**Topic 1 – Concept of Property**

**Legal meaning of property**

- The defining feature of property is the capacity to exclude.
- Property refers to the relationship between an individual and an object/right rather than the object/right itself – *Yanner v Eaton*
- Property is enforceable *in rem*.
- Property only exists where there is a legal framework to support it.
- The concept of property changes to meet social needs.
- 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? CB1.3
- Property ownership = confers social, economic power, power to dictate the rules – to make the law in a way that best suits you - governs the use of things and the allocation of social wealth

**Legal meaning of “property”**

- **Legal Concept:** The term “property” refers to the many different kinds of relationship between a person and an object, object rather than the object itself (CB1.5), also *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/
- **Fragmentation** – different property rights can attach to the same object (CB 1.9) – e.g. different people can have different flavour of rights over the same house
  - Property laws can determine the flavour e.g. one has priority
  - Mortgage e.g. bank has a proprietary interest as well in the house
  - Son: if mortgagor leases out a room in the house – the renter has a property interest in the home
  - Easement – if person owning property wants to build wall but that is only access to house e.g. driveway
  - Chattle v Fixture – e.g. statue connected to land
- Property relationships may be fragmented according to a number of factors:
  - Jurisdiction in which the interest is enforced
  - Subject matter to which the interest relates; that is, whether the subject matter is tangible or intangible because this will affect the nature of the rights
  - Duration of time for which the relationship exists’ that is whether the interest endures for a definite or indefinite period
  - Culture in which the right is enforced; whether it is enforceable within a tenure system or indigenous system
  - Moral atmosphere in which the right is claimed; relevant to new and developing rights
  - Whether the interest is created by statute.
- **Concept:** Property law as an organising principle for allocating rights to land and resources in a society.
- **Against the thing:** a property right is a right *in rem* (Latin: against the thing)
  - If you own bottle, property right is attached to the bottle
  - 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 against the PERSON:** rights in personam (Latin: right directed to a person) eg 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
- Eg contractual right or a debt

**Rights in Rem v Rights in Personam**
- **In personam:** Vicki lends John $20, doesn’t care about actual $20 bill, just cares about receiving $20 from John. SO if John gives the bill to Mary who burns it, Vicki doesn’t care, her property right is against **JOHN**
- A right in personam can be enforced against John regardless of what happens to the $20 note
- In personam can become in rem
- **Contrast: right in rem** in the book (property) itself
  - Vicki gives book to John who gives to Mary, Vicki has property right against both
  - Downsise: if Mary sets book on fire – property right dies – depends on existence of subject
  - Enforceable against the world
- **In rem can become in personam - not so important**

**Associated Rights - BUNDLE**
- Property relationships are defined by a number of rights collectively known as the ‘bundle of sticks’ metaphor. This means that there are a number of separate rights associated with owning property.
  - The right to exclude the world *(in rem)*,
  - The right to possession of the property,
  - The right to use and enjoy the property, and
  - The right to alienate,
    - Meaning the right to alter ownership rights by selling, giving, leasing or mortgaging.
- Features are contentious and not definitive or exclusive to property rights

**IMPORTANT LEGAL CHARACTERISTICS OF PROPERTY:**
1. **Private Property** refers to the **relationship** b/w an individual and an object or right rather than that object/right itself. It is ‘a description of a legal relationship with a thing’: *Yanner v Eaton* (CB 10 13)
2. Property is enforceable **in rem** (against the whole world) rather than **in personam** (against a single person)
3. Property confers upon the holder a ‘bundle of rights’ (an aggregate of rights associated with property enforcement) *Yanner v Eaton*
4. Exists only where there is a legal system/framework to enforce it → Jeremy Bentham, property a ‘legal construct’ - *Wily v St George*
5. One of the primary uses of property is that it governs the use of things and allocation of social wealth
6. Property is a dynamic concept, can change to meet new social needs and changing morals *(Yanner v Eaton)*

**Other essential features of property**
- Property can be defined with reference to its features, such as:
• (a)** transferability** of right
  • Most rights are transferable (includes 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) 196F/G)

• (c) Right to **alienate** a thing – can sell
  • Cf Non-assignable property rights (non-assignable lease)
  • Native title rights are **not** transferable *(Millirrpum)*

• (d) Value
  • market value
  • sentimental value
  • negative value? (toxic chemicals)

**What is a property right?**

• **Past:** 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) (CB 3) Circa 1765*
    • 1. A physical thing
    • 2. Exclusive (despotic ownership)

• **However:** 19th Century acceptance of property in intangibles e.g. trademarks and trade secrets
  • Exclusive possession *(eroded)* contrast public land – e.g. if you have land and want to build skyscraper, have to call council – can own land but don’t have sole dominion – can’t do anything you want

**20th Century Definition**

• 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, A M Honoré
    • Rights in rem survive the changes in the identity of persons against whom the rights hold

**Summary – property rights – BUNDLE OF RIGHTS**

• (a) **Dominion** (right to use)
  • Control exercised by a person over an object
  • Dominion denotes some **legally authorised power**

• (b) **Exclusion**
  • To exclude others from: (a) enjoying same rights; or (b) interfering with the exercise of rights
  • State can enforce exclusion – can call police if someone trespasses on land
  • HOWEVER No longer “total exclusion”

• (c) **(external) Things** – we still believe property of things
  • Things must be separate and apart from ourselves
- Physical things (land and chattels)
- Intangible things (shares, patents and trademarks)
- **(d) External**: demarcation of property/boundaries

### Legal Requirement and Property

**Wily v St George** - Legal recognition – property ONLY EXISTS in the legal system
- "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* CB 1.8)

### What ‘things’ can be the subject of property rights? (CB 1.1)
- 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 - 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

### Sources of property law
- Property law doctrine introduced when British Crown claimed sovereignty over Australia a little more than 200 years ago
- Sources:
  - 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
    - Ex, 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 sequestration interests

### Primer on Native Title
- **Definition** of Native Title: Rights to land held by Aboriginal Australians and Torres Strait Islanders, rights includes hunting, gathering, or fishing.
- Initially: *Milirrpum v Nabalco* (1971): held that there were no property rights available to indigenous Australian’s re: Aboriginal customary rights over land and whether it constituted property
- Changed with: *Mabo v Queensland* (No.2) (1992)
- Native title recognised by common law and so was considered property
• Native title **inalienable** (although can be passed from one generation to another in accordance with customary rules and can be transferred to the crown)
• **Exist alongside but fragile – can be extinguished or reduced**
• **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 (CB1.6)** – state didn’t own fauna, property is relationship not object

• **Facts:** In 1994 Yanner (famed Aboriginal activist) used a traditional harpoon to catch 2 juvenile crocodiles for food under NT rights. Charged with once count of taking fauna without a permit contrary to the *Fauna Conservation Act 1974* (Q) (FCA). Def claimed NT rights extinguished by FCA. **First instance:** Magistrate held Yanner not guilty
• Did *Fauna Conversation Act* extinguish Native Title Act?
  • **S7(1)** of the *Fauna Conservation Act 1974* (Qld): “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:** Does saying you own all fauna make the “property” of the Crown?
  • **COURT HELD:** Property is not an object, but a relationship. Just because you say you own all fauna doesn’t make it so – depends on what your relationship rather than the object itself and that fauna is difficult to identify and exclude from others. Could regulate fauna but not have full and absolute ownership of the fauna itself. Government’s relationship wasn’t one of complete ownership just because they said it was. Rather their interest was a handful of different types of rights to controlling fauna as part of regulatory regime. Having right to control animals in relation to permits is NOT property.
  • **HELD** s7(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
  • **HELD:** NT to hunt crocodiles **NOT** extinguished
  • **Why Crown “property” is not equivalent of full or absolute ownership**
    • Can you define what all fauna is? Can you count birds that fly over from other states? No - Difficulty to identify what fauna is owned by Crown
    • **Reasons** for vesting fauna in Crown: desirability to provide for some vesting to create royalty system – to get money
    • **Comment:** State holds fauna in sense of *imperium* (and not in sense of *dominium*): state merely holds guardianship of resources

**Summary**
• Property is about a **relationships** between people and objects – not about things
• Property law helps to order these relationships – particularly important when we have conflicts
• Objects are usually tangible, HOWEVER EXPANDED to meet new social needs and moral perspectives
• Property rights are in rem cf in personam
• Bundle of rights (not singular) include right to use, exclude, transfer, alienate (important ones).
• NO strict definition of property (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)

Classification of property objects CB1.32
• Property is about a relationships between people and objects

Real property vs Personal property
• Property rights to land classified as ‘real property’ - could bring a ‘real action’ to recover land from someone e.g. specific performance
• Personal - because no real action to recover the thing itself
• Personal property gives rise to compensation - could only get compensation via DAMAGES

Property Categorisation:
Real Property - LAND
Corporeal Forms:
• Land and fixtures on land.

Chattels Real - LEASES
• Property that is not freehold land or a movable object
• Leases
• Easements; (rights which burden one piece of land and benefit another).
• Profits a Prendre (rights to take something from the land’s soil).
• Rent Charge (a burden on land entitling the grantee to collect rents on the land).
• Mortgage (a lender interest in the land which secures repayment of a loan).

Personal Property - EVERYTHING BUT LAND
Corporeal Forms:
• Chattels and goods.

**Incorporeal Forms:**
- Enforceable legal rights that do not confer possession over any tangible object. (e.g., debts, shares, the right to sue under a contract, copyright, insurance policies).

**In rem v In personam; real v personal (DON’T GET CONFUSED)**
- Personal property rights (e.g., rights to my book) are **not** **rights in personam**
  - **In rem** - a property right
    - Personal and real property BOTH in rem
  - **In personam** - a contract right

**Legal and Equitable rights - how property rights are enforced**

Go to equity courts to get injunction or specific performance whereas common law to get damages – want specific performance where you’d want the land back – **British decided to merge these**

- 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 e.g., injunctions, accounts of profits, holding of property under a constructive trust are all equitable remedies
  1. Eg breach of contract of sale – CL remedy?, Equitable remedy?

**Property (in rem – super POWERFUL) v Contractual rights (in personam, only enforceable against opposite party)**
- **Property right (in rem)**
  - Right against the world
  - Confers a right over a thing
  - No one can interfere
Enforceable against third parties/rest of the world
A property right precludes anybody (apart from person with better title) from interfering with property rights

**REMEDIES** (broader) prevent interference with rights over the thing
- Prevent interference
- Specific performance
- Get the land you want
- E.g. 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 only e.g. damages
- Personal right against other party to get damage for breach of obligation
- Remedy: to make good damage

**Property v Contractual rights**
- Why does the distinction matter?
  - Property rights are more powerful than contractual rights – **in rem rather than in personam**
    - enforceable against the whole world as opposed to just people who are privy to the contract
  - Property rights prevent interference over things
    - E.g. specific performance
    - E.g. 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
  - E.g. contract may give rights to use, possess or exclude
  - Eg loan contract secured by property – is a mortgage – the mortgagee has a proprietary interest in the property
    - Mortgage is a loan form a bank using your property as security. It creates contractual and proprietary obligations. Security interests to the mortgage property is conferred upon the bank for the duration of the loan.
  - Eg lease contract – may give lessee rights to exclude, use, possess - gives lessee right of possession to exclusive possession over their apartment – lessee ALSO get proprietary interest
    - Lease is both regulated by contract and property right
- Right to enforce a contract is resource capable of forming the subject of property relation. Enforcing a contract is a right in personam. Owning a contract (chose in action) is a right in rem
  - Ownership of contractual right e.g. mortgage
  - Shares, insurance policies and bank accounts
- Contract does NOT automatically become property right e.g. concert ticket gives you right of entry into place but not exclusive possession – can’t exclude others coming in
  - Cowell v Rosehill Racecourse – e.g. cinema ticket is LICENCE
- Contract in itself can sometimes be subject of property relationship e.g. loan can be in personam – however bank can commodify that debt and sell it to a 3rd party (in rem)
What is a lease? What is a licence?
Lease gives you more than licence
• Holder of the lease has more rights than a holder of a licence.
  • Lease = property right
  • Licence = not a property right
• **Lease:** exclusive possession and access, upon terms, for a limited period of time (property right), right in rem
• **Licence** = NO EP - a right or permission to do or use something (sometimes contract sometimes property right especially if it involves possession)
• **Exclusive possession** is used to distinguish a lease from a licence:
  • exclusive possession (lease);
  • absence thereof (licence)

Types of licences
- **Mere /Bare licence:** gratuitous permission to enter land e.g. shop owner puts out bare licence for people to enter shop OR dinner invitation
  - Revocable at will - *Wood v Leadbitter*
  - Not supported by a contract / consideration.
  - Often a defence to trespass - shop owner can’t say – why are you in my shop, you’re trespassing
- **Licence coupled with a contract:** permission to enter supported by contractual arrangement
  - No proprietary interest conferred when obtaining this licence. Breaching the terms of the contract results in termination under ordinary rules of contract.
  - There is consideration.
  - **Cowell** - E.g. ticket to the cinema
    - Does not become proprietary even if contract contains a provision making it irrevocable: *Cowell*
  - Remedy: If it was breached, you have a remedy - refund
- **Licence coupled with the grant of a property interest:** permission to enter land in support of a recognisable interest in land. **Irrevocable**
  - IRREVOCABLE - *Wood v Manley* (difference between OTHER 2)
  - NOT just having ticket to enter something to have value
  - E.g. right to remove felled timber (profit a prendre) – you buy wood on land, only way you can get wood is by entering land. Purchase of wood is accompanied by licence to enter land to get the property (*Wood v Manley*).
  - Remedy: Wrongful revocation leads to proprietary remedy of specific performance.
  - RARE: spectacle is NOT (*Racecourse*), ticket to racecourse is NOT (*Cowell*)

*Cowell v Rosehill Racecourse* (1937) 56 CLR 605 – VALUE (e.g. TICKET) NOT PROPERTY

Value NOT NECESSARILY PROPERTY
• P paid for a irrevocable ticket (licence) to the races and was forcibly removed. P claims damages for assault. D claims ticket was revoked. P was a trespasser, reasonable force permitted.
• **Issue:** Was the ticket to enter the racecourse, a licence coupled with a proprietary interest? *Cowell* argued licence coupled with proprietary interest to see horses.
• **Issue:** Is the entertainment spectacle of a horserace a “property”? Look at characteristics e.g. can be sold, exclusive (depends)
• **RULE:** *Wood v Leadbitter*: mere licence is revocable; licence coupled with a property interest is irrevocable (*Wood v Manley*).
• **COURT HELD:** 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. (Starke J)
• **Just because a show is valuable DOESN’T make it property.** 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.
  - Latham J: The right to see a spectacle cannot be regarded as a proprietary interest.
• **Majority:** Doesn’t make these rights “property” enforceable by specific performance. E.g. dismissed servant – servant can enter home and do valuable things in your home (e.g. clean). If you dismiss or fire and they refuse to leave, **Hurst** would say that ability to work is valuable, making it property right (WRONG).
• **Dixon J** - “No right of a proprietary nature is given. … 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.”
  - Not really using the land itself – can’t give property interest
• **Dissent Evatt J:** court of equity should intervene to restrain the revocation of licence in breach of contract. Also danger of court putting emphasis on trying to find property right somewhere where an equity court would intervene on equity alone.
• **Argued** that licence said irrevocable therefore licence to go to show must be property
• **Court held Per Starke J in Cowell** – just because ticket is irrevocable doesn’t make substance of ticket is property
  - 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”

**Summary**

- 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 (like spaghetti – **Cooke**) or relationship
- Licence coupled with contract does not become proprietary **even if** contract contains a provision making it irrevocable (**Cowell**) 

**The Concept of Property**

1. **History and philosophy of property law**
   1. Why do we need private property rights – need to know why we can justify having property rights – will inform us as to whether it’s appropriate to propertise things e.g. water, air – tell us whether we have **exclusive possession**
   2. Property rights require justification because they correspond to duties placed on all members of society – property rights are in rem – if we say we own air, we can enforce against WHOLE WORLD
   3. Justification of property rights – contentious, complex, emotional and political
2. Property rights in the future (originally focussed on land, now body parts, ideas, intangibles)
   1. **Vic Park Racing v Taylor**
   2. **Moore v Regents California**
Private Property
- Private property is defined as a relationship between a person and an object that allows that person to exclude the rest of the world (in rem) from that object.
- There may be multiple parties that have a property interest in an object. (E.g. lease - A lease confers a right of property because the tenant has the right to exclude non-tenants).

Justification of (private) property
- **Rewards labour – John Locke**
- **Privacy** – I can erect fences if I say this is my land
- **Security** – if people know what rules are, they won’t trespass/interfere
- **Personal and economic incentives – Jeremy Bentham**
- **Freedom - Personal liberty** (CB 36) - Will theories (Kant, Hegel) - if I have right to own land, helps me determine future e.g. Jews/women once weren’t allowed to own land – now they can determine future
- **Efficient use of resources - Posner** (economic analysis)
- 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)

Property – LABOUR - John Locke, The Second Treatise of Civil Government Ch V, 1689
- Locke’s Labour Theory of Property (natural law/ classical liberalism)
  - The labour of his body and the Work of his hands, we may say, are properly his. Whosoever 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.
  - Said: if I create something, I’ve mixed my labour with it – I own everything in my body, therefore if I mix my body with thing, it becomes my property – justified colonialism

Justification of private property
- **UTILITY, INCENTIVES, HAPPINNES - Jeremy Bentham 19th Century**
  - Differed to Locke – object of law should be to maximise utility for maximum number of people – need property create savings
  - 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
- **FREEDOM - 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.
  - Only when we have ability to impose will on objects we can have personal freedom
- Karl Marx used Locke’s ideas about the relationship between labour with property and capital
  - Private property is an individual pursuit and doesn’t benefit society at large
Given all value comes from labour – unfair that capitalist owns means of productions and controls the benefit

Liberation of the people through abolition of private property

**EFFICIENCY - Posner (economic analysis):** promotes the efficient use of resources - privatise

- Eg tragedy of the commons – field of grass open to everyone, if all shepherds acting rationally, they will graze on commons however if all of them do it – grass will run out. Therefore if you privatise, person that wants it most will pay most and the grass will survive.
- Markets best to determine prices (cf governments)
- Private property should be: universal (propertise 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?**

- Courts decide how to determine new forms of property and defer to legislature
- Tangible – intangible – deal with both these types of property and decide whether they should be subject of property
- Romans distinguished between things capable of private ownership and things not capable of private ownership (*res intra commercium* and *res extra commercium*)
  - Things inside vs outside commerce
  - Public things (*res publicae*) property of state but intended for public use
  - Roads, rivers and harbours
  - Common things (*res communes*) common to all but not capable of private appropriation
  - Air, running water, sea
  - Tragedy of Commons – common ownership increases exploitation : statutory controls
- Social and moral reasons state these types of things outside the possibility of ownership
- General Principles: to be property, should be able to declare what is and not yours
  - **Boundaries** – e.g. land – the fence line, 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** – close courts (3-2 decisions)
  - **Moore v Regents of California** – close courts (3-2 decisions)

**REQUIREMENTS:** 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
  - E.g. if commons start to be destroyed there is an economic imperative to privatise commons

**SPECTACLE NOT PROPERTY**

*Victoria Park Racing and Recreation Ground v Taylor* (1937) 58 CLR 479

- D1 George Taylor lived across road from the racecourse. He was paid a small amount of money by radio station to allow D3 (Cyril) to build platform and broadcast. D2 2UW erected a platform in his front yard, so D3 could use binoculars and call the race and broadcast information such as winners, scratchings, postings. Broadcast succeeded. 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.
ARGUED RULE: Nuisance: the Pl has a right to enjoy his/her property without interference

ISSUE: Was the spectacle of a horserace “property”?
- Taylor wasn’t actually entering property and not like pollution case where factory dumping pollution into stadium. Therefore had to argue they had property in spectacle.

Court held: **There is no property in a spectacle** because it cannot be demarcated (in the sense of forcing people not to look at what they see) and **not exclusive**. E.g. cannot exclude a neighbour from looking as to what is happening on property. Can erect a fence but the law cannot by an injunction erect a fence. **No duty not to gaze upon your neighbour’s property.**
- Other property rights, such as lease of stadium can be used to control access to spectacle.
  - Latham CJ - If such law was made making describing something they saw illegal - ridiculous

Argued: Tried using Locke labour theory arguing there’s quasi-property – by spending money, P created property
- Court held: **There is NO quasi-property in a spectacle just because labour has been invested**
  - Dixon J - Law would be created to force people from looking at law - ridiculous
    - Will not get you injunction to stop someone from looking at that

McTiernan – NO EP
- “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 PI land thus upheld nuisance
- Evatt J (dissenting) “the defendant has “reaped[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. You can create your own fence but can’t ask court build fence for you.

Boundaries of Ownership – moral boundaries
- **LIFE** - Cannot own another life - cannot be considered private property and therefore cannot be owned. Human Rights and other protections ensure that a **person can exercise freedom over their own life so property rights are unnecessary to protect a person’s ownership of their own life** and private property rights over a human life would open up the possibility of legally owning another person’s life.
- **BODY PARTS** - Each individual owns their own body parts – blood, urine, sperm (regenerative, transferable as property)
  - Highly regulated
- **Regenerative** parts of a human body such as blood or sperm **can be owned** and can therefore be transferred to a third party who can then claim ownership.
  - HIGHLY REGULATED
- **Non-regenerative tissues** - parts of a body such as a limb or vital organ cannot be transferred unless it is freely donated - regulated by **Human Tissue Act (Vic) 1982 ss38-39** prohibits the selling and buying of human tissue
  - Transplants
- **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 disposal of property. **Court held**, no conversion, 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. - law should protect and enhance the development of medical research
- Dr breached judiciary duty – should pursue remedy as a result of the breach

**Boundaries of Ownership – common heritage of mankind**

Outer space – province of all mankind
- 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 – common heritage of mankind but not signed by USA
  - Regulating control and ownership of moon
  - US did not sign
  - Division of lunar resources
  - *Res communes* concept
  - Private ownership not expressly prohibited