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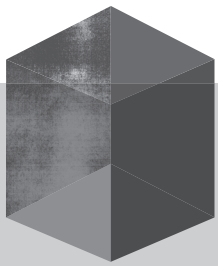
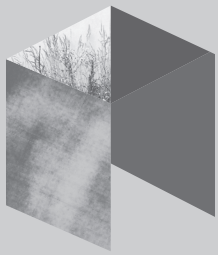
The Meaning of Land



This chapter focuses on the following areas of law:

A. The owner's rights to airspace
B. The owner's rights to minerals on or under the surface
C. The boundaries with neighbouring land
D. The owner's rights to things grown on the land.



A. The owner's rights to airspace

Introduction

[1.01] The Latin maxim *Cuius est solum, eius est usque ad coelum* means a person entitled to possession of land has exclusive rights upwards to the sun and downward to the centre of the earth: See generally the history of this maxim discussed by Lord Wilberforce in *Commissioner for Railways v Valuer-General* [1974] AC 328 at 351.

[1.02] The application of this maxim in England can be traced back to at least 1285, although it is suggested by Professor Butt that its origins may lie in Jewish law at least 1000 years earlier: Professor Butt (at [206]).

Lord Coke in his *Commentary on Littleton* in 1628 observed:

> The earth hath in law a great extent upwards, not only of water ... but of ayre and all other things even up to the heaven.

In practice, the cases do not literally apply this maxim. The courts do not restrain each and every encroachment of airspace, because an action in trespass is based on an interference with the possession of land. Some encroachments of airspace are not seen to interfere with the possession of the land.

Who may bring proceedings?

[1.03] In *Rodrigues v Ufton* (1894) 20 VLR 539, it was held that an owner of real estate can only bring an action to restrain trespass to airspace where either:

- the owner has rights to minerals on or under the surface;
- the owner is in possession; or
- the owner's reversionary interest will be affected.

It follows that in the absence of the owner's reversionary interest being adversely affected by any trespass to airspace, only the lessee of tenanted property can complain about a trespass to airspace.

Permanent encroachments

[1.04] 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.

For instance, in *Kelsen v Imperial Tobacco Co Limited* [1957] 2 QB 334, a permanent encroachment by a sign protruding from the building on one property into the airspace of the adjoining property was held to be a trespass.

In so holding, McNair J relied on the decision of Romer J in *Gifford v Dent* [1926] WN 336 where the judge had taken the view that a sign which was erected on the wall above the ground floor premises and which projected some four feet, eight inches (ie 1.4 metres) from the wall constituted a trespass over the plaintiff's airspace. McNair J at 345 held:

> That decision ... has been recognised by the textbook writers ... as stating the true law. It is not without significance that the legislature in the *Air Navigation Act 1920*, s 9 (replaced by s 40(1) of the *Civil Aviation Act 1949*), found it necessary expressly to negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land. It seems to me clearly to indicate that the legislature at least was not taking the same view of the matter as Lord Ellenborough in *Pickering v Rudd* (4 Camp. 219), but rather taking the view accepted in the later cases, such as the *Wandsworth District case* (13 QBD 904), subsequently followed by Romer J in *Gifford v Dent* [1926] WN 336. Accordingly, I reach the conclusion that a trespass and not a mere nuisance was created by the invasion of the plaintiff's airspace by this sign.

[1.05] Other cases of permanent encroachment include:

- *Wandsworth District Board of Works v United Telephone Co Limited* (1884) 13 QBD 904, where a case of wires swinging across a neighbour's property was held to be a trespass; and
- *Lemmon v Webb* [1895] AC 1 where the House of Lords held that an owner may cut branches and roots of a tree which encroach on their land from an adjoining property, (subject to tree preservation orders and other requirements of local councils and shires).

Temporary encroachments into airspace: the balloon and bullet cases

[1.06] In *Pickering v Rudd* (1815) 171 ER 70, Lord Ellenborough expressed the view that a person in an air balloon passing over a property would not be a trespasser. His Lordship at 71 observed that:

> I do not think it is a trespass to interfere with the column of air super incumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it so as that the shot must have struck the soil, was guilty of breaking and entering it … but I am by no means prepared to say, that firing across a field in vacuo, no part of the contents touching it, amounts to a clausum fregit …

[1.07] The English Court has declined to restrain the firing of bullets that passed over the plaintiff's land at a height of 75 feet (ie 22.5 metres): *Clifton v Bury* (1887) 4 TLR 8.

On the other hand, the Supreme Court of Tasmania has held that a plaintiff has sufficient rights to the airspace above his land to prevent his neighbour from shooting his cat while it was sitting on the roof of his shed: *Davies v Bennison* (1927) 22 Tas LR 52.

It is suggested that *Davies v Bennison* is reconcilable with *Pickering v Rudd* and *Clifton v Bury* because of the proximity of the cat to the structure on the land. It would appear that where the intrusion into the airspace occurs near the surface of the land, the court is more likely to determine that there has been a trespass than in the situation where the intrusion into the airspace occurs at a significant height above the surface.

Temporary encroachments into airspace: the aircraft cases

[1.08] There is some uncertainty in relation to aircraft flying over land. Insofar as the courts are prepared to extend Lord Ellenborough's reasoning in *Pickering v Rudd* to aircraft cases, aircraft flying above the surface of land will not normally be regarded as a trespass unless traversing the land near to the surface.

[1.09] Because the matter is not free from doubt and because of the increasing importance of aircraft in our modern society, Parliament has enacted legislation to ensure that aircraft flying over private land are not automatically liable for trespass to that land. See generally the *Damage by Aircraft Act 1952* (NSW), and the *Damage by Aircraft Act 1999* (Cth).

This legislation provides that as long as an aircraft traverses a property at a reasonable height, having regard to all the facts and circumstances, there will be no liability for trespass. On the other hand, as a legislative trade off, there is strict liability should the aircraft cause damage to personal property such as would occur if the aircraft crashed into the land or into a structure erected on the land.

Bernstein of Leigh (Baron) v Skyviews & General Limited

[1.10] In *Bernstein of Leigh (Baron) v Skyviews & General Limited* [1978] QB 479, the plaintiff was the owner and resident of a country property in Kent, England. The defendants operated a business that involved the taking of aerial photographs of properties. The defendants took aerial photographs of the plaintiff's property from a height of several hundred feet. The plaintiff objected to this taking place without his permission and commenced proceedings. In particular he contended that the

defendants were not entitled to rely on the statutory defences available under the United Kingdom equivalent of our civil aviation legislation on the grounds that it did not permit the use of airspace for the purposes of photography.

[1.11] Griffiths J rejected the submission that the plaintiff's rights in the airspace, continued to an unlimited height. His Honour noted the disapproval of the views of Lord Ellenborough in *Pickering v Rudd* by McNair J in *Kelsen v Imperial Tobacco Co* [1957] 2 QB 334.

While Griffiths J made it clear that he did not wish to cast any doubts on the correctness of the *Kelsen* decision on its own particular facts, Griffiths J held at 486-8:

> It may be a sound and practical rule to regard any incursion into airspace at a height which may interfere with the ordinary user of the land as a trespass rather than a nuisance. Adjoining owners then know where they stand; they have no right to erect structures overhanging or passing over their neighbours' land and there is no room for argument whether they are thereby causing damage or annoyance to their neighbours about which there may be much room for argument and uncertainty. But wholly different considerations arise when considering the passage of aircraft at a height, which in no way affects the user of the land ...
>
> I can find no support in authority for the view that a landowner's rights in the airspace above his property extend to an unlimited height ... The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science how offered in the use of airspace. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the enjoyment of his land and the structures on it, and declaring that above that height he has no greater rights in the airspace than any other member of the public ...

His Honour applied this test of 'what is necessary for the ordinary use and enjoyment of the land and the structures on it?' to the facts of the case and determined that the defendant's aircraft did not infringe any rights in the plaintiff's airspace and thus, no trespass was committed.

Temporary encroachments into airspace: the building cases

Woollerton & Wilson Limited v Richard Costain Limited

[1.12] In *Woollerton & Wilson Limited v Richard Costain Limited* [1970] 1 WLR 411 the English Court of Appeal was asked to restrain a building contractor from allowing a tower crane to encroach upon the airspace of the plaintiff's land. When the crane was in operation, and also when it was not in use, and the wind was blowing in a certain direction, the jib of the crane encroached upon the plaintiff's airspace at a height of 15 metres above the roof level.

The building contractor admitted the trespass but pointed out that the building would be substantially delayed as it had been planned around the use of the tower crane. There was evidence that the building contractors had offered the plaintiffs a substantial sum for the right to encroach on the airspace of the plaintiffs.

[1.13] The English Court of Appeal held that there was a trespass to the plaintiff's airspace, but, in the exercise of its discretion, the court delayed the operation of the injunction for sufficient time to allow the builder to complete the building.

The court so exercised its discretion because the building contractor had offered the plaintiffs a substantial sum of money as compensation and by reason of the fact that there was no earlier precedent to forewarn the building contractor of the possibility that it would be restrained from completing the building at a time when the work was in progress. The court was satisfied that the building contractor had not acted in flagrant disregard of the plaintiffs' rights.

[1.14] *Woollerton & Wilson Limited v Richard Costain Limited* has since been applied in Australia by the Full Court of the Supreme Court of Queensland in *Graham v KD Morris & Sons Limited* [1974] Qd R 1. There it was held that a builder should be restrained immediately from allowing a crane on the building site to encroach the airspace of neighbouring land. This builder acted in flagrant disregard of the plaintiff's rights and was of course on notice of the precedent set by the earlier case of *Woollerton & Wilson Limited v Richard Costain Limited*.

LJP Investments Pty Limited v Howard Chia Investments Pty Limited

[1.15] In *LJP Investments Pty Limited v Howard Chia Investments Pty Limited* (1989) 24 NSWLR 490, Hodgson J, as he then was, held that the defendant was liable for trespass to airspace because it allowed scaffolding to encroach over the plaintiff's land during the course of construction of a wall along the boundary between the defendant's land and the plaintiff's land.

In this case, the defendant was the owner of a property on which a substantial commercial development was being constructed. The defendant instructed its builder to erect scaffolding, which encroached over the plaintiff's land from a height of about 4.5 metres above ground level. The scaffolding extended about 16 metres along the boundary and protruded about 1.5 metres into the airspace above the plaintiff's property.

Senior Counsel for the defendant relied on *Bernstein of Leigh (Baron) v Skyviews & General Limited*. He argued that an encroachment into airspace is only a trespass if it occurs at a height and in a manner that interferes with the occupier's use of the land.

[1.16] Hodgson J at 495 held:

> If the defendant's submission is to the effect that entry into airspace is a trespass only if it occurs at a height and in a manner, which actually interferes with the occupier's actual use of land at the time, then I think it is incorrect.
>
> In my view, the rule stated in *Bernstein of Leigh (Baron) v Skyviews & General Limited* by Griffiths J was rather that a trespass occurred only if the incursion was at a height, which may interfere with the ordinary user of land, or is into airspace, which is necessary for the ordinary use and enjoyment of the land and structures upon it: see (at 486, 488). It was held that in that case that there was no trespass by an aeroplane flying many hundreds of feet above the land.
>
> On the other hand, in *Woollerton and Wilson Limited v Richard Costain Limited* and *Graham v KD Morris and Sons Pty Limited*, the incursions of crane jibs at heights of the order of 50 feet above the plaintiff's roof were treated as trespasses.

Hodgson J, at 495–6, went on to observe:

> I think the 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. Such a rule has the advantages stated by Griffiths J in *Bernstein of Leigh (Baron) v Skyviews & General Limited*.

In passing, Hodgson J stated that the weight of authority was against the view adopted in *Pickering v Rudd* that the incursion into the plaintiff's airspace of an overhanging sign was a nuisance rather than a trespass.

Bendal Pty Limited v Mirvac Pty Limited

[1.17] In *Bendal Pty Limited v Mirvac Pty Limited* (1991) 23 NSWLR 464, Bryson J was faced with a case where a defendant builder used protective mesh screens that encroached into the plaintiff's airspace from a high-rise building site. His Honour held that the encroachment was a trespass. He followed the decision by Hodgson J in *LJP Investments Pty Limited v Howard Chia Investments Pty Limited*.

On behalf of the defendant in this case, it was argued that *Bernstein of Leigh (Baron) v Skyviews & General Limited* was applicable.

[1.18] Bryson J distinguished this case at 470 as follows:

> At some point for which no precise definition is available, activities above the surface of land cease to have sufficiently close relationship with it to be protected by the law of trespass, the modern example being furnished by the decision of Griffiths J in *Bernstein of Leigh (Baron) v Skyviews & General Limited* [1978] QB 479 relating to over flying aircraft.
>
> The activities complained of in the present cases are supported by the ground surface. They have a clear relation to ownership of the right to control the ground surface and they do not involve the kind of problems presented by overflying aircraft for trespass law. Hodgson J expressed the matter this way:
>
> > I think the relevant test is not whether the incursion actually interfered with the occupier's actually use of the 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.
>
> The defendants' own activities demonstrate that putting building works in position at a great height, including screens and the operation of cranes are ordinary uses of land, which an occupier may see fit to undertake, because the defendants are undertaking them themselves in relation to the second defendant's land and at the height complained of. It is not relevant to the ambit of protection of trespass law that the plaintiff himself is not at present undertaking corresponding activities and does not intend to in the near future. The defendant's own conduct demonstrates the advantage of owning the land and controlling such activities.
>
> In my view, the defendant's conduct complained of relating to the screen is a continuing trespass and the defendant's own evidence makes it in every way plain that the defendants intend that it should continue and that it is highly probable that it will continue unless restrained by injunction.

[1.19] Bryson J noted that the defendant could have carried out the building working in a manner that did not involve such a serious encroachment, although this would have involved greater cost for the builder. At 472, his Honour observed:

> The defendants have adopted techniques, which involve encroachment, although other techniques, which would not have involved such serious encroachment, but would have involved a greater cost, were available to them and still are available ...
>
> The resource represented by the plaintiff's airspace is not available like natural resources of the countryside for them to take as they find suitable, any more than they could count on using other people's bricks or other resources. At the heart of the litigation is a very simple question of using or not using other people's property, and this disqualifies the defendants from any real claim to consideration of hardships which they have incurred.

[1.20] Although his Honour ordered that the defendant be restrained from allowing the protective mesh screens to encroach the plaintiff's airspace, His Honour declined to restrain the defendant's encroachment, constituted as what is known as 'weathervaning'. In this respect, his Honour held at 467:

> Another encroachment related to the crane is referred to as weathervaning. When the crane is not under load it is allowed to act as a weathervane, and it moves with the wind with the jib at an elevation of 45 degrees at which it has a radius expressed horizontally of about 23 metres. The free movement of the crane would carry it from time to time, in an uncontrolled way over the plaintiff's building.
>
> I do not take a very grave view of the encroachment constituted by allowing the crane to weathervane. Any encroachment has, I suppose, some discernable risk but the free movement of the crane has relatively small discernable risk, particularly when compared with the use of the crane to pass loads over the plaintiff's building. There is a good practical reason for allowing the crane to weathervane, as this minimises the stresses produced on the tower and the crane structure generally by wind.

Can these cases be reconciled?

[1.21] There are clearly differences of approach in the abovementioned cases.

In the cases discussed under the heading 'Permanent encroachments', such as *Kelsen*, there is a rejection of certain comments made by Lord Ellenborough in *Pickering v Rudd*. On the other hand, in *Bernstein of Leigh (Baron) v Skyviews & General Limited*, Griffiths J is critical of the views expressed by the court in *Kelsen*, although Griffiths J was at pains to point out that he did not disagree with the outcome of the facts of *Kelsen*.

In each of the cases *LJP Investments Pty Limited v Howard Chia Investments Pty Limited* and *Bendal Pty Limited v Mirvac Pty Limited*, the Supreme Court of New South Wales rejected submissions that invited the court to apply the test annunciated by Griffiths J in *Bernstein of Leigh (Baron) v Skyviews & General Limited* to the facts of these building cases.

Certainly, the diverse reasoning by the judges in these cases is difficult to reconcile. On the other hand, it is suggested that they are reconcilable if one applies different principles to the balloon, bullet and aircraft cases, on the one hand, to those that have been applied in other situations.

On balance, it would appear that this is an area of law where judicial guidance at the appellate level is required to clarify the law in relation to trespass to airspace.

Enforcement

[1.22] If there is a trespass, an occupier (or an owner not in occupation insofar as the reversionary interest is affected) can:

- exercise a right of self-help by for example, evicting a trespasser or by removing an encroaching wall: *Traian v Ware* [1957] VR 200;
- claim damages for the loss suffered by the plaintiff. Sometimes it will be possible for the plaintiff to recover restitutionary damages based on the benefit to the defendant by reason of the trespass or exemplary damages by way of punishment of the defendant. See generally *LJP Investments v Howard Chia Investments (No. 2)* (1990) 24 NSWLR 499.
- seek an injunction: *Woollerton & Wilson Limited v Richard Costain Limited* [1970] 1 WLR 411; *Bendal Pty Limited v Mirvac Pty Limited* (1991) 23 NSWLR 464.

Legislation regulating rights to airspace and access to land at ground level

[1.23] The above law relating to trespass to airspace and land at ground level in New South Wales is subject to the following legislation:

- Section 88 K of the *Conveyancing Act 1919* (NSW);
- *Access to Neighbouring Land Act 2000* (NSW);
- *Damage by Aircraft Act 1952* (NSW);
- *Damage by Aircraft Act 1999* (Cth); and
- *Encroachment of Buildings Act 1922* (NSW).

Section 88 K of the *Conveyancing Act 1919* (NSW)

[1.24] This is dealt with below, in the chapter on easements under the heading 'Creation of easements by statute—Section 88 K of the *Conveyancing Act*'.

Access to Neighbouring Land Act 2000 (NSW)

[1.25] Section 7 of the *Access to Neighbouring Land Act 2000* (NSW) (the '*Access Act*') provides:

> (1) A person who, for the purpose of carrying out work on land owned by the person, requires access to adjoining or adjacent land may apply to a Local Court for a neighbouring land access order.

(2) A person who, for the purpose of carrying out work on land owned by another person, requires access to adjoining or adjacent land may apply to a Local Court for a neighbouring land access order with the consent of the person on whose behalf the work is to be carried out.
(3) The Local Court may waive the requirement for consent under subsection (2) if it thinks it appropriate to do so in the circumstances.
(4) A person may apply for a neighbouring land access order even if access to the land concerned, for the purposes for which access is required, may be obtained by way of an easement imposed by an order under section 88K of the *Conveyancing Act 1919*. However, a person may not apply for a neighbouring land access order if access to the land concerned, for the purposes for which access is required, may be obtained or granted under any other provision of an Act.

Section 8 of the *Access Act* provides:

(1) A person who, either solely or jointly, is entitled to the use of a utility service or a proposed utility service but who is not the owner of the whole or part of the land on which it is located or proposed to be located and who requires access to that land for the purpose of carrying out work on or in connection with the utility service may apply to a Local Court for a utility service access order.
(2) A person may apply for a utility service access order even if:
  (a) There is an easement or other right of access to the land concerned to carry out the work, or
  (b) Access to the land concerned, for the purposes for which access is required, may be obtained by way of an easement imposed by an order under section 88K of the *Conveyancing Act 1919*.
(3) However, a person may not apply for a utility access order if access to the land concerned, for the purposes for which access is required, may be obtained or granted under any other provision of an Act.

[1.26] A person who requires access for purposes referred to in both ss 7 and 8 may apply to a Local Court for both a neighbouring land access order and a utility service access order: s 9 of the *Access Act*.

Section 10 of the *Access Act* requires an applicant for an access order to give at least 21 days' notice of the lodging of the application and the terms of any order sought to:

- the owner of the land to which access is sought under the application; and
- any other person entitled to the use of any utility service on which work is proposed to be carried out; and
- any other person the applicant has reason to believe will be affected by the order.

The Local Court may direct that notice of an application be given to a person or that notice be given in a specified manner or within a specified period. The Local Court may waive the requirement to give notice or vary the period of notice under this section if it thinks it appropriate to do so in the circumstances: Section 10 of the *Access Act*.

A Local Court may make a neighbouring land access order if it is satisfied that, for the purpose of carrying out work on land, access to adjoining or adjacent land is required and it is satisfied that it is appropriate to make the order in the circumstances of the case.

[1.27] On the other hand, s 11 of the *Access Act* provides that a Local Court must not make a neighbouring land access order unless it is satisfied:

- that the applicant has made a reasonable effort to reach agreement with every person whose consent to access is required as to the access and carrying out of the work; and
- if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with ss 10 and 34 (if applicable).

[1.28] The types of work for which neighbouring land access orders may be made are dealt with in s 12 of the *Access Act*. This section provides:

> (1) A neighbouring land access order may be made for one or more of the following purposes in connection with the land on which the work is to be carried out:
>
> (a) Carrying out work of construction, repair, maintenance, improvement, decoration, alteration, adjustment, renewal or demolition of buildings and other structures,
>
> (b) Carrying out inspections for the purpose of ascertaining whether any such work is required,
>
> (c) Making plans in connection with such work,
>
> (d) Ascertaining the course of drains, sewers, pipes or cables and renewing, repairing or clearing them,
>
> (e) Ascertaining whether any hedge, tree or shrub is dangerous, dead, diseased, damaged or insecurely rooted,
>
> (f) Replacing any hedge, tree or shrub,
>
> (g) Removing, felling, cutting back or treating any hedge, tree or shrub,
>
> (h) Clearing or filling in ditches,
>
> (i) Carrying out any work that is necessary for, or incidental to, anything referred to in paragraphs (a)-(h).
>
> (2) This section does not limit the kinds of work with respect to land for which a neighbouring land access order may be made.

Section 14 of the *Access Act* has similar provisions in relation to the various types of work for which utility service access order may be made.

[1.29] A Local Court, pursuant to s 13 of the *Access Act* may make a utility service access order if it is satisfied that access to land is required for the purpose of carrying out work on or in connection with a utility service situated on the land and it is satisfied that it is appropriate to make the order in the circumstances of the case.

On the other hand, s 13 of the *Access Act* provides that the court must not make a utility service access order unless it is satisfied that:

- the applicant has made a reasonable effort to reach agreement with every person whose consent to access is required as to the access and carrying out of the work, and if the requirement to give notice has not been waived;
- the applicant has given notice of the application in accordance with ss 10 and 34 (if applicable).

[1.30] Before determining an application for an access order, the Local Court is required by s 15 of the *Access Act* to consider the following matters:

- whether the work cannot be carried out or would be substantially more difficult or expensive to carry out without access to the land the subject of the application; and
- whether the access would cause unreasonable hardship to a person affected by the order.

[1.31] Section 16 of the *Access Act* sets out the conditions that may be imposed by the Local Court when making an access order, while s 17 of the *Access Act* sets out the form of access orders.

The general effect of neighbouring land access orders is dealt with in s 18 and the general effect of utility service access orders are dealt with in s 19. Section 20 of the *Access Act* empowers the Local Court to give authority to carry out ancillary activities.

[1.32] Section 21 of the *Access Act* sets out the obligations on an applicant under the Act to restore the land and indemnify the owner of the land for any damage arising from access being given by the Local Court. This section provides that the applicant must:

(a) restore the land concerned to the same condition it was in before the access, so far as is reasonably practicable, on or before the date specified in the order for that purpose, and
(b) indemnify the owner of the land to which access is granted against damage to the land or personal property arising from the access.

[1.33] The owner of the land to which access is granted must permit access to the land in accordance with the order and this Act: s 22 of the *Access Act*.

A person who is not a party to the proceedings for an access order, or expressly bound by the order, is not bound by the access order: s 23(1) of the *Access Act*.

A successor in title to an owner of land to which access is granted is bound by that order in the same way as that owner: s 23(2) of the *Access Act*.

An access order does not confer on any party to the order any interest in the land to which access is granted sufficient to enable any such person to place a caveat on the title to the land under the *Real Property Act 1900*: s 23(3) of the *Access Act*.

[1.34] A Local Court may vary or revoke an access order on application by the applicant for the order or by any other person affected by the order: s 24 of the *Access Act*.

[1.35] Section 25 of the *Access Act* deals with the circumstances when access orders cease to be in force.

[1.36] Section 26 of the *Access Act* deals with compensation. This section provides that:

(1) A Local Court may order that a person to whom an access order is granted pay compensation to the owner of the land to which access is granted for loss, damage or injury, including damage to personal property, financial loss and personal injury arising from the access.
(2) Compensation is not payable under this section for loss of privacy or inconvenience suffered by the owner solely as a result of access authorised by the access order or solely because of the making of the order.
(3) An order for compensation may be made at any time and may be made whether or not the access order is in force.

(4) An action for an order for compensation may not be brought more than 3 years after the last date on which access occurred under the order.

(5) Any such order is enforceable as if it were a judgment for that amount by a Local Court exercising jurisdiction under the *Local Courts (Civil Claims) Act 1970*.

[1.37] The costs of an application for an access order are payable at the Local Court's discretion: s 27 of the *Access Act*. In determining whether the whole or part of the costs of an application for an access order is payable by a party, the Local Court may consider the following matters:

- any attempts by the parties to reach agreement before the proceedings;
- whether the refusal to consent to access was unreasonable in the circumstances;
- any other matter it thinks fit.

[1.38] Section 28 of the *Access Act* deals with the consequences for a person who fails to comply with an access order.

[1.39] A Local Court must order the transfer of the whole or any part of proceedings for compensation under this Act to the Land and Environment Court, if the amount of any compensation or damages involved is likely to exceed the amount of the Local Court's jurisdiction in an action for the recovery of a debt under the *Local Courts (Civil Claims) Act 1970*: s 29(1) of the *Access Act*.

[1.40] The Land and Environment Court has, in respect of proceedings transferred under this section and in addition to any other jurisdiction and functions it has, the same jurisdiction and functions as are conferred on a Local Court by or under this Act, except in relation to ss 30 and 31: s 29(4) of the *Access Act*.

[1.41] If, in proceedings before it under this Act, a question of law arises, a Local Court may decide the question or refer it to the Land and Environment Court for decision: s 30(1) of the *Access Act*.

On deciding the question, the Land and Environment Court must remit its decision to the Local Court and that court must not proceed in a manner, or make an order or decision, that is inconsistent with the decision of the Land and Environment Court: s 30(3) of the *Access Act*.

[1.42] A party to proceedings before a Local Court for an access order may appeal within 30 days after the decision to grant or not to grant the access order is made to the Land and Environment Court, on a question of law, against a decision to grant or not to grant an access order: s 31 of the *Access Act*.

[1.43] The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The review is to be undertaken as soon as possible after the period of five years from the date of assent to this Act. A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of five years: s 40 of the *Access Act*.

Encroachment of Buildings Act 1922 (NSW)

[1.44] The *Encroachment of Buildings Act 1922* (NSW) gives the Land and Environment Court power to settle encroachment disputes between adjacent landowners. This includes the power to enable encroachments to remain in place: *Cuthbert v Hardie* (1989) 17 NSWLR 321 at 323.

The Act gives the court jurisdiction to make orders in respect of 'encroachments' by 'substantial buildings' of a 'permanent character'.

The definition of 'building' is dealt with by s 2.

The meaning of 'substantial building' of a 'permanent character'

[1.45] The requirement of 'substantial building' of a 'permanent character' has been held to include:

- a concrete driveway: *Ward v Griffiths* (1987) 9 NSWLR 458;
- a concrete-block wall: *Cuthbert v Hardie* (1989) 17 NSWLR 321;
- a retaining wall: *Boed Pty Limited v Seymour* (1989) 15 NSWLR 715;
- protruding floor beams: *Droga v Proprietors, SP 51722* (1996) 93 LGERA 120; and
- a weld-mesh fence set in concrete: *Ex parte van Achterberg* [1984] 1 Qd R 160.

[1.46] The requirement of 'substantial building' of a 'permanent character' does not include small structures such as a swimming pool's pump house and filter: *Cuthbert v Hardie* (1989) 17 NSWLR 321, or courtyard paving: *Cantamessa v Sanderson* (1993) 6 BPR 13,127.

[1.47] The encroachment may be either intentional or unintentional: *Droga v Proprietors Strata Plan 51722* (1996) 93 LGERA 120: *Boed Pty Limited v Seymour* (1989) 15 NSWLR 715.

Either the adjacent owner or the encroaching owner may apply to the court for relief pursuant to s 3(1) of the *Encroachment of Buildings Act 1922* (NSW).

Legislation as to relief

[1.48] The court is empowered by s 3(2) of the Act to make such orders as it may deem just with respect to:

- the payment of compensation to the adjacent owner;
- the conveyance, transfer or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest therein, or any easement right or privilege in relation thereto;
- the removal of the encroachment.

Pursuant to s 3(3) of the Act, the court may grant or refuse the relief or any part thereof as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider amongst other matters:

- the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be;
- the situation and value of the subject land, and the nature and extent of the encroachment;
- the character of the encroaching building, and the purposes for which it may be used;
- the loss and damage that has been or will be incurred by the adjacent owner;
- the loss and damage that would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment;
- the circumstances in which the encroachment was made.

[1.49] The court may refer to any registered land surveyor (within the meaning of the *Surveying Act 2002*), or to any registered real estate valuer (within the meaning of the *Valuers Registration Act 1975*), any question involved in proceedings on the application: s 3(4) of the Act.

Compensation as a remedy

[1.50] The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant to the encroaching owner shall, if the encroaching owner satisfies the court that the encroachment was not intentional and did not arise from negligence, be the land value of the subject land, and in any other case three times such land value: s 4 of the Act.

The court in determining whether the compensation shall exceed this minimum, and if so by what amount, shall have regard to:

- the value, whether improved or unimproved, of the subject land to the adjacent owner;
- the loss and damage that has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner;
- the circumstances in which the encroachment was made.

The order for payment of compensation shall except so far as the court may therein otherwise direct, upon registration operate as a charge upon the land of the encroaching owner ie the parcel of land contiguous to the boundary beyond which the encroachment extends, or such part thereof as the court may specify in the order in priority to any charge created by the encroaching owner or by his or her predecessor in title: s 5 of the Act.

Where the encroaching owner is not an owner

[1.51] Where the encroaching owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court is empowered by s 6 of the Act to determine:

- by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately;
- to whom, for whose benefit and upon what limitations the conveyance transfer or lease of the subject land or grant in respect thereof is to be made.

[1.52] Where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court is empowered by s 7 of the Act to determine:

- to whom, for whose benefit and in what proportions the compensation is to be paid or applied; and
- by whom the conveyance transfer or lease of the subject land or grant in respect thereof is to be made.

Different forms of relief

[1.53] Where the court decides to grant relief, it may order the ownership of the land on which the encroachment stands to be transferred. This occurred in *McGeever v Kritsotakis* (1992) NSW ConvR 55-635 at 59-663 and also in a number of South Australian decisions: *Carlin v Mladenovic* (2000) 77 SASR 302; *Gladwell v Steen* (2000) 77 SASR 310; *Bunney v South Australia* (2000) 77 SASR 319.

The court may, in its discretion, grant a lesser interest such as:

- an easement: *Re Marsh* (1941) 42 SR (NSW) 21; *Kostis v Devitt* (1979) 1 BPR 9231; *Ward v Griffiths* (1987) 9 NSWLR 458; or
- an easement for the life of the encroachment: *Cantamessa v Sanderson* (1993) 6 BPR 13,127; or
- a lease, the possibility of which was recognised in *Kostis v Devitt* (1979) 1 BPR 9231 at 9236.

Alternatively, the court may order that:

- the encroachment be demolished: *Perdita Pty Limited v Lark* (1987) ANZ ConvR 280;
- the encroaching structure be relocated so that it is within the proper boundaries: *Vaughan v Byron Shire Council* (1999) 103 LGERA 321 at 333–4; or
- there be no relief ordered at all: *Haddans Pty Limited v Nesbitt* [1962] QWN 44 (which concerned a carport); *Ex parte van Achterberg* [1984] 1 Qd R 160 (which concerned a fence); *Cuthbert v Hardie* (1989) 17 NSWLR 321 (which concerned an encroaching wall); *Euchtritz v Watson* (1993) 6 BPR 13,582 (which concerned a tennis court fence).

Damage by Aircraft Act 1952 (NSW)

[1.54] Under this Act, no action lies in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case are reasonable, or the ordinary incidents of such a flight, so long as the provisions of the *Air Navigation Regulations* are satisfied: s (2)(1) of the Act.

On the other hand, where damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages shall be recoverable without proof of negligence or intention or other cause of action, as if the damage had been caused by the willful act, neglect, or default of the owner of the aircraft.

[1.55] It should, however, be noted that where material loss or damage is caused as aforesaid in circumstances in which:

- damages are recoverable in respect of the said loss or damage by virtue only of the foregoing provisions of this subsection; and
- a legal liability is created in some person other than the owner to pay damages in respect of the said loss or damage,

the owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage: s 2(2) of the Act.

[1.56] Where the aircraft concerned has been bona fide demised, let or hired out for a period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, this section shall have effect as if for references therein to the owner there were substituted references to the person to whom the aircraft has been so demised, let or hired out: s 2(3) of the Act.

Damage by Aircraft Act 1999 (Cth)

[1.57] The *Damage by Aircraft Act 1999* (Cth) (the *Commonwealth Act*) must be read in tandem with the *Damage by Aircraft Act* (NSW).

Section 9(4) of the *Commonwealth Act* provides that this Act applies in relation to Commonwealth aircraft; aircraft owned by a foreign corporation or a trading or financial corporation (within the meaning of para 51(xx) of the *Constitution*); or aircraft (including foreign aircraft) engaged in:

- international air navigation; or
- air navigation in relation to trade and commerce with other countries and among the states; or
- air navigation conducted by a foreign corporation or a trading or financial corporation (within the meaning of para 51(xx) of the *Constitution*); or
- air navigation to or from, or within, the Territories; or
- landing at, or taking off from, a place acquired by the Commonwealth for public purposes.

[1.58] Section 10(1) of the *Commonwealth Act* applies where a person or property on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction caused by:

- an impact with an aircraft that is in flight, or that was in flight immediately before the impact happened; or
- an impact with part of an aircraft that was damaged or destroyed while in flight; or
- an impact with a person, animal or thing that dropped or fell from an aircraft in flight.

Section 10(2) makes the following people jointly and severally liable in respect of the injury, loss, damage or destruction:

- the operator of the aircraft immediately before the impact happened;
- the owner of the aircraft immediately before the impact happened;
- if the operator of the aircraft immediately before the impact happened was authorised to use the aircraft but did not have the exclusive right to use it for a period of more than 14 consecutive days—the person who so authorised the use of the aircraft;
- if the operator of the aircraft immediately before the impact happened was using the aircraft without the authority of the person entitled to control its navigation—the person entitled to control the navigation of the aircraft.

Section 10(2A) exempts from liability any person who, immediately before the impact happened, was the owner of the aircraft; and did not have an active role in the operation of the aircraft; and either:

- there was a lease or other arrangement in force (whether or not with the owner) under which another person had the exclusive right to use the aircraft; or
- another person had the exclusive right to use the aircraft and there was an agreement in force under which the owner provided financial accommodation in connection with the aircraft.

[1.59] The recovery of damages is dealt with by s 11 of the *Commonwealth Act*, which provides that:

> Damages in respect of an injury, loss, damage or destruction of the kind to which section 10 applies are recoverable in an action in a court of competent jurisdiction in Australian territory against all or any of the persons who are jointly and severally liable under that section in respect of the injury,

> loss, damage or destruction without proof of intention, negligence or other cause of action, as if the injury, loss, damage or destruction had been caused by the wilful act, negligence or default of the defendant or defendants.

B. The owner's rights to minerals on or under the surface

Minerals

[1.60] A mineral is anything capable of being mined.

At common law, the surface owner's rights extend downwards sufficiently to permit the extraction of minerals.

[1.61] In the absence of any express or implied limitation of rights, an owner of land, at common law is entitled to the subsoil, 'cuius est solum, eius est usque ad coelum et ad infernos', and to the minerals therein: *Wade v NSW Rutile Mining Co Pty Limited* (1969) 121 CLR 177.

It is however possible for a person other than the owner of the land to own minerals on or under the land.

[1.62] A severance of minerals from the rest of the land may be affected by:

- a Crown grant itself by way of a reservation of the minerals to the Crown; or
- an assurance or reservation contained in an instrument operating between the owner of the land and another person.

[1.63] The reservation of minerals implies the existence of a right to mine them, where such a right is not specifically reserved: *Borys v Canadian Pacific Railways* [1953] AC 217.

The royal minerals

[1.64] Even in the absence of an express reservation, the royal minerals (ie gold and silver) are vested in the Crown at common law. The royal minerals do not pass from the Crown unless specifically stated: *Woolley v Attorney General of Victoria* (1877) 2 App Cas 163; *Attorney-General v Great Cobar Copper Mining Co* (1900) 21 NSWR 351.

The rights of the Crown to gold were expressly reserved by the Statutes 16 Vict, No 43, 20 Vict, No 29, s 31, and 30 Vict, No 8, s 26: see *R v Wilson* (1874) 12 SCR 258.

Mining Act 1906 (NSW)

[1.65] The *Mining Act 1906* defines minerals to be:

> silver, copper, tin, iron, antimony, cinnabar, galena, nickel, cobalt, platinum, bismuth, manganese, marble, kaolin, mineral pigments, mercury, lead, wolfram, coal, shale, scheelite, chromite, opal, turquoise, diamond, ruby, sapphire, emerald, zircon, apatite and other phosphates, serpentine, molybdenite, alunite and alum, barytes, asbestos, gypsum, monazite, and any other substance which may from time to time be declared a 'mineral' within the meaning of this Act by proclamation of the Governor published in the Gazette.

Section 8 of the *Mining Act 1906* provides:

> Nothing in this Act, except so far as is herein expressly enacted, shall abridge or control the prerogative rights and powers of Her Majesty in respect to gold mines and silver mines.

The mining of coal

[1.66] All reservations of coal mines contained in Crown grants made in New South Wales before 29 January, 1850, were abandoned by the Crown by proclamation in the Government Gazette of that date, except those affecting such lands as were comprised in any city, township, or village.

Under s 2 of the *State Coal Mines Act 1912* (NSW), the Governor, by proclamation, is empowered to set apart Crown lands which contains coal or may be required for coal mining operations under the Act.

Section 3 of the *State Coal Mines Act 1912* (NSW) provides that private land alienated without any reservation of minerals to the Crown or alternatively, private or Crown lands held under mineral lease from the Crown, may be purchased on offer from the owner or lessee as the case may be. Section 4 provides that the Minister may resume such land for coalmines.

Petroleum products

[1.67] All petroleum and helium existing in a natural state on or below the surface of any land belongs to the Crown: s 6(1) of the *Petroleum Act 1955* (NSW). This is so regardless of whether these minerals were or were not originally reserved to the Crown, because s 6(2) provides that all Crown grants and leases shall, whether granted before or after the commencement of the section, be deemed to contain a reservation to the Crown of all petroleum and helium existing in a natural state on or below the surface of the land.

Petroleum is defined by s 3 of the *Petroleum Act 1955* (NSW) to mean:

> naturally occurring hydrocarbons in a free state, whether in the form of natural gas or in a liquid or solid form, but does not include—
>
> (a) helium occurring in association with petroleum; or
>
> (b) coal or shale or any substance which may be extracted from coal, shale or other rock by the application of heat or by a chemical process.

Commonwealth powers

[1.68] The Commonwealth *Constitution* has not divested the states of their control of min-erals. Where, however, property is vested in the Commonwealth by virtue of the Constitution or where it is compulsorily acquired under the *Lands Acquisition Act 1955* (Cth) all minerals pass to the Commonwealth: *Commonwealth v New South Wales* (1923) 33 CLR 1.

The *Atomic Energy Act 1953* (Cth) has conferred wide powers on the Commonwealth. Under s 41, a person may be authorised by the Commonwealth, to carry on mining and treatment operations on private land in relation to 'prescribed substances', which are defined in s 5 as being 'uranium, thorium,

plutonium, neptunium, or any of their respective compounds and any other substance specified in regulations as one which is, or may be, used for or in connection with production of, or research into atomic energy'.

Summary of the law on minerals

[1.69] The position in relation to minerals in New South Wales has been helpfully summarised by Professor Woodman at 30, as follows:

- The Commonwealth has certain powers, for defence purposes, in relation to 'prescribed substances'. It also has the power of 'acquisition' of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws': *Commonwealth of Australia Constitution Act 1900*, s 51 (xxxi). In conjunction with the defence power, this power authorises the Federal Government to acquire and control such mineral rights and resources as are essential for the defence of the Commonwealth.
- The Commonwealth has title to minerals vested in it under s 85 of the Constitution, or compulsorily acquired by it.
- All petroleum and helium are, by statute, vested in the Crown right of the State: *Petroleum Act 1955*, s 6. It would seem, however, that if the Commonwealth resumes the land, the title of the Commonwealth would prevail over that conferred by the State Statute.
- Gold and silver are reserved to the Crown, by virtue of the prerogative and remain vested in the Crown unless and until granted in express terms.
- Other minerals and metals may, or may not, be reserved to the Crown, the matter being dependent upon the terms of the Crown grant. If not reserved to the Crown, they will vest in the surface owner, unless he or one of his predecessors in title has severed the minerals from the rest of the land by a severance in favour of third parties.

C. The boundaries with neighbouring land

Meaning of boundaries

[1.70] Lines on the surface of the earth define the horizontal boundaries of land. As to the vertical boundaries, the theoretical starting point is that land usually extends down to the centre of the earth and up to the sun.

Land, can be limited in height or depth. For instance:

- a transfer may reserve to the transferor all land more than a certain height above the Australian Standard Height Datum; or
- a Crown grant may reserve to the Crown all land more than a certain depth below the surface.

A boundary may be a natural one, such as the seashore, or the shore or bank of a lake or stream: see (1968) 41 *ALJ* 532. Alternatively, land may have a non-natural boundary.

Tidal water boundaries

[1.71] Land adjoining tidal water is bounded by the mean high water mark, unless the contrary is shown. The contrary can be shown by showing that the title has a different boundary.

If a Crown grant or a transfer describes land as adjoining tidal water, the natural inference is that the title boundary was the actual high water mark at the time of the Crown Grant: see Moore, 'Land by the water' (1968) 41 *ALJ* 532.

[1.72] The mean high water mark is taken to be at a point of the line of the medium high tide between the spring and neap, ascertained by taking the average medium tides during the year: *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Limited* [1915] AC 599; *Humphrey v Burrell* [1951] NZLR 262; *Verrall v Nott* (1939) 39 SR (NSW) 89; *Government of the State of Penang v Beng Hong Oon* [1972] AC 425.

[1.73] Such a boundary is ambulatory. If the high water mark retreats as a result of natural accretion, the additional land accrues to the landward title. As Moore stated at 534:

> Land described as being bounded by the sea is not excluded from the benefit of accretion because measurements are also given.

A boundary may be defined by measurement or by reference to the mean high water mark. Where tidal water constitutes a boundary, the mean high water mark is taken, in the absence of any contrary indication in the Crown grant, to be the correct line of demarcation. Any land below that line is vested in the Crown: *Hill v Lyne* (1893) 14 NSWLR 449.

[1.74] Crown grants in New South Wales frequently contain a reservation to the Crown of a strip of land above high water mark; typically 30.48 metres (ie 100 feet). In this situation, the line is determined by reference to the mean high water mark at the date of the grant: *McGrath v Williams* (1912) 12 SR (NSW) 477. Contrast *Attorney-General v Merewether* (1905) 5 SR (NSW) 157, where it was held that the lagoon in question was not an 'inlet of the sea' within the meaning of the Crown grant and so the reservation of 100 feet did not apply.

Accretion and erosion in relation to tidal waters

[1.75] It follows that where the boundary turns out to be defined by the mean high water mark or by reference to the mark, and the mark shifts by accretion or erosion, the boundary shifts.

The above rules apply in relation to land under the *Real Property Act*, notwithstanding the issue of a certificate of title showing the boundary in a plan: *Verrall v Nott* (1939) 39 SR (NSW) 89.

The existence of a certificate of title to land with a water frontage, even if there is also a certificate of title to the foreshore and sea bed, does not exclude the doctrine of accretion provided the true boundary is ambulatory: *Verrall v Nott* (1939) 39 SR (NSW) 89, 99; *Butcher v Lachlan Elder Realty Pty Limited* [2002] NSWCA 237.

Where there is an accretion as a result of artificial works, the boundary does not change: *Attorney General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750. The boundary does however change where the accretion is intentionally assisted by artificial means: *Verrall v Nott* (1939) 39 SR (NSW) 89.

If accretion occurred on the water frontage, title to the additional land would have accrued in favour of the owner of the waterfront lot. Once reclamation work is undertaken, however, the boundary to the mean high water mark is fixed, as the title to reclaimed land is in the owner of the sea bed, and not the frontager: *Attorney General of Southern Nigeria v Holt* [1915] AC 599, 615; *Butcher v Lachlan Elder Realty Pty Limited* [2002] NSWCA 237; and Moore at 536.

Non-tidal water boundaries

[1.76] The adjoining owners own the bed of non-tidal water, such as occurs in relation to part of a river or a creek or a lake that is above tidal reach. The boundary is taken to be in the middle unless a contrary intention is expressed. This is known as the *ad medium filum* rule.

A contrary intention may result in the boundary being defined by measurement or as being the bank of the non-tidal water.

A Crown grant or a transfer describing land as adjoining non-tidal water is presumed to include the bed of the water as far as the middle line, subject to any contrary intention.

This presumption applies to Torrens Title land: *Lanyon Pty Limited v Canberra Washed Sand Pty Limited* (1966) 115 CLR 342; s 45A(1) of the *Real Property Act 1900* (NSW).

Accretion and erosion in relation to non-tidal waters

[1.77] If the boundary turns out to be the middle line and either bank shifts by accretion or erosion, the boundary shifts proportionately. If the boundary turns out to be the bank, and the bank shifts by accretion or erosion, the boundary shifts to the new position of the bank.

In relation to rivers, the boundary line may vary by accretion or encroachment: *Hindson v Ashby* [1896] 2 Ch 1.

The doctrine of accretion does not apply and is deemed to have never applied to a non-tidal lake: *Crown Lands Consolidation Act 1913* (NSW) s 235A(6).

Avulsion, which is where there is a sudden movement in the normal water mark, after say an earthquake, does not alter the boundary: *Humphrey v Burrell* [1951] NZLR 262. This applies in the case of both tidal and non-tidal waters: *Thakurain Ritraj Koer v Thakurain Sarfaraz Koer* (1905) 21 TLR 637.

The *ad medium filum* rule

[1.78] There is a presumption at law that the bed of a non-tidal stream and the soil of a highway belong to adjoining owners on each side up to the centre line of the stream or road. The rule does not apply to tidal waters: *Gann v The Free Fishers of Whitsable* (1865) 11 HLC 192; 11 ER 1305.

In their book, *Baalman, The Torrens System in New South Wales*, 2nd edn, Law Book Co, the learned authors Professor Woodman and PJ Grimes at 222 summarised the position as follows:

> In regard to streams, the rule was held by the Privy Council to apply to Crown grants in New South Wales: *Lord v Commissioners of Sydney* (1859) 12 Moo PC 473; 14 ER 991; followed by *Attorney-General v White* (1925) 26 SR (NSW) 216.

In regard to roads, the Full Court of the Supreme Court of New South Wales held that the presumption did not apply to Crown grants of land described as bounded by a road: *Tierney v Loxton* (1891) 12 LR (NSW) 308. But in a later case, *Harris v Municipal Council of Sydney* (1910) 10 SR (NSW) 860, the Full Court held that the *ad medium filum* rule applied to a road created by a private individual; see also *Re Priddle* (1916) 16 SR (NSW) 54.

The rule did not apply to land bounded by a salt-water lagoon: *Williams v Booth* (1910) 10 CLR 341.

[1.79] The application of the rule in New South Wales that the bed of a non-tidal stream and the soil of a highway belong to adjoining owners on each side up to the centre line of the stream or road has been restricted by legislative exceptions. It does not apply and is deemed never to have applied to:

- Crown grants described as bounded by a non-tidal lake: *Crown Lands Consolidation Act 1913*, s 235A(6);
- where under the *Crown Lands Consolidation Act 1913*, the bed of a river has been reserved from sale or lease, the owner of land adjoining the river is not entitled to any rights 'of access over or to the user of any part of the bed of the river' other than rights under the *Water Act 1912*: *Crown Lands Consolidation Act 1913*, s 235A(8);
- land granted by the Crown that is bounded by a road created by the Crown: *Crown Lands Consolidation Act 1913*, s 235A(9);
- public roads in a municipality or shire. Every such road, and the soil and all materials thereof, is vested (in the municipality or shire.) ...

[1.80] The owner of land described in a folio of the Register created under Torrens Title as being bounded by a non-tidal river is the owner of the bed of the river *ad medium filum*: *Lanyon Pty Limited v Canberra Washed Sand Pty Limited* (1966) 115 CLR 342. This is the rule in the absence of rebutting circumstances.

[1.81] Under s 45A of the *Real Property Act*, inserted in 1930, the rule is referred to as a rebuttable rule of construction, which 'shall apply, and be deemed always to have applied' to dealings registered under the provisions of the Act, and the fact that an applicant to bring land under the Act has not expressly declared his entitlement to the middle line of the stream or road shall not prevent the application of the rule: *Wood v Mittagong Shire Council* (1977) 35 LGRA 323.

The existence of a folio of the Register which does not indicate ownership of half of a road adjoining the land and the subject of the folio of the Register, or the execution of a transfer referring without more to the land comprised in the folio of the Register, is not sufficient to rebut the *ad medium filum* rule of construction: *Wood v Mittagong Shire Council* (1977) 35 LGRA 323.

Jennings v Sylvania Waters Pty Limited

[1.82] In *Jennings v Sylvania Waters Pty Limited* [1972] 2 NSWLR 4, H was the owner of land ('the riparian land') adjoining Gwawley Bay, a part of Georges River. In 1866 the bay by Crown grant was issued pursuant to s 9 of the *Crown Lands Alienation Act 1861* granted in fee simple to H ('the riverine land'). At a time when J and X were registered proprietors under the *Real Property Act* of part of the

riparian land and s was the registered proprietor of the whole of the riverine land, s reclaimed the bed of the bay and carried out works on it.

J and X sought damages from s for interference with their common law rights of access to the river and rights to navigate upon the river.

[1.83] The Court of Appeal held that:

- The plaintiffs' riparian rights and rights to navigate upon the river were natural rights, not easements, and passed to J and X when they acquired their land.
- The fact that in 1866 the riparian land and the riverine land were in common ownership did not end the natural rights formerly attaching to the riparian land.
- The plaintiff's right of access to the waters of the bay was not an interest which, by virtue of s 42, must be recorded in the defendant's folio of the Register if it is to be enforceable by the plaintiffs; nor was it a right requiring to be expressly recorded in the plaintiff's folio of the Register for the purpose of that section.
- The natural rights of a riparian owner do not represent an interest within the meaning of s 42 of the *Real Property Act*.
- The natural rights of a riparian owner are rights comprehended within the natural of fee simple of the riparian land.

Non-natural boundaries

[1.84] These are imaginary lines described by reference to physical objects or survey marks. Such lines may be described in loose terms, or with mathematical accuracy as in a surveyor's description. Their position may then be plotted on the surface of the land by survey, and marked with surveyor's pegs.

Boundaries: description of lands

[1.85] An accurate description of a property that is the subject of a contract of sale is desirable. The standard form of contract of sale provides, amongst other things, that no error or misdescription of the property shall avoid the sale.

It is important to determine the subject matter of the sale. The vendor cannot insist on the purchaser taking, with compensation, a property substantially different from that which was purchased. On the other hand, purchaser cannot take advantage of a slight error or misdescription in the contract and purport to rescind: *Gardiner v Orchard* (1910) 10 CLR 722; *Stephens v Selsey Renovations Pty Limited* [1974] 1 NSWLR 273.

Fencing of boundaries

[1.86] At common law the owners of adjoining properties are not bound to fence, either against or for the benefit of another: *Halsbury's Laws of England*, 4th edn, Vol 4, 385.

In New South Wales, under the *Dividing Fences Act 1991* (NSW), an owner of land may be required to share the cost of constructing and maintaining an adequate fence between his land and any adjoining land. Owners of adjoining lands, not divided by a sufficient dividing fence, are liable to join in or contribute equally to the construction of a dividing fence.

D. The owner's rights to things grown on the land

[1.87] A tree or other growing thing is part of the land while it is growing. Once it is severed, it becomes a chattel.

The exception is a crop, which is replanted from time to time. A crop is a chattel that belongs to the person who plants it.

[1.88] A distinction should be drawn in relation to things that grow on land between:

- the annual produce of agricultural labour, which is known as fructus industriales: *Duppa v Mayo* (1669) 1 Wms Saund 275; 85 ER 336; *Dunne v Ferguson* (1832) Hayes 540; and
- natural things which grow on land, such as trees, grass and the fruit of fruit trees, which are known as *fructus naturales*.

[1.89] In the case of a contract of sale or will, natural things are considered part of the land and pass under any transfer or will without being expressly mentioned. They may be excluded expressly or they may be granted separately from the land: *Eastern Construction Co Limited v National Trust Co Limited & Schmidt* [1914] AC 197.