

LAW316: PROPERTY LAW

Lecture 1 - The concept of property

- Every definition of property has direct consequences for questions of the distribution of economic wealth and power, the role of governments and the autonomy of citizens
- A broad definition of the rights of property holder will reduce correspondingly the civil rights of others; a narrow one will tip the balance in favour of the public
- *“Property is the institution by mean of which societies regulate access to material resources”* Sackville and Neave
- *“Property is the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”* - Sir William Blackstone 1765

Three basic elements in any property right

1. **Dominion.** Denotes some form of legally authorised power. These rights are concentrated in one or more specific person.
2. **Exclusion.** The right to exclude others from enjoying the same rights or interfering with the property holder's rights. If there is no right to exclude, there is no dominion and therefore no property rights.
3. **External things.** May be a physical thing, chattel, and land including airspace and intangible things such as shares, patents and copyright. Also has right to transfer, or alienate, the thing.

Thus:

'A owns P', we imply that:

1. A has the right to use P;
2. Others may use P if, and only if, A consents; and
3. A may permanently transfer the rights under 1 and 2 to other, specific persons by consent.

These primary rules are commonly supplemented by rules from common law and tort

4. **Punishment rules** which detail what may happen to B if he or she wrongfully interferes with A's use of P
5. **Damage rules** which require B to pay compensation if he or she damages P without A's consent
6. **Liability rules** which specify that if A's use of P results in damage to others he or he will be held responsible

A M Honoroe's elements of property rights/bundle of rights theory of property

1. **The right to possess.** The right to exclusive physical control of a thing over which ownership is claimed.
 2. **The right to use.** A right to actually make use of or enjoy the thing
 3. **The right to manage.** The right to determine who may use a thing and how.
 4. **The right to the income.** The right to the value generated by the thing
 5. **The right to the capital.** The right to consume, waste or destroy.
 6. **The right to security.** The right to exclude others, including the state.
 7. **The right to transmissibility.** The right to transfer the thing to others, either *inter vivos* (during one's lifetime) or on death
 8. **The absence of term.** The right to enjoy the thing indefinitely
 9. **The prohibition of harmful use.** The duty to refrain from using the thing in way which interfere with the property or personal rights of others
 10. **Liability to execution.** The liability to have the thing taken away for the satisfaction of debts
 11. **Residuary rights.** Rights, which govern the entitlements of other persons to the thing when present ownership has lapsed.
- It is not necessary for all these rights to exist for a property right to exist

Land, fixtures and chattels

Two categories of property:

1. Real property, or *realty*; and
2. Personal property, or *personalty*.

Two Categories of Private property

- (1) Realty:
- Corporeal e.g. land, buildings, fixtures
 - Incorporeal e.g. easements and profits
- (2) Personalty:
- Pure personalty (chattels personal)
 - Choses in possession (tangibles) → chattels and goods denote tangible personal property for e.g. a car
 - Choses in action (intangibles) → Property rights of intangible things for e.g. shares, patents, copyright
 - Chattels real → leases; for e.g. fixed-term, periodic, at sufferance and at will

➤ **LAND** (realty, real property)

- Usually has to be dealt with in writing
- Rights over land and anything annexed to it. May include airspace.
- Also known as 'immovables'
- Distinct physical features of land. Its permanency, finity & its immovability in conjunction with its economic and social significance gives rise to particular pattern of legal regulation
- Ownership of land can be split into multiple interests both physically and according to the doctrine of estates
- Land has been important for its use for the status that it gave rather than as a commodity to be traded to increase wealth (land ownership gave suffrage)
- Corporeal property or 'hereditaments' refer to rights to the land itself
- Incorporeal property refers to the rights *over* the land
- Land also includes fixtures; chattels which become part of the realty

➤ **PERSONAL PROPERTY**

- Personal property is moveable, tradeable and, with some exceptions valuable only in monetary terms. Includes tangible and intangible property, intellectual property rights and other choses in action
- Goods can be physically transferred over time and are often fungible
- Most forms of personal property
- Have a limited life
- Rules for transfer of personal property are aimed at increasing market efficiency

➤ Differences in personalty and realty property are why they have different rules in law.

➤ **Sources of Australian land law**

- English land law as was applicable to the conditions of the colony of New South Wales on 25 July 1828
- *Conveyancing Act* 1919, NSW
- *Real Property Act*, 1900 NSW
- Common law of contract, tort, equity

What is land?

- The physical earth, minerals, vegetation and buildings on it. Even if the earth is removed, owner still retains rights to space it once occupied
- The airspace can be sold as land in its own right

➤ **The limits of land**

Cujus est solum ejus est usque ad coelum et ad inferos (land is owned from the heavens above to the land centre of the earth)

➤ **2 ways in which something can be considered land**

- It can fall within the legal definition of land, or real property
- It can have acquired legal status as part of the land through the doctrine of fixtures

Airspace

- Subject to zoning laws, owner may use his airspace to build to any height and for any purpose.
- As for excluding others, he is entitled to use so much of the airspace as is **necessary for the reasonable enjoyment of the land**
- ***Bernstein of Leigh (Baron) v Skyviews and General Ltd***: Owner of land objected to aircraft flying over his property for sightseeing purposes. Court held that to allow trespass in respect to this type of activity would be an unreasonable use of the land, concluding that the owner has exclusive rights to the airspace 'to such height as is necessary for the ordinary use of the land and the structures upon it'. Inspecting the land from adjacent property is not trespass.
- Invasion of airspace over which owner has exclusive rights to is trespass. *Davies v Bennison* even if bullet hit nothing it is still trespass and damages can be recovered.
- ***Kelsen v Imperial Tobacco Co***: Plaintiff leased tobacco store and attached to wall of adjoining building but extending 8 inches into airspace of landowner's property was a tobacco sign. Plaintiff wanted it removed from his airspace and alleged trespass seeking injunction. Court held it was trespass.
- Court may refuse injunction if trespass is trivial or owner has rejected reasonable offers of compensation
- ***Woollerton v Costain***: crane was passing over land of plaintiff. Defendant had offered considerable amount of money to compensate. Plaintiff denied. Court found intrusion was trespass but delayed grant of injunction until after building was completed because plaintiff had been offered money, builder hadn't acted in flagrant disregard of plaintiff and there was no precedent.
- ***JP Investments Pty Ltd v Howard Chia Investments (No 2)***: "relevant test is not whether the incursion actually interferes with the occupier's actual use of land at the time, but rather whether it is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake."
- ***LJP Investments Pty Ltd v Howard Chia Investments (No 3)***: developers cannot unlawfully trespass. Should pay price demanded by owner unless clearly unreasonable
- Statute allows granting of easements over land or rights of access over land for purpose of building, repair or maintenance of adjoining land s 88K *Conveyancing Act NSW*
- Overhanging trees are not trespass (remedy is in nuisance)

- No right to sue in trespass for flight over property at reasonable height *Damage by Aircraft Act 1952* (NSW)
- Civil Aviation legislation allow aircraft to fly at reasonable heights

Subsoil

- Owner has general right to extract minerals below surface
- Legislation passed conferring rights to specific resources such as coal, petroleum and atomic substances
- Gold and silver are considered to be royal mineral belong to the Crown at common law
- Items are Aboriginal cultural heritage are protected

Boundaries of land

- Artificial boundaries fixed until such time as the adjacent owners agree to shift them and remain unaffected by movements in the land itself
 - Natural boundaries shift from time to time by natural forces
- **Land bounded by tidal waters**
- Owner owns the land up to the mean high water mark. Land below the mark belongs to the Crown.
- **Land bounded by non tidal waters**
- If land contains non tidal waters owner retains exclusive rights to the bed
 - If land is bounded by non tidal waters ownership confers rights up to the 'middle line' of the water
- **Accretion and erosion**
- Legal boundaries will only change if:
 - Erosion or accretion is gradual as to be imperceptible for the naked eye. Rapid transformation of boundaries e.g. earthquake, flood, will not affect legal boundaries
 - Accretions of land bounded by sea → title to the increase in land will be in the landowner
 - If erosion → Crown will accrue land
 - Principle of accretion and erosion apply equally to tidal and non-tidal land

Doctrine of Fixtures

- Land includes fixtures – **chattels that have become part of the realty by virtue of having been attached to it in a particular way, or annexed to it.**
- Owner of chattel and owner of land are one and the same
- Annexation becomes important where:
 1. Sale of land will only confer rights to the land; right over chattels remain with vendor unless contract provides otherwise
 2. Life tenancy comes to an end and the tenant leaves chattels by will. The remainder person will be entitled to fixtures
 3. Owner of land gives mortgage over the land, and later annexes chattels to the land. Who has rights over the chattels?
 4. After mortgage is granted, the owner annexes chattels belonging to another person
 5. Fixtures are annexed by a tenant. Do they become part of the landlord's property or the tenants?
 6. Tax is assessed on the chattels