

PROPERTY LAW SUMMARY



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NOTE

The Lawskool Property Law Summary covers real property law, which at times touches on the areas of equity and trusts and torts law. If some of the material does not sound too familiar in terms of what you are learning in your “real property” course at university, it is probably related to Equity & Trusts. Don’t panic.

To help you to better understand how the law is applied in practice we have included an Exam Hints Section at the end of every heading. Some of these sections will include an exam style question and a flow chart detailing the sub headings that you should make and how you should go about answering the question in an exam.

Please note that the sample examination questions will be easier than your final exam. Your real examination paper will consist of facts giving rise to several different legal problems which will make identifying the issues one of your biggest challenges. Our sample questions, will only contain issues related to that section. They are meant to provide an example of how a question relating to that topic may be formulated. For a more detailed exam model, please see the Lawskool Model Exam.

CHAPTER 1: THE CONCEPT OF PROPERTY

- The law conceptualises property as rights to things; as legal relationships between people with respect to objects.¹ In *Milirrpum v Nabalco*, Blackburn J stated that 'property... generally implies the right to use or enjoy, the right to exclude others and the right to alienate'.²
- The High Court examined the scope of the relationship in the case of *Yanner v Eaton*,³ and developed the principle that 'property is that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.⁴
- Property has been defined as 'every species of valuable right and interest'.⁵
- Property is an area of law that prescribes the rights that an individual has regarding a thing, which are not rights to the thing itself. Property governs the **relationship** between individuals and things, and thus the **sources** of power or rights over things.

What can be considered property?

- The law classifies objects of ownership into real property or realty (such as land and those things affixed to land and tenements), and personal property (such as goods and chattels).⁶

1. Real Property

Real property consists of land and interests in land. All real property interests can be classified as corporeal or incorporeal hereditaments.

- A. Corporeal hereditaments: tangible real property interests (such as ownership of a building or land), which may be inherited.
 - They who own the land own everything reaching up to the very heavens and down to the depths of the earth.⁷ This presumption has been limited by the courts in the context of airspace.⁸

¹ Felix Cohen 'Dialogue on Private Property' (1954) *Rutgers LR* 357.

² *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

³ *Yanner v Eaton* (1999) 166 ALR 258.

⁴ Blackstone, *Commentaries on the Law of England*, Dawsons, London, 1966, vol II.

⁵ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J).

⁶ *Ibid.*

- B. Incorporeal hereditaments: intangible rights attached to land such as easements, mortgages and the right to take natural resources from land (profit à prendre).

2. Personal Property

Personal property consists of all other property interests, and can be subdivided into two categories:

- Chattels real: interests in land for a fixed number of years (e.g. leases).
- Chattels personal: all other forms of property, which are categorised as:
 - o Choses in possession (tangible items capable of actual possession, such as books); and
 - o Choses in action (intangible rights that can only be enforced by bringing an action, such as patent, trademarks and copyrights).

Note that there is continuing debate as to the ownership of medical science.

Moore v Regents of the University of California:⁹ This case is

FACTS: Moore tried to argue that he had a proprietary right in the commercial use of his cells.

ISSUE: Whether it is possible to have property rights in human tissue, and thus to effectively be the owner of a cell-line.

HELD: The Court held that Moore was not entitled to a proprietary remedy against the Regents (but he was entitled to a personal remedy, namely damages for breach of fiduciary duty) and that the Regents had exclusive property rights over the cell-line in the form of patents.

It was held that there are no property rights in human tissue.

However, in his dissenting judgment, Broussard J argued that a broad statement of the inapplicability of the tort of conversion to body parts must only apply to plaintiffs in an analogous position to Moore. It follows that if a thief breaks in to the Regents' laboratory and steals the cell-line *after* it had been removed, the Regents would have been able to maintain an action in conversion.

⁷ See: Tan, Webb, Wright, *Land Law Butterworths Tutorial Series*, 2nd ed, LexisNexis Butterworths, Australia, 2002.

⁸ *Bernstein v Skyview & General Ltd* [1978] 1 QB 479.

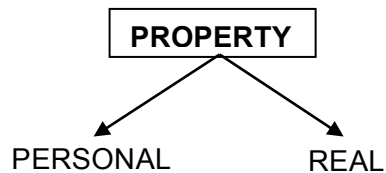
⁹ *Moore v Regents of the University of California* (1990) 793 P 2d 479.

NOTE: Section 32 of the *Human Tissue Act 1983* (NSW) prohibits the sale of human tissue without a license.

However, a 2011 decision by the Supreme Court of NSW found that a wife could have a proprietary interest in her late husband's sperm.¹⁰

The Distinction between personal and real property

The difference between personal and real property stems from the different remedies available at common law.¹¹ If a person was entitled to a real remedy (could recover the object as of right) it was classified as real property.



- Real property deals with interests in land, or realty. The holder of the land could traditionally bring a real action to recover land from someone who was wrongly in possession of it.
- Personal property deals with other items of moveable property, or personality. Traditionally there was no real action available to recover the thing itself, and thus the holder of the personal property had to bring a personal action to be compensated for an interference of their proprietary right.



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¹⁰ *Re Edwards* (2011) 81 NSWLR 198.

¹¹ MA Neave, CJ Rossiter, MA Stone. *Sackville and Neave Property Law* (1999) 6th Ed Butterworths Sydney.