

Property Law

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Week 1 – Intro to Real Property Law

Meaning of Land

Acts Interpretation Act 1901 (Cth) s 2B

- ‘Messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description whatever, may be the estate or interest in them’.

Real Property Act 1886 (SA) s 3

- ‘Land includes all tenements and hereditaments corporeal and incorporeal of every kind and description, and every estate and interest in land’.

Acts Interpretation Act 1915 (SA) s 4

Land includes–

- (a) A building or structure affixed to land;
- (b) Waters and airspace over land;
- (c) The bed of any body of waters;
- (d) Subsoil and subterranean waters.

Re Lehrer and the Real Property Act [1906]

Land includes in law – any ground or soil or earth, anything below or above the surface (e.g. airspace), and anything that is a fixture on the land.

Why is land studied separately?

- Land is indestructible and endures overtime. It cannot be destroyed or consumed.
- Land is capable of division (both horizontally and vertically).
- It is unique – therefore special legal rules have developed to resolve disputes.

Explanation

- These above definitions are a comprehensive way of describing what *land* includes legally – the way how it goes beyond physical soil and embraces various forms of property + legal rights related to land.
- Land therefore encompasses:
 - o Physical property – houses & buildings (*messuages, tenements, corporeal*)
 - o Intangible rights related to land – easements (*incorporeal*)
 - o All types of ownership or possession – (*tenure*)
 - o Any kind of legal interest in the land – (*estate/interest*)
- Legally, when land is referred to, it doesn’t just incorporate the physical land, it includes the buildings, rights associated with it and the ways it can be held or transferred.

Messuages → a dwelling house or building with its associated land.

Tenements → any type of land or property that could be held by a tenant, under some form of lease of ownership – in modern legal terms it can include both residential and non-residential properties.

Hereditaments → property, real or personal that can pass down through generations – land, buildings, or rights associated with land which are transferrable upon death.

Corporeal → tangible, physical property – something that can be seen and touched (land itself, buildings or fixtures).

Incorporeal → intangible property interests (rights/privileges) tied to the land but not physically tangible.

Tenure → the way in which land or property is held or owned. This could be freehold (ownership outright), leasehold (rented for a period) etc.

Estate → type of ownership rights a person has in the property.

Interest → any legal rights or claims a person might have to land – e.g. mortgage interest or leasehold interest.

Of any tenure or description whatever → definition of land includes all possible types of ownership possession – regardless of how the land is held (whether owned outright or leased).

May be the estate or interest in them → extends the definition of land to cover all possible estates or interests that could exist in the property.

Physical limits of land

Traditional maxim: *Cuius est solum est usque ad coelum et ad inferos*.

‘They who own the land own everything reaching up to the very heavens and down to the depths of the earth’.

- This maxim is not applied literally in modern law.

Airspace Rights

- Airspace forms part of land. A person cannot use airspace they do not own without the landowner’s permission.
 - o Unauthorised use of airspace, like unauthorised entry onto land, constitutes trespass.
- HOWEVER, landowner rights extend only to what is necessary for ordinary use & enjoyment. Above that height, airspace is available for public use.
- Actual interference isn’t necessary, the possibility of interference is enough for a claim of trespass.
 - o No need to prove damage.

Essential case law:

- *Kelsen v Imperial Tobacco (of Great Britain and Ireland) Ltd* [1957] 2 WB 334
- *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479.
- *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 4905

Important questions:

1. What rights does the owner of the land have to use the airspace?
2. What remedies does the landowner have for intrusions in airspace?

Kelsen v Imperial Tobacco (of Great Britain and Ireland) Ltd [1957] 2 WB 334

- **Facts:**
 - o Kelsen leased a tobacconist shop. Imperial Tobacco owned the neighbouring building, and they put a large advertising sign that stuck out 4in into Kelsen’s shop’s airspace. Kelsen claimed invasion of airspace and trespass against Imperial.
- **Issue:**
 - o How much airspace is protected by law? Does invading someone else’s airspace count as trespass to land, even if it was empty air and not even touching?
- **Decision:**

- McNair J: The projection of the sign into the airspace above the shop did constitute trespass.
- The rights of a landowner extended to the airspace above their property and any intrusion into this space (however minimal) is trespass.
- Court granted mandatory injunction ordering removal of the sign.

Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] QB 479.

- **Facts:**
 - Skyviews, an ariel photos business, flew a plane several hundred feet over Bernstein's property and took photos without his consent. Bernstein claimed they trespassed in his airspace.
- **Issue:**
 - Does a landowner's right to airspace extend hundreds of feet up such that an aircraft flying overhead commits trespass? Latin maxim?
- **Decision:**
 - Griffiths J held that it was best to restrict the rights of an owner in the airspace above their land to such height as is necessary for the ordinary use and enjoyment of the land and the structures upon it.
 - The defendant's aircraft did not infringe the plaintiff's airspace – thus no trespass because it did not cause any interference with any use to which the plaintiff put or might wish to put the land.

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (1989) 24 NSWLR 4905

- **Facts:**
 - Plaintiff was the owner and occupier of property next to the defendant's property. The defendant, undertaking commercial development on their land, had extended a scaffolding 1-1.5m into the plaintiff's airspace above their property.
- **Issue:**
 - Whether the scaffolding intruding the plaintiff's airspace constituted trespass to land.
 - Did this constitute interference with the plaintiff's current use and enjoyment of their property?
- **Decision:**
 - Hodgson J held that there was a trespass and granted an injunction ordering removal of the scaffolding.
 - *** The relevant test is not whether there was actual interference with the occupier's actual use of the land at the time but whether it was of a nature and at a height that may interfere with the ordinary uses of the land which the occupier may see fit to undertake.
 - Is there the possibility that the occupier may want to use the land at that level or in that place?

Actions available for intrusions in the airspace

- Airspace disputes can usually sit in the following two causes of action:
 - Trespass to land
 - Here, the plaintiff is entitled to injunctive relief to restrain the infringement (regardless of damage).
 - Private nuisance
 - This occurs when the interference falls short of trespass. The court will award damages (injunctions only granted where the interference is unreasonable and damages are inadequate).

- The actions overlap but the thresholds and reasoning are very different. The remedies include injunctions and/or damages.

Aspect	Trespass	Nuisance
Nature	Physical intrusion INTO airspace	Interference affecting your use
Damage required?	NO - actionable per se	YES - must prove actual interference
Test	May interfere with ordinary uses	Substantial and unreasonable interference
Primary remedy	Injunction	Damages
Damages available?	Yes - nominal, compensatory, or exemplary	Yes - compensatory only
Injunction available?	Automatic if trespass proven	Only if unreasonable AND damages inadequate

Summary airspace trespass cases and other examples				
Case	Type of Interference	Facts	Principle	Finding
Bernstein v Skyviews & General Ltd [1978] QB 479	Aircraft (high-altitude overflight)	Aircraft flew over claimant's land taking photographs.	No unlimited airspace ownership; only airspace needed for ordinary use is protected.	No trespass – high-altitude overflight.
Kelsen v Imperial Tobacco Co Ltd [1957] 2 QB 334	Advertising sign	Advertising sign projected inches into neighbour's airspace.	Even minimal permanent intrusion into protected airspace is trespass.	Trespass established; injunction granted.
Graham v KD Morris & Sons Pty Ltd [1974] Qd R 1	Crane jib	Crane jib regularly overswung neighbouring land.	Repeated low-level intrusion interferes with possession.	Trespass; injunction restraining overswing.
Schleier t/as Cape Crawford Tourism v Brazakka	Tourism structures/activities	Tourism structures/activities intruded into neighbour's airspace.	Distinction between transient overflight and ongoing physical encroachment.	Trespass; commercial justification irrelevant.
LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (1989) 24 NSWLR 490	Scaffolding	Scaffolding protruded over adjacent land.	Industry practice does not defeat proprietary rights.	Trespass; injunction (with conditions).
Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd [2007] VSCA 311	Building cladding	Metal cladding attached to 12-storey building protruded 3-6 cm into neighbouring airspace.	Injunction is prima facie remedy for trespass; damages awarded only exceptionally (Shelfer principle).	Trespass established; mandatory injunction granted for removal of cladding.

Re Lehrer and the Real Property Act [1960] NSW 570

This case revealed that ‘land includes in law – any ground or soil or earth, anything below or above the surface (e.g. airspace), and anything that is a fixture on the land’

- Airspace may form part of land.
- It can be transferred/conveyed separately from the surface land.
- The interest can be registered on the title under the Torrens system.
- **Facts:**
 - Four leases were lodged for registration. These leases were for the upstairs rooms only (not the whole building).
- **Issue:**
 - Can you legally separate and transfer ownership of just the upper part of the building as well as its airspace? (this is without the ground floor/land beneath).
- **Decision:**
 - The court determined that it is possible to transfer/convey or own a piece of airspace (like an upstairs apartment) separately from the land below it (this type of ownership qualifies as a legal interest in land).

Rights Below the Surface

Bocado SA v Star Energy UK Onshore Ltd [2011] 1 AC 380

- **Facts:**
 - Bocado owned property in Surrey, England and Star energy had a govt license to extract from a field under his property.
 - After star energy drilled 800-2900ft holes under his property, Bocado claimed it was trespass.
- **Issue:**
 - Does a landowner's rights extend to hundreds of feet underground?
 - Does drilling deep underground holes without consent but with a govt license trespass?
- **Decision:**
 - UK supreme court held it was trespass and that land ownership included the strata beneath the surface (unless rights are given away by statute). There was however only minimal compensation given because the drilling did not interfere with Bocado's use of the land. License didn't excuse trespass – it limited damages.
- **Significance:**
 - The traditional premise (Latin maxim) → down to the centre of the earth.
 - The precise extent of the landowner's rights is uncertain.
 - It seems that ownership extends to a considerable depth but not to the point of absurdity.
 - The owner of the land has the right to subsoil within their effective control.
 - This principle helps against tunnels, drilling, and underground intrusions.

Mineral Rights

R v Earl of Northumberland (1568) 75 ER 472

- **Facts:**
 - Gold and silver were found in mines on land owned by the Earl of Northumberland and the crown claimed that the gold belonged to them.
- **Issue:**
 - Do mines of gold and silver found on private land belong to the landowner or the crown by virtue of the royal prerogative?
- **Decision:**
 - Court held that all mines of gold and silver belong to the crown regardless of whether they are on private land.

Woolley v Attorney General (Vic) (1877) 2 App Cas 163

- **Facts:**
 - Woolley was granted land by the crown in Victoria that contained minerals (grant didn't include the gold + silver on his land). Woolley thought he had the right to it and sought an injunction to prevent a 3rd party mining operation in extracting hold. The attorney-general however argues that under Victorian law, the crown retained rights to minerals.
- **Issue:**
 - Do minerals found on private land belong to the landowner or the crown?
- **Decision:**
 - It was held that minerals were not automatically included in private land grants unless explicitly states and the crown retained the rights to them.
- **Significance:**

- Had an extensive impact during the gold-rush times – which was also when the govt developed mining legislation and leases etc. to control access to minerals on behalf of the crown.
- At common law, landowners own minerals except gold and silver (which are historically reserved to the crown. Historically, gold and silver contributed to coinage.
 - The crown needed these metals under control for financial and economic power.
- Modern legislation reserve minerals to the crown as well → s 6 and 16 – *Mining Act 1971* (SA).
 - Similar to petroleum (also reserved to crown) – *Energy Resources Act 2000* (SA).
- All other non-precious metals stayed with the landowner.

Reservation of Minerals upon Sale

Chirnside v Registrar of Titles [1921] VLR 406

- Facts:

- Chirnside sold land but reserved all coal, lignite and mines 50ft below the surface. The registrar of titles, however refused, saying it was not legal to register land with such exceptions.

- Issue:

- Can a transfer of land occur with reservation of minerals? Can airspace/subsurface part of land be dealt with separately?

- Decision:

- Supreme court of Victoria held the reservation to be valid and registrable as minerals are part of 'land' and its separate reservations are allowed.