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## 'Invisible substances': Can we trade them? Of course we can...

Today I heard the leader of the federal opposition, Tony Abbott, describe the government's proposed change to an emissions trading scheme, as:

A market in the non-delivery of an invisible substance to no-one.

This position is not new, and Mr Abbott has [for some years](#) described carbon in terms such as an 'invisible, odourless, weightless, tasteless substance'. Regardless of the science or the economics involved in characterising carbon and the effectiveness of a carbon market per se, what interests me is the problematising of a market in an 'invisible substance'. It also surprises me in light of the law's unambiguous acceptance of intangibles as property, which supports the commodification and therefore marketisation of a host of 'invisible, odourless, weightless, tasteless'...*non*-substances.

Historically, the law has recognised two classes of property: real property (interests relating to land) and personal property (non-land). Within each class there is both tangible (corporeal) and intangible (incorporeal) property.

### Personal property

Personal property can exist in a tangible form such as a book, a chair, grocery items etc. But we are becoming increasingly acquainted with a wide variety of intangible personal property. Most Australians would have superannuation, much of which is invested in the share market. Shares are intangible property. Your share certificate is not the property you own: rather, you have an intangible (invisible) right to dividends arising from company profits.

Although invisible (and unlike carbon, not even a substance) shares are marketised: they are the subject of trading transactions which are regulated by complex laws. The rights and responsibilities (and liabilities) attached to shares are a fiction invented by the law to facilitate the flow of capital.

Not unlike a carbon emissions scheme.

Likewise, copyright and other intellectual property is invisible. Like shares, intellectual property is also not a substance. It may be tempting to view this property as somehow having substance as a creative work, for example. However it is, like shares, a fiction created by the law that gives property not in the work itself (for example a physical painting, or the words written on paper in a book) but to the creative work behind them. I have [written before here](#) and [here](#) about the complexity of property interests in digital works, which are not categorised by a physical thing.

### Real property (land)

Unlike intangible personal property, real property - land - probably seems very concrete, substantial. In fact, in spite of its visibility, there is nothing at all tangible about real property.

#### About Me



#### Kate Galloway

I lecture in land law at James Cook University and I write and think about the nature of

property and its representations in the law; about issues affecting women; about justice generally; and about legal education.

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Like the tangible and intangible personal property interests, real property can be corporeal and incorporeal. Corporeal property relates to rights of full possession, or ownership, of land. In fact however a land owner does not own the *land* but instead owns an *estate*. Under Australian law, inherited from England, the State owns all freehold land. This is indeed visible, tangible, corporeal. However the State grants the 'owner' only an estate in the land. An estate is a right to possession. It is not the land itself.


This is another legal fiction, created by mediaeval English lawyers to circumvent the reality of paramount Crown ownership of land. In spite of this interest or right being decidedly invisible, there is a thriving market in it governed by a complex system of laws.

Incorporeal interests in land are rights such as mortgages and easements. These are rights to deal with land rather than to the admittedly more concrete right of possession. Easements are traded along with the estate, but mortgages can of course be traded without trading the underlying estate. That is to say, there is a market for an incorporeal, intangible, invisible non-substance.

## Red herrings

The focus of Mr Abbott's soundbites seems to be on the implausibility of propertisation or marketisation of invisible substances (or non-substances), and on rendering carbon ostensibly benign. Through this rhetorical device, the leader of the opposition apparently seeks to divert public attention from potential solutions to the problem of carbon emission. His red herring however is based on an incorrect premise.

Posted by [Kate Galloway](#) at [13:56](#)

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