

2026 Property A Notes

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Week 1: The Concepts of Property and Ownership

1.1- What is Property?

Definition Of Property:

Property's classic definition is that property rights are “rights in rem” (literally, rights to a thing). This means that property rights are rights that are enforceable “against the world”. If somebody steals your phone, you have a right of action against them no matter who it is or where in the world they are from.

The distinction is with “rights in personam” (rights against a person), which typically are the type of rights that arise in cases of tort or breach of contract.

In *Yanner v Eaton* [1999] HCA 53, the High Court of Australia emphasised that this traditional distinction must be considered in context:

The word ‘property’ is often used to refer to something that belongs to another. But ... ‘property’ does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of ‘property’ may be elusive. Usually it is treated as a ‘bundle of rights’.

What Are The Implications Of The ‘In Rem’ Nature Of Property Rights?

The in rem nature of property rights has a number of implications, including:

1. There are fixed categories of rights that the law recognises as having a proprietary (relating to ownership) character. These rights include fee simple (freehold), leases, restrictive covenants, easements and mortgages. To determine whether an arrangement confers a proprietary interest, the arrangement must be examined to see if it satisfies the definition of any one of the recognised proprietary interests.
2. Most systems of property rights – particularly in relation to land – incorporate mechanisms of public recording (either of titles or transactions). The rationale is that “the world” must know that there are rights against them (i.e. property rights to a thing).

Relationships Relating to Property

There are various relationships that may arise from competing rights in relation to property, the most common are:

- Bank and Borrower (mortgagee and mortgagor), as bank will typically hold a right over the property as security in case the mortgagor defaults on their payments
- Owner/landlord and Tenant (freeholder and leaseholder), as owner must sacrifice their right to possession for the duration of the lease
- Neighbour and Neighbour (freeholders of adjoining land), where one neighbour may have a right to pass through or otherwise use their neighbours land through an easement

1.2- Characteristics Of Property?

What Are The Characteristics Of Property?

Property is often defined as a “bundle of rights” (enforceable against the world), including rights to

- Use,
- Alienate (sell), and
- Exclude.

It is ultimately up to the Parliament and the Courts to decide what is and is not property and how these rights should operate.

Property v Contractual Right

Property rights are rights **in rem** (enforceable against all other persons/everyone).

- Refers to effect of right and how it is enforced.
- Rights to exclude, to use, to enjoy, to alienate.
 - These rights effectively mean the right to recover the thing itself (**in specie**) if necessary, and not suing for money instead of the thing itself.
- Property rights are enforceable against the world at large.

Contract rights are said to be **in personam** (against person/s with whom we contract).

- Part of the multitude of personal rights.
- Limited to personal action only.
- **Contractual rights:** enforceable against the other person/s to the contract.
 - These rights do not give right to recover the thing itself, but only to money from the person.

Billposting Example-*King v David Allen & Sons*

- King granted by way of contract a right to David Allen to post advertising on a wall on King's property.
- Subsequently, King granted a lease to another party over the property. Did David Allen have enforceable rights against the lessee?

Held: David Allen's rights were contractual (i.e. personal against King) and not proprietary (i.e. enforceable “against the world”). Essentially, the right to display advertising signs was held to confer only personal rights.

Recognition of New Forms of Proprietary Interest

Parliament can create new property rights.

- Example:
 - Intellectual property: *Copyright Act 1968*, *Designs Act 1906*, and *Trademarks Act 1995*.

- Digital property
- Environment and environmental resources

The **courts** can create new property rights, e.g.:

- Restrictive covenants (**Tulk v Moxhay**)
- Native title (**Mabo**)

The courts have also denied creating new property rights (e.g. **spectacle** in **VPR v Taylor**).

1.3- Property and the Radical Title Of The Crown?

Context

As with other areas, **Australian property law is derived from the British legal system** that was imposed at the point of British colonization. This British feudal system forms the basis of Australian property law. This system was directly imposed in Australia because the British deemed the land to be **terra nullius**, and interpreted all land as having been immediately vested in the British crown, regardless of the fact that there were people inhabiting the land.

Legal Consequences of Radical Title in Australia

The only property rights that could be recognised were those granted by the Crown. The Crown granted estates to European settlers and did not acknowledge indigenous populations as having any form of rights to the land they were living on.

Native Title

The concept refers **to ancient land rights, a recognition that there were indigenous rights from time immemorial**.

- Recognising these rights requires us to conclude that:
 - a) they existed at the time that the British colonised Australian land, and
 - b) that these rights were not extinguished by the extension of the radical title of the Crown

The problem: The idea of any kind of native property 'rights' in the sense that we understand property rights to operate simply cannot work within the radical title of the Crown system that was transposed. Only the Crown could grant freeholds (any estate which is "free from hold" of any entity besides the owner), and if indigenous communities do not have freehold, they do not have 'ownership' in the way that we understand today.

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

- **Rejected the concept that Australia was terra nullius at the point of colonization** and determined that, prior to European settlement, there were existing land rights based on a relationship with the land. But were these extinguished at the point that British law was received?