

Monday 7 July 3.30pm to 4.30pm

The Contemporary Reality of Realty
Associate Professor Matthew Storey
Charles Darwin University

Abstract

The paper considers the contemporary distinction between those classes of property identified as realty and those classes of property identified as personalty. Commencing by briefly recounting the historical basis of the distinction the paper moves to identify the distinctions between realty and personalty that are most usually identified: access to remedies; forms of succession; and, application of the doctrine of tenure. The paper identifies first that the distinctions are consequential of classification rather than determinative. Second though, the paper suggests that as a result of centuries old statutory intervention and the development of Equity, the fundamental contemporary distinction between realty and personalty lies in the application of the doctrine of tenure to realty.

At this point the paper moves to consider in some detail contemporary formulation of the doctrine of tenure and the notion of the radical title of the Crown. Examining Australian authority subsequent to *Mabo v Queensland (No 2)* (1992) 175 CLR 1, various crown land and land titles legislation the paper concludes that the contemporary radical title of the Crown amounts to an ability to grant an interest in land the subject of radical title. Thus formulated, the paper contrasts radical title with the Crown's "property" in fauna identified by the majority of the High Court in *Yanner v Eaton* (1999) 73 ALJR 1518 at 1525 being "...the aggregate of the various rights of control by the Executive...".

The paper concludes by suggesting that there is no practical contemporary distinction between the "aggregate of rights to control" and radical title and that this conclusion suggests a merging of realty and personalty. The paper ends though by noting that the theoretical conclusion reached cannot alter the weight of history in applying consequential distinctions to classes of property that greatly influence their contemporary reality.

Til Death us do Part: Characterising the Proprietary Nature of Joint Tenancy
Kate Galloway
James Cook University

Abstract

What is the true nature and extent of the interest of the joint tenant, as distinct from their joint interest in the property itself? Can the joint tenancy itself constitute property? And, will the extent of a joint tenant's interest always be an undivided moiety? This paper reviews two recent decisions: *Peldan v Anderson* (2006) 80 ALJR 1588 and *Cummins v Cummins* [2006] HCA 7. At first instance, the court in *Peldan v Anderson* conceptualised the severance of a joint tenancy as a transfer of *property*. This was discussed also in the Federal Court decision and in the High Court on appeal. The Federal Court analysed the severance of a joint tenancy in terms of the alienation of a bundle of rights, indicating an understanding of a joint tenancy as itself a property interest. This paper uses Penner's challenge to the 'bundle of rights' theory of property as a framework to reject this. Having determined the nature of a joint tenancy as other than property, the paper refers to *Cummins* to examine the extent of the joint tenant's property interest. This case shows a contemporary application of equitable rules that result in the deconstruction of the joint tenant's undivided moiety. Together, these cases highlight the challenges associated with finding the true extent of 'ownership' and 'property' where a joint tenancy is involved.
