Topic 1: (A) The Concept and Function of "Property" and (B) Introduction to Real Property

What we learn:

- Nexus between physical nature of the subject of the property right and substantive law
    - Constitutes territory of a political or cultural community (doctrine of tenure; native title)
    - Enduring (Doctrine of estates)
    - Attachment of things (Law of fixtures)

What is Land?

- Constitutes territory of a political or cultural community (Doctrine of tenure, native title)
- Enduring (Doctrine of estates)
- Attachment of things (Law of fixtures)
- [Vertical as well as horizontal boundaries (airspace and subsoil trespass etc): Not Examinable]

Property is a right between the owner of the property and the non-owners. (Relationship between people)

"numerus clausus" – closed number

Rights usually associated with "property"

- Use and enjoy
- Exclude
- **Alienate/transfer** (Topic's focus)

The right to use and exclude provides incentive to put resources to their most productive use (planting a seed and not worrying about people taking it). However this may not be the most efficient if someone who can build a house a rent it then the right to transfer for a mutually beneficial exchange will make it efficient.

Yanner v Eaton (1999)

Native title is always a right to land and never a right to chattels or intangible things. Native title includes the right to hunt fauna including crocodiles for food and ceremony, but not a right to animals themselves.

Facts	Mr Yanner was prosecuted for catching a juvenile crocodile contrary to the Queensland Fauna Act 1974. He argued he was exercising native title rights and was protected from prosecution by s 211 Native Title Act 2003 (Cth). The Queensland govt argued there was no native title right because the Fauna Act provided that all fauna was the 'property' of the Crown.
Issue	What did the legislation mean? That Qld was the owner of all the fauna in the state?
Reasoning	Gleenson CJ, Gaudron, Kirby and Hayne JJ: - The vesting of 'property' had to be understood in the context and purpose of the statute, and so the right of ownership conferred was for the narrow purpose of regulation (to form a basis for charging a royalty) and did not amount to giving the govt complete control to the exclusion of Mr Yanner. Gummon J: - To give 'property' that meaning contended for by the govt would give a larger right than any person at common law, where a wild animal could only give the subject of property rights once it was reduced to possession. McHugh J and Callinan J: - Separate judgments, dissenting that 'property' means what it says, and that meaning is 'the sole and absolute right to the thing'. That is what the Qld govt said, and that is how the legislation should be interpreted.

'Property' does not mean absolute ownership in the Fauna Act it received a lesser bundle of rights of how fauna could be taken, rights to possession and rights to receive royalty in respect of fauna. 'Property' was a regulatory power not a right of absolute ownership. **Property does not have a definitive meaning and must be explored properly to understand.**

Proof of Native Title:

In Yorta Yorta v Victoria (2002), drawing upon the majority judgment in Mabo the Court held that in order to prove native title, Claimants must establish there has been an acknowledgment and observance of laws and customs on a substantially uninterrupted basis since sovereignty.

Extinguishment of Native Title:

Wik (1996): While radical title confers upon the commonwealth the power to extinguish native title without consent but there must be a clear legislative intent that the grant be inconsistent with the traditional interest of indigenous people in that land.

- Freehold, leasehold extinguishes but pastoral leases not necessarily.
- **Western Australia v Ward** (2002) – Tenant's right to exclusive possession (eg through a mining lease) of land extinguishes native title completely.

Requirements for the creation or transfer of Proprietary interests:

King v David Allen and Sons, Billposting Ltd [1916] 2 AC 54

Contractual v Proprietary rights

DA&S was given sole right to affix posters on King. King leased the land to a third party (Lessee) but Lessee was not a party to the agreement as the contract was between King and Billposting. They needed to argue an action in property as it is binding against the whole world.

Billposting would need to show a proprietary interest, the rights were not recognised by common law thus HoL that King and Billposting had a license (permission to do something, which if you did it without permission would be unlawful – only binds King and Billposting)

'It is unreasonable to attempt to construct the relationship of landlord and tenant or grantor and grantee of an easement out of such a transaction'

The right of Billposting does not amount to exclusive possession – cannot tear down the building, can only use other land – not sufficient for easement. No land that could be benefited by these rights.

Requirement for creation or transfer of a (particular) proprietary right

1. Have you intended to create a package of proprietary rights recognised under common law?
2. Was there any formal requirement? (Document needed? If so in what way?)

Definitions of Essential/ Substantive requirements

- **Fee simple** [exclusive possession 'forever']
- **Life estate** [exclusive possession for duration of measuring life]
- **Legal remainder** [future interest given to a person]
    - **Contingent remainder** [A condition for a future interest given to a person]
- **Lease** [exclusive possession for certain term (specified duration of time)]
    - **Lessor** [Still has fee simple]
    - **Lessee**
- **Easement** [right, accommodating dominant land to use, or restrain use of, servient land in a manner not inconsistent with servient owner's continuing ownership]
    - **Positive and Negative Easement**
- **Profit a prendre** [right to enter servient land and remove the soil or its natural produce] (Only right if it is natural, cannot be cultivated by human endeavours)
- **Chattel ownership** [exclusive possession 'forever']
- **Bailment of chattel** [delivery of exclusive possession with an obligation to redeliver]

Formal Requirements:

- How must that intention be manifested?

Eg. Must a document be used; if so, what type; is a particular form of words required?

Difference between contractual and proprietary rights:

Contractual Rights:

- Sphere of enforceability - Promisee to the promisor

Property Rights:

- Sphere of enforceability- Rights against the whole world.

Property is a right, not a thing. Property is a relationship between people.

Property rights relate to external things where the right is enforceable generally against other members of society.

For a property right to exist, it must:

1. Depend upon the **existence of a particular thing**. A property right must relate to something which is only contingently connected to the right holder. It excludes those things which are intrinsic to the person.
    a. Human bodies or reputations are not 'things' and thus property rights must relate to things that are separate and apart from ourselves. Where a body part such as a lock of hair is severed from the body and transformed from being a part of a person into a thing which a person owns, it can become subject to property rights.
    b. Removal of regenerating tissue such as blood, sperm or ova which is capable of returning person to the same state is regarded as separate from the person and subject to property rights. Removal of non-regenerating tissue such as a kidney, diminishes the living donor and is a permanent subtraction from the person and does not give property rights. This is so as to reduce the sale of body parts.
2. Property rights must be **enforceable**, not just against specific persons, but against a wide range of persons. A property right is defined through enforceability as a right to a thing which can be enforced generally against an indefinite class of other members of society (***rights in rem***) and not just enforced against specific persons (***rights in personam***).
    a. Right in rem depends upon the continued existence of the thing to which the right relates.

Doctrine of Estate: People did not own the land itself, but rather have estates in land (right to possess land as a tenant for a period of time)

Two types: Freehold estates and Leasehold estates

Freehold estates: Last for indefinite periods measured in lifetimes (**Protected by the real actions**)

- **Fee Simple**: (Life estate + Remainder)
    - The fee simple estate is the greatest right to land recognised at common law. Fee means that the estate is inheritable and 'simple' means that it is not qualified in any way.
    - A fee simple estate is created by a grant of land to a tenant and her or his heirs. This creates an estate lasting as long as the tenant and any of her or his heirs survive. On the death of the last heir, the estate comes to an end and the land escheats, meaning it returns to the Crown or the grantor from whom the tenant held tenure. The tenant is however able to transfer the estate before the tenant dies and not allow the heirs to gain title (the tenant can dispose of the fee simple either by disposition during life or by will).
    - Where the tenant of a fee simple estate dies without heirs and without disposing of the estate at will, it does not escheat, but is treated like all the tenants of other property rights and goes to the Crown as bona cantia (property without an owner applying when a person dies intestate and without heirs).
- **Fee tail:**
    - A tenant with fee tail would be restricted to the land and their heirs. On the tenant's death, the estate would pass to the heir and if no lineal descendent survived the tenant, the estate would escheat to the person with the fee simple.
    - **This no longer exists in NSW**. (Abolished by s 19 of Conveyancing Act)
- **Life estate:**
    - A life estate is an estate of freehold which entitles the holder (life tenant) to possession of the land and right to income from it, but no power to grant an interest in it beyond the holder's lifetime. Unlike the fee simple and fee tail, the life estate is not an estate of inheritance. (Two forms)
    - "Ordinary" life estate – estate for the life of the grantee. ("*to A for life*")
        - A life estate gives the spouse the right to reside in the property and receive income but only in the spouse's lifetime. Thus the spouse has security but no power to jeopardise the interest of those with rights to the fee simple after the spouse's death. Life estate assumes that the grantee is capable of dying thus corporations cannot hold a life estate.
    - "Pur autre" life estate: Estate for the life of another ('*to A for the life of B'*)
        - If A owned a fee simple estate and granted the land to B for life, B would have an estate

Leasehold estates (or leases): Last definite periods such as five years (**Also protected by real action)**

- A lease is held by the tenant (or lessee), who is entitled to possession of the land for the duration of the estate from a landlord (or lessor), who is either the Crown or the person who holds a greater estate from which the lease is carved (fee simple estate or a life estate).
- Leases differ to freehold estates in two ways:
    - While freeholds are measured in lives, leaseholds are measured in definite blocks of time.
    - A tenant of a freehold estate is said to be seised of that estate, while the tenant of a lease has

Vesting: to confer the right of enjoyment of an estate

- '**Vesting in possession'**: The holder of the estate has an immediate right to enjoyment of possession (immediate grant of a life estate)
- '**Vesting in interest'**: The holder of the estate has a present right to the interest conferred, but no immediate right to possession. (H has a fee simple estate and grants a life estate to I with the remainder to J. J has a right to possession through a fee simple estate that is vested in interest. It becomes 'vested in possession' when I dies. I has a life estate that is 'vested in both interest and possession').
- **'Contingent interest'**: An interest which might or might not vest (in interest or possession) depending on whether a condition precedent to vesting was satisfied. (Eg. To A for life remainder to B and his heirs if B attains the age of 21) If A dies and B is not 21, then it will not vest and revert back to the grantor.

History - Doctrine of Tenure and Estate

The crown is the ultimate owner of the land and when they acquired sovereignty the king also acquired ownership. People who own the land are seen as tenant of the crown and own 'interests of the land'. **Doctrine of Tenure applies in Australia (Mabo 1992)**.

Whereas the doctrine of tenure recognised that a number of persons could have a proprietary interest in the one piece of land at the same time, by relying on duration, the doctrine of Estates allowed for the creation of successive interests, present and future, in the same piece of land. (Western Australia v Ward 2000)

Australian Doctrine of Tenure means that the Crown has acquired sovereignty of the land, radical title of the land but it hasn't acquired beneficial ownership. The fact that crown is paramount lord does not give it beneficial ownership. It can use sovereign power to extinguish native title but the mere sovereignty does not.

Beneficial owner of the land, extinguishing any existing rights and creating new rights.

Imperial Acts Application Act 1969 (NSW) s36:

- "Land held of the Crown in fee simple may be assured in fee simple without license and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect." (**Allowing land to be transferred without over Lord**)

S37:

- "All tenures created by the Crown by way of the alienation of an estate in fee simple in land after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown." (Crown no longer has ownership and duties of the tenure is only for the sovereignty of the Crown.)

Abolition of Crown's right of escheat: (Now the Crown still takes back the land but as bona vacantia)

If fee simple with will then it will pass to heir. If died with property then go to heir but for personal property it would go to next of kin. If died without will for personal property ti would belong to Crown as bona vacantia. If you died without will for property then it would go back to the Crown in the right of escheat. Now under Succession Act 2006 (NSW) s 136, doctrine of escheat was removed and now the Crown takes the land back as bona vacantia.

Requirements for Existence of Native Title: (Brennan J in Mabo v Qld (No 2))

"Where 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**. …

- However, **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**." (59 – 60)

When Native Title can be extinguished? (Mabo)

'Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incident of native title must be ascertained as a matter of fact by reference to those laws and customs' It cannot be transferred, but can be surrendered to the Crown. 'May be proprietary or personal and usufructuary (rights of use) in nature and possessed by a community, a group or an individual'. Subject to being extinguished by an interest granted by the Crown.

Parliament has two methods of extinguishing Native Title:

Native title will be extinguished when the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. (eg. **Land used for roads, railways, post office and other permanent public works**) However native title is not extinguished where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (eg. Land set aside as a national park as it does not interfere with the enjoyment of the land).

Native title is limited to:

Traditional use (hunting) and cannot be transferred. (Existing tenures were still protected).

When Native Title is extinguished in Common and Statute:

1. At **common law**, extinguishment occurs once and for all when the Crown does an act, which **evinces a clear and plain intention to extinguish native title** (Mabo 1992).
2. When extinguishment is alleged to have occurred as a result of **legislation**, the intention to extinguish is inferred from the legislative intent discernable in the terms of the legislation; specifically, **did the legislation grant (or authorise the grant) of interests that were inconsistent with the native title?**

When extinguishment is alleged to have occurred as a result of **legislation**:

Wik Peoples v Qld (1996)

Leases were granted by statute, rather than the common law, thus it does not necessarily grant exclusive possession.

Leases granted by **statute can co-exist with Native Title** and where they came into conflict the rights of the lessee prevails. (Need to construe the grant as to whether it confers exclusive possession) **From the facts, the land was not developed.**