refer to **aggregate of various rights of control** including the **right to establish a regulatory regime**
 - this is less than full beneficial or absolute ownership — NT to hunt crocodiles not extinguished
- Why crown 'property' is **not equivalent of full or absolute ownership:**
 - difficulty to identify what fauna is owned by Crown
 - meaning of all and beneficial ownership of wild animals?
 - wild animals at common law: limited property rights
 - property in Act cannot be equated to property of domesticated animals
 - ownership connotes right to have and dispose of possession (fauna outside possession and disposition)

- reasons for vesting fauna in Crown: desirability to provide for some vesting to create royalty system
- state holds fauna in sense of **imperium** (and **not** in sense of dominium): guardianship of resources
- “referring to the conclusions of Professor Kevin Gray who stated that much of our ‘false thinking about property stems for the residual perception that “property” is itself a thing or resource rather than a **legally endorsed concentration of power over things and resources...**’ and that (the “ultimate fact about property is that it is an illusion’ and that talk of property is merely talk without substances because upon closer inspection it is a concept which vanishes into thin air.” CB1.7

CLASSIFICATION OF PROPERTY

- Property is about a **relationships between people and objects**
- Classification or taxonomy is important to understand how property rules relate to each other and other areas of law
- Enables understanding of priorities, remedies



- Many ways to classify

‘Real’ property vs ‘personal’ property

- 13th C English legal actions
 - Property rights to land were classified as ‘**real property**’ because could bring a ‘**real action**’ to **recover land/object from someone**
 - Other actions were ‘**personal**’ because **no real action** to recover the thing itself
 - ‘personal’ property gives rise to compensation
- E.g. Chattels Real — Property that is not freehold land or a movable object
- E.g. lease (personal property relating to an interest in land)

In rem vs in personam; real vs personal

- Don't confuse distinction between real and personal property with the distinction between *rights in rem* and *rights in personam* — completely different!
- Personal property rights (eg rights to my book) **are not** *rights in personam*

LEGAL AND EQUITABLE RIGHTS

How property rights are enforced

- Legal rights derive from statute and common law; Equitable interests derive from rules and principles of equity
- Most legal property rights have an equitable counterpart

Four areas of equitable jurisdiction relevant today

- 1) Trusts
 - 2) Enforcing informal contracts (estoppel, part performance)
 - 3) Preventing enforcement of legal rights against conscience
 - 4) Granting remedies not available under common law e.g. injunctions and specific performance
- Motives to employ equity are remedy driven eg injunctions, accounts of profits, holding of property under a constructive trust are all equitable remedies
 - E.g. breach of contract of sale – CL remedy?, Equitable remedy?

PROPERTY RIGHTS DISTINGUISHED FROM CONTRACTUAL RIGHTS

Property right

- Confers a **right over a thing**
- Enforceable **against third parties/rest of the world**
- A property right **precludes anybody** (apart from person with better title) **from interfering with property rights**
- Property remedies **prevent interference with rights over the thing** — Eg right to remain on the land
- “no two parcels of land are the same”

Contractual right

- .Not a right to a thing, right against a person
- Contractual right is only enforceable against other party to a contract
- A contract right entitles party to sue in the event of breach of contract by the other party
- Range of personal remedies
- Personal right against other party to get damage for breach of obligation
- Remedy: to make good damage

Why does the distinction matter?

- Property rights are **more powerful** than contractual rights
- Property rights — e.g. specific performance; right to remain on the land
- Contract — usually only damages

When contracts become proprietary

- A relationship between a person and an object can be **both contractual and proprietary**

- Confusing when a contract deals with or regulates property; E.g. contract may give rights to use, possess or exclude
- Right to enforce a contract is resource **capable of forming subject of property relation**:
 - Ownership of contractual right e.g. mortgage
 - Shares, insurance policies and bank accounts
- E.g. a lease contract where the lessor confers exclusive possession upon the lessee creates a lease estate which is a proprietary interest
- **Note:** Contracts that merely give rights over “things” do not automatically become property rights (see *Cowell v Rosehill Racecourse*)
 - What is a lease? What is a licence?

Lease vs license

- The distinction between a lease and licence highlights the distinction between property and non-property and a property right and contractual right
- Holder of the lease has more rights than a holder of a license.
 - **Lease = property right**
 - **Licence = not a property right**
- Right to **exclusive possession** is used to distinguish a lease from a licence:
 - exclusive possession (lease);
 - absence thereof (licence)

Lease = conferral of **exclusive possession via contract**, upon terms, for a limited period of time (property right), **right in rem**

- A property interest is created by conferring possession/enjoyment of land
- Exclusive possession = property interest/right
- Right in rem

Licence = a right or **permission** to do or use something (sometimes contract sometimes property right especially if it involves possession)

Licence coupled with contract (e.g. ticket to see a show/something of value) does not become proprietary even if the contract contains a provision making it irrevocable

- **Note:** Licence coupled with a contract that says its **irrevocable** = still revocable as no proprietary: *Cowell*
- The right to see or broadcast a spectacle is **not** a proprietary interest: *Cowell of Hurst*

Licence coupled with an interest e.g. profit a prendre = proprietary = irrevocable

Types of licenses

- i) **Mere /Bare licence:** gratuitous permission to enter land (e.g. dinner party guest)
 - revocable at will, because the law does not enforce promises without consideration
 - Not supported by a contract / considerations
 - Often a defence to trespass
- ii) **Licence coupled with a contract:** permission to enter supported by contractual arrangement (e.g. ticket to the cinema)
- iii) **Licence coupled with the grant of a property interest:** permission to enter land in support of a recognisable interest in land
 - CL rule: licence is irrevocable (e.g. right to remove felled timber; **profit a prendre**)

Cowell v Rosehill Racecourse (1937) 56 CLR 605 CB 1.12

- PI paid for a irrevocable ticket (licence) to the races and was forcibly removed. PI claims damages for assault. Def claims ticket was revoked. Thus PI was a trespasser, reasonable force permitted
- Issue: Was the PI a trespasser? Thus a defence to assault.
- Key legal Issue: Was the ticket to enter the racecourse, a licence coupled with a proprietary interest?
- Key legal issue: Is the entertainment spectacle of a horserace a "property"?

Held —

- **RULE: Wood v Leadbitter: mere licence is revocable; licence coupled with a property interest is irrevocable.**
 - "A licence to enter a man's property is *prima facie* revocable, but it is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty."
 - If A sells to B felled timber lying on A's land, on the terms that B may enter and carry it away, the licence conferred is an irrevocable licence because it is coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B -- *Wood v Manley*, (1839) 11 A. & E. 34 -- per Parker, J, *Jones v Tankerville*, [1909] 2 Ch 440 at pp 442-3. (cited by Starke J)
- Is the viewing of a horse race a "proprietary interest"?
 - PI relied on *Hurst v Picture Theatres* – property right to see a spectacle
 - *Hurst* wrongly decided (majority)
 - A licence **not** coupled with a grant of interest in any ascertainable property is simply a right in contract to see a performance and **is revocable notwithstanding an express contract not to revoke it.** (per Starke J)
- The right to see entertainment is valuable but so are other rights requiring entry up on land. Doesn't make these rights "property" enforceable by specific performance. See eg of dismissed servant
- If follow *Hurst* —
 - A concert ticket may be revoked for safety reasons (thus revoking the licence of the audience to be on premises). *Hurst* would say its irrevocable and forcible removal results in damages for assault (p. 25).
 - A fired building contractor can remain on your land and sue for damages for assault if he were forcibly removed (p.25)
- Evatt J (dissent): A court of equity should intervene to restrain the revocation of licence in breach of contract. "A court of equity should regard the licence as irrevocable in all proceedings in which equitable principles are recognised." The fallacy with the criticism of *Hurst's Case* is the continuous insistence upon discovering a proprietary right as a condition of equitable intervention.
- Per Starke J (CB p33) case book, "The plaintiff had a license given for value, coupled **with an agreement not to revoke it.** That was an enforceable right, and it was a breach of contract to revoke the license. ... Assuming that a court of equity had jurisdiction to restrain and would by injunction have restrained such a breach [VH eg remedy to uphold a contract for a box seat at the opera], ... **still the contract would not create a licence coupled with a grant or interest in any ascertainable property**, which is the relevant consideration"
- "The right to see a spectacle cannot, in the ordinary sense of legal language, be regarded as a proprietary interest. **Fifty-thousand people who pay to see a football match do not obtain fifty-thousand interests in the football-ground.** A contrary view produces results which may fairly be described as remarkable. The Statute of Frauds would be applicable. A person who bought a reserved seat might be held to have what could be called "a term of hours" in the seat. ...
- There is nothing in the majority judgments in *Hurst's Case* to show that these consequences were appreciated when the case was decided."
- "**No right of a proprietary nature is given.** The contract is not of a kind which Courts of Equity have ever enforced specifically.... The purpose is not to enjoy the amenities forming part of the land, but to witness the races, and, perhaps, to use the facilities provided for adding to the pleasure and excitement of the spectacle."

SUMMARY: Equity

- Difficult to identify a set of core characteristics
- Emphasis seems to be placed upon the **characteristic of excludability** (making it private)
- Property rights are limited (*numerus clausus*):
- Freehold estates; leasehold estates; easements; profits and mortgages
- Equitable interests: beneficial ownership (trust), equitable lease; restrictive covenants and liens
- Public interest in property: modified by rights of other
- Property has become fragmented in modern world

- Property is seen as a bundle of rights or relationship
- Property rather involves a complex bundle of relationships: 'man is not an island, he is more like a spaghetti junction' (Cooke)

TOPIC 1.2: THE CONCEPT OF PROPERTY

1) History and philosophy of property law

- Why do we need private property rights
- Property rights require justification because they correspond to duties placed on all members of society
- Justification of property rights – contentious, complex, emotional and political

5) Property rights in the future (originally focussed on land, now body parts, ideas, intangibles)

- *Vic Park Racing v Taylor*
- *Moore v Regents California*

Justification of (private) property

- Rewards labour; Protects privacy; Promotes security; Personal and economic incentives; Promotes personal liberty (CB 36)
- It should be noted that:
 - Property remains a social **creation**: not absolute, sacrosanct and government may interfere with it
 - Property has led to **monopolisation** of scarce resources
 - Property rights are **subjugated** by public interests concerns (environmental law and resource management)

John Locke, The Second Treatise of Civil Government Ch V. 1689

Locke's Labour Theory of Property (natural law/ classical liberalism) — "Though the earth and all inferior Creatures be common to all men, yet, every man has a property in his own person. This no Body has any right to but himself. The labour of his body and the Work of his hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left in, he hath mixed his labour with, and joyned to it something that is his own, and thereby makes it his property." Locke, J., The Second Treatise of Government (1st ed.) (orig published 1690), Bobbs-Merrill Educational, 1980.

Jeremy Bentham 19th Century - Utilitarian view

- Assumes the law should be used to produce the greatest happiness for the greatest number (maximise utility)
- Private property creates incentives for industry and thrift and thus happiness
- Increases general welfare of society, this outweighs consequences of inequality
- Thus "greatest good" for humanity

Will theories (Kant, Hegel) 18th C

- Persons are abstract units of free will or autonomy that act on 'things'
- Private property essential for expression of individual will and personality
- Private property justified by goal of freedom.

Karl Marx: Mid – 19th C

- Marx used Locke's ideas about the relationship between labour with property and capital
- Liberation of the people through abolition of private property

Posner (economic analysis)

- The legal protection of private property promotes the efficient use of resources. (e.g. tragedy of the commons)
- Markets best to determine prices (cf governments)
- Private property should be: universal (property all resources unless they are not scarce ex air); exclusive (maximum exclusivity leads to maximum efficiency); transferable (easily).

BOUNDARIES OF OWNERSHIP: What can and cannot be private property?

How to determine new forms of property

- Courts, Legislature
- Tangible – intangible
- General Principles:
 - **Boundaries** – e.g. land, e.g. patents
 - Social and moral issues e.g. information, e.g. slavery, e.g. body parts
- How do courts deal with novel issues?: *Victoria Park Racing v Taylor*; *Moore v Regents of California*

If new forms of property are created:

- It must be identifiable;
- its scope and form must be ascertainable;
- it must not impinge upon accepted moral boundaries;
- there has to be a socially and economically imperative for the creation of new property

Is there property in a spectacle? Is there property in body parts?

Property in a spectacle

Vic Park Racing and Recreation Ground v Taylor (1937) 58 CLR 479 CB 1.27

- Def 1 George Taylor lived across road from the racecourse. He was paid a small amount of money. Def 2 2UW erected a platform in his front yard, so Def 3 Cyril Angles could use binoculars and call the race and broadcast information such as winners, scratchings, postings. Huge success. Punters said they preferred Cyril's calls to going to the field. Race attendance plummeted. Race track didn't permit any broadcasting of any information
- RULE: Nuisance: the PI has a right to enjoy his/her property without interference. ISSUE: Was the spectacle of a horserace "property"?

Held — **There is no property in a spectacle**

- "I find difficulty in attaching any precise meaning to the phrase "property in a spectacle." A "spectacle" cannot be "owned" in any ordinary sense of that word. Even if there were any legal principle which prevented one person from gaining an advantage for himself or causing damage to another by describing a spectacle produced by that other person, the rights of the latter person could be described as property only in a metaphorical sense." per Latham CJ

Held — **There is no quasi-property in a spectacle**

- "It has been argued that by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. The vagueness of this proposition is apparent upon its face." — What legal theory was the Plaintiff relying on?: Locke 'sweat' theory
- "What it really means is that there is some principle (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and then describing what they see." per Latham CJ

Held — **There is no "quasi-property" in a spectacle just because labour has been invested**

- "If English law had followed the course of development that has recently taken place in the United States, the "broadcasting rights" in respect of the races might have been protected **as part of the quasi-property created by the enterprise, organisation and labour of the plaintiff in establishing and equipping a racecourse and doing all that is necessary to conduct race meetings. But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of**

value...; "In my opinion, the right to exclude the defendant's from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law. It is not an interest falling within any category which is protected in law or in equity." per Dixon J

- McTiernan — "Private property is either property in possession, property in action or property that an individual has a special right to acquire... A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it. It is for the good of the public that he should." But the element of exclusiveness is missing from the plaintiff's right in the knowledge which the defendants participate in broadcasting. "
- Rich J (dissenting) "there is a limit to this right of overlooking" – Def interfered with the "right of profitable enjoyment" of the Pl land thus upheld nuisance; Evatt J (dissenting) "the defendant has "reap[ed] where it has not sown". Interference with the plaintiff's profitable use of its land".

Conclusion: nuisance = no property right in the spectacle that could give rise to "interference" — lawful for a neighbour to "overlook the land" — cannot claim exclusive ownership of the view.

BOUNDARIES OF OWNERSHIP: Moral boundaries

- Cannot own another life
- Each individual owns their own body parts – blood, urine, sperm (regenerative, transferable as property)
 - Highly regulated
- Non-regenerative tissues are regulated by *Human Tissue Act (Vic)* 1982 ss38-39 prohibits the selling and buying of human tissue
 - Transplants

Property in body parts

Moore v Regents of the University of California (51 Cal. 3d 120, (1990))

- Moore had leukaemia. Dr removed tissues for testing. Used tissue for research (no consent). Developed cell line, patented by the UoC. Moore sued for conversion (wrongful use of his property)

Held — no conversation, no property rights in discarded cells

- Policy: "The extension of personal property rights to interfere with proper and effective development of medical research would be socially unacceptable and unjustified."
- D Mortimer p 65 "The theme which runs through each of the majority's concern is that the law should protect and enhance the development of medical research because of its social utility rather than pursuing a course which prefers the protection of individual rights. Such individual rights are, the majority argued well enough protected by the doctrines of fiduciary duty and informed consent."

BOUNDARIES OF OWNERSHIP: Common heritage of mankind

- Outer space
 - Notion of common heritage of mankind
 - Endorsing private ownership will lead to conflict
 - UN Outer space treaty — Space is province of all mankind; No sovereignty claims by states
 - Moon Treaty
 - Regulating control and ownership of moon
 - US did not sign
 - Division of lunar resources
 - *Res communes* concept
 - Private ownership not expressly prohibited

SUMMARY TOPIC 1.1

1) What are property rights?

- Property is **relationship between an object and an object / thing**: *Yanner v Eaton*

- A **property right is a right in rem** of in personam
 - Property relationship consists of a **“bundle of rights”**: *Blackstone, Hohfield, Honore*
 - *Yanner v Eaton* – **property is not a thing, rather concentration of power over things**
 - Property rights exist in a social context / social construct/ contentious
- 2) What can be the subject of property rights? (objects)
- Objects of property – land, lyrics, genes? (continued discussion today)
- 3) How to classify these objects?
- **Real, Chattels Real, Personal property** (goods)
 - Relevance of equitable and common law remedies
 - The classification of property and remedies (this will be discussed in depth in topic 2 and topic 8)

The concept of property

- Property is a relationship between a person and an object eg *Yanner v Eaton*
- Property relationship consists of a bundle of rights
- What can be property determined by law and morality
 - Eg *Vic Park Racing*
 - Eg *Moore*
 - Eg CB 1.32 (common forms of property)

The boundaries of property

- *Vic Park Racing and Recreation Ground v Taylor* (1937) 58 CLR 479 –
 - A **“spectacle” is not property**
 - A **“spectacle” is not quasi-property / labour theory**
- *Moore v. Regents of the University of California* (51 Cal. 3d 120, (1990))
 - **No property in cancer cells**

Property vs Contract

- **Property – in rem, property remedies** e.g. injunctions and specific performance
- **Contract – in personam, contract remedies** usually money damages
- **Lease = property rights**
- **Licence = contract rights**
- *Cowell v Rosehill Racecourse* (1937) 56 CLR 605
 - License **couple with a property interest is irrevocable** (*Wood v Lead bitter*)
 - A **race is a spectacle that is not property**
 - A **ticket to an entertainment event obtains no property, only contractual right**

2 PERSONAL PROPERTY, POSSESSION & FIXTURES

SUMMARY OF POSSESSIVE TITLE

Importance of possession

- Possession requires **1) Physical control** and **2) Intent**
- **Possession itself is a property right** (other members of society may not interfere with right)
- Possession gives rise to rights: **to defend, sell or devise possession and to be compensated** upon compulsory acquisition
- **Possession generates a second right, namely a right to possession** (prior possession is protected against subsequent possession)
- Possession provides **evidence of ownership**
- **Possession over time may become ownership** (adverse possession)
- Possession is a **root of title**: *Asher v Whitlock*

Enforceability of possessory title

- Possessory title differs from proprietary title
- The primary difference between proprietary title and possessory title thus lies in the scope of enforceability:
 - Proprietary title is **enforceable against all the world** (*in rem*)
 - Possessory title is **enforceable against the whole world except for the true owner**
- Possessory title is a relative concept in the sense that its scope of enforceability is not as wide as proprietary title
- In any competition between possessory and proprietary title, the owner will always defeat the possessor (unless the possessory title has acquired additional statutory protection (limitations of action)); possessory title is transformed into adverse possession

Competition between possessory title holders

- The **right of the prior possessor over land will defeat those of subsequent, physical possessor** (*Asher v Whitlock*):
 - **Possessory title confers a range of rights** including the right to alienate (sell, bequest or devise under will)
 - Possessory title is **capable of being inherited**
 - **Inherited prior possessory title defeats subsequent possessory title**