71116 Real Property

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Topic 1: Tenures and Estates & Native Title

Allodial system	Where **land holding is absolute**
Tenurial	Where land is **held "of" another party**
Real property	Land, and interest in land, made up of: · **Corporeal hereditaments** (tangible rights i.e. land)**;** and, · **Incorporeal hereditaments** (intangible rights, e.g. an easement, rights of way)
Estate	An **interest of land → held "of" the crown →** entitling the holder to a parcel of **rights**
Free and common socage	**Land ownership without periodic payment** or **military service**
Terra Nullius	**Land** with **no owner**
Reservation clause	A **limitation on the rights →** enjoyed by the **holder** of **estate in fee simple**
Fee simple	Unrestrictedly, inheritable & indefinite **→ title to land** "fee" **→ inheritability** "simple" **→ no restrictions on inheritance**

Radical title	A **beneficial right the crown holds with respect to land**: practically, this is the *right to grant and manage land*
Sovereignty	The **right to make laws with respect to something**: e.g. the crown's sovereignty with respect to Australia
Alienable	**Able** to **sell**
Intestate	**Without will** → bona vacantia → ethsheat

Reception of british law

- British imperial law = legal framework that governed Britain's relations with her colonies
    - Law and offical policy
    - Settled v conquered colonies
- An englishman brings as much of the common law with them as is relevant to the circumstances of the colony (*Cooper v Stuart*)

Doctrine of tenure

Tenure: the system of tenure is where no one holds land absolutely → all land is held of the Crown → and no one holds land except of the crown

- Based on feudalism
- Essentially *allows the crown to grant interests in land*

1. **No one owns land absolutely**
2. **All land is held *of* the crown (allodial)**
3. **No one holds land except *of* the crown (i.e. by grant)**

History

- Early history
    - People transferred land to a leader → in exchange for protection
        - These people maintained possession, but paid the leader with either cash or military service
    - When William the Conqueror conquered England in 1066, the legal fiction was created where "all land is held of the crown"
        - At the same moment, all land was regranted to those who owned it in the first place
        - This made the King paramount lord
- Transmission to NSW
    - By the time of transmission to NSW, the state of tenure in England was as follows:
        - There could be only **one level of tenancy** (Land held "of" the crown, rather than a Lord as a middleman)
        - The only form of land holding (tenure) still around was **"free and common socage"** → land payment without military service or periodic payment
    - The common law of England was brought to Australia with settlement (settled as opposed to conquered because the *English considered it Terra Nullius)*
        - An Englishman brings as much of the common law with them as is relevant to the circumstances of the colony (Cooper v Stuart)

        - We **imported the feudal law of tenure** (Attorney-General v Brown)

Feudal tenures

- The <u>king owned all land absolutely</u>
    - He g**ranted his subjects (tenants)** → the **right to *use* the land**, not the land itself
    - The **right to use the land** that was granted = **estate**
    - In return, the tenant owed the king obligations

Traditional versus new conceptions of tenure

- Traditional view of tenure in Australia: *Attorney General v Brown*
    - <u>Facts:</u>
        - A man owns land in Newcastle
        - Finds coal → starts digging for it
        - The *crown says it was the crown's coal, not his* → as all land is held of the crown
        - When the land was granted, there was a *reservation clause granting the land but reserving mineral rights*
        - Brown argued:
            - The doctrine of tenure was not the same as the English doctrine → It was modified to fit the circumstances of the colony.
            - If the traditional version is that the crown owns all the land absolutely (actual owner of all land) → this was not true in NSW
            - Therefore, because the crown did not own all land → did not own the coal → reservation was ineffective as you cant own what you don't have.
            - He argued that the crown gets sovereignty (internal and external supreme authority of the colony) → doesn't need to own all land as sovereignty is all you need
        - <u>Held:</u>
            - The crown does own all land → because no one else owns it
            - This goes against native title
            - Brown in his argument, essentially admitted the crown had sovereignty
            - Thus, in creating his parcel of land, they were fully within their rights as sovereigns to create reservation clauses
            - *Tenure:*
                - The crown owned land since 1788
                - Tenure, in england, is a fiction
                - In australia, it is a reality → because of terra nullius (that is, because the land belongs to no one, no one holds lands absolutely, allowing the crown to hold all land)
                - Therefore, all land in australia is crown land → that can be granted
                - Thus, tenure in australia has an even more solid legal basis than in england
- Modern view of tenure in Australia → essentially redefined the tenure system in australia, stating that with sovereignty, t**he Crown has the option to exercise power to *own* land (radical title)** → which only **extinguishes prior interests if exercised with the creation of an estate that allows for exclusive possession**: *Mabo v State of Queensland (No. 2)*
    - <u>Facts:</u>
        - The plaintiff argued that traditional rights to country survived the crown coming to Australia
            - These rights should be recognised as native title
        - The crown argued that when the land was vested in the crown, native title was extinguished
        - To find for the plaintiff, the court would have to overrule AG v Brown
    - <u>Held:</u>

- The court amended the notion of tenure of in australia, as oppose to removing it
  - "To abolish tenure would fracture the skeleton of the common law" - Brennan
  - This enabled australia to catch up with the world → as this decision was made in light of international agreements on discrimination
- The court essentially held that tenure exists
- Thus, the crown has a notional interest in the land known as radical title
  - "Radical title is the concommitant [same thing] of sovereignty" - Brennan
  - Sovereignty = crown's independence and right to rule
- So essentially, radical title = sovereignty in land law ⇒**power to create and manage interests in land**
  - Crown did not acquire absolute ownership (we call this beneficial ownership) over all of Australia → because there were other owners (i.e. no terra nullius)
  - ⇒**the crown does not *own* the land, but has the *power to grant and control* the land**
  - In relation to aboriginal land rights, radical title does not extinguish native title → unless the power to grant was exercised
- Therefore, on acquisiton of sovereignty, the crown gets sovereignty, radical title and ownership of the land where there are no other owners (however where/who are these other owners?)

Estates

Estate: an interest in land → that provides a right/power

- Estates are **granted by the crown**
- Estates are generally **alienable** → meaning there are *no restrictions on selling*
- Estates give you rights/powers to **use your land → rather than absolute ownership**
- Estates are based on time
  - The difference between the types of estate → time which they endure (i.e. how long the estate exists)
  - Therefore, the different estates are classified accordingt o how long they last
  - More than one estate can exist at the same time

1. *Freehold estates (uncertain duration)*

a. *Fee simple*

b. *Life estate*

2. *Leasehold estates (certain duration)*
3. *Simultaneous estates*

c. *Reversion*

d. *Remainder*

e. *Alienability*

Freehold estates (uncertain duration)

Fee simple

Fee simple: the equivalent of full ownership of the land

- **Inheritable estate ('fee')** → indicated in the grant by the use of the terms 'heirs'
  - Essentially you can inherit the land → passed down to you
  - It *never ends*
- Rights of ownership
  - **Alienable:** to dispose of the property to another person
  - **Exlcusive possession:** the right to exclude all others (opposite of alienable)
    - Exclusive possession is the test
- Any language that indicates that it is to be permanent = sufficient to create a fee simple

- Common law:
    - Previously, "to A and his heirs"
- Statute: *Conveyancing Act* s 47(1), (2)
    - Now can be "to A in fee simple" or "to A, forever"
- Default: *Conveyancing Act* s 19 and 19A
    - An estate in fee simple can also be created by default → if you *attempt* to create a fee tail

Life estate

- **Non-inheritable** → because it *ends when someone's life ends*
    - *Uncertain duration* (because we don't know when the life of someone will end)
    - As it is dependent on someone's life → it is a risky security to lenders
- All rights of the holder of an estate in fee simple exist (alienable + exclusive possession)
    - Whoever is given a life estate can alienate his estate e.g. through sale to another person → however it will still be dependent on his life
    - However this is dependent on whether anyone wants the estate i.e. how long its going to last, the value of the property
- After the death of the person granted → the estate in fee simple falls back on the remainder man
- However, you don't have the right to "waste" land → doctrine of waste
- Often given by way of trust → will
    - Commonly familial situations
- Common law:
    - **Life estate:** "To A for the life of A"
    - **Life estate pur autre vie:** "To A for the life of B"
- Statute: *Conveyancing Act s 47(2)*
    - Now, you must show an intention to create a life estate
    - A life estate can also be created by failing to make a fee simple

Leasehold estates (certain duration)

- Leasehold land → certain duration
    - e.g. purchasing a 99 year lease etc
- After the life of the lease, the lessor has a reversionary interest

Simultaneous estates

Reversion

- "To A for life, reversion to grantor"
- Essentially, the **grantor has a fee simple in reversion**
- A will still have your estate in fee simple → but its called an estate in reversion
    - You can do anything not relating to possession → you do not have exclusive possession
- At the same time, the grantor has another life estate
    - If you create another estate in fee simple, the other person will also have EXCLUSIVE possession → to the exclusion of others, even the person who has given you the right because all they have is a property estate → the other person can rent it, mortgage it and lease it etc because they have possession
- After the person who has given you the right has died + the person who received the right dies → it will go to the person who had possession's heirs

Remainder

- "To A for life, remainder to B in fee simple"
    - So if A dies tomorrow, B gets the fee simple
- The heirs will be exempt

- Someone has exclusive possession → the other does not

Native title

- Native title is a western concept → not an indigenous concept
    - Thus, it reflects western land concepts, not aboriginal ones

Mabo (No. 2)

- This case essentially established native title in australia
- Origin and content of native title:
    - Essentially the traditions of aboriginal law
    - "Native title has its *origins* in and is given its *content* by the **traditional laws acknowledged by and the traditional customs observed by → the Indigenous inhabitants of a territory**.
    - The nature and incidents of native title must be ascertained as a matter of fact according to those laws and customs." at 58 (Brennan J)
- Native title is not an institution of the common law – it is the **recognition by the common law** → of **rights and interests** → that are **sourced in a normative system → which pre-existed sovereignty**
- Held:
    - *Brennan*
        - Cannot get rid of tenure (facture the skeleton)
        - Tenure exists, and the crown grants land
        - Sovereignty is not the same as a beneficial interest in the land
        - When native title expires, the crown gets the beneficial interest
    - *Deane and Guadron*
        - Native title is extinguished by an unqualified crown grant of an inconsistent estate
    - *Mason, brennan and McHugh*
        - Title extinguished by inconsistent grant

Mabo (No 2)	Brennan J	Deane and Gaudron JJ	Toohey J
Terra nullius	No	No	No
Establishing native title	Retained link with the land. Traditional connection	Occupation and use of the land	Physical presence
Content of native title	Your rights are ascertained by your traditional laws and customs on the land	As under traditional law and custom	N/A
How can native title holders deal	Depends on the traditional laws and	Rights are personal rather than proprietary.	N/A

with their rights	customs	Native title cannot be sold.

Native Title

- Every claim of native title has different law based on different customers → as the origins of native title are in the traditions of aboriginal law
- We can get information about aboriginal law from oral tradtions, writings about the people
- However, it is not the best system for aboriginals
    - Expensive
    - Rights given are minimal
    - Culture may be offended → i.e. giving sensitive evidence
- Therefore, we look at native title as **recognition**, as opposed to the creation of aboriginal rights and interests (WA v Ward)

Elements

- **Ongoing, "substantially interrupted" → connection to the land**
- The **customs and traditions** → use of land must **maintain its traditional nature** (Yanner v Eaton)
    - E.g. in Yanner, fishing happened traditionally → but aboriginals used a spear gun and a motorboat now
- Rights that can be granted:
    - Hunting, fishing and subsistence
    - Ceremonial use
    - Exclusion
    - Use of resources (i.e. use of ochre)
    - Right to live on the land

Extinguishment

- The person claiming has to **prove that the native title right has not been extinguished**
    - Once the right is extinguished → it is extinguished forever
- *Mabo*
    - Brennan → exintguishment occurs when:
        - Where the **crown exercises sovereign power with an intention to extinguish** (as shown by an inconsistent grant)
          Or where the **connection with the land is lost "tide of history is washed away"**
    - Deane and Guadron → extinguishment occurs when:
        - **Inconsistent dealings**
        - **Abandonment**
    - Toohey → extinguishment occurs when:
        - Clear legislative intention (though compensation is allowed)
- *Fejo*
    - Facts:
        - Northern territory case
        - Mr brown is granted an estate in fee simple in a newly opened area → granted in 1840
        - Mr brown surrenders his estate in fee simple to the crown → therefore the estate ceases to exist
        - Mr brown has never seen his estate in fee simple or done anything on the land → the indigenous inhabitants have no idea that he has an estate in fee simple
        - Years later, the descendants of these traditional owners decide to make a native title claim
        - They include a tenure map → that includes the area claiming and not claiming

    - Held:
        - Due to the extinguishment after 5 years by mr brown → native title has therefore been permanently extinguished
        - **Possession excludes native title → as they exclude all others → there is inconsistency**
        - Estates in fee simple a problem in urban australia
        - ⇒The **creation of an estate in fee simple** was seen as extinguishing → since it is the **exclusive right to possession**
            - Thus, native title is extinguished → because it is legally inconsistent with exclusive possession
            - Native title, thus, yields to an estate in fee simple
- *Wik*
    - Facts
        - Pastoral leases → giant leases created by the State Lands Act
        - The land was designed for grazing
    - Issue: did pastoral lease extinguish native title
    - Held
        - Pastoral lease = lease ⇒confers exclusive possession
        - Thus, the lease must be interpreted in light of the purpose of its creation ('a light footprint on the land')
        - However, there was no intention to confer exclusive possession → as the lease was not condition
        - As such, there is no exclusive possession → does not totally extinguish possession
        - Thus, have to list native title right (e.g. hunting, living, etc.) and pastoralist rights (running cattle, building a farmhouse, etc.) and we smoosh them together to see where they are inconsistent. **If a native title right cannot coexist with a pastoralist right, it is extinguished**.

Effect of native title

- It is an ***in*alienable right** (cannot be sold)
    - Alienable only to the crown → cannot be transferred by the group to any individual → this is meant to be a predictive provision
- It **cannot be mortgaged or economically developed**
- It is **communal**
    - It is vested in the group of native title right-holders
    - The right is vested in a group that is changeable, into which people leave, are born into, adopted into and changes through people dying → as opposed to a specific, identifiable individuals
- It is a **bundle of rights** (different to the 11 rights conferred to a holder of an estate in fee simple) → that is **not fixed, but changeable, based on culture**

The Native title act

- Replaces most of common law
- Provides a **claim mechanism**
    - S 223 is therefore the starting point for any determination of native title
    - It is the substantive points of proof
- Sets out a different mechanism for future governments to change this law
- Defines native title: s 223
    - Rights and interest are part of the definition
    - Right with respect to land or water
- Over time, courts have significantly enlarged what must be proven → by reading words into s 223 and by giving particular emphasis to particular words

223 Native title

Common law rights and interests

(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters,

where:

(a) the **rights and interests are possessed under the traditional laws *acknowledged***, and the **traditional customs observed**, **by the Aboriginal peoples or Torres Strait Islanders**; *and*

(b) the **Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a *connection***

with the land or waters; *and*

(c) the **rights and interests are *recognised* by the common law of Australia**.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.

- What must be in determination is in s 225

225 Determination of native title

A determination of native title is a determination whether or not native title exists in relation to a particular area (the determination area) of land or waters and, if it does exist, a determination of:

(a) **who the persons**, or each group of persons, **holding the common or group rights comprising the native title are**; and

(b) the **nature and extent of the native title rights and interests** in relation to the determination area; and

(c) the **nature and extent of any other interests** in relation to the determination area; and

(d) the **relationship between the rights and interests in paragraphs (b) and (c)** (taking into account the effect of this Act); and

(e) to the **extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease**--whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

- The most important element now of the test for native title is set out in: *Far West Coast Native Title Claim v SA* (No. 7) (2013)
  - **A recognisable group or society** → that **presently recognises and observes traditional laws and customs in the Determination Area**.
  - (1) they must be a **society united in and by their acknowledgement and observance of a body of accepted laws and customs**;
  - (2) that th**e present day body of accepted laws and customs of the society, in essence, is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances**; and
  - (3) that the **acknowledgement and observance of those laws and customs has continued substantially uninterrupted** by each generation since sovereignty and that the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs; and

- (4) The claimants must show that they **still possess rights and interests under the traditional laws acknowledged and the traditional customs observed by them and that those laws and customs give them a connection to the land.**

Managing land: future acts

Future act: any acitivity that occurs on Crown land (not private land) → after the commencement of the provisions of the Native Title Act (Cth) 1993 and which 'affects' native title

- I.e. acts that affect native title → extinguishment
- Examples:
  - A legislative act such as the making of or amendment of acts of parliament
  - Creation of estates
  - An administrative act e.g. issue of a license to use crown land, the issue of a management plan for a park or reserve or the sale of Crown land
  - A physical act such as the constrution of facilitities on a Crown reserve

Native Title Act

- The NTA allows for a range of future acts to occur on Crown land → specifies the level of consultation that must be carried out before the act can occur (i.e. without this producedure = invalid)
- S 24AA sets out the different kinds of future acts and what has to be done before each is valid. The response might be:
  - None
  - Opportuniy comment
  - Negotiation
  - Making of an indigenous land use agreement

Future acts

(1) This Division deals mainly with future acts, which are defined in section 233. **Acts that do not affect native title are not *future acts*** ; therefore this Division does not deal with them (see section 227 for the meaning of acts that *affect* native title).

227 Act affecting native title

An act affects native title if it **extinguishes the native title rights and interests** or if it is otherwise **wholly or partly inconsistent with their continued existence, enjoyment or exercise**.

Validity of future acts

(2) Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not.

Validity under indigenous land use agreements

(3) A future act will be valid if the parties to certain agreements (called indigenous land use agreements--see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements. An indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done.

SUMMARY

- Our interests come from crown grants
- Interests are granted by radical title

- Native rights and interests originate from the traditional laws and customs of the native title plaintiffs
- Native title is not an estate
- The effect of a crown grant on native title extinguishes native title to the extent of inconsistency
- The relationship of radical title to native title