

LAND LAW CONCEPTS

The Definition of Land

- Real Property— land

- Rights over volume of space— covers the surface of the earth and part of the earth below and above.
- **Above the land:** Roughly 200m above the roof-line
 - To height “necessary for ordinary use and enjoyment” of land and its structures (*Baron Bernstein of Leigh v Skyviews & general Ltd* (1977)).
 - Exception made for landing and taking off aircraft.
 - Access to sunlight is not an ownership right.
- **Below the land:** 200m below.
 - Landowners have right to assert title to subsoil within their effective control.
 - Minerals vested in Crown
- **Waters:**
 - If bounded by tidal waters (eg. on sea or tidal river/ lake) the owner owns the land up to the mean high water mark (*Attorney-General v Chambers* (1954)).
 - If contains non-tidal waters (eg. river or lake), owner retains exclusive rights to the bed (*Orr Ewing v Colquhoun* (1877)). But if bounded by non-tidal waters, rights up to the ‘middle line’ of the water (*Lord v Commissioners for the City of Sydney* (1859)).

Property Law Act 1958 (Vic) s18

“Land” includes land of any tenure, and mine and minerals whether or not held apart from the surface, buildings, or parts of buildings...and other corporeal hereditaments; also a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over and derived from the land and also an undivided share in land; and mine and minerals include any strata or seam of minerals or substances in or under any land, and powers or working and getting the same.

Transfer of Land Act 1958 (Vic) s4(1)

‘Land’ includes any estate or interest in land but does not include—

- (a) an interest in land under the *Mineral Resources (Sustainable Development) Act 1990*; or
- (b) a carbon sequestration right or soil carbon right granted in relation to Crown land under Carbon Sequestration Agreement within the meaning of the Climate Change Act 2010;

• **Improvements to Land:**

- Added- anything which is added to land is an improvement.
- When you buy the land you also buy the improvement on it.
- An improvement to land becomes so fixed that it becomes part of it (*Reid v Smith*).

- Most durable and substantial features of the built environment are viewed not as fixtures but simply as having melded with the freehold.
- Building with foundations in soil.
- **Two rights over land:** (*Colonial Bank v Whinney*); PLA s18.
 - 1. Corporeal hereditament:
 - Physical presence, tangible
 - Surface of the earth and physical things attached.
 - Substantial or permanent objects constituted by or connected with immovable property.
 - 2. Incorporeal hereditament:
 - Intangible rights which may be enjoyed in, over or in respect of land.
 - Right to exclude others.
 - Right to sell and lease.

The Doctrine of Tenure

- **Crown owns all land absolutely**— we are tenants of the Crown.
 - Landowners hold an interest ‘of the Crown’ [‘mediately or immediately from the crown’]
 - Their interest must derive from a Crown grant (originally, derivatively or fictively).
- *Attorney General of NSW v Brown* (1847): held that the doctrine of tenure applied in Australia upon Crown’s acquisition of sovereignty. Until then had just been presumed to apply.
 - When Crown acquired sovereignty in each of the new colonies, it acquired absolute ownership of the land.
- **Native Title** exists outside of Doctrine of Tenure.
 - **Background:** Australia settled by way of *terra nullius* (land of no-one) and Doctrine of Tenure. Doctrines legitimated ‘settlement’ and dispossession of Aboriginal people.
- **Prior to *Mabo (No 2)***— Sovereignty = full beneficial ownership of land.
 - “On the foundation of NSW...every square inch of territory in the colony became the property of the Crown [and all] titles, rights and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown”: Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) (Gove Island Lands Rights Case)
 - Statement rejected by HC.

- Indigenous occupants had no rights in the land.
- **After *Mabo (No 2)*** — Sovereignty = ‘radical title’ — beneficial ownership of land.
 - HC declared *terra nullius* a legal fiction and indigenous people occupied the land before British settlement (land was not uninhabited).
 - Pre-existing interests in land of the Indigenous inhabitants were able to be accommodated by the Doctrine of Tenure.
 - On the assumption of sovereignty over the territory, Crown acquired ‘radical title’ to all of the land in the territory.
 - Brennan: acquisition of radical title deferred from actual ownership.
 - If indigenous occupants at the time of acquisition of sovereignty had interests in land under their own law, these interests were recognisable under common law, then those pre-existing Native Title rights persisted until extinguished or abandoned.
- What is the meaning of ‘radical title’?
 - It is a public law concept. It is not a proprietary interest in the land.
 - Crown acquired a governmental supervisory role over the land when it acquired sovereignty.
 - Crown can lawfully manage and regulate the granting of interests in land in any way it chooses.
 - The Crown’s ‘radical title’ can be exercised by granting a proprietary interest in land to itself or to others.
 - Unless and until the Crown does this, any Native Title over the land continues to exist.

The Doctrine of Estates

- Estates relate only to land