

4. Native Title Law

Historical Context

- Two legal obstacles to recognition in Australia:
 1. Absolute Crown ownership — all land in Australia held by or through the Crown
 2. Terra Nullius — pre-existing population treated as too "low in social organisation" to have land rights
- *Milirrpum v Nabalco* (1971): first attempt at recognition — failed due to problems in principle and timing

Mabo Decision

- Three plaintiffs from the Torres Strait — native title was recognised
- Terra Nullius rejected; absolute Crown ownership rejected
- Brennan J: native title can survive as a "burden" against the Crown but is exposed to extinguishment by inconsistent acts of the sovereign
- Native title ascertained according to traditional laws and customs of the Indigenous community

Native Title Act 1993 (Cth)

s 223(1): Native title rights and interests means communal, group or individual rights of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights are possessed under traditional laws acknowledged and customs observed by those peoples; AND
- (b) those peoples have a connection with the land or waters by those laws and customs; AND
- (c) the rights are recognised by the common law of Australia
- s 223(2): Includes rights to hunting, gathering, or fishing

Key Cases

Akiba v Commonwealth (2013) (HCA)

- Native title rights included a surviving, non-exclusive right to take resources for ANY purpose (not limited to subsistence)
- Contrasted with Ward (more specific — must demonstrate a need)
- HCA: State Fisheries Legislation had NOT extinguished native title fishing rights; s 211 NTA applied as defence

Willis v WA [2014]

- Did Akiba's "taking for any purpose" principle translate to the mainland?
- North J: rejected government's argument requiring specific reasons for taking — no need to demonstrate specific needs
- Allowed the non-exclusive Akiba line of rights to penetrate the mainland

5. Physical Dimensions of Real Property

5.1 Rights Below the Ground

Principle: ownership of the surface includes both the sky above and the soil beneath, to the centre of the earth (*cujus est solum maxim*).

Mineral Rights

- *Woolley v Attorney-General of Victoria* (1877): gold can only pass to landowner if the Crown grant included "apt and precise words" conveying the gold

Mining Act 1978 (WA) s 9: all gold, silver and precious metals existing in their natural condition are property of the Crown (whenever the land was alienated); all other minerals on land not alienated before 1 Jan 1899 are Crown property

- Grants of land prior to 1899 may pass rights to base minerals
- Depth limit: from 22 May 1981, a **12.19 metre depth limit** applies to all Crown grants

Edwards v Sims (1929)

- Edwards owned land containing entrance to a cave; neighbour Lee sought survey to determine if cave ran under his land
- "The man who owns the surface, without reservation, owns not only the land itself but everything upon, above or under it which he may use for his profit or pleasure"
- Owner of the surface owns the cave beneath, even if inaccessible from their land

5.2 Rights Above the Ground

Cujus est solum: landowner owns both the airspace above and the soil below. However, this is modified for practical reasons.

- Two categories of interference: **overhanging structures** (trespass) vs **overflight by objects** (context-dependent)

Lord Bernstein v Skyviews [1978]

- Company took aerial photos of property and offered to sell to owner — claimed trespass and invasion of privacy
- Balance between owner's right to enjoy land and public right to use airspace for science and aviation
- Overflight by plane at reasonable height: NOT trespass; similarly for balloons and satellites
- Overhanging structures ARE trespass: telephone wires (*Wandsworth v United Telephone Co*); overhanging signs (*Kelsen v Imperial Tobacco Co*); crane jibs (*Graham v Morris*); scaffolding (*Bendal v Mirvac*)

Damage by Aircraft Act 1964 s 4: no liability in trespass or nuisance for flight at reasonable height complying with Air Navigation Regulations; but strict liability for damage caused by things falling from aircraft

Graham v Morris [1974]

- Crane jib left free to rotate, periodically encroaching 62 feet over neighbour's land during construction
- Held: trespass — incites fear and unsightly

Bendal Pty Ltd v Mirvac Project Pty Ltd [1991]

- Scaffolding screens encroached over Pf's airspace; crane swung loads over Pf's property
- Injunction granted to Pf

5.3 Rights to Water

Categories of Water

- **Defined** (riparian rights): rivers, lakes, streams — above or below ground; must have a bank
- **Undefined** (rule of capture): groundwater, rainwater, wetlands
- **Riparian rights**: landowner's right to have water flow naturally through their land — right to receive and transmit the natural flow
- **Rule of capture**: appropriated water belongs to the person who captures it

Acton v Blundell (1843)

- Coal mining diminished supply of water to Pf's mill well
- Surface water rule: no proprietor can diminish quantity or injure quality of water that would otherwise naturally descend
- Underground spring DIFFERENT: "the person who owns the surface may dig therein...if in doing so he intercepts his neighbour's well, that is *damnum absque injuria* (loss without injury)"

Chasemore v Richards [1843–60]

- Large bore sunk by Board of Health diminished flow of water to Pf's ancient mill
- Landowner has absolute right to extract groundwater beneath their land even if this causes harm to adjoining properties
- Distinguished surface water (riparian rights) from percolating groundwater (rule of capture)

Kennedy v Minister of Works [1970]

- Government planned to draw from aquifer to supply Dampier and Karratha — would reduce flow at Millstream Spring
- Held: aquifer was not a defined channel — riparian rights did not apply

Water Legislation (WA)

Rights in Water and Irrigation Act 1914 (WA) s 5A: natural waters vest in the Crown

s 9: Riparian rights — owner/occupier through which a watercourse or wetland runs may take water free of charge for domestic use and watering stock

5.4 Fixtures

The doctrine of fixtures determines when personal property attached to land loses its identity as a chattel and merges with the land (becomes realty).

When Does the Doctrine Matter?

- Vendor and purchaser; landlord and tenant; mortgagor and mortgagee; wills; stamp duty calculations

Two Presumptions — *Holland v Hodgson* (1872)

3. If chattel is **fixed to the land** (no matter how slightly) → presumed to be a **fixture**
 4. If chattel **rests on land by its own weight** → presumed to remain a **chattel**
- Both presumptions can be rebutted depending on: nature of the chattel; intention (object and purpose of annexation); all circumstances
 - Where owner of fee simple affixes an article to enhance the value of the premises for their intended purpose — it is a fixture

Two Tests for Determining Fixtures

Degree of annexation — *NAB v Blacker* [2000]:

- Whether removal would cause damage to land/buildings; mode and structure of annexation; whether removal would destroy/damage the item; cost of renewal vs value

Object and purpose of annexation (more important) — *Eon Metals* (1991):

- Whether attachment was for better enjoyment of the property generally; nature of the property; permanent or temporary; function served by annexation

Key Cases

Holland v Hodgson (1872)

- Looms bolted to floor of weaving mill — mortgage over mill and "all fixtures"
- Looms were fixtures — bolted to floor; affixed to enhance value of premises as a mill

Hellawell v Eastwood (1851)

- Cotton spinning mules attached to floor of mill by tenant; landlord sought to remove them for rent arrears
- Equipment attached to property becomes a fixture, however tenant has right to sever at end of tenancy

Reid v Smith (1905)

- Houses rested by own weight on brick piers embedded in soil; lease expired; tenant sought to remove them
- Objective intention: ordinary dwelling houses on town allotments are intended to be fixtures

Eon Metals v Commissioner of State Taxation (1991)

- Mining equipment at Matilda Mine — was it fixtures or chattels?
- Items inside shed = chattels: limited mine life; transportable; common practice to transfer; economic incentive to remove; slight degree of attachment; easily detachable
- Power station structure = fixture: firmly affixed in concrete footings; part of integrated system

NAB v Blacker [2000]

- Irrigation equipment on dairy farm — electric pumps and sprinkler heads (own weight); L-shaped valves (attached)
- Comprehensive statement of degree and purpose of annexation tests

Third Party Rights — Hobson v Gorringe [1897]

- Hire purchase agreement — engine bolted to floor (= fixture when bolted); mortgagee with no notice of HP agreement protected

Hire Purchase Act 1959: hired goods that are fixtures remain subject to HP agreement during its term; but repossession not available against bona fide purchaser of interest in dwelling-house who acquired without notice

Encroachment and Estoppel

- If B mistakenly builds on A's land — prima facie the house belongs to A (doctrine of fixtures)
- Estoppel elements (*Brand v Chris Building Society [1957]*): B mistakes legal rights; B expends money on that mistaken belief; A knows own rights; A knows of B's mistaken belief; A encourages B's expenditure or remains silent

Property Law Act 1969 (WA) ss 122–123: statutory protection against encroachment

5.5 Personal Property Securities Act 2009 (Cth) (PPSA)

- Creates a national system for registering security interests in personal property and determining priority

s 12(1): "security interest" means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation

- "Personal property" (s 10): includes motor vehicles, household goods, business inventory, intellectual property, company shares — tangible and intangible
- Fixtures (s 10): goods affixed to land — EXCLUDED from "personal property" for PPSA purposes
- Act does NOT apply to: interests in land; certain interests in rights to payment connected to land (s 8)
- "PPS lease": long term lease of at least 2 years, indefinite lease, or lease renewable to 2+ years — *OPS Screening v Gold Valley Iron [2020]*

Power Rental v Forge Group Power [2017]

- Four gas turbines leased to Forge Power for \$28M+ for 2 years; Forge Power went insolvent; PPS lease NOT registered
- Court applied common law test for "affixed to land": (1) degree of annexation; (2) purpose of annexation
- Contractual terms showed no intention to leave turbines after lease; affixation not significant — turbines were NOT fixtures
- s 267 PPSA: unperfected security interests void on insolvency — Power Rental lost the turbines

6. Tenures and Estates

Doctrine of Tenures in Australia

- "On the foundation of NSW every square inch of territory in the colony became the property of the Crown [and all] titles, rights and interests in land which existed thereafter were the direct consequence of some grant from the Crown" — *Milirrpum v Nabalco* (1971)
- Crown grants of property: Fee Simple Estate (closest to absolute ownership); Leasehold (usually pastoral leases)

Feudal Origins

- 1066: King owns all land — grants to tenants in chief subject to conditions; tenant in chief can grant to others (subinfeudation)
- Tenant does not own the land — tenant holds an "estate" or interest (doctrine of estates)

Types of Estates

Freehold Estates:

- **Fee Simple:** *Property Law Act* s 37 and *Wills Act* s 26(e) — closest to absolute ownership
- **Fee Tail:** abolished by *PLA* s 23 ("to heirs of his body")
- **Life Estate** — *pur sa vie* ("to A for life" — reverts to grantor on A's death); *pur autre vie* ("to A for the life of B")
- **Reversion:** future interest reverting to grantor; **Remainder:** future interest granted to third person ("to A for life, remainder to B")

Leasehold Estates:

- Fixed term; periodic lease; tenancy at will; tenancy at sufferance