

Kate Galloway

Property Law



Preface

The contents of this student guide are adapted from Kate Galloway, *Land Law and Sustainability*, an iBook published in 2015. That book is available on iTunes at no cost.

This book is designed to provide students in my Bond University Property Law class with a guide to the subject. It contains exercises and a brief overview of the topics, to prompt student reflection as they undertake their studies.

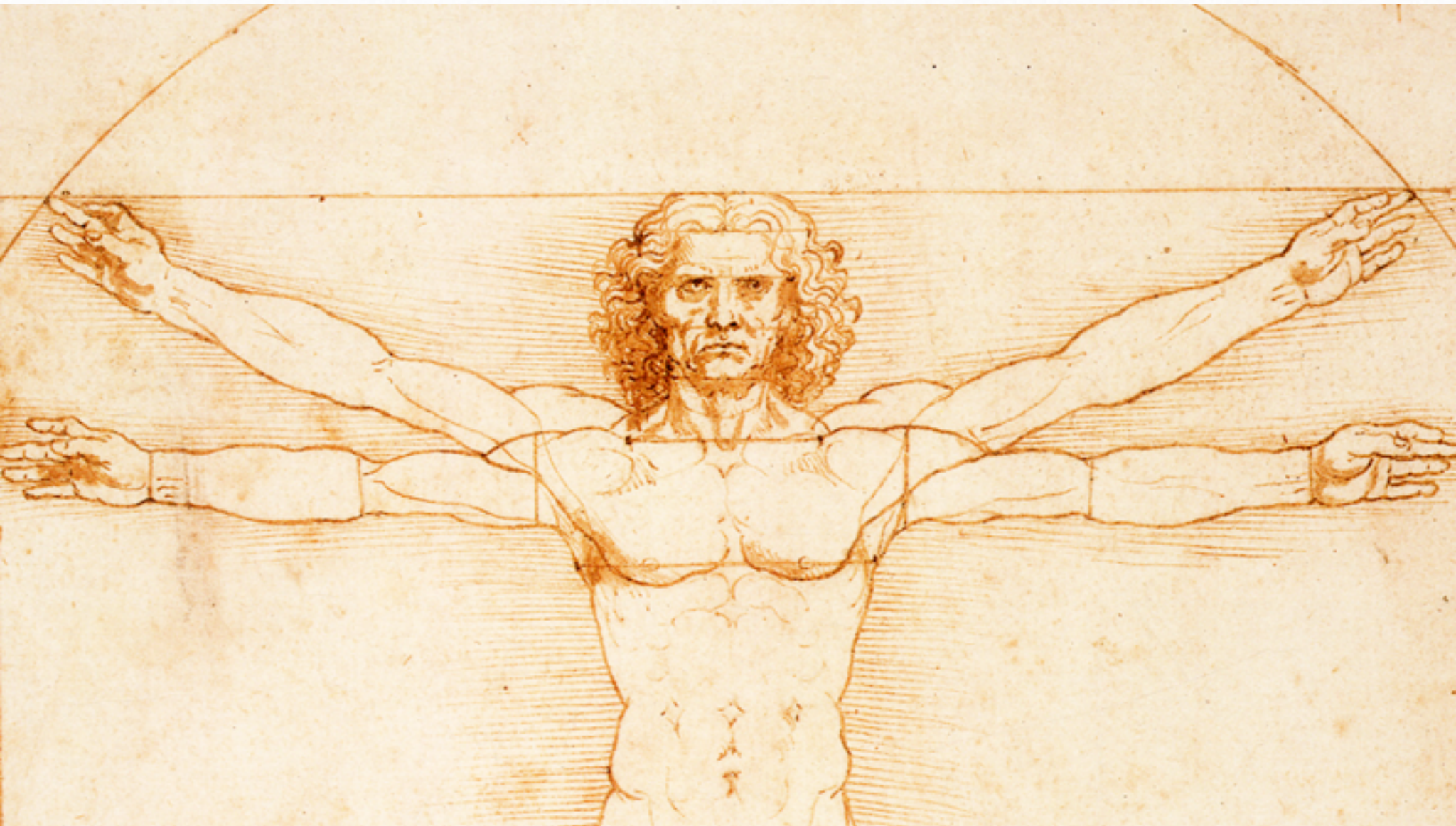
The subject materials may differ at times from what is presented in this book: however it will still provide a useful starting point for students of property law.

1

Property

'Property is theft!'

Pierre-Joseph Proudhon (1840)



What is property?

Consider what the layperson understands by 'property'. Write down how you understand the term. Also consider what you think it means to 'own' something.

You are likely to find that the law differs from the layperson in its definition of property – though ideas of 'ownership' may coincide.

By way of contrast, what does the law say about what is property? Read [Yanner v Eaton \(1991\) 201 CLR 351](#), and write a case note. Explain the difference between the judge's interpretation of 'property' in this case, and your own ideas.

Property can encompass a variety of different rights. Penner, for example, refers to this as a 'bundle of rights'. Based on your readings, what are examples of the rights that make up this 'bundle'?

While 'ownership' may consist of many or all of these rights, there are only two characteristics of property that are essential in defining it as such – what are they?

The concept of property has changed at law from time to time – it is in fact a product of history and culture. Look at the YouTube clip from the film [The Gods Must Be Crazy](#) and consider the meaning of property in the context of the clip. Now read [Milirpum v Nabalco Pty Ltd \(1970\) 17 FLR 141](#). Consider how this decision treats property in terms of a particular cultural understanding of how it is defined.

Classification of property

Before considering the legal classification of property, consider as many different types of 'property' as you can. Attempt to

sort them into different groupings based on what you think are similar characteristics.



Draw a diagram to represent how you think you might sort out different types of property.

The law has its own way of classifying different types of property and this is based on the law's historical understanding of property. The classification of property is a function of how the law has traditionally recognized different rights. Make sure you are clear about the classification of property, and are able to explain the different types of property. Draw a diagram that represents the classification of property according to law. Is there much of a difference between this diagram and your own?

In understanding the concept of property, there are a few important things to know:

- property is not a thing - it is a relationship between a person and a thing
- there are two essential characteristics of property, but many non-essential characteristics
- the classification of property is based on historical foundations

Human body as property

One of the essential characteristics of property is that it is a thing outside of ourselves. Historically people have been treated as property – a thing over which the owner can exercise rights. This confirms the nature of property as dependent on time, culture and place. Contemporary law however is quite clear that there is no property in the human body – or is it?

Consider these different parts of the human body and whether you think it is right that people might have property in them; and why:

- A live person
- Human hair
- A tumour excised from a human
- Human blood
- A human kidney from a deceased person
- A human umbilical cord
- A [human embryo](#)
- A corpse awaiting burial
- [Human eggs](#)
- Human sperm

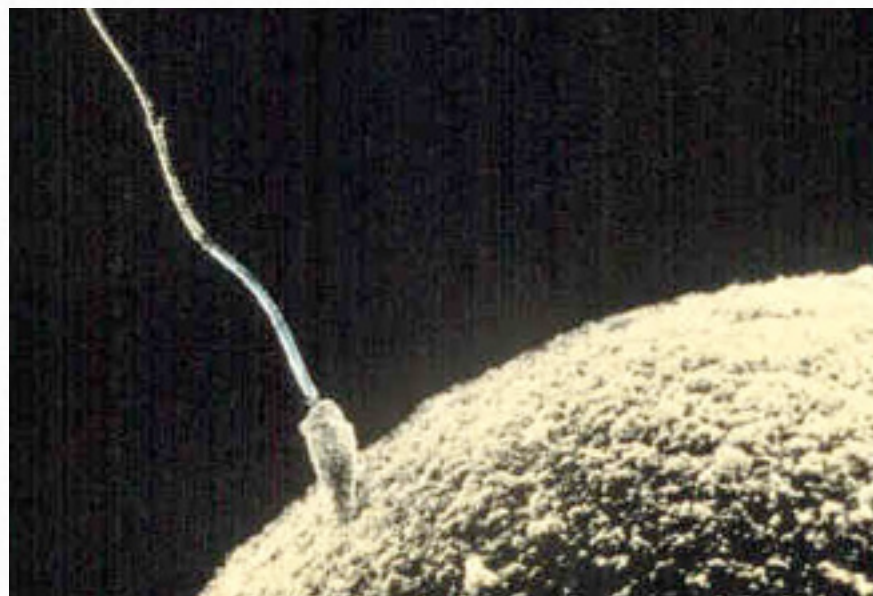


Image from [Wikimedia Commons](#)

What is the legal position in relation to these different types of body parts? (You may not find all the answers to this in your text – but you should be able to identify that the law has tended to treat different types of body parts differently.) Is there any one legal position? Does the legal position accord with your own interpretation?

Read [Doodeward v Spence \(1908\) 6 CLR 406](#). Did the Court find that there is property in a corpse?

Now compare the decision of the majority in *Moore v Regents of California* (1990) 793 P 2d 479. Did the Court find that a cell taken from a human is property? Could it ever be property? Does this decision fit with *Doodeward v Spence*?

What did the court find in [Re the estate of the late Mark Edwards \[2011\] NSWSC](#)

478? When you read this decision, take care to observe the Judge's language. Did he find a *property* interest? Is there a difference between a property interest and a *possessory* interest? What are the implications of this?

Questions

Question 1

1. Discuss the meaning of 'real property'.
2. What is meant by tangible and intangible property rights?
3. Is it possible for both tangible and intangible property rights to exist with the same piece of property?
4. Discuss the legal significance, if any, and the traditional classification of personal property into:
 - a) Pure personal property (chattels personal); and
 - b) Chattels real.
5. What are the differences between a western concept of property and an Indigenous concept of property?

Question 2

Is it true to say that there is no property in the human body? If not, why not? If so,

how can this be justified? Explain your answer with reference to relevant case law.

*Obviously this question is asking you to consider case law – and inevitably you will need to compare and contrast some decisions. Considerations of property in the human body often start with the decision of *Doodeward v Spence*. This chapter has also considered other relevant cases. In your answer, be careful to distinguish between different aspects of the human body.*

2

Personal property

Possession is nine tenths of the law



Personal Property

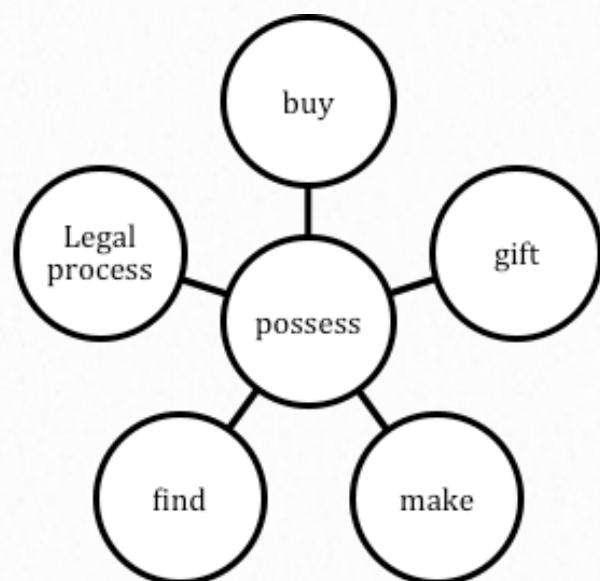
Reflect on what you have learned so far. Consider your understanding of property; ownership, and possession.

In this topic we expand on these concepts, looking at examples of

- Derivation of interests in personal property and the nature of those interests

- Rights that exist as a consequence of property in chattels

Consider the, diagram below.



Which of these are derivative rights and which are original rights?

Explain what these ideas mean in terms of property.

It will be useful for you to have an overview of the decisions in *Re Jigrose* and *Parker v British Airways Board*. What did the court find in each case?

Possession as root of title

Recall the possible role of possession as a source of property. What did the court find in the decision in *Button v Cooper* (1947) SASR 286?

Consider: possession is a FACT—so what does this ‘factual possession’ look like for the purposes of the law?

1. If I hold the keys to a locked car, do I have possession of the car?
2. If I lock the keys in a car, do I have possession of the car?
3. If I own the house where a person has parked a car, do I have possession of the car?
4. Think of examples of the fact of possession, and consider whether this might be possession at law

Consider the decisions in *Parker v British Airway Board* and *Knapp v Knapp* [1944] SASR 257.

Think about the difference between the elements of possession, and the attributes of possession.

Relative title

What does ‘relative title’ mean?

What are the implications of ‘relative title’?

Consider the decision in *Jeffries v Great Western Railway Co.*

‘A person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by shewing

that there was title in some third person.’

Lord Campbell CJ

(citing *Wilbraham v Snow*)

‘Possession with an assertion of title, or even possession alone, gives the possessor a property as will enable him to maintain this action against a wrong-doer; for possession is prima facie evidence of property.’

Wightman J

Now consider *degrees of possession*. You will find these explained in the readings from Fisher, in iLearn. What does each of them mean?

1. Custody
2. Actual/de facto possession
3. Legal possession
4. Lawful possession
5. Constructive possession
6. Right to possession

Acquiring goods

There are two foundation concepts relevant to the acquisition...and the losing of goods—consider delivery and abandonment

What does the decision in *Re Jigrose* say about the acquisition of goods?

Finding

Consider the central problem of property: how does the law resolve competing claims to possession. Does the law look for the best title?

Think back to the concept of *relativity of title*...

What does the law of finding tell us about resolving disputes? Outline the decision in *Armory v Delamirie*.

Bailment

An aspect of private law independent of contract and tort, bailment deals with rights and interests where possession is divorced from ownership

When does it arise?

What is the nature of a bailment?

What are the elements of bailment?

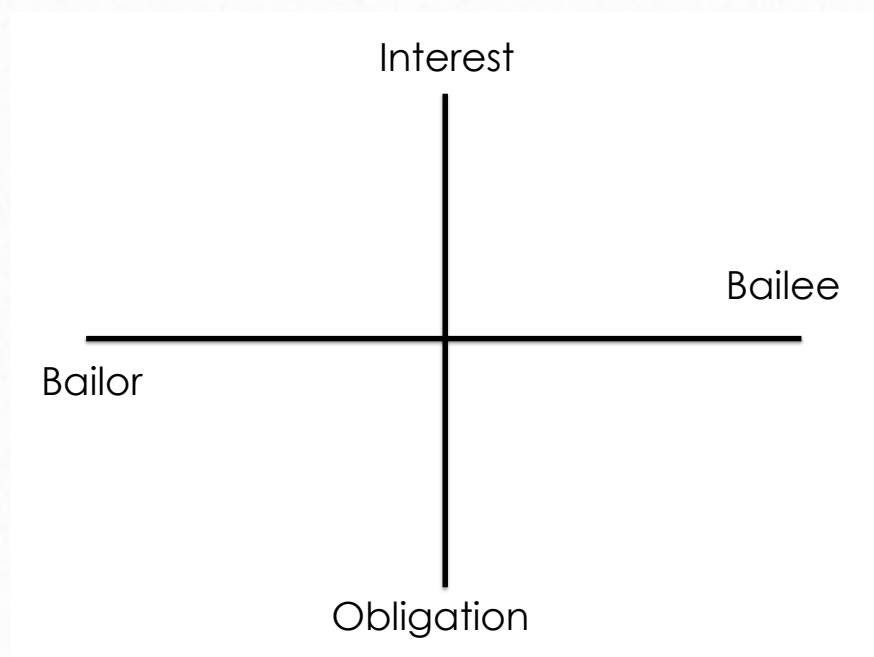
Take a look at the readings in Fisher, in iLearn, to identify the categories of bail-

ment (from *Coggs v Bernard* (1703) 2 Ld Raym 909, 912-3)

Can you identify examples of bailment that you have encountered in your life?

Describe them.

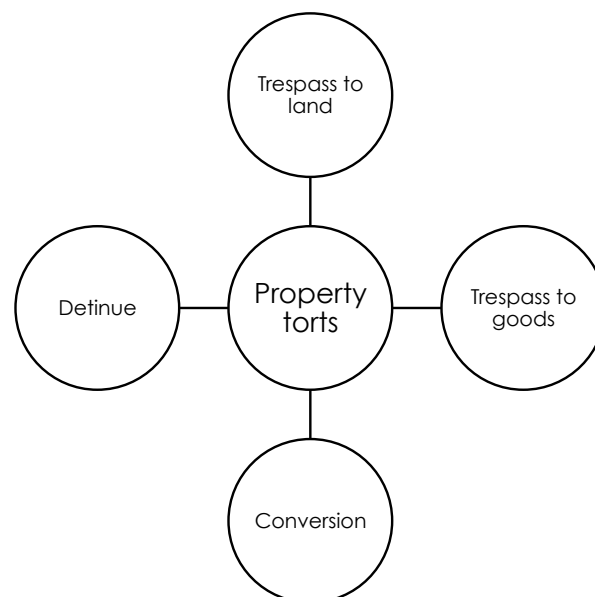
Use the readings in Fisher, provided in iLearn, to identify the parties' interests and obligations under bailment. Plot them on the matrix below.



Torts

What is a 'tort'?

There are four (key) torts involving property. For our purposes, these help illustrate the nature of property.



Describe each of them, and the role played by these concepts:

- Property
- Possession
- Ownership
- Custody
- Control

Questions

Question One

This problem involves personal property and finding. Consider the ways in which a person might derive property in a chattel. Then think about the way in which the law resolves a dispute about property in that chattel.

Shira and Alex are in the market for furniture for their new home. They visit a local

furniture retailer, Furniture Barn, which sells new and second hand furniture. Shira and Alex select a number of items of furniture including an old cupboard. They pay for the furniture and arrange with the store for the furniture to be delivered to their new home the following day.

Furniture Barn sends its driver Jenna to deliver the furniture. He is responsible for loading furniture onto the delivery van, driving to the specified delivery point, and unloading the furniture at the direction of the customers.

On the day appointed for delivery, Jenna loads the van with furniture, including those items purchased by Shira and Alex. He is helped by Xena, who is also employed by Furniture Barn. Jenna prides himself on getting the deliveries for the day completed quickly. He has several deliveries to make that day. He is familiar with the area in which Shira and Alex live and takes a short cut across some bumpy back roads. When he arrives there is no one is at home. He nevertheless proceeds, with the assistance of Xena, to unload the furniture onto the footpath outside Shira and Alex's home.

The last item to be unloaded is the cupboard. As Jenna and Xena are unloading it,

Jenna discovers that a secret compartment in the cupboard has sprung open. Jenna inspects the compartment and finds an old but expensive looking item of jewellery. He immediately puts it in his pocket, and he and Xena jump back in the van and speed away to get it valued.

Jenna obtains a value on the jewellery. As he suspected, it is extremely valuable. Although Jenna assures Xena that he will hand the brooch over to Furniture Barn, he does not. Xena informs Furniture Barn about Jenna finding the jewellery. Furniture Barn now claims that it is entitled to the jewellery.

Shira and Alex have also heard about the jewellery and claim that it belongs to them. Furniture Barn claims that the jewellery belongs to it, but Jenna says that it is his. Who is the owner of the jewellery?

Tip: *this question has set out the overarching issue for you. This is a competition between three parties about ownership of (or property in) the jewellery. You will need to cite the law relating to property in chattels and apply it to resolve the competing claims. Work through the claims, one by one.*

Question Two

This question involves bailment. In a bailment situation you must identify who is the bailor and the bailee; and the rights and obligations between the parties.

There is a side issue here about a property tort. Are you able to identify it?

Mike loves to watch television cooking shows. He watches 'The Nude Chef' on the television and becomes enthused about cooking. What he lacks are cooking utensils, equipment and common sense. His trusting neighbour Julia is well equipped in that area. He asks Julia to borrow her special chef knives and spoons; and her very expensive commercial mix-master. Julia agrees and hands them to Mike stating, 'Just for the weekend mind you, I have to cook for my cake shop on Monday and I need this equipment to do my special pastry and cake for my commercial customers and I need the equipment by 9 am to allow me to fulfill my orders that afternoon. Whatever you do – don't lend this equipment to any one else.' Julia has a large order for pastry and cakes

that must be completed by midday on Monday.

Mike gets the mix-master jammed in a piece of his anatomy (when the mixer vibrates wildly – Julia had forgotten to tell Mike about this problem) and the engine is burnt out. One spoon falls out the window while he is using it and is permanently bent out of shape. Mike lends the knives to Roger Dodger who promptly sells them for cash.

Mike is embarrassed about this damage and doesn't answer the door when Julia arrives on Monday morning. Julia continues to knock for three days. On the fourth day she demands in writing the return of her chattels. Mike tells Julia through the door on day three 'I am injured and ashamed. I can't see you or return the goods.' On day five Julia sees her local solicitor about what she should do. You are that lawyer. Advise her.

3

Fixtures

'We don't own the land, the land owns us.' Bob Randall, a Yankunytjatjara elder.



Real property, personal property

Chapter One looked at the concept of property. Think back to the classification of

property and locate the 'place' of land within the law's classification.

Recall also the reason for the differentiation between real and personal

property. The focus in this chapter is to investigate circumstances where personal property and real property converge.

land includes messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in the land

Acts Interpretation Act 1954 (Qld), Schedule

As you read about the law's definition of land, bear in mind how Aboriginal and Torres Strait Islander Australians think about their lands. Is there a material difference between land and water? Do Indigenous Australians consider that they own land, in the way that you would consider this? Watch [this YouTube clip of Bob Randall](#) explaining his feelings about land and its extent – what does he have to say about his relationship with land? Recall also the decision in [Milirrpum v Nabalco](#).

Vegetation

On an *ecological* interpretation of land, vegetation would normally be considered to be part of the land. But again, the law separates parts of the land into *resources*, conceptualising them differently. The law attaches different rights to vegetation, vest-

ing them in different 'owners', depending on its own categorisation.

Look up the following terms, and explain what they mean:

- Fructus industriales
- Fructus naturales

Explain the difference between these terms – which forms part of the land and which is a chattel?

Are these banana trees fructus industriales or fructus naturales? What are the implications?



As can be seen, the law considers *land* quite differently from the way that a biologist might understand the concept, and probably differently from the way non-lawyers might see it.

Fixtures: *Things attached to land*

Having an understanding of the different classifications of property is important in that different rights flow depending upon the nature of that property. This is highlighted in the law of fixtures, and otherwise in relation to vegetation attached to land. On the one hand, such objects could be land, in which case land law applies. On the other, they could be chattels in which case they are personal property, and different legal principles apply.

The law of fixtures changes the character of some physical objects placed on land from personal property to real property – thereby impacting on the law that applies. This becomes relevant in a variety of circumstances – for example:

- If you are a tenant and you attach a plasma television to the wall of your rental property, can you take it with you when you leave?
- If you inherit a house under a will, and your sibling inherits the chattels of the deceased, who can take the dishwasher?

Quicquid Plantatur Solo Solo Cedit

What does this mean?

Think about the examples above – when might this principle become important? Does the law take this maxim literally?

Chattel or Fixture?

Read the decision in [Geita Sebea v The Territory of Papua \(1941\) 67 CLR 544](#). What are the facts of this case? What did the court find?

In deciding whether an object is a chattel or a fixture (and therefore part of the land), the starting point is whether the object is affixed to the land. From there, the courts have developed a test for determining whether a thing is a chattel or a fixture. Explain what this test is – in doing so, explain the difference between the degree of annexation test and the purpose of annexation test. See *Belgrave Nominees v Barlin Scott Air Conditioning* (1984) VR 947.

Consider the examples in the table below, and decide whether they are fixtures or chattels – and explain why you reach that conclusion:

Object	Reason
loom attached to floor of mill by nails	keeps loom steady

So far, we have looked at whether an object is a fixture or a chattel. In analysing a problem, this is our first port of call. However there are some modifications to this law that need also to be considered. It is possible that either equity or statute may change your conclusion.

Estoppel

In some circumstances, equity will find that a thing erected by another person on your land, will not become part of your land – ie it will not become a fixture that belongs to the owner of the land.

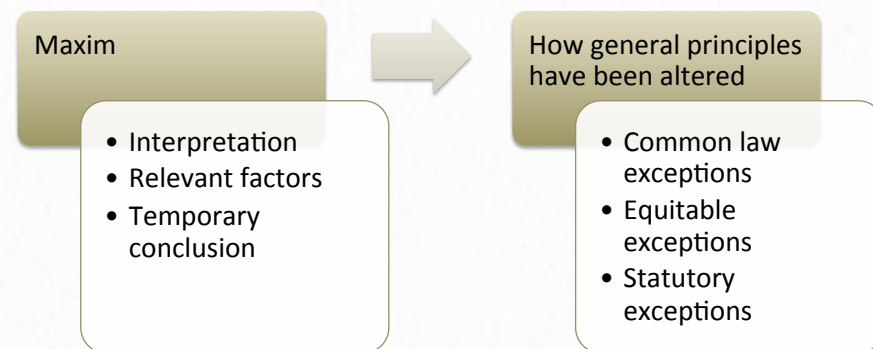
Explain how estoppel will operate to prevent something that is affixed to land from becoming a fixture. See eg *Willmott v Barber* (1880) 15 Ch D LR 96, 105.

Modifying the maxim - statute

In some circumstances, Parliament has enacted laws that change the conclusion of whether an object is a fixture. Use your Property Law Act to locate the relevant provisions:

- Agricultural holdings
- Encroachment of building
- Improvement under mistake of title

Solving a Fixtures Problem



Questions

Question 1

Explain the maxim *quicquid plantatur solo solo cedit*. What is the rationale for this maxim?

‘Explain’ invites you not just to provide a definition of a phrase. Consider how the courts have applied the maxim; the full extent of the proposition, including its limitations. Also provide examples of its application to help illustrate your point. Remember always to use primary sources (ie case law and statute) to support your claims.

Question 2

Humphrey contracted to purchase Lauren's rural property of two acres on which there stood a dwelling house and various improvements. The property purchased was subject to a lease. Prior to the contract Humphrey inspected the property and assumed that the following items were included in the sale:

- a) A clothes hoist installed by Lauren
- b) A dishwasher installed by Lauren
- c) An aluminium shed fixed to a concrete slab, and
- d) A honey separator machine bolted to the floor of the shed.

carefully at the facts to assist you to determine what the real issues are.

None of these items was specifically mentioned in the sale contract.

After settlement Humphrey arrived at the farm to find that all of these items had been removed.

Assume that:

- the vendor, Lauren, removed the clothes hoist and the dishwasher; and
- Peter, a tenant living in the premises removed the shed and the honey machine which he had installed during the tenancy. The tenancy is due to terminate soon, all rent having been paid.

Advise Humphrey as to whether he can recover any of these items or their value, and if so, from whom.

Think logically about the problem. The way the question has been set out provides you with a general structure within which to think about the issues. Remember to look

4

Fragmentation of Property Interests

A single parcel of land may support a number of different interests - all of which are property.



Land regulation in Queensland

Recall your studies in first year, and consider the constitutional structure in Australia,

and the power vested in Commonwealth and State governments. Which layer of government is responsible for regulation of land and interests in land? Pro-

vide examples of the exercise of this power.

Law relating to land is derived from common law principles, although many of these are now embodied in statute. Some common law principles have been radically altered by statute. In each section of this chapter, you will observe the relationship between common law and statute, and the evolution of doctrine concerning land. To begin with however, it is useful to start by working out the operation of Queensland's principal property statute, the *Property Law Act 1974* (Qld).

Reading statutes

Statutes form the majority of contemporary law. Central to the skills of the lawyer is the ability to read and to understand statutes. You started learning this skill in first year. It is a skill that will require practice as you work through your law degree. The *Property Law Act 1974* (Qld) ('PLA') is central to the study of property law in Queensland. This book encourages you to work with this Act to practise statutory interpretation skills. Where do you go to find an authorized version of this Act?

Looking at your PLA, answer the following questions:

1. To what date is your reprint current?
2. What is the long title of the Act?
3. Where would you find definitions in the Act?
4. What is the purpose of the Act?
5. Describe, in your own words, the application of the Act
6. Compare the titles of the different parts in the Act and the key concepts or chapter titles in this book – can you find any similarities? Which parts do you think might be relevant in this subject?
7. Describe the overall structure of the Act – draw a mind map or diagram of how it is structured.

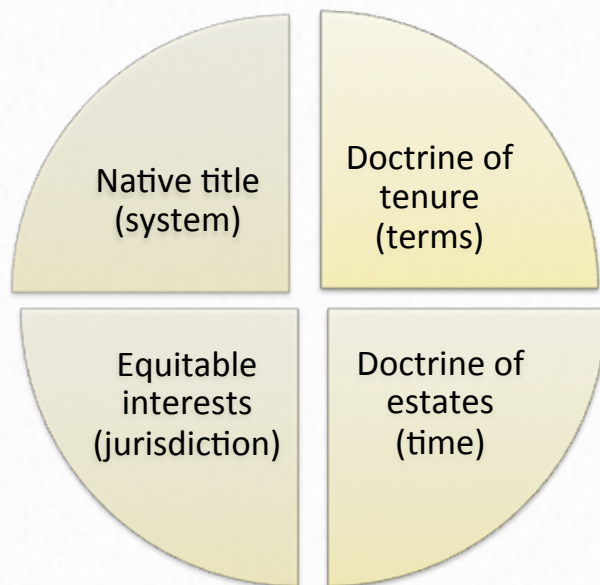
Think about what you already know of the classification of property – can you see any specific types of interests, or rights or property mentioned in the contents of the Act?

Fragmenting property interests

The rest of this chapter is divided into sections. Each section represents a different aspect of what is referred to as the *fragmentation* of proprietary interests in land.

This means that we can understand property in land in a number of ways. Each section will look at a different 'fragment' of proprietary interests in land.

Property in land can be understood in different ways



The doctrine of tenure



The feudal doctrine of tenure

Recall that property is a product of time and society. This section provides an overview of the development of the Australian system of land law through examining the doctrine of tenure. The doctrine evolved significantly from the time following the Norman Conquest in England, but at the time of reception of English law in Australia was still recognisable.

In Norman England **tenure** took different forms – it reflected a number of different relationships between land ‘owner’ and landholder. In addition, in exchange for the privilege of holding any particular class of tenure, the landholder was required to offer services of some sort – known as the **incidents of tenure**. This system helped to sustain the new regime in England after the Norman conquest, and became central to the organisation of society.



Think again about the role of regulation of land in terms of its capacity to sustain social relations.

Name the different types of tenure, and also the incidents of tenure. What did these incidents involve? (look them up if you're not sure.)



If all the incidents of tenure are abolished, does the doctrine of tenure continue to exist?

There were some major problems with the doctrine of tenure in its purest form. Describe the effect of the *Statute of Quia Emptores 1290* and the *Tenures Abolition Act 1660*. Are these part of Queensland law? Explain.

The doctrine of tenure in Australia

Think back to your studies in first year law. How was it possible to justify sovereignty at international law? How did Britain justify sovereignty over Australia? What legal fiction did it use for this purpose? Describe this 'legal fiction' in your own words.

Having justified sovereignty, the English then had to determine what law applied to land in Australia. Consider this case extract. What does it mean? Consider the doctrine of tenure and how this doctrine relates to this statement.

The waste lands of this colony are and ever have been, from time of its first settlement in 1788, in the crown; that they are and ever have been, from that date... in the sovereign's possession; and that as his or her property they have been and may now be effectually granted to subjects of the Crown.

A-G v Brown (1847) 2 SCR (NSW) App 30

Tenure in Queensland

Look at the *Property Law Act 1974* (Qld), in particular ss20, 21. Relate these provisions to what you know about the doctrine of tenure.

Common law is the dominant source of both interests in land and the concepts embodied in statutes, but native title represents another way in which the system of land holding in Australia has been fragmented. How would you say that the idea of native title represents a challenge to the feudal doctrine of tenure?

Fragmenting tenure

Consider the antecedents to [Mabo: Milirrpum v Nabalco](#); [Coe v Commonwealth](#).

How did the decisions in these cases deal with the arguments of the applicants?

Explain the impact of *Mabo* on the British theory of universal and absolute crown ownership.

What are the nature and incidents of native title? How do these differ from common law title?

What is the status of native title relative to common law title? How does this relate to sovereignty?

Interactive 4.1 Fragmentation of proprietary interests



An overview of the introduction into Australia of the doctrine of tenure, and its evolution in the Australian context.

Native title



The decision in *Mabo* opened the way for the recognition of another system of recognition of interests in land in Australia. It did this through adapting the feudal doctrine of tenure to Australian conditions – through recognition that the Crown, upon claiming **sovereignty** in Australia, did not get the full beneficial title to land but rather only held **radical title**. Therefore, the doctrine of tenure only came into play once a grant of land had been made.

This then opened the way for traditional owners to claim their traditional interests in land – to have their traditional interests recognised by common law. This section looks first at how Australian law recognises these interests, and contrasts this with the means by which the common law recognises an estate in land – a common law interest.

After *Mabo* the [Native Title Act 1993 \(Cth\)](#) came into force. What is the purpose and the structure of the *Native Title Act* ('NTA')?

Now read s223 of the Act carefully. In your own words, explain what this section means, and how it relates to the decision in *Mabo*.

The limits to native title were tested in the [Wik decision](#). Did this decision widen the way in which the law understands native title interests, or narrow it? Explain the nature and effect of the amendments to the Act post-*Wik*.

Testing the Act

The NTA has been tested on many occasions. Consider the cases that have tested it, and think about these issues:

- Is the NTA unconstitutional?
- Could individual states enact their own legislation to overrule native title? Why or why not?
- Could extinguishment be implied through acts of the state? Could there be a presumption of no extinguishment?
- What is the implication of Crown sovereignty in relation to title? Does this have an effect on native title?

- Did mere grant of a **pastoral lease** change Crown's underlying title?
- What is the impact on native title of a grant of **fee simple**?
- What is the link between connection and extinguishment?

Native title represents fragmentation of rights in land by system, but the doctrine of estates represents fragmentation of rights in land by time. That is, the estate is a means of holding an interest in land for a period of time.

Questions

Question 1

With the aid of appropriate statute and case law, discuss the doctrine of tenure in Australia pre-*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

Question 2

What was the justification of Blackburn J in *Milirrpum v Nabalco* (1971) 17 FLR 142 for the finding that the plaintiff did not have title to the land in question? Use your knowledge of classification of property rights to explain your answer.

Question 3

Compare and contrast the judgments of Gibbs CJ and Murphy J in *Coe v Commonwealth* (1979) 53 ALJR 403.

Question 4

Discuss the significance of the decision in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 for Australian real property law and, in particular, for the doctrine of tenure. In your answer, assess whether and if so, to what extent, native title is compatible with the doctrine of tenure.

Question 5

Using the language of the Court in *Mabo v Queensland*, explain whether you think a native title claim would be successful over the cities of Townsville or Cairns

These questions require you to read the cases and to interpret what you have read. Interpretation requires you to ‘comprehend and express the meaning and significance’ of what you have read. These decisions therefore need to be placed in the context of property law and land law.

While topics that invite you to ‘discuss’ may not be phrased as a question, one way to tackle the task is to rephrase the topic as a question. The question may also have a number of sub-questions. By rephrasing, you can test whether your response does answer the question. It pro-

vides you with a useful framework for discussion.

A comparison asks you to find what is similar, and in contrasting the judgments, you need to find what is different. Think back to your previous studies, and the way in which judges approach their decision-making. This will give you a wider base from which to compare the judgments.

Interactive 4.2 Native title



This slideshow provides an overview of the evolution of native title jurisprudence in Australia.

Estates



The nature of an estate

Native title survived the doctrine of tenure because the Court in *Mabo* recognized a difference between radical and full beneficial title. The Court also said that native title could be extinguished by a grant of an estate in fee simple – ie the estate is an interest that is given preference to that of native title. The grant of an estate in land is an exercise of the prerogative of the Crown because it is the sovereign.

An estate is a grant of **seisin** in **freehold** land. This involves an understanding of the distinction between title, seisin and possession.

What do each of these concepts mean, and how are they related?

Relationship between interests in land

Estates: seisin

Freehold

leasehold

Fee simple

Fee tail

Life estate

Freehold estates

Native title interests are recognised by Australian law according to evidence of connection with land and traditional norms that were in place at the time of English sovereignty over Australia. In contrast, traditional common law interests in land,

namely estates, were recognised according to the words used to create them.

At common law, there were three kinds of freehold titles: fee simple, **fee tail** and **life estate**. Consider how the law recognizes a validly created estate at common law and under statute. Consider also the difference between an estate created by will and one created **inter vivos**. Make sure you read carefully s29 of the PLA.

Life estates

Despite the name, a life estate is a freehold estate. Contrast this with a right to occupy a house for life. What is the difference?

Can you identify the **cestui que vie** and the **remainderman** or **reversioner**?

A life tenant has rights and obligations that relate to the fact that at the end of the life estate the estate reverts back to the grantor so it needs to be preserved. Look at the [Trusts Act 1973 \(Qld\)](#). Does the Act apply to a life tenant? How?

In addition to the *Trusts Act*, the **doctrine of waste** has developed to protect and preserve the property. Consider the different types of waste. How is it defined? Can it be understood differently in different contexts? Read the PLA and identify how the

Review 4.1 Creating estates: you will need to review your text and the PLA to answer these questions

Question 1 of 7

What are the words of purchase?

- A.** Words that designate the person upon
- B.** Words that indicate a
- C.** Words that identify
- D.** Words that indicate

Check Answer

doctrine of waste is now provided for by statute.

Further limits to estates

An estate is an example of how interests in land have been fragmented – that is, there are a number of ways to hold an interest in land. While tenure is a way of defining interests based on relationships of service, native title is a means of holding an interest based on a different system of law, and an estate creates an interest in land limited by time. However the holder of an estate may seek to limit that time some more. This is done through adding words to the grant that seek to cut the estate short if a particular event occurs.

In your own words, explain the difference between a determinable limitation and a condition subsequent attached to the grant of estate. Why is it important to make this distinction?

Void limiting events

Consider what will happen if the limiting event is void. What limitations are void? Make sure you can follow the line of cases relating to limiting events. Many of these turn on the facts of the case, so understanding the underlying concepts is important.

Estates – present and future

Future interests represent a present right to possess and enjoy the land at a future time. The law has developed in this area to limit the extent to which a landowner can control ownership into the future. To do this, there are a number of relevant concepts.

There are three types of future interest – reversion, remainders and executory interests. What is a reversion? What is a remainder?

Example 1

X owns fee simple estate = estate in fee simple in possession

X grants estate 'to A for life'

A has what sort of estate?

X has what sort of estate?

Example 2

X owns fee simple estate in possession

X grants an estate: 'to A for life, then to B for life'

A has what sort of estate?

B has what sort of estate?

X has what sort of estate?

Is the estate vested in interest or in possession?

What is the nature of a right given in possession? Give an example of a right that is granted in possession. Contrast this with future interests – or a grant of a present right to future possession.

Contingent interests

An interest is contingent if it is subject to a condition that might or might not happen. For example:

X grants Greenacre: 'to A for life, remainder to B in fee simple if B has attained the age of 21'

X had an interest in possession in fee simple, and granted it away.

A has a life estate.

B has a remainder that is contingent upon his/her turning 21.

This is not considered to be an interest at all. The law developed four rules to deal with legal remainders such as this – refer to your text if you are interested in learning more.

Remember that the doctrine of estates provides for the orderly succession of land (the common law abhors an abeyance of

seisin...). Imagine drafting a will leaving property:

To my children but if they are dead, then to my grandchildren, but if they do not take the interest, then to my great grandchildren, but if they do not take, then... (and so on)

What kind of interest do these descendants have? Is it possible to make provision indefinitely for people to take your estate? Is this desirable? Why or why not?

Review 4.2 Vested and contingent estates

Question 1 of 6

X grants Greenacre (which he holds in fee simple) to A for life What estate does X hold?

- A.** X holds an estate in fee simple in reversion
- B.** X holds an estate in fee simple in remainder
- C.** X holds a future interest contingent on A's death



Check Answer



Rule against perpetuities

To avoid this kind of situation (and potentially to avoid an abeyance of seisin) the courts have determined that the validity of a future interest is governed by time within which the interest is to vest. If that time is too remote, the future interest is invalid. This resulted in the rule against perpetuities.

An interest is only good if it must vest, if it vests at all, not later than 21 years after the death of some life in being who was alive or *en ventre sa mere* [in the womb] at the creation of the interest. If no such life in being was in existence at the creation of the interest, then the term of 21 years only is allowed.

Duke of Norfolk's Case (1682) 3 Ch Cas 1

Consider the effect of the rule against perpetuities. As a lawyer, what do you need to bear in mind when drafting grants? When might this be relevant?

It's useful to think about the rule in segments...

1. The rule applies only to contingent remainders and executory interests, not vested interests

2. When does the perpetuity period start?
Remember: the perpetuity period begins to run at creation of interest. Think: this differs for interests created by will and inter vivos...
3. Who is the life in being? Explain what is the life in being. It's important to understand this concept. What happens if the life in being is part of a group?
4. The interest must vest, if at all.

This is the crux of the rule against perpetuities. Remember, it is a rule that seeks to limit the endless grant of successive interests at remote times in the future. So the interest, must vest, if at all... within the boundaries imposed by the rule.

There are a series of constructs at common law that relate to this idea: precocious toddler; fertile octogenarian; magic gravel pits; unborn widow... What do these constructs mean and how were they applied? Further, what is the meaning of the 'initial certainty rule'?

Hint: See McCrimmon, Les A, 'Gametes, embryos and the life in being: The impact of reproductive technology on the rule against perpetuities' (Winter 2000) *Real Property Probate and Trust Journal*.

When is the class-closing rule required?
What if the class is capable of further growth? The rule has of course been modified by statute.

Questions

Question 1

How has the rule against perpetuities been modified? What is the effect of the PLA on the elements of the rule that you have been looking at?

Question 2

With reference to the doctrine of estates, explain:

- a) Words of limitation
- b) Words of purchase
- c) Words of procreation

Question 3

What interest does each party, including the grantor, take in the following cases. In each case the grantor held a fee simple. How would your answer differ if the donation is made by a will?

- a) to Anne
- b) to Barry for life
- c) to Andrea for life, remainder to Brian in fee simple

- d) to Ada and her heirs for life
- e) to Andrew during the lifetime of Bronwyn
- f) to Alan for life remainder to Brenda for life remainder to the heirs of Alan
- g) to Alan for life remainder to Bonnie and her heirs remainder to the heirs of Alain's body

Question 4

Bill Bloggs was a prominent member of the Coffee Party. For several years he was the Federal Member of Parliament for his constituency. In his will he devised:

- a) his townhouse to his widow, Anna, for life provided that she remained his widow and continued to uphold 'liberal political views'.
- b) his Gold Coast house to his eldest son, Simon, for life as long as he did not attempt to sell it.

What estates do Anna and Simon have and are they bound by the stated conditions?

Do you know what 'devised' means? Make sure you use your legal dictionary to clarify the meaning of any words of which you are unsure.

Question 5

Mr Hog, the registered proprietor of Greenacres in fee simple, devised Greenacres to his daughter Eve, but if she marries or dies, then the property is to pass to his eldest son Adam. Eve and Adam have fallen out mainly because Eve is living with Mac, a member of the local bikers club. Adam is also concerned that:

- a) the property is in disrepair;
- b) Eve has allowed Mac to alter the house and construct a big shed wherein all his bikie mates can hang out, all of which he finds disgusting; and
- c) Mac has convinced Eve to cut several trees on the property to make way for a parking area for all the bikes during meets.

Adam seeks your advice as to whether he has any cause of action against his sister.

The structure of this question provides you with a hint as to the issues involved in this scenario. Use this as a framework for your answer.

Question 6

Explain in your own words what is the rule against perpetuities. Think about why and

in what circumstances a lawyer would need to understand these rules.

Question 7

Discuss whether the following grant would satisfy the rule against perpetuities under:

- (a) the common law; and
- (b) *Property Law Act 1974* (Qld).

To Alana for life and thereafter to the first child of Alana to reach 25.

Question 8

What is the purpose of the mediating concept of the estate? How does it affect the endurance of society, economy, environment and governance?

Interactive 4.3 Estates



This slideshow will guide you through the concepts covered in this chapter

The equitable estate



Recall from first year how the **common law** developed in England, and resulted in the development of the **Courts of Chancery**. These courts were the courts of conscience. In addition to developing concepts such as estoppel and remedies of specific performance, these courts developed a different approach to proprietary interests.

On this basis, over time, where the common law courts may not have found the ex-

istence of a legal estate, the courts of equity would. In this way, the estate could be held simultaneously by one person as a legal estate, and by another as an equitable estate.

Have you already encountered 'equitable interests'? Explain what these interests are.

Question 1

What is an equitable interest in land and how does it differ from a legal interest?

Question 2

What does the rise of equity say about the capacity of the common law to meet changing social and economic needs?

5

Proprietary Interests

Not only does the law feature the structure of land ownership, but it regulates the way in which property is created and transmitted.



Revising the rise of **equity**...

So far, we have looked at a number of circumstances in which an equitable interest in land might be created: consider for ex-

ample the idea of an equitable interest as co-owner, which may differ from the legal estate.



How did equity arise? What are some examples of the ‘dual’ nature of interests in land, or the fragmentation of interests by jurisdiction?

Two estates...in one thing: where a person who holds the legal interest in property does not also hold the equitable interest in that property, in equity, the holder of the legal interest holds subject to an obligation to deal with the property in the interests of the holder of the equitable interest.

Acquiring interests in land

This chapter deals with the law that resolves competitions between interests in land. It is possible to acquire a legal interest in land, or an equitable interest. We also know that it is possible to have multiple of these interests in the one parcel of land. This presupposes first, that you understand the nature of property: that it represents a large number of different types of rights; and that you understand that equitable interests may exist at the same time as legal interests.

First, we establish the law relating to the creation of interests in land – at law and in equity – and then we will look at the law to resolve disputes between holders of different interests in land to answer the question: who can take the land?

‘Old system’ land

Since the mid-1800’s, the creation of title to land in Australia has been regulated by statute Torrens title (*Land Title Act*). Land held at common law is known as old system land or general law land. It is land that is not registered in the Torrens register. To start with, we are only looking at this common law title – old system title. This will allow us to establish firmly the basis on which interests are created.

Creation/acquisition of legal interests

Creation or acquisition of legal interests in land is covered by a group of sections (which happen to apply both to ‘old system’ and to Torrens titles): PLA ss 59, 6, 8, 10, 11.

Look carefully at s59 PLA (otherwise known as the ‘Statute of Frauds’ provision). Recall this provision from contract law. In relation to acquisition of legal interests, read this provision in conjunction with PLA s6. Look also at PLA s8: think about the effect of this section. Consider these provisions then in conjunction with PLA s10... and PLA s11. Explain in your own words what these sections together mean for the creation of an interest in land.

Hint: What were the requirements of a conveyance (transfer of land) in the feudal system? What is the effect of s8, PLA?

What is the relationship between s11 and s10?

Creating legal interest in old system land

It is important to understand what are the requirements for creation of a legal interest of old system land – can you summarise the requirements? Make sure you can apply these requirements to a set of facts.

Creating legal interests in Torrens title land

The Torrens Title system of landholding is explained in detail in Chapter 7. For now, all you need to know is that:

- Old system land can be brought under the Torrens system by registering a plan of survey, which will trigger the issue of a title.
- Now, all freehold land in Queensland is Torrens land.
- Legal title is only created through the act of registration of an interest in the registry. This is done under the *Land Title Act*.

- Subject to some exceptions (covered in some detail in Chapter 7) a registered title (legal title) defeats all unregistered (equitable) interests.
- Registration under the LTA satisfies all the PLA requirements for creation of a legal title.

Equitable interests

Equitable interests may be created by:

- trust; or
- force of law, or
- may constitute an equitable interest in land

Creating equitable interests

What is a **trust**? How is an equitable interest created by operation of law?

For every legal interest in land there may exist a parallel interest in equity, for example:

- equitable life estate;
- equitable lease;
- equitable mortgage, etc

These interests may be created where there is a failure to comply with rules for

creating/ transferring legal interest in land. For example: a failure to register under the LTA; failure to satisfy the PLA requirements of writing.



Think: What is the most 'valuable' equity? Why? Think of examples of the three types of equity...

Formal requirements for equitable interests are contained in PLA s11 – what is the basic formal requirement? What did *Lysaght v Edwards* (1876) 2 Ch D 499 hold?

If this basic requirement is not fulfilled, then consider part performance: PLA. What are the elements required for part performance?

Hint: Look at *Maddison v Alderson* (1883) approved by the High Court in *Regent v Millett* (1976).

What is a conveyance? Can you explain the conveyancing process in general terms?

Old system mortgage

To understand the types of interests that can be created at law and in equity, it is important that you understand what is an 'old system' mortgage. What interest did the bank (lender) have? What interest did the borrower (home owner) have?

How could an equitable mortgage be created?

Think: Is it possible to have more than one interest in one parcel of land? If so, whose interest might prevail in the event of a dispute?

Priorities under the general law

What are the three steps to take in examining a priorities dispute?

General principles

In general, what is the status of legal rights? In general, what is the status of equitable rights?

Whose interests prevail in the following competitions in general law (old system) land? (ie ignore Torrens title.)

	later legal	later equitable
earlier legal		
later equitable		

What approach do the courts take to determining priority between competing equitable interests? (Refer to *Rice v Rice* as your starting point.)

Questions

Question 1

1. How is a legal title created under old system land?
2. How is a legal title created under Torrens land?
3. How is an equitable interest created?

Question 2

The effect of *Walsh v Lonsdale* (1882) 21 Ch D 9 was often summed up in the words ‘a contract for a lease is as good as a lease.’ For many purposes this is true, but as a generalization it is misleading, for it ignores the vital differences between legal and equitable interests.

With illustrations from decided cases, discuss this statement.

Question 3

Explain how a dispute between equitable interest holders is resolved, with reference to the case law.

Question 4

What kind of interest does X have in these examples? Explain your reasoning.

- a) X signs a contract to purchase land from Y.

- b) X borrows money from ABC Bank, and lodges her title deeds with the bank as security.
- c) X owns land subject to a mortgage, but is in breach of his mortgage. The mortgagee sells the land without giving proper notice to X of his breach, and the purchaser is related to the mortgagee.
- d) Y signs a deed of conveyance of Y’s land in favour of X, in exchange for the full purchase price. The land is not on the Torrens register.
- e) X buys land from Z, and the transfer of land is registered in the Torrens register.
- f) X lends Z money, and Z writes a letter to X promising to sign a mortgage in X’s favour. Z fails to sign a mortgage.

Question 5

Jason, the owner of a house in South Townsville, died in December last year. In November, a month before he died, Rose had written to him offering to buy his house for \$200,000. The following day Jason had replied to Rose stating he would accept \$220,000 for the house, ‘nothing more, nothing less.’ Rose sent another letter to Jason agreeing to buy the house for

\$220,000 and enclosed a cheque for \$22,000 as proof of her good faith. She also indicated that the cheque was her deposit on the house and evidence of a binding contract of sale. Jason promptly paid the cheque into his bank account and sent a note to Rose to 'acknowledge receipt of \$22,000.'

Three days later Peta learnt from a friend that Jason was looking for a buyer for his house. Peta, who was unaware of what had already transpired between Jason and Rose in connection with the house, went to see Jason and offered to pay \$250,000 for the house. Jason gleefully accepted: he could not believe his luck. Jason and Peta signed a written agreement and Peta paid \$50,000 as a deposit, promising to pay the balance within a month upon transfer of title. Jason suffered a heart seizure soon afterwards and died.

Jason's executors seek advice on all the relevant legal issues in relation to the house. Advise them especially as to the entitlements of Rose and Peta.

Question 6

Consider the way in which the law resolves these disputes over land. Do you think that they are fair? Are they economically sustainable? Explain your answer, considering

the implications for the economy and also in relation to contemporary technologies.

6

Statutory title

Common law did its best to resolve competitions between competing interests in land, but the private system was complex and expensive.



TITLE DEED
OLD KENT RD.

RENT—Site only	£2
.. With 1 House	10
.. .. 2 Houses	30
.. .. 3 Houses	90
.. .. 4 Houses	160
.. .. HOTEL	250

If a player owns ALL the Sites of any Colour-Group, the rent is Doubled on Unimproved Sites in that group.

COST of Houses, £50 each
.. .. Hotels, £50
.. .. plus 4 houses
MORTGAGE Value of Site, £30



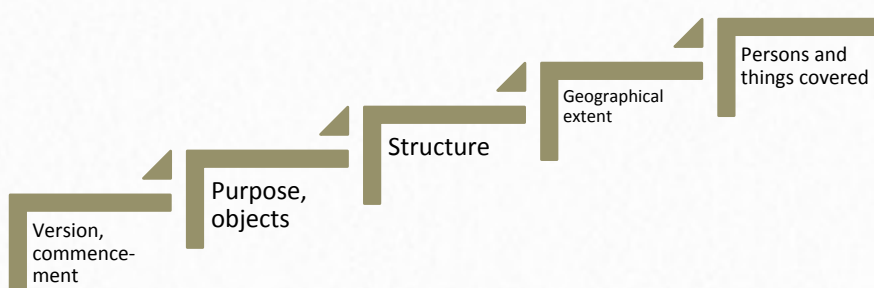
This Chapter canvasses the development of land title beyond the common law. This first part covers the early statutory schemes of recording land title, and the following three sections deal with the Torrens

system of land title. This chapter requires close attention to the text, purpose and context of the Torrens statute. But first, an overview of early government intervention through the *Property Law Act*.

Government intervention

Recalling the previous chapter, consider the drawbacks of the common law system of resolving priorities disputes. Why might Parliament have intervened to provide for a public register of land interests?

The relevant provisions are contained in the PLA. Recall the structure of the PLA, and the method of locating the purpose of the legislation.



Remembering that we are dealing with *un-registered land*, use the table of contents in the PLA to identify the Part that is likely to be relevant here.

Knowing about the concept of ‘**chain of title**’ for an old system conveyance, locate the provision in Part 18 of the PLA that is relevant. Consider in particular, *how far back in time* a seller must show title.

Considering the drawbacks associated with the private form of creation of interests in land, the PLA (and its predecessor

Acts) created a system of registration of deeds. Look at the PLA to identify the relevant Division dealing with deeds registration.

Reading the PLA, explain:

- the meaning of s241
- the effect of registration on the priority of interests
- the effect of fraud of the conveying party

Why do you think that the owner of an interest in land might register their deed? What are the benefits of registration? On the other hand, what are the drawbacks in this statutory scheme?

The effect of registration is to give the instrument registered ‘priority’ over all instruments that are either unregistered or not registered until later. This may allow a person who would have had a defective title at common law (eg because his vendor had previously parted with the fee simple estate) to take a good title under the deeds registration system by virtue of the timely registration of the relevant instrument.

Boyce v Beckman (1890) 11 LR (NSW) 139

Look also at [Darbyshire v Darbyshire \(1905\) 2 CLR 787](#).

What is the extent of the benefit afforded by s246 PLA? Read the text of the Act carefully, identifying the circumstances in which it will apply. You will see for example that the scheme of deeds registration only applies to *instruments*. What is the effect of this? What kinds of interests might be excluded? (See PLA s10(2)(c); ss59 and 6; *Land Title Act* s75.)

You may need to look at the *context* of these provisions to locate the definition of words used in the Act. Are there any words in s246 that are defined in the Act?

Other words may have been interpreted by the courts. For example, what is the meaning of *bona fides* in the context of statutory registration of interests? (See *Davidson v O'Halloran* [1913] VLR 367; *Scholes v Blunt* (1916) 17 SR (NSW) 36, but contrast *Burrows v Crimp* (1887) LR (NSW) (L) 198.)

Registration & validity of instrument

Does registration affect the validity of the instrument? Explain how this might impact on the scheme.

Disadvantages

Consider advantages of deeds registration system. Now consider disadvantages of deeds registration system: what elements of common law priorities disputes will it not address?

Parliament was again called on to deal with the shortcomings of the deeds registration system. Consider the genesis of the Torrens system of title. What lies at the heart of the Torrens system that represents an improvement on old system title, including the deeds registration system?

Explain the evolution of statutory schemes of registration in light of the limitations of Old System title.

Movie 6.1 Key concepts



This prezi provides an overview of the key concepts and organisation of the chapters so far.

Torrens System of Title



Review

How would you describe the progression of concepts relating to interests in land?

What is general law (old system) land?

What sort of rights did it entail? How was it created? What priority does it have?

Torrens Title

The Torrens title system involves principally the same concepts as those in **old system land**, though some have been

modified. The nature of land title remains the same as old system: the process of Crown grant is the same and the title held is a freehold estate in fee simple - thus the doctrines of tenure and estates continue to apply.

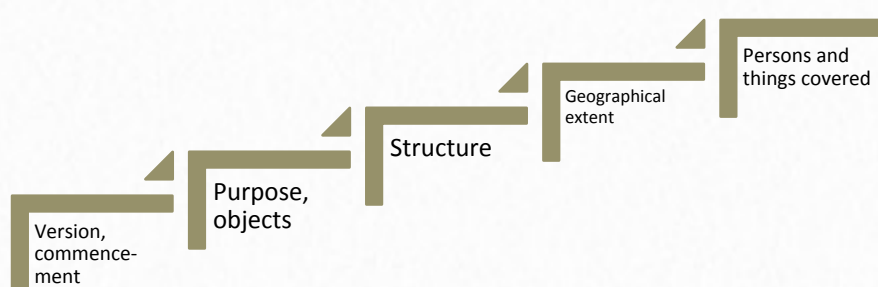
Read Division Four of Part 18 of the PLA. Explain how old system land was brought within the new system of land registration.

Read your text and consider systems for registration of interests in land. The first

part of this Chapter looked at the deeds registration system. Consider:

- How is the interest created?
- What are the advantages and disadvantages of the deeds registration system?
- What if the chain of title is defective?
- Does it resolve fraudulent dealings?
- Is the **register** definitive?
- Does it apply universally to land?

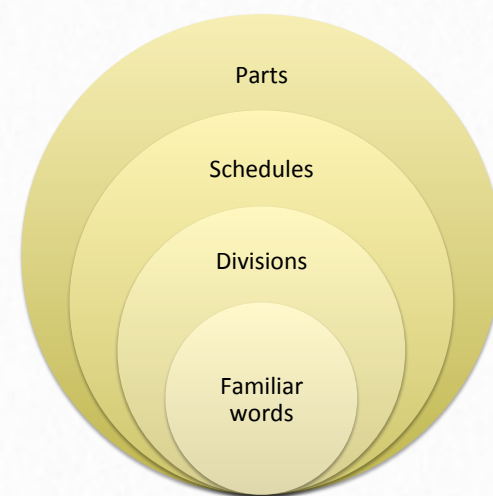
While Torrens title is a statutory system of registration of interests in land, it operates quite differently to the deeds registration system. Under Torrens, registration itself creates the interest. To understand the operation of the system requires knowledge of the *Land Title Act* (LTA). As always, start with the broadest reading of the Act.



Initial overview of statute

What is the *purpose* of the LTA?

To establish the *structure* of the Act, refer to the table of contents.



The Torrens system of land title is a system of government guaranteed title by registration. How does this contrast with old system title and the deeds registration system?

Bringing land on to the register

All freehold land in Queensland is now on the register: the only way to give a legal title is to use the Torrens system of registration. How does this differ from the old system of land title?

All land on the register is surveyed. A plan of survey will show details such as:

- Lot numbers
- Dedicated roads
- Easements

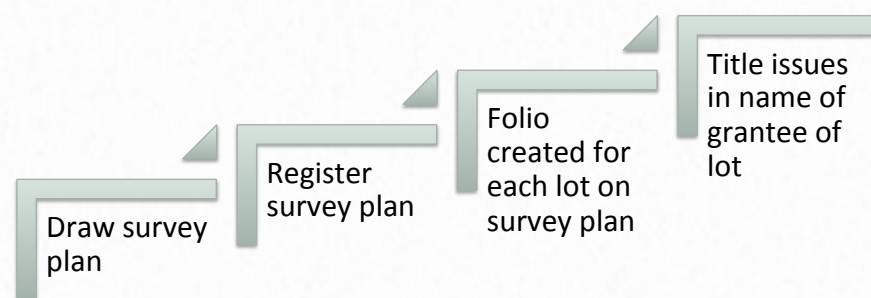
- Lot boundaries
- Surveyor's reference marks
- Entitlements created by the plan
- Plan number and locality
- Owner consent
- Council consent
- Surveyor's certificate
- Cancelled lots
- Details of all new titles created



Image from [Definium](#)

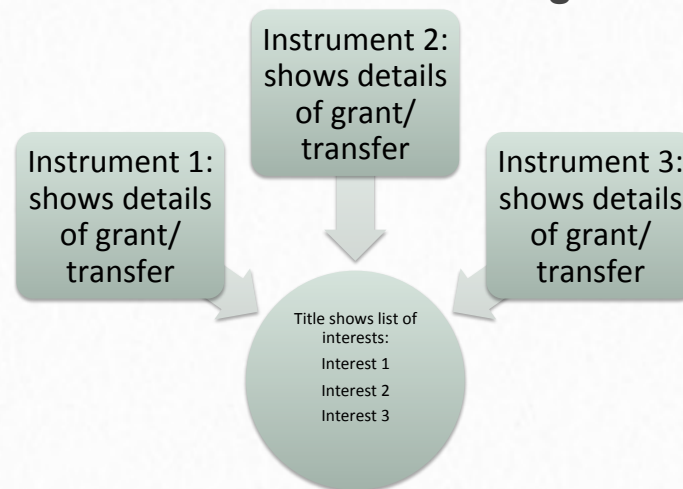
The information identified on the survey plan forms the basis of the information recorded on the new title that issues (lot number, title reference etc).

Figure 1 Bringing Land onto the Register



The survey plan will not however identify the *nature* of interests in that land. This information is created by other instruments that are lodged with the Registrar, and which are recorded on the title.

Figure 2 What Constitutes the Register?



Many of the cases concerning Torrens focus on paper title. Originally the register consisted of books in which each page (folio) evidenced title to land. Each folio had a *duplicate* which was held by the land owner. Before any dealing could be made on the register, the duplicate certificate of title had to be produced. The changes were then noted on both the original folio and on the duplicate.



With the introduction of the LTA, the registrar is no longer required to retain paper title. The register now exists electronically.

•What is the meaning of s8 LTA?

- How does Part 3, Division 3 affect the issue of a duplicate certificate of title?
- What might be the risks in an electronic system of titling?
- Consider how an electronic register might improve upon a paper-based system of title registration.

The register

Central to the operation of the Torrens system is the *freehold land register*. Locate the relevant division in the LTA. What does the register do, and what information does it contain?

Often a statutory provision is uncertain in its operation, and comes before the court for determination. Read [Bursill Enterprises v Burgess \(1971\) 124 CLR](#) and explain how it sheds light on the meaning of the *regis-*

ter and what is recorded there. As you read this case, consider the terms used – can you describe the registration process? Can you understand the nature of the register and what is recorded there?

Explain the sequence of events in this case – show it on a time line; draw a diagram of the land involved.

What is a *memorial*? Look at Figure 2 (above) to see the difference between the ‘face’ of the title, and the totality of the ‘register’.

What did the Court in *Bursill Enterprises* say was the extent of the title owned? Did it include the building over the laneway? Why?

Registration

Describe the process of *registration* of an interest. What is registration? When does registration occur? As you consider this process, consider the nature of the interest that exists at each stage of the process.

Importantly, you should be aware of the point at which the interest gains priority. (s177 LTA)

Explain the benefits of registration. In general terms, thinking about the purpose of

the Torrens system, what do you think is the meaning of indefeasibility?

Now consider the benefits of the Torrens system, as against the challenges implicit in the old system of land titling. Consider:

- the nature of the estate created
- the status of documents registered
- Torrens system's approach to priority issues

Above all, registration confers indefeasibility.

Remedies

The Torrens system is described as a 'state guarantee of land title'. What do you think this means? Find the relevant provisions in the *Land Title Act*.

Recall the decision in [Breskvar v Wall \(1972\) 126 CLR 376](#) - whose interest took priority there? You will see that one of the parties 'missed out' on their interest taking priority. Now read *Breskvar v White* [1978] Qd R 188. Were the Breskvars successful in their claim for compensation? Why not? Would this outcome be the same under the *Land Title Act*?

Questions

Question 1

'The Torrens System of registered title ... is not a system of registration of title but a system of title by registration.'

Breskvar v Wall (1971) 126 CLR 376, per Barwick CJ.

Discuss.

'The instruction to discuss something... involves both description and interpretation. It requires you to explain the relevant ideas and arguments and examine them through reasoned argument, supported by authority... to reach a conclusion. A discussion should not be one-sided but a consideration of the arguments on all sides of the debate.'

Simon Askey & Ian McLeod Studying Law (2nd ed, 2008), 171

Question 2

'The philosophy of an ideal system [of land registration] is that it provides, as conclusive title binding all the world, a state-guaranteed registration evidenced by a certificate which reflects the exact state of the title at any moment in time.'

C Dent Bostick, cited in Lynden Griggs 'Torrens Title in a Digital World' [2001] Murdoch University Electronic Journal of Law 20, footnote 15.

Consider this statement, and discuss:

1. how such a system of land registration would improve upon the system of determining title to old system land;
2. how an electronic titling system (as opposed to a paper system) might enhance or hinder this philosophy; and
3. why the system includes a state 'guarantee' of title, and whether this is appropriate

In this question, you will need to review your notes on old system title, and the deeds registration system in Queensland (see the *Property Law Act 1974* (Qld)).

Question 3

Find the Electronic Conveyancing National Law (Queensland) Bill 2012 (Qld), and its explanatory note.

1. How did you find this Bill and explanatory note? Explain your process.
2. At what stage of the legislative process is the Bill now?

3. What is the rationale for enacting this Bill?
4. With reference to the Bill, explain how this legislation will interact with other jurisdictions.
5. Will the Bill amend any Queensland legislation? If so, what legislation?
6. Look at s46 of the Bill. Explain what you think will be the effect of this provision.
7. Find the *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld). Does it look different from the Bill? How? Explain its operation.

This question is designed to give you a structure for reading a Bill, working out how the Bill will operate, what effect it will have on existing legislation and for you to turn your mind to some fundamental issues concerning Torrens title.

Question 4

Write a case note on *Imperial Bros Pty Ltd v Ronim Pty Ltd* [1998] QCA 444. Bring a printed version of your case note to class, and be prepared to swap your case note and to comment on your peers' case notes.

Writing case notes is an essential part of studying and practising law. It should be

second nature to you now but if you are not sure about how to write it, refer to a law study skills text for guidance, or to your notes from first year.

Question 5

Mr and Mrs York deposited their certificate of title with their nephew, Max (an accountant), for safe-keeping. Max forged the Yorks' signatures on an instrument of transfer and purported to transfer the land to 'Mr Heinz' a non-existent person. The transfer was registered. Pretending to be Mr Heinz, Max borrowed \$20,000 from the Northpac bank on security of the subject land.

Max is now serving a prison term for fraud.

Advise the Yorks in the following circumstances:

1. the Northpac Bank did not register the mortgage; and
2. the Northpac Bank had registered the mortgage.

Remember the process for answering a problem question. What are the issues? Are there any sub-issues? Do the facts remind you of any cases on the topic?

Interactive 6.1 Introducing the Torrens System



This slideshow takes you through the key features of the Torrens system and the improvements it made to deeds registration and the Old System of land titling.

Indefeasibility of title



Indefeasibility

Read [Breskvar v Wall \(1972\) 126 CLR 376](#) and make sure that you can explain the primary issue in this case from the perspective of indefeasibility – there were two issues raised by the Breskvars to challenge the indefeasibility of Wall's title. Look at the judgements of Barwick CJ and Menzies J – what was their view of these arguments?

Explain how s184 LTA ties in with the idea of indefeasibility.

Investigating indefeasibility

Does indefeasibility operate immediately? Outline the arguments in favour of this view, and against it. Trace the case law so that you can understand the comments of the court in *Breskvar v Wall*. What does *Breskvar v Wall* say is the position in Australia?

Contrast the decision in *Gibbs v Messer*. What did the Court find in this case, and why? When you look at the line of decisions on the issue of deferred and immediate indefeasibility, consider the law in *Gibbs v Messer* today – is it current? Do you think that it would stand up?

What does indefeasibility mean today? Consider the discussion in [Cassegrain v Gerard Cassegrain & Co \[2015\] HCA 2](#). Is there a difference between the law in Victoria and in Queensland that might prompt a different outcome if the case had occurred in Queensland?

Exceptions

Despite the paramountcy of title under Torrens, there is a series of exceptions. Exceptions are contained in ss184 and 185 of the LTA. There has been a considerable body of case law interpreting the exceptions and to understand these provisions properly requires an understanding of the issues raised in the case law, and how the courts resolved these issues.

Fraud

What is fraud? Is it defined in the LTA? When reading a statute, first look at the text, then examine the context, and finally examine the purpose. Part of understand-

ing statutes involves using judicial interpretation of particular provisions.

Fraud has many meanings at law. For the purposes of the Torrens statute, it is important to be able to identify what it means in the context of the indefeasibility provisions (ie s184 LTA). You will need to be able to discuss its meaning, and to apply the law to diverse factual scenarios. Compare and contrast the factual scenarios in:

- *Assets Co v Mere Roihi* [1905] AC 176
- *Frazer v Walker* [1967] AC 569
- [Breskvar v Wall \(1977\) 126 CLR 376](#)
- [Bahr v Nicolay](#)
- [Young v Hoger \[2001\] QCA 453](#)

What might be the implication for indefeasibility of:

- attesting to a signature ‘signed in my presence by the mortgagor who is personally known to me’... when the mortgagor is not personally known to me?
- Attesting to a signature forged by someone you do not know?

What would the consequences be for a lawyer in these scenarios?

In fact, the LTA contains fraud prevention mechanisms. Find s162 of the LTA. What is the obligation of a witness? Now that electronic documents are acceptable under the register, what sort of issues might arise? How would an electronic system deal with authentication of signature? Are the issues any different from a paper-based system?

Can Notice = Fraud?

Consider the meaning of s184(2)(a) LTA. Compare *Loke Yew v Port Swettenham Rubber Co Ltd* and *Friedman v Barrett*. Why is there a difference between them?

Can there be fraud after registration? See *Bahr v Nicolay*, and consider the approaches taken in this case. Contrast the judgements. Is the matter settled? If not, how would you apply this in a problem?



Construct a Summary: fraud.

Exception: In personam

What meaning have the courts given to this exception (s185(1)(a) LTA)? Start with *Frazer v Walker* [1967] AC 569, where the Court stated that the registered proprietor is:

...exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required.

at 580

The leading case on the in personam exception is [Bahr v Nicolay](#). Explain who had the personal obligation in this case, and how this operated to defeat a registered interest.

Look also at the decision of Mahoney JA in *Mercantile Mutual v Gosper* (1991) 25 NSWLR 32. What did he have to say about the meaning of 'personal equity'?



Construct a Summary: in personam exception.

Exception: Short Leases

What is a 'short lease'? Use your skills of statutory interpretation to find meaning for words used in statutes. Where might you start looking for the meaning of a specific word in a statute?

Refer to accompanying words

Refer to other parts of the legislation

Refer to interpretation legislation

May interpret with reference to other legislation

from Cook et al, *Laying Down the Law* (8th ed, 2012), 325

What sort of interest is a short lease – legal or equitable? Find the applicable law to complete the table below.

Why is this an exception to indefeasibility. Do you think it is a good idea or not? Explain your thinking.

Exception: Omitted or misdescribed

	equitable	legal
short lease		
long lease		

easements

Read the text of this provisions. What does ‘omitted’ mean? Work through the interpretation process outlined above.

Contrast easements that have never been registered, from those that have been registered but for some reason are no longer recorded – see *Connellan Nominees v*

Camerer [1988] 2 Qd R 248 for an example of this. How does this idea fit within the idea of the Torrens system, and the paramountcy of the register? Is it sustainable to have a land dealings system with such ‘hidden’ interests?

Does the owner of land need knowledge of the easement for it to subsist?

Exception: Adverse possession

What does ‘adverse possession’ mean? Again, apply the interpretive processes to give it meaning. What statutes are relevant in ascertaining meaning?

On one reading, adverse possession exists perhaps as a relic of the idea of seisin and possession. Consider how this possessory title can be reconciled with the nature of the Torrens system.

Exception: Prior certificate of title; earlier existing title

Consider how an inconsistency might be resolved where there are two indefeasible titles issued (under Torrens) for the same land.

In *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 609, the Court considered a case where there had been three (counterpart) duplicate certificates of title issued in respect of the same lot (as there

were three owners). When the land was transferred to a single owner, the three certificates were cancelled, and the new single certificate failed to show the tenant's two options to renew its lease. What was the effect of the cancellation of these certificates of title? Were they considered to be the same as an earlier existing title?

Contrast a situation where the registrar has not cancelled an earlier title [s185(1)(f)].

Why the difference?

Exception: Wrong description

Where land is misdescribed, the true owner, rather than the registered proprietor, retains title – why? See *Beames v Leader* [2000] 1 Qd R 343. In this case, extrinsic evidence is admissible to prove the true boundaries and area of land.

How does this accord with your understanding of the *register*? Consider this in light of the policy underpinning the Torrens statute.

Exception: Interest of authority holders under access agreements

Chapter Four looked at the way in which multiple kinds of property were being created from the one parcel of land. Sections 185(1)(h)-(i) are fairly recent additions to the exceptions to indefeasibility. They recognise interests granted under other stat-

utes. These other interests will not appear on the face of the register, but under these exceptions, will bind successors in title. How do these exceptions fit with the overall tenor of the Torrens statute? In particular, do these exceptions promote economic outcomes sought by the original Torrens system? Do they affect your understanding of the *register*? Do they affect your understanding of the nature of the freehold estate?

Exception: Mortgagee fails to check identity of mortgagor

There have been a number of cases involving mortgagees who have granted mortgages to a person who is not the mortgagor (see eg [Young v Hoger](#)). The mortgage was valid because the mortgagee (the person who took the interest) had not engaged in the fraud. What other cases fall into this category?

Consequently, the Parliament enacted s185(1A) LTA together with s11A LTA. It is now the mortgagee's responsibility to check the identity of the borrower. If they fail to do so, and the mortgagor is not who they purport to be, then by s185(1A) the mortgagee will lose indefeasibility.

Registrar's powers of correction

Recall the purpose of the **Torrens** statute. As a government-guarantee of land title, it requires administration by government. Part of its attraction is rendering public the transactions and interests that were previously private. Yet land title remains an individual interest.

How much power does the registrar have over the title? Can the power be exercised where it adversely affects indefeasible title of registered bona fide purchaser? The Court noted in *Medical Benefits Fund v Fisher* that this is a largely unexplored area of the Torrens system.

Indefeasibility, General Law, and Overriding Statute

There are common law (general law) rights and interests that may override the Torrens statute – for example an easement of necessity has been found to constitute an implied exception. Is this the case in Queensland?

Statutes also create competing interests in land. See for example:

- *Acquisition of Land Act 1967* (Qld) – Crown may compulsorily acquire land
- *Land Tax Act 2010* (Qld) – unpaid land tax forms a charge on the land

- *Property Law Act 1974* (Qld) ss182-94 – express powers for court to make orders which deprive a person of their indefeasible title (eg encroachment)

Two of these statutes pre-date the LTA. Do they override indefeasibility under the LTA? Why? How does the *Land Tax Act* deal with the LTA?

In addition to these provisions that expressly give power to resume or charge the land, there is an increasing number of statutes that:

- place obligations on owners eg *Environmental Protection Act 1994* in relation to contamination
- restrict the use of the land specifically eg *Queensland Heritage Act 1992* (as distinct from legislation that governs use of the land generally, such as the *Integrated Planning Act 1997*)
- grant new rights in land eg *Greenhouse Gas Storage Act 2009*

What seems to be the purpose of the types of legislation that place obligations and restrictions on landowners? What are the problems with these other rights and obligations? Consider the transparency of the register, and impact upon title...

Questions

Question 1

Explain the operation of the Torrens statute in terms of its capacity to deliver a trustworthy system of land title. Refer to statute and case law in your answer.

Question 2

1. What is the date of the latest amendment to the LTA? Which amendment is it?
2. With reference to the PLA and the LTA, how is a legal estate in land created?

3. What are the key indefeasibility provisions in the LTA? Explain them in your own words.
4. Where are the exceptions to indefeasibility in the LTA? Explain the exceptions in your own words.
5. How are documents validly witnessed in terms of the LTA?

Interactive 6.2 The Limits of Indefeasibility



This slideshow guides you in working through the statute to get a picture of how it works, and what indefeasibility means.

Unregistered interests under Torrens



Registered | Unregistered

The conceptual foundation of Torrens is the creation of interests in land through *registration* in the *register*. Locate the relevant provision in the LTA concerning the creation of an interest in a lot through registration. Yet the system does not prevent the creation of equitable interests - indeed it makes provision for them. See [Barry v Heider \(1914\) 19 CLR 197](#). Why might this be desirable? Consider the overarching policy behind Torrens and weigh this against the

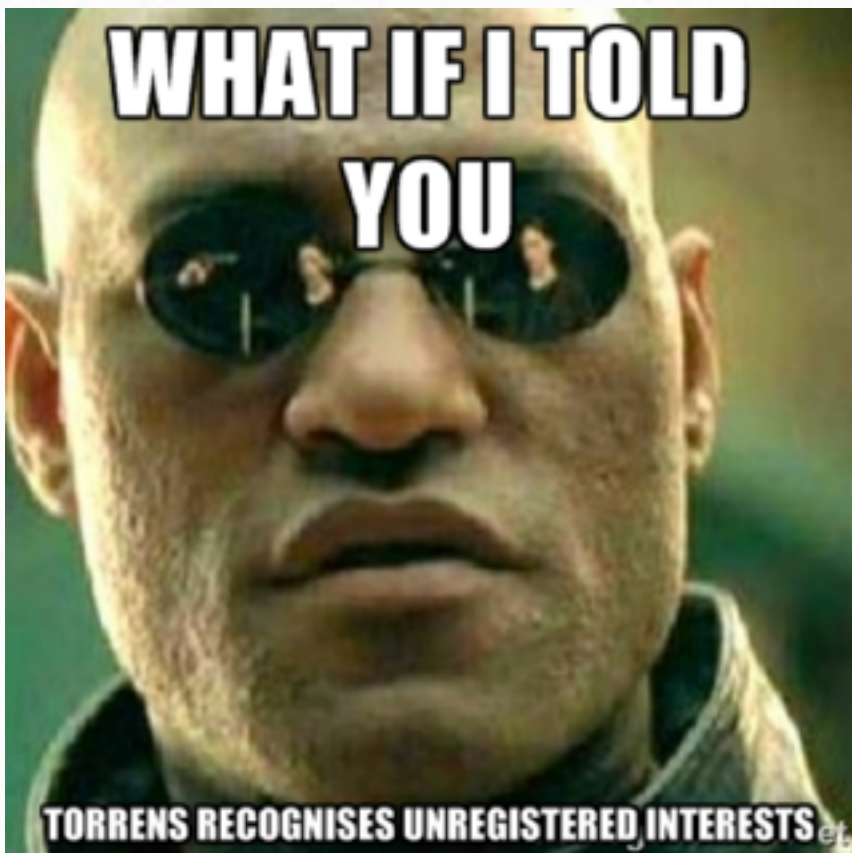
ways in which property interests can be created at common law. Is it sustainable to ignore unregistered interests?

Broadly speaking there are two kinds of unregistered interest:

1. those not capable of registration - which tend to be recognised equitable interests at common law; and

2. those capable of registration but have not been registered (deliberately or otherwise).

The Torrens system allows equitable interests to be protected through the *caveats* system.



Caveats

Read the LTA and ascertain the Part and Division of the Act relevant to caveats. Read the text of these provisions. Reading them together provides *context* to assist in understanding the *text* of particular sections. Reading the relevant division, explain in your own words what a caveat is.

In support of the text of the section itself, the courts have interpreted the effect of a caveat. The common law thus enhances our understanding of the statute. See [But-](#)

[ler v Fairclough \(1917\) 23 CLR 78](#); and [IAC \(Finance\) Pty Ltd v Courtenay \(1963\) 110 CLR 550](#) for an explanation of the nature of a caveat.

Who may caveat

Read the relevant Division of the LTA to ascertain the prerequisite for caveating. Having established who may lodge a caveat, the next question is what amounts to a *caveatable interest*. Think about these examples of caveatable interests:

- interest of a purchaser under an unconditional contract for sale
- interest of a purchaser under an option to purchase
- interest of a mortgagee under an unregistered mortgage
- purchaser's right for the return of the deposit and instalments paid under the contract for sale of land where the contract is terminated without fault by the purchaser
- right to a **profit a prendre**

Contrast these with decisions finding an applicant did not have a caveatable interest. Can you find an underlying theme?

What is the difference between a conditional and an unconditional contract for sale of land? Do both represent a caveatable interest? Consider *Re Henderson's Caveat* [1998] 1 Qd R 632, 641-2.

Caveats – Types, duration, removal

Not all caveats are the same. Reading the LTA, identify the types of caveats that are available.

How long do caveats last? Is it desirable that they can last indefinitely? Why (or why not)? How can caveats be removed from the title? Find the relevant provisions in the LTA.

Liability for Wrongful Lodgment

Note that the LTA provides for liability if a caveat is wrongfully lodged. What circumstances might constitute wrongful lodgment? How does this provision support the underlying policy of the Torrens statute?

Priorities under the Torrens system

Recall the issues that occurred at general law in relation to resolution of priorities disputes. To what extent does the Torrens system resolve these issues – particularly in relation to legal vs legal estates? Consider the changes that the Torrens system has

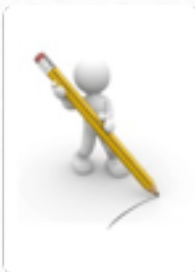
effected on the creation of an interest in land.

In this section however, consider what effect the Torrens system has on priorities of interests in land?

Recall the general law approach to priorities questions:

1. first, identify the nature of the interests (legal or equitable) – recall the rules for creation of interests, and note the means by which a legal interest is created under the Torrens system.
2. Next, work out the nature of the priority dispute.
3. Then find the appropriate rules, now asking the question whether Torrens modifies the rules.

[Butler v Fairclough](#) is a decision with which you should be familiar – firstly by understanding how the courts characterize the nature of a caveat, but secondly, by appreciating the court's comments in relation to the parties' obligations to lodge a caveat. Look at the case and consider when might have been an appropriate time frame within which the second mortgagee should have lodged a caveat.



Draw a timeline for the events that transpired in *Butler v Fairclough*.

One aspect addressed in *Butler v Fairclough* is the question of when failure to caveat will constitute postponing conduct. What did the Court say about when a party is expected to lodge a caveat? Did this have any implications for a caveator?

There is arguably a ‘trade off’ between protection given by the Torrens statute to an unregistered or unregistrable interest, and protection given by the Torrens system to those relying on the register. What is the nature of this trade off? Do you think it is justified? Why or why not?

In considering a party’s failure to caveat in the context of their conduct (for determining priorities), only general principles apply – there are no fast rules. You will therefore need to be familiar with the cases and their facts – and also be able to draw out general principles.

- Will omission to caveat of itself warrant postponement? (see *Abigail v Lapin*; contrast this with *Clark v Raymor*)
- Can prior holder guard against postponement – how? Is lodging a caveat the only

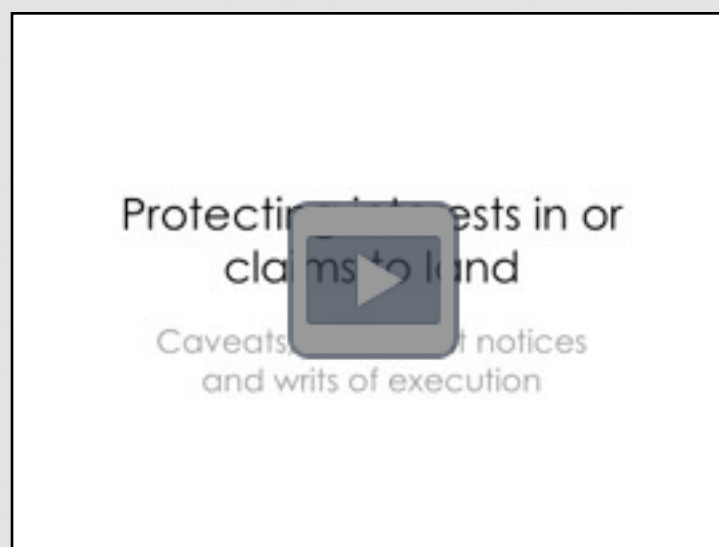
way? (consider *J & H Just Holdings*; *IAC v Courtenay*)

- Can notice play a role? (*Platzer*; *IAC v Courtenay*; *J & H Just Holdings*) Contrast constructive and actual notice
- What of the holder of an equitable interest seeking to uphold that interest against potential competing interests – will an injunction be enough? (see *Black v Garnock*)



Construct a summary: priorities in Torrens

Interactive 6.3 Caveats, Settlement Notices, Writs of Execution



This slideshow provides a guide to the topic of caveats.

Writs of execution, settlement notices

Locate in the LTA the provisions concerning a writ of execution. What is a writ of

execution? Where did you look to find this out?

Read the provisions in the LTA about settlement notices. What are they? Compare and contrast settlement notices and caveats. Identify the similarities and differences.

Questions

Question 1

Make sure you have case notes for the following cases. Some may require a time line to ensure you have the sequence of events correct. Bring your case notes to class to compare.

- *Butler v Fairclough* (1917) 23 CLR 78
- *Breskvar v Wall* (1971) 126 CLR 376
- *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550
- *J & H Just (Holdings) Pty Ltd v Bank of NSW* (1971) 125 CLR 546
- *Platzer v Commonwealth Bank of Australia* [1997] 1 Qd R 266

QUESTION 2

In dealing with such equitable rights the Courts in general act upon the principles which are applicable to

equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it.

Butler v Fairclough (1917) 23 CLR 78, 91.

Discuss.

Make sure you understand what the Judge is saying – go to the case for context and rewrite this passage in your own words. Remember that discussion involves analysis also. Put this case in context: what is it authority for? What topic in this subject does it cover? Use this concept then to guide you in your discussion about this passage from the case. The passage is not just

about competing equities, but about something more.

Question 3

Bond is the registered proprietor of a block of land in suburban Townsville which is registered under the *Land Title Act 1994* (Qld). The title is electronic – there is no duplicate title. On 1 April 2012, he enters into a contract to sell the land to Milton for \$100,000. The date for settlement is 1 May 2012.

On 10 April 2012, Bond borrows \$20,000 from Ezy Loan Pty Ltd to buy a car. As security, he gives Ezy Loan a mortgage over the land. Bond and Ezy Loan agree not to register the mortgage, and as additional security, Bond gives Ezy Loan the instrument of transfer he has executed in favour of Milton. Bond's solicitor asks Ezy Loan to produce the transfer at the settlement on 1 May 2012.

Milton arranges to raise the finance he needs to buy the land by borrowing the purchase money from Flinders Bank Ltd, to be paid to Milton at settlement. Milton executes a mortgage in respect of the land in favour of Flinders Bank, and hands it to the bank manager in readiness for settlement.

On the day of settlement, Milton's solicitor searches the title and notes that the title is clear of any mortgages or other encumbrances. At settlement:

- Ezy Loan hands the instrument of transfer to Milton's solicitor
- Milton's solicitor hands the transfer to Flinders Bank
- Flinders Bank hands the purchase money to Bond's solicitor

Milton is happy because he finally gets the keys to the land. His Bank, Flinders Bank, then lodges for registration the transfer and the mortgage Milton has executed in its favour.

Bond is happy because he has sold his house and has the full \$100,000.

The following day, the Titles Office rings Flinders Bank, stating that the mortgage has not been correctly signed. The Bank withdraws the documents and has them correctly signed.

By the time Flinders Bank returns to lodge the documents, Ezy Loan has lodged a caveat against the title to the land.

Advise Milton and Flinders Bank.

In this question it is important to break it into parts. First of all, make sure you have a timeline. What happened when in the transaction? Whose interests came first? Are they legal or equitable interests? Make sure that if you are citing legislation, you cite the relevant section – you should always read the section to make sure you understand it properly.

Do the facts of this problem look similar to any cases that you have read? If so, what did those cases find? Make sure that you answer the question.

This problem involves a conveyance of land. Familiarise yourself with the conveying process to help you to understand the facts of this scenario.

Question 4

Refer to the LTA to answer these questions.

1. Identify the different types of caveat that may be lodged.
2. Identify the different ways in which a caveat may end.
3. Explain, with reference to the LTA provisions, the time during which a caveat is valid.

4. What is the process for protecting the interest of a buyer under a contract for sale?

Question 5

Consider whether the parties in these scenarios have a caveatable interest, and explain why.

1. Bill signs a contract to sell his land to Ben. Ben finds out Bill has also signed a contract to sell to Helen. Does Ben have a caveatable interest?
2. Peter borrows money from the bank, and deposits his title deeds as security. Does the bank have a caveatable interest?
3. Joanne has signed a contract to buy a farm. The contract is subject to finance. Does Joanne have a caveatable interest?
4. Margaret has defaulted on her mortgage, and the bank has exercised its power of sale. The bank has signed a contract to sell to a related entity. Does Margaret have a caveatable interest?
5. Jonathan has signed a contract to buy land that is subject to council approval for subdivision. Council has not yet given its approval. The owner is threaten-

ing to sell the land to a third party. Does Jonathan have a caveatable interest?

6. Pauline is a beneficiary under a trust that owns land. The trustee is planning to sell the land. Does Pauline have a caveatable interest?

To find out whether these parties have caveatable interests, you will need to look carefully at your text and also at the cases that have decided similar issues. You may wish to look at Laws of Australia – a legal encyclopaedia. Some cases will be straight forward, but with others, there may be some doubt. How do you reach a conclusion where there is some doubt?

How would you find Laws of Australia? Once in the encyclopaedia, how would you find the relevant information?

Authorised version of a statute

The authorised version of a statute is published by the Parliament itself, the State or the Commonwealth, as the case may be. Unauthorised versions are readily accessible, for example via Austlii, but these may not be up to date and do not contain all the relevant information. Be careful also in using the authorised version as there is a tendency to view sections in isolation, rather than the more holistic approach provided in the authorised version.

Related Glossary Terms

Drag related terms here

Index

Chapter 4 - Fragmentation of Property Interests

Chapter 4 - Native title

Chapter 4 - Estates

Chapter 4 - Estates

Chapter 4 - Estates

Chapter 4 - Estates

Chapter 4 - Estates

Chapter 4 - Estates

Chapter 4 - Estates

Chapter 6 - Statutory title

Chapter 6 - Torrens System of Title

Chapter 6 - Unregistered interests under Torrens

Beneficial title

A beneficial title represents specific property rights in equity that belong to a person even though legal title of the property belongs to another person.

Related Glossary Terms

Equity, Proprietary interest, Trust

Cestui que use

The cestui que use is the person for whose benefit the trust is created. The cestui que trust is the person entitled to an equitable, as opposed to a legal, interest. Thus, if land is granted to the use of A in trust for B, A is cestui que trust and B is the trustee, or use.

Related Glossary Terms

Drag related terms here

Cestui que vie

The person whose life is used to measure various things, such as the term of a trust, or a gift. For the life estate, it is the person against whose life the term is measured.

Related Glossary Terms

Life estate

Chain of title

The sequence of historical transfers of title to a property. The 'chain' is from current owner back to the original owner of the property. The chain is important in old system title which relies on valid documentation to confirm ownership.

Related Glossary Terms

Drag related terms here

Common law

The part of Australian (and English) law derived from custom and judicial precedent rather than statutes. Often contrasted with statutory law.

Related Glossary Terms

Drag related terms here

Conveyance

The legal process of transferring property from one owner to another.

Buying real property

Land law does not operate in a vacuum. At the very least, it will often involve the application of contract law or at least presuppose that a contract has been entered into. That is our starting point for understanding a conveyance of an estate in fee simple – or, if you like, the process of 'buying a house'.

The process from finding the property to becoming the legal owner is described in the diagram below:



Unlike buying a loaf of bread where the transaction is instantaneous, the acquisition of an estate in fee simple in real property occurs in a number of steps. Each step involves a lag and the interests of the parties will evolve as each step is completed.

Entering into the contract

The first step to the purchase of real property is signing a contract. At this point, each party (buyer and seller) has an interest in the land.

The contract is an agreement to transfer title to the land on a nominated date. It is not a conveyance, but an agreement to convey. There will be a lag between the date of the contract and the date the title is transferred. (In most residential conveyances, this will be a month. Commercial transactions may take more time.)

Once the contract is signed, the buyer will investigate the seller's title to the land. The seller will have an obligation under the contract to convey good title to the buyer on settlement. During this time, the buyer also prepares the documents necessary to convey title. Under Torrens, this includes an instrument of transfer.

You can look at this form (Form 1 Transfer) online:

http://www.derm.qld.gov.au/property/titles/forms_pub.htm.

All these documents will be prepared, signed and made ready for 'settlement' or completion of the contract.

Getting Finance

Most buyers will not have the funds to purchase the property. They will usually obtain finance from a bank or other financial institution. During the period of the contract, the buyer will also make arrangements with the financier to provide finance at settlement. The financier will usually require security in exchange for the loan, by way of a mortgage over the land being purchased. This mortgage will usually be registered over the title to the land being purchased. (You can see a 'Form 2 – Mortgage' at http://www.derm.qld.gov.au/property/titles/forms_pub.htm.)

Like the buyer, the financier wants to make sure that the buyer is getting good title. So during this time, the financier will also make inquiries into the title. They will prepare all the documents necessary to secure their interest over the property so that they are ready for settlement.

Settlement

The contract for sale will stipulate the day for settlement (or completion). The parties will arrange a mutually convenient time to meet to exchange documents and money.

Let's think about completing the contract and what each party, seller and buyer, needs to do at settlement.

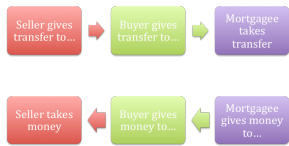
Party	What they give	What they take
Seller	Title (instrument of transfer)	Money (payment of the contract price)
Buyer	Money (payment of the contract price)	Title (instrument of transfer)

This is the essence of the conveyance transaction.

Let's now add another step. Remember, the buyer won't have the money themselves. They are relying on their financier to provide the purchase money. This is a separate transaction but it occurs at the same time as the conveyance itself:

Party	What they give	What they take
Buyer (mortgagor)	Title (instrument of transfer)	Money (payment of the contract price)
Financier (mortgagee)	Money (payment of the contract price)	Title (instrument of transfer)

These two transactions together look something like this:



Let's take this even further. What if the seller has a mortgage over their land? The buyer will want to take title free from this interest. The seller therefore needs to arrange to have this mortgage released. The mortgagee (the financier) will not want to release their security until they have been paid out in full.

Therefore, once the contract is signed but before settlement, the seller will find out how much money needs to be repaid and ask their financier to prepare the documents to release the mortgage. (You can see the 'Form 3 – Release' at http://www.derm.qld.gov.au/property/titles/forms_pub.html)

The buyer and the buyer's financier will want to receive the release mortgage because without it, they will not get a clear title.

This is how this last transaction will look:

Party	What they give	What they take
Seller (mortgagor)	Money (repay loan in full)	Instrument of release mortgage (frees title)
Financier (mortgagee)	Instrument of release mortgage (frees title)	Money (repay loan in full)

Finally, let's put all these transactions together to see what happens at settlement.



Lodgement for registration

One of the things we will learn about the Torrens system is that it is a system of title by registration. Therefore, although we talk about giving title at settlement, this is not yet legal title. It's not legal title for the buyer, and it's not legal title for the mortgagee.

In the simplest transaction that does not involve any financiers (mortgagees) the buyer will simply take the instrument of transfer and lodge it for registration.

In transactions involving the grant of a mortgage (as above), the buyer's bank will have all the relevant documents and will be responsible for lodging these for registration. The order of lodgement is important – first any mortgage must be released; then the transfer of title will give the buyer legal title; then the mortgage is lodged, granting the security interest to the bank.

But things do not stop there. Remember we said above that there is a lag at every stage of the transaction. So lodgement is not sufficient to grant a legal title – it is registration that gives title and this does not occur immediately upon lodgement.

Registration of title

Once documents have been lodged, they will be checked by Titles Office staff. If they are in order, then they will be noted on the register and legal title is created (with reference to the time of lodgement).

If documents are not in order, they may be requisitioned and this will cause further delay while the documents are fixed up by the relevant parties.

Courts of Chancery

The courts traditionally under the jurisdiction of the chancellor which minister equity according to the forms and principles of equity.

Related Glossary Terms

Drag related terms here

Index

Find Term

Chapter 4 - The equitable estate

Cuius est solum

(full term: cuius est solum, eius est usque ad coelum, et ad inferos) Landowner's is the soil, it is theirs all the way to Heaven and all the way to hell

Related Glossary Terms

Drag related terms here

Doctrine of tenure

The doctrine of tenure is division (fragmentation) of land based on space. The doctrine's legal effect is twofold. The first is that the Crown is the owner of all land - there is no allodial land. The second is that the only way to hold land is by way of Crown grant. Because of this, no one has absolute ownership.

Related Glossary Terms

Radical title

Doctrine of waste

The principle whereby the current tenant of land is not permitted to alter the condition of the land so as to damage its value.

Related Glossary Terms

Waste

Easement

A right to cross or otherwise use someone else's land for a specified purpose without affecting the underlying ownership of that land.

Related Glossary Terms

Drag related terms here

Equity

The branch of judge-made law originating under authority of the Court of Chancery, designed to complement the rigidity of the common law writs.

Related Glossary Terms

Beneficial title, Trust

Estate

An estate in land is an interest in real property that allows possession or sometime in the future for a specific or unlimited period of time.

Related Glossary Terms

Drag related terms here

Fee simple

a type of estate in land that is a form of freehold ownership. It is the highest form of ownership interest in real property.

Related Glossary Terms

Drag related terms here

Fee tail

A former type of freehold estate in land with restrictions (entailment) of heirs to whom it may be willed.

Related Glossary Terms

Drag related terms here

Feudal

According to, resembling, or denoting the system of feudalism. Feudalism was the dominant social system in medieval Europe, most perfectly implemented in England. It was a system of social and political organisation in which the nobles held lands from the Crown in exchange for military service, and vassals in turn tenants of the nobles, while the peasants (villeins or serfs) were obliged to live on their lord's land and give him homage, labour, and a share of the produce, notionally in exchange for military protection.

Related Glossary Terms

Drag related terms here

Freehold

Permanent and absolute tenure of land or property with freedom to dispose of it at will

Related Glossary Terms

Drag related terms here

Incidents of tenure

Homage, fealty and suit of court:

- homage – the ceremony by which the tenant (vassal) became the lord's man
- Fealty - the oath by which the tenant swore to faithfully perform the feudal obligations.
- Suit of court - the tenant's obligation to attend the lord's court and assist in deliberations.

Aids: the tenant's obligation to support the lord financially when he needed it.

Relief & Primer Seisin:

- relief - when a tenant inherited property, he was required to pay a sum of money to the lord as the price paid for the right to take up the inheritance.
- primer seisin - if the inheriting tenant was a tenant-in-chief, the king was also entitled to take possession of the land until the heir rendered homage and relief

Wardship & Marriage: where a tenant died leaving a male heir under 21 or a female heir under 14 (if unmarried) or under 16 if married), the heirs became wards of the lord. The lord controlled and managed the heir's land for his own benefit and was not required to account to the heir for any profits from the land. Wardship extended to control over the person of the heir - so the lord maintained and educated the heir and controlled the heir's marriage.

Escheat:

- if a tenant died without heirs, the land would go back to the lord from whom it was held
- where a tenant committed a felony, the felony was seen to involve a breach of the tenant's obligation to serve the lord faithfully and thus justified the return of the land to the lord

Inter vivos

During life. A gift inter vivos is a gift made during the grantor's life - in contrast to a gift made by will.

Related Glossary Terms

Drag related terms here

Index

Find Term

Chapter 4 - Estates

Life estate

Ownership of land for the duration of a person's life - whether that life is the life of the holder of the life estate, or another person. The estate ends on the death of the measuring life (cestui que vie) when ownership of the property either reverts to the original owner, or passes to another person.

Related Glossary Terms

Cestui que vie

Mortgage

A right over land by way of security for performance of an obligation, in the repayment of money.

Related Glossary Terms

Old system mortgage

Old system land

Land under old system title.

Related Glossary Terms

Old system mortgage

Old system mortgage

An old system mortgage consisted of a conveyance of the estate in fee with a proviso for re-conveyance upon repayment of the loan. It contrasted with the Torrens mortgage, which is security only. In other words, the Torrens mortgage does not involve a conveyance of the fee simple - merely a grant of a security interest.

Related Glossary Terms

Conveyance, Mortgage, Old system land, Torrens title

Old system title

Also known as 'common law title' or 'general law title', old system title means of proving title through privately held documents that evidence source of all interests in the land. It consists of the 'title deeds' ie the of documents that trace title. Under this system, a grantor of an interest need to show a 'chain of title' that had no defects (eg fraud).

Related Glossary Terms

Drag related terms here

Pastoral lease

Crown land that government leases under a statute, generally for the purpose of grazing.

Related Glossary Terms

Drag related terms here

Priorities

In circumstances of competing claims over the same parcel of land, 'p' are the rules which will determine which interest takes in preference to s ie which interest is given priority.

Related Glossary Terms

Drag related terms here

Profit a prendre

Right to take from another person's land something that is part of the soil and is the property of the landowner.

Related Glossary Terms

Drag related terms here

Proprietary interest

Total or partial ownership over a thing.

Related Glossary Terms

Beneficial title

Radical title

Title acquired by the Crown when it asserts sovereignty. It is regarded as the 'ultimate' or 'underlying' or 'final' title.

Related Glossary Terms

Doctrine of tenure, Sovereignty

Real property

In broad terms, real property is land and interests in land - though according to its classical definition, it excludes chattels real.

Related Glossary Terms

Drag related terms here

Register

In the context of Torrens title, the register is the entirety of government-generated data concerning Torrens land, including details about lots within jurisdiction, all interests in those lots, and any other information provided under the relevant legislation.

Related Glossary Terms

Torrens title

Remainderman

A person who inherits or is entitled to inherit property upon the termination of the estate of the former owner.

Related Glossary Terms

Drag related terms here

Reversioner

A person entitled to receive back the residue of an estate that will come into possession after the determination of some prior particular estate.

Related Glossary Terms

Drag related terms here

Seisin

The possession of a freehold estate in land by a person who has title to the land. A historical term, but continues to inform our understanding of the doctrine of estates.

Related Glossary Terms

Drag related terms here

Sovereignty

The authority of a state to govern itself or another state.

Related Glossary Terms

Radical title

Tenure

The conditions under which land or buildings are held or occupied.

Related Glossary Terms

Drag related terms here

Title

In property law, a comprehensive term referring to the legal basis of the ownership of property, encompassing real and personal property and intangible interests. Colloquially, it refers to a document evidencing ownership of property, such as the certificate of title to land.

Related Glossary Terms

Drag related terms here

Torrens title

Torrens title is a system of land title in which a register of land holdings maintained by the state guarantees an indefeasible title to those included in the register. Land ownership is transferred through registration of title instead of deeds.

It is named after Sir Robert Torrens, the South Australian parliamentarian who developed the system.

Related Glossary Terms

Old system mortgage, Register

Trespass

The tort of knowingly entering another person's property without permission.
The action is held to infringe upon a property owner's legal right to enjoy the benefits of ownership.

Related Glossary Terms

Drag related terms here

Trust

A relationship whereby property is held by one party for the benefit of trust is created by a settlor, who transfers some or all of their property to a trustee. The trustee holds that property for the trust's beneficiaries.

Related Glossary Terms

Beneficial title, Equity

Waste

See doctrine of waste

Related Glossary Terms

Doctrine of waste