

# LAND LAW

## **NOTES**

<b>1 INTERESTS IN LAND</b>	<b>12</b>
“LAND”	12
GENERAL LAW LAND V TORRENS TITLE LAND	12
General law land	12
Torrens title land	12
General law (old title) and Torrens title land: What is the difference?	13
INTERESTS IN LAND	13
General law interests	13
“Searching a Chain of Title”	13
Torrens Title interests	14
1) REGISTERED AND UNREGISTERED INTEREST	14
History: System of deeds registration — categorise deeds according to lodgement	14
2) LEGAL AND EQUITABLE INTERESTS	15
a) LEGAL INTERESTS IN LAND	15
Formalities for legal interests	15
A deed: s 52, s 73 PLA	16
Execution of a deed	17
b) EQUITABLE INTERESTS IN LAND	17
Equitable interests in land: Statute of Frauds	17
Formalities for equitable interest	17
Types of trusts re s 53	18
THE DOCTRINE OF PART PERFORMANCE	19
Equitable interests arising from part performance	19
Approaches to part performance	19
Australian position	19
Types of acts constituting part performance:	20
Part performance is established by showing:	20
BOUNDARIES OF LAND OWNERSHIP	21
Re surface of land	21
1) Water rights / boundaries	21
Natural boundaries	22
(a) Tidal water (land abuts sea-shore)	22
(b) Non-tidal water: centre of water/river (ad medium filum aquae rule) (unless abrogated by statute):	23
Alluvio et avulsio	23
Accretion and erosion	23
2) Fence boundaries	24
3) Encroachment / Encroaching buildings upon land	24
Legislation	24
a) Encroachment of airspace	25
GENERAL LAW PRIORITY RULES	26

1) Pure legal interests / Legal and legal interests	26
Nemo dat	27
Examples of nemo dat	27
2) Legal and equitable interests	27
3) Prior legal and subsequent equitable interest	28
Categories of priority of subsequent equitable holder over legal title holder	28
<i>Northern Counties of England Fire Ins Co v Whipp</i>	29
<i>Walker v Linom (Court of Chancery)</i>	29
Other cases	30
4) Prior equitable interest and subsequent legal interest	30
Meaning: 'Good faith' & 'purchaser'	30
Meaning: 'Value' & 'notice'	30
<i>Pilcher v Rawlins</i>	31
'Bona fide purchaser for value without notice' rule: Elements	31
Doctrine of notice	32
Timing of notice	32
Exception to the doctrine of notice: <i>Wilkes v Spooner</i> [1911] CB 530	33
Obligations on purchaser	33
5) Priorities between competing equitable interests	34
a) Traditional rule / Merit analysis approach: <i>Rice v Rice</i>	34
<i>Rice v Rice</i>	35
b) Postponement approach: <i>Heid v Reliance</i>	36
c) Estoppel: <i>Rimmer v Webster</i>	36
Which to use?	37
6) Prior mere equity and subsequent equitable interest	37
<i>Latec Investment Ltd v Hotel Terrigal Pty Ltd</i>	38
<i>Ruthol Pty Ltd v Mills</i>	38
EFFECT OF REGISTRATION ON PRIORITIES	40
Deeds registration system	40
<b>2 PHYSICAL &amp; DIGITAL LAND CONVEYANCING</b>	<b>41</b>
PHYSICAL LAND CONVEYANCE	41
Basic stages of a physical land conveyance	41
Problems with physical conveyancing processes	41
COMPUTERISED TITLE	41
DIGITAL CONVEYANCING	41
Shift to digital processing: Core Concepts	41
Where are the changes?	41
REGULATORY FRAMEWORK	42
Electronic Conveyancing National Law (ECNL)	42
Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) (Appendix)	42
Rules made pursuant to the ECNL	42

KEY CONCEPTS	43
1) Client Authorisation	43
2) Verification of identity	44
3) Digital signatures	44
4) Electronic certificate of title	45
5) Dictionary	45
6) PEXA	45
The documentary framework	46
RISKS & BENEFITS	46
Risks of electronic conveyancing	46
Benefits of electronic conveyancing	46
REFLECTIONS	47
<b>3 BASIC ELEMENTS OF THE TORRENS SYSTEM</b>	<b>48</b>
A. GENERAL LAW WITHOUT A REGISTRATION SYSTEM	48
Problems with A. General law without a registration system	48
B. DEEDS REGISTRATION SYSTEM	48
Problems with B. deeds registration system	49
C. TORRENS SYSTEM	50
Caveat system	50
Key points re Torrens system	50
Registration under the TS	51
<i>Breskvar v Wall (1971) 126 CLR 376</i>	51
THE TORRENS FRAMEWORK	52
Types of interests under the TLA	52
CHARACTERISTICS OF THE TORRENS SYSTEM	53
1) The register	53
2) Registrable interests	53
Three principles of the TS	54
3) Registration	54
Effect of registration	54
“No rights prior to registration?”	54
4) Indefeasibility of title	55
Indefeasibility of title: Absolute?	55
5) Paramount interests	56
D. COMPUTERISATION / E-CONVEYANCING	56
<b>4 INDEFEASIBILITY OF TITLE</b>	<b>57</b>
RECAP / OVERVIEW	57
INDEFEASIBILITY	57
Indefeasibility of title: Absolute?	58
Registered title	58

STATUTE: Paramount provisions	58
Core exceptions or circumstances that can 'penetrate' the indefeasibility are:	59
STATUTE: Further examination	60
Section 40: instrument not effectual until registered	60
Section 41: Certificate to be conclusive evidence of title	60
Section 42: Estate of registered proprietor paramount	60
Section 43: Persons dealing with the registered proprietor not affected by notice	62
Section 44: Certificates etc void for fraud	62
Conclusion re sections 40-44:	63
IMMEDIATE AND DEFERRED INDEFEASIBILITY	63
Immediate indefeasibility	64
Deferred indefeasibility	64
Deferred indefeasibility: Gibbs v Messer	64
<i>Gibbs v Messer (1891 Privy Council)</i>	64
Comment re Gibbs v Messer	65
Immediate indefeasibility: Frazer v Walker	65
<i>Frazer v Walker — Privy Council</i>	65
Comment re Fraser v Walker	66
<i>Breskvar v Wall – High Court CB 11.13</i>	66
Comment re above cases	67
<i>City of Canada Bay Council v Bonaccorso Pty Ltd (NSWCA)</i>	67
Currently: Indefeasibility	68
Terms in registered instrument / Scope of Protection	68
<i>Mercantile Credit v Shell Co of Australia CB 11.15</i>	68
Established after Mercantile:	69
Extent / Scope of indefeasibility	69
Scope of protection: Personal interests	69
CONCLUSION	70
<b>5 STATUTORY EXCEPTIONS TO INDEFEASIBILITY</b>	<b>71</b>
1) FRAUD	72
What is fraud?	72
Fraud in provisions of TLA	72
Meaning in TLA	73
Equitable vs statutory fraud	73
CATEGORIES OF FRAUD	74
Forgery	74
Fraud by agent	74
FRAUD CASES	75
<i>Loke Yew v Port Swettenham Rubber (1913) CB 11.19</i>	75
<i>Bahr v Nicolay (1988) CB 11.21</i>	75
<i>Russo v Bendigo Bank (1993) CB 11.23</i>	76

Comment re Russo v Bendigo Bank:	77
<i>Bank of South Australia v Ferguson (1998) CB 11.25</i>	77
<i>Gerard Cassegrain v Felicity Cassegrain Pty Ltd [2015] CB 11.27 (NSW Court of Appeal) and High Court overview</i>	78
CONCLUSION: Fraud	79
2) PRIOR CERTIFICATE OF TITLE	80
3) WRONG / ERRONEOUS DESCRIPTION OF LAND	80
4) PARAMOUNT INTERESTS	81
(a) Crown grants: s 42(2)(a)	81
(b) Adverse possession: s 42(2)(b)	81
(c) Easements: s 42(2)(d)	82
<i>Castle Construction Pty Ltd v Sahab Holdings Pty Ltd (HCA)</i>	83
Easement and the in personam exception in NSW	83
<i>McGrath v Campbell</i>	84
Comment re Campbell:	84
Summary: Easements	85
(d) Tenancies / Leases: s 42(2)(e)	85
<i>Downie v Lockwood [1965] VR 257</i>	86
<i>Swan v Ueker and Greaves [2016] VSC 313</i>	86
Restrictive covenant	87
Power of registrar to correct register	87
Section 103 TLA: General provision as to correction of errors etc	87
Section 44H TLA	88
<b>6 NON-STATUTORY EXCEPTIONS TO INDEFEASIBILITY</b>	<b>89</b>
1) IN PERSONAM DEFENCE	89
Meaning	89
Difficulties with in personam	90
<i>Bahr v Nicolay</i>	91
Application of Barnes v Addy principles:	92
<i>Macquarie Bank v 64th Throne</i>	92
Comment re Macquarie Bank:	93
<i>LHK Nominees v Kenworthy</i>	93
In personam: Barnes v Addy claims	94
<i>Farah Constructions v Say-Lee</i>	94
Comment re above cases	95
RELATIONSHIP BETWEEN FRAUD AND RIGHTS IN PERSONAM	95
2) INCONSISTENT LEGISLATION EXCEPTION	96
Overriding legislation	96
<i>Pratten v Warringah Shire Council</i>	97
Comment re Pratten v Warringah SC:	97
<i>Horvath v Commonwealth Bank of Australia</i>	98
Tips in assessing inconsistency (re Horvath)	99
<i>Calabro v Bayside City Council (V)</i>	99

<i>Hillpalm v Heavens Door</i> [2004] 220 CLR 472	99
Comment re Hillpalm:	100
<i>Kogarah Municipal Council</i>	100
<i>City of Canada Bay Council v F &amp; D Bonaccorso Pty Ltd</i>	101
CONCLUSION: Inconsistent legislation	101
3) VOLUNTEERS	102
Meaning	102
Relevant statute	102
Indefeasibility or not?	103
Do the indefeasibility provisions protect registered interest holders who take without having given valuable consideration?	103
Difference between 'valuable' and 'good' consideration: Director of Public Prosecutions (Vic) v Le (2007) 232 CLR 562 (per Gummow and Hayne JJ)	104
Does a person who has given no consideration, insufficient consideration or good consideration (as opposed to valuable consideration) gain the protection of the indefeasibility provisions?	104
<i>King v Smail</i>	104
Comment: King v Smail:	105
<i>Kitto J in IAC (Finance) Pty Ltd v Courtenay</i> (1963) 110 CLR 550 at 572:	105
<i>Bogdanovic v Koteff</i> (NSW)	105
<i>Rasmussen v Rasmussen</i>	106
<i>Valoutin v Furst</i>	106
<i>Conlan v Registrar of Titles</i> (WA)	107
Comment re Conlan:	107
<b>7 THE ASSURANCE FUND</b>	<b>108</b>
THE ASSURANCE FUND / STATE GUARANTEE OF TITLE	108
Background	108
Objectives of State Guarantee of Title	109
Relevant Provisions in the TLA	109
Section 109(2)	109
Section 110	109
Section 110(3) and (4)	111
Limitation periods	111
Compensable interest	111
Restrictions on Compensation Claims beyond the TLA	112
State Guarantee of Title: Cases	113
<i>Diemasters v Meadowcorp</i> (2001) NSWSC 495	113
<i>Solak v Registrar of Titles</i> [2009] VSC 614	113
Instances of compensation	114
Exclusion of compensation	114
Exclusion of payment	115
Other statutes	115
Process of application	115
Amount of compensation	116

PRIVATE INSURANCE OPTIONS	116
<b>8 unregistered interests</b>	<b>117</b>
Overview	117
<i>Barry v Heider</i>	118
Comments re Barry v Heider	118
TYPES OF UNREGISTERED INTERESTS	119
(a) Trust interest incapable of registration	119
Examples of unregistered interests	119
Protection	119
CAVEAT SYSTEM	120
Caveat	120
Extracts from ss 90 and 91 TLA	120
Caveat by Registrar	121
THE NATURE OF A CAVEATABLE INTEREST	121
Examples of 'caveatable interests' are:	122
Nature of interests	123
Failure to lodge a caveat	123
<i>Leros v Terara Pty Ltd</i>	123
Incidents of indefeasibility: Leros v Terara	124
Caveat in general: Leros v Terara	124
Caveat subject to claim	124
Dealing with an unregistered interest	125
<i>Black v Garnock</i>	125
Caveat must relate to existing interests	125
Consequences of failing to lodge a caveat	125
Automatic lapsing of caveat	126
Reasonable grounds for lodgement	126
PRIORITY RULES	126
1) PRIORITIES BETWEEN REGISTERED AND SUBSEQUENT REGISTERED INTERESTS	126
2) PRIORITIES BETWEEN REGISTERED AND UNREGISTERED INTERESTS	126
3) PRIORITIES BETWEEN UNREGISTERED INTERESTS	127
Factors in assessing merits	127
Categories of postponement	128
<i>Heid v Reliance Corp Pty Ltd (HCA)</i>	128
<i>Black v Garnock (HCA)</i>	130
<i>J &amp; H Just (Holdings) Pty Ltd v Bank of NSW (HC)</i>	130
<i>IAC Finance Pty Ltd v Courtenay (HC)</i>	131
<i>Jacobs v Platt Nominees (VSC)</i>	131
<i>Leros Pty Ltd v Terara Pty Ltd</i>	132
Failure to caveat	132
Relevance of notice	133

<i>Moffett v Dillon (VCA)</i>	133
Comments re <i>Moffett v Dillon</i>	134
SUMMARY: Priority rules for unregistered interests under the TLA	134
<b>9 CO-OWNERSHIP</b>	<b>136</b>
Background	136
Co-ownership	136
FORMS OF CO-OWNERSHIP	137
1) JOINT TENANCY	137
Features of joint tenancy	137
(a) The Four Unities	138
(b) Right of survivorship	139
2) TENANCY IN COMMON	140
CREATION OF CO-OWNERSHIP	141
Words of severance	141
CREATION AT COMMON LAW	142
Rebuttal of common law presumption	142
<i>Public Trustee v Pfeiffle</i>	142
<i>Aoun Investments CB 1117</i>	143
CREATION UNDER STATUTE	143
PRESUMPTION IN EQUITY	143
Three established situations	144
(a) Unequal contribution to purchase price ( <i>Calverley v Green</i> )	144
<i>Delehunt v Carmody</i>	144
(b) Mortgagees/Business partners	145
<i>Malayan Credit</i>	145
Domestic environment -- Aus position: <i>Trustees v Cummings</i>	146
<i>Trustees of Property of Cummings v Cummins (2006) High Court</i>	146
Unequal Contribution / Domestic environment: <i>Stack v Dowden (UK)</i>	147
Comment re <i>Stack v Dowden</i> :	147
Post <i>Stack v Dowden</i> : <i>Jones v Kernott [2012] 1 All ER 1265</i>	148
RIGHTS AND DUTIES OF CO-OWNERS	149
Victorian Civil and Administrative Tribunal	149
1) Payment for improvements and repairs	150
2) Payment of occupational rent	151
Occupational rent at common law	152
(a) Wrongful exclusion	152
The meaning of 'wrongful exclusion: Common law	152
<i>Biviano v Natoli</i>	152
b) and c) Agreement and offset	153
Occupational rent under Vic statute	153
How does the improvements 'set-off' work?	153

What are 'improvements': Common law	154
What are 'improvements': Statute	154
3) Right to rents and profits	154
Third party rents received: Claim in equity	155
PLA s 234	155
4) Right to alienate or encumber a co-owner's own interest in land	155
Encumbrance	156
Leases, mortgages and easements	156
Fraud by one JT will affect the other: Cassegrain (HCA)	156
<b>10 SEVERANCE &amp; PARTITION</b>	<b>157</b>
DISPOSITION OF INTERESTS	157
SEVERANCE OF JOINT TENANCY	157
Effect of severance	158
<i>Examples:</i>	158
1) SEVERANCE BY ALIENATION	159
A) Severance by alienation at law	159
(a) Sale to a third party	159
(b) Mutual/cross transfers	159
<i>Wright v Gibbons (HC)</i>	159
(c) Alienation to oneself	160
<i>Peldan v Anderson</i>	160
Trust relationship	161
Donation	162
Operation of an equitable alienation	162
<i>Corin v Patton</i>	162
Comment re Corin v Patton	163
2) SEVERANCE BY MUTUAL AGREEMENT (IN EQUITY)	164
<i>Wright v Gibbins (1949) 78 CLR 313</i>	164
<i>Peldan v Anderson</i>	164
Unilateral severance	165
<i>McCoy v Call</i>	166
<i>Hulme v Schaecken</i>	166
Approach	166
3) SEVERANCE BY COURSE OF CONDUCT	167
Right to alienate / Encumber	167
Mortgage	167
<i>Guthrie v ANZ Banking Group Ltd (1991) 23 NSWLR 672</i>	168
<i>Lyons v Lyons</i>	168
Comment re Lyons v Lyons	169
Lease	169
Lease + Australian cases	170

4) SEVERANCE BY OPERATION OF LAW: BANKRUPTCY OR COURT ORDER	170
Involuntary severances	170
5) SEVERANCE BY MERGER	170
6) SEVERANCE BY HOMICIDE / UNLAWFUL KILLING	171
Forfeiture rule in Victoria	171
7) SEVERANCE BY PARTITION	171
Partition under PLA	173
Statutory trust	174
TERMINATING A CO-OWNERSHIP	174

# 1 INTERESTS IN LAND

## “LAND”

- Land law deals with the acquisition, nature, transfer and priorities of rights and interests in land
  - **Common law meaning** of land: some part of the earth
  - Including physical **components**: soil, minerals, vegetation and fixtures
  - Land is indestructible (?)
  - *Cuius est solum* rule: ownership of land extends up to heaven and down to centre of the earth (fanciful phrase subject to limitations)
  - Three-dimensional space: Surface, above the surface and below the surface. Butt: Open-ended inverted pyramid
  - “Land” may be defined for purpose of a statute:
- S 4(1)** Transfer of Land Act 1958 (Vic): Land “includes any estate or interest in land: but does not include:
- (a) an interest in land arising under the Mineral Resources (Sustainable Development) Act, 1990 and
  - (b) a carbon sequestration right or soil carbon right granted in relation to Crown land under a Carbon Sequestration Agreement
- Two types of land: **General law land** and **Torrens title land**

## GENERAL LAW LAND V TORRENS TITLE LAND

### General law land

- Different systems of land registration applicable to:
  - Torrens title land
  - General law land
- General law land is land alienated or granted by the Crown from 1837 to the commencement of Torrens legislation in 1862 (Vic)
- Legal title could only have been transferred by a deed of conveyance
- Parcels of general law are diminishing due to conversions
- General law land is governed by Property Law Act 1958 (Vic)

**Relevance:** General law land (and PLA) remain relevant —

- Many of those titles have been converted over the intervening years but those that remain in the system are still valid proof of ownership
- A program to convert Victoria’s remaining General Law titles to the Torrens system continues
- When application for conversions is made to bring general law land within the operation of the Torrens system, priorities between the conflicting interests are judged according to the rules of the old system
- Even with converted land the provision of the Property Law Act may still affect priorities

### Torrens title land

- Torrens title land includes:
  - Land alienated or granted by the Crown after commencement of Torrens legislation in a particular state (SA 1858; Vic 1862); and
  - Old title land converted to Torrens title land
- Transfer of Land Act 1958 (Vic) applies to Torrens title land

- **Title** to Torrens title land is evidenced by a Certificate of Title
- Interest is known as a **registered interest**
- **System** of title by registration:
  - validates a defective title; and
  - guarantees protection of title
- Distinction between registered & unregistered interest
- Lack of uniformity in Torrens legislation of the different states

### **General law (old title) and Torrens title land: What is the difference?**

- General Law (Old Title) Land represents all land grants issued between 1838 and 1862 which have not been brought under the Torrens system.
- General Law is the original form of land ownership. When land was sold or otherwise allocated by the government, a Crown Grant would state that the land described had been given to the person named in the Grant. Each time the property was sold a new deed would be added to the Grant. These would grow into a chain of deeds. To prove ownership, a vendor would have to produce the complete and unbroken chain of titles. These days any general law land that is transferred must be converted to modern Torrens title
- In Victoria the Torrens system first introduced in 1862 pursuant to the Real Property Act (Vic) which is now set out in the Transfer of Land Act 1958 (Vic). Land issued *after* 1862 was Torrens land OR land converted to Torrens under the 'conversion process' is Torrens land

### **INTERESTS IN LAND**

- A contract for the sale/ disposition of land/ any interest in land is unenforceable unless it is **in writing** and **signed** by the party or representative
- **Applies to legal and equitable interests**
- Not invalid but merely unenforceable
- Not enforceable in court, unless written agreement is produced
- Equitable interest can be created orally but to enforce interest it must be in writing

### **General law interests**

- In Victoria today, most land is now Torrens title.
- Remaining old title land **must**, where transferred, be brought under the TLA so that eventually all land will be covered.
- General law land is evidenced by a 'chain of title'. Torrens title land is evidenced by a CT.
- Chain of title dates back to the original grant.

### "Searching a Chain of Title"

- To verify general law title, **s44** PLA sets out only need to search back for the 'good root' of title. This amounts to documentary title apparent in the previous 30 years.
- Purchaser is not affected by any title existing beyond this 30 year period: PLA **s44(6)**
- Must be aware of titles existing within the 30 year period because will be affected by this.
- No guarantee of title with general law interests

## Torrens Title interests

- The *Transfer of Land Act* provides for the Register to be in a variety of forms and on any medium, including parchment (old CT's) and a computer
- The computer title information forms part of the Register and can be updated by registering new dealings on the computer database without having to update any paper title.
- The folio is the original document in the titles office. The certificate of title is the duplicate of the folio (known as the duplicate certificate of title).
- For a computer title, the Certificate of Title is a computer printout

### Computer titles may be created in two ways:

- (1) directly from newly registered plans of subdivision for lots, roads and reserves on those plans. In this situation there is no paper folio for the land, only the computer folio information
  - (2) through the registration of a dealing affecting a paper folio (title) for which there is computer "search" data available. The registration transforms the data to computer folio data, which can be subsequently updated instead of the paper title
- Computer titles do not contain the breadth of detail as the old paper titles.
  - They only contain current information (ie not old registered proprietors etc) and they do not contain any detailed diagrams of easements etc
  - Verified: Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) Appendix – Victorian Act – ss7(documents may be lodged electronically and s12( digital signatures)

## 1) REGISTERED AND UNREGISTERED INTEREST

- Both general and Torrens title land **may be unregistered**.
- General law interests cannot be registered under Torrens until they are converted.
- Torrens title interests may be unregistered because holders choose not to register as the system is not compulsory
- Unregistered interests do not gain the protection of indefeasibility that registered holders of Torrens title land acquire

## History: System of deeds registration — categorise deeds according to lodgement

- **Title** was comprised of a series of deeds forming a chain of title representing the history of the land grant
- Vendor must prove title by searching each document in chain to ensure that link to original Crown grant is unbroken (Aus: 1788)
- Theory of relative dependent title: each owner of an estate could acquire only such title as his predecessor held
- Search of chain of title
  - Difficulties and costs
  - Statutory limitations of statutory search:
    - Need only to search title back for 30 years, provided good title can be found during that period: **s 44(1)** of the PLA
    - Purchaser not deemed to be affected by notice of interest prior to the 30 year period: **s 44(6)** of the PLA
- Although registration not compulsory registrations did take place
- Distinction between legal and equitable interests
- **Priority** is given to a registered interest over unregistered interest and interest registered at a later date, provided it was acquired:

- bona fide
- for valuable consideration
- without actual or constructive knowledge: **s 6** PLA
- Registration does not validate a defective title and provides no guarantee of title
- Deeds, conveyances or other instrument may no longer be registered in the office of the Registrar-General: **s 6(2)** PLA
- All dealings relating to old title land must now be registered under the Torrens system necessitating a conversion from old title to Torrens title

## 2) LEGAL AND EQUITABLE INTERESTS

### a) LEGAL INTERESTS IN LAND

- A **legal interest** in land is one which constitutes a recognisable common law estate/interest and which is created in accordance with the requisite formality requirements.
- All legal interests over land **must be in the form of a deed** otherwise not legal: **s52(1)** PLA
- Exceptions to this are set out in **s52(2)** (variety of orders) **AND s54(2)** PLA sets out that leases not required to be in writing such as oral leases for 3 years and under.
- Applies to all 'conveyances' of land — **s18** PLA defines conveyances broadly to include: 'mortgage, charge, lease, assent, declaration etc'
- Conveyance not restricted to formal deed or transfer

### Formalities for legal interests

- Formalities for creation and conveyance of legal interests are set out in statutes of different states
- In Victoria, a legal interest in land is created or conveyed by state grant (**s 51(1)** PLA) or execution of a **deed (s 52(1))** or registration of an instrument
- If formalities are not met, an equitable interest may exist
- Creation of parol leases (taking effect for a term not exceeding three years) need not to be executed by deed to be valid: **s 54(2)** PLA

**S 51** PLA: "All lands and all interests therein shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale....."

- Land/interest in land shall lie in grant
- Incapable of conveyance by livery, or livery and seisin or by feoffment or by bargain and sale
- Possession is passed by conveyance of an interest

**S 52(1)**: "All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed"

- Land/interest in land must be conveyed by deed
- Legal interest = recognisable common law estate
- If a deed is executed a legal interest is created enforceable in the common law
- If no deed is executed:
  - no legal interest is created
  - an equitable interest may be created

### **S52(2)** exceptions to conveyance by deed:

- Surrenders by operation of law (s 52(2)(c))
- Leases or tenancies not required by law to be made in writing (s 52(2)(d))
- Vesting orders by a court (s 52(2)(f))
- Conveyances taking place by operation of law (s 52(2)(g))

### **S 54(2)**

- "Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine."
- Formalities do not apply to oral leases for three years or less

### **A deed: s 52, s 73 PLA**

- **Deed:** most solemn act a person can perform with respect to a particular property: *Manton*
- Other definitions —
  - At common law re *Manton v Parabolic* = Ritual/instrument to signify solemnity.
  - Early times: 'Livery of seisin': vendor removed his battle glove from which he had defended the land and 'vested' the purchaser with it. Vendor then dug up a sod and handed it to purchaser along with the knife.
  - A Memorandum of events subsequently prepared. This Memorandum came to be known as deed – replaced ancient rituals.
- **Usually applied to:** conveyances, transfers, mortgages, charges and leases of land.
- Common law requires a deed to be: **signed, sealed and delivered**.
  - 'A deed must be intended by the party who does it to be the most solemn indication to the community that he really means what he is doing. The solemn indication is given by sealing a deed which witnesses to what has been done': *Manton v Parabolic Pty Ltd*
- It must be **executed by the grantor in presence** of the prescribed number of witnesses, known as instrumentary witnesses.
- Originally, a **seal** had to be affixed to it. Most jurisdictions outdated seals, and now the grantor and witnesses signatures are primary.
- Deed for purposes of PLA: document signed by both parties with intention of operating as a deed and witnessed — No wax or wafer seal; **Printed indication** where the seal should be affixed

### **Statutory requirements —**

- Person who executes a deed **must sign or place mark** on deed; sealing alone insufficient: **s73** of PLA;
- if deed expressed to be sealed shall have the same effect as if it has been: **s 73**.
- Attested by witness not a party to deed; **s 73** and
- Sealed: instrument which is expressed to be sealed shall operate as if sealed: **s73A**
- TLA **s40(2)** Every instrument – when registered – shall have the same effect as if it were a deed under seal. Electronic Conveyancing (Adoption of National Law Act) 2012 (NSW) Appendix **s 9(1)** gives electronically lodged registry instruments the same effect as paper documents

## Execution of a deed

- Corporation executes a deed by affixing the common seal of corporation
- 'Conveyance' includes: Mortgage, charge, lease, assent, vesting declaration, disclaimer, release, extinguishment or assurance of property/interest by any instrument (except will)
- **Delivery** of title deed – changed from actual delivery to constructive delivery
- Once delivered, the delivering party cannot withdraw or resile from it
- Delivery can be unconditional or conditional ('escrow'; not effective until condition is fulfilled)
- Formality of execution of a deed required for:
  - *Inter vivos* transfer of an estate in general law land
  - Grant of a lesser interest such as:
    - Lease (subject to **s 54(2)** exception)
    - Mortgage
    - Easement
  - Registration of instrument in Torrens system has the same effect as deed: **s 40(2) TLA** (repealed in 2014)

## b) EQUITABLE INTERESTS IN LAND

- An **equitable interest** is a "right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him".
- Legal Interest at Settlement **BUT** equitable interest enforceable when contract entered.
- Settlement period necessary to organise finance; investigate title
- Contract will generate equitable interest (constructive trust/equitable lien) if specifically enforceable
- Specific performance available if damages inadequate and parties ready and willing and the contract is valid
- Orthodox type of equitable interest: constructive trust: vendor qualified trustee and purchaser holds beneficial title. Vendors trusteeship qualified by vendors lien: *Lysaght v Edwards*
- Tanwar dicta revises this: suggests no constructive trust but purchaser holds equitable lien over deposit bc description of purchaser as constructive trustee conceals the contractual relationship and this analysis is 'bedevilled by circularity.'

## Equitable interests in land: Statute of Frauds

- Contracts in land must be in writing/signed: **s126** Instruments Act / **s53** (to enforce any contract for sale of land or any interest in land)
- Exception to formality requirement: Oral contract which are specifically enforceable may be valid if satisfies doctrine of part performance: **s55(d)** PLA: 'Nothing in the last two preceding sections shall- ... (d) affect the operation of the law relating to part performance.'
- These provisions derived from Statute of Frauds which will render a non-compliant contract or interest in land unenforceable (note that unenforceable does not mean that the interest is extinguished).

## Formalities for equitable interest

- As an interest in land, equitable interest must satisfy statutory requirements for (a) **creation** and (b) **enforceability**
- Provisions regarding **creation** of an equitable interest in land is **s 53** Property Law Act
- **Creation** or **disposition** of an equitable interest has to occur in **writing**
- Writing and signing are liberally interpreted

- Formalities are required to prevent **fraud** in creation and transfer of interests in land
- Need not to be created by deed
- **Contract of sale** – deposit and agreement that vendor will execute a conveyance of legal estate and purchaser pays rest of purchase price
- **Term** (express/implied) of contract for sale that vendor proves good title to land
- Constructive **trust** or **lien** may arise to protect interest of purchaser
- At completion of sale (settlement): balance of purchase price, executed transfer, documents of title and keys are handed over

### **S 53 PLA**

(1) ...

- (a) An interest in land can only be created or disposed of by writing signed by the person creating or conveying the same, or by will, or operation of law
- (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
- (c) a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing and signed by the person disposing of the same or by will

(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

### **Types of trusts re s 53**

For purposes of **s 53** the different trusts must be kept in mind. The following trusts are recognised:

- 1) Express trust — Grantor expressly intends to create a trust and transfer legal title to a third party (trustee) for benefit of a defined party (beneficiary)
- 2) Resulting trust — An intention to create a trust is inferred from the circumstances and an act of performance supports the intention
- 3) Constructive trust — It is imposed at the discretion of the court where it is concluded that justice and fairness require it

### **S 53(1) PLA**

- **Section 53(1)** applies to the creation of all trusts and other **express equitable interest** but not to resulting trust or constructive trusts
- An express trust by **transfer** must be created in writing
- An express trust created by **declaration** rather than transfer needs only to be evidenced in writing, not created in writing
- A trust can be created **orally** and subsequently enforced by evidence in writing or the terms of the trust which have been signed by the settlor
- **S53(1)(a)** does not overlap with oral trusts coming within the application of **subs (b)**.
- If a trust over land is orally declared, subs (b) has independent operation.
- **Section 53(1)(c)** applies to transactions with pre-existing equitable interest
  - Disposition = transfer/assignment or direction
  - Disposition has to be in writing and signed by transferor or his agent

### **S 126 of Instruments Act 1958 (Vic)**

- No action shall be brought upon any contract for the sale or other disposition of land or of any interest in land, unless an agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some person thereunto by him lawfully authorised.
- This provision relates to the **enforceability** of all contracts or dispositions relating to land
- Written agreement creating interest, note or memorandum of agreement

## THE DOCTRINE OF PART PERFORMANCE

- Part Performance : The Australian position is the strict test as set out in *Maddison v Alderson*: must prove acts unequivocally referable to agreement was endorsed in *Millet v Regent*
- The doctrine of part performance requires that the plaintiff must be able to show that he or she has made a substantial commitment to the contract so that it would be unconscionable to allow the defence. Note that it must be the acts of the *plaintiff*. The doctrine is based on the idea of unconscionability generated by the plaintiff's reliance on the existence of a contract. Acts of the defendant which show that there is a contract therefore do not count.
- What acts of part performance will suffice: generally the taking of money alone is insufficient. However, it is not necessary for the entire contract to be performed and generally, taking possession of land will raise a part performance action.

## Equitable interests arising from part performance

- Despite absence of writing/insufficient writing a contract may still be enforceable if there are sufficient acts of part performance by plaintiff
- Equitable interest may arise if a court is prepared to issue a decree for specific performance in circumstances where it would be inequitable not to do so
- Qualification of Statute of Frauds of 1677
- Preconditions for a decree for specific performance:
  - Valid contract
  - General requirements for contract of sale of land have been met
  - Absence of adequate remedy at law in damages
  - Party seeking enforcement must prove that he has performed or is ready and willing to perform the substance of his contract obligations
  - Contract must be unconditional
  - No bar to award of equitable remedy of specific performance. Relief is refused in case of undue influence, delay or acquiescence
  - Vendor must prove good title or the purchaser has accepted such title as vendor has
- Doctrine of part performance allows for **enforcement** of an oral contract of sale of an interest in land when the contract has been sufficiently acted upon
- **Basis**: If a contracting party is induced to alter position on faith of contract it would be fraud on such party to set up the defence of invalidity of contract

## Approaches to part performance

Two perspectives as to what constitutes to part performance:

1) Stringent approach requiring:

- acts relied upon must be **unequivocally**; and
- in their own referable to some agreement alleged **nature**: *Madison v Alderson* (HL) (non-payment of salary for years in return for grant of life estate; held insufficient evidence)

2) Liberal approach:

- an act constitute part performance if on the balance of probabilities they indicate that a contract of some kind existed: *Steadman v Steadman* (HL)

## Australian position

- Test in *Madison* represents the Australian position
- *Steadman*, however, not rejected in *Regent v Millet* (was not necessary to consider *Steadman* because acts met stricter test).

### Regent v Millet

- Agreement to transfer property to daughter and partner if they paid deposit and loan off. They took possession and made payments, sought an additional loan for renovations. Father refused to transfer title.
- Acts relied upon:
  - taking of possession;
  - repairs and renovations; and
  - making of mortgage payments
- Court found that doctrine of part performance applied
- The court applied stringent requirement test
- Court found that granting and taking of possession constitutes part performance
- Found it unnecessary to consider other acts

### **Types of acts constituting part performance:**

- Payment of purchase price;
- Depositing of title deeds; and
- Giving and taking of possession
- Combination of these acts (and not act per se) constitutes part performance

### **Part performance is established by showing:**

- that the acts of performance unequivocally relate to the agreement alleged; and
- that the act relied upon must:
  - have been done on the faith of the agreement; and
  - resulted in a change of position with respect to the subject matter of the contract such that the person would be unfairly prejudiced if the other party were to take advantage of the absence of any written evidence: *Madison v Alderson* (1883) (UK)
- **S 126** of the Instruments Act does not recognise part performance as an exception to the formality requirements
- **S 55(d)** of the PLA acknowledges part performance as an exception to formality requirements as set out in s 53 of the PLA.

## BOUNDARIES OF LAND OWNERSHIP

- Land may have artificial or natural boundaries
- Common law meaning of land is a three-dimensional space
- *Cuius est solum eius est usque ad coelum et ad inferos* rule: Ownership of land extends upwards indefinitely and downwards to the centre of the earth in the shape of an open-ended inverted pyramid
- Ownership rights can only be exercised within the specific dimensions of the land
- Boundary of land title is defined according to **survey lines** in Victoria
- If survey lines have been moved, a fence/wall erected and requirements of adverse possession have been met the erected fence/wall will be the boundary
- Owner of land does not own **minerals** in soil
- Ownership of (unsevered) gold and silver vest in Crown by royal prerogative: *Cadia Holdings Pty Ltd v NSW*
- In Victoria ownership of other (unsevered) minerals is vested in Crown. Mineral (Resources Development) Act 1990 s 9: "The Crown owns all minerals", except when:
  - a mineral exemption is current; or
  - minerals are separated from land in accordance with a statutory authorisation (licence or right) by an authorised person: **s 11**

## Re surface of land

- *Cuius est solum* rule
- Rights of owner above surface:
  - Trespass of air space?
    - Transient intrusion will not constitute trespass
    - Permanent intrusion constitutes trespass
    - Aviation laws
- Rights of owner to surface
  - Encroachments
- Rights of owner below the surface
  - Trespass
    - Excavations or tunnels
  - Statutes can limit ownership beyond a certain depth
  - In general, minerals belong to the Crown (in right of the State)

## 1) Water rights / boundaries

- If land does **not abut water**, it has **artificial boundaries which are fixed**
- If **land abuts water**, the **boundary is natural**
- A **natural boundary is not fixed** and may shift from time to time by natural forces
- Artificial boundaries are determined in accordance with reference to specific measurements in the certificate of title
- Physical Measurements: Boundary defined according to survey lines. If survey lines removed may establish boundary lines according to adverse possession (where proven)
- Own up to the heavens and down to hell: *cuius est solum maxim* **BUT** Crown reserves certain rights which include minerals and now – regulation of bore water.
  - Crown owns riverbed an access depends on legislation
  - Ownership of and entitlements to water is vested in the Crown

- Water rights are granted pursuant to licences
  - Range of factors to be taken into account when Minister grants a licence
  - Unauthorised taking of water constitutes civil liability (Vic)
  - Minister may suspend, revoke and cancel licences
  - Water Act 2007 (*Cth*): regulates the management of water in the Murray-Darling Basin
- **If measurements incorrect:** General law land will result in defective title. Torrens title land no indefeasibility for registered holder of land 'wrongly described' unless can prove are a bona fide purchaser for value.
  - Error in description of land in old title which vendor and purchaser are unaware will result in acquisition of defective title
  - If vendor is aware of defective title purchaser may set aside contract
  - If Torrens title land the registered proprietor will not acquire indefeasible title if land is incorrectly described
  - If land has been included by wrong description the proprietor cannot claim it (bfpw will be protected)
  - If error is due to incorrect survey the proprietor will acquire indefeasible title
  - Registrar may correct errors
  - Correction or entry of Registrar may not prejudice new rights

#### **LAND ACT 1958 (V), s 385(1)**

Crown property in bed and banks of certain watercourses

(1) If—

- (a) land is bounded in whole or in part by a watercourse; and
- (b) the land was alienated by the Crown before, or is so alienated on or after, the commencement of section 327 of the Water Act 1989 —

the bed and bank of the watercourse remain, and must be taken always to have remained, the property of the Crown despite the alienation of the land and despite the fact that the same person owned or owns, or holds or obtains a consolidated certificate of title for, the land adjacent to both banks (my underlining).

#### **WATER ACT 1989 (V), s7(1)**

Continuation of the Crown's rights to water

The Crown has the right to the use, flow and control of all water in a waterway and all groundwater

#### **Natural boundaries**

Specific rules have developed to determine the boundary line of natural boundaries:

##### **(a) Tidal water (land abuts sea-shore)**

- **Tidal Waters: High Water mark** is the boundary subject to public rights to fish and navigate.
- Boundary is the mean high water mark
  - Averaging out of annual tidal level reached by spring and neaps
- Unless the boundary is expressly set out upon grant
- Land beyond the high water mark (foreshore) belongs to the Crown:
  - Unless contrary intention was set out in certificate of title
  - Modification: WA straight line drawn as near as possible to the high water mark of all land fronting body of water: Land Act 1933 (WA) s 16(3)
- Territorial sea is regulated by state and territory laws
  - Subject to public's common law rights of navigation and fishing

- Giving an exhaustive list of common law rights of public to tidal waters and foreshore is not possible
- Rights of public may be abrogated/changed by legislation
- Native title may not abrogate a public law or international right of fishing or navigation
- If Native title is inconsistent with such right it becomes a non-recognition right which cannot be exercised (Akiba)
- Private grant in respect of the foreshore is possible
- If the median high water mark changes over time due to gradual and imperceptible change so does the boundary

**(b) Non-tidal water: centre of water/river (*ad medium filum aquae* rule) (unless abrogated by statute):**

- **Non-tidal Waters: Middle Line approach** – abrogated by statute in Vic to vest river bed in the Crown: Water Act 1989, s327(1). Riparian entitlements now also vested in the Crown
- Non-tidal river running through centre of adjoining land is presumed to be divided down the centre of river by adjoining landowners
- Presumption may be rebutted by proving Crown did not intend equal division
- Most Aus States have, however abrogated or modified rule:
  - Qld: rule completely abrogated: beds and banks of water courses and lakes are property of State (Qld Water Act 2000 s 21)
  - Vic: riverbed and bank of river remains property of Crown subject to the right of exercise of water rights by landowner.

**Alluvio et avulsio**

- It is possible for owner of land to acquire land through a gradual process of alluvion by action of the sea/river
- If the adding of land is rapid and perceptible (avulsio) land is not acquired: *Williams v Booth*
- Roman law definition of alluvio and avulsion:
- "That," says Gaius (Gaius, II.70,), "appears to be added to our land by alluvio, which a river adds to our land (*ager*) so gradually that we cannot estimate how much is added in each moment of time; or, as it is commonly expressed, it is that which is added so gradually as to escape observation. But if a river (at once) takes away a part of your land, and brings it to mine, this part still remains your property (*avulsio*)."

**Accretion and erosion**

- **Accretion/Avulsion:** Land with 'ambulatory borders' may acquire or lose land where there is erosion or accretion which is gradual and 'imperceptible' rather than sudden and dramatic: *Williams v Booth* CB 150
- *Alluvio et avulsio* take place in respect of tidal and non-tidal water
- Land can be acquired by *alluvio* but not *avulsio*
- Natural and imperceptible deposits by *alluvio* will pass in ownership to the adjoining owner
  - De minimis non curat lex
  - "Imperceptible" refers to slowness of additions to the soil (*Williams v Booth*)
  - Whether alluvio or avulsion has take place is a question of fact
- Not restricted to action of water: accretion by windblown sand is possible– *Southern Centre of Theosophy v South Australia* [1982] AC 706
- Rapid and perceptible accretion by *avulsio* or flood will not result in passing of ownership to adjoining owner

- Gradual and imperceptible loss of land by erosion to the sea will pass to the Crown; Rapid and swift loss of land to the sea will not result in passing of ownership to the Crown
- Even upon an assumption of permanent closure of the mouth of a lagoon cutting it off from the sea, accretion of body of water of the lagoon and soil covered by it does not take place because it amounts to sudden and considerable alluvion or dereliction (Williams v Booth)
- Application of the doctrine may be excluded or modified by grant

## **2) Fence boundaries**

- Fence usually upon boundary of land
- Upon purchase of land one must ensure that physical boundaries corresponds with legal boundaries set out in title
- No common law duty on adjoining owners to keep fence in reasonable condition
- Common law exceptions: (roaming livestock)
- Maintenance may be imposed by contract, covenant or easement

### Fences Act 1984 (Vic)

- Regulated by statute
- Adjoining landowners must construct or jointly contribute to construction of a fence which is sufficient for both occupiers
- In absence of agreement a court may determine liability
- If contribution is sought a notice in writing must be served upon neighbour setting out the relevant area and type of fencing necessary

## **3) Encroachment / Encroaching buildings upon land**

- Property rights only extend to physical boundaries of land
- Any encroaching property which is affixed to the land will be owned by the adjoining land owner pursuant to doctrine of fixtures
- If encroachment not affixed, adjoining owner may claim damages for intrusion. Encroachment includes land and airspace.
- Encroachment of surface, airspace or underground possible
- Encroaching buildings upon the land of another will vest in ownership in the other owner in terms of the doctrine of fixture.
- No compensation is available to encroaching owner
- Other (aggrieved) owner may apply for:
  - Removal
  - Compensation
  - Land transfer
  - Lease

## **Legislation**

- Qld (PLA, s 196) WA (PLA, s 123(1)) legislation entitles a person to apply for relief if he made a lasting improvement to another's land in genuine belief that the land belongs to him
- Court has power to:
  - issue an order conveying, transferring, leasing, and conferring any easement, right of privilege in any person over the whole or any part of the land which the improvement has been made
  - Issue and order requiring any person to remove the improvement from the land

- Issue an order for the payment of compensation in respect of any land or any improvement
- Issue an order that any person have or give possession of the land or improvement for such period and upon such terms and conditions as the court may specify
- Court has broad **discretion** and take following factors in account:
  - the extent and purpose of the encroachment
  - the knowledge of the encroaching owner
  - how the encroachment affects the value of the encroached land
  - loss and damage suffered; and
  - costs associated with the removal of the encroachment.
- Alternatively, an action may be brought by aggrieved owner (land encroached upon):
  - for trespass (impedes proprietary rights); or
  - nuisance (continuous, unlawful interference with use and enjoyment of land).

**a) Encroachment of airspace**

- Encroachment occurs via spatial interference (*cuius est solum* rule)
- Spatial interference may constitute an encroachment
- Legislation: Aviation laws
- Structural encroachment may constitute **trespass** entitling aggrieved owner to seek compensation (damage is not a necessary element of the tort)
- Continuing trespass
- Conduct of trespasser not selfish or unreasonable
- Injunction prohibiting further infringement
- Courts not empowered by statute to refuse injunction
- In public interest to prohibit infringements

## GENERAL LAW PRIORITY RULES

### Why do we need priority rules?

- Jurisdictional Fragmentation increases chance of conflict
- Must determine which interest is entitled to priority
- Priority dispute will arise where two or more interests in conflict, whether partial or direct, over one piece of land
- Priority only conferred to extent of conflict

### Different sources of priority rules

- Land Interests exist under common law, equity and statute – so do priority rules
- General Law rules: common law and equity apply as base rules and TLA superimposed on this
- Torrens title priority rules are superimposed over general law rules where land interest is registered under Torrens system

Priority disputes over old title land are governed by two sets of **principles**:

- (a) **Principles (priority rules)** have developed in **common law and equity** to resolve disputes between:
- Two legal interests (*prior in tempore potior in iure*)
  - Prior legal interest and subsequent equitable interest (fraud principle)
  - Earlier equitable interest and subsequent legal interest (*bona fide purchaser for value without notice*)
  - Two equitable interests (merit and *prior in tempore*)
  - A mere equity and an equitable interest (higher equitable interest will prevail over a mere equity)
- (b) The **statutory scheme of registration** of the instruments that has led to creation of particular interests:
- Statutory scheme operates as a gloss on the former rules

### 1) Pure legal interests / Legal and legal interests

- Legal interest in land by deed or per exemption
- Torrens legal interest – registered **s 40(2)** TLA
- Old title legal interest – chain of title representing all transactions over that land since first issued by Crown
  
- Two non-identical interest may be created in land
  - (Example, an easement followed by mortgage: earlier legal easement has priority over a later legal mortgage)
  - (Example, a life estate and remainder interest is granted)
- Dispute between two legal interests is determined according to the priority of time by which they are created: ***prior in tempore potior in iure*** (*Moffet v Dillon*). Interests operate chronologically
- It is, however, not possible to confer two **identical legal estates** to persons over a single piece of land
- Once a legal estate has been issued another identical estate can not be granted: the grantor has no estate to give
- When a person attempts to convey a legal estate which he or she no longer has, the ***nemo dat quod not habet*** principle applies
- Literally, it means no person can give what he or she does not have
- As a result of the *nemo dat quod not habet principle* **priority** is given to the legal interest created first in time
- *Nemo dat quod not habet* is strictly speaking a principle of **invalidity** rather than priority