

# Property Law

## Exam Notes

SAMPLE

# Concept of Property

## What is property?

- Something which is capable of ownership or a right of ownership but more so, property is the relationship with the thing.
- Property law is the relationship of individuals to things and the extent of those rights in regards to enforcement of those rights. Legal relationship with the thing. 'A bundle of rights'. (*Moore v Regents of University of California*).
- Property rights *in rem* are rights related to and depending upon a particular thing (property) and are protected against the whole world unless there is someone with a better property right (*Yanner v Eaton*).
- Right to: use, enjoy, exclude, transfer, possess, destroy.

## Cases

- *Victoria Park Racing and Recreation Grounds Company Pty Ltd v Taylor* (1937) 58 CLR 479  
**Held:** No property right in spectacle. People are entitled to do what they want on their own land even if that means watching you.
- *Yanner v Eaton* (1999) 291 CLR 351  
**Held:** Cannot own an animal, Crown has ability to control things but not animals (crocodiles). Defined property as 'legal relationship with the thing'.

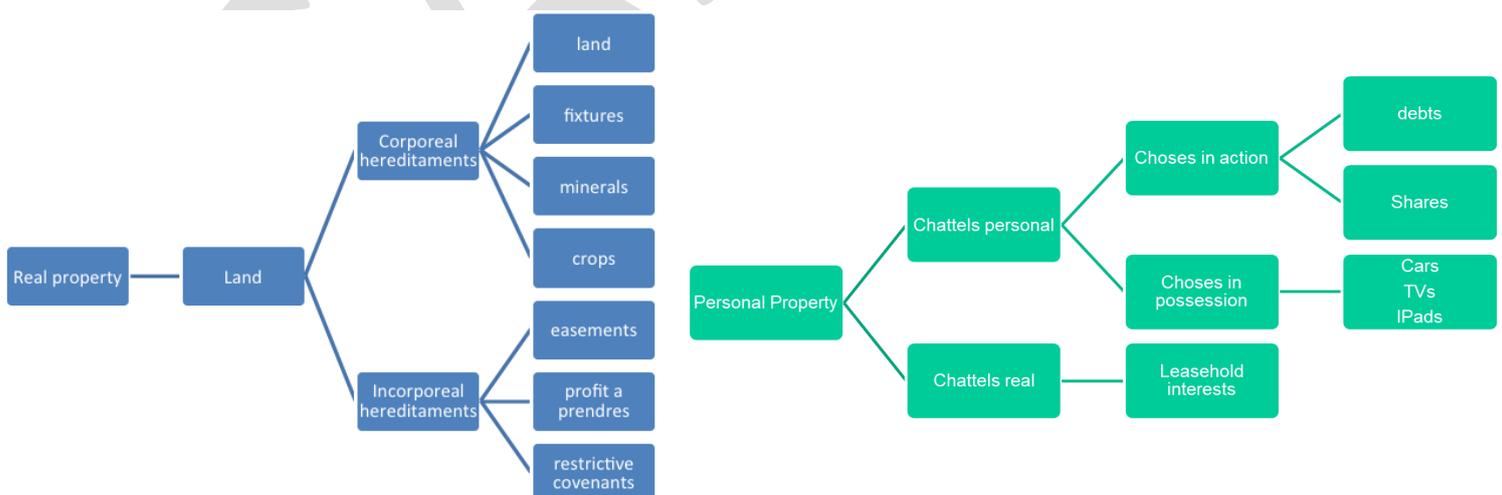
## Classification of property

**Real Property:** Refers to land (excluding leases)

- A. Corporeal Hereditament
- B. Incorporeal Hereditament

**Personal Property:** Refers to chattels (objects and other property such as shares and choses in action).

- A. Chattels Real (Leasehold Interests)
- B. Chattels Personal (Choses in Action, Choses in Possession).



# Introduction to Land Title

## Doctrine of Tenure

- The Doctrine of Tenure is the concept of absolute Crown ownership. The Crown owns all land and any interest in land is conferred by a Crown grant.
- In 1788 when Australia was settled it was declared *terra nullius* – land belonging to no one.

### Pre-Mabo

- Upon settlement the Crown acquired absolute beneficial ownership and title to land.
- No right or interest could be possessed without a Crown grant.
- Crown holds radical title and absolute ownership.
- **Milirrpum v Nabalco (1971)** – Court not willing to overturn *terra nullius*. No native title rights.

### Post Mabo and Doctrine of Tenure

- **Mabo v Queensland (No 2) (1992)**: HCA found:
  - Rejected *terra nullius* and found that the Meriam people were entitled to possession, occupation, use and enjoyments of that land.
  - Native title exists where people have maintained their connection with the land and where their title has not been extinguished by acts of Imperial (royal), State or Commonwealth governments. (Now set out in **s 223 of Native Title Act 1993**).
- Common law now recognises native title rights. If native title is established, it exists outside the tenurial system.
- The Crown holds a diminished radical title over land encumbered by native title.

## Native Title

- The right of Indigenous peoples to own their traditional lands and waters.
- **Native Title Act 1993 – s 3**: main objectives are to recognise and protect native title rights.
- In Victoria, **Traditional Owner Settlement Act 2010**.
- **Karpny v Dietman (2013)** – HCA held: Native title right not extinguished. Allowed to take fish from river per their traditional laws and customs.
- **Akiba v Commonwealth (2013)** – HCA held: Native title right not extinguished and right to take fish as per the 'bundle of rights' in **Yanner v Eaton**.

## Acquisition of property through taking possession

- Possession is the root of title and therefore possession confers a property right (held in both the doctrine of tenure and native title).
- Possession acquired by: consent, gift, sale, loan, taking possession (finding lost/ abandoned goods).
- Property interest enforceable against entire world except where someone has a better title.
- Possession denotes a person having control of property and intends to control property as 'owner' might.

## Adverse Possession

- The title of property acquired adversely is possessory in nature.
- Possession requires: **The Tubantia [1924]**
  1. Factual possession (a person have sufficient control over the object); and
  2. Intention to exclude all others.
- Cannot be claimed against the Crown (**Limitations of Actions Act 1958 s 7**).

## Fragmentation by reference to the nature of interests

- Real property can be fragmented by reference to the nature of the interest that is create.
- The property interest that can exist in relation to the one property depend on the nature of the interest.
- In an estate in land many interest can be carved such as easements, profit a prendre, covenants, and security interests.

## Easements

- An easement is an incorporeal hereditament. It operates
- It gives one person (dominant tenement) the right to use another person's land (the servient tenement) for a particular purpose (the grant).
- The benefited land is the dominant tenement and the burdened land is the servient tenement.
- A carriageway easement is the most common form of easement (driveway in a block of units).

Elements: from *Re Ellenborough Park [1956]*

1. There must be a dominant and servient tenement
2. The easement must accommodate the dominant tenement
3. The dominant and servient tenements must not be owned or occupied by the same person
4. The easement must be capable of forming the subject matter of a grant
  - a. The right should be clearly and precisely defined (*Riley v Pentilla [1974]*)
  - b. Should be a right of utility (*Re Ellenborough Park 1956*)
  - c. The right should not interfere with the enjoyment of/ grant exclusive possession of burdened land.

### Easement Characteristics

- An easement can be **positive or negative**. Positive easements confer upon the owner of the benefited land the right to carry out certain activities over the land (right of way, right to use toilet), negative easements restrict certain activities from being carried out (right to receive water through pipes).
- Easements run with the land and are of infinite duration.
- Easements are an encumbrance on land title.
- Easements are an exception to the indefeasibility of title.
- Easements can be implied.

### Cases

*Riley v Pentilla [1974]*

**Held:** An easement must not be adversely possessed. This decision confirmed the elements in *Re Ellenborough*.

*Hill v Tupper (1863)*

**Held:** Easement cannot be of personal benefit and by extension for a commercial purpose. Must be for use and enjoyment of the land.

*Clos Farming Estates v Easton & Anor [2002]*

**Held:** Whether the easement has a connection with the land in the sense that it is

## Equitable Interests

- Where the principles of equity may result in the transfer an equitable (or beneficial) interest to a person.
- Generally, equity in its discretion may grant an equitable remedy on the basis of particular equitable principles and doctrines such as:
  - Injunctions
  - Specific performance

### Equitable Interest in Land

#### Contract for the Sale of an Interest in Land

- Equitable interests in land pre settlement are limited.
- Full equitable interest is attained once settlement occurs.
- Once title registered, full legal interest acquired.

#### *Specifically Enforceable Contracts*

Consider the following cases when deciding whether a person has acquired an equitable interest in land for a specifically enforceable contract.

- **Lysaght v Edwards (1876)**  
**Held:** That where there is a valid contract means that vendor becomes trustee for purchaser in equity.  
Elements:
  - Interest passes at the time of signing the contract.
  - Contract must be valid and cannot be set aside.
  - Beneficiary must have insurance as risk passes.
- **Chang v Registrar of Title (1976)**  
**Held:** The purchaser of land under a contract of sale of land becomes its equitable owner if the contract is specifically enforceable. When purchase money is paid, vendor becomes the trustee for the purchaser in equity.
- **Tanwar Enterprises Pty Ltd v Cauchi (2003)**  
**Held:** HCA finds that purchaser has some form of equitable interest but prior to settlement, the interest is less than full beneficial ownership. A purchaser cannot insist upon specific performance where the purchaser was in serious breach of the purchaser's obligations.

#### *Mortgages*

- Legal mortgages of land must be registered (s40 of TLA)
- **Equity** - Contract to create a mortgage, equity would decree specific performance gives rise to an equitable mortgage.
- **Walsh v Lonsdale (1882)**  
**Held:** mortgage may be equitable.

#### *Doctrine of Part Performance*

1. This doctrine is not confined to contracts concerning land but is restricted to contracts which are specifically enforceable but is related to oral contracts.
2. A court in equity may enforce a contract not evidenced in writing if there is some evidence of its existence, specifically if there has been sufficient acts of part performance.
3. Not a rule of evidence but rather whether the acts of part performance give rise to an equitable interest which entitled that person to specific performance.

# Boundaries, Adverse Possession and the Doctrine of Fixtures

## Boundaries

- Boundaries are set by the original survey of the Crown land.

### *Boundaries: Height and depth*

- Consider airspace and below ground boundaries.
- *Cujus est solum ejus est usque ad coelum et ad inferos*: The person who owns the surface of the land also owns both the sky space above the surface stretching to the limits of the atmosphere and the soil beneath the surface down to the centre of the earth. **This is no longer true.** Consider cases below.
- As of 3 July 1973 you are only entitled to own 15 metres of the land below your property.
  - Exceptions to this rule is the suburbs of Morwell and Churchill which sits at 305m.

### Cases

- **Lord Bernstein of Leigh v Skyviews & General Ltd [1978]**  
**Held:** that you only own as high up as reasonably necessary for the use and enjoyment of the land and therefore planes flying over land are not able to be sued in trespass.
- **Break Fast Investment Pty Ltd V PCH Melbourne Pty Ltd (2007)**  
**Held:** Cladding hanging over 60mm over neighbouring land considered trespass.
- **LIP Investments Pty Ltd v Howard Chia Investments Pty Ltd (1989)**  
**Held:** Court find that test is whether interference is of such a nature and at a height which may interfere with the ordinary use of the land which the occupier may see fit to undertake.

### *Boundaries: Horizontal/ Misdescription*

- Most parcels of land in Victoria are based on surveys having derived from a Crown grant.
- **S269 of PLA** – land conveyed in a Crown grant is taken to be the true boundary.
- In Victoria, a margin of error is allowed in the description of boundaries.
- **S272 of PLA** - allows for a discrepancy of 50mm over neighbouring land (may be subject to a writ of possession).

### *Boundaries: Watercourses*

- Land may be bound by a creek, river, lake or sea.
- **s 384 of Land Act 1958** – watercourse defined as any river, creek, stream, watercourse, lake, lagoon, swamp or marsh.
- **S 385 of LA** – bed and banks of the watercourse remain the property of the Crown despite someone else owning title for land adjacent to bank.
- **S 386(1) of LA** – Owner/ occupier of land adjacent to watercourse have the same right of access to and same right to use for grazing purposes that part of the bend and banks adjoining the land as the Crown.
- **S 386(2) of LA** –Owner/ Occupier has same right to seek and obtain a remedy for trespass against the person with respect to the bed and banks of watercourse as the Crown.

### Doctrine of Accretion/ Diluvion

- The doctrine of accretion is the principle for when land is bounded by water on one of more rise, the natural process if erosion may reduce or increase the total area of the land. As a result, ownership of land may change.

## Leases

- In Victoria, the law regarding landlords and tenants is codified in the *Residential Tenancies Act 1997*. The law in respect to retail shop leases, the law is codified in the *Retail Leases Act 2003*.
- A lease confers permission to enter land and is coupled with a proprietary right to use that land exclusively for the purpose set out in the lease agreement.
- A lease provides for greater protection than a licence agreement due to the proprietary nature. Exclusive possession to the exclusion of others is a distinguishing feature of a lease.
- Person granting a leasehold interest is referred to as the lessor or landlord.
- The grantee of the interest is the lessee or tenant.
- The agreement can be referred to as a demise, lease, tenancy, tenancy agreement, retail tenancy.

### Characteristics of a Lease

- A lease can be express or implied by statute or a Court.

Core requirements of a lease: *King v David Allen & Sons Billposting Ltd [1916]*:

- Exclusive possession; and
- Certainty of duration.

### *Exclusive possession*

- This is the distinguishing characteristic of a lease.
- No lease can exist unless a tenant is granted a right of exclusive possession.
- This is a question of fact and the Court will consider whether the grantor remains in general control of the property or not.

### Cases:

- *Street v Mountford [1985]*  
**Held:** That there was exclusive possession granted for a term at a rent and therefore the agreement was a lease irrespective of what was stipulated in the contract. Contract said that it was a licence not a lease and would not fall under the *Rents Act*.
- *Radaich v Smith (1959)*  
**Held:** Found that despite the contract's form (stipulating it was a licence for the durations of 5 years), it was in fact a lease. Exclusive possession being the key consideration of the Court. Important to examine the substance and not the form.
- *Swan v Uecker [2016]*  
**Held:** Supreme Court found that an AirBnB is a lease not a licence.
- *Taylor v Caldwell (1863)*  
**Held:** The term lease does not mean it is a lease.

### *Certainty of Duration*

- Another distinguishing characteristic of a lease is the essential requirement that the duration of the lease is known or ascertainable. Must be certain or fixed in calendar terms.
- Leases may be of any length, provided that, at the time the agreement is entered into, the exact date of termination is either known or ascertainable by the parties.

### Cases

## Co-Ownership

- Co-ownership examines the capacity in which two or more people own land and the rights and obligations that arise in such a situation.
- Co-ownership regulates mutual ownership of a single estate or interest in land but it does not regulate separate ownership of different types of estates or interests in the land.
- Two main types of co-ownership:
  - Tenancy in common; and
  - Joint tenancy.

### Tenancy in Common

- A tenancy in common will arise where two or more people hold an interest in land which gives them unity of possession.
- A tenancy in common gives each tenant possession of the whole of the land and each tenant is regarded as holding a distinct but undivided share in that land.
- Tenant in common may deal with their share as they wish (example: grant it out, devise it)
- Upon death, the interest will go to the person's estate. The remaining shareholders do not have their share enlarged.
- Requirement:
  - Mutual ownership in an interest in land.

### Joint Tenancy

- Under a joint tenancy, each joint tenant holds a part of the entire estate, an undivided moiety (two parts which can be divided).
- Joint ownership of the whole estate and an equal interest in the property with the other joint tenants.
- **S33(4) of TLA** – assumption that where there is a conveyance to two or more persons it will be in the form of a joint tenancy unless words are expressed to the contrary.
- **S28 of PLA** – Corporation can be a joint tenant.
  - **S28(2) of PLA** – upon dissolution of corporation, other tenants rights are enlarged.
- Rule of survivorship – if one tenant dies, the other tenant's rights are enlarged.
- Requirements:
  - Unity of title
  - Unity of interest
  - Unity of possession
  - Unity of time

#### *Unity of Title*

- The unity of title requires that all the interest of the joint tenants are conveyed under the same instrument (act/ document).
- Where one or more co owners have acquired their interest from a different instrument, there can be no unity of title and the relationship cannot amount to joint tenancy.

#### *Unity of Interest*

- The unity of interest requires that all the joint tenants have identical interest. The nature, extent and duration of the interest must be the same.
- Unity of interest refers to not only the nature but also the quantity.
- There can be no joint tenancy between persons who hold interests of a different nature.

## Torrens and Indefeasibility

- All land alienated by the Crown in fee simple on or after 2 October 1862 in Victoria is under the operation of **the Transfer of Land Act 1958**.
- Torrens Land System is the prevalent system of land ownership in Victoria.
- The doctrine of estates and the types of interest in land that can exist at common law have not been discarded by the Torrens System.
- The Torrens System confers an indefeasible title on a proprietor of a registered interest in land, subject to certain exceptions.

### Register of Titles and the Registrar of Titles

- There is a register of titles which contains a record of land in the jurisdiction of the Torrens System.
- Land title in Torrens System is completed by registering one's name on a certificate of title or, the folio of the Register. It is the registration of an interest which provides title.
- The Register contains a record of all persons who have interests in such land with the intention that a search of the register will reveal the nature of the estates/interests in the land and the identity of the interest holders.
- This is maintained by the Registrar of Titles.

### Certificate of Title

- A certificate of title records the interest and rights affecting a person's land.
- It includes registered and recorded dealings such as:
  - Name of registered proprietor
  - Mortgages
  - Easements
  - Covenants
  - Caveats
  - Charges

### Registered v Recorded

- **S40 of TLA** – interest/ transfer or title must be registered to be effective transfer.
- Some interests which are not registrable may be noted or recorded on the folio of title.
  - For example, restrictive covenants are recorded (**s88 of TLA**).
- **S37 of TLA** – cannot register or record on the folio of title trusts whether they are express, implied or constructive. They can be created however they can't be entered.

### Transfer v Registration

- The process of transfer means the parties enter into the transaction executing the registrable documents.
- If a document is registered, the title passes to the registered transferee whatever the invalidity in the process of the transfer (unless fraud).

### Indefeasibility of Title

- The fundamental features of the Torrens System is to provide security of title and compensation for loss.
- The principle underlying the Torrens System is indefeasibility. Indefeasibility means that the title of the registered proprietor is subject only to such estates and interests as are recorded on the title.
- **S42 of TLA** – Estate of registered proprietor paramount.

## Priority Disputes

- Conflicts between legal and equitable estates and interest in land are reconciled in accordance with established priority rules.

### *Registered v Registered*

- First in Time prevails (order of lodgment s 34 TLA)

### *Prior Equitable v Subsequent Registered*

- Registered prevails unless exception to indefeasibility (fraud, in personam, s. 42)

### *Prior Registered v Subsequent Equitable*

- In personam may apply where RP created later interest
- Where RP did not create later interest, turn to see if any conduct which warrants prior registered interest losing priority (unusual)

### *Prior Equitable v Subsequent Equitable*

- General law priority rules apply

## Registered v Registered

- First in time prevails.
- S34 of TLA – instruments are entitled to priority according to date of registration.

## Registered v Unregistered

- Registered proprietor takes land subject to notations of the title and title is not defeasible unless it was taken with fraud or another exception (lease, adverse possession, easement, statutory charge, overriding statute).

## Unregistered v Unregistered

- Unregistered interests are to be regarded as equitable estates or interests in the land (**Barry v Heider 1914**).
- The Courts will search for a better equitable interest by considering all circumstances of the case. It can do this by determining relative merits and postponing conduct according to the below tests.
- \*\* Irrespective of tests, Court is looking for the 'better' equity.

### Tests

- Merits/ First in Time, Conduct of the Parties, and Notice.
  - Nature and condition of respective interest
  - Circumstances and manner of acquisition
  - Whole conduct of the parties

### Merits Test/First in Time:

- First in time prevails unless there is some act or neglect on the part of the prior equitable owner. With this approach, onus is on the second interest holder to show some postponing conduct on the part of the first interest holder.

## Caveats

- The Torrens System promotes certainty of title by registration that is indefeasible.
- If a person holds a registered interest then generally that interest is paramount even if a prior unregistered interest exists.
  - **Bahr v Nicolay (No 2) (1988)**
- Whilst registration is paramount, Torrens system permits some degree of protection for holders of unregistered interest through the use of a caveat.
- A caveat is a statutory injunction that temporarily forbids any alteration to the register.

## Lodging a Caveat

- A caveat can be lodged in the following situations:
- **S26R of TLA** – by any person claiming an estate or interest in the land may lodge a caveat on the land. Registrar must notify registered proprietor and Registrar cannot remove caveat until withdrawn, lapsed or by Court order.
- **S61 of TLA** – person may lodge a caveat against title based on adverse possession claim
- **S89 of TLA** – caveat prohibiting the registration and recording of all/ or specifically named dealing in the land which would affect the interest protected by the caveat.
- **S106(1)(a) of TLA** – Registrar may enter a caveat on behalf of the Queen or a person under disability for that person's protection restraining any dealing in the land. Or if the Registrar has a view to prevent fraud.

## The Caveat System

- In Victoria, the notation of a caveat is visible to anyone who searched the title. The notation is usually found on the encumbrances hearing on the title and would have an instrument number.
- When a dealing is lodged, the caveator is given notice and he or she has a set period in which to consent to the dealing or to take action to protect his or her interest and show cause why the dealing should not be registered.

### Common Caveat

- The most common caveat is a caveat against dealings lodged by a person claiming an estate or interest in the land.
- **J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971)**  
**Held:** Caveat acts as an injunction to prevent the Registrar from amending the folio but it may also act as a notice (when registered on title) to all others that person lodging caveat has an interest in the land.

## Caveat – Estate or Interest

- The Torrens provisions require that a caveator 'claim' an estate or interest in the land. Therefore, a non-proprietary interest, such as a licence, is not a caveatable interest.

### Estate

- Fee simple
- Life estate

### Interest

- Beneficiary under a trust
- Interest of an optionee under an option to purchase provided the terms and conditions are set out in the option.