

PROPERTY LAW SUMMARY



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TABLE OF CONTENTS

CHAPTER 1: HOW DOES THE LAW DEFINE PROPERTY	10
What can be considered property?	10
The Distinction between PERSONAL and real property	11
Personal vs. Real Remedy	11
Difference between personal rights and real (proprietary) rights	12
The rights of property	12
The concept of Property does not Include	12
The issue of airspace	12
CHAPTER 2: DOCTRINE OF FIXTURES	17
1. The degree of annexation	18
2. Purpose of annexation	18
Factors derived from the various cases	20
Example cases:	21
CHAPTER 3: POSSESSION AND TITLE (NOTE: THIS CHAPTER CONCERNS INFORMATION LEARNT IN TORTS AND COMMERCIAL LAW)	24
HOW DO WE OWN PROPERTY?	25
i) What about objects UNDER or IN the land?	26
ii) Objects on land	26
Causes of action to protect personal property	28
a) Tort of trespass	28
b) Tort of conversion	28
c) Detinue	29
Adverse possession of land	29
Justification for Adverse Possession	30
Claim against the Crown	30
When does time begin to run for the plaintiff?	30
Part of the Land	33
Does adverse possession require an objective or subjective test?	33
How to stop time running against the plaintiff	34
Transferring the property to someone else	34
CHAPTER 4: PROPRIETARY INTERESTS	36
1) The separation of proprietary interests	36
Tenure	36
Doctrine of estates	36

PROPERTY LAW

Freehold estates	37
Less than freehold estates	38
The development of the trust	38
2) Transfer of proprietary interests.....	39
Transfer of a legal interest – consensual transactions	39
What is a deed?.....	39
The sale of land	40
Contract to create a new interest in land.....	43
Succession on death (by will)	45
Transfer of an equitable interest.....	46
Intestate succession	46
Bankruptcy	46
Execution of judgments	46
Compulsory acquisition.....	46
CHAPTER 5: ORIGINAL ACQUISITION OF PROPRIETARY INTERESTS	49
Acquisition of a property interest through a Constructive trust	49
Acquisition of a property interest by operation of estoppel	49
CHAPTER 6: TORRENS TITLE	52
Interests in land	53
The difference between registration and recording	54
Indefeasibility/indefeasible title	54
Fraud as an exception to indefeasible title	56
Knowledge of fraud committed by someone else.....	56
Instances of fraud while attesting signatures.....	57
Agents.....	58
The time the fraud takes place	58
Actions in personam	59
Other exceptions and qualifications to indefeasibility	61
Inconsistent legislation:.....	61
Volunteer Registered Proprietors	61
Unregistered leases	62
Registrar’s power to correct.....	63
Estates and interests recorded in a folio on the register	63

CHAPTER 7: ENFORCEABILITY OF PROPRIETARY INTERESTS: PRIORITIES	67
Priority rule 1 – prior legal (L) versus later legal (L)	67
Priority rule 2 – prior legal (L) versus later equitable (E)	67
Priority rule 3 – prior equitable (E) versus later legal(L)	68
Actual notice	69
Imputed notice	69
Constructive notice	69
Priority rule 4 – prior equitable (E) versus later equitable(E)	71
Interests in equity	72
CHAPTER 8: UNREGISTERED INTERESTS	73
Overview	73
Caveats.....	73
Injunctions.....	75
Priority rules concerning unregistered interests	75
CHAPTER 9: MORTGAGES	82
Equitable mortgages.....	83
Mortgagee’s remedies for default by the mortgagor	85
Possession	85
Appoint a receiver.....	85
Foreclosure	86
Power of sale	86
YES (power of sale)	95
CHAPTER 10: LEASES.....	96
Creation of different types of leases	96
Lease created by possession	96
Implied periodic lease	96
Enforcing a lease at equity	97
Torrens land.....	97
Substantive requirements for leases	98
Unregistered leases	98
Rights and obligations of lessor and lessee	99
Breach of covenants: express or implied	101
Landlord’s remedies:	101
Tenant’s remedies	102

CHAPTER 11: ASSIGNMENT AND SUBLETTING	105
Privity of contract	105
Privity of estate	107
CHAPTER12: CO-OWNERSHIP	108
Tenancy in common	108
Joint tenancy	108
The four unities	108
Creation Under Statute	109
The rights of owners between themselves	110
Conversion of a joint tenancy into a tenancy in common	110
Bringing co-ownership to an end	113
Private regulation of land use	117
CHAPTER 13: EASEMENTS	118
The essentials of an easement.....	118
Creating an easement	119
Easements and the Torrens system	121
Remedies for interference with an easement	122
CONCLUSION	125
CHAPTER 14: COVENANTS	126

CASES

Abigail v Lapin: [1934] AC 491. (Privy Council).....72, 74,78

ANZ Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd: (1978) 139 CLR 195.....87

Armory v Delamirie: (1722) 1 Strange 506 (Court of King’s Bench).....23

Assets Co Ltd v Mere Roihi: [1905] AC 176 at 210.....53, 61

(Australasia) Pty Ltd v Thomas Cook & Son (Australasia) Pty Ltd, [1970] 2
NSWR 257.....96

Australian Provincial Assurance Co Ltd v Coroneo. (1938) 38 SR (NSW) 700... 18,21

Australian Guarantee Corporation Ltd v De Jager: [1984] VR 483.....54

Bahr v Nicolay (No 2): (1988) 164 CLR 604.....55,56

Barnes v Addy (1874) LR 9 Ch App 244.....57

Baron Bernstein of Leigh v Skyviews & General Ltd [1978] QB 479.15

Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning (Aust) Pty Ltd [1984] VR
947 (Supreme Court of Victoria).....20, 22

Bogdanovic v Koteff: [NSW Case] (1988) 12 NSWLR 472. (NSW Court of
Appeal).....57,59

Buckinghamshire County Council v Moran [1989] 2 All ER 225 (Court of
Appeal).....30

Burns v Dennis (1948) 48 SR (NSW) 266.....92

*Butler v Fairclough*1917) 23 CLR 78.....74,75,78

Byrne v Hoare: 1965] Qd R 135.....26

Counce v Counce: [1969] 1 WLR 286.....67

Crabb v Arun District Council 1976] Ch 197.....46, 47, 118

Cuckmere Brick Co Ltd v Mutual Finance Co Ltd: (English case) [1971] Ch 949.....85

Delohery v Permanent Trustee Co of NSW 1904) 1 CLR 283.....115, 118

Dobbie v Davidson (1991) 23 NSWLR 625.....116

Dockrill v Cavanagh (1944) 45 SR (NSW) 78. (Supreme Court of NSW Full
Court).....93

Elwes v Brigg Gas Co (1886) 33 Ch D 562.....25

Efstratious v Glantschnig: (NZ case) [1972] NZLR 594.....53

Farrar v Farrars Ltd: (English Case) (1888) 40 Ch D 395.....87

Flack v Chairperson, National Crime Authority: 1997) 150 ALR 153.....26

Forsyth v Blundell (1973) 129 CLR 477.....89

*Frazer v Walker*1967] 1 AC 569 at 580.....51

Grgic v ANZ Banking Co: (1994) 33 NSWLR 202.....55

Heath v Pugh (1881) 6 QBD 345.....83

PROPERTY LAW

<i>Heid v Reliance Finance Corp:</i> (1983) 49 ALR 229.....	68,69,76,77,78.
<i>Hobson v Gorringe</i> [1897] 1 Ch 182.....	19,20,71
<i>Holland v Hodgson:</i> (1872) LR 7 CP 328.....	17,18,19
<i>IAC (Finance) Pty Ltd v Courtenay.</i> (1963) 110 CLR 550. (High Court of Australia).....	73
<i>Inwards v Baker:</i> [1965] 2 QB 29. (Court of Appeal).....	46
<i>J & H Just (Holdings) Pty Ltd v Bank of New South Wales:</i> (1971) 125 CLR 546 (High Court of Australia).....	74,75
<i>James v Registrar-General.</i> (1967) 69 SR (NSW) 361.....	117
<i>Jared v Clements:</i> 1902] 2 Ch 399.....	66
<i>Kelsen v Imperial Tobacco Ltd</i> [1957] 2 QB 334.....	14
<i>Kennedy v De Trafford</i> [1897] AC 180.....	89
<i>Kenny v Preen</i> [1963] 1 QB 499.....	96
<i>King v David Allen & Sons, Billposting Ltd</i> [1916] 2 AC 54.....	16
<i>Kingsnorth Trust Ltd v Tizard,</i> 1986] 2 All ER 54	68
<i>Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd</i> (1989) 166 CLR 625	98
<i>Leigh v Dickeson</i> (1884).....	111
<i>Leigh v Jack:</i> 1879) 5 Ex D 264).....	31
<i>Leigh v Taylor:</i> [1902] AC 157.....	19, 22
<i>LHK Nominee Pty Ltd v Kenworthy</i> [2002] WASC A291.....	57
<i>Liverpool City Council v Irwin</i> [1977] AC 239.....	95
<i>Loke Yew v Port Swettenham Rubber Co</i> (1913).....	63
<i>McBride v Sandland</i> (1918) 25 CLR 69.....	40,41
<i>Maddison v Alderson</i> 1883) 8 App Cas 467.....	40,41,48,73
<i>Mayer v Coe</i> (1968) 88WN (NSW) (Part 1) 549.....	52,62
<i>Mercantile Credits Ltd v Shell Co of Australia Ltd:</i> (1976) 136 CLR 326. (High Court of Australia).....	57
<i>Mercantile Mutual Life Insurance Co Ltd v Gosper</i> (1991) 25 NSWLR 32.....	60
<i>Milirrputum v Nabalco Pty Ltd and Commonwealth</i> [1971] ALR 65.....	13
<i>Millett v Regent,</i> (1976) 133 CLR 679.....	41
<i>Moore v Dimond</i> (1929) 43 CLR 105.....	93
<i>Moule v Garrett</i> (1872) LR Ex 101. (Court of Exchequer Chamber).....	102
<i>National Carriers Ltd v Panalpina (Northern) Ltd</i> [1981] AC 675.....	96
<i>Noakes & Co v Rice</i> [1902] AC 24.....	79
<i>Northern Counties of England Fire Insurance Company v Whipp:</i> (1884) 26 Ch D 482.....	65,69

PROPERTY LAW

<i>Ogilvie v Ryan</i> , [1976] 2 NSWLR 504.....	41
<i>O'Dea v Allstates Leasing System(WA) Pty Ltd (1983) 152 CLR 359</i>	89
<i>Osmanoski v Rose</i> : (1974) VR 523.....	78
<i>Palumberi v Palumberi</i> [1986] NSW Conv R 55-287.....	21,22
<i>Parker v British Airways Board</i> : 1982] 1 QB 1004.....	24
<i>Perry v Clissold</i> [1907] AC 73. <i>South Staffordshire Water Co v Sharman</i> : [1896] 2 QB 44.....	24
<i>Person-to-Person financial interests and Sharari</i> : (1984) NSW Conv R 55-187.....	75
<i>Pierson v Post</i> (1805) 3 Caines 175 (Supreme Court of New York).....	25
<i>Pratten v Warringah Shire Council</i> : (1969) 90 WN (NSW) (Pt 1) 134.....	58,61
<i>RM Hosking Properties Ltd v Barnes</i> [1971] SASR 100.....	54
<i>Rasmussen v Rasmussen</i> : [Vic Case] [1995] 1 VR 613. (Supreme Court of Victoria).....	59,61
<i>Re Ellenborough Park</i> [1956] CH 131.....	113
<i>Reynolds v Ashby & Son</i> [1904] AC 461 (HL).....	18
<i>Rodrigues v Ufton</i> (1894) 20 VLR 539.....	13
<i>Santley v Wilde</i> (1899).....	79
<i>Steadman v Steadman</i> [1976] AC 536.....	40
<i>Strode v Parker</i> (1694) 32 ER 804.....	89
<i>Southern Goldfields Ltd v General Credits Ltd</i> : (1991) 4 WAR 138. (Supreme Court of Western Australia (Full Court)).....	85,86
<i>Tara Shire Council v Garner</i> : [2002] QCA 232.....	56
<i>Taylor v Russell</i> [1892] AC 244	90
<i>Tulk v Moxhay</i> (1842) 41 ER 1143.....	121,123
<i>Victoria Park Racing Co v Taylor</i> (1937) 58 CLR 479.....	15
<i>Walsh v Lonsdale</i> : 1882) 21 Ch D 9. (Court of Appeal).....	41,80
<i>Wandsworth District Board of Works v United Telephone Co Ltd</i> (1884) 13QBD 904.....	10
<i>Westpac Banking Corporation Ltd v Kingsland</i> : (1991) 26 NSWLR 700. (Supreme Court of NSW, Commercial Division)	86
<i>Wicks v Bennett</i> : (1921) 30 CLR 80.....	54,61
<i>Wilkes v Spooner</i> [1911] 2 KB 473.....	64,65,69
<i>Wright v Gibbons</i> (1949) 78 CLR 313.....	106
<i>Young v Hichens</i> : (1844) 6 QB 606.....	26

NOTE

The Lawskool Property Law Summary covers real property law, which at times touches on the areas of equity and trusts and torts law. If some of the material does not sound too familiar with what you are learning in your “real property” course at university, it is probably related to Equity & Trusts. Don’t panic.

To assist you better understand how the law is applied in practice we have included an Exam Hints Section at the end of every heading. It may include an exam style question and a flow chart detailing the sub headings that you should make and how you should go about answering the question in an exam.

Please note that the sample examination questions will be easier than that of the standard which you will be tested on. Your real examination paper will contain lots of problems mixed together which will make identifying the issues one of your biggest challenges. Our sample questions, placed at the end of each section, will only contain issues related to that section. They are only meant to provide an example of how a question relating to that topic may be formulated. For a more detailed exam model, please see the Lawskool Model Exam.

CHAPTER 1: HOW DOES THE LAW DEFINE PROPERTY

The law conceptualises property as rights to things, as legal relationships between people with respect to objects.¹

Blackburn J stated that “property... generally implies the right to use or enjoy, the right to exclude others and the right to alienate.”²

The High Court examined the scope of the relationship in the case of *Yanner v Eaton*.³

“Property is that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”.⁴

Section 22(1)(c) of the *Acts Interpretation Act 1901* (Cth) defines ‘land’ to include ‘*messuages tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein*’.

what can be considered property?

Property has been defined to mean “objects of ownership”. The law classifies objects of ownership into real property or realty (such as land and those things affixed to land and tenements) and personal property (such as goods and chattels).⁵

Real Property

Historically linked to land.

- Corporeal hereditaments – the holder of the interest has possession and enjoyment of the land, its surface, buildings and fixtures
 - o The maxim *cuius est solum est usque ad coelum et ad inferos* means they who own the land own everything reaching up to the very heavens and down to the depths of the earth.⁶ This concept has however been dismissed by the courts.⁷

¹ Felix Cohen ‘*Dialogue on Private Property*’ (1954) *Rutgers LR* 357.

² *Milirrpum v Nabalco*

³ (1999) 166 ALR 258.

⁴ Blackstone, *Commentaries on the Law of England*, Dawsons, London, 1966, vol II.

⁵ See: Vermeesch and Lindgren, *Business Law of Australia*, 10th ed, Butterworths, Australia, 2001.

⁶ See: Tan, Webb, Wright, *Land Law Butterworths Tutorial Series*, 2nd ed, LexisNexis Butterworths, Australia, 2002.

⁷ *Lord Bernstein v Skyview & General Ltd* [1978] 1 QB 479.

- Incorporeal hereditaments – intangible property such as easements and profits a prendre.

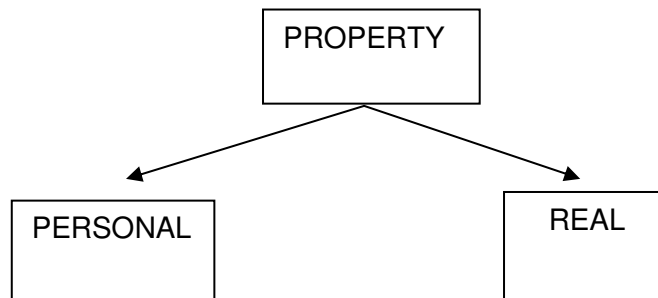
Personal Property

- Chattels real i.e. leases
- Chattels personal, i.e. choses in possession (tangibles such as books) and choses in action i.e. things that can only be recovered by bringing an action, or intangible property such as patents, trademarks, copyrights and shares.

Note that there is current and contentious debate as to the ownership of medical science. The position of the common law is that the human body and its parts are not property. For example, Moore v Regents of the University of California: there are no property rights in human tissue.⁸

The Distinction between PERSONAL and real property

The difference between personal and real property stems from the different remedies available at common law.⁹ If a person was entitled to a real remedy (could recover the object as of right) it was classified as real property.



Personal vs. Real Remedy

Personal remedies: money, financial compensation.

Real remedy: allows plaintiff to enforce their right to the property against the world.

Remedies include: possession, injunction, specific performance, and eviction.

⁸ (1990) 793 P 2d 479.

⁹ MA Neave, CJ Rossiter, MA Stone. *Sackville and Neave Property Law* (1999) 6th Ed Butterworths Sydney.

Difference between personal rights and real (proprietary) rights

King v David Allen.¹⁰

FACTS: David Allen had a contract with King giving them permission to affix posters to the wall of King's theatre. Theatre's ownership was then transferred to another company. Can David Allen enforce the contract against the new company?

ISSUE: The difference between personal and real rights. Personal rights can only be enforced against parties to the contract. In contrast, real (proprietary) rights have a greater scope of enforceability and can be enforced against the world.

HELD: David Allen only had a personal right, which could not be enforced against the company.

the rights of property

As mentioned above, Blackburn J in *Milirrpum v Nabalco*,¹¹ held that the rights include:

- Right to use and enjoy
- Right to exclude others from use and enjoyment
- Right to alienate (transfer ownership etc).

Note:

- It is not necessary that all these rights co-exist before there is a proprietary interest (and all these rights are subject to qualification).

The concept of Property does not Include

- Slavery
- Airspace – contentious area due to the issues of aviation and satellites
- “Things owned by common license”. Things not governed by property rules such as public software.

The issue of airspace

Only the owner in possession or in their absence, the lessee can bring proceedings against trespass to airspace (Rodrigues v Ufton).¹²

¹⁰ *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54.

¹¹ *Milirrpum v Nabalco Pty Ltd and Commonwealth* [1971] ALR 65.

¹² *Rodrigues v Ufton* (1894) 20 VLR 539

*In determining whether there has been a trespass, the court will generally consider whether the encroachment to the airspace is permanent or temporary. The court has shown a greater willingness to find a trespass where there is a permanent encroachment of the airspace above the land than in other situations*¹³
*(Kelsen v Imperial Tobacco Co Ltd).*¹⁴

What is “permanent”?¹⁵

The permanent encroachment cases are:

*Kelson v Imperial Tobacco Ltd (1957)*¹⁶- A sign from one property entering the airspace of the adjoining property

*Wandsworth District Board of Works v United Telephone Co Ltd (1884)*¹⁷- wires swinging across a neighbour’s property

What is “temporary”?

There are two main types of temporary encroachments to airspace:

- 1) Building cases
- 2) Aircraft cases

1) Building Cases

When houses or buildings are built, building equipment such as scaffolding and cranes can protrude over the adjoining property’s airspace. However without the use of such equipment the building could be substantially delayed.

*Woollerton & Wilson Ltd v Richard Costain Ltd (1970)*¹⁸

FACTS: The jib of the crane encroached upon the plaintiff’s airspace. The building contractors had tried to compensate the neighbours by offering a substantial sum of money.

ISSUE: Was it still considered trespass?

JUDGMENT: Although the court held that there was trespass they delayed the injunction giving the contractors time to finish their project.

¹³ Moore Geoffrey, *Essential Real Property*, [1st edition) p2

¹⁴ *Kelsen v Imperial Tobacco Ltd [1957] 2 QB 334*

¹⁵ Ibid- *Essential Real Property* has a more detailed analysis on the discussion concerning trespass to airspace from p1-26

¹⁶ *Kelsen v Imperial Tobacco Ltd [1957] 2 QB 334*

¹⁷ *Wandsworth District Board of Works v United Telephone Co Ltd (1884) 13QBD 904*

¹⁸ *Woollerton & Wilson Ltd v Richard Costain Ltd [1970]1 WLR 411.*

2) Aircraft Cases

Damage by Aircraft Act 1999(Cth)

According to the legislation when an aircraft travels at a reasonable height over property there is no liability for trespass. However s11 states that if any damage is caused, then the defendants will be automatically liable and the plaintiffs do not need to prove intention or negligence.

Bernstein v Skyview:¹⁹

ISSUE: Whether the owner of an estate has an action against a company flying over the land without permission in order to take photographs of the estate to offer for sale.

GRIFFITHS J: The right of the owner is restricted to the airspace above his land to such height as is needed for the ordinary use and enjoyment of his land and the structures on it.²⁰

In summary, subject to zoning laws, the owner of land may use their airspace to build to any height and for any purpose.²¹

EXAM HINTS

Below is a flow chart which you should follow when faced with a trespass to airspace issue. Use the flow chart in your response in the form of sub headings, the setting out will make your answer clearer. Note that these issues are only minor and will only make up part of a problem question. Nevertheless care should be taken not to skip over them.

MODEL QUESTION

For e.g. Annie's neighbour Fred is extending his house. The only way to do so is by using a crane. The crane's jib protrudes Annie's airspace when it is not in use. Annie has complained to Fred but was rudely insulted and told to "get lost". Annie now seeks your advice. Advise Annie.



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¹⁹ *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479.

²⁰ *Ibid* 488.

²¹ *Victoria Park Racing Co v Taylor* (1937) 58 CLR 479.