

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.

FIGURE 1.1 The classification of property



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.

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

inferior 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.

Actual organs cannot be sold, although they can be donated at death or during life, particularly by a relative. In *Colavito v New York Organ Donor Network Inc* (2006) 8 NY3d 43 the court had to decide whether a kidney of the deceased, which had been promised to Colavito by the deceased's widow, was capable of being the subject of a claim for conversion when the donor network had given it to another patient. It was held by the court that there was no property in a corpse, but left unanswered the question as to whether there should be a public policy against finding property rights in donated organs, because Colavito had no enforceable right to the kidney since it was incompatible with his antibodies.

This concept, that there is no property in a corpse, is a law that is nearly 400 years old, having been established in *Haynes Case* (1614) Co Rep 113, which involved a grave robber. It was also a concept that was examined by the High Court in the case of *Doodeward v Spence* (1908) 6 CLR 406.

A CASE TO REMEMBER

Doodeward v Spence (1908) 6 CLR 406

Facts: In 1868 a stillborn baby was birthed in New Zealand with the distinctive feature of having two heads. It was preserved in a jar by Dr Donahoe who was the doctor at hand at the time of the birth. On his death in 1870 it was sold at auction with his other personal effects, and later came into the possession of Doodeward, whose father who had bought it at the auction for £36. It was then confiscated by a police officer who felt the body should be given a Christian burial.

Decision: There is no law forbidding the mere possession of a human body, whether it had been born alive or dead, for purposes other than immediate burial. When a person has by lawful work and skill dealt with a human body so that it has some attributes differentiating it from a corpse that is awaiting burial, then there is a right to possession. One such example given was that of a mummy, because the skill of the embalmer has turned it into something else. Such possession is not unlawful if the body possesses attributes of such a nature that its preservation may afford valuable or interesting information or instruction.

The common law, therefore, is that there is no property in a corpse, with exceptions such as the work and skill exception and the museum specimen exception. The basis of these exceptions is that some skill was required and applied to obtain the human material, or that the possession has a training or instruction purpose to it. That is why ownership of the spleen cells in *Moore* was with the doctors, and the law would be the same in Australia.

Another issue in regard to the human body as property is the right to possession of the body for the purpose of burial. This was examined in *Smith v Tamworth*

City Council (1997) 41 NSWLR 680, where a child who had been adopted later died. His biological parents wanted the **title** to the cemetery plot in which he had been buried transferred to them, and with it, an exclusive right to control the plot. Alternatively, they wanted to be able to erect their own headstone on the plot in addition to the one that had already been erected by the adoptive parents. It was held that ownership of a cemetery plot involved a licence granted by the cemetery authority, not actual title to that plot. The right to erect a headstone belonged to the person who owned the licence to the burial plot, and there was no right to have an additional headstone erected. However, while the adoptive parents were the legal parents, they could not deny other relatives access to the grave, and could not unreasonably remove any flowers that had been left on the grave.

There can sometimes be conflict between various family members as to where the body should be buried, and this can be decided by the court on the grounds of practicalities. In *Calma v Sesar* (1992) 106 FLR 446, for instance, it was held that as the body was already in Darwin and funeral arrangements had already been made, the funeral should go ahead there, despite the father's wish he be buried in Port Hedland. It can also be determined by what was indicated in the will, and in *Manktelow v Public Trustees* [2001] WASC 290, it was held that the funeral and burial should be held in Perth, as indicated by the deceased's will, and not in the Barossa Valley where her surviving children wanted her to be buried.

Cultural issues may also need to be considered, and in *Jones v Dodd* [1999] SASC 125 the father, Paddy Jones, wished to have his son buried at Oodnadatta, while the deceased's former de facto, Laurie Dodd, wanted him buried at Port Augusta. The court took into account the relevant cultural issues, noting that according to Aboriginal law and custom it was important that the deceased be buried in the area in which he lived, so that his spirit could come back to that area. The court referred to the International Covenant on Civil and Political Rights and the Draft Declaration on the Rights of Indigenous Peoples, and while it acknowledged these international instruments were primarily drafted for living persons, it also stated that the 'common considerations of decency and respect for human dignity should lead those responsible for the burial of a corpse to recognise, and where possible to give effect to, the cultural, spiritual and religious beliefs and practices of the deceased'.

INTELLECTUAL PROPERTY

Intellectual property involves the rights that provide protection to creative and intellectual works. It includes laws relating to copyright, designs, patents and trademarks, each of which now has its own Commonwealth Act, namely the *Copyright Act 1968* (Cth), *Designs Act 2003* (Cth), *Patents Act 1990* (Cth) and the *Trade Marks Act 1995* (Cth). Thus, a feature of intellectual property is that the

relevant legislation has been enacted at the Commonwealth level, unlike most areas of property law, where the relevant statutes are in the state jurisdictions. The fact that each of these areas is covered by its own statute illustrates that the law relating to these various areas evolved independently and for different reasons. This means that the term ‘intellectual property’ covers a wide and diverse collection of laws, rather than being one distinct area of law. The common distinctive feature of these various areas is that it governs work derived from either a creative or an intellectual effort. This is illustrated in the case of *CBS Records Australia Ltd v Gross* (1989) 15 IPR 385 where copyright was claimed on a demo tape of a song entitled *Ring My Bell*, which became a hit in the 1970s. It was held that the song constituted sufficient original skill and creative labour to be covered by copyright.

Copyright is probably the most significant area of intellectual property and is an example of an intangible property right that gives the person who owns the right exclusive rights in relation to that property. A copyright owner can therefore allow certain things to be done with that property, or prohibit things to be done with that property. For example, a copyright owner of a song could allow the song to be used in an advertisement, or alternatively could prevent someone from using it in an advertisement.

It should be noted that copyright law did not develop under common law and was established by statute—in Australia originally by the *Copyright Act 1905* (Cth). This is now reflected in s 8 of the present statute, *Copyright Act 1968* (Cth), which states that copyright only exists by virtue of this Act.

The 1968 Act covers areas such as original literary, dramatic, musical and artistic works, as well as sound recordings, cinematograph films and television programs. It is considered to be a **code** for copyright, although the comment has been made that it is always out of date, because new technology is continually providing new areas that need protection under the Act. Advances in technology are such that once the necessary amendments have passed through parliament, another area created by new technology means further amendments to the Act are needed. Even the advent of television required such an amendment, because the legislation of the time only referred to, and covered, cinematographic films. Copyright law, therefore, gives a graphic indication that the concept of property is always evolving and changing.

Another feature of copyright is that it may exist separately from ownership of the physical property. In *Dickens v Hawksley* [1935] 1 Ch 267, for instance, the trustees of a beneficial trust set up by author Charles Dickens argued that they owned the copyright of an unpublished manuscript entitled ‘The Life of Christ’. This claim was based on it forming part of the residual **estate**, rather than the copyright being with Dickens’s sister-in-law, who had been left the manuscript along with all his papers. It was held that the copyright formed part of the residual estate because the copyright was separate and distinct from the manuscript itself. Thus, the case

illustrates that ownership of the intangible copyright can be separate and distinct from the ownership of the actual chattel, in this case the manuscript.

Similarly, in *Boyapati v Rockefeller Management Corporation* (2008) 77 IPR 251 it was stated that if copyright in questions for practice exams had been held by Rockefeller through its director, Dallas Gibson, then it would have become vested with the trustees who were dealing with Gibson's bankruptcy. This again illustrates that copyright is a property right that can be transferred. In this case, however, the copyright was held by the plaintiff due to the fact that the independent skill, judgment and labour involved in producing them satisfied copyright's originality requirement.

PRACTICAL EXAMPLE

If you go out shopping and buy a book, a CD and DVD you will then have ownership of those physical items. However, that does not mean that you now own the copyright of the creative work they contain, because this is a separate, intangible property right that will usually remain with the person who was responsible for the creation of that work. This means that while you have every right to use the items as often as you wish, any reproduction of them will be in breach of the copyright.

Due to its intangible nature, there is a danger that copyright can extend too far and therefore restrict the creation of new pieces of work. In *Baigent v Random House Group Ltd* (2007) 72 IPR 195, for instance, the authors and publisher of a book entitled *The Holy Blood and the Holy Grail* claimed that Dan Brown had infringed their copyright in his bestselling novel, *The Da Vinci Code*. Brown admitted that he had looked at the book as part of his research for *The Da Vinci Code*, and it was held that what he had taken were general propositions, too abstract to qualify for copyright protection, because they were merely historical facts, ideas and theories. A distinction was made between the legitimate use of ideas expressed and the unlawful copying of the expression of those ideas, which meant no copyright had been breached in this case.

A CASE TO REMEMBER

Singtel Optus v National Rugby League Investments Pty Ltd (No2) [2012] FCA 34.

Facts: In July 2011 Singtel Optus, and its subsidiary, Optus Mobile Pty Ltd, began a new service called TV Now, which enabled customers to record free-to-air television programs on personal computers, iPhone or iPod, Android mobile devices, or 3G mobile phones. The central issue in the case was whether Optus had infringed the copyright of the National Rugby League (NRL), Australian Football League (AFL) and Telstra in regard to several matches played in September 2011. The alleged copyright breaches centred on whether the ability of people using TV Now to record programs, and then watch them time

delayed, was in breach of the *Copyright Act*. The issue at trial was whether there had been a breach of the amended s 111, which allows people to record films, or sound recordings, to watch at a more convenient time provided it is solely for private and domestic use.

Decision: The original trial judge, Justice Rares, held that the users had made their films and viewed them near live, solely for private and domestic purposes, and to watch them at a more convenient time than the live broadcast. His Honour also held that it was the user who was responsible for any communication, because it was the user who initially chose to record the program—even though it was Optus who provided the services—and hence there was no breach of copyright. However, on appeal to the Full Court of the Federal Court it was noted that Optus had retained possession, ownership and control of the physical copies made on the hard disk until deleted by Optus. Thus, the court held that Optus' role in capturing the broadcast, and then embodying its images and sounds meant that what Optus did was 'sufficiently close and causal to the illegal copying' by the machine owner who had breached the 'exclusive domain of the copyright owner'. It was also held that while without the subscriber's involvement, nothing would be created, and without Optus' involvement, nothing would be copied. Both parties were therefore involved with the act of making the copies. While the individuals were covered by the s 111 domestic purposes exemption, Optus was not protected, due to its commercial activities. It was then held that only Optus could be sued for breach of copyright, because the subscriber could rely on s 111. Thus, the appeal by the NRL was successful.

THINK ABOUT IT

- 1 Do you agree that the concept of property is culturally dependent? How has the concept changed in the 200 years or so of European settlement in Australia? Does the Western concept of property differ from the Indigenous concept?
- 2 The idea of the human body as property raises moral and ethical questions, as well as legal ones. Some questions you may wish to consider are:
 - Do you think that people should be paid to give blood in Australia, as they are in the United States?
 - Do you believe that someone should be able to 'sell' their kidneys or other organs after they have died in order to provide a greater 'inheritance' for their children?
 - Do you believe that a family member should be forced to give up a kidney or bone marrow to save the life of another family member?
- 3 Do you agree that intellectual property rights, such as copyright, need to be covered by Commonwealth legislation? Do you think that all property should be covered by Commonwealth Acts, rather than state ones? If so, why? If not, why?