

LAWS2012:

IPCL

Semester 1 2016

TOPIC 1: (A) THE CONCEPT & FUNCTION OF “PROPERTY” & (B) INTRODUCTION TO REAL PROPERTY

Introduction to General Property Concepts

Land

- Constitutes territory of a political or cultural community (doctrine of tenure; native title)
- Enduring (doctrine of estates)
- Attachment of things (law of fixtures)

Concept of Possession

- 1. The ability to control/exclude others
- 2. The intention to control an asset & exclude others from it

Overview of Property Rights

- House = subject to property right
- Property = right itself
- I.e. - property is not the object itself
- Owner has rights that are exercisable against the rest of the world
- Property is a right and not a thing

Introduction to Real Property Concepts

Assignable Rights

- At its widest, property means any right that can be transferred from one person to another

Rights in Rem

- Rights *in rem* are rights people have concerning particular things, without much regard to the people against whom those rights might be enforced. Property law is primarily about rights *in rem*.
- The distinction b/w rights *in rem* & rights *in personam* is important:
 - A right *in rem* depends upon the continued existence of the thing to which the right relates E.g. – if your book is destroyed, your property right is gone. The destruction may give you a right *in personam* against the person who destroyed your book or against your insurance company, but it brings to an end your right *in rem* to the book
 - A right *in personam* does not depend on the existence of any particular thing. It corresponds to some person's obligation to fulfil that right. Although your right to be paid does not depend on the existence of any particular thing, my lack of sufficient assets to meet my obligations can affect the value of your right.

The Essential Characteristics of Property Rights

- A property right always relates to, & depends upon the existence of, some particular thing
- A property right can be enforced not just against specific persons, but against a wide range of persons
- The existence of a property right depends ultimately on the existence of a legal remedy to protect or enforce that right. The remedy should be able to be brought against any other person.

Enforceability

- No specific persons responsible for the fulfilment of property rights
- The obligation which corresponds to your property right is owed by other members of society. They each have a duty not to interfere with your rights to your book.

The Existence of Some Thing

- An essential characteristic of property rights is that they are enforceable generally against other persons in society
- Property rights must relate to things which are separate & apart from ourselves

Other Essential Characteristics?

- *Alienability* –
 - Meaning that they can be sold or given away to others
 - All property rights can be described as “alienable” if that term is understood to mean “disposable” rather than “transferable”
- *Excludability* –
 - The holder of a property right is able to exclude others from making use of the thing subject to that right
- *Value* –
 - Usually have some market value
 - Some only have sentimental value

Land & Goods

- The most important division in the law of property may be that which is drawn b/w land & other things
- Most things other than land are referred to as goods (and less commonly as chattels)
- Goods = tangible
- Land = both permanent & stationary – remains relatively constant
- Most other things are transitory
- Goods can be moved from one place to another
- Movable = *res mobiles*
- Immovable = *res immobiles*

Real & Personal

- Distinction b/w real & personal property = based on the nature of the right
- All real property rights are rights to land, while most personal property rights are not
- Distinction should not be confused with the distinction b/w rights *in rem* & rights *in personam*
- Personal property rights are not personal rights. They are property rights b/c they relate to external things and are enforceable generally against other members of society. However, they are normally enforced by means of personal rights.

Legal & Equitable

- Property rights can also be divided into legal & equitable rights – based on the nature of the right
- Two main differences are the manner of their creation & their durability

- Most equitable property rights can be created with less formality than the comparable legal property rights. They tend to be less durable than legal property rights & are more easily distinguished by competing property rights to the same thing.

Tangible & Intangible

- Corporeal/incorporeal
- All property rights are intangible in the sense that they are rights enforceable against other persons, regardless of the nature of the thing to which those rights relate
- The distinction depends on whether the property right entitles the holder to possession of the thing involved
- Tangible (corporeal) property rights include the right to possession of some thing, while intangible (incorporeal) property rights do not
- A thing cannot be possessed unless it is something which can be controlled physically. Therefore, property rights to things which cannot be possessed are necessarily intangible. However, the converse is not true. It is possible to have property rights to physical things which do not entitle the holder to possession of that thing.

Property Creating Events

- Another way to organise property rights is according to the events that create them.
- Most property rights are created by consent. Property rights can also be created by wrongdoing
- There are property rights created by unjust enrichment
- Other events includes the creation (& destruction) of property rights brought about by physical changes to things

Introduction to Ownership

- Ownership is not the same as property

Ownership & Possession

- Must distinguish
- One feature of ownership, which distinguishes it from possession, is its potential for permanence
- While ownership normally includes the right to possess a thing indefinitely, possession without ownership is a temporary right
- The difference between a sale or gift (which transfer ownership) & a lease or bailment (which transfers possession, but not ownership) is that the former disposes of all the owner's rights to the thing, while the latter leaves the owner with some residual right.
- To distinguish ownership from possession, it is necessary to look at the rights a person has to use a thing in the future
- Confers on the owner the competence to enjoy, use, possess, dispose of & alienate the object, as well as the capacity to ward off any encroachment on the object

Bundle of Rights

- Honores sets out 3 rights of ownership which do not belong to a non-owner with a right to possession.
- The right to capital entitles the owner to destroy or alienate the thing itself.

Responsibilities of Ownership

- Honore's description of ownership includes the duty to prevent harm & the liability to execution
- *Duty to Prevent Harm* –
 - 1) There are 2 types of harm to consider: the duty not to harm others with the thing owned & the duty not to harm the thing itself
 - 2) Even if a duty to prevent harm is part of the law of property, it is not clear whether it attaches to ownership or the right to possession
 - 3) The more difficult question = whether the owner of a thing can have a duty not to harm the thing itself
 - 4) Clear that the possessor can be liable to the owner for damage to the thing
 - 5) However, the sole owner of a thing, to which no-one else has a property right, usually is free to destroy or damage it, provided that this causes no harm to others
 - 6) There are situations in which the owner is not free to harm the thing owned e.g. – animals
- *Liability to Execution* –
 - For Honore, ownership includes a liability to execution
 - This means that the rights of the owner may be acquired by the government for the greater good & may be seized & sold to pay the owner's debts
 - The possibility of compulsory acquisition by the government = a generally accepted limit on ownership

Difference b/w Contractual & Property Rights

Contractual Rights

- Sphere of enforceability
- *Rights in personam*
- Arise out of agreement b/w parties

Property Rights

- *Rights in rem*
- Sphere of enforceability
- Bind the whole world

But role in Equity bridging the divide...

- Equity regards as done that which ought to be done
- *Lysaght v Edwards; Walsh v Lonsdale*

Rights Usually Associated with "Property"

- Right to:
 - 1) Use & enjoy
 - 2) Exclude
 - 3) Alienate/transfer
- Economic justification for "property"
 - Efficient allocation of resources (measured by willingness to pay) & so maximise total wealth of society
 - Right to use & exclude provide incentive to put resources to their most productive use
 - Right to alienate allows resources to move to more highly valued uses through mutually beneficial exchange

- However, property rights can vary from context to context, depending upon the ends we want property to serve

<i>Yanner v Eaton</i>	
Facts:	<ul style="list-style-type: none"> ⇒ Yanner, an Aboriginal man, used a traditional harpoon to hunt crocodiles. The crocodiles were killed, and Yanner shared the meat with other members of his Gunnamulla clan. Yanner was charged with taking a crocodile without a licence contrary to the Queensland Fauna Conservation Act 1974 (“Fauna Act”). ⇒ Under the Native Title Act 1993 (Cth), Yanner would not have been guilty of the offence if he were exercising native title rights. Eaton, the police officer who laid the charge (and the Commonwealth and various states intervening in the action), argued that any native title rights Yanner would otherwise have had been extinguished by s 7(1) of the Fauna Act, which provided that “all fauna ... is property of the Crown.” ⇒ If the Crown’s property meant absolute ownership, then any native title rights would have been extinguished. But by majority, the High Court held that this was not the effect of s 7(1). Rather the property of the Crown was such that they could co-exist with Yanner’s native title rights. ⇒ A magistrate found that the man’s clan had a connection with the land from which the crocodiles were taken which had existed before the common law of Queensland had come into being & which continued thereafter ⇒ The magistrate further held that it was a traditional custom of the clan to hunt juvenile crocodiles for food
Judgement:	<ul style="list-style-type: none"> ⇒ Illustrates variable meaning of “property” ⇒ The "property" which the Fauna Act and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created. So far as now relevant those were rights to limit what fauna might be taken and how it might be taken, rights to possession of fauna that had been reduced to possession, and rights to receive royalty in respect of fauna that was taken (all coupled with, or supported by, a prohibition against taking or keeping fauna except in accordance with the Act 1975). Those rights are less than the rights of full beneficial, or absolute, ownership. Taken as a whole the effect of the Fauna Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act. ... Gleeson CJ, Gaudron, Kirby and Hayne JJ, 370 [30] ⇒ "Property" is used in the ... sense in s 7(1)... as an aggregate of legal relations between the "Crown" and "fauna". Gummow J, 389, [86] ⇒ Argument of Crown would have been successful if under the Statute, property meant absolute ownership but majority of HCA rejected argument, saying that property doesn’t necessarily mean absolute ownership & can have a range of meanings ⇒ The word "property" is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, "property" does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power

permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights." ...

- ⇒ "Property" is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not "a monolithic notion of standard content and invariable intensity". ...
- ⇒ Because "property" is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? ...
- ⇒ HCA: In this case, property meant a lesser set of rights which still allowed Yanner's native title rights to subsist
- ⇒ HCA looked at various specific powers that Legislature gave to Crown in respect of fauna & said property is basically a useful description to describe those rights but didn't mean absolute ownership, all it really meant were the specific rights given to the Crown could be collectively referred to as "property"
- ⇒ Gleeson CJ, Gaudron, Kirby & Hayne JJ:
 - *"The word "property" is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, "property" does not refer to a thing: It is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as a power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a bundle of rights."*
 - *"There are several reasons to conclude that the "property" conferred on the Crown is not accurately described as "full beneficial, or absolute, ownership". First, there is the difficulty in identifying what fauna is owned by the Crown....Secondly, assuming that the subject matter of the asserted ownership could be identified or some suitable criterion of identification could be determined, what exactly is meant by saying that the Crown has full beneficial, or absolute, ownership or a wild bird or animal?"*
 - *"At common law, wild animals were the subject of only the most limited property rights. At common law there could be no "absolute property", but only "qualified property" in fire, light, air, water & wild animals."*
 - *"Thirdly, there are several aspects of the Fauna Act which tend to suggest that the property in fauna conferred on the Crown may not easily be equated with the property of an individual may have in a domestic animal....Fourthly, it is necessary to consider why property in some fauna is vested in the Crown."*
 - *"In light of all these considerations, the statutory vesting of "property" in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve & regulate the exploitation of an important resource."*
 - *"The property which the Fauna Act and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created...Those rights are less than the rights of full beneficial, or absolute, ownership. Taken as a whole the effect of the Fauna*

	<i>Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act.”</i>
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Notes to *Yanner v Eaton*

- Section 51(xxxi) Const. allows the acquisition of property for a purpose for which the Cth has power to make laws, but only on the provision of just terms. This constitutional protection of property rights was recently considered in *ICM Agriculture v Cth* (2009). ICM had its rights to take water from the Lower Lachlan Groundwater System, pursuant to a bore licence, replaced with less generous rights under an aquifer access licence. HCA concluded that there had not been an acquisition of property by NSW through its cancellation. This was b/c NSW did not acquire an identifiable & measurable benefit through the cancellation of the licence, as its rights w.r.t the subsurface water had not been enlarged. Although ICM's property rights had been varied/extinguished, there had been no acquisition of property by NSW. Accordingly, the Cth had no obligation to provide just terms to ICM.

Statutory Recognition & Protection of Native Title

- Native title is now a creature of statute. The *Native Title Act 1993* follows the reasoning of the High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 but today it is the Act which confers the entitlement to native title.

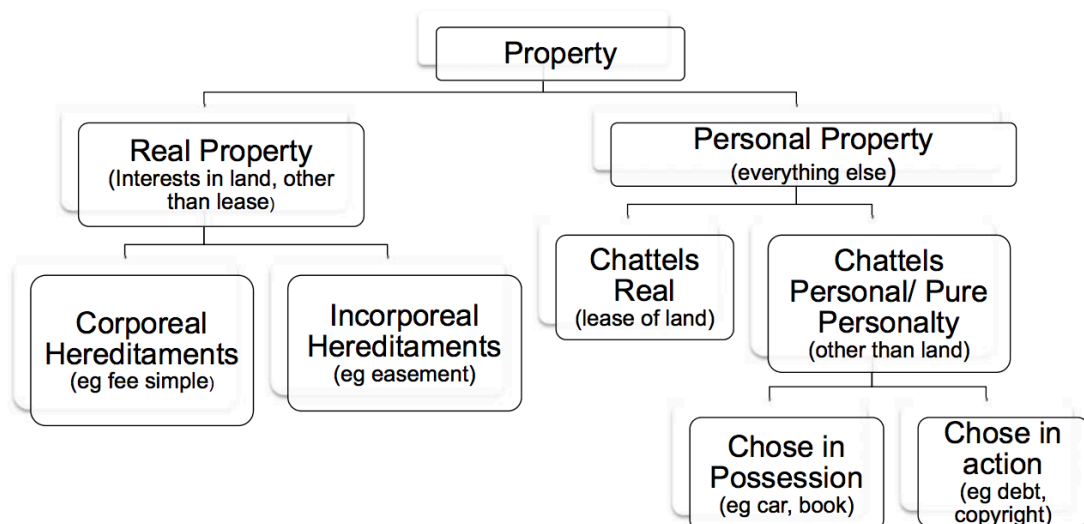
<i>King v David Allen & Sons, Billposting Ltd</i> [1916]	
Facts:	<ul style="list-style-type: none"> ⇒ Outlines difference b/w contractual & property rights ⇒ Looks at situation where one party alleges they have been granted property rights from another, need to fit property right into limited pigeonhole that exists ⇒ King owned land on which a picture theatre was to be erected. King agreed with David Allen and Sons, Billposting (“Billposting Company”) that the Company would have the sole right to affix posters and advertisements on the walls of the proposed theatre for a period of 4 years for a specified yearly payment. Subsequently King leased the land to a third party (Lessee). Under the lease the Lessee was obliged to erect a theatre, which it did. The lease did not refer to the agreement between King and the Billposting Company. ⇒ When the theatre was erected the Billposting Company attempted to post their bills on the wall of the theatre, as contemplated by its agreement with King, but the Lessee refused to allow this. The Billposting Company sued King for breach of contract. King unsuccessfully argued that the agreement with the Billposting Company created an interest in land that was enforceable against the Lessee and therefore that King was not in breach of the agreement ⇒ The agreement between King and the Billposting Company created a licence; it did not create an interest in the land.
Judgement:	<ul style="list-style-type: none"> ⇒ Lord Buckmaster LC, 60; Earl Loreburn, 62) <ul style="list-style-type: none"> ○ “There is a contract between [King and the Billposting Company] which creates nothing but a personal obligation. It is a licence given for good and valuable consideration and to endure for a certain time. But I fail to see ...that there is any authority for saying that the document creates rights other than

	<p>I have described. ... [I]t is unreasonable to attempt to construct the relationship of landlord and tenant or grantor and grantee of an easement out of such a transaction ...” Lord Buckmaster LC, 61)</p> <ul style="list-style-type: none"> ○ The agreement contained an implied term that King would not disable himself from carrying out his contractual obligation. King breached that condition and was liable in damages to the Billposting Company. (Earl Loreburn, 62) <p>⇒ King was in breach of contract</p>
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Requirements for Creation/Transfer of a (Particular) Proprietary Right

- Essential/Substantive Requirements
 - If it doesn't fall within interest, can't grant someone a property right, only a contractual right
 - What package of rights has the grantor/transferor intended to create in the grantee/transferee? Eg:
 - ⇒ **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 a 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]
- Formal Requirements
 - How must that intention be manifested?
 - E.g. - must a document be used; if so, what type; is a particular form of words required?

Taxonomy of Property Interests



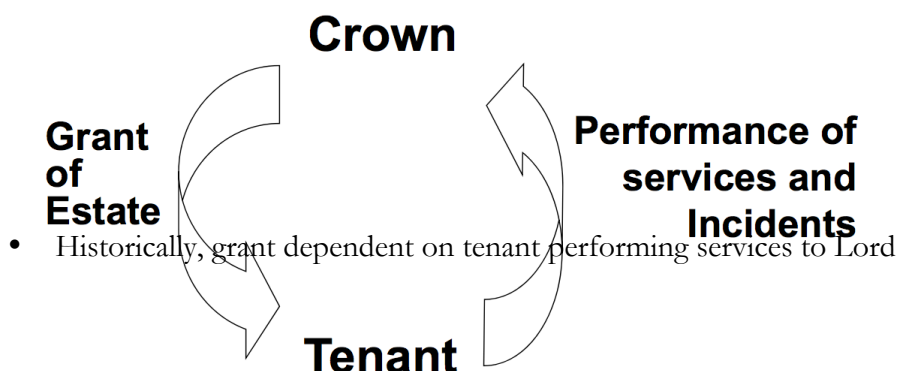
Tenures, Estates & Native Title

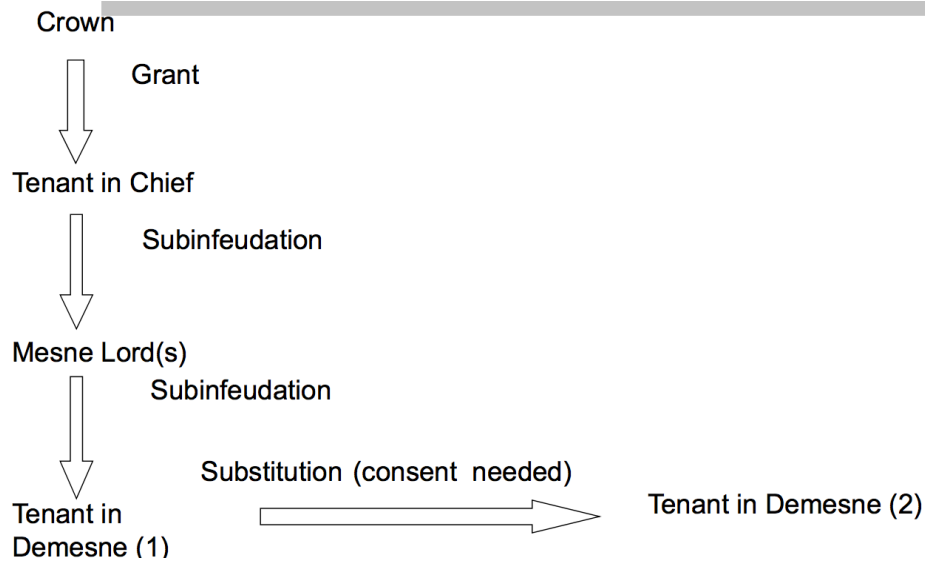
Doctrine of Tenure

- All land technically owned by the Crown
- Person we would colloquially call the owner actually has interest – ‘fee simple’
- “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. The origin of the rule is to be found in a traditional belief that, at some time after the Norman Conquest, the King either owned beneficially and granted, or otherwise became the Paramount Lord of, all the Land in the Kingdom. It is not surprising that the fiction that land granted by the Crown had been beneficially owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law. It is far too late in the day to contemplate an allodial or other system of land ownership. 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.” *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 46 – 47 (Brennan J)
- *Mabo* accepts that Doctrine of Tenure applies in Australia
- Own fee simple from Crown as tenant of the Crown for property

<i>WA v Ward</i>	
Judgement:	<ul style="list-style-type: none"> ⇒ Clear summary of the history & development of doctrines of tenures & estates ⇒ The doctrine was the first way in which the ownership of property was fragmented ⇒ By demonstrating that several persons could hold proprietary interests in the one piece of land, the doctrine of tenure laid the groundwork for the division of land in ways other than pursuant to the tenurial r/ship ⇒ 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 have interests in the same land giving them future rights to possession. ⇒ “[q]uestions of extinguishment first require identification of the native title rights and interests that are alleged to exist”.

Doctrine of Tenure





“Decline” of Tenure – *Statute of Quia Emptores 1290*

- Allowed transfer without consent
- Prohibited further subinfeudation
- *Imperial Acts Application Act 1969* (NSW) s 36
 - Allows you to transfer land without consent of Crown
 - “Land held of the Crown in fee simple may be assured in fee simple without licence 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.”
- *Imperial Acts Application Act 1969* (NSW) s 37
 - “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.”
- Historically, Crown had right to take land back if you died without heirs → now = next of kin under rules of intestacy
- *Succession Act 2006* (NSW), s 136
 - “If an intestate dies leaving no person who is entitled to the intestate estate, the State is entitled to the whole of the intestate estate.”
 - Goes to Crown under doctrine of Unowned Property

Doctrine of Estates

- Crown is the ultimate owner (Doctrine of Tenure)
- Tenant simply has an estate in the land (usually a fee simple)
- “A subject could hold land only as a tenant, directly or indirectly, of the Crown. ... The ‘estate’ which a subject held in land as tenant was itself property which was the subject of ‘ownership’ both in law and equity. The primary estate of a subject, the estate in fee simple, became, for almost all practical purposes, equivalent to full ownership of the land itself. Nonetheless 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.” *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 80 – 81 (Deane and Gaudron JJ)

- “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.” *Western Australia v Ward* (2000) 170 ALR 159 (FCA), 359 – 360 (North J)
- Types:
 - Fee simple
 - Fee tail (extinct in NSW)
 - Life estate
 - Contrast other interests e.g. –
 - ⇒ Lease
 - ⇒ Easement
 - ⇒ Profit a prendre