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Concepts of property

Michael Weir, Associate Professor, Bond University

What is property? You might think you know what property is but surprisingly it is a difficult thing to describe adequately.

Jot down quickly what property you have.

Things like Tennis rackets, Clothes, Money, Computer, Books.

All of these things are what most people think is their 'property' and what people 'own.' For lawyers these are inexact descriptions of what in law is the relationship that exists between a person and things or land.

The lay person's view of what is property is acceptable and understandable in most contexts as there is usually no need to be more precise. But if the purpose is to analyse the nature of the property relationship in a legal context these categories may be inadequate. This is especially true when one attempts to apply legal definitions in a commercial context.

We will be looking at 'property' in two contexts:

as a noun ie "my property includes the following"

and when describing the legal relationship existing between a person and a thing or land ie "I have property in that land."

Definitions of Property

As a starting point we should start with some definitions of property.

What is defined as property may depend upon the context.

One case defined "property" in these terms:

"The term property is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value."

Under the Income Tax Assessment Act property includes "services" s136 AA while under s1xxxii of the Commonwealth Constitution "money" was deemed not to be property. *Mutual Pools and Staff Pty Ltd v*

Commonwealth (1994) 179 CLR 155 at 195-6. Under most definitions money is deemed property.

Property as a legal relationship

We will now discuss the concept of property when the term is used to describe the legal relationship between a person and an object or land ie "I have property in that car or that parcel of land."

Some define "property" in this context very broadly as "a legal relationship" where there are three persons in that relationship.

the state,

a person the state has concluded is the holder of a specified form of property.

any other person whom the state has concluded does not hold the specified form of property.

The state will suppress the civil liberties of the third person to the extent they fall within the scope of the property held. This is basic to the concept of property that is the notion that the person who holds the property being entitled to exclude another from access to the property which is sanctioned by the state.

This definition of property indicates –

First, that when you say you have property this is an interest separate from the thing itself. For example:

If I say I include in my property "a car" in a technical legal sense what I have or hold is property in the car. In a technical sense I own the property in the car and not the car as a physical object.

The concept of property is also abstract. Rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a bundle of rights that may be exercised with respect to that object.

Ownership is usually conceived of as being the highest form of "property" or relationship with the thing or land being considered. There are other types of "property" that one can hold such as possession, a security interest, a leasehold interest over land or a life estate over land (a freehold interest in land for the life of a person) which are different types of property in a thing or land.

Often ownership and possession is merged in one person ie when I say "This is my pen" I have ownership and possession. If I give my pen to a friend to use then I will still own the pen but my friend will have possession being a form of property in the pen.

This approach allows a number of people to have "property" in an object at the same time. For example if A owns a book because they purchased it from a bookshop it can be said the property they have in that book is "ownership." If A then lends the book to Y that person has 'property' in that book as they have possession of the book. If Z steals the book from Y that person has a type of tenuous property in the book based upon his possession though the rights of Z will be subject to the entitlements of A and Y who have prior interests with A having the primary interest as owner.

Thus you may have a number of parties all with 'property' in the book though each having different types of rights. The book is not property itself rather it is the object of property.

Different Forms of Property

A major division occurs in relation to property between private and public property. Often when we speak of prop-

erty we talk about private property, that is, property owned by private individuals or corporations. This form of property predominates in our private enterprise economic system. Your ownership or property in a bike or money will be based upon the concept of private property.

Public property is property owned by one of the three tiers of government ie Federal, State or Local Government. Examples of public property are public parks, national parks or military equipment.

In western countries property is predominantly held as private property or by the state as public property. In other more traditional cultures communal property is the norm.

In the Australian context the concept of communal ownership was discussed in the High Court case of *Mabo v State of Queensland*. In that case the High Court acknowledged that the common law of Australia recognized a form of native title which provided for entitlements based upon laws and customs of tribal peoples. These entitlements were communal in nature that is they attached to the group rather than to the individual. This is an acceptance of communal rights though it is still a form of ownership. As the terms of this decision and subsequent legislation like the Native Title Act and its state equivalents take effect large parts of Australia will be held by groups of Aborigines under native title based upon communal ownership concepts.

There are some assets for which there are no owners such as the air we breath.

Justification for Private Property

A discussion of the philosophical and policy basis of the relationship between the parties to a property interest, that is, the state and the holder of the various property interests can assist in understanding what property is.

The pervasive impact of property requires some sort of policy or philosophy to support it. While lawyers may ask who owns property philosophers ask why anyone can legitimately claim to own anything.

The question of why the state will protect a person's property interest and the means of obtaining a property interest have as a background particular philosophies which provides the justification for how we distribute and allocate property in our society.

We will discuss 4 theoretical justifications for property ie:

1. the occupation theory

This theory suggests that the party who is the original discoverer and occupant of property was entitled to dispose of those assets. This approach has the advantage of certainty and security as the person in possession can retain possession until someone else shows a better title.

This philosophy is reflected in the law of property. If a person retains possession of land over a long period of time this may make this possessory title unassailable by the original owner. This is based upon the concept of adverse possession of land. If you squat on land for many years and the true owner does not remove you from the property in some circumstances you may be acknowledged as 'owning' the land.

The ability of this theory to explain the basis of property is obvious. Today few things are acquired by being found rather they rely upon the labour of others or by other transactions like sale and purchase.

2. The labour theory

This theory suggests that a person is entitled to the full produce of their labour. The basis behind this theory is that a society should encourage labour and property should be distributed according to one's productivity.

This theory is based on the approach that originally all property was owned in common but people had the right to appropriate this property by co-mingling their labour with it. This theory arose out of the English revolution that was based upon an attack upon the institutions of the monarchy and hereditary ownership of land. This was a time when the middle class emerged after ancient and medieval times when much of the work was performed by slaves and serfs. To the middle class this theory fitted the times as they began to accumulate assets by their own labour and effort not in accordance with hereditary succession. This theory was also one justification for ignoring the interests of aboriginal inhabitants. On occasion the European perspective in centuries past was that native inhabitants did not have an entitlement to land rights as they did not make the land fruitful by cultivation or development.

This theory has the difficulty of dealing with how one separates the efforts of various labour contributions to a product, such as how can you distinguish the bricklayer, truck driver and brick kiln operator in providing the labour for a house. This concern is especially relevant when it involves services not directly involved in the process for example the police force in preserving peace. We also need to consider that most societies choose to provide support to those who do not produce anything to avoid unnecessary poverty and deprivation to those who are unable to provide adequate labour.

3. Property and Personality

This theory is based upon the view that an individual's ability to act as a free personality requires the ability to have dominion over property.

4. The economic theory

This argument supports the view that private property creates the environment where maximum productivity is created based upon the profit motive.

For example, consider a field used for cultivation of corn where a farmer has no property rights in the land and the crop the farmer could not stop anyone entering the land to remove the corn. Very soon the farmer would stop cultivation because the effort involved would not reflect in the likely result to be achieved. Also important in this approach is the ability to assign interests. If the farmer is inefficient efficiency may be enhanced by allowing the farmer to transfer his or her property interest to another who could apply more efficient techniques.

This economic theory supports the profit motive and the incentive it provides for developing and seeking out ideas and processes to support productive activity. This view is based upon belief in the distributive and controlling influence of the market.

History suggests that the market is not a perfect vehicle and often the profit motive will create over-supply, under-supply, monopolies and other non productive arrangements. This theory gives little credence to broader social interests. It may be in the personal economic interest for a person to maximize profits by exploitation of people and the environ-

ment which may be to the long term detriment of those factors for the society as a whole.

Perhaps at the end of the day there is no theory of private property that can provide a complete justification for private property rather it is a matter of considering all these theories as providing some part of the philosophical basis for private property.

Discussion Point:

Which of the philosophies discussed above best explains how we view property and why?

Categories of Property Interests

To date we have spoken about property generally. It is now time to differentiate between the two branches of property namely real property and personal property.

The division of property in real and personal property is a hallmark of the common law system.

In the civil law system (ie that system of law that predominates in Europe) a distinction is made between corporeal movable (goods) and corporeal immovable (land) property, corporeal refers to the physical thing. There is another category of incorporeal movable (ownership) of goods and incorporeal immovable (ownership of land). Under the civil law the concept of incorporeality represents the legal bond between the object and the holder of the legal object.

The legal history of personal property is less developed than that for real property. Perhaps because the concept of land was so vital economically, socially and politically under the feudal system, when many fundamental concepts were developed, there was less attention given to the development of the law on personal property that developed as commerce expanded in more recent centuries. As a result it was difficult to detect the same depth and richness in historical development in personal property law.

What is Land?

English law separates 'property' into 'real property' – ie: realty; and 'personal property' – ie: personalty.

The distinction between real and personal property has its roots in the medieval period of English history – ie: the late 12th century.

From 1066 to the close of the medieval period, which occurred in approximately 1485 AD, you had two types of legal actions to recover property:

1. First, you had an action where the thing itself (in Latin the 'res'), could be recovered – this was called a 'real action' or an 'action in rem';

Hence, the specific thing, or 'res', recoverable through the commencement of a real action came to be known as 'real property'.

2. Second, you had an action where the court could order that the defendant return the thing to the successful plaintiff, but the defendant had the option of paying the plaintiff the value of the thing in money – this was called a 'personal action' or an 'action in personam'.

The reason it is called a personal action is because the order of the court was directed at the defendant personally, not at the thing retained by the defendant.

The specific thing covered by such an action came to be known as 'personal property'.

If the defendant did not have the option of paying cash for the thing retained, that thing was known as 'real property'.

So what 'thing' fell into the category of 'real property'?

Well, the law stipulated that only freehold interests in land could be the subject matter of a 'real action'.

Real Property – is property which is the subject of a 'real' (or 'in rem') action, – namely where you can get the property itself back – and the only property which fell into this category are freehold interests in land; whereas

Personal Property – is property which is the subject of a 'personal' (or 'in personam') action – namely where you could get the property itself back but the defendant had the option of paying you the money's worth in lieu of giving you the property back.

Corporeal and Incorporeal Hereditaments

Before we move on to discuss the reception of English law into the Australian colonies, I want to touch briefly on the distinction between corporeal and incorporeal hereditaments.

Corporeal and incorporeal hereditaments are a sub-category of Real Property.

Simply put, corporeal hereditaments are 'actual physical things over which rights of ownership can be exercised'.

Corporeal hereditaments are tangible objects such as land and all tangible objects which are affixed to the land such as trees, dirt, grass, buildings, etc.

Incorporeal Hereditaments are 'intangible, non-physical, rights affecting the land – for example, easements (which includes a right of way enjoyed over another person's land, and profits a prendre (which is the entitlement to go onto someone's land and to remove material like timber, gravel etc.)

Incorporeal hereditaments are the intangible rights annexed to or issuing out of the land that the common law treated as real property.

Hence, if you have an easement across your neighbour's land, that is an incorporeal hereditament – ie, real property – and if your neighbour denies you access, you can go to court and get an order compelling your neighbour to allow you to cross his or her land on the easement.

Personal Property

The category of chattels (derived from the word cattle) is divided into choses in possession and choses in action. Choses in possession may be referred to as goods or tangible personal property or movable corporeal property.

Choses in Possession

The term choses in possession is perceived as synonymous with goods and chattels. A chose or thing in possession is something capable of being reduced to possession with remedies available to protect possession. Examples pen, car, radio.

Choses in Action

Considered to be a residual category to choses in possession.

Choses in action are all personal chattels that are not in choses in possession.

Choses in action include a right to recover a debt or to sue for a tort, bonds, cheques, shares in companies, policies of insurance. In the case of bonds, shares, insurance policies the material form of the cheque, bond or insurance policy document which may be required by statute or custom to evidence a transaction provides the means to enforce the underlying intangible chose in action.

Although we say that personal property is either a chose in possession or a chose in action it is possible for both categories to co - exist in the same object ie a book that is a chattel while the copyright owner has rights in regard to the book which is a chose in action. Also a cheque is a form of chose in action as between the bank and the drawer while the physical object is characterized as a chattel or chose in possession.

Class exercise:

Categorise either into real property or personal property the following items of property:

- Cheque
- Copyright in a book I have written
- My freehold interest in a parcel of land in Sydney
- A Holden Commodore
- An easement of right of way over my neighbour's land
- A debt of \$2,000 owed to a bank.

The Law Society of New South Wales Inter-School Mock Trial Competition

What is a Mock Trial?

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For further information write to:

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The Law Society of NSW is developing links with Bond University School of Law. The Law School is currently providing all editorial material and discussion questions for publication in Legal Eagle; providing two scholarships to study law at Bond University to the outstanding advocates in the Law Society's popular Mock Trial competition for secondary school students; and also participating in the annual Legal Studies Teachers Conference.