INTRODUCTION TO GENERAL PROPERTY CONCEPTS

- Laws about People (Rights in personam – not assignable)
- Laws about Property (Rights in rem – rights people have concerning particular things)
  - Real Property
  - Personal Property

We have laws regulating the use of our things – property both tangible and intangible.

**Property is a right, not a thing. It refers to a legally enforceable relationship between the subject and the object.** Need to consider relationship with people – if there is no third party to enforce against then a right is not proprietary (think desert island).

NOTE: A contractual right is not proprietary, not enforceable against third parties → to avoid circularity in this reasoning look to precedent.
Property rights are the legal rights that entitle people to make use of things.

**PROPERTY RIGHTS:**
1. What sort of right is it?
2. How was it created? And,
3. What priority does it have?

**Characteristics of property** → first two essential characteristics separating from personal rights, rest overlapping indicia – not set or conclusive

- **Enforceability** → generally against other persons in society, the right not to interfere with your property and your obligation not to interfere with theirs
- **The Existence of Some Thing** → must relate to things which are separate and apart from ourselves
- **Alienability** → can be sold or given away to others
- **Excludability** → ability to exclude others from making use of the thing subject to the right
- **Value** → not always necessary
- **Transferrable/assignable** → Is it personal to right holder or can be transferred to another?
- **Possession** → or physical control in re corporeal hereditaments
- **Enjoyment and use** → property rights are use rights but not necessarily vice versa – just because you have the right to enter a national park you don’t own it
  - Enjoyment rights can turn into property rights, e.g. fishing or hunting once you have possession of the dead animal
  - Other enjoyment rights can have proprietary characteristics e.g. *Rahne v Telstra* → the number became valuable to the user and subject to PR’s
- **Durability**

- **Dominion – right against the world (in rem)?**
  - Blackstone: one is a sovereign over one’s property. Home as castle etc.
  - Not true, because crown has an ultimate right to take people’s property away.
  - State government could take away property without compensation, but federal government can’t because constitution says “on just terms”
  - NSW government can take property away if suspected of a criminal offence.

Above all, need to look not at legal system but **public policy**.

- **Public interest – benefits v detriments of recognizing property rights**
  - There will be some property interests that will not be recognised because of the public interest
  - Some historical examples:
    - The quasi-proprietary nature of familial services. Married woman.
DEAD HUMAN TISSUE  

*Doodeward, Kelly, Yearworth*  
1. Primarily cannot be the subject of property – *res nullius* – a thing that does not exist.  
   a. *Dr Handyside’s Case* (1749)  
   b. *The res nullius rule presupposes that tissue cannot be property or subject to property rights unless it is laboured upon.*  
2. *Note* the exception – for ‘work and skill’ *Doodeward*  
   a.  
3. Consider the characteristics of property → not definitive but can bolster argument  
   a. Tangible etc  

A corpse is not a thing subject to property rights – the executor has the right to custody as the guardian of the corpse → not for their own benefit, but to facilitate proper treatment of corpse. *However* – can be recognised that are subject to property rights and they are with the executor. 

NB also acknowledge that can lawfully obtain rights to a body e.g. medical training.  

LIVING HUMAN TISSUE  

**Regenerating**  
1. Can be subject to property rights  
2. Doesn’t count as a subtraction of the person → hair, urine, blood (illegal to steal back from police)  
   - NB includes gametes (sperm and ova even though don’t technically regenerate)  
   - Embryos → regulated by statute.  

**Non-regenerating**  
1. Can be subject to property rights – concern as to black market trade, so make subject to property rights and then the law can prohibit certain types of transactions (sales and contracts) with respect to human tissues  
2. Diminishes the donor  

Once tissue has been removed from a living person, it takes on a separate identity as a thing which should be subject to property rights. Someone must have the right to control the use of that tissue and the important question is who that should be.  

Professor Loane Skene (2002; 2007) is a leading advocate of why property rights should not be recognised in human tissue. She states that following public policy issues justify the law’s failure to recognise property rights (2004: 166):  

- *emotional* (a repugnance at people selling their bodies and body parts);  
- *familial* (stored genetic material should be available to blood relatives for their own testing, not subject to veto by one person);  
- *pragmatic* (the possible consequences of such a principle for hospitals and laboratories);  
- *economic* (undue fettering of teaching, research and commercialisation of biological inventions); and  
- *social* (maintenance of museum collections and educational institutions)  

**Case Law**  

*King v David Allen & Sons Billposting Ltd* **[1916]**  

FACTS: P had a licence with a cinema as a poster biller for 3 years, when the ownership of the cinema changes he claimed proprietary rights to continue putting the posters up. Is a proprietary right really what he contracted for? Was there as intention that these rights be enforceable against 3rd parties?  

HELD: The right was a contractual right, not enforceable against non-parties. He could only seek contractual remedies.  

- A personal licence is a right *in personam*
**Yanner v Eaton** (1999)

Example of a thing falling into “property”

**FACTS:** Yanner was a member of an Aboriginal clan; crocodile meat was found in his freezer in contravention with the Fauna Conservation Act that provided “a person shall not take, keep or attempt to take fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.”

**ISSUE:** Did this clause take away all rights to hunt crocodiles?

**HELD:** Queensland “owned” the crocodiles:

- The word "property" is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, "property" does not refer to a thing; it is a description of a legal relationship with a thing[26]. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights"[27]. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said[28], that "the ultimate fact about property is that it does not really exist: it is mere illusion".

- Property not a thing in the Act but a legal relationship. Property doesn’t really exist it is an illusion. Rules – aren’t natural, reflect particular concerns of society at different times.

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**Doodeward v Spence** (1908)

**FACTS:** Corpse of a human foetus which had been a stillborn with two heads travelled with a circus, and was seized by police who then used it to make their own profit. Could the P have a property right to possession?

**HELD:** Yes – police had to return the foetus.

- If you lawfully perform work on a corpse can transform it to a thing subject to property rights the stillborn had been placed in a bottle with preserving fluids.
- Also as the foetus was stillborn was never a corpse of a deceased person.
- Refers to the human corpse as ‘special property’
- Griffiths CJ “When a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body 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.”

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**Yearworth v North Britsol NHS Trust** [2009]

**FACTS:** Negligent storage of sperm samples for cancer patients – negligent bailment? (bailment – looking after possessions for someone else)

**HELD:** Able to recognise property rights in human tissue without the need for labour

- Went beyond Doodeward, recognised that people have property rights in their tissues without work. E.g. sperm bank, doctors doing work, not the men but still property (using the labour theory in the abstract to give men rights)
- Don’t worry about the labour added fact JUDGMENT FOLLOWS

(a) In this jurisdiction developments in medical science now require a re-analysis of the common law’s treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action in negligence) or otherwise.

(b) The present claims relate to products of a living human body intended for use by the persons whose bodies have generated them. In these appeals we are not invited to consider whether there is any significant difference between such claims and those in which the products are intended for use by other persons, for example donated products in respect of which claims might be brought by the donors or even perhaps by any donees permissibly specified by the donors.

(c) For us the easiest course would be to uphold the claims of the men to have had ownership of the sperm for present purposes by reference to the principle first identified in Doodeward. We would have no difficulty in concluding that the unit’s storage of the sperm in liquid nitrogen at minus 196°C was an application to the sperm of work and skill which conferred on it a substantially different attribute, namely the arrest of its swift
perishability. We would regard _Kelly_ as entirely consistent with such an analysis and _Dobson_ as a claim which failed for a different reason, namely that the pathologist never undertook to the claimants, and was not otherwise obliged, to continue to preserve the brain.

(d) However, as foreshadowed by Rose LJ in _Kelly_, we are not content to see the common law in this area founded upon the principle in _Doodeward_, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation. Moreover a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. Why, for example, should the surgeon presented with a part of the body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes?

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**Re Estate of Edwards [2011]**

**FACTS:** Wife wanted an order which allowed her to take sperm to ACT where no regulation on her getting herself impregnated. Can only do this if have property rights over sperm. She was executrix, took sperm, and made it property?

**HELD:** Using the reasoning in _Yearworth_ held that there could be proprietary rights over the sperm.

- Not _Doodeward_ because labour hasn’t been added when she was claiming the property. We have property rights over tissue.

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**Milirrapum v Nabalco Pty Ltd (1971)**

*Property rights as to land – characteristics of property.*

**FACTS:** P’s claimed that the D’s mining activities were wrongly interfering with thwre property rights to use certain land to perform ritual ceremonies.

**HELD:** Did not have property rights enforceable against other member of society.

**REASONING:** Blackburn J “I think property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate.”

The P’s were not entitles to exclude others from the land and could not sell or give the rights to others.

**NOTE:** Important not to overstate the essential characteristics of property.

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**Moore v Regents of the University of California (1990)**

**FACTS:** D removed tissue from the P and used it to develop and patent a valuable cell line. The removal was done with consent to treat the P’s leukaemia. He was however unaware and therefore didn’t consent to the use of his tissues for medical research.

**HELD:** P did not have a right to possession over tissues removed from them.

- The P only had a claim for breach of a fiduciary duty (of loyalty) against the doctor who removed the tissue
- The D could also not be liable to the P for conversion (wrongful interference with another person’s right to possess a thing) of the tissue → didn’t have a sufficient property right to support such a claim
- It was in the economic interest to deny him proprietary rights
**COMMON TERMS**

**Interest**
- The conventional term for the *bundle of rights* which a person has in an object.
- Eg interests in land (covenants, easements, caveats, contract for sale) v ownership of land
- A claim of a proprietary sort over an object

**Ownership**
- Not important, as *possession is important*. Ownership could not be proven.
- *Knapp v Knapp* [1944] SASR 257 at 261 per Mayo J:
  - "The general right of ownership embraces subsidiary rights such as exclusive enjoyment, to destroy, to alienate or to alter, and, of course, the right to maintain, and to resume and recover possession from other persons"
- Defined in the absence, negatively.
- Ownership indicates the relationship between a person and a corporeal or incorporeal legal object. It confers a bundle of rights to enjoy, use possess, dispose of and alienate a "thing" as well as the capacity to ward of any encroachment on the thing. Ownership can be limited by other rights but is not dependent on other rights.
- Ownership is therefore the subsidiary right that is left when all other interests in the property have been taken away (*Campbells Hardware & Timber Pty Limited v CSD (Qld)* (1996) 96 ATC 4348)
- Ownership can be limited by other rights, but is not defined by other rights → it is not parasitic, has not been given to you by anyone.
  - Above all it is created in a contractual process e.g. fee simple holder is technically given ownership from the Crown

**Title**
- This is the *measure of strength of an interest*
- It provides a yardstick to measure the strength of competing claims of interests in property

**Possession**
- No complete, logical and exhaustive definition of "possession" has ever been given for the common law – *United States of America & Republic of France v Dollfus Mieg et Cie SA & Bank of England* [1952] AC 582 at 605
- "Possession connotes a relationship between a person and some material object. It is a relation subsisting in fact. The 'right' of the possessor to the chattel arises out of the factual situation" – *Button v Cooper* [1947] SASR 286 at 292
- More important than ownership → possession is nine tenths of the law

**Possessory Title**
- Possession confers a possessory title – possession is a root of title – possession is not only evidence of title but is a form of title itself – hence you have a claim against the whole world barring the true owner –
- RECALL title is relative, this may not be the strongest claim of title
- Two elements are necessary –
  - (1) *control* (*corpus possessinis*) – some exercise of power over the goods or land. Physical.
  - (2) *intention* (*animus possidendi*) – an attitude in the mind of the actor denying the rights of other to have access to the land or goods. Mental.
**Joint tenancy**
- Form of co-ownership.
- If your interests have been created in the same transaction, we say that there is a **unity of time, title, interest and possession.**
- Gives a right of survivorship, meaning if one dies the interest passes automatically to the other.
  - Not considered a transfer of the right to the other tenants, the right simply *ceases to exist* – it is an expansion of surviving tenant’s interest
  - NOT new property right, existed from the beginning
  - Statute means that a body corporate can be joint tenant (even though possible indefinite life kills right of survivorship)

**Tenancy in common**
- Opposite form of co-ownership. 2/3 owner and 1/3 owner – a reflection of proportion of ownership.
- Can merge JT and TIC – (M+L = JT) + D (TIC)
FUNNILY ENOUGH LOOK BACK TO THE MESSAGE COMING OUT OF YANNER v EATON ➔ TAKE NOTHING ON FACE VALUE. MUST LOOK DEEPLY INTO THE CLAIM BEING MADE.

DEFINITION OF LAND – FIXTURES
- When a chattel is brought onto land it may retain its character as a chattel or change its character and become a fixture ➔ what becomes part of the ‘estate’
- This becomes relevant in at least five situations
  1. When realty is sold, fixtures pass with the realty without need for any express mention to be made of them. Chattels do not pass without mention in the contract.
  2. A mortgagee is entitled to fixtures in the event of a default, but is not entitled to chattels.
  3. Chattels installed or upon a property which belong to a tenant may become fixtures.
  4. Fixtures installed in or on property by a life tenant become part of the reversion.
  5. On death, fixtures pass to the beneficiaries entitled to the realty, they are not part of the personal estate of the deceased.
- There are two factors which are sued to determine whether gods have become fixtures:
  - Degree of annexation
  - Object of annexation (apparent purpose of attachment)

The general principal can be stated as “quicquid plantatur solo, solo credit”
“Whatever is attached to the land belongs to the land.”

THE TWO PRESUMPTIONS
1. When the item is fixed to land to any extent it is presumed to be a fixture and the burden of proving otherwise is with the owner of the chattel (onus rests upon he party so contending)
2. Where the item is simply resting on the land by its own weight it is presumed not to be a fixture and the burden of proving otherwise is with the landowner.
- As these are presumptions these must be rebutted with evidence to the contrary.

MENTION THE DIFFERENT TESTS FOR FIXTURES, AND THE MOVEMENT FROM ANNEXATION TO THE INTENTION TEST (OBJECT AND PURPOSE.. TO ENHANCE HOUSE ENJOYMENT OR ITEM ENJOYMENT).
NB FLEXIBILITY AND DISCRETION EXERCISED.

FIXTURES: WHAT IS THE TEST?
- The old common rule relied almost exclusively on the degree of annexation in determining whether a chattel retained its character as a chattel or became a fixture.
- This reliance on annexation has declined and the determination is now primarily based on the intention of the person placing the item.
  - Why was it attached?
- If the item is placed with the intention of better enjoying the land then it is likely to be a fixture.
  - E.g. air conditioner
- If the item is placed with the intention of better enjoying the item then it is likely to remain a chattel (even if attached in some way) (statue)
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As these are presumptions they may be rebutted by evidence to the contrary.

**Nature of Intention – TENTION HE TES**

What would an objective person looking at the circumstances under which the object was attached believe to be the intention of attaching it to be a fixture, or chattel?

The nature of the intention of the person placing the chattel must be determined objectively – it must be "patent for all to see".

This test is used to ensure legal certainty.

**N H Dunn Pty Ltd v L M Ericsson Pty Ltd**

FACTS: whether a house on stilts was a fixture.
HELD: Yes.
REASONING: The nature of intention of the person placing the property there was that it was a fixture. It’s a house.

**D’Eyncourt v Gregory** (1866) LR 3 Eq 382

FACTS: Concerned presumed chattels in a house and garden described as part of the “grand architectural design”. When the house was sold this question came into issue.
HELD: The statues were fixtures even though they were standing on their own weight (not affixed) the intention was clearly that they were to be part of the house.
- The items were specifically designed for the space and seen as part of the design.

**Standard Portland Cement Co Pty Ltd v Good** (1982) 47 ALR 107

FACTS: Concerned a cement mill which sitting on it's own weight (100 tons), however was hard to move. It was placed in a factory on a temporary lease, contracted that it was to be moved at the end of the lease. However the P (party to the contract) claimed that after 12 months the mill was a fixture.
HELD: Not a fixture.
REASONING: Contract itself didn't say that it would become dedicated to land, it was open then that the people could come and get it. Just because it was outside of the contracted time to remove the mill does not mean you can’t come get your property The fact that it was written in the contract that it would be removed indicates an express intention for it not to become a fixture. NB also was not affixed. However – Was it a breach of contract? Yes, awarded damages.

**Webb v Frank Bevis, Ltd** [1940] 1 All ER 247

In re levels of annexation – part of an item a fixture and other part a chattel.

FACTS: A tenant had constructed a large shed of corrugated iron supported by timber posts resting on a concrete slab. The posts were supported by iron straps embedded in the slab but bolted to the posts. The roof and sides were capable of removal in sections.
The owner asserted that the slab and superstructure were one unit and must remain. The tenant asserted that the slab must stay as a fixture but that the rest of the superstructure was not a fixture and could be removed.
HELD: The concrete slab was held to be a fixture, however the framework and panelling were not fixed permanently and the intention was for them to be taken up and down not a fixture.
REASONING:
Scott L.J. in delivering the judgement of the Court said:

- “That the concrete floor was so affixed to the ground as to become part of the soil is obvious. It was completely and permanently attached to the ground, and, secondly, it could not be detached except by being broken up and ceasing to exist as a concrete floor or as the cement and rubble out of which it had been made. Does that fact of itself prevent the superstructure from being a tenant’s fixture? I do not think so.”

- “The judge held, and I think rightly held, that the superstructure was “to a very large extent” a “temporary” building, by which I understand him to mean that the object and purpose for which the company erected it were its use for such time as they might need it.”

**Palumberi v Palumberi** (1986) NSW ConvR 55-287

**FACTS:** Concerned a dispute between brothers where an arrangement was entered into for the sale to one brother by the other of an interest in property as tenant in common. The property comprised 2 self-contained flats. There was an exchange of letters evidencing the arrangement but nothing in the letters concerning fixtures or chattels.

**HELD:** The stove (wired into walls) and carpet (permanently glued down) were held to be fixtures but the other items claimed to be fixtures by the purchaser were found to be chattels.

**JUDGMENT:**

In his judgement Kearney J quoted from many cases and formed the following view:

- “It would seem from perusal of these and other authorities in the field that there has been a perceptible decline in the comparative importance of the degree or mode of annexation, with a tendency to greater emphasis being placed upon the purpose or object of annexation, or, putting it another way, the intention with which the item is placed upon land. The shift has involved a greater reliance upon the individual surrounding circumstances of the case in question as distinct from any attempt to seek to apply some simple rule or automatic solution………no standard solution is to be derived from such cases which, upon ultimate analysis, are found to turn upon their individual facts.”

- The provision of cooking facilities by means of a stove would seem to me to form an essential and integral element to constitute a kitchen. Such provision is something necessary to the ordinary use of such premises, so that such provision should be properly characterised as being for the benefit of the premises …

- Notwithstanding the slight degree of annexation in the case both of the stove and of the carpet, these items are in the special circumstances of this case is to be regarded as having been installed for the purpose of improvement and enjoyment of the premises themselves so as to constitute fixtures.

**Tenant’s fixtures**

**Leigh v Taylor** (1902) AC 157 at 162

**FACTS:** A life tenant of a mansion affixed valuable tapestries to the walls. They were fastened to canvas stretched over strips of wood and nailed to the strips which were nailed to the walls. The tapestries could be removed without any “structural injury”.

The life tenant died and her executors and the remaindermen both claimed the tapestries.

**HELD:** The HoL’s decided that the tapestries retained their character as chattels as they could only be enjoyed as ornamental tapestries by fixing them in this way. There was “no intention to dedicate these tapestries to the house”.

- The tapestries “put up with that purpose and attached in that manner, did not pass with the freehold to the remainderman, but formed part of the personal estate of the tenant for life, and were removable by her executor.”

- No intention for them to be permanently fixed