

## Is \_\_\_\_\_ capable of being identified as Property?

### 1) Define property in general

- Property law defines the relationship between legal persons with respect to things. Property is the bundle of rights the subject exerts over a thing.
- While it is very difficult to define property, the summary by Blackburn J provides: *“I think that property in its many forms generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications.”*
- Further classifying a thing as property gives rise to rights in rem, that is, rights enforceable against the world

### 2) Classifying new forms of property

- **Theories of property**
  - o Labour theories etc. may be useful
- **Characteristics of property**
  - o Use, Exclude, Alienability, value
  - o Enforceability
  - o Not an exhaustive list and not all elements are required: Blackburn J *Millirpum v Nabalco*
- **Policy/moral issues**
  - o Any implications or benefits for recognising the right?
    - E.g. scientific development *Moore*
    - Should the court or parliament be making these decisions?

### 3) If so, who is the owner of \_\_\_\_\_?

- This is a matter of fact and should be decided on the facts

# 1 The Concept of Property

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=> The distinction between ownership in a physical sense (I am holding a pen) to **legal ownership**, whereby one has the **bundle of rights**

- Right to use or enjoy
- Right to exclude others
- Right to alienate

## Nature and Essence of Property

*Cohen*: Private Property is a **relationship between people** in respect of things, **tangible or intangible**, such that the **owner can exclude** others from certain activities and **permit others to engage** in those activities and in either case, **secure the assistance of the state** in carrying out his decision

>>> **Property can be**

- Tangible
- Intangible
  - o IP
  - o Debts
  - o Goodwill
- Involves the relationships between people (*Cohen*)
- Property may exist without value; value exists without property (*Cohen*)

=>The distinction between personal rights and proprietary rights:

- Personal - enforceable against a specific person.
- Proprietary - enforceable against anyone in the world.

**BASICALLY** Property Law governs the relations between persons in relation to things. Essential characteristic of private property must at least involve right of the owner to exclude.

*The main dichotomy is between property as a physical thing to which various legal rights are attached, and the legal interest pertaining to a physical object. The latter is the current preferred view in legal academia*

## Private Property

- Basic idea: “In a private property system, a rule is laid down that, in the case of each object, the **individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by society as final**”  
(Waldron)
  - o Stupid uses or none at all
  - o C.f. native title and other customary systems e.g. communist – Waldron’s notion doesn’t cover all rights/relationships to land
- C.f. John Finnis “As a private owner of a natural resource or capital good, one has a duty in justice to put it to productive use or, if one lacks the further resources required to do so, to dispose of it to someone willing and able to do so”

## Justifications for and Criticisms of Private Property

- First Occupation Theory: first possession/occupation is enough to justify legal protection of the claims of the possessor. Doesn’t justify existence of private property in broader sense, explains why first possessor takes superior right and supports principle that possession is worth protecting.
- Labour Theory/Natural Law Tradition: Locke, central moral justification for private property. the sower is entitled to reap what he has sown. All property originally appropriated from a common pool and men have right to keep that which they had produced with their labour. Unlikely today that economic productivity result of unaided labour. Value lies in the reward western systems place on individual effort.
  - o *Doodeward v Spence* HCA per Griffith CJ - Two-headed still born case
  - o When a person has by lawful exercise of work/skill so dealt with a human body or part of it in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it
- Idealist ‘personality’ Theory/ Free Will: Hegel and Kant, moral justification, taking possession of something is one of the most important ways to manifest our free will. private property helps the individual develop a free will, reason and personality. Essential for development as rational beings. Not sound but realistic, private property necessarily limits freedom of less fortunate.
- Economic Efficiency Theory/ Utilitarian: provide incentive for more efficient use of resources and promote maximum economic productivity. Doesn’t demonstrate that greater productivity is necessarily achieved by private ownership of resources. Can’t isolate economic efficiency from social consequences. Demsetz, Hardin. Need to prevent problems of free-riding and over exploitation of the asset – if you over exploit, you pay the cost. Don’t want someone to get

the benefit of something without the cost, no one will have the incentive to produce good things.

- *Spontaneous Order*: **Hume**, people want to be civilised in order to avoid Hobbs' State of Nature. Balance between needs and wants will inevitably lead to conflict, they spontaneously come together in order to develop a system of property rights to avoid conflict.
- **Basic problem of imposing duties on others by a unilateral act**

## Characteristics of Property

These rights need to be enforceable – rights in rem

- Generally, includes the right to use, exclude, alienate

### Right to alienate

- **Transfer to someone else (gift or sale)**
- **Can have a property right without right to alienate** e.g. leasing a house you can exclude and use but can't sell or assign your lease to another, non-transferable shares
- Can have rights you can assign that don't have a tangible existence e.g. company shares (contractual rights against company) aren't things in real world
- Existence/absence of alienability doesn't make something property or not property

### Right to exclude others

- There are certain assets from which you can't exclude other people therefore they can't be the object of property (**K Gray**: talking about *Victoria Park* – dissenting judgements disagree)
- Systems of private property based on a right to exclude others aren't enough to cover potential forms of property
- **Merrill** – as long as you can exclude others then you have property and you're the property owner (although usually have more)
- *Third parties can't have property rights enforced against them*
  - o Simplicity – have to have simple rights in order for the large number of everyday people to comply with them
  - o Shouldn't subject people to restrictions on the use of their things if they didn't agree to them/entered into a contract
  - o Price of future sales (*Tulk v Moxhay*)
- Rights correlate to duties - If I have a property right, what does this oblige the world at large to refrain from doing? >> interference
- **Cohen** – it's property if the following label can be attached

- To the world: Keep off X unless you have my permission, which I may grant or withhold
- Signed: Private citizen
- Endorsed: The state
- Exclusion model?
  - Efficient way of getting most of what we want from a system of property – *Smith*
  - Shortcut of a system which specifies all uses and rights over every thing
    - Problems – mess of duties, impossible to articulate them all, difficult to adhere to and remember them all
    - *Merrill; Smith* say the exclusion model is better because it's a simple message

### Right to use or enjoy

- Don't have a right to use things at large
- It's the fact that no one but the owner can touch it without permission is why you can do all the things you do with it. Others can't use it without 'touching' it
- Whether you have **physically interfered** with it is the basic criterion of whether you have infringed a property right (why the surfboard e.g. isn't an interference with a property right)
  - Doesn't apply to shares or money ^ don't behave in same way as tangible things <= can't interfere in the same way because if a third party interferes a bank still owes its obligation to you
  - Surfboard e.g. No interference with the item means no interference with the property right, still have the right to use it even though physically incapable. Others can't use it without physically interfering with it

### *Milirrpum v Nabalco Pty Ltd (1971) HCA*

- Blackburn J: I think that property in its many forms, **generally implies the right to use or enjoy, the right to exclude others, and the right to alienate.**
- I do not say that all these rights must coexist before there can be a proprietary interest, or deny that each of them may be subject to qualifications
- Possible for property to exist where one or other of these features is missing
- HELD: The aboriginals have a connection to the land, **but not proprietary one:**
  - A proprietary relationship implied 'the right to use or enjoy, the right to exclude others, and the right to alienate'.
  - Wasn't demonstrated by P who only had a **'religious relationship'** with the land.
- The court did recognise the existence of Aboriginal laws. However, the court was not willing to overturn terra nullius.

## Contract VS Property Rights

- Difference lies in enforceability
- *King v David Allen* – license doesn't confer a sufficient plenitude of rights over the land to qualify as a proprietary right. **Only proprietary rights are enforceable against third parties**

## Rights in personam (contract) VS Rights in rem (property)

- Rights against a person, enforce without much regard to things they might have AND ONLY enforced against the PARTIES TO THE AGREEMENT
  - VS
  - Rights people have concerning particular things, without much regard to who the rights might be enforced upon AND enforced against the WHOLE WORLD
  - Assignable contractual rights
    - o Assigning benefits not burdens (duty is still imposed upon the person who consented to its creation)
  - General rule – can't impose duties without the consent of the duty-owner (*King v David Allen*)
    - o The borderline – restrictive covenants (*Tulk v Moxhay*)
    - o License (implied or express) to be on property is different to property right because it is revokable
    - o E.g. contract for use of land not a property right even though it pertains to a thing because it isn't enforceable against world at large its enforceable to party to contract
- >> about the **range of enforcement of right**

>>Licenses are contracts which allow a person to use another's land without committing trespass.

**Licenses confer personal rights and not proprietary rights**

### *King v David Allen & Sons Billposting Ltd (1916) UK*

- HELD: An agreement for a license to display advertisements on the wall of a picture-house was not binding on a tenant with notice to whom the licensor demised the land. The owner of the land was liable for a breach of contract.
- **A license does not qualify as a proprietary right.** This is because it delivers insufficient control over the land
- Only proprietary rights are enforceable against third parties. However, **an interest is not proprietary simply because it is enforceable against third parties.**
- A proprietary interest could have been created through clear wording in the contract as a lease – shows importance of construing the document

## Recognition of New Forms of Proprietary Interests

### By Courts:

As proprietary rights are rights in rem, **courts are careful in recognising new proprietary interests**. By creating new property rights, the courts are **giving authority to persons to exclude and control an object of property**. Further, it can also have **massive implications = creation of markets, degeneration of the moral worth of the object**

The court must be prepared to identify three elements

- A subject of property
- An object of property
- Various rights and entitlements attached to the object for the benefit of the subject (and most significantly the right to exclude)

### METHOD

- Can the existing law accommodate this situation?
- If not can we create a new interest?
  - o Consider other cases
  - o Is there policy/moral reasons not to define as a property right

### Restrictive Covenants

Attaching conditions to the use of land (even if you no longer own it)

#### *Tulk v Moxhay* (1848) UK

- Promise to not build on land doesn't continue to the new purchaser because they're not privy (in contract)
- Not hold people to obligations that they never agreed to
- M, who, despite taken with notice of the covenant, argued it was unenforceable against him.
- **UPHELD the covenant: M had notice of covenant and price paid reflected restrictions therefore bound by the restriction (Lord Cottenham)**
  - o Two elements: *covenant must be negative in nature and must relate to the land or the person taking the benefit or covenantee*
  - o *Notice must be given*, Only when aware of the covenant – if bona fide not aware, then free of covenant
- This applies only to restrictive covenants

## Native Title

### *Milirrpum v Nabalco Pty Ltd (1971) HCA*

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  - o Wasn't demonstrated by P who only had a **'religious relationship'** with the land.
- The court did recognise the existence of Aboriginal laws. However, the court was not willing to overturn terra nullius.
- HELD: right we see doesn't allow for alienation or exclusion, so not property right

### *Mabo v Queensland (1992) HCA*

- CL recognises a form of native title, reflects rights of indigenous in accordance with their laws and customs.
- Native title exists where:
  - o The indigenous can prove a continuous connection (from before colonisation) to land through traditional customs; and
  - o This title hasn't been extinguished or modified subsequently (i.e., the Crown hasn't 'granted' it to someone).
- **Only the indigenous can have native title**, and once it is lost (e.g., by purchase, voluntarily, by losing connection with the land, if it was extinguished by the Crown), it is lost forever.
- **Native title may be protected by legal and equitable remedies**, provided it's not repugnant to 'natural justice, equity and good conscience'.
- Possession under native title may be enforced by representatives of indigenous clan or group.
- Certain requirements for Crown to extinguish native title, the most important being **'a clear and plain intention to do so'**. Circumstances which don't evince one include:
  - o A law merely regulating the enjoyment of native title
  - o A law creating a regime of control consistent with continued enjoyment of native title