

PROPERTY LAW REVIEW

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ARTICLES

The nature and scope of rights of removal – *Samantha Hepburn* and *Steve Jaynes*

The rationale underlying the fixtures and accession presumptions is the need to protect the value of the chattel as well as the need to protect third-party interests. The destruction of the independent legal status of an attached chattel is generally deemed appropriate where the value of the co-mingled asset will be diminished if the chattel retains a separate legal title and this would generate unfairness because third parties have dealt with the co-mingled asset on the basis of its overall value. Rights to remove have evolved under both common law and equity to moderate the scope of these presumptions. Common law will uphold the right of a tenant to remove chattels that have been attached to leased premises during the currency of the lease. Equity on the other hand will uphold the right to remove affixed chattels in circumstances where the enforcement of such an entitlement is consistent with contractual intention and transactional fairness. This article examines the different rights of removal that have evolved under Australian law to date and the emergent statutory framework supporting these rights. It discusses the historical purpose and structural utility of these entitlements within a land framework that supports fixtures presumptions. Rights of removal, whether validated at law or in equity, confer positive entitlements upon the holder to access and remove affixed goods in circumstances where, because of the fixtures and accession presumptions, those goods no longer retain any separate legal status. The capacity of the holder to enforce this right against third parties is illustrative of their distinctive proprietary perspective. 123

Human Rights Act 1998 (UK): Cohabitation, property and human rights – *Simone Wong*

This article is concerned with whether the *Human Rights Act 1998* (UK), which came into force in 2000, nearly 13 years ago, has had any horizontal effect on the law relating to cohabitants' rights with regards to property matters. At the infancy of the *Human Rights Act*, there seemed limited scope for human rights arguments to be made with regard to the (re)distribution of property upon the termination of a cohabiting relationship. A major obstacle for cohabitants when arguing that they were being discriminated against laid in the wide margin of appreciation provided to states. This article examines whether, with the passage of time, there is now greater potential for cohabitants to engage human rights arguments when resolving property disputes upon termination of their relationships, whether by separation or death. Two examples are considered: first, cases involving the establishment of rights to property where one partner is not a co-owner; and second, the differential tax treatment of spouses and cohabitants in relation to property on death. The article argues that, notwithstanding the increasing rates and acceptance of cohabitation within English society, cohabitants still face a challenge in relying on human rights arguments to fight for equality with other legally formalised relationships, such as marriage and civil partnerships, in relation to property matters. 138

Indigenous rights in disrepute: The curious case of Hong Kong – Malcolm Merry

Hong Kong’s law and administrative practice has recognised the customs of indigenous inhabitants for more than a century. Among those customs is the right of a male indigenous villager to build a family house in the ancestral village upon marriage. Since 1972, government policy has facilitated this right by providing subsidised rural building land. The right has, however, been exploited by developers who, in the name of indigenous villagers, build and sell luxury houses on such land, rewarding the villagers with a share of the proceeds. This has caused resentment and anger in the rest of the population and led to political controversy. In this article the author summarises the history of the right and the policy, explains the exploitation and examines public reaction to it. He asks how this favourable treatment of the indigenous came about, how it has survived for so long and how long it can last. 152

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