POSESSORY TITLE

- **Period of possession** required to bar the title of a Documentary Owner (***DO***) is **12 years** (*Limitation Act 1969* (NSW) s 27(2)).
- **Time begins to run** where owner has been **dispossessed** or **discontinued** possession (s 28). BUT:
    - Where **DO dies**, their estate is frozen and must be dealt with under laws of intestacy or the will (s 28). If beneficiary doesn't take possession, but someone else does, time begins to run on date of death.
    - If property is **granted/conveyed**, and purchaser doesn't take possession and seller remains in property, the time runs at the date of the conveyance, or as soon as someone is in adverse possession (s 30).
    - Where there is a **future interest**, time doesn't begin to run until interest becomes present interest (s 31).
        - E.g. when life tenant dies, until remainder or reversion steps in their shoes.
        - E.g. when lease expires between tenant and landlord.
- Time period will be **suspended** in the case of:
    - **Disability**, for the duration of the disability (ss 11(3), 52(1)(d)). Also, if the period would otherwise expire within 3 years after the DO ceases to be under the disability, the period is extended to allow the DO a full 3 years after the disability ceases (s 52(1)(e)). A person is under disability:
        - while **under age of 18 years** (s 11(3)(a)); or
        - while, for a continuous period of 28 days or more, incapable of, or substantially **impeded in, the management of his/her affairs** in relation to the cause of action, by reason of disease or impairment of physical or mental condition, restraint (lawful or unlawful), or war (s 11(3)(b)).
    - **Fraud** (s 55). Where DO's cause of action, or Adverse Possessor's (***AP's***) identity, is fraudulently concealed, time doesn't begin to run until DO first discovers the fraud or could with reasonable diligence have discovered it.
    - But **ultimate bar** of **30 years** (s 51).
- Time period will be **cancelled** if:
    - AP **confirmed** (in writing & signed) DO's ownership or cause of action (ss 54(1), (4)). E.g. seeks lease or DO's contribution to rates, offers to purchase. BUT: offer to purchase may indicate AP is trying to resolve situation, rather than confirm DO's superior title; may also offer to purchase using words 'without prejudice'.
        - *Pye*: AP's admission that it would've paid for another licence didn't prevent it relying on AP.
        - *Whittlesea*: AP's acknowledgments in planning application and to witness that she didn't own land weren't inconsistent with AP.
    - If AP remains in possession after confirmation, time begins to run from scratch (s 54).
- In all cases, **time doesn't begin to run until someone is in adverse possession** (s 38(1)). Possession is 'adverse' where there is:
    - 1. **Factual possession**
        - Requires a sufficient degree of physical custody and control (*Pye*).
        - Must be open (not secret), peaceful (not by force), and adverse (not with DO's consent) (*Re Riley* per McLelland CJ).
            - E.g. Foster daughter not officially adopted – possession was adverse (*Roy v Lagona*).
        - Don't have to demonstrate usage inconsistent with usage of DO (*Whittlesea*).
        - Don't have to alter the physical characteristics of the land (*Whittlesea*).
        - Acts may be equivocal because indicate merely an intention to derive some enjoyment from land, consistent with uses others might wish to make of it. May thus require proof of actual intention.
    - 2. **Intention to possess**
        - Requires an intention to exercise such custody and control on one's own behalf and for one's own benefit to the exclusion of the whole world, including the DO (*Pye*).
    - Examples where title acquired via adverse possession:
        - *Kirby* [1912]: mortgagee paid rates and taxes in relation to the land.

        - *Re Riley* (1965): resided in and fenced land; kept fences in repair; conducted businesses and picnics on the land.
        - *Watu-OfeiDanquah* [1961]: put survey pegs on 4 corners of the unfenced land.
        - *Mulcahy* [1974]: fenced triangular block enclosed in their own land; planted crops; ran livestock.
        - *Pye* [2003]: remained on land after expiry of licencing agreement for farming activities.
        - *Whittlesea* (2009): home enclosed council land which AP used to raise stock and for recreational purposes. Fenced it; installed gates; maintained land at own expense.
    - Examples where title *not* acquired via adverse possession:
        - *Harnett* (1883): where land comprised 18 acres of unfenced virgin bush, simply walking over the land once a week, occasionally warning people off it, and receiving infrequent payments for the right to cut and take away timber, was insufficient. Acts which may be evidence of occupation include running of cattle or horses on the land and cultivating the land. But such acts may be equivocal – may indicate merely an intention to derive some enjoyment from the land.
        - *Higgs* [1975]: farmed only part of land. No ouster [but NB: dispossession sufficient in Aus].
        - *Findlay* (1926): Fencing and running cattle didn't constitute adverse possession because fencing was just to ensure the cattle didn't run away.
        - *Payne* [2013]: simply owning the fee simple and having possession of the land wasn't sufficient to constitute adverse possession. Made no attempt to take the minerals or exercise any control.
- Time will cease to run if AP **abandoned** possession before limitation period expired (*Short*; s 38(3)).
    - AP's abandonment of possession after the limitation period will be of no avail to DO because by then documentary title has been extinguished (*Mulcahy*).
    - Mere non-use is not conclusive evidence that possession has been abandoned (*Whittlesea*: AP moved away from district, but regularly returned to maintain use of the land – no abandonment).
- Time will cease to run if DO **resumed** possession (*Randall*).
    - It is immaterial how long or short the resumed possession was (*Randall; Worssam*).
    - Given *Zarb* [2012], seems like courts are now demanding more from the DO.
    - Even if acts of AP are criminal, they will not preclude a claim for AP (*Best* [2014]).
    - **Insufficient:**
        - Oral or written protests (*Mount Carmel*).
        - 'Paper dealings' such as giving a mortgage over the land (*O'Neil v Hart*).
        - Granting a lease where tenant doesn't take actual possession (*Simpson*).
        - Conveyance of land to a purchaser for value [compare Torrens title – *RPA* s 45D(4)].
        - Mere formal entry onto the land (*Randall*; *Limitation Act* s 39(a)).
    - **Sufficient:**
        - Turning out the possessor (*Randall*).
        - Removing fences (*Worssam*) or other structures (*Symes*).
        - Bringing court proceedings for possession (*Symes*).
    - Examples where DO's acts **insufficient** to recover possession:
        - *Mount Carmel* [1988]: Sent letter requiring property to be vacated.
        - *Robertson* [1915]: Large tract of land. DO had had picnics on land several times a year, occasionally went to land to shoot rabbits, and wrote a letter to AP.
        - *Zarb* [2012]: DOs removed some of fence, put fence posts into ground where they thought boundary lay, wound surveyors tape around trees to enclose contested area, cut down a shrub. Left due to verbal altercation with APs. Insufficient – symbolic (Lord Justice Arden and Lord Justice Jackson); or hadn't brought resumption to a conclusion (Justice Neuberger).
    - Examples where DO's acts **sufficient** to recover possession:
        - *Randall* (1853): DO removed AP and most of their furniture. On same day, AP resumed possession and remained there for another 12 years.
        - *Worssam* (1858): DO entered land for 15 minutes, pulled down a fence erected by AP, and put up a sign claiming possession of the land.
        - *Hodson* (1906): DO entered and surveyed land. Stayed for 2 days. Didn't see AP. AP unaware.

        - *Symes* [1952]: Sufficient re northern strip – uprooted shrub, chipped down bricks of wall built by AP, drew a chalk line. Insufficient re southern strip.
- If there is a **succession** of persons **claiming through** the original AP:
    - E.g. AP passes inchoate possessory title to successor under will or via conveyance.
    - Can add together periods of adverse possession to show that limitation period has expired (*Mulcahy*; s 38(2)).
    - Last successor acquires title good against the whole world including the DO (*Mulcahy*).
    - Adverse possession between the successors must have been continuous (s 38(3)).
- If there is a **succession** of **independent trespassers not claiming through** original AP:
    - And total period of adverse possession exceeds 12 years, can claim that limitation period has expired, so long as there is sufficient continuity (*Short;* ss 38(2), (3)).
        - *Nicholas*: AP hadn't been in possession, but was putting tenants in property; there were *small* gaps, but court held that possession hadn't been abandoned.
        - *Roy v Lagona*: after AP's death (foster child of deceased), period of about a year in which no one occupied the property. Successors couldn't use predecessor's adverse possession because no continuity.
    - Last successor acquires title good against the whole world, except for other previous APs (unless there was qualified abandonment – previous AP abandoned possession, and succeeding AP immediately entered, meaning there was no ordinary abandonment which stops time running) (*Mulcahy*).
- If the land under the **Torrens title** system:
    - AP must apply to R-G to be recorded as the new proprietor when it has fulfilled requirements under the *Limitation Act* (*RPA* s 45D(1)). R-G can grant a possessory application if satisfied that requirements of s 45D are met (s 45E(1)). A possessory application shall be granted by recording AP on register (s 45E(3)).
        - R-G has discretion to refuse the application under s 45G(2).
    - Application must be in respect of a '**whole parcel of land**' (s 45D(1)(a)).
        - But applicant whose possession extends to an 'occupational boundary' (such as a fence, wall, river of give-and-take fence (s 45D(6)), that represents, but is inside, the true boundary, may include in the application for the 'whole parcel' the area beyond the occupational boundary and up to the true boundary, even though it doesn't actually occupy that area (s 45D(2)).
    - If there is a new purchaser, and purchaser becomes RP without fraud (see s 42 exception), limitation period starts afresh (s 45D(4)).
        - What if purchase isn't registered? Rule is first in time, unless there are postponing interests. Presumably, if AP failed to lodge a caveat, this could amount to postponing conduct.
        - *Spark*: AP's right to possession is good against whole world except RP. [here, AP ejected by Whale via Whale's criminal activities; AP succeeded in action in ejectment against Whale].
    - BUT:
        - A person claiming a legal or equitable interest in land that might be subject to an application by an AP is permitted to lodge a caveat against the granting of possession by the R-G (s 74F(3)).
        - R-G can't grant a possessory application without caveator's consent (s 74H(1)(a)(ii)).
    - AP doesn't acquire an interest until their possessory application is granted by the R-G (s 45C precludes the acquisition of any interest by virtue of possession except as under Pt 6A).
        - BUT commentators such as Butt have raised point that, despite s 41, courts have taken view that such an AP has same status as other unregistered interest holders in Torrens title land.
        - Even an AP that has been in possession for less than full limitation period may have an inchoate interest in the land similar to the inchoate interest enjoyed by an AP of old system land (Butt).
    - If, immediately before grant of possessory application, any easement, profit ã prendre benefited the land, or land was subject to any condition or other provision (not being an easement or covenant), that continues to have same force and effect in relation to the estate or interest acquired by adverse possession (s 45E(4)).

LEASES

- Lease can be classified as either:
    - 1. A **registered Torrens title lease**, which requires execution of an approved form of lease if it has a term of 3 years or more (*RPA* s 53(1)), and registration in the Torrens register (s 41).
    - 2. A **legal old system lease**, which requires a deed (*CA* s 23B) or satisfaction of s 23D(2).
    - 3. An **equitable (old system/Torrens) lease**, which requires written agreement signed by landlord or its agent authorised in writing (s 23C); or an agreement supported by acts of part performance (s 23E(d)).

LANDLORD'S COVENANTS

IMPLIED COVENANT FOR QUIET ENJOYMENT

- Breach requires **substantial interference with tenant's beneficial enjoyment** of the premises (*Southwark*). In this context, the term 'quiet' has been interpreted as meaning 'free from interruption' or 'peaceful'. Physical interference with possession or occupancy is not necessary (*Aussie Traveller*).
- This is a term of every residential tenancy agreement (*RTA* s 50).
- Can use **short form covenant** (Covenant 21 in *CA* Sch 4). Use of short-form will imply a covenant in the terms contained in the second column of Sch 4 (unless words struck out or omitted) (*CA* ss 86(1), (2)).
- *Southwark* [1999]
    - Facts: Tenants in residential flats complained about noise coming from other tenants' activities in jointly let premises. Premises inadequately **sound proofed**.
    - Held: No breach. (1) Covenant not prospective in nature – lack of soundproofing existed before tenant took the lease. (2) Ordinary use of residential premises without more doesn't constitute nuisance – use must be unusual or unreasonable, having regard to the purposes for which the premises were constructed.
- *Aussie Traveller* (1997)
    - Facts: Adjoining tenant generated significant noise pollution and sawdust, which disturbed conduct of tenant's business in a number of ways:
        - Damaged products; reduced profitability (had to discount normal prices); noise pollution (ordinary speech inaudible; employees wore earmuffs; some customers left premises without making purchases); high staff turnover and increased absences.
    - Held: Breach. **Landlord liable** because: (1) it was aware of the issue from its various meetings with tenant; (2) it had power under lease agreement with tenant to rectify issue (tenant agreed not to do or permit any act which might be a nuisance or cause damage or disturbance to any other tenant or the lessor).
- *Coventry* [2014] [NB: UK case focused on *nuisance*]
    - Facts: Stadium constructed for motor sports. Complainants bought a house nearby and brought an action against landlord and tenant.
    - Held: **Tenant liable for nuisance, but not landlord** – no authorisation by letting the property (need high degree of probability that letting would result in nuisance; here, intended use of the property could be carried on without causing nuisance). Nor was there participation (not enough that landlord was aware of nuisance but took no steps to prevent it; landlord's attempt to fight off the risk of nuisance abatement by the local authority had more force, but insufficient). Importantly, noted that **landlords couldn't have escaped liability by simply making a covenant against nuisance**.
- **Remedies**
    - Tenant is entitled to damages for pecuniary loss, on normal contract law principles (*Mira*). These damages might include damages for lost business profits (*Spathis v Hanave Investment*). Orthodox view is that they do not include damages for mental upset and distress (*Spathis*).
    - Landlord's action could also constitute a tort, such as trespass or nuisance, which might entitle tenant to exemplary damages.

IMPLIED COVENANT FOR NON-DEROGATION FROM GRANT

- Breach requires **substantial interference with tenant's enjoyment** of the premises such as to render the premises '**unfit from a reasonable point of view for the purpose for which' the lease is granted** (*Gordon*).
- Scope of obligation to be determined by surrounding circs and terms of the lease (*Healthscope*) (esp. purpose).
- *Retail Leases Act 1994* (NSW) (*RLA*) ss 33, 34, 34A, 35 – more specific focus.
    - See *Skiwing* re s 34A – proposal doesn't lose its character as a 'genuine proposal' because landlord pursues the redevelopment for its own self-interest. Just have to comply with s 34A e.g. notices.
- *Karaggianis* (1979)
    - Facts: 6th floor of city building leased for purposes of conducting a cafeteria. Lessor ceased operating the escalators and reduced the lift service.
    - Held: Breach. Lessor had undertaken not to use and control the common areas in such a way as to substantially diminish the means of access offered.
- *Harmer v Jumbil* [1921]
    - Facts: Land leased for purpose of storing **explosives**.
    - Held: Breach. Landlord couldn't do or allow on his adjoining land any act that would put at risk tenant's licence to store explosives.
- *Gordon* [1966]
    - Facts: Landlord erected wall which reduced visibility of Gordon's shop.
    - Held: No breach. Still practicable to carry on business profitably. Early stage of development – couldn't draw inferences from figures provided about economic impact. Negotiated during construction – terms not well-tailored to lessee's needs. Customers still had access. Landlord just complying with council reqs.
- *Telex* [1970]
    - Facts: Premises leased at a premium. To be used solely as an office or show room for display and sale of surgical and dental equipment. Lessee claimed air-conditioning system installed by lessor made it impossible to carry out testing and premises unfit.
    - Held: Breach. **Detailed material** about lessee's profits and losses.
- *Norden* [1996]
    - Facts: Landlord let 5th floor to tenant who used it as **brothel**. P tenant used 3rd as office.
    - Held: Breach.
- *Healthscope* [2012]
    - Facts: Lease with 3 hospitals for purpose of conducting pathology business. Lessor acquired competitor company operating from premises adjacent to hospital. Tubular vacuum system was connected between hospital and competitor's premises.
    - Held: Breach. Vacuum system materially altered the circs in which the parties had contemplated the tenant would use the premises (destroyed tenant's advantage). Conduct of a **competing business** doesn't itself constitute derogation.
- **Remedies:** same as those for breach of covenant for quiet enjoyment.

IMPLIED COVENANT FOR REASONABLE HABITABILITY OF FURNISHED DWELLINGS AT COMMENCEMENT OF TERM

- Landlord must provide **dwelling-houses** that are reasonably habitable **if are furnished** (*Keates; Cruise v Mount*).
- Applies only to the condition of the premises **when the lease begins**.
- Applies only to the **condition of the premises** – i.e. the house and its fixtures – not to personalty on the premises, such as furnishings or appliances (*Pampris v Thanos*).
- ***RTA* s 52(1):** landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant. This is a term of every residential tenancy agreement (s 52(4)).
    - Rely on this provision, rather than landlord's implied covenant.