

## TRESPASS NOTES

In Australia, a private land owner has the paramount right of possession. This is highly evidenced by the right to refuse entry. <sup>1</sup>

A person renting land also has legal possession for the purpose of evicting a trespasser. <sup>2</sup>

There are only two ways of legally entering private property; <sup>3</sup>

1. Implied Right of Entry
2. Lawful Right of Entry

The reason for entering determines whether or not entry is trespass. Any entry for a purpose outside of these 2 points and without permission is trespass.

The burden of proof lies on the trespasser to show there was no criminal purpose <sup>4</sup>

1. A reasonable excuse is not acceptable as a lawful excuse
2. A mistake is not acceptable as a lawful excuse
3. Entering to fulfil a purpose outside of an Implied and Lawful Right of Entry can not be accepted at law.

Any person who enters using a lawful right of entry and abuses that right, becomes a trespasser *ab initio* (from the beginning). A person must enter land lawfully. <sup>5</sup>

In order to refuse entry to any person prior to entry, the land owner must <sup>6</sup>

1. Notify that person or persons that all right of entry has been removed and/or
2. Lock the gates and/or
3. Place a No Trespass sign at all entry points

In order to refuse entry to any person at the time of entry, the land owner must <sup>7</sup>

1. Ask the person to leave.

For legal purposes, the No Trespass sign is required to state “No Trespass, Private Property” <sup>8</sup>

For the purposes of the landowner – it is wise to include the words “any persons or entities” .

In the event the land includes rented/leased land, it would be worth including the fact that permission has been removed from that land also.

The land owner does not require justification for refusing entry. It is not up to the land owner to anticipate the entry of a trespasser. The law does not require the occupier to speculate about or foresee the movements of a trespasser. <sup>9</sup>

## A. Implied Right of Entry

When a property does not have a locked gate and/or a No Trespass sign and/or that person has not been notified of the revocation of entry in any other way – a person wishing to enter has an implied right of entry. See 3

The courts specifically have stated that entry under these circumstances must be along a path or driveway leading to the entrance of the home. In the absence of the land owner, the visitor must leave immediately. 10

A sign stating “Private Property” does not remove the Implied right of entry. 11

Implied Right of Entry is defined as 12

1. Invitation and/or consent
2. Inevitable accident as opposed to a mistake
3. Incapacity, illness, etc
4. Necessity
5. A limited right to recapture chattels

Invitation and/or consent – authorization given by the land owner or renter. Either / and / or by words (parol) or in writing.

Inevitable accident – where some manner of “force” or “inducement” has caused entry. A mistake can not be used as defence.

Incapacity, illness – where a person may require medical assistance or the use of a phone to call for medical assistance.

Necessity – to fight a fire, etc

To recapture chattels – where stock or some object belonging to another have entered private land and require removal.

Outside of Invitation – all the implied rights of entry are for a specific purpose and for a limited period of time. See 3

Invitation and/or consent – at the point of entry, can not be assumed. Nor can further entry onto land be assumed even with that invitation existing. 13

### ***Revocation of Implied Right of Entry***

No Implied Right of Entry exists where permission has been removed through a sign and/or a locked gate and/or notification that entry is refused – meaning that any entry at that time is already trespass.14

In the event that an Implied Right of Entry exists however, at any point the land owner can revoke the Implied Right verbally.15

If an invitation exists at the very moment it is offered, the revocation of that invitation also exists from the very moment it is removed. 16

A person holding an Implied licence to enter becomes a trespasser when 17

1. the licence has been countermanded
2. a reasonable time has elapsed to allow his/her removal
3. he/she removes whatever property he/she brought onto the property

## **B. Lawful Right of Entry**

A Lawful Right of Entry is an entry authorized or excused by law. 18

1. Generally involving a warrant

Except for in cases provided for by common law and statute circumstances, police officers have no special rights to enter land. The principle of the invasion of private property being trespass applies to officers of the government and private persons equally. 19

It should be noted that Government legislation does not authorize the commission of trespass to apply the legislation. Where a judge can authorize a warrant, he cannot authorise that it be used in contradiction to the law. 20

### ***Revocation of Lawful Right of Entry***

In all circumstances, once the legitimate entry has been concluded, the persons in question must leave.

## **C. Sign**

There is no legislation dealing with the details of a trespass sign, however the police have indicated, as previously mentioned, that it must include the words “Private Property” and “No trespass.”

Specifically, the High Court discussed in *Roads & Traffic Authority of NSW v Dederer* that

- 1 A sign of prohibition does constitute a warning
- 2 Even reasonable signs can fail, but the question is always the reasonableness, not is failure.
- 3 In the event the sign proves inefficient, the owner of the sign has the responsibility to improve it.
- 4 In the circumstances, the law demand no more and no less.

## **D. Assault**

In the event the trespasser ignores your requests to leave and moves towards you, this can be deemed assault and the apprehension of assault. 21

## E. Further Information

The right to refuse entry also gives the right to refuse permission to photograph.<sup>22</sup>

## F. Duty of Care

In the event, the trespasser is acting for someone else – ie a process server - consider including the boss in a trespass case.

The may state the trespasser was working as an independent contractor, however the following applies.

The General rule governing a principal and an independent contractor is

- **Hetherington v Mirvac Pty Ltd & Ors 1999**
  - a principal is not liable for negligent conduct of an independent contractor
- **Hollis v Vabu Pty Ltd 2001**
  - An employer is vicariously liable for the tortious actions of an employee
  - But not for the tortious actions of an independent contractor
- **Kondis v State Transit Rail Authority 1984**
  - An employer is not liable for the negligence of an independent contractor
- **Leighardt Municipal Council v Montgomery 2007**
  - A person can not be held responsible for the actions of an independent contractor
- **Stoneman v Lyons 1975**
  - A person is not liable for the negligence of his independent contractor
- **Torette House Pty Ltd v Berkman 1940**
  - An employer is not liable for the act of his independent contractor

However, there are two major exceptions

### 1. a non-delegable authority??

- **Hetherington v Mirvac Pty Ltd & Ors 1999**
  - Where the principal engages an independent contractor
    - to perform a duty resting on him
- **Hollis v Vabu Pty Ltd 2001**
  - The person acts as an employee
    - if they are carrying out a contractual obligation of the employer
  - The employer is liable if they delegate to the contractor
    - a task they are contract to perform
  - The contractor is acting within the scope of authority
    - conferred by the employer
  - The employer allocates the work,
    - there being no scope for tendering
  - The contractor operates as part of the employer's organization
  - The contractor is operating for the financial benefit of the employer

- **Kirkpatrick v Kotis 2004**
  - When the function entrusted is that of or representing the person who request its performance
    - And is in essence, standing in the place of the employer
    - Assuming to act in his right
      - He is not an independent contractor
- **Kondis v State Transit Rail Authority 1984**
  - A person causing something to be done
    - The doing of which casts on him a duty
    - Cannot escape from the responsibility attached of seeing that duty is performed
      - By delegating it to an independent contractor
- **Leighardt Municipal Council v Montgomery 2007**
  - A person causing something to be done
    - The doing of which casts on him a duty
    - Cannot escape from the responsibility of seeing that duty performed
    - By delegating it to a contractor
  - Therefore, he cannot relieve himself from the attached liability
- **Stoneman v Lyons 1975**
  - The principal
    - Who owes a duty to a third party
    - Cannot avoid responsibility for discharging that duty
    - By delegating performance of it
    - To an independent contractor

## 2. hiring to do an illegal act

- **Hetherington v Mirvac Pty Ltd & Ors 1999**
  - where the principal directly authorises the tortious act
- **Hollis v Vabu Pty Ltd 2001**
  - an employer is vicariously liable for the tortious actions of an employee
  - The employer puts the contractor in the situation to perform the act
    - and must be answerable for the manner in which it is carried out
- **Torette House Pty Ltd v Berkman 1940**
  - The employer is liable if that contractor was hired to do an illegal act

## G. Further comments –

There is a current and on-going case in which the judge found for the trespasser, who was a public servant. It is now going to appeal.

In this case, the land owners had a large relevant sign approx 30 metres from the main entrance, which is a public road through a property and hence can not be closed with a gate.

They had written to the local newspaper discussing trespass as well as to the relevant govt dept. The trespasser was acting for that department.

Under all legal “rules” the trespasser did not have an Implied Right of Entry as his entrance to serve a summons, was outside of the definition of an Implied Right of Entry.

The judge indicated that the sign

1. did not have any lighting
2. did not use reflective paint
3. was not close enough to the road
4. was of a font size that rendered it too small to be read.

The judge further indicated that he was satisfied that the defendant had not received notification of the removal of the Implied Right of Entry through any other means.

And although, the trespasser was asked 4 times to leave, the judge ruled that he was then asked a question which the trespasser felt asked him to remain.

So – be very specific to the cases and this judge’s interpretation of the case.

In the situation of the mines –

- 1 Write to the very head of **every** mine or corporate body you wish to notify and any relevant department bosses – giving them a definite Private Property No Trespass Notice and using the statement - Notice to Principal is Notice to Agent, Notice to Agent is Notice to Principal. (In one case, a Sydney council was found to be not responsible for damaging potholes unless the head of the relevant department had received definite complaints.)
- 2 Use the terms “persons” and “entities”, as a person in a governmental/ corporate role is an entity. The lack of this word may be used against your sign.
- 3 If you rent land, make sure that it is included on your sign – ie. land owned and rented....In the case mentioned, the judge ruled that the rented edges of the public road were exempt as they were not on the sign.
- 4 Make sure your sign is simple, to the point, in reflective paint and situated NOT on the gate/s, BUT beside them on the driver’s side. (This means that an open gate can not be used as a point of ignorance or an invitation).
- 5 Make sure you have a sign at every entrance.
- 6 If you have a gate, chain and padlock it.
- 7 If you suffer trespass, do not discuss anything with that person. Although do get licence plate numbers and possibly the person’s name.
- 8 Simply state, “You are trespassing, leave now.”
- 9 Repeat that statement until they go.
- 10 Make immediate contemporaneous notes – get all details down within a **very** short time. After 24 hours you are deemed to be outside of contemporaneous notes and your notes can be ignored.

- 11 If you have a portable recording device, use it as your **contemporaneous note taker**. Under the The Surveillance Devices Act 2007 - s7 – a person can tape a conversation they are a principal party to, to protect their legal interest. Do so.
- 12 If you do use a recording device, make comment during the trespass such as – do not come close to me, you have been asked to leave – you must not walk towards me, etc.
- 13 If the trespass occurs at night, try and get a photograph of the car used in the daylight – it has come to our notice that in one case the trespasser may have changed the rego on the vehicle used in order to make the land owners appear to have defective memories.
- 14 Get photos if possible - get them printed from the memory through a printing agency, rather than through a personal computer, so they can be proven as genuine and not photoshopped.
- 15 Have the date on your camera.

## H. COURT CASES re Trespass

1. Coco v R 1994
2. Hill v Obrien 1938; Hutchinson v Scott 1905; O'Keefe v Williams 1910; Western Australia v Ward 2002; Yandama Pastoral Company v Mundi Mundi Pastoral Co Ltd 1925
3. Barker v R 1983; Coco v R 1994; Commissioner for Railways (NSW) v Cardy 1960; Cowell v Rosehill Racecourse Co Ltd 1937; Halliday v Nevill 1984; Johnston v ANZ Banking Group Ltd and Ors 2004; Kuru v State of New South Wales 2008; NSW v Ibbett 2005; NSW v Ibbett 2006 (Appeal); O'Donohue v Wille & Ors 199 ; Plenty v Dillon 1991; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008; Thompson v Vincent 2005 Yandama Pastoral Company v Mundi Mundi Pastoral Co Ltd 1925
4. Barker v R 1983; Commissioner for Railways (NSW) v Cardy 1960; Halliday v Nevill 1984; Johnston v ANZ Banking Group Ltd and Ors 2004; Kuru v State of New South Wales 2008; Mills v Perras 2005; O'Donohue v Wille & Ors 1999; Plenty v Dillon 1991; Proprietors of SP 20297 v G and S Developments P L 2008; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008; Thompson v Vincent 2005
5. Barker v R 1983; Commissioner for Railways (NSW) v Cardy 1960
6. Cowell v Rosehill Racecourse Co Ltd 1937; Halliday v Nevill 1984; Hill v O'Brien 1938; Kuru v State of New South Wales 2008; O'Donohue v Wille & Ors 1999; Plenty v Dillon 1991; Roads & Traffic Authority of NSW v Dederer 2007; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008; Thompson v Vincent 2005
7. Coco v R 1994; Commissioner for Railways (NSW) v Cardy 1960; Halliday v Nevill 1984; Kuru v State of New South Wales 2008; Plenty v Dillon 1991; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008;
8. Thompson v Vincent 2005
9. ABC v Lenah Game Meats Pty Ltd 2001; Commissioner for Railways (NSW) v Cardy 1960; Hackshaw v Shaw 1984; Halliday v Nevill 1984; Roads & Traffic Authority of NSW v Dederer 2007; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008Anning ;
10. Halliday v Nevill 1984; Kuru v State of New South Wales 2008; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008
11. Thompson v Vincent 2005
12. Barker v R 1983; O'Donohue v Wille & Ors
13. Commissioner for Railways (NSW) v Cardy 1960; Halliday v Nevill 1984; Kuru v State of New South Wales 2008; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008



14. Coco v R 1994; Cowell v Rosehill Racecourse Co Ltd 1937; Halliday v Nevill 1984; Kuru v State of New South Wales 2008; Plenty v Dillon 1991; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008 ; Thompson v Vincent 2005
15. ABC v Lenah Game Meats Pty Ltd 2001; Coco v R 1994; Cowell v Rosehill Racecourse Co Ltd 1937; Halliday v Nevill 1984; Kuru V State of NSW; Plenty v Dillon 1991; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008
16. Coco v R 1994; Cowell v Rosehill Racecourse Co Ltd 1937; Kuru v State of New South Wales 2008; Plenty v Dillon 1991;
17. Cowell v Rosehill Racecourse Co Ltd 1937
18. Barker v R 1983; Coco v R 1994; Kuru v State of New South Wales 2008; O'Donohue v Wille & Ors 1999; Plenty v Dillon 1991; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008; Thompson v Vincent 2005
19. Kuru v State of New South Wales 2008; Plenty v Dillon 1991; O'Donohue v Wille & Ors 1999
20. Coco v R 1994; Halliday v Nevill 1984;
21. NSW v Ibbett 2005; NSW v Ibbett 2006 (Appeal)
22. ABC v Lenah Game Meats Pty Ltd 2001; TCN Channel Nine Pty Ltd v Ilvari Pty Ltd 2008