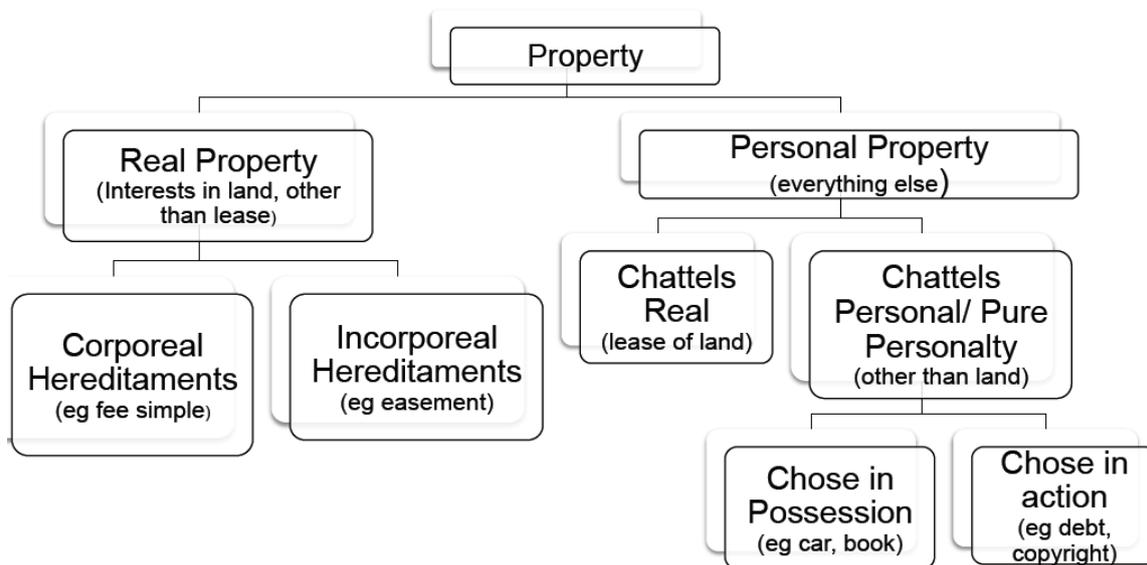


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SCAFFOLD



TOPIC 1 INTRODUCTION TO REAL PROPERTY

1. Definition

• Property:

- Right with respect to the real/imaginary thing
- One's ownership of the 'thing' is the property (house is the 'subject matter')
- Legal relationship that exists between a person and a resource
- Legal relationship/bundle of rights with respect to object (not object itself)

• Essential characteristic of property right/rights usually associated with property:

- A *property right* always relates to, and depends upon the existence of, some particular thing
- A *property right* is enforceable not just against specific persons, but, also against wide range of persons (whole world) (rights 'in rem')
- *Right to*
 - Value of the property
 - Excludability: The holder of a property right is able to exclude others from making use of the thing subject to that right
 - Alienate/transfer: Property rights can be sold or given away to others

Yanner v Eaton

Facts:

- Y (Aboriginal man), used a traditional harpoon to hunt crocodiles
- s 7(1) Fauna Act, which provided that 'all fauna is property of Crown (right of Qld)' → argued that native title was extinguished due to intervening legislation

Held: crown property ≠ absolute ownership, only limited regulatory powers → native title not extinguished

- Property, quoting Prof Gray, is **not 'itself a thing or resource'** but, rather, is **'a legally endorsed concentration of power over things and resources'**.
- Crown given property rights, but rights did not amount to absolute ownership ('property' in Fauna Act ≠ absolute ownership)
- The statutory label of 'property' was 'a fiction expressive in **legal shorthand** of the importance to its people that a **State have power to preserve and regulate the exploitation of an important resource'**
- Taken as a whole, the effect of Fauna Act was to **establish a regime forbidding the taking/keeping of fauna except pursuant to licence granted by/under the Act**

Principle:

- **Property** usually involves the right to use, enjoy, exclude, alienate etc. but, **sometimes** law gives a **more expansive meaning** to property
 - **The meaning of property must be read in the context of the legislation**
- 'Property' does **not** have a **single, fixed meaning** (it is flexible) → Usually, it is treated as a **bundle of rights** → **description of a legal relationship with a thing**

King v David Allen

Facts:

- K owned land → K and D contracted for D to put posters up → K leased land to L (3rd party) → D attempts to put posters up but L refused → D sued K for breach of contract
- K argued that k with D created an interest in land that was enforceable against L and thus K was not in breach of k (failed)

Held:

- The agreement between K and D **created a licence** (rights in k only – **enforceable against K but not against 3rd parties**); it did not create an interest in the land (Lord Buckmaster; Earl Loreburn)
 - Personal rights → enforceable against specific persons
 - Proprietary rights → enforceable against 3rd parties/the world
- There is a k between K and D which creates nothing but a personal obligation. It is a licence given for good and valuable consideration and to endure for a certain time
- Agreement contained an **implied term that K would not disable himself from carrying out his contractual obligation**. K breached that condition and was liable in damages to D
- Not a:
 - Lease: since D did not have exclusive rights to the land for a period of time
 - Easement: Although D has the right to go onto the land of the theatre and do something, the benefit of that obligation is personal to D and does not benefit any other land owned by D

2. Tenures, Estates and Native Title

- **Doctrine of Tenure**: the **land is ultimately** owned by the **Crown**, with people holding their interests in the land directly/indirectly from the Crown
 - **Person owns their house as a tenant of the Crown**
 - A number of persons can have a proprietary interest in the land at same time
- **Doctrine of Estates**: a **person** should be able to have an **interest in land** giving rise to a **present right to possession**, while at the same time **other persons** would also have **interests in the land** giving them **future rights to possession**; **WA v Ward (North J)**
 - The doctrine of estates allowed for the creation of **successive interests, present and future**, in the **same piece of land**
 - ie, a in a leasehold the tenant has a present right to possession whilst the landlord has a reversionary or future right to possession
 - The **owner of land owns an estate in the land** → Under the rules of equity, the legal estate could be held upon trust for some other person/persons or for some purpose; **Mabo v Qld (No 2)**
- **Three types of estate**:
 - **1. Fee simple**: The fee simple is indefinite, allowing the holder to dispose of the estate inter vivos (while alive) or by testamentary disposition (in a will) – necessary since the doctrine of tenure prevents the holder of such an estate from being the absolute owner.
 - **2. Fee tail**: Only in South Australia – idea is to keep an estate within a particular branch of a family.
 - **3. Life estate**: either a) granted for the life of the grantee or; b) granted for the life of a person other than the grantee i.e. an estate *pur autre vie* – e.g. conveying the estate to another person in a will.
- **Doctrine of Tenure and Native Title**
 - To extinguish native title → grant of rights to use land for particular purposes (whether pastoral/mining/other), must be accompanied by the grant of a right to exclude any/everyone from the land

Mabo v Qld (No 2)

Acquisition of sovereignty does not extinguish pre-existing native title, but, sovereignty allows the Crown to with its executive power, independently of legislative power, extinguish native title

- The Crown was treated as having 'radical title' to all sovereign land – the power to prescribe how land is distributed in the sovereign's beneficial demesne.
- Deserted land (terra nullius) was an absolute beneficial title (an allodial title) as there is no other proprietor.
- But indigenous occupancy meant that the radical title which was acquired with sovereignty was *not* of itself the conferral of an 'absolute beneficial title to the occupied land'

Requirements for existence of native title

- Group/clan must have a connection with the land, that connection must have a particular significance, in accordance with the traditional laws, customs of group/clan
- However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared
- Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown
- *Merriam People asserted an exclusive right to occupy the Murray Islands and, as a community, held a proprietary interest in the Islands* → maintained identity and observed traditional customs

Extinguishment of native title

- Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory

- **Through Tenure:** Where Crown has **validly alienated land** by **granting an interest wholly/partially inconsistent** with a **continuing right to enjoy native title**, native title is **extinguished to extent of inconsistency**
 - Thus, native title has been **extinguished by grants of estates of freehold/of leases** but not necessarily by the grant of lesser interests (e.g. authorities to prospect for minerals)
- **Through exercise of plenary power:** *If Crown has validly, effectively appropriated land to itself and the appropriation is wholly/partially inconsistent with a continuing right to enjoy native title, native title is extinguished to extent of inconsistency*
 - Native title extinguished where land appropriated and used for roads, railways, post offices and other **permanent public works**
 - Native title **not extinguished** where the **appropriation and use is consistent** with the **continuing concurrent enjoyment of native title over the land** (e.g. land set aside as a national park)

Wik v Qld

Issue: Did pastoral leases granted under *Land Act 1962* (Qld) confer exclusive possession on grantees so as to completely extinguish the native titles of the Wik?

Held: NO

- The leases were creatures of statute, rather than the common law, and thus did not necessarily grant exclusive possession → on proper construction, did not confer exclusive possession
- For pastoral leases granted by statute to give rise to exclusive possession there must be clear language of extinguishment within the Act.
- Only if there is **inconsistency between the legal interests** of the **lessee** (as defined by the instrument of lease and the legislation under which it was granted) and the **native title** (as established by evidence), will such **native title**, to the extent of the inconsistency, be **extinguished**
 - Inconsistencies identified by identifying what native title rights in the system of rights and interests upon which the Wik rely are asserted in relation to the land contained in the pastoral leases
 - must 'focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right'

WA v Brown

Facts:

- Mineral lease authorised the joint venturers to extract iron ore and to build a town, roads and railway
- After cessation of mining, the town was closed and removed
- *Joint venturers argued that native title rights had been extinguished as they were inconsistent with their rights under the mineral leases. Inconsistency was alleged on 3 independent bases:*
 - 1. Mineral leases conferred right to exclusive possession;
 - 2. Grant of right to mine, construct infrastructure anywhere on the land was inconsistent with continuation of native title;
 - 3. Exercise of right to mine, construct infrastructure at particular sites inconsistent with continuation of native title

Held: *Rejected 3 arguments*

- Mineral leases did not confer a right to exclusive possession, but rather right to go onto land, to get, remove iron ore
- Any competition between the exercise of the two rights must be resolved in favour of the rights granted by statute
- But when the joint venturers cease to exercise their rights (or their rights come to an end) the native title rights and interests remain, unaffected

Principle: *Extinguishment occurs where the rights granted by Crown and native title rights are **inconsistent***

- *Need to identify and compare the two sets of rights:* It is an objective inquiry that looks to the legal nature and content of the rights at the time of their creation, and not how the rights are subsequently exercised
- **Rights are inconsistent where the existence of one necessarily implies the non-existence of the other**
 - No degrees of inconsistency – they are either inconsistent or they are not

3. Creation/Transfer of Proprietary Rights – REAL PROPERTY

1. Essential/substantive requirements: What package of rights has the grantor/transferor intended to create in the grantee/transferee?

- Right must fall within below a proprietary interest → intention to grant a
 - **Fee simple:** Exclusive possession 'forever'
 - Only comes to end if current holder dies w/o will/next of kin
 - Gives exclusive possession, doctrine of tenure, right to transfer/alienate *inter vivos* (s 36 *Imperial Acts Application Act*)

- **Life estate:** Exclusive possession for the duration of measuring life
 - Can be alienated *inter vivos* (but still only for duration of original grantee's life)
 - Can be passed in will if it is a *pur autre vie*
 -
- **Lease:** Exclusive possession for a certain term
- **Easement:** Right, accommodating dominant land to use/restrain use of, servient land in a manner not inconsistent with servient owner's continuing ownership (e.g. no easement in *King v David Allen*)
 - Two parcels of land – dominant land which has benefit of easement, and the servient land which is burdened by the easement. Do not need to be adjacent, but need to be in reasonable proximity. Easement must benefit dominant land (not just owner)
 - **Two types:** positive and negative. Law more prepared for positive easements to exist in novel situations. Reluctant to extend negative (only four types)
 - **Positive:** dominant owner can do certain activities on servient land (e.g. land-locked, have right of way to road through servient land). Cannot enjoy dominant land without
- **Profit a pendre:** Right to enter servient land, remove soil/natural produce
 - Allows person to enter servient land and remove anything naturally occurring/growing on land (e.g. berries, land etc.)
 - Anything the profit of human industry cannot be a profit because taking something other than occurring naturally
- **Chattel ownership:** Exclusive possession 'forever'
- **Bailment of chattel:** Deliver exclusive possession with obligation to redeliver

2. Formal Requirements:

LEGAL INTERESTS

• Old System Title

- **Conveyancing Act s23B**
 - (1) No assurances of land shall be valid to pass an interest at law unless made by deed
 - only way to transfer legal interest in land is by deed → cannot be oral/normal document
 - (2) This section does not apply to: (d) Lease/tenancy/other assurances not require by law to be made in writing
 - (3) This section does not apply to land (torrens title land) under provisions of Real Property Act 1900 → i.e. only applies to old system land
- **What is a deed?** Mix of common law and statutory requirement
 - Must be **written in paper, parchment or vellum**;
 - **Signed, sealed and attested by one witness who is not a party**; *Conveyancing Act s 38(1)*
 - **Sealed** (deemed sealed if it is expressed as an indenture or a deed or if it says it is sealed if signed and attested; *Conveyancing Act s 38(3)*)
 - **Delivered** (delivered when it is intended to become operative)
 - Indenting is no longer necessary; *Conveyancing Act s 38(2)*
- **Exception to s23B → leases + tenancies; s23D**
 - (1) All interest in land created by parol or not put in writing/signed(no deed) shall have the force and effect of interests at will only
 - Tenancy at will, also known as estate at will, is a property tenure that can be terminated at any time by either the tenant or the owner (landlord). → confirms s23B(1)
 - (2) Confined ability to create interests → legal leases can be created even orally/written document not in form of deed provided the lease satisfies **3 requirements**:
 - 1. Best rent reasonably available: must be a **market rent**
 - 2. Lease takes effect in possession: must give lessee immediate right to possession (**lessee immediately entitled to possession**)
 - 3. **Term of lease + any option must not exceed 3 years**

• Torrens Title

- Involves title by registration, not registration of title; *Breskvar v Wall (Barwick CJ)*
- It is being **recorded in the register that gives a person their interest**, not taking a valid transfer from the previous holder of the registered interest
- **s 41 Real Property Act 1900 (NSW)**
 - No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate/interest in any land under the provisions of this Act
 - But, upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass
- But, unregistered interests can exist (usually treated as equitable interests); *Barry v Heider*

- **Indefeasibility: *Frazer v Walker*, s42(1) Real Property Act**
 - A registered interest is indefeasible (not subject to adverse claims) free of any interests that are not registered unless exception applies, such as where holder is personally guilty of fraud
- **Notice Provision: s 43(1) Real Property Act**
 - Once a person completes a transfer from the real proprietor, he is free from any trust or unregistered interests, **even if he had notice of that interest**
 - Does not apply in the case of fraud
- **Fraud**
 - **Doctrine of immediate indefeasibility:** a purchaser registered through fraud, error, or by means of a void instrument nevertheless grants the purchaser indefeasible title immediately (as long as the purchaser didn't cause the fraud); s45 RPA
 - **If the purchaser caused the fraud; *Breskvar v Wall***
 - Registration still creates title however the difference is that the title is subject to the rights on the defrauded vendor (**ie, the title is defeasible**).
 - The fraud creates an **equitable interest on the part of the defrauded vendor**, which is not barred by the legislation because there is an exception made for fraud. **The vendor can thus cancel the registration of the purchaser.**
 - However, once the purchaser transfers his title to a third party (bona fide and good consideration), it becomes a question of priorities.
 - If the third party completes registration entirely, then he obtains indefeasible title.
 - **s43A RPA:** where there is a competition between a person holding an earlier equitable interest (defrauded vendor), and a person who has obtained a later equitable (second purchaser) interest **through a dealing with the registered proprietor** (ie, whose interest is registrable, but has not yet been registered). For the purposes of such a scenario, the equitable interest of the person dealing with the registered proprietor is treated as a **legal interest**.

EQUITABLE INTERESTS – Old System/Torrens Title

- **Contracts to create/transfer interest in land; *Walsh v Lonsdale*, *Lysaught v Edwards***
 - **1.** If there is an **enforceable k** to **grant/transfer an interest in land** (whether it be a fee simple/life estate/mortgage/profit a pendre); and
 - **a. Conveyancing Act s54A**
 - (1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the **agreement** upon which such action or proceedings is brought, **or some memorandum or note thereof, is in writing, and signed by the party** to be charged or by some other person thereunto lawfully authorised by the party to be charged
 - **Note:** can be just evidence of the agreement signed by party
 - i.e. if A sues B → B must sign or if B sues A → A must sign
 - (2) This section ... does not affect the law relating to part performance (K is enforceable if there has been sufficient part performance by promise)
 - **Note:** oral K can be enforceable if there are sufficient acts of part performance
 - (3) This section applies ... to land under the provisions of the Real Property Act 1900 → Torrens Title Land
 - **b. Conveyancing Act s23C**
 - (1)(a) No interest in land can be created/disposed of except **by writing signed**
 - **Allows creation of equitable interest in Old System land** by a written and signed instrument (not in the form of a deed) **even without consideration**
 - **Does not** allow the creation of an **equitable interest in Torrens title land** by an unregistered written and signed instrument (even in registrable form) **without** the provision of consideration; *Real Property Act 1900 (NSW), s 41; *Corin v Patton**
 - **2. Remedy of specific performance available;** then
 - **3. The interest contracted for is granted/transferred in equity** even though the interest has not yet arisen in law because the legal formalities have not been complied with (equity regards as done that which ought to be done)

Ciaglia v Ciaglia

Facts:

- This transaction was in substance an old system mortgage, where legal title had been transferred (to

PAS) with a proviso for re-conveyance (by PAS) on repayment

- *Issue re interrelationship between ss 23C, 54A (whether one/other/both applied)*

Held: Followed *Khoury v Khouri*

- Both ss 54A, 23C apply where there is an agreement which gives rise to immediate interest
 - For example, I might agree to give a mortgage in the future (executor contract to which s 54A applies). By contract, I could agree with you now that you hold a mortgage over my land – not in the future, but now. This is an executed agreement – and from this case, both s 54A and 23C would apply.
- Obstacle in s 23C(1)(a) overcome → *Statute (here it is s 23C(1)) cannot be used as an instrument of fraud (Last v Rosenfeld; Theodore v Mistford)*
 - P had **transferred property** to PAS pursuant to a **common understanding** that it was by **mortgage**,
 - It would be **fraud** for **PAS** and his **estate** (D) to **deny** that he had **received** the property as **mortgagee** when it **had been conveyed to him on that basis**
 - Given that it was a **mortgage** and **not** an **absolute transfer**, on **repayment** by P, **PAS holds P's interest as constructive trustee** for the P and constructive trusts **need not be in writing** (s 23C(2))
- Obstacle in s 54A(1) overcome (in two way) [Possibility that D's formal defence constituted a note or memorandum signed by her as party to be charged in the action]
 - [1] **Statute (being s 54A) cannot be used as an instrument of fraud**
 - [2] **Sufficient acts of part performance** (*signing of transfer, receipt of loan advance by P, repayment of loan and interest, P's improvements of property with PAS's knowledge after loan repaid*)
 - Payment of money (especially in mortgage transactions) can be relevant, even though not itself sufficient
 - Those payments made by 3rd parties on behalf of P can be acts of part performance due to D's admission that loan had been repaid

Lysaght v Edwards → Fee Simple

Purchaser has an equitable fee simple in the land

- When you have a valid k for sale, the **vendor becomes, in equity**,
 - A **trustee** for the **purchaser** of the **estate sold**, and
 - The **beneficial ownership passes** to the **purchaser**,
 - The **vendor** having the **right to purchase-money**, a charge/**lien** on the **estate** for the **security** of that **purchase-money** and a **right to retain possession** of the **estate until the purchase-money is paid**

Walsh v Lonsdale → Lease

Facts:

- Agreement to grant a lease for 7 years
- No legal lease as no actual formal lease (deed) was entered into

Held:

- Creates requirement that specific performance must be available
- Equity maxim comes into operation only when k is one for which equity would grant specific performance

Where there is an enforceable k [written – s 54A(1), part performance – s 54A(2)], and where equity would decree specific performance, an interest arises in equity, regards the lease as having been granted and is treated as if it were a legal lease (equitable interest arises)

4. Oral Contracts & Part Performance

For the doctrine of part performance to apply, three matters need to be established; *McBride v Sandland*

- **1.** The acts done must be **done by the party** to the contract seeking to **rely on the doctrine**.
- **2.** It must be shown that the **acts done by the plaintiff were permitted**, but **not necessarily required**, to be done by the terms of the oral agreement: *Regent v Millett (1976)*
- **3.** The acts done must be **unequivocally and in their own nature referable** to a contract of the **general nature of the alleged oral agreement**
 - Court looks at the acts done and then judges to see if there is an implication of an agreement of the type alleged NOT see if acts are consistent with oral agreement; *McBride v Sandland*
 - *Maddison v Alderson*
 - **Not enough** that **act** done should be a condition of/good consideration for, a k
 - '...an act is such a part execution as to **change their relative positions as to the subject matter of the contract**' i.e. act which relates to the 'possession, use, enjoyment or tenure of the land itself; *Maddison*
 - **Payment of money alone is not sufficient** act of part performance since it is equivocal – doesn't necessarily amount to evidence for the creation of the contract; *Maddison*

Cooney v Burns

Facts:

- Sale of lease of hotel → agent not authorized
- Relied on *purported acts of part performance*
 - Took inventory of the contents of the hotel
 - C handing lease doc to B's solicitor for preparation of transfer
 - B incurred expense in preparing the assignment of lease and applying for transfer of hotel licence

Held: Everything is done in preparation for K, NOT because of K

- Acts did not *relate to the possession/use/improvement of land*
 - **Cannot be an act merely preparatory/ancillary** to
 - Acts done not required to be done under agreement
 - Acts done were in preparation for the performance of the k (step before performance) being the ordinary production for inspection of title
- **Act did not change the relative position of the parties in respect of the land (acts do not go to the title/possession/use of the land)**

Regent v Millett (1976)

Facts:

- Oral contract for parents to transfer house when daughter (M) paid off parents' (R) mortgage. Daughter goes into possession and the payments were made. R reneges on his bargain.

Held:

- The quintessential act of part performance: **going into possession with consent of the owner, pursuant (but not even required) by the contract = sufficient act of part performance.**

Theodore v Mistford – NOT a part performance case

Facts:

- Seller required buyer to guarantee money not yet paid by his company. The company is indebted to the vendor, but Glen Theodore gave a guarantee – a promise by a third party that allows the debtor to sue them: a personal obligation. If he is bankrupt, the vendor can't get anything – so often they require a mortgage.
- Glen got his mother to mortgage her land to secure his obligations. She gave the certificate of title to the vendors lawyers.

Held:

- **Part performance was inapplicable because Mrs T had made no agreement/not contracted to provide a formal mortgage**
- But can such an equitable mortgage arise despite this obstacle (not written & signed) to establish an equitable mortgage? **It would be fraud for her to deny that she granted a mortgage.**
- **An equitable interest can arise through the principle that equity will not permit a statute to be an instrument of fraud (Last v Rosenfeld)**
 - A person who has **purported to create an interest in land cannot rely on the Statute of Frauds to argue that an interest has not been created because of an absence of writing, if to make that claim, would be fraudulent/dishonest**
 - Requires a **primary, valid transaction entered into on the basis of a secondary transaction** – here, that transaction was only entered into on the basis that Mrs Theodore was granting an equitable mortgage.
 - It would be fraudulent/dishonest for Mrs T to say that the absence of writing on her part means that no enforceable interest has been created, because, she knew that the vendor completed the sale of k by selling the business to G's company, on the assumption that it had an equitable mortgage from Mrs T. Thus, she now cannot deny that an equitable mortgage has been created

5. Fixtures: Look at K FIRST → THEN LAW OF FIXTURES – PERSONAL PROPERTY

- A fixture is a chose in possession (chattel) that has been **attached/is resting on land** in such away that it has **lost its legal identity as a separate object**, and has become a **part of the land**
- **1. Initial presumption (determines burden of proof):**
 - a. *Object resting by its own weight only, presumed to be a chattel*
 - Burden is on party asserting that it is a fixture to show that it is so
 - b. *Object attached to land in some way, presumed to be a fixture*
 - Burden of proof is party asserting that it is a chattel to show that it is so

Belgrave Nominees v Barlin-Scott Airconditioning (Kaye J)

- Even **slight fixing** to the land is **sufficient** to raise the **presumption** that a chattel is a **fixture** (but, for only slight fixing, this presumption is weak)
- Air-conditioning chillers, otherwise resting by own weight on platforms on roof of building, were connected to water pipes by means of four bolts and nuts: indirect and slight connection with building,

NOTES

LAW2012 – INTRO TO PROPERTY AND COMMERCIAL LAW

When dealing with property rights, there are three basic questions to ask:

1. What sort of right is it?
2. How was it created?
3. What priority does it have?

Important things:

<p><i>Creation of proprietary interests</i></p> <p>[1] Essential/substantive requirements</p> <ul style="list-style-type: none"> • What bundle of rights does grantor seek to invest in grantee? • Is this something recognised by law? • Based on grantor's intention <p>[2] Formal requirements</p> <ul style="list-style-type: none"> • Does the law require intention to be manifested in particular way? <ul style="list-style-type: none"> ○ In document (e.g. deed)? ○ Granted orally? ○ Are specific words needed? 	<p><i>Distinguish</i></p> <ul style="list-style-type: none"> • Legal interests • Equitable interests 	<p><i>Concept of possession</i></p> <ul style="list-style-type: none"> • Physical control • Intention to control
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Definitions of property:

Property	Rights which people have to things (rather than 'things' themselves)
Property right	A right to a 'thing' which can be enforced generally against other members of society (and not just against specific persons)
Assignable rights	<ul style="list-style-type: none"> • <i>Property means any right that can be transferred from one to another</i> • The distinction between personal rights and property rights is based on their enforceability
Rights in rem	<p>Depends upon continued existence of the 'thing' to which right relates</p> <ul style="list-style-type: none"> • Rights <i>in rem</i> vs rights <i>in personam</i> – rights <i>in rem</i> are dependent on the existence of particular things; rights <i>in personam</i> instead correspond to a person's obligation to fulfill that right. Property rights are rights <i>in rem</i>.
Legal fee simple	<p><i>An interest in a freehold estate which is potentially of infinite duration</i></p> <ul style="list-style-type: none"> • Only comes to end if current holder dies w/o will/next of kin • Gives exclusive possession, doctrine of tenure, right to transfer/alienate <i>inter vivos</i> (s 36 Imperial Acts Application Act)
Legal life estate	<p><i>Freehold estate and exclusive possession for duration of uncertain period, being the duration of the measuring life (usually life of grantee/duration of 3rd party's life)</i></p> <ul style="list-style-type: none"> • Can be alienated <i>inter vivos</i> (but still only for duration of original grantee's life) • Can be passed in will if it is a <i>pur autre vie</i> • <i>Historically</i>: fee tail, automatic descent to heirs of dedicated class
Legal remainder	Right now to enjoy land in the future; vested interest
Legal contingent remainder	<p><i>Contingent upon a certain event happening (death of another does not count as that will happen anyway) that stands in the way of the right</i></p> <ul style="list-style-type: none"> • e.g. 'to A for life, then to B when B graduates from USYD law' • Passes within 80 years if event contingent does not happen • If contingency never occurs, it goes back to the person who granted the interest • e.g. A dies without B graduating within 80 year period, goes back to original owner
Seisin	<ul style="list-style-type: none"> • Possession of land pursuant to a freehold interest; overtime action in ejectment – easier than real actions • If have fee simple and lease land to X, still have seisin
'Old system' mortgage	<ul style="list-style-type: none"> • Mortgagor grants legal fee simple in writing by deed to mortgagee (s 23B); mortgagor retains contractual right • Mortgagor retains equitable interest
'Torrens' mortgage	<ul style="list-style-type: none"> • System of land ownership from 1860s, whereby legal title is recognised through its registration • s 52(1) RPA – torrens mortgage only takes effect by security

Easement	<ul style="list-style-type: none"> Two parcels of land – dominant land which has benefit of easement, and the servient land which is burdened by the easement. Do not need to be adjacent, but need to be in reasonable proximity. Easement must benefit dominant land (not just owner) Two types: positive and negative. Law more prepared for positive easements to exist in novel situations. Reluctant to extend negative (only four types) Positive: dominant owner can do certain activities on servient land (e.g. land-locked, have right of way to road through servient land). Cannot enjoy dominant land without
Profit a prendre	<ul style="list-style-type: none"> Allows person to enter servient land and remove anything naturally occurring/growing on land (e.g. berries, land etc.) Anything the profit of human industry cannot be a profit because taking something other than occurring naturally

TOPIC 1 – THE CONCEPT AND FUNCTION OF ‘PROPERTY’ AND REAL PROPERTY

1. Introduction to General Property Concepts

- Property:**
 - Right with respect to the real/imaginary thing
 - One’s ownership of the ‘thing’ is the property (house is the ‘subject matter’)
 - Legal relationship that exists between a person and a resource
 - Legal relationship/bundle of rights with respect to object (not object itself)
- Because property is a right (and not a thing), it is a relationship between people**
 - Ability to compel the action/reaction of others
 - If person has a right, others may have a duty to comply with the person’s right
 - Owner has a negative right to stop others from interfering with their enjoyment of the property
- Difference between contractual and proprietary rights (King v David Allen):**

	Contractual rights	Property rights
Sphere of enforceability (who can enforce right/against whom can right be enforced against?)	<i>Narrow</i> <ul style="list-style-type: none"> Parties of the k against other party (privity doctrine) Promisee/promisor 	<i>Broader</i> <ul style="list-style-type: none"> Rights enforceable against entire world No doctrine of privity as it relates to property generally (rights ‘in rem’)
Potential content of the right	<i>Infinite number of possible contractual rights</i> <ul style="list-style-type: none"> Governed by the terms of the k Parties can k about anything they wish 	<i>Closed number</i> <ul style="list-style-type: none"> Limited no. of proprietary rights which exist in CL (numerus clausus) Come in a particular form (as enforceable against all thus unfair to expect people to comply with novel forms of proprietary rights)

- But → principles of equity can bridge divide btw contractual, proprietary rights:**
 - Equity undermines divide by transmuted purely k rights into property rights
 - If k is one for which equity would grant specific performance, equity regards k (e.g. k to grant an interest in property) as having been performed
 - Lysaght v Edwards; Walsh v Lonsdale
- Essential characteristic of property right/rights usually associated with property:
 - A property right always* relates to, and depends upon the existence of, some particular thing
 - A property right is enforceable not just against specific persons*, but, also against wide range of persons (whole world)
 - Right to*
 - Value:
 - Excludability: The holder of a property right is able to exclude others from making use of the thing subject to that right
 - Alienate/transfer: Property rights can be sold or given away to others
- Economic justification for property:**
 - Efficient allocation of resources (measured by WTP) and so maximise total wealth of society
 - Right to use, exclude provide incentive to put resources to most productive use
 - Right to alienate allows resources to move to more highly valued uses through mutually beneficial exchange

- However, property rights can vary from context to context, depending upon the ends we want property to serve

- **Variable meaning of property**

Yanner v Eaton

Facts:

- Y (Aboriginal man), used a traditional harpoon to hunt crocodiles
- Crocodiles killed, Y shared meat with other members of his clan
- Y charged with taking croc w/o licence contrary *Fauna Act* (Qld)
- Under *Native Title Act 1993* (Cth), Y would not have been guilty of the offence, if he were exercising native title rights (gives indigenous people exercising rights the right to game even take without license otherwise required by state law)
- E (police officer who laid the charge and Cth and various states intervening in the action), argued that any native title rights Y would otherwise have had been extinguished by s 7(1) *Fauna Act*, which provided that 'all fauna is property of Crown (right of Qld)'

Issue: What interest in fauna was vested in the Crown when the *Fauna Act* provided that some fauna was 'the property of the Crown and under the control of the Fauna Authority' and under its 'full beneficial, or absolute, ownership'?

Held:

- If the Crown's property meant absolute ownership, then any native title rights would have been extinguished but, by majority, HCA held this was not the effect of s 7(1)
- Property, quoting Prof Gray, is not 'itself a thing or resource' but, rather, is 'a legally endorsed concentration of power over things and resources'.
- Crown given property rights, but rights did not amount to absolute ownership ('property' in *Fauna Act* ≠ absolute ownership)
 - *Fauna Act* only granted Crown limited regulatory powers
 - Rather, the property of the Crown was such that they could co-exist with Y's native title rights

Gleeson CJ, Gaudron, Kirby, Hayne JJ:

- Four problems:
 - i) what fauna is owned (across borders? *Fauna* at any time in Qld?);
 - ii) the subject matter – wild animals – remains outside the possession of humans (*Missouri v Holland* (1920) 252 US 416 at 434: 'Wild birds are not in the possession of anyone; and possession is the beginning of ownership');
 - iii) not equitable with property between an individual and a domestic animal (i.e. less than „full beneficial, or absolute, ownership“); and
 - iv) the purpose of why property in some fauna is vested in the Crown.
- The statutory label of 'property' was 'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource'
- Taken as a whole, the effect of *Fauna Act* was to establish a regime forbidding the taking/keeping of fauna except pursuant to licence granted by/under the Act

Gummow J:

- 'Property' is used in the sense in s 7(1) as an aggregate of legal relations between the Crown and fauna

Principle:

- **Property** usually involves the right to use, enjoy, exclude, alienate etc. but, **sometimes** law gives a **more expansive meaning** to property
- 'Property' is often used to refer to something that belongs to another but, in *Fauna Act*, as elsewhere in law, 'property' does not refer to a thing; it is a **description of a legal relationship with a thing**
- It refers to a degree of power that is recognised in law as power permissibly exercised over the thing
- 'Property' does **not** have a **single, fixed meaning** (it is flexible)
- Usually, it is treated as a **bundle of rights**
- 'Property' is a term that can be, and is, **applied to many different kinds of relationships with a subject matter**
 - Not monolithic notion of standard content and invariable intensity
 - Property rights differ from contexts to contexts
- 'Property' → comprehensive term so it can be used to describe all/any of very many different kinds of relationship between person, subject matter
 - To say that person A has property in item B invites the question what is the interest that A has in B?
 - The statement that A has property in B will usually provoke further questions of classification
 - Is the interest real/personal?
 - Is the item tangible/intangible?
 - Is the interest legal/equitable?

- **Statute vs common law property rights:**

King v David Allen

Facts:

- K owned land on which a theatre was to be erected
- K agreed with D that D would have the sole right to affix posters on the walls of the proposed theatre for 4 years for a yearly sum
- Subsequently, K leased the land to a 3rd party (L)
- Under the lease, L was obliged to erect a theatre, which it did → L did not refer to the agreement between K and D
- After theatre erected, D attempted to post bills on theatre wall, as contemplated by its agreement with K, but L refused to allow this
- D sued K for breach of k
- K argued that k with D created an interest in land that was enforceable against L and thus K was not in breach of k (failed)

Issue:

- Is a proprietary right really what he contracted for?
- Intention that these rights be enforceable against 3rd parties?

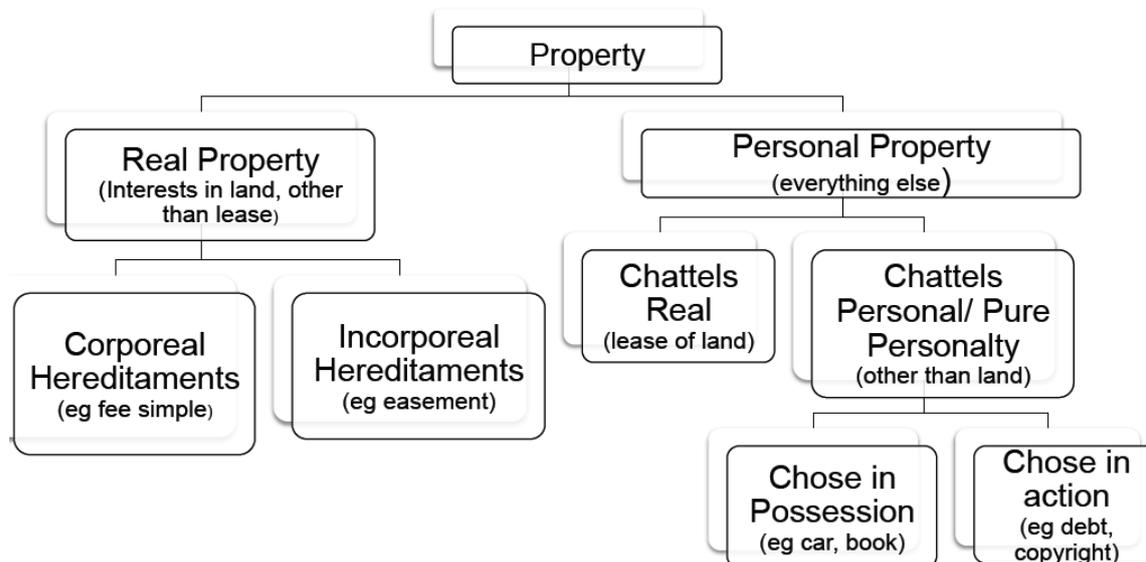
Held:

- The agreement between K and D created a licence (rights in k only – enforceable against K but not against 3rd parties); it did not create an interest in the land (Lord Buckmaster; Earl Loreburn)
- There is a k between K and D which creates nothing but a personal obligation. It is a licence given for good and valuable consideration and to endure for a certain time. It is unreasonable to attempt to construct the relationship of landlord and tenant/grantor and grantee of an easement out of such a transaction (Lord Buckmaster)
- Agreement contained an implied term that K would not disable himself from carrying out his contractual obligation. K breached that condition and was liable in damages to D (Earl Loreburn)
- Not a lease (lease gives right to exclusive possession for a period)
 - D had rights in relation to the land which lasted for a period of time, but, the rights were not exclusive
 - D did not have the ability to prevent the use of wall of theatre in any other way (only entitled to post ads on wall)
 - D did not have the right to exclude leasee (L) of the land from enjoying the theatre
- Not an easement
 - Although D has the right to go onto the land of the theatre and do something, the benefit of that obligation is personal to D,
 - It does not benefit any other land owned by D (cannot have an easement unless there is a dominant tenant)
- HoL construed agreement as containing a personal obligation that K would not do anything to prevent D from exercising/enjoying its rights,
 - K, by selling the land, had prejudiced the rights of D,
 - Thus, D could sue K in k
 - But, D could not sue L
 - Because, D was not a party to that k/3rd party and,
 - D had no proprietary interest in the land
 - Contractual right thus could only seek contractual remedies

Principle: License → confers personal rights and not proprietary rights

- Because, license delivers insufficient control over the land
- License = k for A to use B's land w/o committing trespass
- Personal rights → enforceable against specific persons
- Proprietary rights → enforceable against 3rd parties/the world
- But, an interest is not proprietary simply because it is enforceable against 3rd parties
- **No proprietary rights are created if the rights granted do not correspond to any proprietary rights recognised by CL**
 - Statute can create whatever forms of property it likes
 - But, only limited no. of property rights can be created under CL

- **Taxonomy of property interests:**



2. Tenures, Estates and Native Title

a. Doctrine of Tenure; *Mabo v Qld (No 2)* (Brennan J)

- Doctrine of tenure forms **part of Australian land law**
- As in the UK, the **land** is **ultimately** owned by the **Crown**, with people holding their interests in the land directly/indirectly from the Crown
- **Person owns their house as a tenant of the Crown**
 - A number of persons can have a proprietary interest in the land at same time

b. Doctrine of Estates

- *Mabo v Qld (No 2)* (Deane and Gaudron J)
 - The **owner of land owns an estate in the land**
 - The 'estate' which a subject held in land as tenant was itself property which was the subject of 'ownership' both in law and equity
 - The legal ownership of an estate in land was in the person/persons in whom the legal title was vested
 - Under the rules of equity, the legal estate could be held upon trust for some other person/persons or for some purpose
- *WA v Ward (North J)*
 - Whereas the doctrine of tenure recognised that a no. of persons could have a proprietary interest in one piece of land at same time, by relying on duration,
 - The doctrine of estates allowed for the creation of **successive interests, present and future**, in the **same piece of land**
 - In essence, the doctrine of estates reflected the idea that a **person** should be able to have an **interest in land** giving rise to a **present right to possession**, while at the same time **other persons** would also have **interests in the land** giving them **future rights to possession**
 - ie, a in a leasehold the tenant has a present right to possession whilst the landlord has a reversionary or future right to possession
- **Three types of estate:**
 - 1. Fee simple: The fee simple is indefinite, allowing the holder to dispose of the estate inter vivos (while alive) or by testamentary disposition (in a will) – necessary since the doctrine of tenure prevents the holder of such an estate from being the absolute owner.
 - 2. Fee tail: Only in South Australia – idea is to keep an estate within a particular branch of a family.
 - 3. Life estate: either a) granted for the life of the grantee or; b) granted for the life of a person other than the grantee i.e. an estate *pur autre vie* – e.g. conveying the estate to another person in a will.

c. Doctrine of Tenure and Native Title

Mabo v Qld (No 2)

Facts:

- Meriam people (MP) occupied the Murray Islands long before European contact

- 1879: Islands annexed to Colony of Queensland
- 1982: Ps sought declaration that MP held native title over Islands
- 1985: Qld enacts *Queensland Coast Islands Declaratory Act*
- 1985 (Q): following their annexation in 1879, the Murray Islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims
- *Mabo (No 1)*: HCA held that if native title existed at the time of the enactment of *Racial Discrimination Act 1975* (Cth), *Qld Act* invalid to the extent that it purported to extinguish that native title (inconsistency with *Cth Act*)

Issue:

- Did native title exist at time of enactment of *RDA*?
- Does Crown's radical title (being the paramount lord of the realm) have significance in the sense that it extinguishes native title?

Held: *Recognition of the radical title of the Crown is quite consistent with the recognition of native title to land,*

- The Crown was treated as having 'radical title' to all sovereign land – the power to prescribe how land is distributed in the sovereign's beneficial demesne.
- Deserted land (*terra nullius*) was an absolute beneficial title (an allodial title) as there is no other proprietor.
- But indigenous occupancy meant that the radical title which was acquired with sovereignty was *not* of itself the conferral of an 'absolute beneficial title to the occupied land'
- Unless the sovereign power is exercised in one/other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title
- It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty

Acquisition of sovereignty does not extinguish pre-existing native title, but, sovereignty allows the Crown to with its executive power, independently of legislative power, extinguish native title

Brennan J: *Concept of native title*

- It is sufficient to state that, in my opinion, CL of Australia rejects the notion that, when the Crown acquired sovereignty over the territory (which is now part of Australia), it thereby acquired the absolute beneficial ownership of the land therein, and
- Accepts the antecedent rights and interests in land possessed by the indigenous of the territory survived the change in sovereignty
- *Those antecedent rights and interests thus constitute a burden on the radical title of Crown*
 - Indigenous rights burden the radical title of the Crown but not the sovereignty of the Crown, does not inhibit Crown's right to exercise its sovereign power
- CL does not create native title, it merely recognises it
- HCA departing from English doctrine of tenure (which states the acquisition of sovereignty extinguished pre-existing native title)
- *Attributes of native title*
 - *Native title has its origin 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 by reference to those laws and customs
 - Native title allows land's traditional uses to be carried out
 - *Cannot be transferred, but can be surrendered to the Crown*
 - *May be proprietary/personal and usufructuary (use, enjoyment of the land but not to exclude others from the land) in nature and possessed by a community, a group/individual*
 - *Subject to being extinguished by an interest granted by the Crown*
- *Requirements for existence of native title*
 - *Where clan/group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan/group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan/group can be said to remain in existence*
 - Group/clan must have a connection with the land, that connection must have a particular significance, in accordance with the traditional laws, customs of group/clan
 - However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared
 - A native title which has ceased with abandoning of laws, customs based on tradition cannot be revived for contemporary recognition
 - Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown
 - *MP asserted an exclusive right to occupy the Murray Islands and, as a community, held a proprietary interest in the Islands*

- They have maintained their identity as a people and they observe customs which are traditionally based
- The Murray Islands clearly remain their home country
- Extinguishment of native title
 - Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory
 - Thus, on a **change of sovereignty**, the **rights and interests in land** that may have been **indefeasible** under **old regime** become **liable to extinction** by **exercise of new sovereign power**
 - The sovereign power may/may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power
- Extinguishment of native title through doctrine of tenure
 - Where Crown has **validly alienated land** by **granting an interest wholly/partially inconsistent** with a **continuing right to enjoy native title**, native title is **extinguished to extent of inconsistency**
 - Thus, native title has been extinguished by grants of estates of freehold/of leases but not necessarily by the grant of lesser interests (e.g. authorities to prospect for minerals)
- Extinguishment of native title through exercise of plenary power
 - **If Crown has validly, effectively appropriated land to itself and the appropriation is wholly/partially inconsistent with a continuing right to enjoy native title, native title is extinguished to extent of inconsistency**
 - Native title extinguished where land appropriated and used for roads, railways, post offices and other **permanent public works**
 - Native title **not extinguished** where the **appropriation and use is consistent** with the **continuing concurrent enjoyment of native title over the land** (e.g. land set aside as a national park)

Wik v Qld

Issue: Did pastoral leases granted under *Land Act 1962* (Qld) confer exclusive possession on grantees so as to completely extinguish the native titles of the Wik and Thayorre peoples to their traditional lands on Western Cape?

Held: **No (majority)**

- The leases were creatures of statute, rather than the common law, and thus did not necessarily grant exclusive possession
- Construction of the terms of the specific grants and the statute which authorised them leads to conclusion that the leases did not confer exclusive possession (unlike a common law lease)
- Contrast these Qld leases with pastoral leases granted in NSW and WA, which HCA in *Wilson v Anderson* and *WA v Ward* found to have conferred a right confer exclusive possession

Kirby J:

- Pastoral leases give rise to statutory interests in land which are *sui generis*. Being creatures of Australian statutes, their character and incidents must be derived from the statute
- Neither Act in question here expressly extinguishes native title
- To do so, very clear statutory language would, by conventional theory, be required
- When the Acts are examined, clear language of extinguishment is simply missing (**no clear language of extinguishment in Acts**)
- In contrast, there are several indications which support the contention that interest in land which was granted to pastoralist was a limited one: for grazing purposes only, as the leases stated
- Such an interest could, in law, be exercised and enjoyed to the full without necessarily extinguishing native title interests
- The extent to which the two interests could operate together is a matter for further evidence and legal analysis
- Only if there is **inconsistency between the legal interests** of the **lessee** (as defined by the instrument of lease and the legislation under which it was granted) and the **native title** (as established by evidence), will such **native title**, to the extent of the inconsistency, be **extinguished**

Toohy J:

- Inconsistency can only be determined, in the present context, by identifying what native title rights in the system of rights and interests upon which the appellants rely are asserted in relation to the land contained in the pastoral leases
- This cannot be done by some general statement; it must 'focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right'
- Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail

Gummow J:

- In none of these instances was there clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title which might have existed
- It does not appear that the statutory interests could be enjoyed only with the full abrogation of any such native title

WA v Brown

Facts:

- Parties agreed, absent issue of extinguishment, that Ngarla People held native title over traditional lands in the Pilbara region of WA
- Native title rights included non-exclusive rights to access and camp on land; to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land; to engage in ritual and ceremony on the land; and to care for, maintain and protect sites of particular significance
- Mineral lease authorised the joint venturers to extract iron ore and to build a town, roads and railway
- Town of over 200 houses was constructed, together with roads, shopping centre, school, clubs, sporting facilities, medical centre, police station etc. covered 1/3 of area subject to one of the leases
- After cessation of mining, the town was closed and removed
- *Joint venturers argued that native title rights had been extinguished as they were inconsistent with their rights under the mineral leases. Inconsistency was alleged on 3 independent bases:*
 - 1. Mineral leases conferred right to exclusive possession;
 - 2. Grant of right to mine, construct infrastructure anywhere on the land was inconsistent with continuation of native title;
 - 3. Exercise of right to mine, construct infrastructure at particular sites inconsistent with continuation of native title

Issue: Whether native title had been extinguished by grant in 1966 and 1974 of two mineral leases to joint venturers (prior to enactment of *RDA* (Cth))

Held: *Rejected 3 arguments*

- Grant by the Crown of a right to exclusive possession – the right to exclude others from the land, for any reason/for no reason – is inconsistent with, and therefore extinguishes, native title
- However, mineral leases did not confer a right to exclusive possession, but rather right to go onto land, to get, remove iron ore
- HCA also rejected 2 alternate arguments that the width of activity **allowed** by mineral leases or the activity subsequently **carried out**, were inconsistent with the claimed native title interests
- *‘Narrower’ argument that the exercise of rights under the leases extinguished native title inconsistent with principle that it is the nature and content of the two sets of rights, rather than the manner of their exercise, that is relevant*
 - (Argument is misconceived as it looks at the way in which the act was exercised and not the nature of the right itself)
 - In the end, then, the state’s narrower alternative argument reduces to the practical observation that two persons cannot occupy the one place
 - When the joint venturers built a house in the town, native title holders could not (for example) hunt and gather on the land which the house occupied
 - And the rights which the joint venturers had, and exercised, took and continue to take priority over the rights and interests of the native title holders for so long as the joint venturers enjoy and exercise those rights
 - Any competition between the exercise of the two rights must be resolved in favour of the rights granted by statute
 - But when the joint venturers cease to exercise their rights (or their rights come to an end) the native title rights and interests remain, unaffected

Principle: *Extinguishment occurs where the rights granted by Crown and native title rights are **inconsistent***

- *Need to identify and compare the two sets of rights:* It is an objective inquiry that looks to the legal nature and content of the rights at the time of their creation, and not how the rights are subsequently exercised
- *The sets of rights are either inconsistent/not*
 - There are no degrees of inconsistency
 - If rights are inconsistent native title is extinguished to the extent of the inconsistency, and cannot be revived
- *Rights are inconsistent where the existence of one necessarily implies the non-existence of the other*
- *The decisions in both Wik and Ward established that the grant of rights to use land for particular purposes (whether pastoral/mining/other), if not accompanied by the grant of a right to exclude any/everyone from the land for any reason/no reason, is not necessarily inconsistent with, and does not necessarily extinguish, native title rights, such as the right to camp, hunt and gather, conduct ceremonies on land and care for land*

are **other explanations** for **payment of money** other than a k to create an interest in land (e.g. money as a gift)

Cooney v Burns (approves, applies Maddison v Alderson [1], [2] principles)

Facts:

- Written, signed k between C's agent (vendor) and B (purchaser) for the sale of C's lease (with contents) of a hotel in VIC
- However, agent was not authorised by C in writing which was required by VIC statute (contrast s 54A Conveyancing Act (NSW))
- *Thus, B relied on purported acts of part performance*
 - Took inventory of the contents of the hotel
 - C handing lease doc to B's solicitor for preparation of transfer
 - B incurred expense in preparing the assignment of lease and applying for transfer of hotel licence

Held:

- **Everything is done in preparation for K, NOT because of K**
- Drawing up an inventory of inclusions? No
 - Not a part of the agreement, nothing to do with right of ownership
 - Act preparatory to performance of contract
- Handing over lease document? No
 - *Acts did not relate to the possession/use/improvement of land*
 - **Cannot be an act merely preparatory/ancillary to**
 - Acts done not required to be done under agreement
 - Acts done were in preparation for the performance of the k (step before performance) being the ordinary production for inspection of title
 - **Act did not change the relative position of the parties in respect of the land (acts do not go to the title/possession/use of the land)**
 - Contrast with mortgage by deposit of title deeds (handing over lease document was simply so B's solicitor could complete the transfer of lease, this was not an act of part performance)
- Incurring expense in preparing of assignment of lease and applying for transfer of hotel licence? No
 - As above
- The payment of money? No
 - Not sure if it relates to the K, see above

Regent v Millett (1976)

Facts:

- Oral contract for parents to transfer house when daughter (M) paid off parents' (R) mortgage. Daughter goes into possession and the payments were made. R reneges on his bargain.

Held:

- The quintessential act of part performance: **going into possession with consent of the owner, pursuant (but not even required) by the contract = sufficient act of part performance.**
- When the mortgage is paid off, become the owner. It was an act which was 'unequivocally, and in its own nature, referable to some agreement, and changes their positions relative to the land.'
- The principal act relied upon by the High Court was the taking of possession of the property by M
- HC held that this was an act permitted, but not required, to be performed by the oral contract. Nevertheless, it was, of itself, sufficient to attract the operation of the doctrine as an act in performance of the oral contract.

Theodore v Mistford

Oral handing over of certificate of title = strong act of part performance – but in this case the handing over of title deeds can also lead to the creation of an equitable mortgage without relying on part performance.

This is NOT a part performance case.

Facts:

- Seller required buyer to guarantee money not yet paid by his company. The company is indebted to the vendor, but Glen Theodore gave a guarantee – a promise by a third party that allows the debtor to sue them: a personal obligation. If he is bankrupt, the vendor can't get anything – so often they require a mortgage.
- Glen got his mother to mortgage her land to secure his obligations. She gave the certificate of title to the vendors lawyers.
- Before settlement, solicitors held certificate of title on account of Mrs T, and after settlement as security for moneys owing to vendor

Held:

- The vendor had an equitable mortgage even though Mrs T had not promised to grant a legal mortgage

Principle: