Introduction
The question of whether human cadavers, severed tissue and body parts can be treated as property is one of controversy. The law is not really familiar with this issue. However the accepted trite law is that there are no property rights over living humans in Australia. Gradually a few exceptions to the no property rule such as the “work and skill” exception have evolved which now affords limited propriety rights to the possessor of cadavers or removed human body parts from corpses. Recent breakthroughs in the field of biotechnology such as the advancement of human organ transplants and research in stem cell have led to a proliferate demand on human tissues, organs, blood cells, sperms and bone marrow etc. both therapeutic and scientific research purposes. Such frequent uses has reached a level that it has become a necessity to reconsider the seemingly out of date no property rule in cadavers and human tissue. This essay will discuss the jurisprudence in relation to control over human tissue and cadavers. It will also discuss the reforms in this area of law that should be undertaken to address any deficiencies in the law.

1.0 The Concept of Property
The concept of property rights is not an absolute concept. Such property rights include the right to have, the right to prohibit, the right to utilize, the right to exploit, the right to enjoy its benefits or profits as well as the right to demolish. It must be noted that it is not a requirement to fulfil all the above mentioned possibilities for the concept of a property right to be in effect. The concept of property rights in this paper is more attributed to the idea of

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property rights over things and chattels, though human tissues will not be referred to as chattels as such.

2.0 The Current Legal Position in Australia

There is no legally approved market for human organs in Australia as provided for in the Human Tissue Act 1983 (NSW) s32, Human Tissue Act (VIC) s38, and Human Tissue and Transplant Act 1982 (WA) s29 etc. Similarly to UK laws, legal status or property rights in biological materials are not determined by the Australian Legislations which instead required prior consent from the providers for removing and subsequent use of regenerative body tissue. The Australian Law Reform Commission was successful in advising the Federal Government not to enact legislation which confers full property rights in human genetic sample but adopt a protection based on consent and privacy doctrines. The 'no property in a corpse' rule seems to be the same today, both in the United Kingdom and in Australia, despite the small number of cases on which it was based. In a recent Australian case, the parents of a deceased Aboriginal boy were arguing about where he should be buried. The court said that the parents had equal rights to possession of the body for burial, but did not 'own' the body.

3.0 Exceptions to the “No-Property” Rule

By the nineteenth century, it was settled in English Law that there can be no property in a dead body, rendering it incapable of confiscation for an alleged debt. R v Fox also states that the personal representatives of the deceased were entitled to possession of the body for the purpose of burial and could obtain an order of mandamus to get the body back for burial if it was held by someone else. A strict application of the no-property rule would preclude the criminal offence of theft of a cadaver. The courts have in response to public indignation developed a common law exception that grave robbing be classified a misdemeanour even though the wrongdoer could not be prosecuted for theft. Note that this exception is based on criminal law and does not create a proprietary interest on corpses.

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6 Human Tissue Act 1983 (NSW) ss7, 9, 12.
8 Calma v Sesar (1992) 106 FLR 446.
9 R v Fox (1841) 114 ER 95
10 R v Francis Scott (1842) 114 ER 97
11 Ibid 7
13 R v Cundick (1822) Dowl. & Ry N.P.13
14 R v Sharpe (1856) Dears & Bell 160.
3.1 Work and Skill Exception

In the case of *Doodeward v Spence*, the work and skill exception was created in Australia where the court held that where a person has done lawful exercise of work with a human body or part of it in his or her possession, it has a acquired different attributes separating it from a mere corpse awaiting burial, he acquires a right to retain possession of it. The decision in *Doodeward v Spence* has been applied in a subsequent case which held that the preserved body parts misappropriate from the Royal College of surgeons were property capable of being stolen.

3.2 Recognized Duty Exception

Another exception is known as the recognized duty exception where executors, administrators, next of kin and occupiers of buildings are recognized by common law to have a duty to bury a deceased and are afforded temporary possessory rights to the corpse until cremation.

3.3 Regenerative Human Tissues Exception

Regenerative human tissues such as toenails, urine, hair and blood have been recognized as property. A wig made from human hair was held to be property capable of being stolen. A wig can be used in trade and once something becomes an item of trade, it can be recognized as property that can be stolen. Regenerative tissue such as blood has been categorised as materials and goods, albeit in limited context of statutory interpretation of goods and materials under the Trade Practices Act 1974. The possessory right of a deceased’s sperm by his wife for in vitro fertilisation raised concerns in number of Australian cases. The use of the removed sperms for pregnancy was held to be prohibited.

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15 *Doodeward v Spence* (1908) HCA 45; (1908) 6 CLR 406.
17 *R v Stewart* (1840) 113 ER 1107
18 *The State v Truesdale* (1972) 13 Nc App 622.
19 *PQ v Australian Red Cross Society* (1992) 1 VR 19.
4.0 Steps Forward: A Proposed Statutory Legal Regiment to Resolve Conflicts

The discussions above have led us to realize that not enough light has been shed on this area of law in Australia. Hence, this must lead us to consider the principles that should be adopted in the future development of the law in relation to possession, use, and control of excised human body parts and tissue, taking account of the diverse views in the cases and inquiries. Proposals as to how this area of law should be developed are discussed below (4.1 to 4.4).

4.1 Ownership of Body Parts and Tissues Removed with Consent.

In the case of limbs, organs, foetuses and even tissue on slides, there are public health reasons why they should be promptly disposed of, properly preserved in a laboratory or kept hygienically until needed for transplant. In each case, the disposal, retention or care should be the responsibility of the hospital or laboratory. The people from whom the body parts came should not have a legal right to get them back. People do not expect that body parts and tissue removed for therapeutic purposes should be returned to them and many people would object to such a practice. If a request is made for return of excised items, a hospital may exercise discretion to return them if it is satisfied that there is no risk to public safety.

4.2 Executors Right to Possession of Corpse for Burial or Cremation.

The right of executors or personal representatives to obtain possession of a body for the purpose of burial or cremation is well established at common law and should not be altered.

4.3 Lawfully allowing Hospitals to Acquire Human Cadavers and Tissues.

Instead of agonising over whether human bodies, body parts and tissue can be property, we need clear principles on who has proprietary rights in respect of them, including the right of possession, control, use and commercial exploitation. The law should clearly support the proprietary rights of hospitals, research institutes and their staff and that these rights should be extensive.

24 Ibid
27 Roche v Douglas [2000] WASC 146
4.4 Personal Autonomy (during life or after death) not to have Body Parts or Tissue Removed, Retained or Used without being Informed and given the Opportunity to Refuse. This right incorporates the general right that people have under the common law not be touched without their consent or other lawful authority (the law of battery); and the right to be properly informed about what is proposed before consenting to a medical procedure (the law of negligence). Although little consideration has been given to conditions that may be imposed when giving consent for a medical procedure that seems implicit in the very nature of consent. One may consent to some things but not others (for example, to surgery but not to a blood transfusion). Written consent forms for participation in medical research often include provision for selection of projects. For this reason, it is not necessary to legislate to protect people's right to be consulted and to refuse. If desired, it could be supplemented by procedural guidelines to assist clinicians and others regarding the matters on which information should be provided.

Conclusion

It is settled law in countries where slavery has been abolished (which includes Australia) that a living person cannot be an object of property. However the law in Australia isn’t familiar with the proprietary rights to tissues severed from living or dead persons. As discussed in 3.0 to 3.3, there are exceptions upheld by the law to the no-property rule. With the advancement of bio-technology and medical research, it is certain that the future of jurisprudence in respect to this area of law will face obstacles it will need to overcome. This can be done by implementing a legal statutory regiment that conforms to the highest level of public interests whilst being able to support both the advancement of medical research and bio-technology.

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29 Ibid 21.
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