CHAPTER 1

INTRODUCTION

COVERED IN THIS CHAPTER

- Australian property law
- The classification of property
- How does property law link into other areas of law?

AUSTRALIAN PROPERTY LAW

Property law is an old area of law that developed under the English common law over many centuries. This common law was brought to Australia, but in the late nineteenth century property-related legislation was enacted in the then colonies of Australia. In general, these statutes placed the common law into a legislative framework, although some modifications to the common law were also made. The modern-day versions of these Acts govern the application of property and land law in Australia today.

The concise nature and style of this book, however, does not allow for extensive references to these various statutes, and within the text an assumption has often been made that the law is essentially the same in each of the state-based statutes, which are referred to as the ‘relevant statutes’. A list of the relevant statutes has been given at the beginning of each chapter, and several of the more important sections of the relevant statutes are presented in boxes within the text, because property law is a subject where students must get used to applying the relevant statutory principles. While the more important statutes are mentioned, it should be noted that these lists are not exhaustive, because property law is an area where there are many relevant statutes at both Commonwealth and state level. Further, different states may have the same law, which will appear in different jurisdiction-specific statutes. For example, both Queensland and NSW have a presumption in favour of a tenancy in common, but the law is found in s 35 of the Property Law Act 1974 (Qld) and s 26 of the Conveyancing Act 1919 (NSW) respectively.

In this book the relevant statutes are always listed in the alphabetical order of the states; that is, the order is NSW to Western Australia.

THE COMMONWEALTH

The legislation covering property law is, for the most part, state based. However, some specific Commonwealth legislation is relevant to the area, most notably in
the area of Indigenous rights to land. The *Native Title Act 1993* (Cth) is the most significant Act, although the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is also important in regard to rights in the Northern Territory. Recent problems with the Murray–Darling River System have meanwhile seen the enactment of the *Water Act 2007* (Cth) in order to provide a solution to this problem at the Commonwealth level.

NEW SOUTH WALES

The *Real Property Act 1900* (NSW) is the most significant statute regarding real property in that state and, for instance, contains the law relating to the *Torrens system*. Other, more specific aspects of the law are covered by the *Agricultural Tenancies Act 1990* (NSW), the *Residential Tenancies Act 2010* (NSW) and the *Perpetuities Act 1984* (NSW). The *Conveyancing Act 1919* (NSW) covers the procedures required for the transfer of land; while the *Mining Act 1992* (NSW), the *Water Act 1912* (NSW) and *Water Management Act 2000* (NSW) cover the law relating to mineral resources and water use.

QUEENSLAND

The main statute in Queensland is the *Property Law Act 1974* (Qld), which covers all the main areas of property law, including areas such as agricultural holdings and perpetuities, which are covered by specific Acts in NSW. The *Land Title Act 1994* (Qld) covers the requirements for the Torrens system, while specific legislation, such as the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), the *Retail Shop Leases Act 1994* (Qld), the *Mineral Resources Act 1989* (Qld) and the *Water Act 2005* (Qld) cover their respective areas.

SOUTH AUSTRALIA

Like NSW, South Australia has a real property act, the *Real Property Act 1886* (SA), with other areas of the law being covered by the *Law of Property Act 1936* (SA). More specific areas of the law are covered by the *Landlord and Tenant Act 1936* (SA), the *Residential Tenancies Act 1995* (SA) and the *Conveyancers Act 1994* (SA); while other areas are covered by the *Mining Act 1971* (SA) and the *Water Resources Act 1997* (SA).

TASMANIA

The relevant statutes in Tasmania include the *Land Titles Act 1980* (Tas) and the *Conveyancing and Law of Property Act 1884* (Tas); while more specific areas are covered by the *Landlord and Tenant Act 1935* (Tas), the *Perpetuities and Accumulations Act 1992* (Tas) and the *Residential Tenancy Act 1997* (Tas). The *Water Management Act 1999* (Tas) covers the law regarding the management of that resource.
VICTORIA
The Property Law Act 1958 (Vic) is the main statute, with other areas being covered by the Land Act 1958 (Vic). The Torrens system is covered in the Transfer of Land Act 1958 (Vic). More specific areas are covered by the Residential Tenancies Act 1997 (Vic) and the Perpetuities and Accumulations Act 1968 (Vic); while natural resources are covered by the Mineral Resources (Sustainable Development) Act 1990 (Vic) and the Water Act 1989 (Vic).

WESTERN AUSTRALIA
The main statute in Western Australia is the Property Law Act 1969 (WA); while other areas, including the Torrens system, are covered by the Transfer of Land Act 1893 (WA). The Residential Tenancies Act 1987 (WA) provides the legislative framework for that specific area; while mineral resources are covered by the Mining Act 1978 (WA).

THE CLASSIFICATION OF PROPERTY
In order to understand property law, one of the first things that needs to be examined is the classification of property. The law has developed two main categories of property: real property and personal property. The terms ‘real property’ and ‘land’ are effectively interchangeable, with the latter more frequently used today. Historically, this division developed because only land was specifically recoverable under the early common law. It followed that the category of real property was limited to land as the defendant recovered the thing, the ‘res’, the very subject in dispute. Objects not so recoverable were regarded as personal property, and people dispossessed of such objects had a ‘personal’ action for damages against the wrongdoer, but not an order for delivery. Today, this distinction between real and personal property broadly corresponds to the factual distinction between land (that is, real property), and moveable objects and intangibles such as copyright, which are considered to be personal property.

Real property is then divided into corporeal hereditaments, or the tangible real property capable of being alienated or passed onto heirs, and incorporeal hereditaments, the intangible real property rights, such as an easement, which can be a right to walk across another’s land. Personal property, meanwhile, can be divided into chattels real and chattels personal, also known as pure personalty. Chattels real are leasehold interests, with their classification as personal property reflecting the historical emphasis on the personal, contractual nature of a lease. Today, however, a lease is considered to be an interest in the land. Chattels personal include movable objects, such as books and furniture, and also intangibles, such as patents, copyrights and shares.
Chapter 1: Introduction

Figure 1.1 indicates that ‘property law’ is a broader term than ‘land law’, because it incorporates both real property; that is, land and personal property. Both terms are used as titles by the various textbooks in this subject, as is the title ‘real property’. However, even in texts entitled ‘property law’, the material covered is predominantly the law concerning land. This is also reflected in many undergraduate courses that use the term ‘property law’, even though much of the content is actually ‘land law’, with personal property being left to be covered in greater detail in subjects such as commercial law and intellectual property law.

**HOW DOES PROPERTY LAW LINK INTO OTHER AREAS OF LAW?**

While it is both a characteristic, and a need, of an undergraduate degree to isolate and then emphasise the specific nature of a particular subject, it should also be remembered that in reality, each area of law does not work in total isolation. It is important, therefore, to appreciate how this subject fits in, and links, with other areas of law.

At a basic level, the definitions and concepts of property law may be required to understand other areas of law. The classification of property into its two main divisions is required for subjects such as commercial law when covering, for example, the sale of goods. A definition of what constitutes property is also required for the compulsory acquisition of property in constitutional law; while a trespass to land claim in torts requires a definition of what constitutes ‘land’. The law relating to energy, resources and the environment all have connections to property law; for instance, an Act relating to mineral resources usually sets out the requirements for prospecting licences and mining leases. Water rights is presently a very topical area in relation to property, but it is also an area that raises a major constitutional issue in relation to whether the Commonwealth has the power to legislate in this area. Since
property is often placed into a trust, the law of trusts is another area that needs to be kept in mind when examining land law.

Material covered in property law also forms a basis for what is covered in practice-related subjects, such as succession, conveyancing and town planning. Conveyancing, for instance, involves a study of what is actually required in practical terms when transferring land, and the study of land law provides an understanding of why these procedures need to be carried out.
CHAPTER 2

WHAT IS PROPERTY?

COVERED IN THIS CHAPTER

- The definition and concept of property
- The human body as property
- Intellectual property

CASES TO REMEMBER

- Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
- Moore v Regents of the University of California (1990) 793 P 2d 479
- Doodeward v Spence (1908) 6 CLR 406
- Singtel Optus v National Rugby League Investments Pty Ltd (No 2) [2012] FCA 34

RELEVANT STATUTES

- Copyright Act 1968 (Cth)
- Designs Act 2003 (Cth)
- Patents Act 1990 (Cth)
- Trade Marks Act 1995 (Cth)

THE DEFINITION AND CONCEPT OF PROPERTY

The definition of property is a broad one, because property can be considered to be anything that has value and is capable of being owned. It therefore obviously includes land and goods, but also includes more intangible intellectual property rights, such as copyright. An intangible is something that cannot be physically touched. Copyright, for instance, is an intangible property right giving the person who owns the copyright exclusive rights in relation to that property. A copyright owner can therefore allow or prohibit certain things to be done with that property, and in Australia, the scope of these rights is covered by the Copyright Act 1968 (Cth).

Property law, particularly land law, is a very old area of law, and an examination of its history is essential in order to have an understanding of today's concept of property and how the law relates to land. This examination also shows that the concept of property can involve legal philosophy and presiding social attitudes as much as legal definitions.

Australian property law originated in an environment that was very different from present-day Australia. It is derived from English common law, which itself evolved
under the medieval feudal system, in which society was stratified into various classes, with the king at the apex. In such a system land meant wealth, and in turn, this land-based wealth brought immense power to relatively few landowners. This included the church, which owned large tracts of land, and therefore exerted political, as well as spiritual, influence over the people. The English medieval attitude towards property can be seen from the fact that even at the end of the eighteenth century there were over 200 hanging offences, the vast majority of which related to property. A hundred years later, however, there were just four: murder, manslaughter, rape and treason.

The catalyst for this change in attitude towards property during Victorian times was the Industrial Revolution, which changed the power axis. Wealth began to drift away from the landed gentry into the hands of those who owned the means of production, namely the industrial capitalists. The large estates began to disintegrate, and with this came a conversion of land into a commodity. A middle class also began to emerge, mainly to provide the managerial skills required by industrial capitalists. Thus, by the time the Australian colonies were being formed, the English class system and its associated attitude to property were being broken down.

The concept of property therefore reflects political, social and economic conditions, and cannot be explained purely in doctrinal terms. Different societies may have differing attitudes towards property; for instance, some societies allow the ownership of humans as slaves, while in other societies such ownership is prohibited by the state. The twentieth century also saw a difference in the attitude to property between capitalist society, in which the ability to own property privately is an essential component, and socialist society, in which private property is seen as the source of oppression and inequality. Hence, in a capitalist society the quality, size and location of the house an individual owns will reflect the individual’s wealth, which in turn can be a reflection of the individual’s importance in that society. In a socialist society, however, doctors and street cleaners are often paid similar wages, which theoretically prevents inequality when it comes to what type of house they live in. In economic terms the differences in capitalist and socialist attitudes are most apparent, with non-government-owned companies being the norm in capitalist societies and government-owned companies being standard in socialist societies.

Like in most countries, Australia contains a mixture of private and public property, with our numerous beaches, parks and public buildings being examples of property held for the benefit of all. While for the vast majority of Australians the ability to use such public spaces is paramount to the enjoyment of living in Australia, the opportunity to own property, particularly their home, is equally as important.
CHAPTER 2: WHAT IS PROPERTY

The most salient aspect of private property is the right of the owner to exclude others, with legal writer Felix Cohen suggesting, in ‘Dialogue on Private Property’ (1954) 9 Rutgers LR 357, that such property can have the following label attached:

To the world: Keep off unless you have my permission which I may grant or withhold.
Signed: Private Citizen

Endorsed: The State

The right to private ownership is enforceable against everyone and includes the right to decide who can and who cannot enter onto that land. It also requires the endorsement of the state, and in Australia, this is achieved through the relevant law that enables an individual to purchase, and therefore own, what was originally a grant of land from the state.

As previously mentioned, the concept of property involves the application of legal philosophy, and various theories have been attached to property. One is labour theory, attributed to seventeenth-century legal philosopher John Locke. The essence of this theory is that the infinite mind, ‘God’, created all things and is therefore the owner of all that is in the universe; by analogy, what a person acquires from their labour belongs to them. The economic theory, which is a reaction to the labour theory, claims that private property is an essential stimulus to production, and that work performance proceeds from the satisfaction of owning something. Underpinning this theory, therefore, is that humans rationally seek maximum satisfaction from life.

Any definition of property therefore must include 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 is that it constitutes a bundle of rights, namely:

- the right to possess one’s property
- the right to use property
- the right to exclude others
- the right to transfer ownership by gift or by sale
- the right to dispose of one’s property after death
- the right to compensation from governments if they acquire the property.

Attitudes to property, however, do change between cultures and societies. Australian colonial powers often relied on Western ideas about the nature of property rights in order to deny Indigenous people property in land with which they had had a close relationship to for untold generations. This was illustrated in an early native title case, Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141.

This decision clearly relied on a Western concept of property, and reflects the fact that prevailing social views, legal philosophy and other factors may influence the concept of property.
A CASE TO REMEMBER

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Facts: The plaintiffs were Aboriginal people who claimed that their land on the Gove Peninsula (Northern Territory) had been unlawfully invaded by Nabalco, which mined bauxite under an agreement with the Australian government. The plaintiffs needed to establish a proprietary interest in the land in order to maintain the action.

Decision (Blackburn J): I think that property in its many forms generally implies the right to use or enjoy, the right to exclude others, or 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. But by this standard I do not think that I can characterise the relationship of the clan to the land as proprietary … The evidence shows a recognisable system of law which did not provide for any proprietary interest in the plaintiffs in any part of the subject land.

In Yanner v Eaton (1999) 201 CLR 351, the High Court had to decide whether an Aboriginal had breached the Fauna Conservation Act 1974 (Qld) in catching two juvenile crocodiles using traditional methods. It was held that, as a native title holder, he was entitled to hunt for non-commercial communal needs. In reaching its decision, the High Court also stated that property under the Fauna Conservation Act 1974 (Qld) was a ‘description of a legal relationship with a thing’. It was further stated that the term ‘property’ can be used ‘to describe all or any of very many different kinds of relationship between a person and a subject matter’. The case dealt with the question of what fauna could actually be owned by the Crown, with the High Court asking whether it was just fauna located within the state of Queensland, or whether, for example, migratory birds could also be owned. It was noted by the High Court that at common law, wild animals could be the subject of only the most limited property rights. Ownership denotes a legal right to have, and to dispose of, possession and enjoyment of the subject matter, and the High Court considered that under the Act fauna was always meant to be outside the possession of humans.

THE HUMAN BODY AS PROPERTY

If you ever feel totally broke, without even a dollar to your name, you could take some comfort from the fact that you are carrying around property worth an estimated $200,000: your body. Sometimes the human body is characterised as property, sometimes as quasi-property and sometimes not as property, but as the subject of privacy rights. Whether it is achieved through property rights or privacy rights, the objective is the right to possess one’s own body and the right to exclude others from it. John Locke’s view was that ‘though the Earth and all
influent Creatures be common to all Men, yet every Man has a property in his own person. This nobody has any right to but himself’. According to this view, individual ownership of the physical body entailed ownership of those external things that are the product of the body’s labour. Locke therefore viewed individuals as stewards over their own bodies, possessing ‘themselves’ in trust, rather than being outright owners.

The most obvious exception to this was slavery, now illegal in Western society. However, questions have arisen as to whether there can still be ownership of live parts of a body or dead bodies. In Green v Commissioner of Internal Revenue 74 TC 1229 (1980), Margaret Green had a rare type of blood, AB negative. She therefore was able to make a living from repeatedly selling her blood to a blood bank because in the United States, blood donors are paid. The Commissioner then claimed that she should have to pay tax on her ‘earnings’. It was then held by the court that blood was a tangible product, akin to eggs, milk and honey. The money she earned from selling her blood was therefore taxable income, although on a more positive note, she was able to claim related business expenses, such as travel. This case highlights, therefore, the relationship between property law and other areas of law, such as tax. While in Australia blood is donated, rather than sold, there seems to be no reason why other body products, such as hair, could not be sold.

Another United States case that examines the issue of property rights in live parts of the body is Moore v Regents of the University of California (1990) 793 P 2d 479.

A CASE TO REMEMBER

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

Facts: John Moore had leukaemia and was treated over a period of years by Dr Golde at the University of California’s Medical Centre. Samples of blood, bone marrow and skin were taken during his treatment, and on the advice of Dr Golde, his spleen was removed. Dr Golde was aware that the samples and spleen would be valuable for research purposes. Moore had given permission for his spleen to be removed, but had not been informed that the Centre had a financial interest in the removal. Dr Golde then developed a cell line from Moore’s samples which was patented, with Dr Golde and the Regents subsequently receiving considerable payments relating to the commercial development of the cell line. Moore then sued for conversion.

Decision: Moore did not have a proprietary interest in the spleen cells for conversion, but he did have a claim in tort for breach of a fiduciary duty and lack of informed consent for the removal of the spleen. The spleen cells, however, were the property of the scientists who had harvested them due to the skill needed to obtain them.