PROPERTY LAW IN AUSTRALIA: COMMONWEALTH

- The legislation covering property law is mostly state based.
- Specific Commonwealth legislation relates to indigenous land rights *Native Title Act 1993* (Cth); *Aboriginal Land Rights (NT) Act 1976* (Cth) and the *Murray-Darling Water Act 2007* (Cth)

VICTORIA

- *Property Law Act 1958* (Vic) PLA
- *Land Act 1958* (Vic) LA
- *Transfer of Land Act 1958* (Vic) deals with the Torrens System TLA
- *Residential Tenancies Act 1997* (Vic) RTA

CLASSIFICATION OF PROPERTY

Two main categories: real (land) and personal

Real Property: relates to land, is then divided into
- corporeal hereditaments: tangible real property capable of being alienated or passed to heirs, and
- incorporeal herditaments: intangible real property rights eg: easements.

Personal: Moveable objects and intangibles (eg: copyright) then divided into
- chattels real: leasehold interests *Note: a lease is now considered an interest in the land*. Chattels personal: moveables/intangibles

WHAT IS PROPERTY?

Very broad; anything that has value and is capable of being owned.
Includes land and goods, but also intangible intellectual property rights eg: copyright
Can involve legal philosophy and presiding social attitudes and legal definitions.
To have property in a thing is to have a ‘bundle of rights’ in regards to the thing.
General right of ownership embraces other rights *Knapp v Knapp (1944)*

Checklist of the features of a thing:
- possession: capable of possession (actual or constructive), capable of physical control
- exclusion: can exclude others from the thing, stop enjoyment of the thing
- right to enjoy and use the thing
- possible to identify and clearly define the thing
- is the thing durable? will it last.
- can the thing be transferred, sold or assigned – very important
- dominion in the thing; rights ‘in rem’ against the whole world
- public interest in determining whether a thing is property

Aus property law is derived from English common law, which evolved under the medieval feudal system, where society was stratified into various classes with the
King at the apex (Crown). Land = wealth, and land based wealth bought immense power to relatively few landholders (incl. the church) In 1066 William the Conqueror arrived in England and became master of all the land, all derived title through the King. The fact that all ownership derived from the King meant that no land was without an owner and no one had absolute ownership, as residual ownership was with the King. Gave rise to the concepts of tenure and estates.

Catalyst for change in attitude towards property was the industrial revolution, which changed the power axis away from landed gentry to the industrial capitalists – who owned the means of production. Large estates disintegrated and land became a commodity, a middle class emerged.

When the Aus colonies were being formed the English class system and it’s attitudes to property was breaking down.

**The concept of property therefore reflects political, social and economic conditions and cannot be explained in purely doctrinal terms.**

Aus contains a mix of private and public property – parks, beaches, public buildings. Ability to use such public spaces is paramount to the enjoyment of living, as is the opportunity to own real property (family home).

**Important feature of private property:** the right to exclude others – enforceable against everyone and includes the right to decide who can/cannot enter into that land. Requires the endorsement of the state through relevant law that enables an individual to purchase what was originally a grant of land from the Crown.

**Any definition of property therefore includes concepts of economics and wealth, the right to enjoy it and the ability of the law to protect the interest.**

The legal concept of property constitutes a bundle of rights;
- the right to possess one’s property
- the right to use one’s property
- the right to exclude others
- the right to transfer by gift/sale
- the right to dispose after death
- the right to compensation if acquired by the State

**Important:** property is relational in nature. Property refers to a specific type of relationship with a resource or object matter rather than the resource or object itself. Not a thing but rather a relationship one has with a thing.

Aus colonial powers relied on Western ideas about the nature of property rights to deny Indigenous people property in land. ‘Property implies the right to use/enjoy, the right to exclude or alienate – I do not think I can characterize the relationship of the clan to the land as proprietary’ **Milirrpum v Nabalco (1971)**
WHAT IS LAND?

Common law notion: land extends up to the heavens and down to the centre of the earth. Restrictions have been placed in regard to how high above the land ownership goes and ownership in regards to what is in the soil.

An owner’s right in the **airspace** above their land was restricted to such a height as was necessary for the ordinary use and everyday enjoyment of the land – above that height the owner had no greater rights than any other member of the public. Bernstein v Skyways & General Ltd [1978]; Graham v KD Morris & Sons [1974]

The use of airspace is a transferable and transmissible right, though not an actual interest in land. Uniting Church in Australia Property Trust v Immer (1991)

Land owned by the State covers the whole of the soil from the surface to the centre of the earth and everything that is physically incorporated in it, including the minerals Commonwealth v NSW (1923)

FIXTURES

A chattel that has been annexed to the land or a building so as to become part of it. Fixtures are therefore chattels/goods which were intended to become attached to the land and are now considered by the law to be part of the land.

*Holland v Hodgson (1872)* two-step test;

1. Look at the degree of fixation – the more secure the more likely to be a fixture, if only attached by its own weight then generally considered a mere chattel
2. Look at the intention of the annexation – it may be firmly attached but circumstances show it was never intended to be part of the land

The courts look to the **objective intention** of the person who has affixed the object, though the **degree of fixation** may help to indicate what the intention was. Thus every case is determined on the specific set of facts. Look to;

- degree of fixation
- can the object be removed without damage
- what is being done with the object and its function
- is the object for the better use and enjoyment of the item itself (chattel) if for the better use and enjoyment of the actual land/building then fixture
- If the object fits into the overall architectural design of the house – fixture. *Re Whaley (1908)* portrait & tapestry; *Farley v Hawkins (1997)* dishwasher/shed
- Presumption; affixed beyond its own weight = fixture. Burden of proof is on the one who asserts it is not. *Farley v Hawkins (1997)*
- Presumption; affixed by own weight = not fixture. Burden of proof is on the one who asserts it is. *Farley v Hawkins (1997)*
- Houses/buildings are usually intended on being permanent. *Geita Sebea v Territory of Papua (1941)*
- If no intention for buildings to be permanent held to be chattels eg: caravans/mobile homes Yallingup Beach Caravan Park v Valuer-General (1994); Ceedive v May [2005]
- Presumption can be modified; 1. contract of sale
  2. estoppel; protects a party from detriment that would flow from a parties change of position if the assumption/expectation that led to the change – you cannot go back on a promise that leads to detriment. Unconscionability underlies estoppel; Brand v Chris Building Co [1957]
  3. Statute; common in agricultural holdings where a tenant can take away items (eg: generators, pumps, machinery, buildings) that are not affixed. If making improvements that cannot be removed (eg: drainage, dams, buildings) entitled to receive compensation.

WATER RIGHTS

Are connected with the land. Under common law riparian rights allow the owner of land adjacent to a river to take and use water for ordinary purposes connected with land Rugby Joint Water Board v Walters (1967)

Not suitable for Aus therefore statute intervened Water and Conservation Act 1880 (Vic) and Irrigation Act 1886 (Vic) providing regulation in regards to water and irrigation and began to reduce riparian rights. Water Act 1905 provides right to flow and control of water lies with the Crown – rights in connection to water no longer directly connected to ownership of the land – usually a licence is required.

Water Act 2007 (Cth) regulates water resources in Aus as a whole – to deal with Murray/Darling river system issue

MINING RESOURCES & MINING LAW

Minerals are chattels, unless they are so spread and mingled with the earth that they have lost their separateness and are considered part of the soil R v Parker (1989)

- Common law: whoever owns the land owned the minerals, except the royal metals (gold & silver) that belonged to the Crown.
- Statute reserves ALL minerals in the Crown Mining Resources (Sustainable Development) Act 1990 (Vic) s 9
- Commonwealth controls offshore waters and their resources Seas & Submerged Land Act 1975 (Cth)
- States have mining rights out to three nautical miles Coastal Waters (State Powers) Act 1980 - States relevant statutes provide a number of mining tenements incl; prospecting permits, mining claims, exploration permits, mineral developments licences & mining leases
THE DOCTRINES OF TENURE

A land system whereby land is held by someone other than the owner, rather than there being absolute ownership. The concept of being granted land and protection in return for providing service, ‘tenure’ means ‘to hold’.

The ‘subletting’ was known as subinfeudation. There were different types of tenure;
- knight service
- serjeantry (personal services)
- frankalmoin (religious service)
- socage (agricultural service)

Tenure gave rise to other rights/obligations or ‘incidents of tenure’;
- homage/respect to King
- aid/financial support to Lord
- relief
- wardship

The feudal system began to break down via *Quia Emptores 1290*, *Tenures Abolition Act 1660* with William II returning after the Cromwell rule and the rise of parliamentary power. Reflected in PLA which state that land is held without incident to tenure.

The system of tenure was bought to Aus with colonization, with the principle that all land is held for the Crown Attorney-General v Brown (1847) All land grants made in Australia are therefore subject to the doctrine of tenure *Mabo v QLD (No 2) (1992)*

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Principle of ‘escheat’ where the property of a deceased intestate person without heirs reverts to the Crown replaced by *Bona vacantia* where property passes to the Crown as ‘property without an owner’ rather than reverting because of absolute ownership.
THE DOCTRINE OF ESTATES

Flows from the Doctrine of Tenure with the word ‘estate’ meaning ‘to hold’.

In feudal times seisin meant possession, and what the tenant owned was a slice of time, therefore an estate quite separate from the land. Over time all estates became alienable and seisin came to mean actual ownership of the estate.

The common law categorises all Crown grants according to the doctrine of estates – each estate is categorized according to the duration of time for which it exists. An estate existing for an indefinite period of time will amount to a freehold estate, whereas an estate existing for a specific duration of time will be classified as a non-freehold estate or a leasehold interest.

Freehold Estates: There were originally 3 types of estates or interests in land;

- **fee simple** (freehold); greatest estate, that can theoretically last forever, closest thing to absolute ownership under the doctrine of tenure. ‘Fee’ means an inheritable interest, whilst ‘simple’ means descends without qualification (type of heirs are unrestricted).

  Under common law it required ‘words of purchase’ or words that indicated who was supposed to enjoy the estate, and also words of limitation that indicated the extent of the interest that had been given away. Correct expression; ‘to A and his/her heirs’. No other words would create a fee simple estate in an *inter vivos*, thought the law was more lenient if made under will.

  Words of limitation are no longer required under statute, although appropriate words are still required in conveyancing. Legislation presumes an intention on the part of the grantor to transfer a fee simple, provided they have this estate and no contrary intention can be proven *s 60 PLA*

  Fee simple can be alienated, even if the title-holder dies without a will.

- **fee tail**; estate given to a person and then to specified descendants of that person (usually firstborn male). ‘Fee’ meant an inheritable interest, while ‘tail’ could be ‘tail male’ or ‘tail female’.

  Required words of purchase, that is ‘to A’ and also words of procreation ‘and the heirs of his/her body’.

  Fee tail abolished in Aus in 1920’s. An attempt to create a fee tail is deemed to create a fee simple *s 249 PLA*

- **life estates**; an interest in land is granted to a person for the term of their life, via ‘to A for life’. They ensure that the land is returned to the grantor or