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INTRODUCTION TO LAND LAW

Australian Land Law Timeline

- European land settlement commenced in 1788 – land vested in the name of the Crown – ‘Crown Lands’
- 1791-1793 – free grants of land to encourage settlement evidence by ‘Crown Grant’
- 1809-1821 – Governor Macquarie – leasing of lands
- 1825 – system of selling land introduced
- 1831 – free grants of land abolished – land sold at public auction
- *Robertson Act 1861 (NSW)* – selection of Crown land
- *Crown Lands Occupation Act 1861 (NSW)* – leasing - could select up to 320 acres of rural land and purchase the freehold – opened up squatter-held lands for selection.
- *Crown Lands Alienation Act 1861 (NSW)* – sale of land – sale of town and urban land by public auction.
- *Crown Land Acts 1884 (NSW)* – grazing licences, homestead leases, conditional leases, pastoral leases, wharf and jetty permits, division of NSW Crown land into divisions.
- *Crown Lands Consolidation Act 1913 (NSW)* – consolidated legislation
- Now *Crown Lands Act 1989 (NSW)*

Old System Land Timeline

- 1788-1802 – No system for recording land transactions – no documentary evidence of transfer or maybe the particulars of sale written on back of land grant
- 1802 – ‘Old Register’ – Judge Advocate: brief record only
- 1817 – Governor Macquarie – Office of the Judge Advocate registration of deeds relating to land (also part of the ‘Old Register’)
- 1823 – Charter of Justice – office of Judge Advocate abolished and Supreme Court constituted
- *Registration of Deeds Act 1825 (NSW)* – register Deeds in Supreme Court – any Deed or instrument executed bona fide and for valuable consideration take s priority according to date of registration, not execution’ ‘Vendors Index’
- *Registration of Deeds Act 1843 (NSW)* - Office of the Registrar General est. – Register for sworn, complete copy of deed. Existing records transferred to Registrar General
- 1849 – Office abolished – responsibilities went back to the Supreme Court.
- 1856 – Office of the Registrar General established (B, D & M plus Torrens) and from 1857 responsibility for registration of deeds.
- 1896 – Purchasers Index for Old System land established. Based on English Common Law – separate deed each time land was sold, mortgaged, leased etc. – not mandatory until 1961 – needed to examine ‘chain of title’

Old System Land Background

- Purchasers title is still dependant on the chain of title* and the risk that a prior interest may be invalidated breaking the chain of title and destroying the purchaser's interest
- Chain of title was fraught with complexity – to prove title, it was necessary to trace title back through an unbroken chain of events and documents, perhaps as far as the Crown grant.
- English courts later ruled that it needed to go back only 60 years. The *Conveyancing Amendment Act 1930* (NSW) subsequently reduced this period to 30 years.

Torrens Title Land

Background

Robert Richard Torrens (Sir Robert Torrens) devised the “Torrens Title” system of land registration. Torrens system based on merchant shipping registration system. Single doc for each parcel of land (Certificate of Title), on which is recorded all dealings relating to that parcel. Original plus copy. Central Register able to be searched.

The **objective of the Torrens System** “is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title” [*Gibbs v Messer* [1891] AC 248 at 254 per Lord Watson for the Lord Chancellor, Lords Watson, Hobhouse, Herschell, Macnaghten, Morris and Shand].

Definitions: *RPA 1900 (NSW)* s 3

Dealing: Any instrument other than a grant or caveat, including an electronic form of that instrument, being an instrument: that is registrable or capable of being made registrable under the provisions of this Act, or in respect of which any recording in the Register is by this or any other Act or any Act of the Commonwealth required or permitted to be made.

Charge: Any charge on land created for the purpose of securing the payment of an annuity, rent-charge or sum of money other than a debt.

Instrument: Any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate, or exemplification of will, or any other document in writing or in electronic form relating to the disposition, devolution or acquisition of land or evidencing title to land.

Torrens Title System: The Register [*RPA 1900 (NSW)*]

- Issue of a copy of the Certificate of Title [s 33].
- Forms – [http://www.lpi.nsw.gov.au/land_titles/public_registers/torrens_title_register].
- Dealings registered with respect to, or affecting the same estate or interest shall, notwithstanding any notice (whether express, implied or constructive), be entitled in priority* the one over the other according to the order of registration thereof and not according to the dates of the dealings [s 36(9)]. Upon registration, a dealing shall have the effect of a deed duly executed by the parties who signed it [s 36(11)].

SS Fundamental to Torrens Title [*RPA 1900 (NSW)*]

S 40: Manual folio to be considered evidence of title, and that the land has been duly brought under the Act

(1) A manual folio shall be received by all Courts or persons having by law or consent of parties authority to hear, receive and examine evidence as evidence of the particulars therein recorded and shall be conclusive evidence that any person recorded in the folio as the registered proprietor of an estate or interest in the land comprised in the folio is the registered proprietor of that estate or interest and that the land comprised in that folio has been duly brought under the provisions of this Act.

(1A) Where a computer folio certificate is issued in respect of a folio of the Register:

- (a) the certificate is evidence of the particulars recorded in that folio, and
- (b) it shall be conclusively presumed that:
 - (i) the certificate contains all the information that was recorded in that folio at the time specified in the certificate,
 - (ii) the land to which the certificate relates was, at that time, under the provisions of this Act, and
 - (iii) a person recorded in the certificate as the registered proprietor of an estate or interest in the land to which the certificate relates was, at that time, the registered proprietor of that estate or interest.

(1B) Where, in a manual folio or computer folio certificate, the estate or interest of a registered proprietor is expressed to be subject to:

- (a) an estate or interest evidenced by an instrument,
- (b) a provision of an instrument, or
- (c) an enumerated provision of an Act or of an Act of the Parliament of the Commonwealth,

the whole of the contents of the instrument, provision or enumerated provision, as the case may be, shall be deemed to be set forth at length in the folio or certificate.

S 41: Dealings not effectual until recorded in Register

(1) No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature.

“It is not the parties who effectively transfer the land but the State that does so, and in certain cases, more fully than the party could. In short, a transferee seeking registration of a transfer seeks State affirmance of his position” [*Cth v NSW* (1980) 25 CLR 325 at 342 per Isaacs and Rich JJ].

S 45 Bona fide purchasers and mortgagees protected in relation to fraudulent and other transactions

(1) Except to the extent to which this Act otherwise expressly provides, nothing in this Act is to be construed so as to deprive any purchaser or mortgagee bona fide for valuable consideration of any estate or interest in land under the provisions of this Act in respect of which the person is the registered proprietor.

(2) Despite any other provision of this Act, proceedings for the recovery of damages, or for the possession or recovery of land, do not lie against a purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act merely because the vendor or mortgagor of the land:

- (a) may have been registered as proprietor through fraud or error, or by means of a void or voidable instrument, or
- (b) may have procured the registration of the relevant transfer or mortgage to the purchaser or mortgagee through fraud or error, or by means of a void or voidable instrument, or
- (c) may have derived his or her right to registration as proprietor from or through a person who has been registered as proprietor through fraud or error, or by means of a void or voidable instrument.

(3) Subs (2) applies whether the fraud or error consists of a misdescription of the land or its boundaries or otherwise.

EQUITABLE INTERESTS

An equitable interest is an interest held by virtue of an equitable title (a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title) or claimed on equitable grounds, such as the interest held by a trust beneficiary.

Express Equitable Interests

There is a basic hierarchy —

- Legal interest
- Equitable interest
- Personal ('mere') equity

Prior to the election to rescind a voidable contract, P has a **'mere equity'** to have any property transferred under the contract returned to him. After electing to rescind, he has an **equitable interest** in the property [*Latec Investments Ltd v Hotel Terrigal P/L* (1965) 113 CLR 265].

Principles of a Trust

If A transfers legal title to a trustee for the benefit of B, then a claim cannot be brought against A by anyone else.

The following principles of trust law were stated in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961 at 987 per Lord Browne-Wilkinson:

- (i) "Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
- (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.
- (iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.
- (iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice [*'bona fide purchaser'*].

(At 988): "A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights".

Requirements of an Express Trust

The most common form of expressly created equitable title is the beneficial title that arises under the express trust. The preconditions for creating an express trust are:

- The property to be held on trust must be clearly identifiable and in existence.
- The settlor must express a clear intention (usually in writing) that the legal title is to be held by the transferee on trust for the beneficiaries.
- The settlor must clearly set out who the beneficiaries are – there should be no uncertainty as to who the beneficiaries are.

1. *Certainty as to the creator's intention, the trust property, and the description of beneficiaries.*

Certainty of intention: It must be clear that the settlor intended to create a trust, as opposed to another entitlement [*Hyhonie Holdings v Leroy* [2003] NSWSC 624].

- When determining intention, the question is of substance and not of form (ie, look at the conduct and not words): *Commissioner of Stamp Duties v Joliffe* (1920) 28 CLR 178; *Hyhonie Holdings v Leroy*].

Certainty of subject matter: The property must be identified and known.

Certainty of objects: The beneficiaries must be identified and known. Level of certainty required depends on the amount of discretion in the trust—

- Fixed trust: 'list certainty' - the beneficiaries are ascertainable enough to make a list of all individual beneficiaries – Exceptions might be granted in extreme cases [*West v Weston* (1998) 44 NSWLR 657].
- Discretionary trust: if there a criterion which a person must satisfy in order to be a beneficiary [*Re Baden's Deed Trusts*; *McPhail v Doulton* [1971] AC 424].

2. *Proper constitution of the trust either by transfer, declaration or direction.*

Transfer: This is where the settlor transfers the property to a trustee. The test for what constitutes sufficient transfer is:

- The settlor must do all that is necessary on its own part to render the settlement binding, such that the donee can complete the transfer of their own accord. The trust also needs to be acknowledged by the trustee [*Milroy v Lord* (1862) 45 ER 1185]

Declaration: This is where the settlor declares that from now on, he holds the property on trust for the beneficiary (becomes the trustee himself).

- The settlor needs to make an express declaration of trust binding itself.
- Most trusts are created this way by execution of a deed of trust.

Direction: This is where an original beneficiary creates a new trust in favour of a new beneficiary by directing the trustee to hold the property for the new beneficiary.

- It must be in writing [*Grey v IRC* [1960] AC 1].

3. *When dealing with land, creation of the trust must be in writing*

- *Conveyancing Act* 1919 (NSW), s 23C.