Week 1 - Unit Introduction & the Concept of Property

Property Law is a doctrinal subject that combines theory, statute, case law, and equity, requiring a strong foundation in Contract Law. In Australia, the system is heavily influenced by English common law while incorporating unique domestic developments such as Native Title and specific state-based legislation. Unlike Contract Law, Property Law is significantly more statute-heavy, primarily focusing on the **Conveyancing Act 1919 (NSW)**, which governs the transfer of title, and the **Real Property Act 1900 (NSW)**, which handles the registration of title. The unit is structured around three primary dimensions: the **analytical** (what is property), the **philosophical** (justifications for property rights), and the **doctrinal** (legal rules and classifications).

Classifications and Analytical Perspectives

Property is broadly classified into several categories. **Real property** refers to the ownership of immovable land, including houses, apartments, or farms, and is characterized by the owner's ability to seek a "real action" for the restoration of the thing (*res*) in instances of unlawful eviction. In contrast, **personal property** (or chattels) typically consists of movable items. Further classifications include **intellectual property**, which covers intangible creative works like copyright, and **family property**, which involves the adjustment of matrimonial assets under the *Family Law Act*.

The analytical dimension explores the shifting definitions of property. Historically, **Sir William Blackstone** provided a highly influential, individualistic definition, describing property as "sole and despotic dominion" exercised in total exclusion of others. Modern scholars like **Margaret Davies** challenge this view, arguing for a **communitarian perspective** that emphasizes how communities live together and use resources collectively. While Blackstonian elements—dominion, exclusion, and external things—still influence contemporary law, modern conceptions often view property as a **"bundle of rights"**. **Anthony Maurice Honore** identified 11 such rights, including possession, use, and the power of transmissibility. Twentieth-century **legal realism**, led by figures like **Wesley Hohfeld** and **Felix Cohen**, further dephysicalized the concept, asserting that property is not a "thing" but rather a **legal relationship** between persons in relation to things.

Philosophical Justifications and Historical Evolution

Various theories attempt to justify the existence of private property. **John Locke's Labour Theory** posits that property is a natural right arising when an individual mixes their labour with nature. This theory is limited by the "proviso" that one must leave "enough, and as good" for others and not allow resources to spoil. **Jeremy Bentham**, representing the **legal positivist** view, argued that property is purely a creation of law, famously stating that "take away laws, and property ceases". **Richard Posner** provided an economic justification, suggesting that property rights promote efficiency and wealth maximization by shifting resources to their most valuable uses through legal transfers. Alternatively, **Marxist theory** views private property as a tool for class struggle and exploitation, advocating for its abolition to ensure equal distribution.

The historical evolution of property rights also reflects social changes. **John Stuart Mill** advocated for women's property rights, leading to the transition of married women from **feme covert** (where property was controlled by husbands) to **feme sole** (owning property in their own capacity). **Crawford Brough Macpherson** traced the history of property from the inclusive, shared nature of **Feudalism** to the individualistic "right to exclude" in the **liberal seventeenth century**, and finally to the **twentieth-century welfare state**, where the government plays an active role in providing housing and assistance.

Doctrinal Principles: Property vs. Contract

A fundamental doctrinal distinction exists between **contractual rights** (*in personam*) and **proprietary rights** (*in rem*). A contract creates personal obligations between specific parties, and remedies are generally limited to damages. Proprietary rights, however, are enforceable against the "whole world" and often allow for remedies like specific performance. The **numerus clausus** (closed list) principle dictates that parties cannot customize new types of land rights; they must fit within established legal categories.

This distinction is clearly illustrated in the law of **licences**. A **bare licence** is a mere permission that can be revoked at any time, while a **contractual licence** (such as a movie ticket) provides an *in personam* right to entry but does not create a proprietary interest. In *Cowell v Rosehill Racecourse*, the court held that an ejected patron only had contractual rights and could not claim a proprietary interest to remain on the premises. Similarly, in *King v David Allen*, a contract to affix posters was held not to bind a subsequent tenant because it was a personal rather than a proprietary right. In *Georgeski v Owners Corp*, the court affirmed that a licence to use a jetty did not provide a proprietary right to exclude others, as a licence is not an interest in land.

Special Legal Thresholds and Native Title

The law establishes clear boundaries on what can be "propertised." There is generally **no property in a "spectacle,"** meaning one cannot use property law to prevent others from viewing or broadcasting an event from adjacent land (*Victorian Park Racing*; *ABC v Lenah Game Meats*). Regarding **body parts**, the *Human Tissue Act 1983 (NSW)* prohibits their sale, but property rights may be recognized if "lawful exercise of work or skill" has been performed on them, such as preservation (*Doodeward v Spence*). Furthermore, there is no property right to practice a profession, as earning capacity is considered a personal rather than a transmissible proprietary interest (*Dorman v Rodgers*).

The analytical and doctrinal dimensions converge in the study of **Native Title**. In *Milirrpum v Nabalco*, the court initially rejected Native Title claims because the Indigenous connection to land did not meet the Blackstonian indicia of use, exclusion, and alienation. However, the landmark **Mabo (No 2)** decision overturned the doctrine of *terra nullius*, recognizing a form of Native Title grounded in traditional laws and customs. Finally, in *Yanner v Eaton*, the High Court endorsed the "bundle of rights" theory, defining property not as a "thing" but as a legally recognized **degree of power** or relationship with a thing.