

INTRODUCTION TO PROPERTY AND COMMERCIAL LAW

TOPIC 1: (A) The Concept and Function of “Property” and (B) Real Property – Introduction to Real Property

1.1 Introduction to general property concepts

Property: the legal relationship between the person and the object. It is a right not a thing. It is a bundle of rights between the owner and third parties.

- If you have a right, other people must be subject to the right. In property, most rights are fundamentally negative → they compel people not to do something.

1.1.1 Difference between contractual and proprietary rights

- Contractual rights:** only enforceable by parties to contract against another party to the contract (*Doctrine of Privity*)
 - Can contract about anything provided there is consideration, it is not an illegal contract etc.
 - Narrow enforceability, wide range of content
- Property rights:** arise by operation of law (not agreement), they have a wide sphere of enforceability to the absence of any Privity
 - Wide enforceability, narrower range of content
- Equity:** bridges the divide between personal and contractual rise and may give rise to a proprietary interest in equity.

King v David Allen and Sons, Billposting Ltd

FACTS	K owned land on which a picture theatre was to be erected. K agreed with DASB that DASB would have the sole right to affix posters and advertising on the walls for a fixed period. K then leased the land to a third party (the lessee). The lease didn't refer to K's prior arrangement. The lessee did not allow DASB to advertise.
ISSUE	Did the agreement between K and DASB create a proprietary right?
HELD	<ul style="list-style-type: none">The rights created between K and DASB don't fit into a recognised category of proprietary rights.Here, a contract was created between K and DASB which creates nothing but a personal obligation – it is a license given for good and valuable consideration and to endure for a certain time.The agreement contained an implied term that K would not disable himself from carrying out his contractual obligation. K breached that condition and was liable in damages to DASB.

1.1.2 Rights usually associated with “property”

Right to:

- Use and enjoy a particular resource
- Exclude others from enjoyment
- Alienate/transfer the resource

Economic rationale for “property” → society is better off if the resource is in the hands of the people who value them most.

- Efficient allocation of resources (measured by willingness to pay) and thus maximise the total wealth of society.
- Right to use and exclude provides incentive to put resources to their most productive use → otherwise the incentive to use them productively is not present
- Right to alienate allows resources to move to more highly valued uses through mutually beneficial exchange

1.1.3 Variable meaning of “property”

Yanner v Eaton

FACTS	Y used a traditional harpoon to hunt crocodiles. Y was charged with taking a crocodile without a license contrary to QLD statute. Under the <i>Native Title Act</i> (Cth), Y would not have been guilty of the offence if he were exercising native title rights. E argued that any native title rights were extinguished by s7(1) of the <i>Fauna Act</i> – ‘all fauna...is property of the crown.’
ISSUE	If the Crown’s property meant absolute ownership , then any native title rights would have been extinguished, so was this the case?
HELD	<ul style="list-style-type: none"> Property does not refer to a thing; it is a description of a legal relationship with a thing. The concept of property may be elusive, usually it is treated as a ‘bundle of rights’ The majority held that the Crown did not have absolute ownership, rather the property of the Crown was such that they could co-exist with Y’s native title rights. The meaning of the words in this sense, meant that property was a set of regulatory rights (c.f. absolute ownership). Where the rights are statutory, ‘property’ has a wide range of meanings.

1.1.4 Requirements for creation or transfer of a particular proprietary right

1¶ Essential/substantive requirements – what package of rights has the grantor/transferor intended to create in the grantee/transferee

Fee simple [exclusive possession “forever”]

Life estate [exclusive possession for duration of measuring life]

Lease [exclusive possession for certain term]

Easement [right, accommodating dominant land to use, or restrain use of, servient land in a manner not inconsistent with servient owner’s continuing ownership]

Profit à prendre [right to enter servient land and remove the soil or its natural produce]

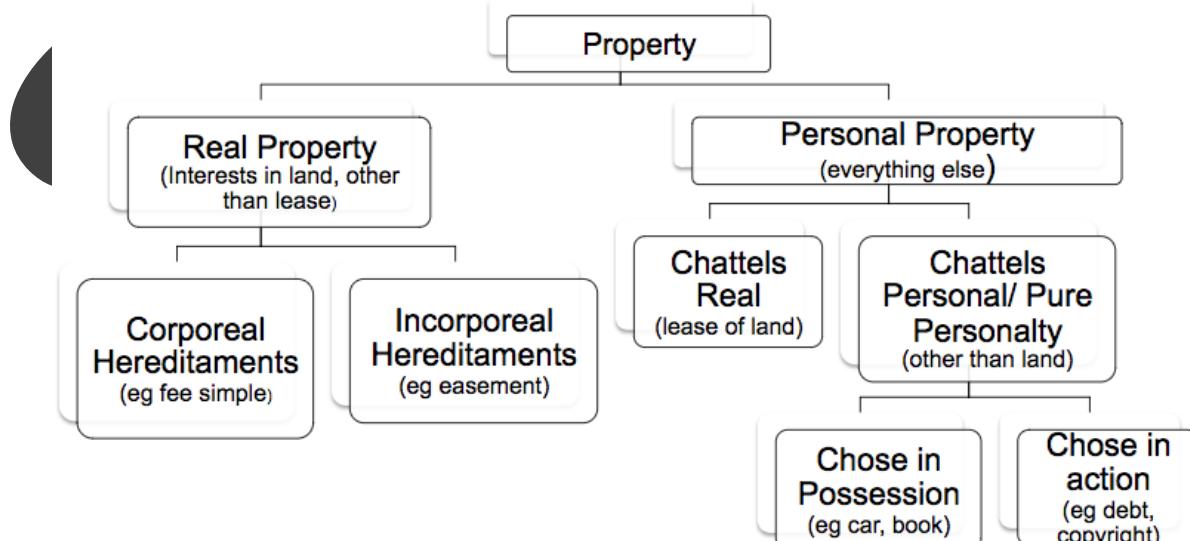
Chattel ownership [exclusive possession “forever”]

Bailment of chattel [delivery of exclusive possession with an obligation to redeliver]

It is the **objective nature** of the rights that are relevant – not necessarily the use of the term/name.

2¶ Formal requirements – how must the intention be manifested? Must a document be used, if so what type; are particular forms of words required?

1.1.5 Taxonomy of Property interests



1.1.6 Doctrine of Tenure

- Doesn't apply to goods or choses in action.

Mabo v Qld (No 2)

- The land law of England is based on the doctrine of tenure. In English legal theory, every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount; the term 'tenure' is used to signify the relationship between tenant and lord ... not the relationship between tenant and land. It is arguable that universality of tenure is a rule depending upon English history and the rule is not reasonably applicable to the Australian colonies.
- Land in Australia which has been granted by the Crown is held on a tenure of some kind and the title acquired under the accepted land law cannot be disturbed – so it does apply in Australia but it operates in a different way.

1.1.7 Doctrine of Estates

- The closest thing that approximates absolute ownership

Mabo v Qld (No 2)

- The underlying thesis of the English law of real property remained that the radical title to (or ultimate ownership of) all land was in the Crown and that the maximum interest which a subject could have in land was ownership not of the land itself but of an estate in fee in it. The legal ownership of an estate in land was in the person or persons in whom the legal title was vested. Under the rules of equity, the legal estate could be held upon trust for some other person or persons or for some purpose.

Western Australia v Ward

- Whereas the doctrine of tenure recognised that a number of persons could have a proprietary interest in the one piece of land at the same time, by relying on duration, the doctrine of estates allowed for the creation of successive interests, present and future, in the same piece of land.
- In essence, the doctrine of estates reflected the idea that a person should be able to have an interest in land giving rise to a present right to possession, while at the same time other persons would also have interests in the land giving them future rights to possession.

1.1.8 Decline of Tenure

Tenures Abolition Act 1660

- Abolition of most feudal incidents – conversion of knight service to socage tenure

Imperial Acts Application Act 1969 (NSW) s37

- All tenures created by the Crown by way of the alienation of an estate in fee simple in land after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown.

Statute of Quia Emptores 1290

- Allowed transfer without consent (except tenants in chief)
- Prohibited further subinfeudation – but could sell without consent

Imperial Acts Application Act 1969 (NSW) s36

- "Land held of the Crown in fee simple may be assured in fee simple without license and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect."

Probate and Administration Act 1898 (NSW) s 61B(7)

- "In default of any person taking an interest under subsections (2) to (6), the estate shall belong to the Crown as bona vacantia, and in place of any right to escheat."

Succession Act 2006 (NSW) s 136

- "If an interstate dies leaving no person who is entitled to the interstate estate, the State is entitled to the whole of the intestate estate."
 - Previously, the tenant had limited rights to dispose of land on their death. Now, treated like any other type of property right. They are unlimited/freely alienated.

1.2 Tenure, estates and Native Title

Mabo v Qld (No 2)

Why recognise Native Title?

- To refuse to recognise native title “would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too law in the scale of social organisation to be acknowledged as possessing rights and interests in land.”
- Recognition of the radical title of the Crown is quite consistent with the recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary power of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown’s territory).

Concept of Native Title

- The common law of Australia rejects the notion that, when the Crown acquired sovereignty over the territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. **Physical presence is insufficient (aimless wandering) → needs a meaningful connection**

Attributes of Native Title

- Native Title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. **Will vary from group to group.**
- They cannot be transferred – they are **not assignable**
- They can be surrendered to the Crown
- May be “proprietary or personal and usufructuary in nature and...possessed by a community, a group or an individual”
- **Subject to being extinguished** by an interested granted by the Crown → **Much more fragile than CL/Statute**

Requirements for Existence of Native Title

- Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.
- When the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.
- A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.
- Once traditional native title expires, the Crown’s radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.

Extinguishment of Native Title

- Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign’s territory.
- The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power.

Extinguishment of Native Title – through doctrine of tenure

- Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g. authorities to prospect for minerals). **No right to exclusive possession → this won’t extinguish Native Title**

Extinguishment of Native Title – through exercise of plenary power

- Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.
- Extinguished – roads, railways, post offices and other permanent public works
- Not extinguished where appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land – national parks → these are not inconsistent, they can co-exist.

Key takeaways:

- Wider concept than common law proprietary interests → things that wouldn't be recognised under CL, are recognised under Native Title.
- More fragile → Native title is extinguished to the extent of any inconsistency by an interest granted by the Crown.

Wik Peoples v Queensland

ISSUE	Did pastoral leases (grazing leases) granted under the <i>Land Act 1962 (Qld)</i> confer exclusive possession on grantees so as to completely extinguish the native titles of the traditional owners?
HELD	<p>Kirby J</p> <ul style="list-style-type: none"> • Pastoral leases give rise to statutory interests in land which are <i>sui generis</i>. Neither of the Acts in question here expressly extinguishes native title. To do so very clear statutory language would, by conventional theory, be required. • The extent to which the two interests could operate together is a matter for further evidence and legal analysis. Only if there is inconsistency between the legal interests of the lessee and the native title, will such native title, to the extent of the inconsistency, be extinguished. <p>Toohey J</p> <ul style="list-style-type: none"> • Inconsistency can only be determined...by identifying what native title rights...are asserted...it must 'focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right.' • Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail. <p>Gummow J</p> <ul style="list-style-type: none"> • In none of these instances was there clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title which might have existed.
Commentary	<ul style="list-style-type: none"> • A common law lease = exclusive possession • These rights that were granted had to be construed with respect to the terms of the statute. • Objective test → are the bundles of rights inconsistent? If so, they are extinguished to the extent of any inconsistency

WA v Brown

FACTS	Parties agreed, absent issue of extinguishment, that native people held native title over traditional lands in the Pilbara region of WA. Joint venturers argued that native title rights had been extinguished because they were inconsistent with their rights under the mineral leases. Argued inconsistencies: <ul style="list-style-type: none"> (i) Mineral leases conferred right to exclusive possession (ii) The grant of right to mine and construct infrastructure anywhere on the land was inconsistent with continuation of native title (iii) Exercise of right to mine and construct infrastructure at particular sites was inconsistent with the continuation of native title.
ISSUE	Whether Native Title had been extinguished by grant in 1966 and 1974 of two mineral leases to joint ventures
TEST	<ul style="list-style-type: none"> • Extinction occurs where rights granted by Crown and native title rights are inconsistent. • Need to identify and compare the two sets of rights. It is an objective inquiry that looks to the legal nature and content of the rights at the time of their creation – NOT how they have been subsequently exercised. • Sets of rights are either inconsistent or not, there is no degree of inconsistency. • Rights are inconsistent where the existence of one necessarily implies the non-existence of the other.
HELD	<ul style="list-style-type: none"> • The right to exclude others from the land, for any reason is inconsistent and therefore extinguishes native title. However, the mineral leases did not confer a right to exclusive possession, but rather the right to go onto the land and to get and remove iron ore. • Following grant of the mineral leases, the native title holders could have exercised all their rights anywhere on the land without breach of any of the lessees' rights. No inconsistency then, and none now. • Any competition between the exercise of the two rights must be resolved in favour of the rights granted by statute. But when the joint venturers cease to exercise their rights (or they come to an end) the native title rights and interests remain, unaffected.

	<ul style="list-style-type: none"> HCA rejected the two alternative arguments.
Commentary	<ul style="list-style-type: none"> It is a test of legal inconsistency → objective, binary state. They are either inconsistent or not. It is the right(s) themselves and not their exercise → legal, not factual incompatibility The question to ask is – before the lessees do anything, can the Natives do what they wanted without there being inconsistency?

Native Title Act 1993 (Cth)

- S233(1):** The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders, where (a) ...possessed under the traditional laws/customs of natives, (b) by those laws/customs have a connection with the land or waters, (c) rights/interests recognised by common law of Aus. **(2)** without limiting **(1)**, rights/interests include hunting, gathering, or fishing, rights and interests.

1.2.1 Formalities for Creating/Transferring Interests in Land

- Substantive:** the rights that you transfer have to fit within one of the established categories.
- Conveyancing Act 1919 (NSW) s 14:** “All land shall as regards the assurance of the immediate freehold thereof be deemed to lie in grant as well as in livery”.
 - S23E:** ‘nothing in section 23B, 23C, or 23D shall: (a) invalidate any disposition by will, or (b) affect any interest validly created before the commencement of the Conveyancing (Amendment) Act 1930, or (c) affect the right to acquire an interest in land by virtue of taking possession, or (d) affect the operation of the law relating to part performance.’

1.3 Legal and equitable interest in land

Equity: a parallel system of legal norms developed by the Courts of Chancery, based upon good conscience, which operate to mitigate the rigours of the common law.”

- Mere dissatisfaction is insufficient
- Gives a remedy in specie

Equity does not destroy legal rights, but restricts how they can be used.

- Personal right in equity** (equity operates *in personam*): operates against the **person**, rather than the thing.
 - Equitable proprietary interest**: in the land itself, creates rights exercisable against the **world**.
- A legal interest (*prima facie* better title than anything else) > equitable interest → not binding against a bona fide 3rd party purchaser who doesn't have notice of the equitable interest.
 - Whether an interest is legal or equitable is a historical question → where did the interest or rule come from?
 - Relevance of the distinction? It will tell us how strong the interest is.

1.3.1 Formalities for Creating/Transferring Interests in Land

Conveyancing Act s23B – Legal interests

- S23B(1):** no assurance of land shall be valid to pass an interest at law unless made by a deed.
- S23B(2):** this section doesn't apply to...(d) a lease or tenancy or other assurance not required by law to be made in writing...
- S23B(3):** this section doesn't apply to land under the provisions of the Real Property Act 1900 (doesn't apply to Torrens land)

Deed: mixture of common law and statutory requirements. Must be **written** on paper, parchment or vellum. Must be **signed, sealed and attested** by one witness not a party (CAs38(1)). Must be **delivered** (not physical, but a manifestation of intent), indenting is not necessary (CA s38(2)).

Conveyancing Act s23D

- (1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by the person's agent thereunto lawfully authorised in writing, shall have, notwithstanding any consideration having been given for the same, the force and effects of interest at will only.
- (2) [verbal] Nothing in this section or in s23B/23C shall affect the creation by parol of a lease at the best rent which can reasonably be obtained without taking a fine taking effect in possession for a term not exceeding 3 years, with or without a right for the lessee to extend the term at the best rent which can reasonably be obtained without taking a fine for any period which with the term would not exceed 3 years.

Commentary: Market rent, immediate right to possession, term plus option must not exceed 3 years.

Conveyancing Act s23C – Equitable interests

- (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol (**orally**):
 - (a) No interest in land can be created/disposed of except **by writing** signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law

Commentary: Allows creation of an equitable (not legal) interest in Old System land by a written and signed instrument (not in the form of a deed) even without consideration (**gifting**)

Does not allow the creation of an equitable interest in Torrents title land by an unregistered written and signed instrument (even if in registrable form) without the provision of consideration. (**RPA s41; Corrin v Patton**)

- (b) A declaration of trust respecting any land or any interest therein must **be manifested and proved by some writing** signed by some person who is able to declare such trust or by the person's will,

Commentary: Deals with the declaration of trusts in respect of land. Retrospective confirmation validates the trust

- (c) A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing.

Commentary: deals with the disposition of existing equitable interests (land and other)

- (2) This section doesn't affect the creation or operation of resulting, implied, or constructive trusts.

Equity – looks at intention, and not the form.

Contracts to create/transfer interest in land: → renders an otherwise unenforceable contract, enforceable

- (1) Where an **enforceable contract** to grant or transfer an interest in land exists; and
- (2) Where equity would decree **specific performance** of the contract; then
- (3) Interest contracted for is granted/transferred **in equity**

Lysaght v Edwards – equitable interests (contracts to transfer fee simple)

- The position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (person without a beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, possession of the estate and a charge upon the estate for his purchase money.
- **Doctrine of conversion:** in equity, the purchase money becomes part of the personal estate of the vendor, and the land forms part of the real estate of the purchaser.
- At the time of contract, legal interest remains in seller but the purchaser has an equitable interest in fee simple.
- **Lien:** arise by operation of law
- **Charge:** expressly granted

Walsh v Lonsdale – contracts to grant lease

- **Facts:** agreement to grant a lease for a term of 7 years (**s23D(2)** not applicable as it exceeds 3 years). No deed of lease ever entered into (**s23B(1)**).
- ‘the tenant holds under an agreement for lease. He holds, therefore, under the same terms in equity as if the lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights the landlord would have if a lease had been granted. On the other hand, he is protected in the same way as if the lease had been granted; he cannot be turned out by 6 months’ notice as a tenant from year to year.’
- The lease is effective in equity → it is an agreement where equity would decree specific performance.

Conveyancing Act s 54A:

- (1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.
- (2) This section...doesn't affect the law relating to part performance
- (3) This section applies...to land under the provisions of the **RPA 1900**.

1.3.1.1 Enforceability of (oral) contracts under the doctrine of part performance

- Enforcing contracts that don't comply with **s54A**
- Particularly relevant where there is no statute for part performance.
- Not enforcing the contract, but the equities resulting from acts done

Maddison v Alderson

Facts	Maddison continued in service as Alderson's housekeeper for many years without the payment of wages and giving up a chance to make a home of her own, allegedly in consideration for Alderson's oral promise to leave her in his will a life interest in his land. Alderson died without a valid will. Held that these were not sufficient acts of part performance. They did not unequivocally point to the existence of a contract under which she was to receive a life interest. They were also consistent with the intention to enjoy present comforts and the expectation of future provision
Held	<ul style="list-style-type: none">• ‘the defendant is really ‘charged’ upon the equities resulting from acts done...and not...upon the contract itself.’• ‘...the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.’• ‘...an act done [which changes] their relative positions as to the subject-matter of the contract.”• ‘the acts...relative to the possession, use or tenure of the land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.’• Payment of money alone will not be a sufficient act of part performance as it is equivocal → ambiguous it could point to any sort of relationship.

Cooney v Burns

Facts	<ul style="list-style-type: none">• Written and signed contract between agent of Cooney (as vendor) and Burns (as purchaser) for the sale of Cooney's lease (with contents) of a hotel in Victoria. However, agent was not authorised in writing as required by Vic statute. (This would not have been an issue in NSW due to the operation of s 54A, the decision is relevant for its discussion pertaining to what may/may not constitute part performance)• Purported acts of performance: 1. taking inventory, 2. Cooney handing lease document to Burns' solicitor for preparation of transfer, 3. Burns incurring expense in preparing the assignment for lease and applying for transfer of hotel license.
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Issues	Were these acts part performance?
Decision	<ol style="list-style-type: none"> 1. No → not part of the agreement, nothing to do with ownership. An act preparatory to performance of contract 2. No → ordinary production for inspection of title; step before performance. Merely preparatory or ancillary to performance, rather than an act relating to possession and the use/improvement of land. Act did not change the relative position of the parties in respect of the land (title, possession or use) 3. No
Comment	<p>Essentially, 2 and 3 were ancillary/preparatory steps in the Conveyancing process, rather than relating to the; use, enjoyment or tenure of the land.</p> <p>With respect to handing over the lease document, an argument was raised that this would be effective under a mortgage and thus should apply to leases → court rejected this stating that mortgages and leases are quite different.</p>

Theodore v Mistford

Facts	T guaranteed the obligations of his company under a contract to purchase a business whereby payment of part of the purchase price was deferred. His mother, Mrs T, authorised him to lodge with the vendor's solicitors, as security for T's obligations under the guarantee, the certificate of title for the land she owned. Before settlement the solicitors held the certificate of title on account of Mrs T, and after settlement as security for moneys owing to the vendor.
Held	The vendor had an equitable mortgage even though Mrs T had not promised to grant a legal mortgage.
Reasoning	<ul style="list-style-type: none"> • Because Mrs T had not contracted to provide a formal mortgage, principles of part performance were inapplicable (The vendor was asserting a mortgage had been granted) • Q was whether the Qld equivalent of s 23C(1)(a) precluded the vendor from holding an equitable mortgage. • 'Ultimate question...was whether in the circumstances...the [vendor] having completed the Sale Contract on the faith of the provision of the...certificate of title [Mrs T] had been entitled to the return of that instrument (full proceeds of sale) without satisfying the secured indebtedness.'
Commentary	In cases dealing with provisions deriving from the Statute of Frauds the courts have not allowed the statute to be made an instrument of fraud (<i>Last v Rosenfeld</i>).

Ciaglia v Ciaglia

Facts	<ul style="list-style-type: none"> • Transaction was in substance an old system mortgage where legal title had been transferred (to P) with a proviso for re-conveyance (by P) on repayment. • P repaid the loan and interest, but P died without re-transferring the plaintiff's share. D (P's widow, executor and beneficiary) refused to do so. • D admitted that the transaction was by way of security and that the loan had been repaid, but claimed that the oral agreement was not enforceable because of s23C and s54A.
Held	Found for plaintiff
Commentary	<ul style="list-style-type: none"> • Issue about interrelationship between s23C and s54A. <ul style="list-style-type: none"> ○ Khoury v Khouri – 'potential overlap' so where there is an agreement which gives rise to an immediate interest, both s 54A and s 23C apply. (this reasoning was followed in the present case – both s23C and s54A present <i>prima facie</i> obstacles to plaintiff enforcing oral agreement for retransfer). ○ Balaglow v Konstaninidis – 'harmonious' so that s54A applies only in case of an executory agreement (contract) and s 23C at the stage of performance or where no prior agreement. (on the present facts, s 54A would not apply as mortgage in place). • S23C(1)(a) discussion

	<ul style="list-style-type: none"> ○ As there was nothing written, the defendant is using the statute as an instrument of fraud. ○ The provision cannot be used to preclude proof that the common intention was that the transfer by the plaintiff to P was by way of mortgage/security, rather than absolute. ○ On repayment in full by the plaintiff, P held the plaintiff's interest on constructive trust for the plaintiff. Under s 23C(2) constructive trusts need not be in writing. ● S54A(1) discussion <ul style="list-style-type: none"> ○ Principle that statute cannot be used as an instrument of fraud also applies. ○ There have been sufficient acts of part performance: <ol style="list-style-type: none"> 1. Signing of transfer, receipt of loan advance by plaintiff, repayment of loan and interest, plaintiff's improvements of property with P's knowledge after loan repaid. 2. Payment of money (especially in mortgage transactions) can be relevant, even though by itself not sufficient 3. Payments made by third parties on behalf of the plaintiff can be acts of part performance because of defendant's admission that loan had been repaid.
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1.4 Old system title registration

- Historical/derivative title: grantee/transferee gets no better title than that of the grantor/transferor – any defect flows.
- If the signature of the grantor/transferor has been forged, the instrument is void. It passes no rights in law or equity
 - Under common law, forgery is a nullity
- If an instrument has been signed by the grantor/transferor, but the execution was induced by the fraud of the grantee/transferee, the instrument can be effective to pass a legal interest, but equity allows the grantor/transferee to have the instrument set aside.
- Registration of valid instruments affecting Old System land under Part 23, Division 1 of the **Conveyancing Acts 184G** gives priority advantages but doesn't cure any defect. A forged instrument will still not pass any title.
- A mortgage of Old System title land transfers the interests of the mortgagor to the mortgagee with the proviso that the mortgagee will reconvey that interest to the mortgagor when the debt is repaid.
 - There can only be one legal mortgage of an interest in Old System land.

1.5 Torrens title land

- Title by registration, not registration of title (**Breskvar v Wall**)
 - To have a legal interest → need to be on the Register
- It is being recorded in the register that gives a person their interest, not taking a valid transfer from the previous holder of the registered interest. (**Real Property Act s 41**)
- However, unregistered interests can exist (usually treated as equitable interests) – **Barry v Heider**
- A registered interest is **indefeasible** (not subject to adverse claims or defeat) unless an exception applies, such as where the holder is personally guilty of fraud (**Frazer v Walker**)
 - A forged instrument, when registered, will give the grantee/transferee a valid (and indefeasible interest), unless the grantee/transferee was guilty of fraud
- For the holder of a registered interest to have been guilty of fraud they must have been guilty of actual dishonesty.
- Where a transfer has been forged, its registration is effective to give the transferee the relevant interest and to deprive the defrauded party of their previously registered interest, **even where the grantee/transferee is guilty of fraud**.
- Even if guilty of fraud, the new registered holder holds a (defeasible) interest, but can still 'pass' a registered interest to another party.
- The fraudulent party, while still on the register, can even grant an **unregistered** interest to a third party (**Breskvar v Wall**)

1.6 General law and Torrens title mortgages

- Unlike an Old System title mortgage, the mortgage of Torrens title land doesn't involve the transfer of the mortgagor's title, but gives the mortgagee a charge over the land.
 - Possible to have more than one legal mortgage
 - 'a mortgage...under this Act has effect as a security but doesn't operate as a transfer of the land mortgaged...' (*RPA s 57(1)*)

1.7 Definition of land – fixtures

Fixture: is a chose in possession (chattel) that has been attached or is resting on land in such a way that it has lost its legal identity as a separate object, and has become a part of the land.

- Ownership of the CiP moves to the owner of the land if it becomes a fixture.
- Usually the contract between A and B will state whether something is a fixture, however, when a 3rd party is involved who is not a party to the contract, this is usually where discussion as to fixtures is concerned.

Indicia:

- Degree/mode of annexation: how firmly attached is the item → would damage to it or the land likely result from its removal
- Object/purpose of annexation: was it annexed for better enjoyment of the land or as a chose in possession?
 - Greater emphasis on object/purpose (*Palumberi v Palumberi*), technology now allows for easier removal.

Presumptions:

- Object resting by its own weight → chattel (burden of proof on person claiming it is a fixture)
- Object attached to land in some way → fixture (burden of proof on person asserting it is a chattel)
 - '...even slight fixing to the land is sufficient to raise the presumption that a chattel is a fixture' (*Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning*) → 4 bolts and nuts; indirect and slight connection, but presumed to be a fixture.
 - Object: 'nature of the chattel' → air-conditioning plant
 - "relation and situation of the party making the annexation vis a vis the owner of the freeholder of the person in possession" → subcontractors v owner of freehold
 - Mode of annexation → connected by pipes to buildings water reticulation system
 - Purpose for which the chattel was fixed → an essential part of the buildings necessary for their use and occupancy as modern office premises
 - C.f. *NH Dunn Pty Ltd v LM Ericsson Pty Ltd* → unit bolted to wall & floor to keep it steady whilst it was in operation → it was fixed for the better enjoyment of it as a chattel.

Re Cancer Care Institute of Australia Pty Ltd

FACTS	<ul style="list-style-type: none">• 2 competing security interests over two linear accelerators (valued at about \$8m) used for radiotherapy in the treatment of cancer.• Equipment was bolted to a steel frame that was cemented or grouted into a recessed pit in the slab floor of the suite.• Equipment could be easily detached from the frame and moved elsewhere to be attached to another frame.• The (then empty) frame could remain in place and other linear accelerators could be attached to it.
Equipment	<ul style="list-style-type: none">• Firstly, equipment and frame are not a single item – they were installed and could be used separately. Further, even if they were a single item, the equipment has a 'separate and independent viability' which means that even if it were part of a single composite machine, the Equipment need not become a fixture even though other parts of the machine did.
Fixture/Chattel	<ul style="list-style-type: none">• Not a fixture – the intention, determined objectively was not that the Equipment would become part of the land.

	<ul style="list-style-type: none"> ○ When determining objective intention, regard to actual intention and the degree of annexation may be evidence of what a reasonable person would've done ○ Interests of the owner of the premises are to be distinguished from the interest of the owner of the equipment and the proposition that the lessor's interest (and community's interest) would be diminished by the removal of the Equipment. ○ Purchaser of very expensive medical equipment, likely to have known that it was capable of being moved/removed → strongly against objective intention that the Equipment be a fixture. ○ Linear accelerators are regularly removed and de-installed → removal unlikely to cause damage.
Tangential Point	<ul style="list-style-type: none"> ● Argument (unsuccessfully) raised was that the Equipment had become a fixture as it contributed to the 'overall architectural design' of the Premises. ● D'Eyncourt v Gregory – carved figures, marble vases, statues and stone seats in the hall and garden of a mansion-house were held to be fixtures, because they were part of the architectural design of the mansion rather than mere ornaments.
Tenant's fixture	<ul style="list-style-type: none"> ● If determined to be a fixture - The equipment had a trade purpose and removal wouldn't cause substantial damage.

1.7.1 Tenant's Right to Remove Fixtures

- Tenant has a common law right to remove certain fixtures, affixed by the tenant to the leased property, at the end of the lease.
- Such fixtures must:
 - Be installed for trade, domestic or ornamental purposes; and
 - Not have been so firmly attached that removal would destroy their essential character or value, or cause substantial damage to the reality
 - Where removal would cause such damage, the fixture is a 'landlord's fixture'

SAMPLE