

## BOOK REVIEW

*Legal and Equitable Property Rights* BY JOHN TARRANT [Sydney: The Federation Press, 2019. xv + 155 pp. Hardcover: AUD\$130.00]

There can be few briefs in private law more challenging than that of answering the question: What is property? That inquiry may be undertaken on so many planes that it can seem at once monumental and Sisyphean. Many have been content to skirt the edges of the debate, perhaps by limiting their investigations within a narrow compass, or by assuming the correctness of a proposition that ought in fairness to require deeper examination. Not so for Professor John Tarrant, who in a significant contribution has tackled the problem squarely.

The challenge is issued right at the beginning of his recent work, compendiously titled *Legal and Equitable Property Rights*. Its main aim is to “develop a comprehensive property theory (comprising both legal and equitable property rights) and to explain the place of property rights within private law” (at p 7). Because of an insistence that any such unified theory must be reconcilable with the case law, Professor Tarrant’s approach has been, first, to discern a judicially and legislatively endorsed theory or conception of property by examining the cases and statutes and second, to identify, based on that theory or conception, the things which may be the legitimate object of property rights. From there he seeks to identify the different characteristics of property rights, and to situate and explain the interaction of these property rights—both legal and equitable—within the sphere of private law.

There are attractions in taking this bottom-up approach. There are also to be avoided some pitfalls; more will be said of these later. The chief merit in deriving a unified theory from the decided cases is that no further empirical confirmation should then be necessary, for the cases themselves are the source *and* validation of the theory. And it is surely advantageous here that Professor Tarrant focuses on and frequently makes comparisons between Australian law and English law. The former, in particular, has been an abundant vein of rigorous legal reasoning in property and trusts law. Given how the method chosen is primarily case-based, it could hardly be more ideal than for key decisions in these jurisdictions to be closely scrutinised.

In Professor Tarrant’s view, then, cases such as the High Court of Australia’s decision in *Yanner v Eaton* (1999) 201 CLR 351 (HCA) require us to conceive of property as a relationship between a person and a thing, or what he calls a thinghood approach. He rejects the notion, famously encapsulated in Lord Wilberforce’s speech in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL), that a property right should have certain unyielding characteristics, for representing an unclear and

imprecise way to locate a property right. This initial finding, it may be thought, betrays a conclusion that Professor Tarrant occasionally seems close to admitting in his book, contrary as that might be to any proposed unified theory. Do the inevitable divergences in case law, particularly in severe instances where the courts in one jurisdiction reject an approach taken in another, mean that something as fundamental as the legal definition of property is ultimately susceptible only to parochial responses? Put simply: what if there is no grand theory?

The next significant conclusion from Professor Tarrant's analysis is that the category of things which may be the object of property rights is extremely wide (comprising things such as land, tangibles, intangibles, shares and contractual obligations), excepting only those resources which the courts and the legislature have decided ought not to be privately owned on policy grounds. From this, he arrives at his own classification of property rights, inarguably the most important intellectual contribution of the book. In brief—and one could do much worse than take in the elegant and well-written discursus in Chapters 3, 4 and 5—private law rights comprise only two categories of rights: rights to personal integrity and property rights. Within the latter category, there are three types of property rights: (i) descriptive property rights (in respect of tangibles and certain intangibles like intellectual property), each correlating with a duty of non-interference; (ii) enforceable property rights, primarily comprising contractual rights, rights of action and shares, each correlating with an obligation that binds another person; and (iii) unilateral property rights, such as a right of rescission or a right to recover mistaken payments, which do not correlate with any duty or obligation. That is the schematic for legal property rights; an equitable property right, on the other hand, is simply a second-level right to obtain a (first-level) legal property right, such as that possessed by the beneficiary of a trust.

The net result, so far as legal rights are concerned, is that every private law right that is not for the safeguarding of personal integrity is a property law right. However, the consequences of this realisation for daily commercial and litigation practice are not fully stated, rendering it difficult to ascertain Professor Tarrant's views in this respect. It would have been interesting to know his opinion, for instance, regarding the fact that limitation statutes across the Commonwealth prescribe different time bars for different causes of action, putting into question his proffered classification of private law rights and whether it fully reflects the way in which the law has presently and systematically distinguished between the types of remedial actions that can be brought. Is it an answer to say that rights and actions should be considered separately, if (as proposed) all, or almost all, rights in respect of things and objects can be characterised as property rights, the infringement of which then potentially leads to a general cause of action in the recovery of property (or of a right therein)? Still on this possible blurring effect, it is slightly curious that there is little discussion of the impact the proposed classification could have on existing laws relating to the priority of security interests, whether laid down by the common law or in statutes such as the *Personal Property Securities Act 2009* (Cth).

One of the persistent difficulties with the ongoing debate has been the lack of consistent terminology used, and nowhere is this more apparent than with the deployment of the terms *equitable interest* and *equitable ownership*. Professor Tarrant himself would confine equitable ownership to a sub-set of equitable interests, with a person only having such ownership if he or she has the power to obtain legal ownership in

an asset actually vested in a trust, by means of collapsing that trust. Those doubtful of such a restricted sense of ownership should hold their criticism in abeyance until they have perused the reasoning in full. But a point can be made that reflects more broadly on the enlisted methodology. In characterising the interest represented by a fixed charge, Professor Tarrant reads Lord Hoffmann's words "right to retransfer of the assets" in *Buchler v Talbot* [2004] 2 AC 298 (HL) at 309 as referring to a retransfer of *control* over the assets, rather than a retransfer of the ownership of the assets, to the chargor (at pp 120-121). The precise reasoning by which that interpretation is reached is open to debate; more critically, though, it shows that no case-based approach is immune to the slant of the reader's viewpoint.

The Herculean question posed at the beginning of this review is bound sometime, in some way, to affect every lawyer, scholar or judge who works in a related field of private law. Few of them, however, will have the ability, capacity and vision to attempt to define legal and equitable property; even fewer will devise a definition that is both internally and externally coherent. The latest efforts of Professor Tarrant therefore deserve much credit. His book represents a notable and important contribution to the existing literature, and comes timeously at a moment when the world is still learning to deal with the effects of rapidly developing technology. One has confidence that *Legal and Equitable Property Rights* will provide fresh stimulus in the continuing debate over the legal nature of property taking place throughout the Commonwealth.

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