

PROPERTY LAW REVIEW

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ARTICLES

Licensee versus trespasser: *Hill v Tupper* resuscitated – *Oscar S Han*

This article reopens a question that is as old as the numerus clausus principle itself: can a contractual licensee, who is not in possession of the land to which their licence extends, maintain an action in trespass to land or private nuisance against a stranger? It is trite that the licensee cannot maintain such an action in their own name. But it has been overlooked that the licensee can, on the old authority of *Hill v Tupper*, bring such an action in the licensor's name with the licensor's permission. Indeed, it is submitted that, where such permission is unforthcoming, the licensee may in particular circumstances extract it by means of an injunction. Accordingly, it is misleading to say, as is conventionally said, that a contractual licence cannot bind third parties. 87

Regulation and private property: The cautionary tale of Ukraine – *Paul Babie*

This article makes the case for regulation as a necessary part of any system of private property. Rather than asserting that case, it presents Ukraine's history since independence from the former Soviet Union as an example of the consequences that can follow from the failure to consider the need for and operation of regulation as part of the adoption of private property. The article is divided into five parts. Following the Introduction in Part I, Part II provides a brief background account of the liberal concept of private property and the nature of an organic regulatory framework that tends to surround it in most contemporary Western liberal legal systems. Part III outlines the substantive form which the implementation of private property took in post-independence Ukraine, using property in land as the paradigmatic example. Part IV examines the negative consequences that have resulted from the attempt to implement a system of private property with little, if any, effective regulatory framework. The difficulties that post-independence Ukraine has encountered demonstrate, quite starkly, what can befall a transitional capitalist economy when it attempts to implement a system of private property without giving full attention to the regulatory context within which such a system typically operates. The final part offers brief concluding reflections on how the issue of regulation can be addressed in emerging market economies. 100

CONSUMER ISSUES

It's a new day, it's a new dawn, it's a new life ... : PEXA, electronic conveyancing, and consumers – *Lynden Griggs*

The most significant change to conveyancing since the introduction of the Torrens system is now underway. The nationwide rollout of electronic conveyancing through Property Exchange Australia (PEXA) aims to deliver a system that will minimise manual procedures, be quicker than traditional conveyancing, eliminate the need for physical interaction between participants, and deliver a more certain outcome. Consumers should also benefit, with 25% of current buyers suffering financially under the existing paper-based manual processes. In this article, the role of PEXA is outlined and then consideration is given to the consumer benefits of participating in online settlements. 117

STRATA AND COMMUNITY TITLE

Tragedy of the anticommons? – *Michael Kleinschmidt*

A recent appeal to the High Court of Australia has considered when body corporate decisions are reasonable, and whether internal opposition to them is, in all of the circumstances, unreasonable. In the context of a dispute about property rights, being a proposed grant of the exclusive use of five square metres of common property air space, the High Court has also affirmed the central place that the body corporate's by-laws (private rules) hold inter partes. While valuable clarity has been provided to the test for unreasonable opposition to a lot owner's proposal by other lot owners, an inevitable side effect is a right of veto, available to all lot owners. As a result, the phenomena of the tragedy of the anticommons will likely be a part of the future of Queensland strata. 122

NEW ZEALAND

Are resource consents property? – *Ongoing issues* – *Thomas Gibbons*

The extent to which rights, permits or permissions to use natural resources constitute "property" has been a challenging issue across a number of jurisdictions. This short article updates the current position in New Zealand, with a focus on two recent decisions of the New Zealand Court of Appeal. 127

SINGAPORE

Recent developments: Resulting trusts, common intention constructive trusts, proprietary estoppel and equitable accounting – *Kelvin Low*

This update on Singapore law addresses developments in a trio of cases relating to doctrines closely related to informal landholding arrangements among close family relations, viz resulting trusts, common intention constructive trusts, proprietary estoppel and equitable accounting following a sale in lieu of partition. 131

QUEENSLAND

Sharing your home in Queensland: Host, landlord or innkeeper? – *Sharon Christensen and WD Duncan*

Transacting in the gig or sharing economy provides many challenges for the application of long-accepted legal concepts. Just as Uber has disrupted traditional taxi services, the rise of Airbnb is causing lawyers and legislators to question the conventional views of landlord and tenant. Application of standard residential tenancy legislative paradigms to the Airbnb "host" and "guest" relationship is neither compatible with the Airbnb Terms of Service (to which both parties subscribe) nor the common law concepts applying to ordinary letting arrangements. This article seeks to draw out some of the novel issues in this sector of the new economy which will soon confront legislators. The authors conclude by suggesting that without a relevant regulatory framework, the potential for costly disputation will increase 137

SOUTH AUSTRALIA

The meaning of "residential tenancy agreement" in South Australia: Schaffer v Usca – *Paul Babie*

While disputes involving State and Territory residential tenancies legislation rarely raise fundamental points, *Schaffer v Usca* offers a rare opportunity to consider the substantive

content of a residential tenancy pursuant to the *Residential Tenancies Act 1995* (SA). The case found that circumstances can arise pursuant to the *Residential Tenancies Act* in which non-typical payments of valuable consideration, in this case the payment of water rates, may be sufficient to establish a residential tenancy. In coming to that conclusion, *Schaffer* provides a useful review of the nature of a residential tenancy pursuant to State and Territory residential tenancies legislation. 144

WESTERN AUSTRALIA

Recent developments: Boarders and lodgers; real estate agents code of conduct; priority between unregistered interests; the Oswal saga – Eileen Webb

This review of developments in Western Australian real property law provides updates on the current status of legislative reform in relation to boarders and lodgers, and a new Code of Conduct for real estate and business agents and sales representatives. Two recent cases are also highlighted. *PSAL Pty Ltd v Raja* concerned priority between competing equitable interests. *Federal Commissioner of Taxation v Oswal (No 6)*, one of a number of matters involving the Oswals, considered the indefeasibility of mortgages. 149