

# LAWS2383

## Land Law

### Comprehensive Course Notes

UNSW Law School

#### Course Structure

Week 1, Class 1: The Concept of Property -- what is property; the bundle of sticks; classifications; land boundaries  
Week 1, Class 2: Origins of Australian Land Law -- tenure; estates; Mabo (No 2)  
Week 2, Class 3: Native Title -- NTA s 223(1); nature and incidents; extinguishment  
Week 2, Class 4: Introduction to Torrens Title and Indefeasibility -- Old System; s 42 RPA; Frazer v Walker; Breskvar v Wall  
Week 3, Class 5: Implications of Indefeasibility -- volunteers; extent of indefeasibility; the Register; e-conveyancing  
Week 3, Class 6: Exceptions to Indefeasibility: Fraud and In Personam  
Week 4, Class 7: Exceptions to Indefeasibility: Short Leases, Omitted Easements, Overriding Statutes  
Week 4, Class 8: Equitable Interests, Caveats, and Competing Equitable Interests  
Week 5, Class 9: Torrens Revision; Week 5, Class 10: Co-ownership  
Week 7, Class 11: Co-ownership: Severance and Section 66G; Week 7, Class 12: Leases  
Week 8, Class 13: Leases: Assignment and Remedies; Week 8, Class 14: Mortgages  
Week 9, Class 15: Easements; Week 9, Class 16: Easements and Restrictive Covenants  
Week 10, Class 17: Restrictive Covenants; Week 10, Class 18: Exam Revision  
Prescribed text: Sackville and Neave, Australian Property Law, 12th edition (2024)  
Key statute: Real Property Act 1900 (NSW)

# WEEK 1, CLASS 1: THE CONCEPT OF PROPERTY

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## 1.1 What is Property?

Property is one of the most contested concepts in legal theory. It is not a 'thing' but a set of relations between people with respect to things. Several foundational ideas help define property.

### Defining Characteristics of Property Rights

In rem: property rights are enforceable against the whole world, not merely against specific individuals. They 'run with the res/thing/land'. This distinguishes them from purely personal (in personam) rights that bind only the parties to a contract.

Stable, identifiable subject matter: property rights attach to identifiable things, objects, or interests. Land is the paradigm case.

Relativity of title: property rights in the common law are relative, not absolute. The 'better title' rather than 'absolute ownership' is what matters. This is captured by the maxim 'possession is the origin of title' (Carol Rose). A possessor can assert their right against the world except the true owner.

Alienable: property rights are inherently transferable, except in limited circumstances (e.g., native title rights are generally inalienable).

Independent of parties: property rights exist independently of the parties who created them and can endure beyond those parties.

Right to exclude: the power to exclude others is regarded by many theorists as the core characteristic of a property right (Felix Cohen: 'Keep off X unless you have my permission').

### Key Theoretical Positions

Felix Cohen (1954): 'That is property to which the following can be attached: To the world: Keep off X unless you have my permission, which I may grant or withhold: Signed: Private citizen; Endorsed: The state.' Two key points: (1) property is fundamentally relational, not a 'thing'; (2) it derives its binding force from state enforcement.

Wesley Hohfeld: distinguished between property as 'subject' (the object of the right), 'object' (the person affected), and rights that 'convey no definite meaning whatever'. Rights, duties, powers, and immunities make up the full set of Hohfeldian relations.

Kevin and Susan Gray: '[T]he beginning of truth about property is the realization that property is not a thing but rather a relationship...' Property is a legal conclusion about what relationships between persons with respect to things will be recognized and enforced.

Section 7 Conveyancing Act 1919 (NSW): 'property includes any real or personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.'

Stow v Mineral Holdings (1977) 180 CLR 295: defines proprietary interests in land as including 'legal and equitable estates and interests e.g. a freehold or a leasehold estate, or incorporeal interests such as easements, profits a prendre, all such interests being held by persons in their individual capacity'.

## 1.2 The Bundle of Sticks Metaphor

The bundle of sticks is the dominant metaphor for property in Anglo-Australian legal thought. Property is not a monolithic concept but a collection of different legal rights, each of which can be held separately or in combination.

### Key 'Sticks' in the Property Bundle

- Right to use and enjoy: the right to occupy and make use of the property.
- Right to exclude: the right to keep others off the property. Regarded by many as the defining characteristic of private property.
- Right to alienate: the right to transfer, sell, lease, mortgage, or otherwise dispose of the property.
- Right to derive income: the right to rent the property and receive the proceeds.
- Right to destroy: the right to demolish structures or to use resources to exhaustion.

The metaphor is useful because it shows that different 'sticks' can be held by different persons simultaneously. For example, in a lease, the landlord holds the right to the reversion and the right to receive rent, while the tenant holds the right to occupy and exclude others during the lease term.

### Limitations and Critiques of the Bundle Metaphor

- The metaphor can mislead by suggesting that any combination of rights can constitute 'property'. In law, not every collection of legal entitlements amounts to a legally recognised property right. The right must have the core characteristics of property: in rem effect, stable subject matter, and so on.
- The metaphor can also mislead by suggesting property rights are infinitely divisible and separately tradeable when in practice many rights come as fixed packages (e.g., a fee simple estate carries a defined set of rights).
- Absence of the right to exclude: in some contexts, the law recognises property-like interests without the right to exclude (e.g., native title rights, which often involve communal rights of access and use that do not exclude the general public).
- Common and public property: the metaphor primarily focuses on private property. Common or public rights in land also exist (e.g., public rights of way) and have their own regime.

## 1.3 Classifications: Real Property vs Personal Property

Category	Description	Examples
<b>Real property (realty)</b>	Property that is fixed in location. Historically, recoverable by a 'real' action (an action to recover the thing itself, not just damages). Includes land and interests in land.	Fee simple estates, leasehold estates, easements, mortgages, profits a prendre, restrictive covenants, native title
<b>Personal property (personalty)</b>	Property that is not land. Historically recoverable only by a personal action for damages. Subdivided into choses in possession (physical chattels) and choses in action (intangible rights).	Laptop computers, shares in public companies, copyright, contractual rights
<b>Chattels real</b>	The historical anomaly: leases are historically classified as personal	Leasehold estates

property despite being interests in real property (land).

## 1.4 Interests and Estates in Land

Australian property law draws a critical distinction between estates (temporal interests in land) and other interests in land such as easements and mortgages. Understanding this hierarchy is fundamental to the course.

### Preview of Estates and Interests

**Fee simple estate:** the largest estate known to the common law. Characterised by uncertain duration (could last forever), inheritability, and alienability. Holds the greatest 'number of sticks in the bundle'. The word 'fee' signifies it is inheritable; 'simple' that it is unrestricted (open to all heirs).

**Leasehold estate:** characterised by its certain (fixed) duration and the grant of exclusive possession to the tenant. Landlord retains the reversion. The lease must have a clear maximum duration.

**Mortgage:** a statutory charge created against Torrens title land, granted by the mortgagor (land owner) to secure repayment of a loan from the mortgagee (lender). In the Torrens system, a registered mortgage is a statutory charge, not a conveyance of the legal estate.

**Easement:** an incorporeal interest in the land of another (the servient tenement) for the benefit of other land (the dominant tenement). A right to use the servient land in a defined way.

**Restrictive covenant:** an equitable interest in land. A promise by one land owner (the covenantor) that restricts the use of their land for the benefit of another's land (the covenantee's land).

## 1.5 Boundaries of Land

Land law must establish what exactly is included within the boundaries of land. The common law develops doctrines for vertical extent (airspace and subsoil) and horizontal extent (boundaries along rivers and shorelines).

### Airspace

**Baron Bernstein of Leigh v Skyviews and General Ltd [1978] QB 479:** a landowner's right to airspace extends only to 'such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it'. Above that height, the Crown has sovereignty, regulated by statute.

**Interference (trespass) with airspace is actionable by injunction.** The usual principle for deciding whether to grant an injunction is Shelfer's rule from *Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287*.

**Shelfer's rule:** a court should generally grant an injunction rather than damages unless: (a) the injury to the plaintiff's legal rights is small; (b) it can be estimated in money; (c) it can be adequately compensated by a small money payment; and (d) it would be oppressive to the defendant to grant an injunction (*Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd (2009)*).

Distinction between transient trespass (e.g., aircraft in flight) and more established structures (e.g., a crane or wall projecting over neighbouring land). Transient trespass to airspace may not be actionable or will attract a lesser remedy.

### Land Boundaries: Accretion, Erosion, and Intermixture

Boundaries are normally fixed by reference to surveyed lines. Exceptionally, boundaries can move.

Accretion: where land accumulates naturally and imperceptibly through alluvial deposits, the boundary moves with the land and the new land belongs to the riparian owner: *Gifford v Lord Yarborough*.

The addition must be imperceptible -- occurring so gradually that it cannot be observed: *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706 (applied to windswept sand).

Erosion: the converse of accretion. Land lost gradually and imperceptibly by water erosion is lost from the owner's title.

Accession and intermixture are related doctrines applying mainly to chattels.

# WEEK 1, CLASS 2: ORIGINS OF AUSTRALIAN LAND LAW

## 2.1 The Doctrine of Tenure

Tenure is the foundational concept of Anglo-Australian land law. It describes how individuals hold estates in land in relation to the Crown, which is theoretically the absolute owner of all land.

### Key Principles of Tenure

All land is owned absolutely by the Crown. Any interest in land must be derived from the Crown by grant. There is no allodial system of land ownership in Australia.

An individual may only hold an estate or interest in land. They hold it 'of' the Crown, not as outright owners.

Historically, tenure was a pyramidal structure (feudalism) where land was held in return for tenurial services. Feudalism was rationalised by the Tenures Abolition Act 1660 (UK), which left free socage tenure as the universal tenure.

In Australia, the feudal period was never truly experienced, but the doctrine of tenure was imported through the application of English law at settlement.

Attorney-General of NSW v Brown (1847): confirmed the feudal system of land tenure applied in Australia. 'Here is property depending for its support on no feudal notions or principles, but if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what ground shall it be said not to be the law of NSW?' per Stephen CJ.

Mabo (No 2) (1992): the Court maintained the doctrine of tenure while departing from terra nullius -- the Crown gained radical title (sovereignty), not full beneficial ownership, upon settlement.

## 2.2 The Doctrine of Estates

Estates in land are not the physical land itself, but rather temporal interests -- the right to possess and use the land for a defined period. They are intellectually consistent with tenure as lesser forms of interest derived from the Crown.

### Fee Simple Estate

The most extensive estate known to the common law: inheritable, alienable, unrestricted, of uncertain duration (could last forever).

'Fee': the estate is inheritable and can pass to heirs. 'Simple': unrestricted as to which heirs may inherit (open to all heirs, as opposed to the fee tail which was restricted to linear descendants).

In contemporary practice, the fee simple is the standard freehold interest. Under Torrens title, the registered proprietor holds an 'estate in fee simple'.

In Torrens title, it is common to describe the interest as 'the estate in fee simple free from all encumbrances except as recorded on the folio'.

Words of limitation formerly required to create a fee simple: 'To A and his heirs'.

Abolished/simplified by statute in Australian jurisdictions.

### Freehold Life Estates

Not an estate of inheritance. An estate of freehold because its holder is entitled to seisin (possession) of the land when it vests.