

## LLB301 – Real Property Law

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## 3.4 Dealings with Land – Mortgages

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### Introduction to *Dealings with Land*

**This category of notes deals with all dealings with land.**

1. Torrens System
2. Sales
3. Leases
4. Mortgages
5. Easements

**This topic of notes deals with mortgages of land.**

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### Introduction

**DEFINITION:** A mortgage is a contract and type of security given by a landowner (mortgagor) to a lender of money (mortgagee) to secure the repayment of the loaned sum.

**DUAL-ASPECT:** As with leases, mortgages have a dual aspect:

1. The personal covenant: the mortgagor's promise to repay the loan; and
2. The legal interest in land: the grant of an interest in the land to the mortgagee by way of security.

### Overview of Process

1. Torrens system mortgages – general introduction
  2. Creation of a mortgage – has a mortgage been created?
  3. Mortgage covenants – are the mortgage covenants valid?
  4. Rights of the mortgagor – does the mortgagor have any rights?
  5. Remedies of the mortgagee – what remedies does the mortgagee have upon default?
- 

## (#1) Torrens System Mortgages

### 1.1 Old System Mortgages

**GENERAL PRINCIPLE:** A mortgage of general law takes effect by way of a transfer of the legal title in the land to the mortgagee, and a promise to re-transfer back to the mortgagor on repayment of the debt.

**EQUITY OF REDEMPTION:** The mortgagor retains an equitable interest in the land, called the equity of redemption.

- Upon full repayment of the debt pursuant to the agreement, the mortgagee has a legal right to have the land re-transferred, called the legal right to redeem.
- Where the mortgagor has lost the legal right to redeem (e.g. because repayment of the debt was late), the mortgagor may still have a right to have the land re-transferred if he can repay the debt within a reasonable time, called the equitable right to redeem.
  - Reasonable time is usually up to 6 months.

**FORECLOSURE:** Loss of the legal and equitable right to redeem allows the mortgagee to foreclose the mortgage and become the absolute beneficial owner of the land.

- Mortgagee achieves foreclosure by application to the court on the basis that the mortgagor can no longer exercise its equitable right to redeem.
- Foreclosure results in outstanding arrears of the debt becoming unrecoverable.

## 1.2 Torrens System Mortgages

**DEFINITION:** A mortgage is a charge on a lot for securing money: *LTA sch 2 (definition of 'Mortgage')*.

**GENERAL PRINCIPLE:** A mortgage of Torrens land takes effect by way of a charge over the land as security for the debt. The mortgagor retains ownership of the land during the period of repayment.

**SOURCE OF OBLIGATIONS:** The parties' obligations are contained in the instrument of mortgage, *Land Title Act* and *Property Law Act*.

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### (#2) Creation of a Mortgage

**REQUIREMENTS:** To create a valid legal mortgage, the following requirements must be satisfied:

1. **Essential covenants** - the mortgage must contain the essential covenants.
  - See 'Essential Covenants' below.
2. **Registration** – the mortgage must be registered.
  - See 'Registration' below.

**ESSENTIAL COVENANTS:** There are two covenants which are essential to the creation of a mortgage:

1. **Charging clause;** and
  - It is a covenant by the mortgagor charging his own interest in the land in accordance with specific terms in order to support his promise to repay the mortgage the debt.
  - Old system approach of transfer by way of charge is allowable under Torrens: *Abigail v Lapin*.
  - **Mortgage v Sale:** look at the substance of agreement → is this a mortgage or a sale with an option to re-purchase under particular circumstances? (Jack and Tom Tutorial 10.1)
2. **Personal covenant to repay.**
  - It can be implied by *PLA s 78(1)*.
  - For a registered mortgage, the deed creates a speciality obligation, meaning that release of the charge from the land does not destroy the personal covenant to repay.
    - Any outstanding debt can be claimed up to 12 years after the right to receive money accrued: *Limitations of Actions Act s 26(1)*.

**REGISTRATION:** Registration is required to create the legal interest in the land: *LTA s 181*.

- Mortgagee must take reasonable steps to verify the ID of the mortgagor: *LTA s 185(1A)*.
  - 'Reasonable steps' is 100 points of ID: *LTA s 11A(3)*.

**UNREGISTERED MORTGAGES:** Unregistered mortgages are equitable mortgages. They can be created by either:

1. An informal charge over land: writing with sufficient information and signed by the mortgagor (or agent): *PLA s 10*.
2. A mortgage in registrable form prior to registration.
3. Deposit of the title deed with a creditor with the intention to create a charge.

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**"(#3) Mortgage Covenants on next page"**