

# 1. Fundamentals of Land Ownership

## (a) Doctrine of Tenure and Doctrine of Estates

1. **Doctrine of Tenure** – *Crown has ultimate ownership of all land in Australia, subject to Native Title*
  - a. **What is it?** – Doctrine of Tenure inherited from UK system developed in 17<sup>th</sup> Century where the Crown is the ultimate and sole owner of all land in the Kingdom. In Australia, this right of Crown ownership has been modified to include Native Title.
    - i. **No Feudalism** – the feudal subinfeudation system of the UK iteration of Doctrine of Tenure does not apply in Australia – s 36, *Imperial Acts Application Act 1969* (NSW)
  - b. **Radical Title** – radical title refers to the iteration of the Doctrine of Tenure in Australia that gives the Crown ultimate, sole ownership of most land, subject to Native Title exceptions.
  - c. **Purpose** – the purpose of the doctrine of tenure is to provide a stable and functional means for the ‘orderly enjoyment of succession of any parcel of land’ – *Wik Peoples v Qld* (Brennan J)
  - d. **Powers** – by virtue of radical title, the Crown has the power to regulate the use and enjoyment of land through doctrine of estates and the right to create beneficial interests in itself or others – i.e. to create various forms of estate held by itself or any other person.
  - e. **Relationship with Doctrine of Estates** – the two Doctrines are complementing rather than competing – e.g. whereas the Crown is the ultimate owner of land under radical title, a holder of a fee simple estate (referred to commonly as the ‘owner’) is regarded as a ‘tenant of the Crown’.
2. **Doctrine of Estates** – *‘Estates’ are various bundles of rights recognised by the common law over land that confer a right to hold or possess the land to the exclusion of others for a certain period*
  - a. **What is an estate?** – an estate refers to certain bundles of rights to land recognised by common law that confer rights to hold or possess land on certain terms to the exclusion of others. Estates in land are about creating certain rights to possess land for a certain temporal period.
  - b. **Types of Estates** – common law recognised freehold and leasehold estates:
    - i. **Freehold** – ‘ownership’ – right to hold land for uncertain duration – e.g. ‘to A for life’ will create an interest of uncertain length.
    - ii. **Leasehold** – fixed duration term of estate – e.g. ‘to A for 10 years from 1/1/10.’
  - c. **Types of Freehold Estates** – 3 types of freehold estates recognised by common law:
    - i. **Fee Simple** – fee simple is the most common type of freehold estates giving the holder effective ‘ownership’ of the land, at least for practical purposes of dealing with the land.

Two key characteristics of fee simple estates:

      1. **Descend to Heirs** – on death of holder of fee simple estate (without a will), the fee simple will descend to the holder’s heirs: firstly, to any lineal heirs (e.g. son); and secondly, if no lineal heirs, to collateral heirs (e.g. sister).
      2. **Alienability** – subject to legislation, holder of fee simple has right to dispose of fee simple during life (‘*inter vivos*’ – e.g. sale of land by contract) or through their will.
    - ii. **Fee Tail** – abolished and ineffective in NSW.
    - iii. **Life Estate** – life estate is a freehold estates entitling the holder to status of ‘life tenant of Crown’. It is not an estate of inheritance and does not descend to the heir of the life tenant.

Two types of life estates:

      1. **Ordinary Life Estate** – an estate granted for the life of the holder of the estate. Commonly created through a will that, e.g., gives a surviving spouse a life estate in property for rest of their life.
        - a. **Construction** – differentiating life estate from a personal right to occupy or a lease for life is a matter of constructing the terms of the relevant instrument in each case.
        - b. **Rights of Life Tenant** – life tenant has most of the rights of an owner in that they can reside at the property and receive income from it.
        - c. **Limitations on Rights** – life tenant cannot dispose of land and cannot create further interests that last beyond the lifetime of the life tenant.
        - d. **Limitation by Contingency** – life estates may be limited in their terms by contingencies – e.g. if life tenant marries then estate ceases.
        - e. **Reversion** – commonly, a life estate is granted subject to reversion to fee simple after death of life tenant – e.g. ‘to A for life, then to B in fee simple’.
      2. **Estate Pur Autre Vie** – where the term of estate is determined by the lifetime of a third party.
        - a. **2 types:**
          - i. **Express Grant** – ‘to A during the life of B’ – term of life tenancy held by A is determined by the life of B, a third party with no interest in the land.

- ii. **Conveyance by Life Tenant** – life tenant conveys the life estate to another – recipient of life estate becomes the tenant, but the term is still determined by the life of original life tenant.
- b. **Issue: life tenant dies before third party** – when the life tenant dies before the third party, then the life tenancy devolves to person nominated in life tenant's will or, if no will, to the tenant's next of kin – s 4, *Succession Act 2006* (NSW)

(b) **Legal and Equitable Interests**

- a. **Creating Proprietary Interests: essential/substantive vs formal requirements** – each type of estate has certain essential and formal requirements.
  - a. **Essential/Substantive Requirements** – each type of estate has different essential requirements – key question: *does the intent/facts substantively match one of the requirements such that a recognised bundle of rights (estate) arises?* – for example:
    - i. **Fee Simple** – exclusive possession of the land forever;
    - ii. **Life Estate** – exclusive possession for duration of measuring life;
    - iii. **Lease** – exclusive possession for certain period;
    - iv. **Easement** – right to use servient land in manner not inconsistent with owner's continuing ownership;
    - v. **Profit a Prendre** – right to enter servient land and remove soil or other natural produce.
  - b. **Formal Requirements** – formal requirements vary between type of estate and whether the relevant land is in Old System or under Torrens System – relevant questions include:
    - i. How has the intention to create the interest been manifested? Is it in line with the legal requirements?
    - ii. Example: has the relevant document or combination of words been used?
- b. **Words of Purchase and Words of Limitation** – once upon a time, certain specific combination of words were needed in order to create a fee simple or life estate – these requirements have now been abolished, however use of the relevant words will still give rise to the relevant interests.
  - a. **Words of Purchase** – “to A” are words of purchase because they indicate to whom the interest is being conveyed.
  - b. **Words of Limitation** – “and his heirs” are words of limitation because they define the nature of the estate being conveyed.
  - c. **Examples:**
    - i. “to A and his heirs” – creates a **fee simple**
    - ii. “to B and the heirs of her body” – creates a **fee tail**
    - iii. “to C for life” – creates a **life estate**
    - iv. “to D for life of X” – creates a **life estate**
    - v. “to E” – before s 47(2) of *Conveyancing Act 1919* would have created a **life estate**; now creates a **fee simple**.
  - d. **Reform: fee simple now default**
    - i. **“fee simple” sufficient** – not necessary to use specific words of limitation above anymore; need only use words “in fee” or “fee simple” to convey a fee simple estate.
    - ii. **Absence of Words of Limitation: fee simple** – when words of limitation are not used for a conveyance of land, the conveyance is presumed to pass the **fee simple** unless a contrary intention is evinced in the conveyance – s 47, *Conveyancing Act 1919*; s 38, *Succession Act 2006*
- c. **Legal and Equitable Interests (Old System + Torrens)**
  - a. **Legal Interests** – legal interests of different kinds are created in the following ways:
    - i. **Old System Land generally** – for old system land ONLY: a legal interest in land is created only way of a deed (subject to certain exceptions) – s 23B(1), *Conveyancing Act 1919*
    - ii. **Torrens System Land generally** – for Torrens System land ONLY: a legal interest in land is created only by way of registration of interest (subject to certain exceptions such as s 23D(2) of *CA* + s 43A of *RPA*) – s 41, *Real Property Act 1900*
    - iii. **Short Term Leases** – exception to s 23B(1) and s 41 above:
      - 1. **Old System + Torrens Land** – a legal interest in Old System or Torrens System land can be created without a deed or registration respectively if three criteria are met: - s 23D(2), *Conveyancing Act 1919*
        - a. **Best Rent** – the lease must be at the best market rent that can reasonably be obtained.

- b. **Immediate Right of Possession** – the lease must give the lessee an immediate right of possession.
    - c. **Max 3 year term** – the term of the lease must not exceed 3 years. If there is an option to renew, then the original term and the option must together not exceed 3 years.
  2. **Torrens System Land: notice of registered proprietor** – provided the s 23D(2) conditions are met, then the leaseholder's interest will take priority over the legal interest of a new registered proprietor if the new registered proprietor had notice of the lease – notice requirement met if the leaseholder is in possession because notice is constructive notice and registered proprietor is assumed to have inspected the property before buying it – **s 42(1)(d), Real Property Act 1900**
- iv. **Implied Leases + Easements – done later** – an implied lease or easement gives the holder legal title independent of any registration etc.
- v. **Statutory Tenancies at Will** – a statutory tenancy at will under s 127 of *Conveyancing Act 1919* creates a legal interest independent of any registration etc.
- b. **Equitable Interests** – equitable interests of different kinds are created in the following ways:
  - i. **Old System Land only: written + signed instrument** – for Old System land ONLY: a written and signed instrument may convey an equitable interest in Old System land – **s 23C(1)(a), Conveyancing Act 1919**
    1. **No application to Torrens Land: s 41** – a transfer by way of written and signed instrument will only be effective for Torrens System land when there is consideration – **s 41, Real Property Act 1900**
  - ii. **Contracts for Sale of Land / Contracts to Grant (other) Interest in Land** – applies to both Old System and Torrens System land:
    1. **Sale of Land Contracts: Rule in *Lysaght v Edwards*** – an equitable interest is created when two conditions met:
      - a. **Enforceable Contract** – there must be a contract for the sale of land that is in writing and signed by the parties – **s 54A(1), Conveyancing Act 1919**
      - b. **Specific Performance** – the contract must be capable of being specifically performed – this is usually the case for contracts for sale of land.
    2. **Equitable Lease: Rule in *Walsh v Lonsdale*** – an equitable lease is created when the following conditions are met:
      - a. **Enforceable Contract** – there must be a contract for lease that is in writing and signed by the parties – **s 54A(1), Conveyancing Act 1919**
      - b. **Specific Performance** – the contract must be capable of being specifically performed – this is usually the case for contracts for sale of land.
    3. **Equitable Mortgage** – an equitable mortgage is created when the following conditions are met:
      - a. **Enforceable Contract** – there must be a contract for mortgage that is in writing and signed by the parties – **s 54A(1), Conveyancing Act 1919**
      - b. **Specific Performance** – the contract must be capable of being specifically performed – this is usually the case for contracts for sale of land.
    4. **Part Performance: alternative to s 54A(1)** – when there is a purely oral contract (i.e. writing + signature requirements in s 54A(1) not met), then part performance may substitute for this requirement to nonetheless create an equitable interest when the contract is also capable of specific performance – requirements of part performance: - **s 54A(2)**
      - a. **Acts done by party pleading part performance** – the acts relied upon to prove part performance must be done by the party seeking to rely on the doctrine (or their agent) – ***ANZ v Widdin***
      - b. **Acts permitted by Oral Agreement** – the acts done by the party invoking part performance were permitted, but not necessarily required, to be done by the terms of the oral agreement – ***Regent v Millett***
      - c. **Unequivocally Referrable to Oral Agreement** – the acts done must be unequivocally and in their own nature referable to the alleged oral agreement – ***Madison v Alderson***
    5. **Constructive Trust** – when an equitable interest arises in either case as above, then the equitable interest is held on constructive by the original registered proprietor who retains legal title for the benefit of the owner of the equitable interest – the

If specific performance is not available, then no equitable interest in the land arises and the only rights of the plaintiff are *in personam* for breach of contract against the vendor for damages equal to value of property.

#### Examples of Part Performance:

- **Take Possession** – for sale or lease
- **Payment made** – payment or part payment has been made for sale or lease (i.e. rent paid)
- **Deposit of Title Deed/CT** – for a mortgage, deposit of Title Deeds or CT with mortgagee

holder the equitable interest can obtain an order from the court compelling the trustee to convey the legal title to them.

- iii. **Declaration of Trust** – an equitable interest in Old System or Torrens System land may be created by declaration of a trust provided that the declaration is in writing and signed by the person declaring the interest – **s 23C(1)(b), Conveyancing Act 1919**
  - 1. **Torrens Land: interest not registered** – an equitable interest under a trust in Torrens Land is not registered; only a legal interest may be registered.
  - 2. **Caveat** – a beneficiary under a trust holding an equitable interest in Torrens System land may register a caveat on the register however.
- iv. **Resulting/Constructive Trust** – an equitable interest in Old System or Torrens System land may be created by a resulting or constructive trust – there is no requirement to register an equitable interest under either type of trust in Torrens System land – **s 23C(2), Conveyancing Act 1919**
- v. **Vendor's Lien** – a vendor's lien is an equitable interest in land.
- vi. **Equity of Redemption** – an equity of redemption on grant of a general law mortgage (Old System land mainly) gives an equitable interest in land.

### (c) Priority Rules

- a. **General Law Priority Rules** – for Torrens Title land, the general law priority rules are only directly relevant to the extent that they govern contests between **inconsistent unregistered interests in land** – statute, by virtue of the indefeasibility provisions in ss 41 and 42 of the *Real Property Act 1900*, has modified priority rules with regards to Torrens Title land, with legal title by way of registration giving indefeasible title subject to the particular exceptions to indefeasibility.
  - a. **prior legal v later legal** – *nemo dat* – prior legal has priority over later legal.
  - b. **prior legal v later equitable** – the prior legal interest will prevail unless the holder of that legal interest has engaged in postponing conduct (next topic).
  - c. **prior equitable v later legal** – the later legal interest will prevail only when there is:
    - i. a bona fide purchaser
    - ii. for value (i.e. consideration)
    - iii. of the legal estate
    - iv. without **notice** (see below) of the prior equitable interest.
  - d. **prior equitable v later equitable** – general rule: when the equitable interests are equal, then the first in time prevails – *Latec Investments v Hotel Terrigal*
    - i. **When equities are NOT equal:**
      - 1. When one equitable interest arises before the other (restatement of general rule).
      - 2. When the holder of the prior equitable interest engages in postponing conduct, then equities are not equal, and the later equitable interest prevails.
  - e. **prior mere equity v later equitable (or legal)** – the later equitable (or legal) interest will prevail only when there is:
    - i. a bona fide purchaser
    - ii. for value (i.e. consideration)
    - iii. of the later equitable (or legal) interest
    - iv. without **notice** (see below) of the prior equitable interest.
- b. **Notice Requirements** – to determine whether a later interest holder had notice of prior interest, following rules apply for both Old System and Torrens System land: - **s 164, Conveyancing Act 1919**
  - a. **Actual Notice** – if the purchaser has actual subjective knowledge of the act or instrument that creates the equitable interest; the purchaser does not need to know the consequences of the act or instrument – **s 164(1)(a)**
  - b. **Imputed Notice** – *agent-principal relationship* – when the agent has actual or constructive notice, then that is imputed to the principal – **s 164(1)(b)**
  - c. **Constructive Notice** – a person is construed as having notice of an interest if they would have had actual notice if they had engaged in “searches, inquiries, and inspections that ought reasonably have been made by the purchaser” – **s 164(1)(c)**
    - i. **What this requires for Torrens Land:**
      - 1. **Search for Title Documents** – search the Register to see what interests the register discloses.
      - 2. **Inspection of Land** – purchaser deemed to have inspected the land and therefore had notice of anyone occupying it – *Hunt v Luck*
- c. **Rule in Wilkes v Spooner** – with regards to a priority contest between a **prior equitable vs later legal interest**, the protection afforded to a bona fide purchaser for value without notice will extend to any person

Section 43A of RPA: relevance to general law rules for prior equitable vs later legal interests in Torrens Land – s 43A provides that once certain preconditions are met but before registration, person is taken to have a legal interest (but not a registered one). Therefore, if a priority contest arose during this period, then the general law priority rule would apply rather than the indefeasibility rule under s 41. May also be relevant for caveats.

who receives a legal estate from that purchaser – the protection extends even if the person receiving the interest had notice of any prior interest or was a volunteer – *Wilkes v Spooner*